

Awangku Muhammad Murshyid Bin Pg Hj Ali ... 1<sup>st</sup> Appellant  
Pg Ali Bin Pg Maon ... 2<sup>nd</sup> Appellant

AND

Makrami Bin Haji Md Noor ... Respondent

---

(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 4 of 2009)

---

AND

Makrami Bin Haji Md Noor ... Appellant

AND

Awangku Muhammad Murshyid Bin Pg Hj Ali ... 1<sup>st</sup> Respondent  
Pg Ali Bin Pg Maon ... 2<sup>nd</sup> Respondent

---

(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 2 of 2009)

---

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

Dr Colin Ong and Mr. Lim Chin Wah of Messrs. Dr Colin Ong Legal Services for the Appellants in CA No. 4 of 2009 and for the Respondents in CA No. 2 of 2009.  
Mr. Eugene Loh of Messrs. Cheok Sankaran Halim for the Respondent in CA No. 4 of 2009 and for the Appellant in CA No. 2 of 2009.

**Mortimer, J.A.:**

The plaintiff's action concerned in these appeals was for personal injuries following a road accident on the 8 December 2003. Liability was admitted and on 12 April 2008 the Deputy Chief Registrar awarded him a total damages of B\$320,889.30.

Both the defendants and the plaintiff appealed and on 16 February 2009 Hayati J dismissed both appeals confirming the Deputy Chief Registrar's award. Both parties now appeal to this court. The defendants against the award for future loss of earnings on the grounds that they were not pleaded or claimed in the statement of claim. The plaintiff appeals on the ground that the judge's award was insufficient.

### **Civil Appeal No 4 of 2009**

This is another case in which the plaintiff failed to serve with the statement of claim an estimate of future any expenses and losses (including loss of earnings and of pension rights) under order 18 rule 11 1A which provides:

*(1A) Subject to paragraph (1B), a plaintiff in action for personal injuries shall serve with his statement of claim –*

*(a)....*

*(b) a statement of the special damages claimed.*

The catch for the unwary practitioner is the unexpected definition of special damages in rule (1C):

*(1C) for the purposes of this rule-*

*“a statement of the special damages claimed” means a statement giving for particulars of the special damages claim and for expenses and losses already incurred and an estimate of any future expenses and losses ( including loss of earnings and of pension rights).*

Although the plaintiff fulfilled the requirement to serve medical reports and to plead some special damages which had already been sustained, he failed to plead any particulars of loss of earnings both past and future. Indeed quite apart from O.18 the pleadings were seriously deficient in that future loss was not specifically claimed at all.

Dr Ong, who appears for the defendants, submits that order 18 rule 11 is mandatory and that a failure to plead an estimate of future loss of earnings and expenses is fatal to the claim and the plaintiff cannot now be permitted to recover them.

As we have said on a number of occasions previously the pleadings are of vital importance to the defining of issues between the parties and to the proper conduct of the trial. Nothing we say is to be taken as condoning laxity in pleadings.

Equally however it is the courts task to do justice between the parties. It would be unfortunate if a party were to be deprived of justice through a technicality of pleading. At the same time a deficiency of pleading cannot be tolerated to the prejudice of the other party. Of course if a party is taken by surprise by new allegation at trial and is prejudiced in his defence it is incumbent upon the party to raise the point without delay. If the wronged party continues to meet the new allegation without objection and only raises the point after the evidence has been concluded this may be a powerful indication that there is no prejudice.

Dr Ong contends that he was prejudiced by the failure to plead future loss of future earnings and the late service of the plaintiff's affidavits. Mr Loh represents the plaintiff. He contends that in spite of the deficiency in his pleadings the defendants were not taken by surprise by the allegation of future loss of earnings. He points to correspondence between the solicitors before the hearing; to Dr Ong's failure to object to the admission of the plaintiffs evidence; to his cross examination of the

plaintiffs witness in the presentation of his case; and to his failure to raise any objection to the pleadings until he submitted his written argument after the close of evidence.

The hearing before the Deputy Chief Registrar to assess damages began on 2 October 2007. The parties were corresponding previously. On 21 September, 2007 the plaintiff's solicitors wrote to the defendant's setting up their claim. This included in item 27 "loss of future earnings" and particulars of his previous salary and age were given.

On 27 September 2007 the defendants' solicitors road to the plaintiff's solicitors a letter which included the following sentence;

*"Whilst we do not at all cast any aspersions on your firm as fellow lawyers, we believe that the plaintiff may have given you false information to back up his claims for future loss of earnings and may have entangled you in a very dangerous situation."*

Finally, on the 28 September 2007 the plaintiff's solicitors wrote again to the defendant's solicitors advancing a claim for loss of earning capacity which from the particulars given was clearly a claim for loss of future earnings.

The defendants were well aware of the plaintiffs intention to claim future loss of earnings together with the details of his previous salary, his annual increments, his age and his retirement age. Affidavits were produced late by the plaintiff at the beginning of the trial but this seems to have been provoked by the allegations made by the defendants in their letter of 27 September 2007 to which we have referred.

At trial plaintiff and his witnesses were cross examined. This included cross examination about salary and the fact that the plaintiff had been working for his brother. No objection was taken to the admission of this evidence in chief and no reference was made to the deficiency in the pleading at that time.

The appeal and rehearing in front of Hayati J began on 3 October 2008. Dr Ong now vigorously contended that the deficiency in the pleading was a bar to any award of future loss of earnings. Plaintiff was provoked by this to apply for an adjournment to amend the pleadings but, after the defendants had tried to challenge the adjournment in this court, abandoned the application on the basis that by this time the claim had been fully particularized and set out in correspondence, affidavits and oral evidence. Dr Ong's submission was firmly rejected by the judge on the basis that the manner in which the defendants case had been advanced demonstrated that they were not in any way prejudiced. Previously the Deputy Chief Registrar had rejected the submission on similar grounds.

The defendants were not taken by surprise by the claim for future loss of earnings, the defendants who raise no objection to the admission of the evidence, the witnesses were cross examined about the claim and the defendants have not been prejudiced by the way this case has been presented and pleaded. In the circumstances it was just to both parties to allow the case to proceed and the claim for future loss of earnings to be made.

For these reasons we agree with the approach of both the Deputy Chief Registrar and the judge. They were each correct in their firm rejection of the defendant's submissions and we dismiss Civil Appeal No 4 of 2009 with an order nisi for costs.

### **Civil Appeal No 2 of 2009**

Agreeing with the Deputy Chief Registrar the judge awarded a total of B\$320,889.30. In detail the award was as follows:

#### **General Damages**

|                                       |           |
|---------------------------------------|-----------|
| 1. Loss of future earning             | \$162,000 |
| 2. Loss of TAP contribution           | \$ 0      |
| 3. Loss of vision                     | \$ 60,000 |
| 4. Future of surgery for the left eye | \$ 20,000 |
| 5. Driver-cum-domestic helper         | \$ 0      |
| 6. Loss of amenities                  | \$ 20,000 |
| 7. Multiple scars                     | \$ 15,000 |
| 8. Loss of car BK8755                 | \$ 5,000  |
| Sub-total                             | \$282,000 |
| Agreed general damages                | \$ 34,500 |
| Grand total                           | \$316,500 |

#### **Special Damages**

The special damage has been agreed at \$4,389.30.

Mr Loh contends that in certain respects this award is too low. He takes three points.

First, he says at the judge's assessment of the average monthly endings of B\$900 was wrong as she failed to take into account the annual increments received by the plaintiff. By the time of the hearing in 2007 his earnings would have been B\$1,300 per month.

Secondly, he submits that the judge ought to have awarded the plaintiff a sum for his future loss of benefits in the employee's provident fund – the TAP.

Finally, he claims that the plaintiff's disability is such that he should be awarded the cost of employing a driver cum domestic helper to properly compensate him.

#### **Future loss of earnings**

Dr Ong was tempted to revisit some of the factual issues raised at trial but he put nothing before the court which demonstrates that either the judge or the registrar was

in error in their findings on the nature of the plaintiff's employment with his brother or the level of his pre-accident earnings.

This included the brother's description of the plaintiff as an employee. In paragraph 7 of his affidavit he says:

*"The plaintiff proved to be an asset to the firm; he was very hardworking and had very good relationships with customers and was more disciplined and dedicated than any of the other employees I had. He never attempted to quit the job like the other employees and because of all this I increased his pay to \$600.00 a month in January 2002 and \$700.00 a month in January, 2003."*

Contrary to Dr Ong's contention that the plaintiff may obtain other employment we are satisfied that the judge and the registrar properly found that he was entitled to full compensation for future loss of earnings. The plaintiff has tried to obtain employment without any success.

Upholding the registrar, the judge assessed his projected future earnings as \$900.00 per month. This was the level of his earnings prior to the accident in 2003. Here we are satisfied the judge fell into error. The plaintiff was receiving increments each year of \$100.00 per month. By the time of the trial therefore it is likely that he would have been earning \$1,300.00 per month. This is the starting point for the assessment of his future loss of earnings.

The future is much less certain. He could not have continued working for his brother whose business had contracted. In the circumstances it would be wrong to find that he would have continued receiving increments of \$100.00 per month until the age of 55 as submitted by Mr. Loh. This would introduce arithmetical certainty into a completely uncertain future and would be likely to lead to error and over compensation.

However, on the brother's evidence, but for the accident, the plaintiff was likely to have remained in employment and to have been a valued employee. Within the limitations of his education it is likely that his earnings would have modestly increased over the years. Making the best assessment we can in these circumstances we think a reasonable estimate of his average future loss is \$1,800.00 per month. For a man of 27 years who could expect to work at least to the age of 55 a multiplier of fifteen years is well within the appropriate range to account for the future vicissitudes of life and accelerated payment. It is certainly not too high.

Accordingly we allow this appeal and increase the award for future loss of earnings from \$162,000.00 to \$324,000. ( $\$1,800.00 \times 12 \times 15 = \$324,000.00$ ).

### **Employee's provident fund TAP**

Again the claim for this loss is not pleaded and was only advanced as a sound claim during Mr. Loh's submissions. Nevertheless, once made the claim is unassailable and we allow it. There can be no prejudice to the defendants.

By law employers must pay into this fund 5% of the employee's wages as the employer's contribution for the employee's benefit. In the absence of employment the plaintiff will lose the benefit. For this he is entitled to be compensated.

Consistent with our award for future loss of earnings the employer's contribution would have been 5% of \$324,000.00 or \$16,200.00. This is the basic figure for any assessment but as the fund cannot usually be drawn upon until the beneficiary is 55 years of age, except for the purpose of buying or building a house, there is a very considerable element of accelerated payment of any award of this kind to a man of the plaintiff's age. Taking this into account we think the proper award for this loss in this case is \$12,000.00.

### **Assistance and Care**

The plaintiff is seriously disabled. He is properly described as  $\frac{3}{4}$  blind. He can no longer drive a car and for a young man in Brunei it is a serious disability. He has lost his independence and mobility. He relies much upon family and friends. Consequently he claims that to be properly compensated he needs permanent assistance in the form of a driver/domestic helper. Detailed figures have been provided and an award approaching \$100,000.00 would be justified if this need is established as a proper award in this case.

However, we are satisfied that in spite of the plaintiff's serious disability, to provide a permanent employee to assist him for the rest of his life would be over compensation. Without in any way diminishing his problems he is by no means totally disabled. Nevertheless, on all the evidence he is entitled to some compensation for his lack of mobility and future care. His difficulty is likely to increase as he gets older. Bearing in mind that the approximate sum which would be awarded for full compensation of this kind we think it appropriate to award him \$40,000.00.

### **Orders**

#### **Civil Appeal 4 of 2009**

1. We dismiss appeal no 4 of 2009.
2. We order nisi that the defendant will pay the costs of the appeal to the plaintiff to be taxed if not agreed.

#### **Civil Appeal 2 of 2009**

1. We allow appeal No 2 of 2009.
2. We give judgment to the plaintiff for total general damages of \$530,500.00 and in addition special damages of \$4,389.30.
3. We order nisi that defendant will pay the costs of the appeal to the plaintiff to be taxed if not agreed.

The orders nisi will become absolute at 11:00 am on 4 June, 2009 unless prior application is made to the court.

**Interest**

In accordance with the standard practice in Brunei we award interest as follows:

1. 3% on the award of special damages from the date of the accident on 8 December 2003 until the date of the judgment by the Deputy Chief Registrar.
2. 6% on the award of general damages from the date of the accident on 8 December 2003 until the date of the above judgment.
3. 6% statutory interest on all judgment awards from the date of judgment until payment.

**Power, P.**

**Mortimer, J.A.**

**Davies, J.A.**