Bijun Kalur … **Appellant**

AND

Pahaytc Sdn Bhd … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 27 of 2008)

Before: Power, P; Mortimer and Davies, JJ.A.
3rd June, 2009.

Damages for future loss of earnings – method of assessment.

Mr. Siva Sankaran of Messrs. Cheok Sankaran Halim for the Appellants.
Mr. Pg Izad Ryan Bin PLKDR Pg Bahrin of Messrs. Pg Izad & Lee for the Respondents.

Davies, J.A.:

This is an appeal against the judgment of Hairol J. given in the High Court on 18 November 2008, on appeal from a judgment of the Registrar on 9 August, 2008. The judgment was relevantly in the following terms:

> *"1. the judgment of the Honourable Acting Senior Registrar Dk Hjh Norismayanti Pg Hj Ismail made on the 27th day of March 2008 be varied by reducing the award for loss of future earnings for the 1st Plaintiff from $270,400 to $249,600;*
>
> *1. the first Plaintiff is entitled to Pre-trial loss of earnings of $95,550.00;*
>
> *2. i) interest of 6% per annum on the award of general damages (except loss of future earnings) from the date of the accident to the date of the judgment;*
>
> *ii) interest of 3% per annum on all special damages awarded from the date of the accident to the date of judgment;*
>
> *iii) interest of 6% per annum on all sums awarded from the date of judgment until further payment hereof.*
>
> *3. Costs of these appeals to be the 1st Plaintiff, to be taxed if not agreed."*

Unfortunately the judgment did not, as it should have, order in terms that the defendant pay the plaintiff the sums stated in paragraphs 1, 2 or 3 or give judgment for those amounts. A judgment for plaintiff either in debt or damages must give judgment for the plaintiff for the total sum awarded. In the present case, having, as he did, varied the assessments of damages for past and future loss of earnings, the learned trial judge should then have given judgment for the total sum to which, on his findings, he had assessed the plaintiff to be entitled. See the orders made at the end of these reasons.

Nevertheless, we treat this as an appeal by the first plaintiff against a final judgment for him for $393,879 90. This appeal, though it is against that judgment, is confined to a challenge to the assessment of damages for future loss of earnings.

The appellant was the driver of a truck which overturned on 21 October 2003 injuring him. His injuries were, in summary, a comminuted compound fracture of the left tibia resulting in a half inch wasting of his leg, some bruising, some abrasions and some cuts resulting in some scarring.

The appellant was born on 5 October, 1970. He was therefore 33 at the date of the accident and 37 at the date of assessment and judgment by the Registrar. His working life, it can be initially assumed, would have extended to the age of 55.

At the time of his accident the appellant was employed as a truck driver by the defendant respondent and had been in that employment for four years. He had left school at 16 without passing his examination in that year and had had a series of labouring type jobs until he qualified as a truck driver in 1996. He was then in constant employment as a truck driver, with gradual increases in his salary, until he commenced work as a truck driver with the respondent in 1999. His commencing salary with the respondent was $1400 a month together with accommodation provided by the respondent. He estimated the value of that accommodation at $200 a month. He received yearly increments in that salary of $100 a year so that, at the time of his accident, he was earning $1800 a month. He also received in each year a bonus of one month's pay.

It is reasonable to assume that, but for his accident, the appellant would have continued, for some time into the future, to work for the respondent as a truck driver and would have continued to receive incremental increases in his salary, whether or not they might have amounted to $100 a year. In estimating how long that might be, it was, no doubt, relevant to consider that he was a citizen of Sabah, not of Brunei, and that, consequently, at some time in the future, he might have left his employment with the respondent to return to Sabah as he did after the accident and his consequent loss of employment. It was also relevant to consider other contingencies referred to below.

It does not appear to have been disputed that the appellant’s accident rendered him unfit for continued work as a truck driver and that, because of that unfitness, he was dismissed by the respondent on 3 December, 2003. Because of his leg disability the appellant is unable to walk or stand for long periods of time due to pain. Dr Heng Aik Cheng, an orthopaedic surgeon who examined the appellant, expressed the opinion that, because of his disability, he would have difficulty in going back to his previous job as a truck driver and will not be able to do manual labour.

Though the appellant has sought other employment since his dismissal by the respondent he has been unable to find any. Given his limited education, and that his previous employment was in labouring type jobs and as a truck driver, that is not surprising. He will plainly have difficulty in finding any employment.

The manner in which the Registrar assessed damages for future loss of income was as follows. First, she arrived at a multiplicand of $2,225 in this way: $1950 (income at trial of $1800 + $150 estimated value of accommodation) + $2500 (estimated likely income and accommodation value at date of retirement): average = $2225. She then accepted a multiplier of 12, to allow for accelerated payment and contingencies, to arrive at a total of $320,400. From that the Registrar then deducted $50,000 for likely future income which the appellant might earn leaving a total of $270,400.

There appear to have been two errors in this. The first is that, while in calculating pre trial loss of income the Registrar was prepared to accept the appellant's estimate of $200 as the value of his accommodation, in this assessment she reduced this amount to $150 because she said that there was no other evidence to support it. That was not a sufficient reason to reject it and, there being no other evidence than the plaintiff's on the point, we think that she should have accepted it.

The second error was in adopting, as the appellant's hypothetical salary at the time of trial, the sum of $1,800. This assumed that the appellant would not have received any increases in salary over the four years from the date of his accident to trial, an assumption which appears to be inconsistent with what had occurred over the four years immediately prior to the accident. Consequently the starting point for calculating future loss of earnings should have been a monthly sum, at the time of assessment, of $2400.

With those errors in mind we turn to the assessment made by the learned judge. He first reduced the multiplicand adopted by the Registrar from $2225 to $2000. He did this by taking as the starting salary at the date of trial the sum of $2,000 and assuming no increments during his hypothetical future working life. However, as mentioned below, he assessed a separate sum for such increments up to age 45. He then reduced the multiplier adopted by the Registrar from 12 to 10 years primarily to take into account the possibility of other employment in the future. (The Registrar had reduced her assessment by $50,000 primarily for this possibility). And finally, he made a separate assessment of $9,600 for incremental increases to the appellant's salary using a multiplier of 8 years. He did this because he said that he did not think that the appellant would have received increases in salary over the whole of the period of his employment.

We think that the learned judge was wrong in accepting that the appellant's hypothetical salary at trial would have been $1,800, his salary at the time of the accident. For the reason given earlier, we think that it should have been $2,400.

We think that the judge also erred, in arriving at the multiplicand, in failing to include salary increments over his working life; and then making a separate assessment in respect of such incremental increases. Whilst it was, no doubt, correct to have regard to the strong possibility that these might not have continued over the whole 18 years

of the appellant's working life, the orthodox way of taking this into account was, in fixing his hypothetical income at the conclusion of his working life, to make some allowance for the fact that incremental increases might not continue to occur throughout the whole of that period. If the incremental increase were allowed for his whole working life, the increments would amount to $1,800, giving a final hypothetical salary figure of $4,200. Taking into account the real possibility that incremental increases would be unlikely to have occurred throughout his working life we fix his hypothetical salary at the conclusion of his working life at $3,600 and consequently fix the multiplicand at $3,000.

Finally, we think that the multiplier of 10 years adopted by the learned judge was appropriate to take into account other contingencies: the possibility that the appellant may have had some other illness or injury which would have prevented him from working; the possibility that, for some other reason, he may have lost or left his employment during his future hypothetical working life; and the possibility that, even now, the appellant may obtain some employment. We think therefore that an appropriate assessment under this head would be $360,000 representing $3,000 x 12 x 10.

We would therefore allow the appeal by substituting the sum of $360,000 for the sum of $249,600 for future loss of earnings.

Orders

1. Allow the appeal;

2. Set aside the judgment for $393,829.90 and in lieu give judgment for the plaintiff for $504,229.90;

3. Order that the defendant pay interest at 6 % per annum on general damages from 21 October, 2003 until 27 March, 2008;

4. Order that the defendant pay interest at 3% per annum on special damages from 21 October, 2003 until 27 March, 2008;

5. Order that the defendant pay interest at 6% per annum on the judgment sum from 27 March until payment;

6. Unless application is made for some other order by 9am on Friday, 4 June, order that the defendant pay the plaintiff's costs, here and below.

Power, P.

Mortimer, J.A. **Davies, J.A.**