

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS45/2014

[2018] SCSC 213

SVELGTA NIKOLOVA
Petitioner

versus

ANGEL TOURS (PROPRIETARY) LIMITED
AMITIE PRASLIN
Respondent

Heard: 28 February 2018
Counsel: Mr Bernard Georges for petitioner
Mr Elvis Chetty for respondent
Delivered: 28 February 2018

JUDGMENT

R. Govinden, J

[1] Introduction

This is a case in which the Defendant has admitted liability. The Court has been called upon through the mutual agreement of both parties to rule on the quantum payable as compensation by the Defendant through evidence adduced in writing.

[2] Case of the Plaintiff

The Plaintiff, a woman aged 53 years, was a tourist in Seychelles and the Defendant is a company registered in Seychelles carrying in a business of boat chartering and excursions. On the 24th of November 2011, the Plaintiff booked an excursion with the Defendant to the islands of Curieuse and Coco and she paid the sum of Euro 298.00.

On the return journey from the said excursion the sea was rough and the Skipper of the Defendant drove the boat so fast and in the circumstances the Plaintiff was thrown up and she fell back hard onto her seat.

The Plaintiff claimed that the Defendant as such committed a faute. The particulars of the faute is averred to be :

- (i) That the Defendant could not anticipate that the weather could be bad; (ii) that the Defendant's agent drove the boat at an unreasonable speed in rough seas, (iii) that the Defendant's agents did not secure the passengers properly in order to avoid them being thrown about.

As a result the Plaintiff claimed that she was injured and had to receive treatment.

According to the Plaintiff her particulars of injuries was a compressed fracture of the second lumber vertebra.

She claim further that she had to undergo x-ray examination on Praslin and Victoria, Mahe and she had to undergo an operation in Bulgaria in order to stabilise the fractured vertebra with a titanium plate and had to undergo physiotherapy.

As a result of the injuries the Plaintiff claimed that she suffered pain, inconvenience and loss. She particularised her pain and inconvenience as intense pain at the site of the fracture and inability to move; temporary loss of consciousness; hospital visit to Praslin and Victoria; hospitalisation and recovery in Bulgaria and further hospitalization for removal of the titanium plate.

The particulars of loss claimed by the Plaintiff are (i) truncated holiday (8 days out of 11) which comes to a loss of Rs86,000; (ii) medical cost in Seychelles which comes to a loss of Rs964,37; (iii) medical cost in Bulgaria which come to a sum of Euro 4,500; (iv) future medical lost in Bulgaria which comes to Euro 3000 and loss of earning which comes to Euro 10,000.

The Plaintiff has estimated her moral damages to be Rs250,000 and her special damage at Rs80,934.37 and Euro 17,500.00.

[3] Case for the Defendant

The Defendant does not contest the fact that the Skipper of the boat in which the Plaintiff suffered the damage was one of its agent, acting out of and in the course of its employment.

The Defendant further does not deny that the injury to the Plaintiff was caused by the acts of the Defendant, though the extent of the injury is being disputed.

As such the facts as averred by the Plaintiff in its Plaint to that extent admitted. The Court would have only to decide on the issue of amount of compensation payable based on the facts laid before Court.

[4] The Law

In considering the compensation payable in this case, both material and moral and both present and for the future I will bear in consideration the following legal principles.

First of all, a person who has sustained injuries resulting in loss and damage as a result of a faute can be compensated by an award of monetary compensation. However, the damages must be compensatory and not punitive. The Plaintiff should suffer no loss but at the same time make no profit.

I bear in mind that changes in the value of money (devaluation), times and lifestyle should be taken into consideration in such kind of awards and that damages should be calculated not on a tabulated scale but by taking all circumstances into consideration.

I further find that in awarding damages for personal injuries, the Court has to maintain a certain amount of consistency in respect to types of injuries and at the same time, be flexible when circumstances and the nature of injuries in a particular case demand a deviation from the general pattern and the previous awards in comparative cases are an important and useful guide.

I also bear into consideration that award can be made for future loss of earning capacity and future loss of earnings in cases where a mere potential for damage in the future exist.

However this damage has to be foreseeable and ascertainable, it cannot be a mere possibility.

Submissions of the Defendant

In its submissions the Defendant submitted that the Court must look at all the documents adduced by the parties carefully. These are the documents submitted by the Plaintiff in order to sustain he claim.

The Defendant submitted that the Plaintiff had a pre-existing medical condition that had not been disclosed. The Defendant submit that the Plaintiff had and old compressed fracture L2 which was found to exist on Praslin during an x-ray examination shortly after the accident. The Defendant submitted that the Plaintiff had failed to disclose this fact in her case.

As to the weight to be given to the evidence, the Defendant submit that the documentary evidence adduced by the Plaintiff are not contested through cross examination and that she has failed to provide a doctor to produce the said document. It submitted therefore, that the assessment of the Plaintiff evidence must be done with scepticism.

The Defendant further submitted that the Court should consider the age of the Plaintiff as her age would make her more susceptible to injuries. The Defendant also submitted that the Court should consider that the Plaintiff was aware of the sea condition and yet decided to venture on the rough seas, knowing that she has a previous medical condition and that this amount to contributory negligence.

The Defendant submitted that there is no lasting physical impairment as a result of the faute.

The Defendant submitted that the Plaintiff has not adduced evidence that the Plaintiff suffered a truncated holiday.

As to future medical bills, the Defendant submitted that the Court cannot be expected to award future medical expenses bills and that despite the need for an operation the Court does not know to what degree the previous injury was exaggerated.

As to moral damage, the defendant submitted that the Plaintiff has failed to testify and explain psychological trauma she has suffered. Therefore the damage should be minimal.

The defendant submitted the evidence as to the loss of income is wanted. It is argued that the only evidence produced shows that the Plaintiff was in hospital from the 7th of December 2011 to 15th of December 2011 when she was receiving Social Security. It is submitted that there is no evidence of the length of time that she had not work or whether her salary was withheld as a result.

In respect of the corporal damage the defendant submitted that in receiving an award under this head the Court must bear in consideration the fact that the Plaintiff had a pre-existing condition and contributory negligence.

[5] Submission of the Plaintiff

The Plaintiff submits that the Defendant has conceded liability. The Plaintiff submitted that she suffered a spinal injury whilst she was in a vacation in Seychelles and she had to cut short her holiday as a result of the acts of the Defendant. The Plaintiff submitted further that 2 days after the accident x-ray revealed that she had a lumbar spine compressive fracture L2.

The Plaintiff submitted that after arriving back in Bulgaria she was diagnosed with L2 vertebra compression fracture and a surgical operation which involved stabilization with metal implants was effected on her.

The Plaintiff further submitted that four years after the accident she was still complaining of lower back pain with stiffness of the back and that x-ray revealed metal contraction stabilization. And she was recommended to avoid lifting heavy weight and to do physio and take painkiller.

The Plaintiff finally submitted that she was out of work for 5 months and had to go on social security as a result of the incident.

[6] Determination

The Defendant submitted that the evidence of the Plaintiff is not tested by Cross examination and therefore is unreliable. The Defendant also submitted that the Court would need to consider the evidence before as contested, especially the medical evidence. The Defendant submitted that this evidence should be treated with scepticism. I find that this submission is totally contradictory to the stance of the Plaintiff taken on evidence in this case. This is revealed in the following proceedings in this case.

Counsel for the Defendant

“We are going to tender documentary evidence to your lordship and then make submission as to quantum. My learned friend and I in the meantime because of certain matters that have come up are wondering when your lordship would be in a position to accept written submissions supported by the documentations that we are going to produce.

Court

“No I do not think that procedure will be appropriate we need to lead evidence first. We cannot provide evidence through submission. If you are all to accept that”.

Counsel for the Plaintiff

My lord we understand that and in fact all the documents, all the evidence will be documentary as your lordship and will be produced from the bar.

Counsel for the Plaintiff

“Yes they admitted several documents.”

After this exchange the Court made a short Ruling on the 3rd of November 2017, to the following effects:-

“Liability in this case is admitted by the Defendant. The matter before the Court is only being adjudicated on to quantum of damages that the Defendant should pay the Plaintiff.

On this basis, both parties have agreed to lead facts in the form of documentary evidence and thereafter to make submissions thereon in order to allow the Court to make a pronouncement to the compensation payable.”

Accordingly, I find that the Plaintiff has admitted and consent to the Court in relying on documentary evidence considering the quantum payable in this case.

Therefore, it was through mutual agreement of both Counsels that no testimony evidence be led in matter of amount of quantum in this case. It was hence through mutual agreement of both Counsels that their evidence would not stand the test of cross examination.

However, the Court would bear into consideration the fact that there would be a need to scrutinise the evidence carefully and root out inconsistencies without considering as part of the adjudicating process and in the assessment of the weight to be given to the evidence in this case.

[7] Contributory Negligence

The Defendant has not pleaded contributory negligence in this case, though there is an averment in the defence that the Plaintiff wanted to take the excursion despite the rough sea. In *Boulle v/s Mohan* 1933 MR 242, the Court held that contributory negligence should be first raised as an issue in the pleadings before the Court proceed on it. This principle

was endorsed in the jurisprudence of Seychelles in case *Tirant and Ors v/s Banane* 177 SCR 1977.

Nonetheless to the extent that this is pleaded by implications the Court found that contributory negligence is not applicable in this case. The Plaintiff being a bona fide client on a sea excursion did not act negligently. Negligence is a failure to exercise the appropriate care expected to be exercised on the specified circumstances. A bona fide client in a boat excursion is expected to act on the diligence and professional seamanship of the skipper of the vessel belonging to the Defendant. It was up to the Defendant to ensure that the sea was not rough; that the speed of the boat and the sitting facility was appropriate. The Plaintiff could have relied upon those conditions as being the obligations of the Defendant and not of her. I find that there is no failure on the part of the Plaintiff to exercise care or attention before or during the excursion.

[8] Pre-existing condition

The Defendant submitted that the Plaintiff had a pre-existing condition that accelerated or exaggerated her medical loss as a result of the accident.

The Defendant submitted that document P4 is an x-ray request Form and notes of Dr. Li (doctor based on Praslin). He makes reference L2 compress fracture and in brackets defines it as old. To treat the Plaintiff the doctor required all the facts and she would have explained of a previous condition which could have been exacerbated.

The Defendant submits that when examining various documents surprisingly the plaintiff make no reference to any medical history of the Plaintiff. However at P6 (pre-operative ... medical history) the report makes reference to a home accident that the Plaintiff has omitted from disclosing.

Upon scrutinizing the evidence in that regards the Court finds that there is no pre-existing condition regarding the injuries of the Plaintiff. The injury to her lumbar spine showed

compressive fracture L2. when she was x-rayed on Praslin on the 26th of November 2011 four days after the incident leads to her injury. Four years later on the 11th March 2013 the Plaintiff was examined and it was found that she had a metal contraction stabilization at an old fracture L2. The old fracture was the fracture that she suffered in 2011, whilst she was on excursion. This cannot be of the pre existing condition. There is no evidence adduced before as of the 2011 existing medical condition.

[9] Particulars of Loss

Truncated holiday

The Plaintiff avers that her holiday was cut short as a result of the fault of the Defendant. She was meant to spend 11 days in Seychelles. As a result of the accident she cut her holiday short and returned home and lost 8 days of her holiday. She claimed Rs10,000 per day for her lost. This Court note that the unfortunate incident has cut by 8 days her intended holidaying in Seychelles. That would have caused pain, loss and suffering. I would award her claim of Rs10,000 per day. There by 8 days lost the total amount of the claim would be Rs80,000

Expenses for medical treatment.

The Plaintiff x-ray procedure on Praslin and trauma cost Rs964,37. Her operation in Bulgaria came up to Euro 4,500 I would award her for this loss. I accordingly find that the Defendant would have to compensate her for Rs964.37 and Euro 4500. I would not award the future medical cost in Bulgaria for Euro 3000.

Future medical cost has to be certain. These are payable provided they are supported by both documentary illustrating the potential lost and medical evidence confirming the necessity that has not been adduced. I will therefore not award any cost for future medical lost in Bulgaria.

[10] Loss of earning

The Plaintiff was employed as Marketing Excursion at Sofia Airport. She claimed to have been out of work from November 2011 to April 2012. She lost five months salary as a result of the fault caused by the Plaintiff. The total salary cost comes to Euro 8,360.00. I would award her that sum for loss of earning capacity.

The Plaintiff has prayed Rs250,000 for moral damages. Given the extent of the injuries and based on previous decisions of this court, I would award damages in the sum of Rs100,000.

As to the material damage the injury that was caused to her, being the fractured vertebra which has to be fixed with a titanium plate which left the Plaintiff in pain for 4 years for 4 years and in temporary disability I would award the sum of Rs100,000 based on the authorities of Farabeau v/s Casamar Seychelles Ltd (2012) SCR 170; Alan .Tucker and ors v/s Ld Digue Island Lodge C/S 393/2009) and Bristol v/s UCPS.

In the light of all the above and having taken into account all the relevant circumstances of this case I would enter judgment in favour of the Plaintiff against the Defendant in the sum of Rs380,962.37 and Euros 12,860 with interest on the said sum at 4% as from the date of the filing of the plaint and with cost.

Signed, dated and delivered at Ile du Port on 28 February 2018

R. Govinden
Judge of the Supreme Court

