

IN THE SEYCHELLES COURT OF APPEAL

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

Civil Appeal SCA 7/2017

(Appeal from Supreme Court Decision CS No. 80/2015

Jonathan Geers

Appellant

Versus

Nadin Dodin

Respondent

Heard: 29 April 2019

Counsel: Mr F. Elizabeth for Appellant

Mr. R. Durup for Respondent

Delivered: 10 May 2019

JUDGMENT

F. Robinson (J.A)

1. On the 7 December 2014, at about 3 a.m., the appellant was the driver of a vehicle, when it was involved in a collision with the respondent's vehicle at Bois de Rose, Victoria, Mahe.
2. In his plaint, filed on the 25 September 2015, the respondent claimed:

*"Moral damages for
pain, suffering,
distress, discomfort,
disability, shock and
anxiety*

SR. 800,000/-

Medical report

SR. 200

Total

SR. 800,200/-"

3. The appellant accepted liability. The sole issue for the learned Judge of the Supreme Court was the quantum of damages awardable against the appellant.
4. The collision had consequences for the respondent. Dr. Rolland Barbe, an ophthalmologist, of the Health Care Agency, testified that the respondent sustained a three millimetres laceration to the right eyebrow and a three millimetres laceration to the upper eyelid of the right eye. Both lacerations were sutured at that time.
5. On the 20 July 2016, Dr. Rolland Barbe again examined the respondent. The injuries had healed completely. The question of residual disability did not arise because the injuries had not affected the respondent's vision. However, he opined that the injuries had caused:

"a small misalignment in the lid margin of upper lid of right eye. By consequence three lashes are now misdirected and grow towards the cornea and could be the cause of discomfort – foreign body sensation. In the case epilation (removal of lashes) is recommended every 2-3 months depending on the severity of symptoms". (P1)

6. The respondent would have to remove the eyelashes that grow turning into the eye, for a considerable period and removal provides only temporary relief. Mechanical removal of the offending eyelashes is done in Seychelles, but not by the Government health care services that considers this procedure to be a cosmetic procedure. Moreover, if the respondent wanted the offending eyelashes to be removed permanently, he would have to go abroad to undergo such a procedure.
7. Dr. Jowlla Manu, an orthopaedic surgeon, of the Health Care Agency, also attended to the respondent when he was admitted to the Casualty Ward, on the 7 December 2014. The respondent had a "*rugged laceration*" on the left knee which Dr. Manu cleaned and sutured. An x-ray of the respondent's right knee showed a fractured patella. On the 8

December 2014, an open reduction and fixation surgery was performed to repair the patella. The bone was put together and fixed into place by two metal rods and wires. After the surgery, the respondent was given a knee splint to wear to allow the incision to heal. The respondent was also provided with crutches. On the 11 December 2014, the respondent was discharged from the hospital.

8. On the 7 January 2015, physiotherapy was prescribed following a review. An x-ray done on the 18 August 2015, showed bone healing of the fracture by seventy percent forming a callus. The metal implants were to be removed in two years' time, of which the respondent will have to undergo surgery. In addition, the surgery wound would take about ten to fourteen days to heal. Dr. Manu opined that the respondent would recover completely with physiotherapy. He also opined that the respondent will experience pain when climbing stairs, but he should have no problems doing other activities. He added that residual pain will be experienced sometime after two to three years of surgery during cold weather. Furthermore, the respondent may also experience joint swelling of the leg. Dr. Manu, further, explained that osteoarthritis is one of the long term complications of patella fracture. He also clarified that osteoarthritis is a natural process, but that its onset may be earlier after an injury.
9. When cross-examined, Dr. Manu stated that the respondent's probability of developing osteoarthritis of the right knee is eighty percent, and that for a person who has not suffered patella fracture, the probability is fifty percent.
10. The respondent's evidence was very scant. He stated that the eyelashes grow turning into the eye, and that one Dr. Murthy removes them every three weeks. He briefly mentioned that he has the option of surgery to stop their growth. The respondent who, according to his evidence, is a self-employed DJ, did not work for six months after the accident. His "*knees functions well*", but he has problems with them when running and climbing stairs. The respondent was not cross-examined.
11. On the 21 February 2017, the learned Judge gave a judgment in the present action. He

awarded a total of 760,200/- rupees. He justified the award as follows:

" [10] *Counsel for the plaintiff has submitted on quantum. He has referred the court to the following cases: **Farabeau Casamar Seychelles Ltd (2012) SLR 170** where for almost similar injury, moral damages for pain and suffering, distress and inconvenience, loss of amenities and permanent disability in the amount of Rs. 350,000.00 was awarded.*

[11] *Counsel for plaintiff has also drawn the attention of the court to the fact that there is an upward trend in the assessment of damages in view of rising inflation. The court does take judicial notice of this fact.*

[12] *The plaintiff has also suffered injury to his eyelid which will not heal completely and will require to regular treatment."*

12. The major rule of the Seychelles civil law, derived from the French jurisprudence, is that civil responsibility for personal injury extends to all pecuniary prejudice suffered by the victim which would not have been suffered but for the injurious act.
13. The Seychelles jurisprudence categorises damage for personal injury under four main heads. (i) Material 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° civ., 28 mai 2009.
14. As mentioned above, moral damage is made up of non-monetary damage suffered by the victim. In the case of personal injury, moral damage reflects pain, emotional distress, loss of physical and mental amenity and loss of quality of life.
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. It follows that an appellate court should not normally interfere with it, unless either the Judge has made some error of principle or misunderstood the facts, or the award is manifestly insufficient or excessive: see for examples, *Vidot v Libanotis 1977 SLR 192*, *Michel & Ors v Talma & Ors (SCA 22/10)*; *Government of Seychelles v Rose SCA 14/2011*, *Ah-Kong v Benoiton & Or (unreported) (SCA No. 3/2016)* and *Flint v Lovell (1935) 1 K.B. 354*.

16. In his grounds of appeal, the appellant complained that the learned Judge acted on a wrong principle of law in making the award for moral damage by not evaluating moral damage. He also contended that the moral damages awarded were manifestly excessive.
17. Counsel for the respondent contended that the learned Judge's award was based on the evidence he had heard about the effect of the respondent's injury on him. He added that the learned Judge, bearing in mind inflation since 2012, opined that the closest case on its facts was *Farabeau Casamar Seychelles Ltd (2012) SLR 170 (supra)* in which moral damages of 350,000/- rupees were awarded. At this appeal, Counsel has referred us to *Allan Tucker and anor v La Digue Island Lodge Civil Side No. 343 of 2009 (unreported)* where the Supreme Court awarded the sum of 190,000/- rupees for the fracture of a femur.
18. I pause here to state that the learned Judge awarded material damages for injury to the eyelid of the respondent which he stated will not heal completely and will require regular treatment. I observe that the respondent did not claim any material damage and, hence, I conclude that the award made by the learned Judge to the sum of 410,000/- rupees was *ultra petita*. I order that the sum of 410,000/- rupees be deducted from the sum of 760,200/- rupees awarded to the respondent by the learned Judge, accordingly.

19. Having considered the judgment and the written submissions of both Counsel in relation to the question of the award for moral damage, I agree with the submissions of Counsel for the respondent that the learned Judge did not act on the wrong principle of law in making the award. I conclude that the contention of the appellant cannot succeed.
20. I now have to consider whether or not moral damages awarded were manifestly excessive. As stated above, in order to justify reversing the learned Judge on the question of the amount of moral damages it will be necessary that I should be convinced that the amount awarded was manifestly excessive as to make it an entirely erroneous estimate of the damages to which the respondent is entitled.
21. I have reviewed **Farabeau** (*supra*) and **Allan Tucker** (*supra*) which Counsel for the respondent has identified. In **Farabeau** (*supra*) the plaintiff was a 36 year old employee of the defendant. He was injured in the course of his employment with the defendant when a bale of new fishing net fell on him. The plaintiff claimed to have suffered "(a) Swelling and tenderness of left knee and a comminuted fracture of the left patella; (b) patella-femoral anchilosis restriction of movement; (c) atrophy of the quadriceps muscle; and (d) permanent disability." The plaintiff claimed from the defendant the following sums of money under the said headings; "(a) pain and suffering – Rs100,000; (b) loss of amenities – Rs150,000; (c) distress and inconvenience – Rs 149,300; (d) permanent disability – Rs500,000; (e) medical report – Rs700; and (f) loss of earnings – Rs1,497,600, all totalling to a sum of Rs2,397,600.00." According to the evidence the plaintiff suffered multiple injuries including a fracture of the patella. He was operated on twice, but in spite of his recovery he had suffered among other things a certain level of permanent disability. He was not able to move his leg as he used to. Neither was he able to stand for long. He was no longer able to participate in sports. His sex life had been inhibited. He has failed to get alternative employment and lost the employment he had with the defendant. The court accepted from the testimony of the plaintiff that he had suffered pain and suffering, and that there has been a loss of amenities together with

permanent disability. The court made a global award of 350,000/- rupees for injuries that the plaintiff had suffered and continues to suffer by reason of the accident. FMS Egonda-Ntende, Chief Justice, considered **Allan Tucker** (*supra*) in making the award.

22. In **Allan Tucker** (*supra*) the first plaintiff suffered the following injuries: "(a) *Depressed tibial plateau fracture of the left knee*; (b) *Wound to left knee*; (c) *Internal bruising to left calf*; (d) *Severe lower back bruising*; (e) *Multiple body scratches*". According to the evidence, the first plaintiff's fracture had healed well. There was however, residual swelling at the right knee. There was some discomfort and clicking in his knee. He was likely to develop osteoarthritis and will suffer all this for the rest of his lifetime. He has limitations of movement to the left knee. His discomfort was estimated to be between minor and moderate. The court made an award of 190,000/- rupees.
23. In this present appeal the respondent's injuries to his right eye has healed completely. He would have to remove the three eyelashes which grow into the eye for a considerable period. He removes them every three weeks. I remark that we were not referred to any past awards.
24. The respondent's fracture has healed well. His "*knees functions well*", but he has problems with them when running and climbing stairs. He is likely to develop osteoarthritis.
25. Taking into account all of the above, including the fact that the evidence of the respondent with respect to moral damage was very scant, I conclude that the amount of damages awarded by the learned Judge is manifestly excessive.
26. I find that the correct award of moral damages in this case is 150,000/- rupees.
27. I therefore, amend the judgment of the learned Judge by substituting for the amount of 760,200/- rupees the amount of 150,200/- rupees. The appeal is otherwise dismissed. Since the appellant has been partly successful, he will pay half of the costs of the present appeal.

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 10 May 2019