

**Kilindo v Morel & Or
(2000) SLR 69**

John Renaud for the plaintiff
Kieran Shah for the defendant

Appeal by the appellant was partly allowed on 12 April 2001 in CA 12 of 2000

Judgment delivered on 30 June 2000 by:

KARUNAKARAN J: The plaintiff, aged 45 is a working woman. She is working as principal secretary at the Directorate of Civil Aviation. On 10 August 1997, she was involved in a motor traffic accident and suffered personal injuries. She sued the defendants for loss and damages arising out of those injuries. The defendants have admitted liability. The only issue before this court is to determine the quantum of damages payable to the plaintiff. In fact, the plaintiff claims a total sum of R3,115,200 from the defendants towards the said loss and damages. However, the defendants dispute the quantum contending that the plaintiff's claim is grossly exaggerated and unreasonable. The particulars of the plaintiff's claim are as follows:

Loss

- | | |
|---|------------|
| 1. Transport to attend hospital and treatment including air-tickets and accommodation | R15,000.00 |
| 2. Medical Reports | R200.00 |

Damages

- | | |
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| 1. Injuries requiring knee change including period in hospital | R900,000.00 |
| 2. Pain and suffering and continued treatment including for cost of medicine | R2,000.00
R800,000.00 |
| 3. Loss of amenities including loss of earning at Rs5000 | R900,000.00 |
| 4. Inconvenience anxiety and distress | R500, 000.00 |
| Total | R3,115,200.00 |

According to the medical report by the orthopedic surgeon Dr. Horatius Browne - dated 15 December, 1997 - the plaintiff had sustained through that accident the following injuries:

1. Comminuted fracture on the medial side of the left knee and loss of tissue at the site of the injury.
2. Left upper 1st and 2nd incisor tooth slightly mobile.

3. Minor bruises below the angle of mouth on right side.
4. One laceration wound on the dorsal aspect of the lower half of the right arm.
5. One laceration wound on the dorsum aspect of upper half of right forearm.
6. Minor abrasions on the antero-medial aspect of upper half of right leg.

The main and major injury the plaintiff suffered was the comminuted fracture of the left knee and lacerations on the right upper and forearm. The plaintiff was initially treated for all the above injuries at Victoria Hospital in Seychelles. Particularly for the major knee-injury of a compound comminuted fracture to the medial plateau of the left tibia, she was surgically operated at the Victoria Hospital. According to the surgeon Dr. Jerom of Victoria Hospital, the plaintiff recovered fully from the injuries No: 2, 3, 4, 5 and 6 above but was suffering a permanent disability from injury No: 1. On recovery from that injury, she complained of residual stiffness and pain in her left knee. It limited her walking and activities of daily living. She could not squat or climb stairs. She could only walk short distances. Symptomatically, she was suffering from pain and sensation of crackling sound during walking. She was unable to flex fully the left knee joint. This caused her pain and great inconvenience at home and at work. Therefore, she had to go to Singapore for further treatments. As per the medical report dated 4 August 1998 from orthopedic surgeons in Singapore she was diagnosed for "genu varum" and early osteoarthritis changes in the medial joint space following the fracture to the tibial plateau. She also had soft tissue contractures in the left knee resulting in restricted range of motion. Following this diagnosis in Singapore, on 29 July 1996 a soft tissue release, quadricepsplasty, joint debriment and high tibial osteotomy were performed using a plate and screw. After this first treatment in Singapore, she again developed "tibial femoral osteoarthritis" as per medical report dated 8 February 1999. This led to severe osteoarthritis changes in both medial and lateral compartments of the left knee. Hence, a total knee replacement was performed in Singapore. Now she has a surgical scar and suffers a permanent disability of 40% mobility to her left leg. According to the prognosis of the orthopaedic surgeon Dr. George Cosmaus that the plaintiff though has suffered a bad knee injury the pain should subside in due course. She will not suffer osteoarthritis as the knee has now been replaced.

The plaintiff testified that following the first operation to her knee in Seychelles, she had to go to Singapore twice for two more surgical operations involving knee replacement. The Government of Seychelles funded her first trip to Singapore. In fact, the Government paid for both the surgical operations done in Singapore. However, for the second trip she had to spend from her pocket. She had to stay in a hotel in Singapore and incurred incidental expenses.

Further, she testified that she could bend her left knee only to 90°. Whenever she climbs up the stairs, she has to put her feet on the step before she could proceed to the

next one. After the accident, she had to sell her car as it had manual gear operation and had to buy an automatic one so that she could avoid clutch operations using her left leg. She bought this car for the sum of R70,000. During her physiotherapy period she had to engage private transport for her trips to the clinic. Before the accident she was working shift duty and was earning an extra allowance in addition to her monthly salary. Now she is unable to work shift hours due to the injuries. Before the accident, she was a very active person. She used to go hiking, to Praslin and La Digue. Since the accident, her movements, physical and social activities are completely restricted. Moreover, the plaintiff testified of her sufferings as follows:

I cannot stand long because of my knee. I can still feel the pain. I cannot wear high heel shoes as I used to wear. Nowadays I would rather stay at home instead of going out for activities because I am afraid that I may make a false step and affect my knee more. For sexual activities, it has been decreased.

In the circumstances, the plaintiff claims a total sum of R3,115,200 from the defendants towards loss and damages.

Firstly, I should mention here that the plaintiff from her demeanour and deportment appeared to be a credible witness. I believe her in every aspect of her testimony. She frankly and truthfully spoke about her injuries, pain and suffering. Having considered the nature and extent of the injuries suffered by the plaintiff, this court finds that she would have suffered considerable pain and suffering resulting from the accident and the three surgical operations. Undoubtedly she would have suffered discomfort, inconvenience and distress. Further, this court finds that the plaintiff has a partial permanent disability of 40% mobility of her left leg due to the injury to the knee. However, in my judgment the claim of the plaintiff under the heads of injuries, pain and suffering, loss of amenities, inconvenience and distress are grossly exaggerated. They all appear to be unreasonably exorbitant and disproportionate to the actualities. At this juncture, it is pertinent to note that the quantum of damages awarded by the courts in cases of this nature must only be compensatory and nothing else. The rate of award should also be appropriate to the commission of the delict in question in terms of article 1149 (3) of the Civil Code of Seychelles. In fact, no victim should be allowed to take advantage of the occasion and make a profit out of it by inflating the claim out of proportion. The loss and damage claimed, should not be too remote or too speculative but should reasonably be foreseeable and ascertainable in the ordinary course of events. Besides, the quantum should be assessed on the basis of some realistic index. In law it should be pegged to some recognised index such as cost of living or other index appropriate to the activity of the victim (see article 1149 (4) of the Civil Code of Seychelles). Obviously, the case law resorting to the doctrine of *stare decisis* could be of much assistance in this respect as they are the essence of the application of such indices on case to case basis. This judicial exercise has evolved by broadening down the case laws from precedent to precedent. By getting guidance from previous decisions we have kept the common law on a good course. Hence, I believe it is preferable to look up some of the precedents for guidance.

In the case of *Loen Malcouzanne v Peter Simeon*(unreported) Civil Side No 241/1993 the plaintiff who suffered limited flexion of right knee of 45° with permanent disability of 20% who used crutches and unable to bend the right leg was awarded R30,000 for pain and suffering and R45,000 for permanent disability.

In *Didas Louis v SPTC* (unreported) Civil Side No 6/1996 the plaintiff - 46 years old - with a fracture of the right patella, and an anarthrotomy of right knee had been performed with chronic pain in his knee and permanent disability of 15%, was awarded R55,000 for pain and suffering and loss of amenities of life.

In *Simon Maillet v Louis* (unreported) Civil Side **No** 117/1999 - the plaintiff sustained a fracture of the left tibia and fibula. After treatment by traction and casting, he continued to have pain in his ankle and also had a limp. He was awarded R30,000 for the injuries and pain and suffering and R10,000 for loss of amenities of life.

In the case of *Antonio Ruiz v Borremans*(unreported) Civil Side No 200/1991 the plaintiff suffered a fracture of the 3rd metatarsal bone of the foot and underwent treatment in Belgium as well as in Seychelles. He had a partial permanent disability of 5% of his left foot. A total sum of R80,000 awarded by Bwana, J. was reduced to R40,000 by the Court of Appeal.

In the case of *Suzette Hermitte v Phillipe Dacambara & Ors*(unreported) Civil Side No 261/1998 - the plaintiff suffered a gunshot injury on her left leg leaving a residual permanent disability of 15%. Perera, J. awarded a sum of R60,000 in respect of the injuries and pain and suffering and R 15,000 for loss of amenities of life.

In *Tirant v Banane* 1977 SLR 219 a 53 year old man, with a fracture of the pelvis, compound fracture of right knee, urethra damaged, amputation of right leg and, who was rendered impotent was awarded moral damage of R100,000.

Indeed, the defendants in their written submission have already admitted the following sums:

1. Transport to attend hospital and treatment including air-tickets and accommodation	R15,000.00
2. Medical Reports	R 200.00
3. Cost of medicine	R 2000.00
4. Loss of earnings	R 5000.00
Total	R22,200.00

In the light of all the above and having taken into account all the relevant circumstances of this case I award the following sums to the plaintiff:

1. Transport to attend hospital and treatment including air-tickets and accommodation	R15,000-00
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2.	Medical Reports	R200-00
3.	Cost of medicine	R2,000-00
4.	Loss of earnings	R5,000-00
5.	Globally for the injuries and for the resultant pain and suffering	R110,000-00
6.	Loss of amenities of life	R20,000-00
7.	Inconvenience, anxiety and distress	R10,000-00
	Total	R162,200-00

Therefore, I enter judgment for the plaintiff and against the defendants jointly and severally for the sum of R162, 200-00 with interest on the said sum at 4% per annum as from the date of the plaint and with costs.

Record: Civil Side No 122 of 1999