

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA
REGULAR JURISDICTION

2019-HC-DEM-CIV-SOC-77

BETWEEN:

1. RADIKA NARINE as the Administratrix ad Litem of the Estate of SUNIL SUKNANDAN, deceased.
2. SOHAN SUKNANDAN as the next friend of VENESHA SUKNANDAN, a minor.

Claimants

-and-

1. CHERYL NOEL
2. North American Fire and General Insurance Company Limited (NAFICO)

Defendants

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Donovan Rangiah for the Claimants

Mr. Leslie Sobers for the First Named Defendant

No appearance by or for the Second Named Defendant

Delivered Marchy 19th 2021

DECISION

The Claimants' case is that on September 13th 2018 the First Named Defendant (hereinafter FND) drove motor car, registration no. PKK 4834, which was insured by the Second Named Defendant (hereinafter SND) negligently and carelessly along the Rupert Craig Highway in the village of Ogle (Demerara) thereby colliding with Sunil Suknandan and Venesha Suknandan resulting in the death of Sunil Suknandan and causing injuries to Venesha Suknandan .

The SND did not enter an appearance in the matter.

In her Statement of Defence the FND denied that she drove negligently and contended that the accident occurred through no fault of hers, that in fact, the two children, Sunil and Venesha, suddenly rushed across the concrete median from the southern carriageway into her path in the southern lane of the northern carriageway thereby causing the collision.

ISSUE I

Was the collision between the motor car driven by the FND and Sunil and Venesha caused by the FND's negligent driving.

LAW

Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done, either in a different manner or not at all. [**Halsbury's Laws of England** [2018] Vol. 78, para 1]

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. [**Blyth v Birmingham Waterworks Company** [1856] 11 Ex Ch 781]

To give a cause of action there must be negligence which amounts to a breach of duty towards the person claiming. [**Farr v Butters Bros. & Co.** [1932] 2 K.B. 606 @ 618]

The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence ... the party complained of should owe to the party complaining a duty to take care and the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. [**Donoghue v Stevenson** [1932] A.C. 562 @ 618]

Negligence is the failure to use the requisite amount of care required by the law in the case where a duty to use care exists. [**Riddell v Reid** [1943] A.C. 1 @ 31]

The standard of care required from a motorist is to drive with reasonable care.

FACTS

Venesha testified that she and Sunil were standing in the corner of the road on the northern side of the northern carriageway of the Rupert Craig Highway in the grass parapet waiting to cross the highway when she saw the [FND's] car swerve and hit her and her brother.

The Claimants pleaded that the accident occurred around 6:00 p.m., however Venesha testified that the accident occurred around 3:00 p.m., she, however, accepted that at the time of the accident the sun was “going down”.

Venesha testified that Sunil was thrown forward with the collision and she was knocked unconscious.

The Claimants called Doctor Samaroo as a witness and he testified that Venesha's injuries were;

- I. injuries to the head, including a laceration to the left temporo-parietal area with evidence of bleeding, multiple abrasions to the face and a laceration to the left ear.
- II. Comminuted fracture to the left humerus - [A comminuted fracture is a break or splinter of the bone into more than two fragments after high-impact trauma.]
- III. Displaced fracture to the right acetabulum.
- IV. Diastasis of the Symphysis Pubis.
- V. Blunt trauma to the abdomen.

The FND testified that she was travelling due east at about 60 km/h when suddenly two children rushed across the concrete median from the southern carriageway into her vehicle's path on the southern lane of the northern carriageway of the highway.

The FND testified that she applied brakes and swerved to the left but the distance was too short to avoid the collision with the children.

She also testified [inconsistently] that it happened so suddenly that she applied brakes after hitting them.

The FND pleaded in her Claim that one of the children was pushing a bicycle.

The FND testified that the damage to her vehicle was more in line with the right front wheel and the right front headlight.

She testified that nothing happened to the left front headlight, that, in fact, the centre of the bonnet and to the left was not damaged.

She testified that the damage to her vehicle was “*mild*”.

ANALYSIS

The resolution of this issue is purely a question of which of the two witnesses, Venesha or the FND, truthfully and accurately recounted to the Court how the collision occurred.

The Court does not believe the FND’s testimony regarding the damage that her vehicle sustained as a result of the collision.

The Court finds it difficult to believe that the vehicle sustained “mild” damage to the area in line with the right front wheel and right front headlight taking into consideration the injuries that Venesha sustained coupled with the fact that Sunil sustained fatal injuries in that collision and additionally the car would have had to hit the bicycle that according to the FND’s pleading, one of the children was pushing.

In addition, the Court finds that it is impossible that contact with both children and the bicycle would have resulted in damage to just one area of the vehicle.

The Court also finds it difficult to accept that the two children could have “*rushed across the concrete median from the southern carriageway into the northern carriageway*” while pushing the bicycle, since the concrete median is an elevated structure higher than the surface of the road.

Further, the Court does not believe that the FND is being truthful with respect to the damage to the vehicle and the fact that her Attorney mentioned the existence of photographs of the damage but she opted not to tender them at this trial but rather to describe the damage, further leads the Court to believe that the FND is not being frank and forthright with the Court about the damage that her vehicle sustained.

The obvious reason that the FND would have for not telling the truth about the extent of the damage to her vehicle is that the damage may very well be in contrast with her story that the children were by the middle divider of the road as opposed to being on the northern side of the road as Venesha testified.

Based on these findings the Court finds that the FND is not a truthful witness, however, on the other hand, the Court found that Venesha was a very frank and forthright witness whose evidence, despite her obvious educational restraints, was not diminished by cross examination.

CONCLUSION

The Court finds that the collision between the motor car driven by the FND and Sunil and Venesha was caused by the FND's negligent driving.

ISSUE II

What damages is the Estate of Sunil Suknandan entitled to.

LAW

Section 3 of the Accidental Deaths and Personal Injuries Act; CAP 99:05 of the Laws of Guyana, which provides;

“Whenever the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is that which would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused in circumstances amounting in law to felony.”

Pickett v British Rail Engineering [1962] 2 Q.B. 210

Gammell v Wilson [1982] A.C. 27.

Rose v Ford [1937] A.C. 826.

Benham v Gambling [1941] A.C. 157.

FACTS

Sunil’s father, Sohan, testified that Sunil helped him catch fish and shrimps every day after school and he [the father] earned an average of \$30,000.00 per week from the sale of the fish and shrimps caught.

He further testified that Sunil was attending the Grahams Hall Primary School where he was in grade 2 and he excelled in his classes.

Sunil was six years old at the time of his death.

ANALYSIS

The Court has to consider, firstly, if Sunil’s Estate is entitled to damages for pecuniary losses.

By definition pecuniary loss refers to matters or issues concerning harm to the Claimant's financial interests, such as medical expenses incurred and loss of earnings.

Under **section 3 of the Accidental Deaths and Personal Injuries Act** any action that the deceased could have maintained against the tortfeasor had he not died can be maintained by his Estate and this would certainly include a claim for damages for loss of earnings.

In **Pickett v British Rail Engineering** the House of Lords established that in a personal injury claim where the claimant's life was shortened he was entitled to claim for loss of earnings during those 'lost years', that is, the years by which his life was shortened.

This position was accepted by the House of Lords in **Gammell v Wilson** where it was reasoned that since the personal injury claimant could claim for the 'lost years' then it follows that in a survival action such a claim by the Estate of the deceased must be allowed.

That position continued in England until changed by legislation, to wit, **section 4 of the Administration of Justice Act 1982** [England], which specifically provided that damages recoverable in a survival action shall not include damages for loss of income in respect of any period after that person's death.

There is no equivalent legislative pronouncement in Guyana and therefore the position that obtained prior to that change in England is applicable in Guyana.

In this regard, the Estate of Sunil Suknandan, deceased, is entitled to damages for pecuniary losses under the head of loss of **prospective** earnings.

Since Sunil was a very young child, the computation of such damages should be based on what he may have been able to save given the opportunity to earn, since it is out of this sum that the beneficiaries of his Estate may have benefitted.

Despite the testimony of his parents that he excelled in school, the Court is not in a position to determine what their concept of “excelled” is since no evidence of his academic performance was presented to the Court.

The Court is therefore unable to determine what the academic capabilities of Sunil were and is left in the unfortunate position of being unable to assess the possible success of Sunil based on scholastic performance.

Considering the evidence of the living conditions of the Suknandan family, the Court does not accept the testimony of Sohan Suknandan that he earned \$30,000.00 per week on average and no other evidence was offered to support this contention.

The Court finds that Sunil may reasonably have attained an earning capacity similar to his father and therefore attributes the sum of \$1,000.00 per week as an amount that he likely would have been able to save and a multiplier of 10 years, taking into consideration that it is likely that he would not have been earning and saving during the next 14 years of his life [age 6 - 20].

Therefore under this head the Court would award the sum of \$520,000.00 to the FNC.

The FNC is also entitled to consequential pecuniary losses suffered, for example, the funeral expenses incurred, however none were prayed for.

The Court must, secondly, consider if Sunil's Estate is entitled to damages for non-pecuniary losses, which will be considered under the traditional heads.

Pain and suffering

The evidence in support of the FNC's case is that Sunil died instantaneously and therefore there can be no award under the head of pain and suffering.

Loss of expectation of life

It was recognised in **Rose v Ford** that damages under the head of loss of expectation of life survived for the benefit of the victim's estate and confirmed in **Benham v Gambling**.

Claims under this head were eventually abolished in England by **section 1 (1) (a) of the Administration of Justice Act 1982**, however, there being no similar legislative change in Guyana, it continues to be a head of damage that survives the death of the victim in this jurisdiction.

In terms of an assessment of damages to be awarded under this head, the following was stated in **Benham v Gambling**;

“The proper assessment of such damages in this case, where the prospects of the boy were particularly favourable, was £200. The assessment of such damages is not to be made upon an actuarial basis. It is not the assessment of compensation for loss of years or for the loss of future pecuniary prospects, but is the fixing

upon common sense principles of a reasonable figure for the loss of prospective happiness.”

In this regard, considering the circumstances of Sunil and his prospective future circumstances as discussed above, the Court finds that an award in the sum of \$500,000.00 for loss of expectation of life is appropriate.

Loss of amenities of life

Counsel for the FNC has submitted that with respect to damages for non-pecuniary losses, the Estate is entitled to recover for the deceased’s loss of amenities, however, the Estate is only entitled to recover for the deceased’s loss of amenities of life **up to the time of his death.**

Damages for loss of amenities of life include such period between the incidence of injury and death, however as was stated previously, according to the evidence, Sunil died instantaneously and therefore there can be no award made under this head.

CONCLUSION

The FNC is entitled to a total award of damages in the sum of \$1,020,000.00.

ISSUE III

What damages is Venesha Suknandan entitled to.

LAW

Cornilliac v St Louis (1964) 7 WIR 491.

McGregor on Damages, Seventeenth Edition, paragraph 35-213;

FACTS

In addition to the aforementioned evidence of Dr. Samaroo, Venesha testified that immediately after being knocked down she felt severe pain in her head, temple, left arm, stomach, both feet and hip.

She spent one month in the hospital and was not able to walk on her own until sometime in November 2018, some 2 months after being knocked down.

She had a cast placed on her left arm and a surgery was performed on her hip region.

She continued to feel pain and discomfort throughout her body and in February 2019 underwent surgery for her left arm.

She testified that she still feels pain throughout her body.

She is unable to play like she used to with her siblings and she gets nightmares about the accident.

Dr. Samaroo also testified that Venesha's injuries would affect her daily life, mainly with activity surrounding her pelvis.

He testified that her injuries can lead to pain and she will walk with a limp, and further, she will likely develop post traumatic osteoarthritis.

He further testified that "*she can perform duties that do not entail lifting more than 20 pounds or frequent stair climbing*".

Prior to the accident she earned \$2,000.00 per week as a domestic servant, assisting her mother, who is a domestic servant, at her job just one day per week.

ANALYSIS

With respect to damages for pecuniary losses, the Court finds that at the very least Venesha would have been able to secure employment as a domestic servant, which may not be possible now considering the evidence of Dr. Samaroo that “*she can perform duties that do not entail lifting more than 20 pounds or frequent stair climbing*”.

In this regard the Court finds that Venesha is entitled to damages for pecuniary losses under the head, **loss of prospective earnings**.

As a domestic servant working full time she would have been able to earn at least \$3,000.00 per day, 5 days per week, which adds up to \$64,500.00 per month, since there are, on average, 4.3 weeks in a month.

Taking into consideration the usual and necessary deductions to be taken from the income and since she is not wholly incapacitated, she should be able secure a job that will provide some earnings, though not \$64,500.00 per month, the Court finds that an appropriate multiplicand is \$32,000.00 x 12 [months] = \$384,000.00 and a fair and practical multiplier in the circumstances of this case is 15.

Based on the foregoing the Court awards the SNC/ Venesha the sum of \$5,760,000.00 as damages for loss of prospective earnings.

The Claimant is also entitled to non-pecuniary losses which will be addressed under the traditional heads bearing in mind the considerations set out by Wooding CJ in

Cornilliac v St Louis, to wit;

(i) the nature and extent of the injuries sustained;

- (ii) the nature and gravity of the resulting physical disability;
- (iii) the pain and suffering which had to be endured;
- (iv) the loss of amenities suffered; and
- (v) the extent to which, consequently, the appellant's pecuniary prospects have been materially affected.

Pain and suffering

The Court approves and adopts the following paragraph from **McGregor on Damages, Seventeenth Edition, paragraph 35-213.**

“It has been suggested that “pain” is the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while “suffering” is distress which is not felt as being directly connected with any bodily condition. On this analysis pain needs no further elucidation; it may be noted that it will include, for the purpose of damages, any pain caused by medical treatment or surgical operation rendered necessary by the injury inflicted by the defendant. As to suffering, this would seem to include fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement.”

It is clear that the injuries that Venesha sustained from the collision were severe and must have caused her grave and agonising pain and the Court has no reason to disbelieve her that the pain persists presently.

In fact, Dr. Samaroo's testimony materially corroborates Venesha's testimony with respect to the pain that she experienced and continues to experience.

The fact that she is condemned to endure the effects of these injuries for the rest of her life, coupled with the limp that she now walks with, is indicative of the suffering that she will have to endure for the rest of her life.

This will also undoubtedly cause some degree of mental anguish especially as she goes through her teenage and young adult years.

Based on the foregoing the Court awards the SNC/ Venesha the sum of \$3,000,000.00 under the head of pain and suffering.

Loss of amenities

This head of damage compensates the Claimant for the loss of the ability or opportunity to enjoy some of life's pleasures that she either enjoyed prior to sustaining the injuries or that she never will be able to enjoy having sustained the injuries.

In this regard, Venesha's evidence coupled with Dr. Samaroo's evidence shows that her once very active life style has been dramatically curtailed, and further, the scarring from the surgeries and the injury to pubic symphysis are sure to interfere with her prospects of marriage and sexual life.

Based on the foregoing the Court awards the SNC the sum of \$2,000,000.00 under the head of **loss of amenities**.

Loss of expectation of life

The Court does not find that the evidence supports or shows that the injuries sustained by Venesha is likely to, or, has indeed shortened her life expectancy and therefore there will be no award made under this head.

CONCLUSION

The SNC/ Venesha is entitled to a total award of damages in the sum of \$10,560,000.00.

ISSUE IV

What if any is the liability of the SND.

FACTS & ANALYSIS

The Claimants have not led any evidence to establish any liability of the SND.

CONCLUSION

The Claim is dismissed against the SND.

The Court awards the sum of \$1,020,000.00 to the FNC as damages for negligence together with costs in the sum of \$354,000.00 against the FND.

The Court awards the sum of \$10,560,000.00 to the SNC/ Venesha as damages for negligence together with costs in the sum of \$1,706,000.00 against the FND.

The Claim is dismissed against the SND with no order as to costs..

Justice N. A. Singh