GAFFOOR
v.
WILSON AND ANOTHER

SUPREME COURT.
M. D. H. FERNANDO, J., A. R. B. AMERASINGHE, J., and K. M. M. B. KULATUNGE, J.
S. C. APPEAL No. 46/87
S.C. (L/A) No. 14/87 C. A. No. 199/72 (F)—D. C. COLOMBO 72752/M.
MARCH 28, 1990.

Delict—Damages for loss of financial support-Negligence-Father's interest in physical fitness and earning capacity of child-Loss of support caused by death of child-Patrimonial Loss-Prospective Loss—Assessment of damages.

The plaintiff's son Ziard (eldest of seven children)died as a result of the negligent driving of a motor vehicle by the defendant's servant on May 27, 1968. Ziard was 24 years old and unmarried at the time of his death. He used to give Rs. 250 a month to his mother the plaintiff towards household expenses. Ziard's father received a salary of Rs. 1,000 for two years after Ziard's death before he retired at the age of 62 years.

Held :

(1) Ziard's contribution to his mother was not as a result of mere filial affection but out of a sense of duty.

(2) Prospective support is included in patrimonial loss and if not too conjectural will found an action provided such support would be rendered in consequence of a duty and not from filial affection.

(3) If the plaintiff alleges and proves—

(*a*) the existence of a relationship from which a duty of support arises. The relationship of parent and child is such a relationship. Being a Muslim the deceased could be expected to have observed the duty imposed by his faith.

(*b*) a strong possibility of his having become dependent on such support in the near future, and

(*c*) a strong probability that the child would have been able to afford such support, he will be entitled to damages.

(4) The plaintiff must satisfy the Court that she was in such a state of indigence as to really need financial support of the child. It is not necessary that the plaintiff should prove that she could not otherwise support herself at all and that she was entirely dependent on the child's assistance. Despite her husband's comfortable salary, because of her large family she was in need of support for the purchase of necessaries and Ziard's contribution was for household expenses.

(5) Although primarily the duty of support falls on the husband, if he is unable to work and is indigent he may himself claim support from a child. Here the deceased was contributing towards household expenses even at the time when his father was in employment and there was a strong probability of the mother becoming even more indigent when her husband retired.

(6) Despite the lack of actuarial assistance in the assessment of damages, the Court is not absolved from the duty of assessing damages. The fact that the deceased had good prospects of attaining a better income will affect the multiplier in the calculation of damages.

Cases referred to :

(1) *Cape Town Municipality v. Paine 1923 CPD 207, 229*
(2) *Agidahamy v. Fonseka (1942) 43 NLR 453, 454, 455*
(3) *Cape of Good Hope Bank v. Fischer (1886) 4 SC 368, 376*
(4) *Jacobs v. Cape Town Municipality 1935, CPD 474, 479*
(5) *Edwards v. Hyde 1903 TS 381*
(6) *Union Government v. Warneke 1911 AD 657*
(7) *Gillespie v. Toplis 1951 (1) SA 290 (C)*
(8) *Oslo Land Co. Ltd. v. Union Government 1938 AD 584, 593*
(9) *Hoffa v.S. A. Mutual Fire & General Insurance Co. Ltd. 1965 (2) SA 944 (C) 951, 952*
(10) *Nkabinde v. SA Motor & General Insurance Co. Ltd. 1961 (1) SA 302*
(11) *Waterson v. Maybery 1934 TPD 210*
(12) *Oosthuizen v. Stanley 1938 AD 322, 328*
(13) *Anthony and Another v. Cape Town Municipality 1967 (4) SALR 445*
(14) *Shiels v. Cruikshanks (1953) 1 All ER 874 (H. L.)*
(15) *Dickson v. National Coal Board 1957 SC 157, 175*
(16) *Gildenhuys v. Transvaal Hindu Educational Council 1938 WLD 260, 263*
(17) *Young v. Hutton 1918 WLD 90*
(18) *Miller v. Miller 1940 CPD 469*
(19) *In re Knoop 1893 10 SC 198*
(20) *Graaf v. Speedy Transport 1944 TPD 236*
(21) *Legal Insurance Co. Ltd. v. Botes 1963 (1) SA (AD) 608, 614*
(22) *Arendse v. Maher 1936 TPD 162, 163, 165*

APPEAL from judgment of the Court of Appeal.

Faiz Mustapha P. C. with *Nigel Hatch* for Plaintiff-Appellant.

Defendant-Respondents absent and unrepresented.

Cur. adv. vult.

April 16, 1990

AMERASINGHE, J.

In this case the plaintiff claims damages for the loss of financial support sustained by her in consequence of the death of her son Ziard which was brought about by the negligent driving of a motor vehicle by the defendant's servant on 27th May, 1968.

The act complained of is a wrong which is technically known as *damnum injuria datum* (See R. G. McKerron, *The Law of Delict*, 1971, 7th Ed. at P. 6). This was created by the *lex Aquilia* which was a plebiscite attributed to various years. Suarez holds that the Aquilian law was passed about 133 B. C. Mommsen thinks that it was enacted before 76 B. C. Pernice advances very cogent reasons for the contention that this law was passed in the year 287 B. C. (See F. P. Van Den Heever *Aquilian Damages in South African Law* Vol. 1 at p. 7 ; F. H. Lawson, *Negligence in the Civil Law* at P. 4). This ancient Roman statute is the foundation of our law in regard to damage caused by negligence. (See *Cape Town Municipality v. Paine (1)* ; *Agidahamy v. Fonseka (2)*.

Although at first the law was narrowly construed, the remedy being available only to the owner of damaged property and where there had been physical destruction, and not merely deterioration, the scope of the action was greatly extended partly by means of *actiones utiles* and *actiones in factum* and by the time of Justinian, the net of extended actions had spread far enough to cover a father's interest in the physical fitness and earning capacity of his child, even though the father was not the owner of his son and although there was no *rumpere* i. e. shattering or breaking down when the son's earning capacity was reduced by an injury to his eye. (*Digest* 9.2.7). Whether Chief Justice de Villiers, claim in *Cape of Good Hope Bank v. Fischer* (3) that in the time of Voet and Matthaeus "the Aquilian action...was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another" is justified or not, it is clear that the scope of the action was greatly extended from time to time. However, writers like Voet, Grueber and Monro thought that although a father could recover damages in respect of the decreased future yield of his son's industry due to an injured eye as well as medical expenses, yet the father had no claim if the son died. True enough the law was originally conceived to provide a remedy in the case of the destruction of property and there was no direct authority in Roman law for giving the *paterfamilias* an action for the loss of the services of a son in case the latter was killed. Noodt *Ad Legem Aquailiam* Cap. 2. *Opera Ominia* -p.139 states this follows *ex mente legis* and Voet, 9.2.11 follows him without comment.

However, the remedy was extended to give a father an action in respect of his son's limbs. In principle and according to our notions there

is no doubt that today the *lex Aquilia* has become a general remedy for loss wrongfully caused and includes a claim by a parent for *alimenta*, that is, the loss of support, caused by the death of a child. (See *Agidahamy v. Fonseka*(2) at 455 ; *Jacobs v. Cape Town Municipality*(4)).

To become entitled to recover damages on the basis of the *lex Aquilia*, a plaintiff must establish *damnum* imputable to the defendant which constitutes a violation of a legally protected interest pertaining to the plaintiff.

In the matter before us there was no difficulty which the District Court and the Court of Appeal had in holding that there was a wrongful act which was imputable on account of *culpa*. The only ground on which both Courts denied the plaintiff relief was the failure of the plaintiff to establish *damnum*.

Subject to certain exceptions, such as the award of compensation for pain and suffering in an action for personal injuries, a Court would award compensation for *damnum* only where it is satisfied that there is loss in respect of property, business or prospective gains capable of pecuniary assessment. See Grotius *Inleiding tot de Hollandsche Rechtsgeleerdheid* 3.34.2; Voet, *Commentarius ad Pandectas*, 9.2.11; *Edwards v. Hyde*,(5) *Union Government v. Warneke*,(6) *Gillespie v. Toplis*,(7) *Oslo Land Co., Ltd. v. Union Government*,(8) *Hoffa v. S.A. Mutual Fire & General Insurance Co., Ltd.*,(9) In an action for damages based on death, as in the case before us, this means that the plaintiff must establish patrimonial loss through being deprived of benefits, whether in the form of maintenance or services, which the deceased was under a legal duty to render. *Union Government v. Warneke, (6) Nkabinde v. S.A. Motor & General Insurance Co. Ltd.* (10)

Whether there was a legal duty of support and what has to be pleaded and established in a given case in connection with that duty would depend on the circumstances of each case.

The case before us relates to a claim by a parent for the loss of support of a child. In such an instance the plaintiff belongs to a class where, on account of the relationship between the plaintiff and the deceased, the law recognizes a duty of support in case of want (*inops*). See *Agidahamy v. Fonseka*(2) *Jacobs v. Cape Town Municipality*,(4) (supra) at p. 479.

After discussing the duty of parents and grandparents to support their children and grandchildren, Voet (*op.cit.*) 25.3.8 states:

> "Contrariwise needy parents also must be maintained by their children." See also van Leeuwen, *Censura Forensis* 1.10.4; *Waterson v. Maybery* (11) ; *Jacobs v. Cape Town Municipality*(4) (supra) ; *Oosthuizen v. Stanley*(12). *Anthony and Another v. Cape Town Municipality*(13).

The inference of a duty of support has been justified on various grounds. In one passage (25.3.5) the *Digest* (25.3.5) explains it on the basis of equity in the following terms:-

> "Where a son has been emancipated before arriving at puberty, he can be compelled to support his father, if the latter is in poverty; for anyone would say with reason that it is most unjust for a father to remain in want while his son was in prosperous circumstances."

That filial affection was at the base of the inferred duty of support is suggested by paragraph 15 of *Digest* 25.3.5 which is as follows:-

> "Filial affection requires that parents should be supported by a son who is in the military service, provided that he has the means to do so."

In *Anthony and Another v. Cape Town Municipality*(13) Holmes J.A. said at p. 447:

> "According to Voet. . this duty to support arises *ex pietate*, out of the sense of dutifulness which every child owes his parents."

The moral duty to support one's parents is also a part of our own oriental traditions. In the *Parabhavasutta* which was a dialogue between a deity and Buddha on the things by which a man loses and those by which he gains in this world, in response to the question of the Deity to name the fourth loser, Bhagavat replies: "He who being rich does not support mother or father who are old or past their youth - that is the cause of loss to the losing man." In the *Vasalasutta* Bhagavat in his reply to Aggikabharadvage's question as to who is an outcast replies: "whosoever being rich does not support mother or father when old and past their youth, let one know him as an outcast". And in the *Dhammikasutta* the

Buddha in discussing what the life of a householder should be says: "Let him dutifully maintain his parents and practice an honourable trade; the householder who observes this strenuously goes to the gods by the name Sayampabhas." In the *Anugita*, which is one of the numerous episodes of the *Mahabharata* in describing the various actions by which one going the round of various births becomes happy, "serving mother and father" is placed immediately before honouring deities and guests. And the *Grihya-sutra* of Hiranyakesin the student who returns after his education is told that "he should support his father and mother."

Was it sufficient for the plaintiff to establish the relationship of parent and child and without more claim that it qualified her for support? In Scots law, which the "gladsome light of Roman jurisprudence" illuminated as it did our own, the answer would be in the affirmative and the sole remaining question would have been the amount of damages recoverable by the mother, for the question of damages there is based on loss and not on need. See *Shiels v. Cruikshanks*(14). As Lord Mackintosh observed in *Dickson v. National Coal Board* (15):

> "In my opinion, a relative who has the necessary title, i.e. one between whom and the deceased there existed a mutual obligation of support in the case of necessity, can, being within the entitled class, then sue for and recover such pecuniary loss as he may be able to prove to have arisen to him as a direct and natural consequence of the deceased's death."

In the South African case of *Gildenhuys v. Transvaal Hindu Educational Council* (16) Schreiner, J. at p. 263 expressed the view that in actions by minor children and spouses of the deceased, there was "a prima facie duty to support which needs no further allegations" as to means while in the case of actions by other dependents "further allegations are necessary."

A parent falls under the category of "other dependents". Therefore evidence of the relationship which establishes a duty of support from the deceased in case of necessity will not be sufficient. It must be supplemented by evidence that the necessity in fact existed. The question of indigence in such a case goes to the existence of a deceased child's duty of support without which a dependent parent's action cannot be maintained.

The plaintiff must satisfy the Court that he or she was in such a state of indigence as to really need the financial support of the child. The fact that at the time of his death the deceased was supporting his parents *ex pietate* will make the plaintiff's task simpler but such payments must be more than uncalled for, gratuitous gifts freely bestowed without legal justification. To be legally justifiable, they ought to be a response to a real need.

The question whether a deceased was making payments in the discharge of his duty *ex pietate* in response to a need in any given case is a factual one. "Each case", to use the words of Holmes, J.A. in *Anthony and Another v. Cape Town Municipality*, (supra) at p. 447 (D-E) "must turn on its own down-to-earth facts, according to the circumstances of the particular family. "See also per Tindall, J.A. in *Oosthuizen v. Stanley*(12).

Although the plaintiff did not plead that she was indigent, one of the matters placed in issue in the case by the plaintiff and not objected to by the defendant was whether "in fact" the plaintiff was "dependent on the said Ziard Gaffoor at the time of his death". And the learned District Judge found that the plaintiff had "come into Court on the basis that she was dependent on the deceased at the time of his death and that the deceased was actually supporting her", and he had in fact "been giving his mother, the plaintiff, a sum of about Rs. 250 per month towards her household expenses."

However the learned District Judge declined to award damages to the plaintiff.

The learned District Judge said that "a duty is cast upon a son to support his parents only when the parents are in such circumstances that they cannot support themselves and the son himself is in a position to render assistance to his needy parents." "I do not think", he went on to say, "that the evidence before me shows that the plaintiff had no other means of supporting herself and was entirely dependent on whatever assistance the deceased was able to give her".

The learned District Judge seemed to be of the view that there was no necessity because the plaintiff had other means of support and that therefore there was no duty of support.

In the case before us the plaintiff had seven children of whom Ziard, who at the time of his death was "about 24 years old", was the eldest. Another son who was at that time 21 years of age and unemployed had now obtained employment and was in receipt of a monthly salary of Rs. 150/=. The plaintiff's husband was at the time of Ziard's death in employment and received a monthly salary of Rs. 1,000/= for two years after Ziard's death when he retired at the age of 62 years.

The learned District Judge said:–

"On the evidence before me it is clear that although the plaintiff had a large family, her husband at that time was in fact drawing what must, having regard to the position in society of the plaintiff and her family, be regarded a comfortable salary; and that the deceased, who at that time was unmarried had monthly given his mother, the plaintiff, a portion of his own income in order to augment the resources available to the plaintiff.

Having regard to the principles of law referred to above, it appears to me that although the plaintiff's son had been in fact assisting his mother by giving a portion of his income to her monthly, he cannot in the circumstances of this case, be considered in law, to have done so under any legal duty which cast upon him the obligation of supporting his mother. It appears to me that the assistance given by the deceased had been so rendered not 'in consequence of a duty' but 'from mere filial affection'.

With great respect I am unable to agree that proving necessity required evidence that the plaintiff could not otherwise support herself at all and that she was entirely dependent on the child's assistance. In *Agidahamy v. Fonseka* (2) (supra) at p. 454 it was observed that the plaintiff's eldest son made some contribution each month. Yet the Court awarded damages for the loss she had sustained by the death of another son who, albeit more substantially, contributed towards her maintenance. in the case before us the learned District Judge found that the contribution of the deceased was towards "household expenses". If as we have stated the duty of support arises when a parent is a victim of *inopia*, then it seems to me, having regard to the meaning of the word, that the plaintiff, despite her husband's "comfortable salary", was, because of her large family in need of support for the

purchase of necessaries. Each case must depend on its own peculiar circumstances, but what a parent is required to show is, in the words of Tindall, J. A. in *Oosthuizen v. Stanley* (12) (supra) at p. 328 is that "considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities".

As for the explanation that the contribution of the son was an act of 'mere filial affection', I am inclined to suspect that the learned District Judge was mislead by the distinction between support rendered in consequence of a duty as distinguished from 'mere filial affection' sought to be drawn by Mackintosh and Scoble, *Negligence in Delict*, 1958 4th Ed. p. 215 which the learned District Judge refers to elsewhere.

Mackintosh and Scoble cite *Young v. Hutton* (17) in support of their proposition. That case, however, makes no such distinction. In that case a son, returning incapacitated from active service and in need of pecuniary assistance from his mother, was awarded damages as patrimonial loss against the defendant who had negligently caused her death.

Filial affection, as we have seen, was one of the bases upon which the duty of support rests. When a person is said to do something *ex pietate* or *pietas causa* it means that he is acting not on account of compulsion but out of affection and on account of a sense of duty. *Pietas* in ancient Rome denoted dutiful conduct towards the Gods, country, one's parents, relatives and benefactors. That duty is not a contractual obligation or one that is imposed by law. The formula was commonly used and well understood. Thus when a monument was set up and the words *ex pietate* or *pietas causa* were inscribed on it, it meant that the monument was erected not *ex testamento*, that is because it was required to be erected in terms of the deceased person's last will but because the person who put up the monument acted through a sense of duty. (E.g. see J. G. Orelli's *Inscriptions* and Fabretti's *Corpus Inscriptionem Italicarum et Glossarium Italicum.)*

It has a similar meaning in the law relating to the duty of support. The duty is an obligation arising as Sutton, J. said in *Jacobs v. Cape Town Municipality* (supra) at p. 479 "out of the sense of dutifulness which every child is presumed to entertain towards its parents." In *Agidahamy v. Fonseka* (supra) at p.455, De Kretser, J. said that the duty of support

"was not a legal obligation in the sense that it was imposed by the law, but it was a legal obligation inasmuch as it was recognized by the law."

Mackintosh and Scoble (ibid) say:

"Prospective support is included in patrimonial loss (per Sutton, J., in *Jacobs v. Cape Town Municipality* (supra) at 479); so that the proof of the loss of prospective support, if not too conjectural, should be sufficient to found the action, provided such support would be rendered in consequence of a duty and not from mere filial affection (cf. *Young v. Hutton* (17) where no support had yet been given). It is submitted that if the plaintiff alleges and proves (*a*) the existence of the relationship from which a duty of support arises, (*b*) a strong possibility of his having become dependent on such support in the near future, and (*c*) a strong probability that the child would have been able to afford such support, he will be entitled to damages, though no doubt on a restricted basis. But the best proof of the duty to support will, of course, be that the plaintiff was, before the death of the child, in receipt of support, and was unable to support himself without such assistance. In *Jacob's* case, where the parents were shown to be unable to support themselves, Sutton, J., expressed the view that they would have been entitled to damages without proof of actual support having being rendered them. In this case, however, they had received actual support. *Waterson v. Mayberry* (supra) was followed and applied in *Oosthuizen v. Stanley*, (supra) . Both cases were an exception."

On the question of prospective support, the learned District Judge states as follows:

"It is in evidence that the plaintiff's husband was at all times material to this action employed, and was in receipt of a monthly income of Rs. 1,000/= and that he continued to be employed for about two years even after the death of the deceased; and that he had retired only in the year 1970 on reaching the age of 62 years."

The learned District Judge goes on to say:

"I do not think that this is a case where the question of prospective support arises for consideration, for at the time of the deceased's death, the plaintiff's husband was in fact employed and had so

continued to be in employment for at least two years after the death of the deceased."

After referring to Mackintosh and Scoble, *Negligence in Delict* 1958, 4th ed. 215 – the only authority cited by the learned District Judge in support of his statement of the law – the Court of Appeal referred to *Jacobs v. Cape Town Municipality*, (supra) ; R. W. Lee's *Introduction to Roman–Dutch Law*, 1953, 5th ed. 41 and went on to state as follows:

"This Court is unable to find authority either in Sir Lanka or in South Africa where damages had been awarded for loss of prospective gain in the absence of a duty of support. If the principles just discussed are to be implemented the plaintiff must first establish the duty of care resting on the deceased to support his parents. In the case of *Agidahamy v. Fonseka* reported at 43 N.L.R. 453, an order for support of a parent was made in circumstances where she was a widow and the husband died before the death of the child. That case can be distinguished as the husband/ father is still alive in the instant case."

With great respect the fact that the father was alive in this case is an unacceptable reason for distinguishing *Agidahamy v. Fonseka*, for what is relevant is whether the father provided and was able to continue to provide sufficiently for his family's necessaries. Primarily the duty of support falls upon the husband. However, where he is dead or unable to provide support, that duty falls on other persons. See *Miller v. Miller* R. W. Lee *An Introduction to Roman-Dutch Law*, 1953, 5th Ed. at p. 41. Indeed a father, if he is unable to work and is indigent, may himself claim to be supported by a child. (*In re Knoop (19) Jacobs v. Cape Town Municipality* (supra) *Oosthuizen v. Stanley* (supra) *Graaf v. Speedy Transport* (20), *Anthony and Another v. Cape Town Municipality (supra).*

The Court of Appeal went on to state as follows:

"Mr. Musthapa has urged this Court to consider that the husband was near retiring age and that the deceased being the eldest son would probably have had to support his parents and the rest of the family in the ordinary course.

We are unable to accept this submission. It could well be that the husband after retirement may find other more lucrative employment.

To come to a view that such things as submitted by appellant's Counsel are probable would be pure conjecture. There is no evidence before this Court to show that the deceased child had a duty of prospective support towards his parents or other members of his family.

We therefore uphold the judgment of the Court below and dismiss the appeal. No costs."

The deceased was contributing towards household expenses even at the time when his father was in employment and there was a strong probability of the mother becoming even more indigent when her husband retired. The learned District Judge was of the view that the son could have been expected to support his mother. He says:

".....the plaintiff's son was about 25 years of age and was unmarried and there was every prospect of his bettering his position. In the circumstances it would be reasonable to infer that the plaintiff's son would have continued to give his mother the support that he had been rendering at the time of his death for at least another five years....."

In the circumstances it is difficult to understand why the learned District Judge found that the question of prospective support did not arise for consideration. It seems to me that when the plaintiff claimed damages for patrimonial loss she was more concerned with prospective gains than with accrued losses. And it is well-settled law that Patrimonial loss includes prospective gains. (See *Union Government v. Warnecke* (supra) *Young v. Hutton (supra) Jacobs v. Cape Town Municipality* (supra) at p. 479. See also the passage in Mackintosh and Scoble cited by the learned District Judge.)

Moreover the deceased was a Muslim and it is to be expected that he would have observed the duty imposed on him by his faith and therefore continued to provide support. In Mulla's *Principles of Mahomedan Law*, 1977, 18th Ed. by M. Hidayatullah and Arshad Hidayatullah the duty is stated as follows at p. 385 paragraph 371:

"**Maintenance of parents.**- (1) Children in easy circumstances are bound to maintain their poor parents although the latter may be able to earn something for themselves.

(2) A son though in straitened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(3) A son, who, though poor, is earning something, is bound to support his poor father who earns nothing."

The finding of the learned District Judge I have referred to with regard to the expected improvement in the financial circumstances of the deceased also disposes of affordability-the third requirement mentioned by Mackintosh and Scoble as being necessary for the plaintiff to qualify for damages..

I turn to the assessment of damages. The plaintiff claimed a sum of Rs. 40,000/=. The learned District Judge held that the plaintiff's claim could not succeed for the reasons we have already discussed. However, he went on to say that if his finding was found to be wrong, then the question of the quantum of damages would arise, and considering that the deceased was 25 years old at the time of his death, that he had every prospect of bettering his position and that he would continue providing support for at least another five years, the learned District Judge was of the view that a sum of Rs 10,000 would be reasonable.

No doubt the matters referred to by the learned District Judge were relevant in arriving at a decision with regard to the assessment of compensation. For instance, he seems to have taken into account the fact that the deceased had good prospects of attaining a much better income. I have taken this into account as affecting the multiplier in the calculation of damages. The age and working life of the deceased-the source of the dependency which (subject to certain exceptions which are not applicable in this case) could not have continued beyond the span of his working life, seems to have been taken into account by the learned District Judge. However, there is nothing to show that he also took into consideration the expectation of life of the claimant. According to the evidence she was 38 years of age when she lost her son and properly proved Life Tables with the assistance of an actuary would have been of great assistance to us. However, no actuarial evidence was put before the Court. Although we are not tied down by what Holmes, J. A. in *Anthony and Another v. Cape Town Municipality* (supra) at p. 451 described as inexorable actuarial calculations (See also *Legal Insurance Co: Ltd., v. Botes (21) Arendse v.*

Maher (22) we would have liked to have had such evidence. For although the formulation of a successful claim for prospective damages or the rebuttal of an extravagantly large one is never a simple exercise in actuarial mathematics (Cf. R. Howroyd and Florence J. Howroyd, *The Assessment of Compensation for Loss of Support*, 1958 LXXV S. A. L. J. 65) such evidence would have been invaluable especially in assessing how much capital should be paid to the plaintiff to enable her to have a fixed sum per month for life. The absence of actuarial evidence does not absolve me from the duty of assessing damages. I must do the best I can. (Cf. *Arendse v. Maher* (22). With the very scanty material in hand, having regard to all the circumstances of the case which are in evidence I am of the view that the sum of Rs. 40,000/= claimed by the plaintiff is not excessive.

For the reasons stated above I set aside the judgment appealed from and order that the defendants - respondents shall pay the plaintiff - appellant an aggregate sum comprising (1) Rs. 40,000/= as damages and (2) interest on the said sum of Rs. 40,000/= at the rate of twelve *per centum per annum from 10th May, 1970, that is, the date of the institution* of the action, to 6th April, 1990, that is, the date of this Order. I also order the payment of further interest at fifteen *per centum* per annum on the said aggregate sum from 6th April, 1990, that is, the date of this Order to the date of payment.

The plaintiff - appellant is entitled to Rs. 2,500/= as costs.

M. D. H. FERNANDO, J. — I agree.

K. M. M. B. KULATUNGE. J. — I agree.

Appeal allowed.

Damages ordered.