IN THE SEYCHELLES COURT OF APPEAL

UNITED CONCRETE PRODUCTS (SEY.) LTD

v

MARK ALBERT

Appeal No CA/19/94



(Before M. Goburdhun, P, A. M. Silungwe
E. O. Ayoola, JJ, A)

Mr. B. George for the Appellant
Mr. P. Boulle for the Respondent.

Judgment of Ayoola, J. A:

The three issues in this appeal are (1) whether the award of R145,000 for permanent disability, infirmity, loss of amenities of life and pain and suffering is manifestly excessive in the light of other awards made by the Supreme Court for similar injuries and of the circumstances of this case; (2) whether the doctrine of 'cumul d'indemnites' applies; and (3) whether the Supreme Court adopted the correct approach to the calculation of the plaintiff's future loss of earnings.

The respondent to this appeal, who, for convenience will be referred to as the plaintiff, was injured by an accident which occurred during the course of his employment with the appellant, who is referred to as the defendant, on 12th December, 1992. The accident occurred as a result of the fault and negligence of the defendant. The plaintiff, 51 years old at the material time, was working as a driller in the defendant's employment earning R2,000 per month.
The accident occurred when in the course of his employment he was sharpening metal bars on 12th December 1992. The machine which he was using disintegrated causing severe injuries to the right side of his face. The most serious of these

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injuries was to his right eye which eventually had to be removed and replaced with an artificial glass eye. The degree of his incapacity resulting from the accident was 40%. The plaintiff sued the defendant claiming damages in a total sum of R760,000. The defendant admitted liability. After assessing damages, the Supreme Court (Perera, J.) awarded damages of R279,500 to the plaintiff under four heads as follows:

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| (1) | Permanent disability infirmity and loss of amenities of life | .. | R135,000 |
| (2) | Pain and suffering | .. | R10,000 |
| (3) | Loss of earnings January 1993 to September 1993 | .. | R11,700 |
| (4) | Future loss of earning | .. | R122,800 |

Claiming that the total award is excessive, the defendant has appealed from that judgment. On this appeal, the defendant conceded that the plaintiff is entitled to the sums of R10,000 awarded in respect of pain and suffering; R15,000 awarded in respect of injuries suffered by the plaintiff other than the loss of an eye; and R11,700 for loss of earning to date. The contest is limited to the amounts awarded as damages due to the plaintiff for permanent disability and future loss of earning. In regard to permanent disability, it was argued by counsel on behalf of the defendant that the sum of R120,000 awarded by the judge for permanent disability and loss of amenities of life was too large, the judge's assessment having been based on an erroneous view of monetary fluctuation in Seychelles. In regard to loss of future earnings, the argument by the defendant's counsel, in substance, is that the judge should not have applied the doctrine of cumul d'indemnites whereby advantages accruing to the plaintiff are not deducted from whatever the plaintiff

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would be awarded. It was argued that the Judge made a wrong assessment of future loss of earning by not taking into consideration social security deductions in determining the multiplicand and in miscalculating the multiplicand and that he should not have assumed that the plaintiff's earning capacity had been reduced proportionately to the degree of his incapacity.

Mr. Boulle, counsel on behalf of the plaintiff who has cross-appealed, argued on the other hand, for the retention of the award made by the judge as regard the permanent disability etc and an increase of the award made as regard the loss of future earnings mainly, on the ground that the judge in determining the multiplicand assumed that the plaitiff could work without having regard to his age and situation of local employment market.

In assessing damages for permanent disability and loss of amenities of life, Perera, J. rightly adverted to the level of awards in recent cases, particularly, this court's decision in Rene De Commarmond Case (CA No. 1 of 1986). In that case, a mechanic sustained loss of his right eye as a result of the fan of an engine disintegrating and causing injuries to that eye. He claimed R400,000 but the trial Judge declined to assess the damages suffered by him and non-suited him. On appeal to this court, he was awarded a sum of R65,000 as moral damages of which R5,000 was for pain and suffering. Perera, J. in this case took the figure of R60,000 awarded to de Commarmond in September 1986 as a starting point. It has not been argued that he erred in so doing. However, Perera, J. had proceeded to "consider a two fold decrease in monetary values from 1986 to the present day as being a reasonable estimate" and consequently, he doubled the award

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made in 1986 for comparable injury. Counsel on behalf of the defendant contended that he was wrong in so doing.

Fluctuation in monetary values is a relevant consideration when heed is paid to level of award in previous cases. In Yorkshire Electricity Board v Naybor (1968) AC 529, 552, Lord-Upjohn said:

> "when assessing damages which depend in part upon loss of future earning capacity ... the depreciation of the pound and the inevitable rise in wages may be very relevant."

A passage quoted by Perera, J. from Holsbury's Laws of England (4th Ed) Vol. 12 para 1147 showg that consideration of depreciation in the value of money is not limited to cases of damages for loss of future earning capacity. The argument advanced by counsel on behalf of the defendant in this case is not that Perera, J. erred in adverting to monetary fluetuation but that he erred in assuming, without evidence, that the Seychelles Rupee had depreciated. Perera, J. was guided by the rate of fall in the value of the English pound as portrayed in the awards made for loss of an eye in England from 1960 to 1974 noted in Holsbury's (supra, para 1147 n.2). He observed that "from 1960 to 1974 the awards for loss of one eye has increased four-fold in the U.K."

In the absence of expert evidence of the fact and extent of depreciation in the value of the Seychelles Rupee, it is not right to assume that the Rupee has depreciated at all or by 100%, in eight years. In Naybor's case (supra, p. 552) the trial judge had before him the evidence of "an expert in economics, statistiés and mathematical economics." No such evidence was made available to Perera, J. It is not safe to assume that because the value of the English pound had

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depreciated over a period of time, the Seychelles Rupee must necessarily have suffered the same fate. In the absence of any evidence of a change in the internal purchasing power of the rupee, what would have been more appropriate after taking the figure awarded in de Commermond Case as the starting point was to assess what, in the light of the present socio-economic circumstances, would be a fair compensation to the plaintiff. It does appear to me that in using the yardstick of an assumed depreciation of the rupee, the learned judge had made a wholly erroneous estimate. Against the pattern of award in personal injury cases in this jurisdiction, I am of the view that the amount awarded under the head of moral damages for permanent disability etc should be reduced by R40,000. In the result I would award a total of R105,000 for moral damages inclusive of pain and suffering.

I now turn to the question of the doctrine of 'cumul d' indemnites, which Perera, J. had applied so that moneys received by the plaintiff from the social security fund are not deducted in the assessment of compensation due to the plaintiff. The dominant question, as I see it, nowadays is, generally, not whether all collateral benefits are not deductible, but which category of such benifits should be deducted in assessing damages, Enough I believe is contained in Civil law jurisprudence to show that certain benefits are deductible. Whether civil law jurisprudence or the common law is applied it is manifest that certain criteria must be employed to determine whether or not collateral benefits accruing to the plaintiff should at all come into reckoning in the assessment of damages. Such criteria have been identified at common law as (a) causation, (b) mitigation, (c) statute, (d) purpose and (e) policy. Of these criteria causation and

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mitigation are clearly not in issue in this case since there is no doubt that social security payment were made to the plaintiff because of his being incapacitated by the injuries he sustained. Mitigation is not an issue since payment of benefits to the plaintiff was not an act of mitigation he had undertaken.

"Purpose" and "policy" therefore become the two main criteria to consider. As regard "purpose" and "policy", I am content to quote two passages from Ogus: The Law of Damages (1973) as follows:

> "Perhaps the most general criterion is whether it was the 'purpose' of the benefit to indemnify the plaintiff in which case a deduction ought to be made, or rather to provide him with a benefit in addition to anything he may recover by way of common law damages." (pp 94 - 95)

And, also

> "At the last resort, the court must resort to policy considerations. Is it 'fair' that the plaintiff should accumulate both the damages and the benefit. The answer to this question will vary according to the nature of the plaintiff's loss, and, more particularly, the source of the compensating advantage". (P 95).

In the recent case of Hodgson v Tropp (1988) 3 W.L.R. 1281, the plaintiff, a 33 year old woman, suffered injuries in a road accident. The defendants admitted liability. One of the questions which arose on an appeal by the defendant, to the

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House of Lords on the assessment of damages for personal injury was whether attendance and mobility allowances payable to the to the plaintiff pursuant to section 35 and 37A of the (English) Social Security Act, 1975 should be ignored in the assessment of damages. Allowing the appeal, the House of Lords, it would appear, ruled that all state securities (not covered by the 1948 Act) should be deducted. In that case (at pp 1285 - 1286) Lord Bridge said:

> "it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory ... if, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages ... To this basic rule there are, of course certain well - established ... exceptions. But ... it is the rule which is fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such."

The rational basis of the doctrine of cumul d'indemnites as described in Encyclopdia Dallos - Civil in the passages to which Mr. Georges, counsel, on behalf of the defendant, has referred does not seem much different from the above. Cummulative indemnity stops where it becomes evident that double compansation starts.

However, in this case Perera, J. held the view as follows:

> "In Seychelles by Article 37 of the Constitution the state recognises the right to Social Security. But the security fund payments are discretionary. How this has now

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> crystallized into an enforesable right under the constitution has yet to be determined. In the meantime the doctrine of "Cumul D' indemnites' should be followed and the tortfeasor should not benefit by any payments made to the plaintiff by the State on an undertaken given in the Constitution. The liability of the tortfeasor to compensate the injured is distinct from the obligation of a Social Welfare State to ensure that 'its citizens are not unprovided for by reason of incapacity to work or involuntary unemployment."

If this passage can be interpreted as an expression of the opinion that state benefit can be added to conpensation regardless of the fact that the purpose of such benefit may be to restore the citizen into the same position, as far as his future earnings are concerned, as if the incident that caused the incapacity to work had not occurred, then, in my view, that is not the view that should recommend itself to this court. I venture to think that although the primary benefit of the welfare state is to protect citizens as much as possible from consequences of mishaps, a side benefit, albeit unexpressed, is that persons who cause those mishaps are also relieved to some extent of some of the financial burden attendant on their error of conduct. For myself, the doctrine of cumul d'indemnites applied so widely without exceptions should not be held to be the view that courts in this jurisdiction should adopt. What I conceive to be the proper approach is that whether the principle of cumul d' indemnites should apply in a particular case or not should depend on the perceived criteria of causation, mitigation, purpose and policy.

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However, although I am of the view that the learned judge had stated the principle rather too widely, I am unable to say that in this case he was in error in applying the doctrine, solely because not enough is contained in the materials on record to facilitate the application of any of the stated criteria. Apart from the evidence that the plaintiff was receiving some social security benefits nothing definite has been said about the nature of his entitlement to the fund, whether, as suggested in Mr. Boulle's address, payment under the fund is "arbitrary", and if it is discretionary, the facts on which to base the exercise of discretion. Although the right to social security is recognised by art 37 of the Constitution, the establishment and administration of such scheme has, understandably, not been spelt out in the Constitution. In the circumstances of this case therefore, and on the materials placed before Perera, J. and this court, it is difficult to conclude that this case falls within any of the exceptions to the doctrine.

On the last of the three main issues in this appeal, the substance of the argument advanced by counsel on behalf of the defendant, is that the learned judge made a mistake in determining the multiplicand for the purpose of estimating the plaintiff's loss of future earnings. Two errors pointed out were, first, that he did not deduct social security payments received by the plaintiff and secondly, that he made an error in determining the multiplicand by using a figure which represented the residual earning capacity of the plaintiff (R1,200) rather than a figure which represented the difference between his income (R2,000) and value of his residual capacity (R1,200). The first error had already been dealt with.

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As for the second error, it cannot be disputed that if the percentage of incapacity were to be used in determining the multiplicand, the appropriate figure of the multiplicand is R800 and not R1,200. Mr. Boulle, counsel on behalf of the plaintiff argued, in effect, that whatever error there has been has been compensated for by the error in the overall assessment in favour of the defendant inherent in the assumption by the learned judge that it necessarily followed that the earning capacity of the plaintiff would be reduced in the same proportion as his degree of disability. Mr. Boulle further argued that the learned judge erred in stating that the plaintiff was employable in a sedentary or manual work without evidence of the state of the employment market and in view of the age of the plaintiff. In the cross-appeal, counsel on behalf of the plaintiff argued that the amount by which the award was discounted (ie, R50,000) was not justified, or realistic.

The multiplier method of assessing future loss of earnings is as widely used as it is widely criticised. It involves (i) finding the net average annual income lost by the plaintiff (the multiplicand) and the number of years during which the loss will last (the multiplier) and (ii) multiplying the multiplicand by the multiplier. In determining what the plaintiff would have earned but for the injury and what he is likely to earn, and also in determining the multiplier a host of factors which may appear speculative make the task of quantifying the plaintiff's loss one which cannot produce a mathmatically accurate result. Much must be left to the good sense of the trial judge to determine, in the final analysis, what is fair in the circumstances of each case after taking

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into account less uncertain factors and contingencies.

In this case, there were manifest errors in the application of the multiplier method. First, there was the mathematical error which increased the multiplicand by R400 to the detriment of the defendant; and, secondly, on the other hand, there was the error in assuming certain facts - such as the employability of the plaintiff. On the totality of the evidence, I am of the opinion that these should be regarded as compensating errors which would cancel themselves out with the result that there is no reason to reverse the award made by the trial judge for loss of future earnings.

In the result, I would dismiss the plaintiff's cross-appeal and allow the defendant's appeal only to the extent that the amount awarded by the judge for permanent disability would be reduced by R40,000. I would order accordingly.

(E. O. AYOOLA
Justice Appeal Court

1995-05-12
Read and delivered by me in open court

Judge