IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal No. 150/2012

SC(HCCA) LA No. 278/2011
WP/HCCA/KAL/114/2009 (F)
D.C. Panadura No. 1964/MR

Wanakkuwatta Waduge Nirosh Priyasad Fernando.
"Swarna",
Swarnajothi Mawatha,
Thanthirimulla,
Panadura.

Plaintiff

Vs.

1. Subramaniam Indrajith,
   No. 26, Thissa Mawatha,
   Horethuduwa,
   Panadura.

2. Hettiyakandage Jagath Jayalal Fernando,
   37/30, Edward Benadict Mawatha,
   Horethuduwa,
   Panadura.

Defendants

Between

1. Subramaniam Indrajith,
   No. 26, Thissa Mawatha,
   Horethuduwa,
   Panadura.

2. Hettiyakandage Jagath Jayalal Fernando,
   37/30, Edward Benadict Mawatha,
   Horethuduwa,
   Panadura.

Defendant-Appellants

Vs.

Wanakkuwatta Waduge Nirosh Priyasad Fernando.
"Swarna",
Swarnajothi Mawatha,
Thanthirimulla,
Panadura.

Plaintiff-Respondent

And Now Between

Wanakkuwatta Waduge Nirosh Priyasad Fernando.
"Swarna",
Swarnajothi Mawatha,
Thanthirimulla,
Panadura.

Plaintiff-Respondent-Petitioner

Vs.

1. Subramaniam Indrajith,
   No. 26, Thissa Mawatha,
   Horethuduwa,
   Panadura.

2. H. Jagath Jayalal Fernando,
   37/30, Edward Benadict Mw,
   Horethuduwa,
   Panadura.

Defendant-Appellant-Respondents.

SC. Appeal No. 150/2012

BEFORE : **Saleem Marsoof,PC. J.**
Sripavan, J. &
Eva Wanasundera, PC.J.

COUNSEL : T.M.S. Nanayakkara for Plaintiff-Respondent-Appellant.
Rohan Gunapala for Defendant-Appellant-Respondents.

ARGUED ON : **03.02.2014**

DECIDED ON : **11.09.2014**

* * * * *

Eva Wanasundera, PC.J.

Leave was granted on 04-09-2012 on the question of law set out in para 18 of the Petition dated 20-07-2011; ie. "whether the Plaintiff-Respondent-Appellant's proceeding for higher studies could be reckoned to mitigate the effect of the injury".

The judgment of the Provincial High Court of Civil Appeal holden at Kalutara dated 09-06-2011 has affirmed the judgment of the District Court dated 14-09-2009 in favour of the Plaintiff – Respondent – Appellant (hereinafter referred to as the "Appellant") but reduced the quantum of damages by Rs.200,000/- . The contention of the Appellant is that the reasons given for such reduction of damages is baseless and as such the judgment of the High Court should be set aside.

The facts in this case are as follows:- A road accident occurred at 6.15 a.m. in Panadura. The Appellant was a child in Grade 10 of Ananda College, Colombo 10. He was seated inside a school van on a window seat of the van. A lorry

driven by the 1st Defendant-Appellant-Respondent (hereinafter referred to as the "1st Respondent") and owned by the 2nd Defendant-Appellant-Respondent (hereinafter referred to as the "2nd Respondent") coming from the opposite side collided with the school van and the Appellant's right arm and hand was injured. The hand was fractured in 4 places. He had to undergo 3 operations in 2 hospitals and get physiotherapy etc. to reach close to a normal working arm and hand. The driver, the 1st Respondent pleaded guilty for negligent driving in the Magistrate's Court and was punished. The Appellant filed action in the District Court. At the end of the trial the District Judge granted damages of Rs.800,000/- to the Appellant child. The 1st and 2nd Respondents appealed to the Civil Appellate High Court and the High Court reduced the quantum of damages to Rs.600,000/-.

The 1st and 2nd Respondents who were the Defendants in the District Court appealed to the Civil Appellate High Court on two grounds i.e. that there was contributory negligence on the part of the driver of the vehicle in which the Plaintiff travelled and that the quantum of damages was excessive. The High Court has clearly and specifically held that there was no contributory negligence on the part of the Plaintiff. Yet, the High Court has reduced the quantum of damages from Rs.800,000/- to Rs. 600,000/-taking into account the fact that the Appellant child had, later on, gone abroad for higher studies, reckoning that as a factor to mitigate the damages for the inquiry suffered by him.

I would like to analyse the situation at this juncture. The Appellant child suffered injuries as a result of the accident which occurred due to the negligence of the lorry driver. The same child, if the accident never occurred could have proceeded abroad for higher studies having done the normal course of studies like any other child. He would have done it with ease, or he would have done it even better if he did not have to suffer so much due to the accident. It could even be otherwise. It could be that he was so determined to do his studies well because he was less capacitated than others of that age due to the fact that he suffered so much which gave him the determination to study well. If that argument is upheld, is the Judge entitled to give credit for that, to the driver who

acted negligently and caused damages to the child for giving him the determination to do well. Definitely not. In the same way, the intelligence of a child, the aptitude of the child and the mentality of the child who has done well after the accident could not be taken into account in calculating the damages for the injury. If the arm or the hand was totally cut off and yet the child performed well in studies, could any person take that into account when calculating damages for the injuries.

There are things that one can do with a well performing arm and hand. There are things that one cannot do with a half performing arm and hand. It is the usability of the hand and the suffering he underwent to get to the point of the arm to be usable that has to be taken into account when calculating the damages. The arm is a limb which a person has got from birth. It is his birth right to be able to use it till nature gets it less usable or unusable. It is his birth right to try and keep it well used and usable. It is the victim who suffers in mind, fears in the mind and with effort gets the limb to work to the extent possible to be used during his life time. The person who caused damage to the limb should be directed to pay damages taking into account the actual cost of medical treatment and compensation for both the resulting patrimonial loss and for the suffering of bodily pain and pain of mind. The victim's birth right to keep the arm and hand intact has been disturbed and that is what should be addressed in calculating damages. What should be considered is not what he has achieved after the incident but what he was subjected to due to the negligence which caused the incident. The aftermath of the vehicle accident should be looked at with a flash light on the substance to the detriment of the victim and not on the substance to the betterment of the victim.

In the case of ***Gafoor vs Wilson and Others 1990 1 SLR 142 at pg. 145***, Amarasinghe,J stated that, under the Aquilian action, compensation is awardable where "there is loss in respect of property, business or prospective gains capable of pecuniary assessment". Hence, even the loss of capability to a smoothly functionable arm can be compensated on the basis of prospective pecuniary

loss, caused by such damage due to a road accident or any other accident, if it could be assessed.

To throw more light on this, I would like to take a beggar man on the road with limbs broken due to a motor car accident. The driver who was negligent cannot ever be heard to say that the victim was not a wage-earner at the time he was run over by the car but he is earning a lot by begging on the road and therefore the damages for the injury should be lessened due to that fact. The better things which happened to the victim as a result of the incident which caused the injury is not a relevant factor to decide on the quantum of damages. Only the worse things after the incident are relevant factors to decide on the quantum of damages.

As such I rule out the reasoning which the High Court Judges have taken into account when reducing the quantum of damages as 'not relevant'. After all it is the birth right of the Appellant which has been interfered with by the negligent driver. I hold that the High Court has held wrongly when it decided to bring down the quantum of damages from Rs.800000/- to Rs. 600000/-. The question of law raised is answered as follows:- "The Plaintiff-Respondent-Appellant's proceeding abroad for higher studies should not have been reckoned to mitigate the effect of the injury".

I set aside the judgment of the Provincial High Court of Civil Appeal holden at Kalutara dated 09-06-2011. I allow the appeal by the Appellant and affirm the judgment of the District Court dated 14-09-2009. The Appellant is entitled to legal interest on the sum awarded by the District Judge from the date of the District Court Judgment and costs of suit in all the lower Courts upto and including the Supreme Court.

Judge of the Supreme Court

Saleem Marsoof,PC. J.

I agree.

Judge of the Supreme Court

Sripavan, J.

I agree.

Judge of the Supreme Court