

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A)F. Robinson (J.A)]

Civil Appeal SCA19/2017

(Appeal from Supreme Court DecisionCS 17/2016)

Theresia Melanie

Appellant

Versus

Clifford Marie

1st Respondent

Seychelles Public Transport Corporation

2nd Respondent

Heard: 12 August 2019

Counsel: Mr. F. Elizabeth for the Appellant

Mr. K. Shah for the Respondents

Delivered: 23 August 2019

JUDGMENT

F. Robinson (J.A)

Background

1. This is an appeal from the judgment of a learned trial Judge of the Supreme Court finding the appellant liable for forty percent of the damages resulting from a road traffic accident in which she was hit by a bus, and ordering the first and second respondents to pay to the appellant, jointly and *in solido*, damages in the total amount of 112,800/- rupees with costs.
2. It was undisputed at the trial that, on the 25 May 2015, at about 4 p.m., the appellant, Ms Theresia Melanie was hit by a bus, bearing registration number S11577, while crossing

the road at the zebra markings in the Victoria bus terminal. It was also undisputed at the trial that the bus belonged to the second respondent and was being driven by the first respondent acting within the scope of his employment.

3. The appellant averred that, at the time of the accident, the bus being driven by the first respondent was in operation, and that it was as a consequence of the negligent operation of the second respondent's bus that the accident occurred.

4. The injuries were particularised as follows:

" PARTICULARS OF INJURY

- a) Left bone parietal flap laceration of 7 cm (with great comminution of bones fragments.*
- b) Immobility of the middle third of the face*
- c) Step like deformity in the left zygomatic bone rim*
- d) Left nasal bone depressed*
- e) Complex facial bone fractures, associated with skull base fractures.*

5. The damage was particularised as follows:

"PARTICULARS OF LOSS AND DAMAGE

- | | |
|---|-----------------------|
| <i>f) Pain and suffering</i> | <i>SCR</i> |
| <i>150,000.00</i> | |
| <i>g) Loss of enjoyment of life</i> | <i>SCR 100,000.00</i> |
| <i>h) Distress, anxiety, shock, trauma</i> | <i>SCR 100,000.00</i> |
| <i>i) Facial Permanent Disfigurement</i> | <i>SCR 200,000.00</i> |
| <i>j) Medical Report</i> | <i>SCR 250.00</i> |
| <i>k) Loss of earnings at SCR 5,485 per</i> | |

<i>month and continuing</i>	SCR 49,365.00
<i>l) Loss of amenities</i>	SCR 100,000.00
<i>m) Moral damages</i>	SCR50,000.00

TOTAL SCR 749,715.00"

6. The defence alleged that it was the appellant's negligence in crossing the road that caused the accident. In the alternative, the defence alleged that the said accident was contributed to by the negligence of the appellant and gave particulars of the contributory negligence alleged.
7. The appellant, being dissatisfied with the judgment, has lodged the present appeal on three grounds. The grounds of appeal challenge both the findings of the learned trial Judge on the issue of liability as well as the quantum of damages awarded to the appellant.

Grounds of appeal

8. The grounds of appeal are as follows:

"GROUND 1

The presiding Judge erred in fact when he made a finding that the Appellant had contributed to the said accident and therefore reduced the amount of damages awarded by 40 %.

GROUND 2

The presiding Judge erred in law and in fact when he awarded the appellant only the sum of SCR 112,800.00 as damages as he failed to appreciate the seriousness of the injuries suffered by the appellant, which the doctor described as life threatening and failed to properly take judicial notice of the level of inflation in the country.

GROUND 3

The presiding Judge erred when he did not award the Appellant

any damages for loss of earnings."

9. At the hearing of the appeal, Counsel for the appellant abandoned ground 1 of these grounds. I consider grounds 2 and 3 of the grounds of appeal, which are concerned with the quantum of damages awardable against the first and second respondents jointly and *in solido*.

Evidence

10. I state the evidence as to the results of the accident upon the appellant.

The evidence of Mrs. Theresia Melanie

11. At the time of the accident, the appellant was fifty nine years-old. An ambulance was called and she was taken to Victoria Hospital. She arrived at Victoria Hospital conscious. She had sustained a cut to her forehead, a painful jaw and scratches to her jaw and left and right arms. She immediately underwent a scan, after which she lost consciousness. When she regained consciousness, she was on the ward. She stayed for some time at Victoria Hospital, but could not recall when she was discharged. The injuries have left scars to her face and arms.
12. The appellant claimed the sum of 150,000/- rupees for pain and suffering. In support of that head of claim, the appellant testified that she gets continuous headaches, that her eyes still hurt, and that she is undergoing treatment. The appellant also claimed the sums of: 100,000/- rupees for loss of enjoyment of life; 100,000/- rupees for distress, anxiety, shock and trauma; 100,000/- rupees for loss of amenity; 200,000/- rupees for permanent facial disfigurement, and 50,000/- rupees for moral damage. In relation to material damage, the appellant claimed the sum of 250/- rupees for a medical report and 49,365/- rupees for loss of earnings. In relation to her claim for loss of earnings, the appellant only testified that she could not recall how much she earned on a monthly basis, but she believed that she earned 5,000/- rupees. She stopped working for the Seychelles Public

Transport Corporation ("SPTC") after having completed medical leave. The appellant, therefore, claimed a total sum of 749,715/- rupees with interest and costs.

13. When cross-examined, the appellant stated that the sum of 749,715/- rupees was not exaggerated. She accepted that she resigned from SPTC.

The evidence of Dr. Rolando Dedieu

14. Dr. Rolando Dedieu, an oral and maxillofacial surgeon, in the employment of the Ministry of Health of the Government of Seychelles, examined the appellant, on the 25 May 2015, at about 6 p.m., and carried out CT scans of the appellant's brain and face.
15. His examination revealed that the appellant was conscious and oriented, and that her pupils were reactive to light. The appellant had sustained a cut to skin and soft tissue at the top of her head, just behind the forehead, which measured seven centimetres in length. He observed broken bones with several pieces (comminuted fracture) and bleeding from her nose. He also observed a step like deformity involving the left cheek bone and depressed fracture of the left nasal bone. CT scans of the brain and face showed that there was no bleeding inside the skull at the time. It also showed bone fractures around the left eye and the base of the skull. On the same day, the cut to her head injury was operated on and was stitched under general anaesthesia and fractures of the nose were put back in place. A nasal splint was applied for seven days after reduction of nasal bone fractures. Thereafter, the appellant was in intensive care.
16. Dr. Dedieu stated that the appellant sustained very serious injuries. He explained that any patient who sustained such injuries, including "*skull base fracture*", must go in intensive care under anaesthetics in case of any complication that may arise in the first 24 to 48 hours. When asked by Counsel whether the injuries were life threatening, Dr. Dedieu answered: "*Yes at some point yes because you never know, even though she was conscious, well oriented it could be any neurological damage. And definitely there was skull base fracture. Even though there was no complication in this respect but it could have been.*"

17. Follow up scans undertaken on the 27 May 2015, showed a small amount of bleeding inside the appellant's left side of her skull. He added that there were complex bones of face fracture associated with a base of skull fracture. He could not testify in relation to the bleeding, which fell under the management of those personnel giving intensive care. He further testified that the cotton inserted in the appellant's nose was removed after 48 hours because the appellant's nose had stopped bleeding completely and a nose support (splint) was applied one week later and then removed within a week.
18. On the 12 June 2015, the appellant was stable, well oriented and did not suffer headaches. She underwent a second operation for the cheek bone fracture, whereby the bone was "*fixed inside*". The floor of the bone around the eye was explored, but had not been displaced. He could not recall whether the appellant was still in intensive care on the 12 June 2015.
19. On the 19 June 2015, the sutures were removed. His examination revealed that the appellant had, by that time, less facial swelling. The appellant complained about blurred vision to the left eye and "*flashing*" at times. She was referred to an Ophthalmologist. He did not know the result of that examination.
20. On the 21 July 2015, his examination revealed that the appellant's cut had healed well, and that she had drooping of left upper eyelid due to scarring (ptosis). He stated that the ptosis has improved.
21. In relation to the scars, which are not hypertrophic scars, he stated that the appellant was advised to use contracutex cream, which is a scar removal cream. He added that treatment was working because the appearance of the scars has improved a lot, but the scars will remain.
22. When cross-examined, Dr. Dedieu stated that, at the time of the injury, the injury was life threatening because the appellant had suffered a little bleeding inside the left side of skull. However, the injuries were now not life threatening. He added that the appellant can lead a fairly normal life.

Discussion

Damage

23. In *Jonathan Geers v Nadin Dodin* (Civil Appeal SCA 7/2017) [2019] SCCA 9 (10 May 2019) para 13, it was laid down that the Seychellois jurisprudence categorises damage for personal injury under four main heads, namely:

"(i) [m]aterial damage in relation to (a) expenditure occasioned by the injury up to the date of judgment; (b) future costs of care and treatment; and (c) loss of earnings both before and after judgment; and (ii) moral damage, representing physical and mental suffering, loss of amenity, and, more generally, what the "Cour de Cassation" has recently called: "loss of quality of life and of its normal pleasures": Cass. 2^e civ., 28 mai 2009."

Moral damage is made up of non-pecuniary damage suffered by the victim. In the case of personal injury, moral damage reflects pain, emotional distress and loss of physical and mental amenity.

24. In this case the claim for moral damage was split into six parts, namely: pain and suffering; loss of enjoyment of life; distress, anxiety, shock and trauma; loss of amenities; permanent facial disfigurement; and moral damage. As set out above, the Seychellois jurisprudence favours a composite award for all non-pecuniary damage. I remark that the learned trial Judge dealt with all non-pecuniary damage together and awarded the total sum of 188,000/- rupees. In *Adonis v Rampal* 2013 SLR 387-401 at 399, the Supreme Court quoted with approval the following extract from the Supreme Court of Canada judgment, *Andrews v Grand & Toy Alberta* [1978] 2 SCR 229 at p. 264 :

"It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is sound practice. Although these elements are analytically distinct, they overlap and merge at the

edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the loss period, and to cause mental pain and suffering in the contemplation of this prospect. These problems as well as the fact that the losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.

25. I now consider ground 2, which appears to be asking us to interfere with the learned trial Judge's judgment as to the amount of moral damages. This court repeated in the case of **Jonathan Geers** *supra* para 15: "*the Seychellois jurisprudence on the subject of moral damage, indicates that it is incapable of an exact calculation. However, where a consistent pattern can be detected in past awards of moral damages by the Seychelles' courts, the award should broadly follow that pattern, subject to adjustments reflecting (i) relevant differences in the facts, and (ii) any decline in the value of money since the earlier judgments: see, for example, Seychelles Breweries v Sabadin SCA 21/2004. In that respect, the assessment of moral damages looks like the exercise of a discretion in being fundamentally a question of judgment.*"
26. It follows, therefore, that this court will not readily interfere with the estimate of damages made by the learned trial Judge. I accept as a criterion that, in order to justify reversing the learned trial Judge on the question of the amount of damages, it is essential that I should be convinced that the learned trial Judge acted upon a wrong principle of law, or that the amount awarded was excessively high or excessively low so as to make it, in my judgment, an erroneous estimate of the damages to which the appellant is entitled: see for examples, *Flint v Lovell* [1935] 1 K.B. 354, *Owen v Sykes*[1936] 1 K.B 192, *Vidot v Libanotis*1977 SLR 192, in which Sauzier, J (as he then was) quoted with approval the case of **Flint** *supra*, *Michel & Ors v Talma & Ors* 2012 SLR 95; *Government of Seychelles v Rose* 2012 SLR 364, *Ah-Kong v Benoiton & Another* (SCA 03/2016) [2018] SCCA 42 (14 December 2018), and **Jonathan Geers** *supra*.
27. The appellant has contended that the learned trial Judge erred in law and in fact in the assessment of moral damages by awarding "**only**" 112,000/- rupees. The appellant's grievance is not entirely clear. In considering ground 2 of the grounds of appeal, I bear in

mind that the total award is 188,000/- rupees. The question that arises on a close reading of ground 2 is whether it addresses the criterion that the learned trial court acted on the wrong principle in awarding damages to the appellant to the sum of 112,000/- rupees, or that the amount of damages is excessively high or excessively low so as to make it an erroneous estimate. However, having considered the submissions offered on behalf of the appellant and the respondents in relation to this ground, it appears that they are agreed that the appellant is contending that the sum of 112,000/- rupees awarded to her is excessively low. I, therefore, reluctantly treat ground 2 as if it gives rise to the issue that the said amount awarded to the appellant, is excessively low.

28. The following factors had a bearing on the assessment of moral damage:

- (a) the learned trial Judge took into account that the appellant would have endured considerable pain and suffering for the reason that her injuries were described as life threatening and required two operations;
- (b) the scarring that has been referred to as a permanent injury. The learned trial Judge observed several scars, specifically to the appellant's forehead and scars to both arms that were highly noticeable;
- (c) the appellant had complained that she suffers from headaches, and that her eyes still hurt. Dr. Dedieu had testified to the effect that there were no lesions of the appellant's optical nerve. The learned trial Judge found that there was no evidence to support her complaints with respect to her eyes;
- (d) the learned trial Judge found that there was no evidence that lent sufficient support of claim for loss of amenities as claimed, other than Dr. Dedieu diagnosing some loss of mobility in the appellant's face at the time of examination immediately after the accident. The learned trial Judge also took into account Dr. Dedieu's finding that the appellant had no necessity for physiotherapy.

29. The learned trial Judge reviewed previous awards of damages and noted that none were precisely comparable to the present case. He also considered inflation and awarded the sum of 188,000/- rupees in 2017 money. Thus, it is not clear why the appellant suggested that the learned trial Judge did not sufficiently take inflation into account.
30. I do not differ from the learned trial Judge's assessment of the relevant facts. I have reviewed the same decisions and some additional ones identified by both Counsel. We informed both Counsel at the hearing of the appeal that none of the decisions are precisely comparable to the present case. I also remark that the judgments are insufficient to show a consistent pattern. In assessing the amount of moral damages to be awarded, the learned trial Judge clearly acted on the evidence of Dr. Dedieu that the injuries sustained by the appellant were, at some point, life threatening. When cross examined, Dr. Dedieu stated that the injuries sustained by the appellant were no longer life threatening, and that the appellant "*can lead a fairly normal life*". I note that there was no evidence with regards to the assessment of any percentage of any permanent disability and no relief had been sought on the basis of any permanent disability. I am of the opinion that when all these circumstances are taken into account, the learned trial Judge's award under this head cannot be faulted.
31. For the reasons stated above, I am not convinced that the amount awarded was excessively low so as to make it, in my judgment, an erroneous estimate. I dismiss ground 2 of the grounds of appeal.
32. In ground 3 of the grounds of appeal, the appellant contended that the learned trial Judge was wrong not to award any damages for loss of earnings. In assessing the amount of damages to be awarded under this item, the learned trial Judge was satisfied that the appellant had failed to adduce any evidence that would suggest that she could no longer perform her job as a result of the accident, and that she had resigned from her employment on her own volition. I hold that the learned trial Judge cannot be faulted under this head because there was no evidence to the court's satisfaction that the appellant has actually suffered any loss of earnings, or that there is certainty that she will suffer such loss in the future.

33. Ground 3 of the grounds of appeal must, therefore, fail.

Decision

34. The appeal is dismissed. I make no order as to costs.

F. Robinson (J.A)

I concur:. A.Fernando (J.A)

I concur:. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019