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IN THE SEYCHELLES COURT OF APPEAL

AMINA PILLAY APPELLANT

versus

ALVINE MARIE RESPONDENT

Civil Appeal No: 8 of 1999

[Before: Ayoola, P., Pillay & Matadeen, JJ.A]

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Mr. F. Bonte for the Appellant
Mr. A. Juliette for the Respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

This is an appeal from the judgment of the Supreme Court (Perera, J.) entered for the plaintiff in the sum of R21,000 together with interest and costs. The plaintiff, represented by his mother, was a three-year-old male child. Sometime on 20th September 1997, the plaintiff (who is the respondent in this appeal) was on the right side of a road (described as an Estate Road in the judgment of the Supreme Court) when he ran into a vehicle driven at the material time by the defendant, who is the appellant in this appeal, and suffered injuries to his right leg.

The plaintiff sued the defendant claiming damages, on the ground that the motor vehicle driven by the defendant was in operation and that it was as a result of its operation that a collision with the plaintiff occurred. In the alternative, he averred by his plaint that the accident was caused by the negligence of the defendant. For her part, the defendant denied that there was a collision with the plaintiff or any collision at all. She pleaded her own version of how the accident occurred.

The trial judge found that the defendant was negligent. However, proceeding on the footing that the action was based on Article 1383(2) of the Civil Code he stated:-

> "This Article provides that where the driver of a motor vehicle, by reason of its operation causes damage to a person or property, there is a presumption that he is at fault and was therefore liable, unless he can prove that the damage was caused inter alia, due to the sole negligence of the injured party. The defendant does not aver negligence on the part of the child."

On the evidence before him he found that as the child had run into the vehicle, he contributed to the accident. However, after considering the opinion of learned authors of Amos and Walton – Introduction to French Law (3rd Ed) that when a person suffering incapability, either because he is too young to be morally responsible or by reason of lunacy or feeble-mindedness, by his act is the direct cause of an accident, the want of reason by the fact of incapability would usually be a sufficient defence, but, that when the incapable person is himself plaintiff his material contribution to the accident is taken into account and the defendant will be exonerated to the extent that the plaintiff's action caused the damage, and after considering a number of conflicting local authorities, Perera, J. came to the conclusion that, based on the Civil Code of Seychelles, there was no justification to consider the plaintiff's share in the accident in the compensation of damages payable by the defendant as the plaintiff was a child.

Moreover, the presumption laid down in Article 1383(2) of the Seychelles Civil Code that the defendant was at fault and liable unless he could prove that the damage was caused inter alia, due to the sole

negligence of the plaintiff had not been rebutted. In the result he found the defendant liable.

Proceeding to the question of damages, he awarded R15,000 for pain and suffering and R5,000 for loss of amenities and enjoyment of life. The defendant appealed from the decision both on the question of liability and on the question of damages.

Of the four grounds of appeal raised by the memorandum of appeal, three dealt with the question, already found by the judge in favour of the defendant, that it was the plaintiff who ran into the vehicle operated by the defendant. A ground of appeal is supposed to be a ground of objection to the decision appealed against. It is clear that a ground of appeal which raises issues already found in favour of the appellant is misconceived.

The only ground of appeal that subsists for consideration is the fourth ground wherein it is complained that the damages of R21,000 were "*far too excessive considering the fact that the respondent did not sustain permanent injury.*"

There was evidence accepted by the learned judge that the plaintiff suffered a fracture of the distal end of the right tibia and that his leg was cast in plaster of paris and was on admission in the hospital for two days. There was neither deformity nor residual disability upon the cast being removed after four weeks.

There can be no doubt that the learned judge was right in awarding damages for pain and suffering. His was the discretion as to the amount of damages to award. Nothing has been usefully urged on this appeal to show that he was unreasonable in the manner he exercised his discretion. An award of damages of R15,000 under this head is not so manifestly excessive as to be unreasonable.

However, the award of R5,000 for loss of amenities and enjoyment of life cannot be justified. The child had neither residual disability nor deformity. The evidence of his mother that he was frightened of green cars after the accident and that he could not run and play as a normal child of that age were mere assertions by the mother, unsubstantiated by any expert evidence. Besides, such fact which is material to an aspect of damages such as loss of amenities and enjoyment of life which the law will not presume, ought to have been pleaded. Facts which are material to that head of damages were not pleaded. The judge, in fairness to the defendant, should have ignored the evidence. As earlier stated, the award of R,5000 for loss of amenities and enjoyment of life was made erroneously and should be set aside.

In the result this appeal succeeds only to the extent that the damages of R21,000 awarded by the Supreme Court is varied by reducing it to R15,000. Each party should bear his or her costs of this appeal.

E. O. AYOOLA	**A. G. PILLAY**	**K. P. MATADEEN**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 17 day of December 1999.