

# **IN THE SUPREME COURT OF SEYCHELLES**

Charles Ventigadoo

Of Belonie, Mahe

**Plaintiff**

**Vs**

**The Government of Seychelles**

**Represented by the Attorney General**

**Of National House, Victoria**

**Defendant**

**Civil Side No: 407 of 1998**

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Mr. A. G. Derjacques for the plaintiff

Mr. R. Govindan for the defendant

**D. Karunakaran, J.**

## **JUDGMENT**

The plaintiff in this action sued the defendant, the Government of Seychelles for damages allegedly arising from medical negligence of the employees of the defendant namely, surgeons, doctors, and staff, who work at the Victoria Hospital. These employees allegedly committed a number of negligent acts or omissions in the course of the medical treatment given to the plaintiff for an accidental cut injury to his right arm. The plaintiff claimed damages

against the defendant based on *vicarious liability* as the said employees were professionally negligent in the course of their employment with the defendant. The plaintiff claimed that the alleged medical negligence resulted in amputation of his right forearm above the elbow and so he suffered extensive loss and damage in all walks of his life. Hence, he claimed a total sum of Rs 918,000/- for loss and damage as detailed below:

(i) <i>Estimated damage for pain and suffering by the plaintiff</i>	Rs150,000.00
(ii) <i>Estimated damages for plaintiff's loss of arm</i>	Rs 200,000.00
(iii) <i>Permanent cosmetic disability</i>	Rs 100,000.00
(iv) <i>Loss of job at Rs2,600/- per month, for life</i>	Rs 468,000.00
	<b>Total</b>
	<b><u>Rs 918,000.00</u></b>

The defendant denied liability. The Supreme Court heard the case on the merits and in its judgment dated 28<sup>th</sup> day of October 2002 refused the claim of the plaintiff and dismissed the suit. The plaintiff being dissatisfied with the said judgment, appealed against it, to the Seychelles Court of Appeal. Having heard the appeal, the Court of Appeal in its Judgment dated the 26<sup>th</sup> April 2007, allowed the appeal and held that the defendant, the Government of Seychelles was liable in damages for the medical negligence of the

hospital staff. Having thus reversed the judgment of the Supreme Court on liability, the Court of Appeal remitted the record to the Supreme Court with direction to assess the quantum of damages and costs to be awarded to the plaintiff, Charles Ventigadoo. Hence, this Court now proceeds to assess them accordingly, in the light of the evidence on record and the submissions made by counsel on both sides.

It is not in dispute that on 2nd of June 1998 the plaintiff was only 19, when he sustained the accidental cut injury. On the same day, he underwent a medical operation at the Victoria Central Hospital for the treatment of the injury. On the 5th of June, that is, on the 3rd postoperative day, the plaintiff suffered severe pain in his right forearm, where the wound had been operated. The same day he was examined by the surgeon in charge and found to have developed gangrene following the injury. He suffered acute pain. The pain was not only localized but was spread all around the area of wound. He could not walk. He could not sleep. His arm suffered inflammation and putrefaction. He had a high rise in his body temperature. On the 6th of June, the plaintiff had to undergo an amputation above the elbow of his forearm obviously, under anesthesia.

### **I - Non-pecuniary damages**

- (i) **Pain and suffering:** Under this head the plaintiff claims *Rs150,000.00*. The defendant contends that although the plaintiff is entitled to damages for actual and prospective pain and suffering caused by the injury, the quantum claimed is excessive and manifestly exaggerated. Frankly speaking, it is impossible to use an exact mathematical standard to measure the amount that an injured person is entitled to recover for physical and mental pain and suffering and loss of normal state of mind. Legally speaking, "pain and suffering" aren't two separate concepts. Instead, it is one compound idea. Awards for "pain and suffering" are not apportioned into separate amounts; one for pain and one for suffering. Pain and suffering is a phrase that is always used as a single unit in legal terminology. While there may be real differences between "pain" and "suffering", it is

legally impossible to separate the two, when trying to award damages.

In most injuries, there will be physical and mental pain and suffering. Physical pain and suffering includes bodily suffering or discomfort. Mental pain and suffering may include *mental anguish* or *loss of enjoyment of life*, in other words *amenities of life*. Following an injury, the injured is entitled to damages for both physical and mental pain and suffering for the past, present and future. Undoubtedly, the plaintiff in this matter would have suffered excruciating pain during the period he had developed gangrene and soon after the amputation and healing period of the wound. He had stayed in hospital for three months because of the injury.

### **Mental Anguish**

Due to amputation, the plaintiff will no longer be able to enjoy the things in life that he used to enjoy like swimming, driving etc. and he should be obviously wracked by worry. Hence, he must be awarded monetary compensation for his *mental anguish* that forms part of the pain and suffering. This includes psychological injury, emotional trauma, and even embarrassment that are a result of the injury. These are relevant consideration in the assessment of damages for pain and suffering in the instant case. Having said that, as rightly pointed out by Perera, ACJ (as was he then) in ***Georges Sidney Laramé vs. Coco D'Or (Pty) Ltd Civil Side No 172 of 1998*** that on a review of cases in respect of personal injuries, the tendency of the Courts appears to be that when the claim is for a loss of an organ or a limb, the substantial award should be made for such loss. On the other hand, in claims for fractured legs or arms from which a claimant recovers completely, the substantial award should be made for "pain and suffering", the

main in damages. Obviously, in the case on hand, the plaintiff has made a separate claim for *loss of the arm* that will be considered later in this judgment. Having regard to all the circumstances of the case and considering the precedents cited by counsel, for *pain and suffering* - since pleaded as a separate head - I would award Rs. 75,000/- which sum in my considered view, is fair and reasonable

- (ii) **Loss of arm:** Under this head, the plaintiff claims Rs 200, 000/- towards damages. The defendant contended that this figure is unreasonable and exaggerated. Indeed, the disfigurement caused by the loss of right arm is the significant **permanent physical disability** attributable to the injury, which the plaintiff suffered. Here restoring the plaintiff to pre-amputation status is clearly impossible. His employability in the world of work and prospects of getting a normal job I would say, almost nil or to say the least, is not as bright as that of any other able man with two good arms.

The dearth of authority pertaining to damages in respect of this particular limb-loss makes assessment by comparison with other domestic awards impossible. In relation to quantum in this respect, it seems to me that even the decisions of English Courts are inapplicable and inappropriate, as those decisions are made in an entirely different socio-economic climate and living standard and index. Be that as it may. Oftentimes an amputation of a limb can affect the way that someone leads his or her life and looks. When this happens, the injured is entitled to disfigurement damages, which are intended to compensate that person for the embarrassment that he feels due to how he or she looks, after the injury. Sometimes this will be lumped in with mental anguish, but this may also often receive more quantum when it is considered as a separate element of the damages-award as the plaintiff has opted in this matter. However, in the instance case, not only might this

include the loss of a limb or scarring, but also the very change that has taken place in the plaintiff's life-style and day-to-day activities, consequent upon loss of his right arm. This physical change would certainly alter the way the plaintiff interacts with others in the family and in the community. His anatomical impairment following the amputation as I see it, has resulted in more than 50% disability and loss of use of his upper limbs especially, for a right-handed person like the plaintiff. For avoidance of doubt, this loss of use of a limb should be considered on its own in this context, without regard to loss of earning capacity, for which the plaintiff is claiming damages under a separate head called "Loss of Job". In any event, it is very difficult to compartmentalize some of the facts and circumstances, which fall in more than one category of damages. Therefore, the ultimate guiding principle is said to be *that* the award should be fair and reasonable, having regard to all the circumstances of the case.

In the case of *George Larame v/s Coco D'Or (Pty) Ltd (Civil side 172/98)*, the Plaintiff sued the Defendant company in delict for personal injuries suffered in the course of his employment. The Plaintiff forearm was severed completely by an electric saw. The arm was amputated below the right elbow. In that case, the Court in considering the damages for *pain and suffering* and *loss of arm*, referred to the previous cases of *Antoine Esparon v/s UCPS Civil Side 118 of 1983*, *Mark Albert v/s the UCPS Civil Side 157 of 1993* and *Rene De Commarmond v/s Government of Seychelles SCA 10 of 1996*, and came to the conclusion that the quantum of damages for the loss of an organ or limb has increased from Rs 50,000 in 1983 to RS 65,0000 in 1986 and Rs105,000 in 1993. In *Larame* the Court went on to hold that in the *Mark Albert* case the court of Appeal had taken consideration of the inflationary tendencies over a period of 8 years between the *De Commarmond Case* and that case, but reduced it to Rs 40,000/- from the award of 145,000/- made by the Supreme Court. The Court concluded that on a consideration of the disability of the Plaintiff in that case and the

comparative awards made by the Court it would make award in the sum of SR 125,000.

Accordingly, the court awarded in *Larame*, a total sum of RS 125,000 to the plaintiff, whose arm was amputated below the right elbow. It was awarded for the total non-pecuniary loss caused by the injury itself, being the loss of the arm, which is consequent upon any disability attributable to the injury.

In the instant case, for the right assessment of damages, I take into account the guidelines and the quantum of damages awarded in the following cases of previous decisions:

- (1) *Harry Hoareau Vs. Joseph Mein, CS No: 16 of 1988*, where the plaintiff was awarded a global sum of Rs30, 000/- for a simple leg injury caused by a very large stone. That was awarded about 16 years back.
- (2) *Francois Savy vs. Willy Sangouin, CS No: 229 of 1983*, where a 60 year old plaintiff was awarded Rs50, 000/- for loss of a leg. That was awarded about 20 years back.
- (3) *Antoine Esparon vs. UPSC, CS No. 118 of 1983*, where Rs 50,000/- was awarded for hand injury resulting in 50% disability and the plaintiff was restricted to light work only. Again this sum was awarded about 22 years back.
- (4) *In Jude Bristol Vs Sodepec Industries Limited - Civil Side No.126 of 2002*, where Rs 160,000/- was awarded for an injury that resulted in amputation of distal part of the right forearm, that involved no loss of earning as the plaintiff continued to work doing light duties with his employer.

As regards the assessment of damages, it should be noted that in a case of

tort, damages are compensatory and not punitive. As a rule, when there has been a fluctuation in the cost of living, prejudice the plaintiff may suffer, must be evaluated as at the date of judgment. But damages must be assessed in such a manner that the plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the Judge even though such assessment is bound to be arbitrary. *See, Fanchette Vs. Attorney General SLR (1968)*. Moreover, it is pertinent to note that the fall in the value of money leads to a continuing reassessment of the awards set by precedents of our case law. *See, Sedgwick vs. Government of Seychelles SLR (1990)*.

Thus, having given diligent consideration to all the facts and circumstances to the instant case, I award Rs150, 000/- to the plaintiff as damages for loss of his right forearm above the elbow.

**(iii) Permanent cosmetic disability:** *under this head the plaintiff claims damages in the sum of Rs 100, 000/-* This claim is pleaded in the plaint as **“Permanent cosmetic disability due to loss of fore arm”** With due respect to the views of the learned plaintiff’s counsel, **disability** could be either **mental disability** of **physical disability**.

Mental disability means and includes any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities that all limits a major life activity whereas **physical disability** means and includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does affects one or more of the body systems, neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic (blood related) and lymphatic, skin, and endocrine Limits that all limits a major life activity.

Hence, when we considered the damages for the loss of the arm supra, we in fact, considered all consequential damages due to **physical disability**, which included “cosmetic disfigurement or cosmetic loss or cosmetic defect” that arose from loss of the arm. Hence, I completely reject the plaintiff claim under this head, as he cannot be allowed to make profit by splitting the



same claim into two different heads using different terminologies.

## **II - Pecuniary Loss**

**Loss of job:** Under this head the plaintiff claims in effect loss of future earnings in the total sum of Rs 468,000/- calculated at the rate of Rs2, 025/- per month being his last earned salary, for a period of 20 years, using the **Multipliers Method** prescribed in the Table of Authentic Awards in the Common law as found in *The Quantum of Damages - Kemp & Kemp 1987*. Since the plaintiff was only 19 years old at the time of the injury, his expectation of life being the maximum, the multiplier of 20 has been used by the plaintiff in the calculation. According to plaintiff's counsel Mr. Derjacques, the plaintiff should be treated as a totally unemployable person incapacitated for any work in the rest of his life and so he is entitled to full compensation for the total loss of future earnings.

On the contrary, Mr. Govindan submitted that the multiplier method used to calculate the prospective loss of earning as suggested by the plaintiff's counsel may not be applicable here as this formula is based on total loss of earning capacity. Mr. Govindan further submitted that according to **Michael Jones on Medical Negligence** at page 474, at 1<sup>st</sup> paragraph on loss of earning capacity as compared to loss of earning, *"In practice, award for loss of earning capacity are more impressionistic and less susceptible to the multiplier method of calculation.(the multiplier) - the solution is to award only moderate sum in this situation, although there is no tariff or conventional award for loss of earning capacity and each case is to be based on its own facts. Vide Forster Vs. Tyne and Wear Country Council [1986] ALLER p567"*.

Therefore, Mr. Govindan submitted that the sum of Rs468, 000/- calculated on *multiplier method* is unreasonable and excessive. Since the plaintiff has only suffered reduction in earning capacity, the Court should award a sum based on this reduced capacity.

While it is true that loss of one arm makes it very unlikely for the plaintiff to obtain any of the several normal jobs in the competitive labor market which are within his skill, experience and qualification, the fact remains that out of his two arms - which in combination contributed to 100% of his upper-limb

functional ability - only one arm has been lost. Therefore, the functional ability of his upper limbs has been reduced to 50%. Therefore, he has in fact suffered **permanent partial disability of his upper limbs** not **permanent total disability**, since his left arm is still in use and functioning. The plaintiff may - through training and practice - develop skills and he will obviously, be able to perform almost all the chores, which he was performing before, using his right arm. A person is said to be **permanently totally disabled**, only if his injury-caused impairments are of such severity and nature that he would never be able to perform any substantial gainful work at all which exists in the competitive labor market, within his skills, qualification and experience. As I see it, this is not the case with the plaintiff in this matter. The answer given by the plaintiff to a question put to him in cross-examination is relevant to the point in this respect. At page 23 of the records, it reads thus:

*Q: Are you aware that there are some possible jobs that you still can (sic) be able to do apart (sic) that you have lost one of your limb?*

*A: There is, but that is not the job I wanted, my job was a boatman.*

Therefore, it goes without saying that despite, this injury the plaintiff still has some residual capacity to work and earn. However, we do not have the necessary sophisticated evidence for an in-depth analysis to determine the percentage of the residual capacity of the plaintiff to work and earn. Having said that, the Court cannot go beyond a simple logical assumption that reduced earnings of partially disabled men or women in Seychelles are subject to their limited access to the labor market. Besides, it is important to note that Section 5 (d) of the Social Security Act, 1987 provides for invalidity benefit to people like plaintiff, as it reads as follows:

“Invalidity benefit which consists of periodic payments to a person covered who is partially or totally incapable of work”

Taking all these factors into account and adjusting for the differences, I am of the view that an award of Rs 275,000/- is the appropriate, fair and

reasonable award for the prospective loss of earning of the plaintiff in this matter.

For these reasons, I enter judgment for the plaintiff and against the defendant in the total sum of Rs 500, 000/- with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

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**D. Karunakaran**

**Judge**

**Dated this 5<sup>th</sup> day of October, 2007**