**Marguerite v Roberts**
**(2000) SLR 41**

Phillippe BOULLE for the plaintiff
Kieran SHAH for the defendant

**Judgment delivered on 11 June 2001 by:**

**PERERA J**: The plaintiff claims damages from the defendan espect of personal injuries suffered by him. He avers that on 5 July 1998 the defen while driving motor vehicle S3736 collided with a wall and a gate at Belonie, and t e said gate hit him injuring both his legs. The action is based on article 1383(2 e Civil Code. The defendant admits liability, but contests the quantum of damages ed in the plaint.

According to the medical report dated 1 April 1999 issued by D xander, the Senior Consultant Surgeon, the plaintiff suffered the following injuries.

1. Comminuted fracture of the shaft right femur in pro l third.

2. Haemarthrosis of the right knee.

An operation was performed the same day and intramedullary g of the right femur was done. He was discharged from hospital on 28 August 19 On 5 January 1999 he was still complaining of pain in the right knee and had a swelling. He was walking with a support. On 20 April 1999, he still had pain in t ht knee. An x-ray examination of the right femur showed a moderate unity of th ht femur. He was advised to undergo an arthroscopy of the right knee, but plaintiff disagreed. However physiotherapy was continued.

Dr Alexander in his testimony stated "haemathrosis" meant ' l inside the knee". This caused swelling and tenderness of the knee with restri of movement. He stated that the actual effect could only have been diagnosed n arthroscopy was done. As regards the intramedullary nailing of the right femur tated that it was a process involving the insertion of a nail in the shaft of the femur urther testified that the plaintiff was bed-ridden for about a month. Explaining the p ent pain, he stated that it could be the result of the fracture, and that such pain ca iate even up to the hip. He further testified that the nail has not been removed as nd that although it could be there lifelong, and that some patients become psychologically affected and avoid certain activities. As a future prognosis, Dr Alexander stated that he may have slight pain when walking a long distance, but he should not lift weights.

As regards injury to the left knee averred in the plaint, Dr Alexander stated that there was only an abrasion, and that there is now a residual scar.

The plaintiff in his testimony stated that he was 29 years old at the time of the accident. He has no wife nor children. He was a welder at Laxmanbhai & Co Ltd, and did mainly roof work. He had worked for 6½ years then, and was receiving a monthly salary of R2650 plus overtime payment. He also did part time work in a garage and received R1000 per month. He stated that his employer paid him up to July 1998.

As regards his sports activities, he stated that he played football for the English River team that took part in league tournaments. He is now unable to play any football. He is also unemployed and received social security payments.
He however stated that he may be able to do a sedentary job. Referring to the advice given by Dr Alexander to do an arthroscopy, he stated that the advantages and disadvantages were not explained to him, and hence he could not take a chance. He said that the thought that he may not get well completely was depressing.

Ms Wyda Payet the physiotherapist testified that the plaintiff had a muscle wastage of .025 on the right leg compared with the left. There is therefore consequent weakness of the quadriceps and hamstrings, and a slight limp. That limp could be due to the restriction of movement caused by the nailing of the femur shaft. Physiotherapy was done up to September 1998, and he was advised to do simple exercises at home and also hydro-therapy in a swimming pool. Although earlier he had to walk with the aid of crutches, he could now walk unaided.

Guy Albert, the former manager of the English River Football Club stated that the plaintiff played in the defence position. He described him as a very fit and able player in the team. He further stated that after the accident, they were unable to find a suitable player to play in that position and consequently the team fared badly in the league matches.

Chrysante Morel, a panel beater by profession stated that the plaintiff was his foster son. He testified that during weekends he helped him with welding work in the garage and received about R1000 per month.

Vijay Pandya, the Financial Controller at Laxmanbhai & Co Ltd testified that the plaintiff, who worked as a welder ceased to work in July 1998 consequent to the accident. He produced a statement indicating the overtime drawn by the plaintiff three months before the accident and the bonus he received for the past 4 years (exhibit P5).

Another witness for the plaintiff Fabien Valmont, a Clearing Agent, stated that the plaintiff cleaned his land on some weekends. He also assisted the contractor who built a retaining wall. He paid him R100 – R150 per day for such work.

Counsel for the defendant, who called no evidence, submitted that the claim was exaggerated. He also submitted that according to medical evidence, the plaintiff, at best would have some weakness on the right leg. He concluded that the plaintiff may not have been able to walk properly for about a year and that in any event is unable to play football. He also submitted that his present condition may have been further

improved had he agreed to an arthroscopy. He invited the Court to consider that the plaintiff has no permanent disability and that he could have done the same job in a reduced capacity, or some other job and mitigated the damages.

Counsel for the plaintiff however contended that the submission that the condition of the plaintiff's injury may have improved had he agreed to an arthroscopy was speculative, as there was also the possibility that further complications may have arisen consequent to such surgical intervention.

On a consideration of the medical evidence in the case it is clear that the plaintiff is not incapacitated to a degree that he cannot engage in a gainful occupation. He should be able to work in his occupation as a welder, although it is not possible to climb roofs of buildings. In any event he should be able to do sedentary work. He is 30 years old now, and is a strong and robust person.

Whether the present pain in the right knee the Plaintiff complains of could have been cured had he agreed to a proper diagnosis by an Arthroscopy, is a moot point. In the case of *Karl Seraphine v Gilbert Sultan* (unreported) CS 214/1998 the plaintiff was advised to have an arthroscopy, but refused. Arthroscopy as explained by Dr Alexander in that case, and in the present case, is a purely investigative process to ascertain whether there is any internal damage in the knee that needs treatment. Persistent pain may be indicative of such injury. In that case I held that the plaintiff had failed to mitigate the damages by his refusal to agree to an arthroscopy. In the present case as well, my finding is the same.

The plaintiff claims R50,000 as moral damages, pain, suffering, anxiety, distress and discomfort; and a further sum of R40,000 for disfigurement and loss of amenities of life. In personal injury cases the damages may be material or pecuniary, or moral or non-pecuniary.

In the case of *Simon Maillet v Louise* (unreported) CS 177/ 1990 the plaintiff suffered a fracture of the left tibia and fibula. He had a permanent disability of 25% and a permanent limp. I awarded a sum of R30,000 for pain and suffering and permanent disability, and R10,000 for loss of amenities of life. In *Simon v Kilindo* (unreported) CS 225/1992 for a similar injury a total sum of R35,000 was awarded under the head of moral damages. In *Danny Mousbe v Jimmy Elizabeth* SCA 14/1993, the Court of Appeal affirmed an award of R40,000 made in respect of a plaintiff who had a compound fracture of the right tibia and fibula with swelling and effusion of the knee.

In the case of *Karl Seraphine* (supra), on a consideration of the above previous awards, I awarded a sum of R25,000 for pain and suffering and R5,000 for loss of amenities of life. In that case too, the plaintiff was 36 years old, and had refused an arthroscopic examination to diagnose the swelling on his knee. He had persistent pain, and was unable to play football.

In the present case, the plaintiff has a scar on his left knee as well. However there is no

medical evidence regarding the extent of any incapacity. Considering the period he was bed-ridden, the pain and suffering he had to undergo due to the injury and the nailing of the femur and his anxieties for the future, I award a global sum of R40,000 under both items 1 and 2 of paragraph 4 of the plaint.

As regards the claim of R31,800 claimed as loss of earnings, the amount is based on monthly earnings calculated at R5300 up to the date of action. However according to exhibit P1, the monthly salary was R2650. He was paid up to 31 August 1998. Hence up to the date of filing the action it was 5 months. Further, according to exhibit P5, he received an average of R200 as overtime for the months of May, June and July 1998 and an annual bonus of about R2800. According to Chrysante Morel, the plaintiff received about R1000 per month for welding work done at the garage.

> This method of assessing prospective loss of earnings is open to serious objection. In fact it gives the respondent more than what he has lost.

The reasoning there was that a plaintiff gets the estimated loss of monthly or weekly earnings for a period up to the end of his working life in a lump sum, and if that sum is invested he gets a monthly interest which is more than his monthly loss. In that case a sum of R72,000 awarded on that method, with a multiplier of 26 years representing the plaintiff's balance working life, was reduced to R40,000. That sum was considered to be a fair assessment of the prospective loss of earnings.

In *UCPS v Mark Albert* (unreported) SCA 19/1994, Ayoola JA (as he then was) discounted this method of calculation as a method which was "as widely used as it is widely criticised". He stated that it involved a host of factors which may appear speculative and hence made the task of quantifying the plaintiff's loss one which could not produce a mathematically accurate result. He further stated that much must be left to the good sense of the trial judge to determine, in the final analysis, as to what is fair in the circumstances of each case after taking into account less uncertain factors and contingencies.

In *SACOS v Gustave Fontaine* (unreported) SCA 41/ 1997 the Court of Appeal unanimously stated that the multiplicand and multiplier method of computing loss of future earnings should be avoided. In that case, an award of R228,000 made on the basis of a multiplier of 38 years representing the plaintiff's working life was reduced to R25,000.

In *Harry Confiance v Allied Builders* (unreported) CS 226/1997 the plaintiff claimed inter alia a sum of R360,000 as loss of future earnings calculated at R1000 per month for 30 years. That income was however what he received from rearing pigs outside his normal working hours. Despite a residual incapacity of 10% on his right leg, he continued to work in the company without any reduction in salary. I considered such ancillary income to be an uncertain factor, and on the basis of the *Gustave Fontaine* case (supra) awarded R10,000 under that head of damages.

In the present case, Dr Alexander in his report dated 18 July 2000 stated that the plaintiff was "still unable to do (the) previous job" therefore advised "light duty" for 1 year. The reason for the defendant company to refuse re-employment to the plaintiff was that the work they carried out in the section of employment the plaintiff was earlier working "did not provide for the possibility of light duties". Mr Pandya testified that the plaintiff came several times seeking re-employment. He would not have sought to work as a welder, albeit on "light duty" for some time, had he been incapacitated to such an extent that he would not be able to pursue his profession. In his testimony, he stated that his welding work involved working on roofs of buildings. Undoubtedly he would not be able to climb roofs or scaffoldings in the foreseeable future. But his skill as a welder could be utilised to work in a garage, as he did with Chrysante Morel, or be self-employed. Hence the claim for loss of future earnings based on the multiplier - multiplicand method is inappropriate in the present case

On the basis of the principles of assessment of prospective prejudice to the earning capacity of an injured person, the present Plaintiff's "partial incapacity" is uncertain. Damages are awarded only when such prejudice is certain. Hence on the basis of the decisions in the case of *Gustave Fontaine* (supra) and *Harry Confiance* (supra), I award a sum of R25,000 under the head of loss of future earnings.

Judgment is accordingly entered in favour of the plaintiff in a sum of R82,750 together with interest and costs.

**Record: Civil Side No 175 of 1999**