

**Azemia v Safrance & Ors
(2002) SLR 65**

John RENAUD for the Plaintiffs
Kieran SHAH for the Defendants

Judgment delivered on 28 March 2002 by:

KARUNAKARAN J: Master Nukus Azemia is a smart boy of tender age. He is now 13 and doing his first year of Secondary School. Throughout his life, it was his maternal grandmother, who brought up him, loved him and maintained him. Since his birth, neither his Mother nor his father has ever cared for him. Nukus is naturally more attached to his grandmother than anyone else in his world and likewise is his grandmother towards him. At the age of 8, he was very fanciful and playful too. In those days, he used to have an ambitious dream about his future. He was always fancying of becoming a pilot or a film-actor when he grew up. Unfortunately, an accident he met in his life shattered his dream. He now feels that his dream career as pilot or an actor would never come true, as he is no longer physically fit to become one.

In fact, at present he is incapacitated permanently due to an injury to his left leg. He sustained that injury in a road traffic accident occurred on 11 August 1996, in which two motor vehicles namely, registration number S 1152 driven by the third Defendant and another motor vehicle registration number S 3505 owned by the second Defendant and driven by first Defendant collided on the public road. Following the collision, the minor Nukus, hereinafter called the Plaintiff, who was a passenger at the material time in one of the said vehicles, suffered severe bodily injuries. This eventually caused him to suffer permanent incapacity to his left leg. According to the Plaintiff, the collision occurred due to the negligence of the Defendants. Hence, the Plaintiff claims damages from the three Defendants levelling joint and several liability against them. At this juncture, I note his grandmother, the second Plaintiff herein, has also claimed damages from the Defendants. However, the counsel for the Plaintiff during the proceedings of 9 November 2001 withdrew her claim against the Defendants in this matter. Be that as it may, the particulars of loss and damage claimed by the Plaintiff -as per plaint- are as follows:

Loss

Attendance to care and assistance	R 13,000-00
Transport to attend hospital and treatment	R 2,000-00
Medical Report	R 1,000-00

Damages

Injuries	R500,000-00
Pain and suffering	R250,000-00
Loss of earnings	R200,000-00

Loss of amenities	R600,000-00
Inconvenience, anxiety and distress	R100,000-00
Grand Total	<u>R1,650,000-00</u>

Wherefore, the Plaintiff prays this Court for a judgment in his favour and against the Defendants in the sum of R1, 650,000-00 with interest at the bank rate as from 11 August 1996, and with costs.

The Defendants on the other hand have admitted liability. However, they dispute only the quantum of damages claimed by the Plaintiff in this matter. According to the Defendants, the Plaintiffs claim is grossly exaggerated and exorbitant. In the circumstances, the only issue before this Court for determination is the assessment of the quantum of damages payable by the Defendants.

I shall now turn to the nature and extent of the injuries the Plaintiff sustained in the accident. According to the testimony and medical report-exhibit P1- dated 21 April 1997 of Dr. Alexander, the surgical consultant the Plaintiff was admitted in Victorian Hospital on 11 August 1996 with the history of road traffic accident. On examination he observed the following injuries on the Plaintiff:

- a. Compound comminuted fracture shaft of the middle femur.
- b. Compound comminuted fracture of the left tibia and middle of the fibula.
- c. Laceration of the right leg on posterior aspect; and
- d. Injury on left calf muscle.

On the same day of admission, the Plaintiff underwent an emergent operation. He also had debridement - surgical removal of dead tissue - from the calf wound and was put on traction pin. Again on 14, 22 and 24 August 1996 wound debridements of the left calf were carried out. Dr. Alexander then examined the Plaintiff on 28 August 1996 and found no calf muscle on the left leg. Upon taking x-ray he noticed that the left femur and tibia were not fixed satisfactorily. On the same day he performed another surgery for the fixation of the left femur and tibia and inserted an Ilisarov's apparatus. Since then daily dressing of the wound were carried out. On 30 August 1996 a skin graft on the granulated wound of the left leg was done. The Ilisarov's apparatus was removed on 14 October 1996. A check X-ray showed a moderate united left tibia and moderate united femur with some angulations. The left leg was immobilized by a plaster of paris, which was removed on 31 October 1996. Again a repeated-close-reduction of left femur was performed by an Ilisarov's apparatus. The apparatus was then removed on 25 November 1996 and physiotherapy started. A pike plaster of paris was applied on the fracture of the left femur. The Plaintiff was finally discharged from hospital on 29 November 1996. The fracture was again immobilized by plaster of paris, when the Plaintiff attended the casualty as an outpatient. This was subsequently removed on the

21 February 1997. A check x-ray showed a united fracture of the left femur with angulations in posterior medial side. But still there was no presence of calf muscle on the left leg. He had a limp and walked with a stick. He had to continue physiotherapy and follow-ups by orthopedic surgeon. He is still limping. He has a chronic ulcer on the calf region of his left leg. He is still suffering from Scoliosis Lumber Spine - an abnormal lateral curvature of the spine - due to trauma.

Further, Dr. Alexander testified that the Plaintiff had to undergo about 10 operations or surgical interventions required at different stages and stayed in hospital for- a long time- about 4 months. Now there is no muscle, no nerves and no artery in the calf region of the left leg. As the Plaintiff is very young the chronic ulcer on his left leg would become complicated in future. There is no tissue to cover the bone in that area as there is no calf muscle to grow around. Tibia is open. There is no protection. Chronic exposure of the bone would inevitably lead to various infections. There is no other medical solution. Plaintiff may get any infection at any time and suffer from pain. He may even need surgical interventions in future. The Plaintiff cannot be the same person what he is now. He needs symptomatic treatments all the time in the rest of his life. His wound needs to be cleaned and dressed up every day throughout his life. The deformity of the spine is due to limping, which in turn caused by the chronic ulcer. The Plaintiff has to take painkillers daily for the pain due to ulcer. He cannot carry heavy objects. He cannot walk normally. He cannot play. He cannot swim. He cannot stay, sit or stand in the same position for some time like normal persons do. He has a permanent disability of 35%. The left leg is shorter than the right one. According to the surgeon the Plaintiff needs plastic surgery of the left leg in future.

Further, the grandmother testified that the injury on the Plaintiff has drastically changed his life style and his personality too. It has also affected his performance in school. As he is not able to lead his normal life like other children of his age he feels sad and at times gets tired very easily. Sometimes he gets frustrated and takes it on his grandmother. As he cannot play after school hours and during weekends he is almost tied up at one place. He does only his school - works, drawings and paintings. Thus, the grandmother concluded that the injury following the accident has devastated the Plaintiff's childhood life.

I diligently perused the medical evidence as to the injuries and the prognosis given by the medical expert. I had the opportunity to observe the injury on the left leg and the present physical, intellectual and emotional condition of the Plaintiff. I gave meticulous thought to the written submissions filed by the counsel. I went through the precedents cited by the counsel with a view to assist this Court to make a critical evaluation of the damages.

I considered the relevant aspects particularly of the following precedents cited by the counsel:

1. *Daphne Louis Azemia v Nishesh Parikh* C. S No: 433 of 1998 in which the Plaintiff had traverse fracture of midshaft, tibia, fibula and

comminuted fracture of cuboids with no residual disability. The Court awarded R30,000 moral damages and loss of amenities of life.

2. *Cathleen Harry and another v Nella Hoareau* C. S No: 393 of 1997 in which the Plaintiff had injury to right knee, fracture of right tibia plateau, a compound fracture of left tibia and fibula with possibility of early arthritis with very slow healing. The Court awarded R35,000 for pain, suffering, distress, discomfort and R15,000 for loss of amenities and loss of equipment.
3. *Jocelyn Nicette v Ralf Valmont* C. S No: 395 of 1997 in which for permanent limp in right leg the Court awarded R15,000.
4. *Harry Confiance v Allied Builders* C. S No:226 of 1997 - a cut injury to patella tendon penetrating in to the joint of right knee; cut injury to the muscular quadriceps and muscular vastus medialis in the right leg, that was the same main muscle of the leg Residual disability of the right leg by 10%. Injury to joint that may cause osteoarthritis. Muscle wasting on right thigh. Diameter of right thigh became less than left thigh. Awarded R15,000 for pain, suffering, distress and discomfort; and R25,000 for permanent disability, infirmity and loss of amenities of life.
5. *Monica Kilindo v Morel* C. S. Appeal No: 2 of 2000 - Comminuted fracture of the left knee, three surgical operations including knee replacement. Moral damage for injuries, pain, suffering, loss of amenities of life, inconvenience, anxiety and distress. Permanent disability of 40%. Award of R140,000 by this Court was increased by the Court of Appeal to R180,000.
6. *Norman Agricole v. Wills Philoe and another* C. S No: 64 of 1996- Right fore foot of a boy aged 12 crushed and amputated. Susceptible to infections due to skin grafting. Awarded R125, 000 for injury and moral damages. For loss of education and future prospects R50, 000 in that he would not be able to engage in sports and walk properly.

In assessing the quantum of damages, firstly I warn myself that this Court should not be influenced by the sympathetic condition of the minor Plaintiff and the deprivation of his childhood activities and enjoyment. Further, I note the damages in tort must be assessed so that the Plaintiff suffers no loss and at the same time makes no profit. In a case of tort the damages are obviously compensatory not punitive. On the question of loss of future earnings one should note that the Plaintiff is not totally incapacitated. He has not lost the hope of future earnings totally. There is no total loss of future earning. The Plaintiff may still be self-employed in future engaging himself in suitable earning activities as he rightly indicated to his grandmother in that, he would be able to run a video rental shop for his livelihood at least sitting at one place when he grows up.

Although the precedents (supra) cited by the learned counsel for the Defendant give some indication to the Court as to quantum, I find that the nature and extent of the injuries, loss and damage suffered by the minor Plaintiff in the present case are notably distinguishable from that of those precedents. Therefore, it is very unsafe to apply the yardstick of those precedents to the present case without altering the quantum. In fact, they have to be recalibrated so as to suit the changing needs of facts and circumstances that are peculiar to the present case on hand and applied accordingly to measure the quantum of damages fairly and as accurately as possible. At the same time I note the quantum claimed by the Plaintiff under each head is highly exaggerated, exorbitant and unreasonable in the circumstances. Moreover, the Plaintiff has not shown the basis or criteria to the Court as to how he arrived at the figure of R200,000 in respect of his claim for loss of earning. After taking all the relevant circumstances into account I award the following sums in favour of the Plaintiff towards loss and damage he suffered following the injury.

Loss

Attendance to care and assistance	R10,000-00
Transport to attend hospital and treatment	R 2,000-00
Medical Report	R 1,000-00

Damages

Injuries	R150,000-00
Pain and suffering	R 60,000-00
Loss of earnings	R100,000-00
Loss of amenities	R 50,000-00
Inconvenience, anxiety and distress	R 50,000-00
Grand Total	<u>R423,000-00</u>

In the circumstances I enter judgment for the Plaintiff and against the Defendants jointly and severally in the sum of R423,000 with costs. Interest at the legal rate shall be payable on the said sum as from the date of judgment.

Since the Plaintiff is a minor I direct that the amount awarded hereof in his favour should remain invested into an interest bearing deposit account on the said minor's name with any commercial bank in Seychelles until he attains majority. Any dealing with the said deposit amount should meet the approval of the Court during his minority.

Record: Civil Side No 118 of 2000