IN THE COURT OF APPEALS OF MARYLAND

No. 86

September Term, 1997

JULIA D. BENYON et al..

v.

MONTGOMERY CABLEVISION LIMITED PARTNERSHIP et al .

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell,

JJ.

Dissenting opinion by Wilner, J.

Filed: October 9, 1998

A jury in the Circuit Court for Montgomery County awarded $1,000,000 in damages to the Estate of Douglas Benyon to compensate Mr. Benyon's beneficiaries for the one-and-a-half to two-and-a-half seconds of fright that it assumed Mr. Benyon must have suffered before crashing into the rear of Mr. Kirkland's truck. Only by virtue of the statutory "cap" on noneconomic damages that was then in effect was that award reduced to $350,000, which still amounts, at the least, to $140,000 per second of assumed fright. The Majority effectively affirms the judgment entered on that verdict, concluding that (1) Maryland recognizes an action for pre-impact fright, even when the impact causes instantaneous death without the prospect of any post-impact pain or suffering; and (2) the existence of that fright can be sufficiently inferred from nothing more than seventy-one-and-a-half feet of skid marks. I agree with the first of those conclusions but most respectfully disagree with the second, and, for that reason, dissent from the mandate reversing the judgment of the Court of Special Appeals and directing that court to affirm the judgment of the circuit court.

There are a number of decisions in other jurisdictions allowing recovery for pre-impact fright, and there appear to be two decisions that allow such a recovery based on nothing more than skid marks or other evidence that the decedent took some action to avoid the collision. *See Fogarty v. Campbell 66 Exp. Inc.*, 640 F. Supp. 953 (D. Kan. 1986) (inference drawn from 56-foot skid mark); *Monk v. Dial*, 441 S.E.2d 857, 859 (Ga. App. 1994) (inference drawn from evidence that decedent's vehicle veered shortly before collision). The Majority's approach is therefore not without *some* support elsewhere. Most of the cases actually allowing recovery, however, as opposed to simply recognizing the

prospect of a recovery, are distinguishable from the case at hand, and the two that may not be I would decline to follow. Neither one of those two emanated from a State Supreme Court.

The Maryland State Police blocked the capital beltway in both directions on the night in question in order to allow the cablevision company to install a replacement cable that crossed the beltway. There were normally four westbound lanes in that area, although, at the time, one was closed due to construction. The flatbed trailer being operated by the defendant Kirkland had safely stopped about a mile from the roadblock, in the middle lane. The trailer had been stopped for at least 20 seconds before the collision.[1] Evidence indicated that trucks were stopped in the other two operable lanes as well. It is not entirely clear when Mr. Benyon first became aware of the backup and of the need to stop. He was traveling at about 55 miles per hour and, according to the evidence, would have needed a minimum of 192 feet in order to stop safely. By apparently slamming on his brakes, he was able to slow only to 41 miles per hour, which was his estimated speed at the point and time of impact. As noted, he left only seventy-one-and-a-half feet of skid marks.

The Majority is comfortable allowing the jury to infer that, during the one-and-a-half to two-and-a-half seconds that Mr. Benyon was desperately trying to stop his vehicle and avoid the collision, he must have been consumed with conscious fright — anticipating his

[1] There was evidence that the trailer had been stopped for about five minutes, inching forward every so often, but that it had remained stationary for about 20 seconds prior to the collision.

imminent death, worrying about the effect of his death on his family, chagrined at losing the opportunity to experience the pleasures of continued life, fearful of any pain that he may momentarily suffer, concerned, perhaps, about what, if any, kind of afterlife he might face. If there was any substantial evidence that any of those thoughts were, in fact, consuming Mr. Benyon during that second or two, I would agree that a recovery would be permissible. But there was no such evidence. It is rank speculation to conclude that Mr. Benyon was consciously thinking about anything other than stopping his vehicle, or, indeed, that his mind and body were engaged in anything but an instinctive reaction directed entirely at self-preservation, requiring little or no ideation at all.

Most of the cases relied upon by the Majority involved circumstances where the decedents were obviously aware of an impending disaster that they, themselves, could do nothing to avert. They were essentially helpless in the situation, left only to contemplate their fate. In *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), for example, the decedents were passengers on a small plane that ran out of gas over the open sea. The court assumed that there was enough time for them to anticipate their death and to suffer the pain of knowing that their three children would be orphaned. Similar circumstances pertained in *Haley v. Pan American World Airways*, 746 F.2d 311 (5th Cir. 1984) (plane's wing struck a tree, rolled, hit the ground, and disintegrated four to six seconds later) and in *Shu-Tao-Lin v. McDonnell Douglas Corp*., 574 F. Supp. 1407 (S.D. N.Y. 1983) (decedent, a passenger, able to see engine breaking away at start of 31-second flight and feel subsequent rolling and banking). In *Missouri Pacific R. Co. v. Lane*, 720 S.W.2d 830 (Tex. App. 1986), the

decedent's truck stalled at a railroad crossing in the path of an oncoming train; he sat in the truck for six to eight seconds contemplating the imminent disaster.

When a person is left in that kind of passive, hopeless situation, the mind is indeed free to contemplate, even if momentarily, the awful reality of what is about to occur. When, as in Mr. Benyon's case, the person either reacts instinctively or marshals his or her whole being in a supreme effort to control the event, *absent some evidence beyond merely that effort*, it is purely speculative to infer that the decedent was consciously pondering the effects of an impending death. There may, of course, be cases where other evidence *does* exist — where a witness testifies as to statements or conduct by the decedent more directly indicating a conscious contemplation of death and the consequences of it. *Thomas v. State Farm Insurance Co.*, 499 So. 2d 562 (La. App. 1986), *writ denied*, 501 So. 2d 213 (La. 1987) is an example. As noted by the Majority, the decedent there grabbed her son's arm and gasped as she saw the oncoming vehicle that struck and killed her.

This case is certainly an extreme one, but, in one sense, it is not unusual. In most pre-impact fright cases where an award is made, although the absolute size of the jury award is ordinarily not great, often ranging from $5,000 to $15,000, the amount per second of fright is enormous. *See* Kathleen M. Turezyn, *When Circumstances Provide a Guarantee of Genuineness: Permitting Recovery for Pre-impact Emotional Distress*, 28 Boston C. L. Rev. 881, 907 and n.165 (1987). Here, the jury's actual award amounted to at least $400,000 per second of fright, later reduced to $140,000 per second of fright. The problem, however, is not simply one of amount. Whether the award is great or small, when grounded on nothing

more than skid marks or other evasive action, it can only be a sympathy verdict based not on any substantial evidence of fright but rather on a desire either to compensate the decedent's beneficiaries for his or her death, beyond what is allowed in a wrongful death action, or to punish the wrongdoer.[2] Maryland has long followed the general principle that, "if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture." *Asibem Associates, Ltd. v. Rill*, 264 Md. 272, 276, 286 A.2d 160, 162 (1972); *Charles Co. Broadcasting v. Meares*, 270 Md. 321, 311 A.2d 27 (1973). We should not depart from that principle, and it appears to me that the Majority has done so.

[2] As the Majority points out, the jury in this case also awarded Mr. Benyon's parents $367,000 in economic losses and $2,500,000 for their past and future pain and suffering from their son's death.