

JACQUES V PROPERTY MANAGEMENT CORPORATION

(2011) SLR 7

A Derjacques for the plaintiff

W Herminie for the defendant

Judgment delivered on 22 February 2011 by

KARUNAKARAN J:

The plaintiff in this action is a former employee of the defendant, which is a statutory corporation, engaged inter alia in property management and housing development in Seychelles. The plaintiff through an amended plaint dated 12 December 2006 claims the total sum of R 3,000,000 from the defendant for damages arising from a fault allegedly committed by another former employee of the defendant, one late Tony Nicolas (hereinafter called the deceased), who had been then employed as a driver with the defendant corporation. The deceased allegedly committed a fault in the course of his employment with the defendant corporation, in that, the deceased drove a motor vehicle recklessly on the public road and caused a fatal accident. In that accident, not only the deceased lost his own life but also the plaintiff, who was a passenger in that vehicle at the material time, sustained serious bodily injuries. Consequently, the plaintiff was rendered paralytic and wheelchair bound for the rest of his life. It is pleaded that the defendant, its servants or agents were negligent in that they –

- (i) Failed to provide a safe system of work for its employees including the plaintiff;
- (ii) Failed to provide the plaintiff with a safe place of work;
- (iii) Directed its messenger/security guard to pick up the plaintiff at a construction site when it knew or ought to have known that the messenger/security guard had no driving experience;
- (iv) Directed its messenger/security guard to drive a hired vehicle in which the plaintiff was a passenger, when it knew or ought to have known that the messenger/security guard had less than 5 months driving experience;
- (v) Failed to appoint an experienced driver to take its employees including the plaintiff on various construction sites, thereby exposing the plaintiff to unnecessary risk;
- (vi) Failed to give proper direction to its employees, including the plaintiff;
- (vii) Failed in all the circumstances to take reasonable care for the safety of the plaintiff; and
- (viii) Were negligent /reckless in all the circumstances of the case.

It is also averred by the plaintiff that in the accident the plaintiff sustained the following injuries:

- (a) Post traumatic tetraplegia;
- (b) Pulmonary contusion;
- (c) Medullar shock; and

(d) Fracture of vertebrae C4 to C7

The plaintiff hence claims damages against the defendant for those injuries, presumably based on vicarious liability as the deceased was allegedly negligent in the course of his employment with the defendant. In passing, I should mention here that the pleadings in paragraph 3 of the plaint pertaining to particulars of fault should have been better worded in order to attribute vicarious liability to the defendant without any ambiguity. Be that as it may, the plaintiff claims that the injury he sustained resulted in a lifelong tetra-plegic condition and paralyzed his limbs permanently. He consequently suffered extensive loss and damage affecting all walks of his life. Therefore, he claims the total sum of R3 million for the loss and damage as detailed and estimated below:

Pain and suffering	R500,000
Loss of enjoyment of life	R500,000
Loss of earnings and future earnings	R750,000
Medical expenses ie airline tickets, Accommodation in Reunion and India, medical report and miscellaneous	R150,000
Future medical expenses	R600,000
Moral damage	R500,000
Total	<u>R3,000,000</u>

On the other hand, the defendant totally denies liability, vicarious or otherwise. According to the defendant, neither the defendant corporation nor its employee - the deceased - committed any fault as alleged by the plaintiff, nor was the defendant corporation negligent in employing the deceased as its driver. It is also pleaded in the statement of defence that the plaintiff sustained those injuries solely due to his own fault. Besides, it is the case of the defence that the plaintiff has been fully and adequately compensated in the total sum of R1.2 million by the insurance company (SACOS). According to the defendant, R1 million was paid by SACOS to the plaintiff under the motor insurance policy that covered third party risks in respect of the motor vehicle involved in the accident and another sum of R200,000 was paid under the Employers Liability Scheme for Personnel Accident that covered the risks of the workers of the defendant corporation. Moreover, the plaintiff also received the sum of R15,000 as a donation from the employees of the Corporation and a further sum of R8,000 as sick leave benefit from the employer. Hence, it is the case of the defendant that the plaintiff has been made good for the loss and damage suffered. In the circumstances, the defendant seeks dismissal of the action.

It is not in dispute that in 2005 the plaintiff, who was only 19, had been employed as a survey technician with the defendant corporation. On 13 July 2005 around 1.30 pm, the plaintiff and two of his co-workers, Clifton Annette and Johnny Vel were returning to their office in town from a site visit in Grand Anse. They were travelling in a jeep driven by the deceased Tony Nicolas. The plaintiff and Johnny Vel were sitting in the back and Clifton was in the front.

The plaintiff, who is now 22, testified in essence that while the jeep was travelling along the Providence highway, the deceased was driving the jeep at a very high speed and seemed to be chasing the other cars in front of them. As they were approaching a road diversion close to a bridge broken due to the tsunami, the

deceased increased the speed of the jeep up to 150 kms per hour. It was seen on the speedometer. There was a bump on the road ahead and he hit against that bump and suddenly lost control. The jeep tripped, somersaulted and rolled over and went off the road. The testimony of the plaintiff on this crucial aspect of the accident runs thus:

He (the deceased) came to pick us up at our site and we were heading towards town from Port Glaud. He was driving all right from Anse Royale onwards and when we came to the highway out of nowhere he started to increase his speed. I thought he was chasing other cars in front of us, but then he increased his speed to 150 and above. Clifton (PW2) spoke up and told him to reduce his speed a little; he slowed down a little bit jokingly and then increased his speed again. There was a bump on the road, he hit the bump, the car sort of tripped and rolled.

As far as the plaintiff could recall, that was the last incident he had registered in his mind as he fell unconscious in the accident, presumably due to spinal injuries. According to the plaintiff, only after a couple of days he regained consciousness in a hospital at Reunion Island.

In the accident, the plaintiff sustained fracture of his C5, C6 and C7 cervical vertebrae, pulmonary contusion and medullar shock. According to Dr Kenneth Henriette, a specialist doctor in Critical Care from the Victoria Hospital soon after the accident the injured plaintiff was brought to the Victoria Hospital and was immediately admitted in ICU as he was unconscious and in a serious condition. He was incubated and ventilated. As the plaintiff's condition was critical, he was transferred to Reunion St Pierre Hospital by plane for emergency overseas medical treatment. Dr Henriette also had to accompany the plaintiff as the latter's cervical bone and neck bone had to be stabilized during travel. The plaintiff was tetraplegic meaning that he was paralyzed from the neck to the bottom of his entire body. Throughout the flight the plaintiff had to be tracheotomised to help him breath. Dr Henriette also produced a report in exhibit P1, compiled by one Rosie Bistoquet, Manageress of the Overseas Specialized Medical Treatment Department of Victoria Hospital, showing the history, how, when and what type of medical treatments were given to plaintiff. Although the plaintiff was discharged from Reunion Hospital on 13 September 2005 after surgical and neurological treatments, he was admitted in Rehabilitation and Re-Education Services at Tampon, Reunion for rehabilitative medicine. On 12 December 2005, the Seychelles Ministry of Health again sent a chartered plane to repatriate the plaintiff from Reunion to Seychelles. The plaintiff also produced a copy of the *Nation* daily newspaper dated 14 July 2005 containing the story of the accident published as a news item. The plaintiff also produced a CD containing a video clipping from SBC 8 pm news showing the scene of accident and the damaged condition of the Jeep after the accident. It was headline news on the fatal day in question.

Mr Clifton Annette - PW2 - one of the co-passengers in the Jeep at the material time also, testified corroborating the evidence of the plaintiff on matters relating to the circumstances that led to the accident. He also testified that the deceased was driving the Jeep at a high speed unsuitable to the road condition that existed then. He applied the brake at a wrong place and time and thus lost control of the Jeep due to high speed. Ms Anne Jacques - PW3- the plaintiff's mother, who is also an

employee of the defendant corporation testified as to the residual effect of the trauma plaintiff suffered and its adverse effect on his physical, mental, emotional and psychological conditions, which have totally changed his lifestyle resulting in loss of amenities.

The Court also visited the residence of the plaintiff for the purpose of taking his evidence and while doing so, it also observed the plaintiff's present physical, psychological and living conditions. This is indeed, helpful for the Court to make a proper assessment on the nature and extent of the plaintiff's injury and the resultant permanent disability. The plaintiff is now bed-ridden. He is not able to walk or stand up. He cannot move his body. He cannot even lift his limbs. He needs a full-time carer to manage his day to day life activities and physical requirements. His limbs require daily exercise and movements. He needs a special bed fitted with pulleys and ropes to facilitate the process of physical exercise. He testified that that he cannot have a sex life as he is physically incapacitated due to his tetraplegic condition.

While he was in employment with the defendant corporation the plaintiff was drawing a salary of R2900 per month. Moreover, he stated that because of his present change in lifestyle and special needs, his personal cost of living is highly increased. Although he received R1.2 million from SACOS as insurance money, that amount was not at all sufficient to meet all his present and future needs that arise out of the injury including the medical expenses he would incur for treatments in specialty hospitals overseas. In view of all the above, it is the case of the plaintiff that the defendant corporation is vicariously liable for the fault committed by its employee, namely, the deceased Tony Nicholas, in that in the course of his employment, the deceased drove the jeep recklessly at the material time, causing the fatal accident and serious bodily injuries to the plaintiff. The defendant is therefore liable to compensate the plaintiff for all the loss and damage, which the latter suffered from the injury. According to the plaintiff's estimate the said loss and damage amounts to R3 million, as detailed supra. Mr Derjaques, counsel for the plaintiff contended that the insurance money the plaintiff admittedly received from SACOS cannot and should not be considered or taken into account by this Court in the assessment of quantum in the award of damages to the plaintiff in this matter, as it is a settled position in case law that "an injured party could claim compensation from the author of a "delict" irrespective of any claim he might have been paid by his insurance company" vide *Sinon v Chang Leng* (1974)SLR 301 and as per Venchard's *The Law of Seychelles through the Cases*, p 504 . On the issue as to assessment of damages, Mr Derjaques invited the Court to apply the principle that was formulated by this Court in the case of *C Ventigadoo v Government of Seychelles* Civil Side No 407 of 1998, which had the backing of the first order, namely, the Seychelles Court of Appeal vide its judgment in SCA Case No 28 of 2007 delivered on 25 April 2008. In the circumstances, the plaintiff urged the Court to enter judgment against the defendant as prayed for in the plaint.

On the other side, the defendant called one Ms Monica Rose (DW1), the Personnel Administration Officer of the defendant corporation as the only witness to testify in support of the defence. According to this witness, the defendant had employed the deceased Tony Nicolas at the material time as driver since he had the necessary

qualification, experience and driving licence to be appointed to the post. She also testified that the corporation took all reasonable and necessary precautions to ensure that the driver was qualified and competent to do the job. As regards the amounts paid to the plaintiff, she confirmed that a sum of R200,000 was paid to the plaintiff under a dependent person accident scheme with SACOS and a further sum of R15,000 was paid by the staff of the corporation as a donation on humanitarian grounds. Thus, this witness testified on matters that were not of much importance or assistance to the defendant. In the circumstances, Mr Herminie, counsel for the defendant, submitted that the defendant corporation is not directly or vicariously liable to pay any compensation to the plaintiff. He also cited an authority of case law *vide Payet v Attorney-General* (1960) SLR 235. Further it is the contention of the defendant that since the plaintiff has already received the sum of R1.2 million as full and adequate compensation from SACOS under the motor vehicle insurance policy, he cannot have another bite of the cherry from the defendant. According to Mr Herminie, the case of *Sinon* cited *supra* is misinterpreted by Mr Derjaques and is not relevant to the case in hand. An injured party cannot recover compensation for the same injury twice from the same tortfeasor, the insured and his insurer. Also, it is the submission of Mr Herminie that the plaintiff is receiving money from social security for his maintenance and free medical care. For these reasons, he invited the Court to dismiss the plaint with costs.

I diligently analysed the entire evidence on record including the documents and other exhibits adduced by the parties. I gave meticulous thought to the written submissions filed by both counsel raising a number of issues touching on points of law and of facts. Before I proceed to identify the live issues for determination, for the sake clarity and convenience, I prefer to examine first the proposition of case law relied upon by Mr Derjaques citing *Sinon v Chang Leng* quoted *supra*. That is: “an injured party could claim compensation from the author of a “délit” irrespective of any claim he might have been paid by his insurance company”.

On a superficial reading of the above proposition in isolation, one could easily misconstrue and might even jump to a wrong conclusion (as counsel Mr Derjaques did in this matter) that an injured party can claim damages cumulatively twice for his benefit from two different sources; that is, one from the tortfeasor and another claim from the insurer (indemnifier) of the tortfeasor. In fact, that is incorrect.

To understand this proposition correctly, one ought to revisit the facts of the case and look at it in the context in which Justice Sauzier formulated this proposition adopting the French doctrine of “cumul d’ indemnités” (aggregation of benefits) and in line with the approach taken by the Supreme Court of Mauritius in the cases of *Walter v Henry* (1957) MR 114 and *Nuttoo v Caine* (1964) MR 196.

The facts of *Sinon* (*supra*) are these. Plaintiff Ms. Sinon claimed compensation from defendant Chang Leng for damage to her car caused by the fault of his préposé, driver of a pick-up which collided with plaintiff’s car. The plaintiff’s car had been insured with an Insurance Company of whom Messrs Hunt, Deltel Company was the agent. This company paid the sum of R320.50 as damages to the plaintiff, the insured -so to say its own client - presumably, under the comprehensive motor insurance policy that covered any damage caused to the plaintiff’s own car. The defendant denied the claim contending that he was not liable to pay damages to Sinon since she had already been paid compensation by her own insurer, who had indemnified her against any damage to her car. However, the Court

rejected that contention of the defendant, applied the doctrine of “cumul d’ indemnités” and held that the “injured party (Sinon) could claim compensation from the author of a “délit” (Chang Leng) irrespective of any claim she might have been paid by her insurance company”.

Hence, it is clear from the facts above that when the insurance company paid compensation to Sinon (the injured party), the company paid its own debt payable under her own contract with the insurance company. In fact, the company did not pay her the debt of Chang Leng, the tortfeasor, or that of any third party; nor did it pay her the debt on behalf of any third party whom it had indemnified under any contract of insurance which is made compulsory in terms of the Motor Vehicle Insurance (Third-Party Risks) Act. Hence, in such cases, the tortfeasor is not exonerated from his tortious liability. The doctrine of “*cumul d’ indemnités*”, or the “entitlement of double claim” if I may say so, applies and the injured party may benefit twice.

However, this doctrine shall not apply to cases where the claimant had already received compensation either directly from the tortfeasor (the author of a “*délit*”) or indirectly from the insurance company of the tortfeasor as has happened in the instant case. Legally speaking, when an insurance company pays the debt to the claimant, it makes payment for and on behalf of its client, the insured. In such cases, the liability of the tortfeasor is extinguished or reduced in proportion to the amount received by the claimant from the insurer of the tortfeasor. At the same time, it should not be misconstrued that any payment received by the claimant from the insurer of the tortfeasor would automatically exonerate the tortfeasor from total liability. Only when the claim is fully paid or so declared by the court, the tortfeasor’s liability shall extinguish.

Coming back to the present case, admittedly SACOS has already paid the total sum of R1.2 million to the plaintiff as compensation for the injury he sustained in the motor accident. Obviously, it has made the payment on behalf of the tortfeasor and/or on behalf of the “*commettant*” or “*préposé*”, who committed the fault and whose risks have been covered and whom it had indemnified under the contract of insurance, which is made compulsory in terms of the Motor Vehicle Insurance (Third-Party Risks) Act. In fact, SACOS in this respect did not pay its own debt to the plaintiff under any contract it had entered into with the plaintiff. In fact, the company paid him only the debt of the tortfeasor that arose from the use of the motor vehicle involved in the accident. Hence, I find the doctrine of “*cumul d’ indemnités*” and the case *Sinon* (supra) has no application in the instant case. Therefore, I hold that the plaintiff in this matter cannot claim and have the benefit of compensation paid twice. That is, one from the defendant and another one from the defendant’s insurance company. Consequently, the amount of R1.2 million the plaintiff received from the defendant’s (tortfeasor’s) insurance company SACOS would accordingly reduce the defendant’s liability on the quantum and so I find.

I will now move on to examine the merits of the case based on the evidence on record. I carefully examined the pleadings and evidence in light of the submissions filed by both counsel. Obviously, the following questions arise for determination in this matter:

1. Has the plaintiff proved on a balance of probabilities that the deceased Tony Nicholas - then employee of the defendant - drove the Jeep in question recklessly at the material time causing accident in that he committed a fault in law? ; if so,
2. Did the plaintiff suffer loss and damage as a result of that fault?
3. Is the defendant vicariously liable to the plaintiff for the fault committed by its employee Tony Nicholas?; if so,
4. What is the quantum of damages the plaintiff is entitled to receive from the defendant and the defendant is liable to pay to the plaintiff?

I will now proceed to find answers to these questions in the order they are listed above.

First, on the issue of reckless driving, I carefully examined the evidence on record direct and circumstantial. The plaintiff in his evidence categorically testified that the deceased was driving the Jeep at the material time at a very high speed chasing the cars in front of him. He even drove up to a speed of 150 kms per hour, as was seen by the plaintiff on the speedometer just before hitting the speed bumps. Although the plaintiff warned the deceased to reduce the speed, the deceased took no heed; rather increased the speed, making fun of the situation. His co-passenger Mr Clifton Annette also asked the deceased to reduce the speed at the material time but of no avail. In fact, Mr Clifton Annette (PW2), who was seated in the backseat next to the plaintiff, also testified corroborating the plaintiff's version as to speeding and the cause of the accident. According to PW2, the deceased applied the brake at a wrong place and wrong time. He lost control of the jeep after the impact with high momentum. The Jeep rolled over and went off the road. I also observed the location, nature of the road, the position and the damaged condition of the Jeep soon after the accident as appeared in the video clippings shown on the SBC news. These video clippings containing the "real evidence" were replayed from the CD produced in evidence. Indeed, the evidence of the plaintiff and that of his co-passenger PW2 are corroborative, reliable, consistent and cogent in that the deceased caused the accident due his rash and reckless driving and so I find. The real evidence as observed by the Court in the video clippings also leads to the only inference that the deceased was driving the Jeep at an imprudently excessive speed in rash and reckless manner and caused the accident. Undoubtedly, this is a fault in law.

Having said that, *dehors* the above finding on evidence, also on a point of law, I find that the defendant has miserably failed to rebut the presumption of fault activated against the deceased driver by operation of law under article 1383(2) of the Civil Code, which runs thus:

The driver of a motor vehicle which, by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall accordingly be liable unless he can prove that the damage was solely due to the negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God.

Evidently, the defendant in this case did not adduce any evidence to prove that the damage was solely due to the negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle.

In view of all the above, I answer the first question in the affirmative, thus: Yes; the plaintiff has proved more than on a balance of probabilities that the deceased Tony Nicholas - then employee of the defendant - drove the Jeep in question recklessly at the material time causing accident, and in that, committed a fault in law.

Moving on to the second question, it is not in dispute that in the accident the plaintiff did sustain serious bodily injuries resulting in tetraplegic and bed-ridden condition. He has in fact, lost sensation below his neck. The plaintiff was only 20 years of age at the material time of the accident. He was young and energetic and very active in sports. He was in decent employment as a survey technician drawing a salary of R2,525 per month. Now he is permanently paralyzed and bed-ridden. He lost not only his job, but also his employability in the job market for the rest of his life. He lost his girlfriend, sports, amenities and pleasures of life. Now, he has to totally rely upon someone to manage his day to day life activities and physical requirements. Needless to say, the plaintiff has thus suffered loss and damage - some of course irreparable and some irreversible - as a result of the personal injuries he sustained in the accident and so I find. This indeed, answers the second question.

Moving on to the third question, on the issue of vicarious liability, the law is very clear in stipulating the conditions required to hold an employer liable for the fault committed by his servant/employees. Article 1384 reads thus:

A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody...

Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.

In the instant case, admittedly, at the time of the accident - that was on 13 July 2005 - the deceased Tony Nicholas had been employed by the defendant corporation as a messenger cum driver. On the fateful day, in pursuance of his employment with the defendant he was transporting the plaintiff and two of his co-workers Clifton Annette (PW2) and Johnny Vel from Grand Anse back to their office in town after a site visit they carried out by virtue of and in the course of their employment with the corporation. At the time of the accident, the deceased was driving the jeep undisputedly within the scope of his employment. Moreover, in the absence of any evidence to the contrary, I find the deceased did not cause the accident deliberately or acted contrary to the express instructions of his employer. In the circumstances, I hold the defendant vicariously liable to the plaintiff for the fault committed by its employee Tony Nicholas. This answers the third question.

I will now move on to the fourth and last question as to assessment of damages for the total permanent incapacity the plaintiff suffered from the trauma. For proper

guidance in this respect, as rightly invited by Mr Derjacques, I would like to revisit and restate the principles this Court applied in the case of *Ventigadoo* cited supra and reapply the same principles in the present case for assessment and award of damages in favour of the plaintiff.

I - Non-pecuniary damages

Pain and suffering: Under this head the plaintiff claims R500,000 as compensation. The defendant contends that the quantum claimed for actual pain and suffering 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" are not 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 psychological depression caused by 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 the fracture of his C5, C6 and C7 cervical vertebrae, pulmonary contusion and medullar shock soon after the fracture, at the post-operative stage of the surgery as well as during the healing period of the wound. He had been admitted in hospital and in Rehabilitation and Re-Education Services Centre in Reunion altogether for about six months following the trauma.

Mental anguish

Due to his tetraplegic condition, 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 obviously forms part of the pain and suffering. This includes psychological injury, emotional trauma, and even embarrassment as a result of the injury. In my view, these are relevant considerations in the assessment of damages for pain and suffering in this case. Having said that, as rightly pointed out by Perera ACJ (as was he then) in *Larame v 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, a 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 head in damages. Obviously, in the case in hand, the plaintiff has made a separate claim for loss of enjoyment of life that will be considered later in this judgment. Having regards to all the circumstances of the case and considering the precedents of our courts - since pleaded as a separate head - I would award R200,000 as compensation for pain and suffering, which sum in my considered view is fair and reasonable.

Loss of enjoyment of life: Under this head, the plaintiff claims R500,000 towards damages. The defendant contended that this figure is unreasonable and exaggerated. Indeed, the tetraplegia caused by the injury to vertebrae and the non-functioning of the limbs is the significant prejudice that has resulted in permanent physical disability attributable to the injury. Here restoring the plaintiff to pre-tetraplegic condition or status is clearly impossible. His employability and the prospects of getting a normal job is evidently, nil. His four limbs have lost major functional values. For assessment purposes, one may even consider that the plaintiff has practically lost all his four limbs as they do not serve their purpose.

The dearth of authority pertaining to damages in respect of non-functional limbs 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. Often times non-function of a limb can affect the way that someone leads his or her life and physical appearance. When this happens, the injured is entitled to damages, which are intended to compensate that person for the embarrassment that he feels due to how he or she looks and suffers in a tetraplegic and wheelchair condition for the rest of his or her life, due to the injury. Sometimes this will be lumped in with mental anguish, but this may also often receive more 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 limb functions, but also the very change that has taken place in the plaintiff’s lifestyle and day-to-day activities, consequent upon his tetraplegic condition. This physical change would certainly alter the way the plaintiff interacts with others in the family and in the community and his living condition and environment. His anatomical impairment due to tetraplegia as I see it, has resulted in more than 90% disability and loss of use of his upper and lower limbs. 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 earning and future earning”. 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 Coco D’Or (Pty) Ltd* (2001) SLR 14, 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 the UCPS Civil*

Side 157 of 1993 and *Rene De Commarmond v 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 R50,000 in 1983 to R65,000 in 1986 and R05,000 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 R40,000 from the award of R145,000 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 eventually awarded the sum of R125,000 in *Larame* 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 previous decisions:

1. *Harry Hoareau v Joseph Mein* CS No 16 of 1988, where the plaintiff was awarded a global sum of R30,000 for a simple leg injury caused by a very large stone. That was awarded about 20 years back.
2. *Francois Savy v Willy Sangouin*, CS No 229 of 1983, where a 60 year old plaintiff was awarded R50,000 for loss of a leg. That was awarded about 20 years back.
3. *Antoine Esparon v UPSC* CS No 118 of 1983, where R50,000 was awarded for a 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 v Sodepec Industries Limited* - Civil Side No 126 of 2002, where R160,000 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 v Attorney General* (1968) SLR 171. 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 v Government of Seychelles* (1990) SLR 220.

Thus, having given diligent consideration to all the facts and circumstances to the instant case, I award R500,000 to the plaintiff as damages for loss of enjoyment of life.

II - Pecuniary loss

Loss of earnings and future earnings: Under this head the plaintiff claims in effect loss of future earnings in the total sum of R750,000 calculated presumably at the rate of R3,125 per month although his last earned salary was only R2,900 per month, for a period of 20 years, using the multiplier 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 is a totally unemployable person incapacitated for any work for the rest of his life and so he is entitled to full compensation for the total loss of future earnings.

In passing, I note that although the multiplier method is appropriate in cases involving total loss of earnings, it may not be so in matters of loss of earning capacity. There is a world of difference between "total loss of earnings" and "loss of earning capacity" As rightly observed by *Michael Jones on Medical Negligence* at 474 as compared to loss of earning

In practice, awards 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 v Tyne and Wear Country Council* [1986] All ER 567.

Evidently, the instant case involves total loss of earnings. Therefore, I find it proper and reasonable to use the multiplier method to calculate the loss of future earnings of the plaintiff in this matter.

A person is said to be permanently totally disabled if his or her 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 labour market, within his or her skills, qualification and experience. As I see it, this is the case with the plaintiff in this matter.

Taking all of the factors into account and applying the multiplier method, I am of the view that an award of R700,000 is the appropriate, fair and reasonable award for the prospective loss of earnings of the plaintiff.

In respect of the plaintiff's claim for medical expenses ie airline tickets, accommodation in Reunion, medical report and miscellaneous etc, I award R100, 000 in total as compensation. For moral damages, taking into account the entire circumstances of the case and the prejudice suffered, I award the sum of R100, 000.

The plaintiff also claims the sum of R600, 000 for future medical expenses. In my considered view, this claim of the plaintiff is very speculative. The court, in fact, cannot award damages for an uncertain future expense, which the plaintiff may or may not incur in future. In any event, the plaintiff has not even adduced any expert medical opinion to substantiate the claim that there is a strong possibility of incurring future medical expenses, in that he may need to go for further treatment or additional treatment or better treatment that is available in any hospital or specialty hospital

elsewhere. In the circumstances, I decline to award any sum under this particular head.

In summing up, I find that the plaintiff has suffered loss and damage from the entire episode as follows:

Pain and suffering	R200,000
Loss of enjoyment of life	R500,000
Prospective loss of earnings	R700,000
Medical expenses ie airline tickets, accommodation in	
Reunion, medical report and miscellaneous	R100,000
Moral damage	R100,000
Total	<u>R1,600,000</u>

Therefore, I conclude that the plaintiff is entitled to compensation from the defendant in the total sum of R1,600,000 for all loss and damage he suffered consequent upon the accident and the resultant injuries.

Having said that, I have already found supra that the amount R1.2 million, which the plaintiff has already received from the defendant's insurance company (SACOS) would accordingly reduce the defendant's liability on the quantum. Consequently, I find the defendant is eventually liable to pay only R400,000 being the balance that now remains payable on its liability on the quantum.

For these reasons, I enter judgment for the plaintiff and against the defendant in the total sum of R400,000 with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.