

**Deveraj Muthusamy Veerasamy**  
**Marissa Deveraj Muthusamy Veerasamy**

**... 1<sup>st</sup> Appellant**  
**... 2<sup>nd</sup> Appellant**

AND

**Hj Khairul Pehin Salleh**  
**Hjh Mariam Binti Hj Salleh**

**... 1<sup>st</sup> Respondent**  
**... 2<sup>nd</sup> Respondent**

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**(Court of Appeal of Brunei Darussalam)**  
**(Civil Appeal No. 11 of 2007)**

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Power, P.; Mortimer and Davies, JJ.A.  
**22<sup>nd</sup> May, 2008.**

Quantum of general damages – pain and suffering and loss of amenities – nature of disability – whether plaintiff’s disability caused by accident – importance of evidence of expert – danger of admitting documentary opinion into evidence unless put to and accepted by expert witness.

Mr Adrian and Miss Sarojini Veerasamy (M/S Veerasamy Associates) for the Appellant.  
Ms. Lim (M/S Susanna Lim Partnership) for the Respondent.

**Davies, J.A.:**

***The appeal***

This is an appeal against a judgment of the Intermediate Court on the 28 July 2007 allowing an appeal from assessments of damages for personal injuries made by the Registrar in respect of two plaintiffs who were involved in a motor vehicle accident on 6 December 2004. We should say, at the outset, that we think that the assessments made by the Registrar were generally correct and that, consequently, they should be restored. It is convenient to deal with these assessments separately.

***The first plaintiff***

In respect of this plaintiff general damages for pain and suffering were agreed as follows:

- (a) swelling on the right temporal region - \$4000;
- (b) tenderness over the C4, C5, C6 and C6 dematonic area - \$4000.

Special damages were also agreed.

The dispute before the Registrar and before the Intermediate Court concerned the plaintiff's claim that, in the accident, he suffered a traction injury to the brachial plexus causing weakness to his left arm which prevented him from playing rugby which he enjoyed. It was not contended that this consequence was permanent; on the contrary it was accepted that it would resolve with time though it had not completely resolved by the time of the hearing in the Intermediate Court two and a half years later. The dispute was as to whether the plaintiff had suffered such an injury in the accident or whether whatever symptoms he had were the consequences of the natural progression of cervical spondylosis. It was common ground that the plaintiff had cervical spondylosis, a degenerative condition of the spine and that he had symptoms of this condition, which included aching and stiffness of his neck after playing rugby.

It was uncontested that the plaintiff, notwithstanding that he was 42 years of age, was playing rugby up to the time of the accident. His evidence was that the weakness in his left arm prevented him from playing rugby after the accident.

He was admitted to hospital immediately after the accident where he was seen by Doctor Sardin on whose report the Intermediate Court Judge relied. Dr Sardin noted:

*“Previously he had a long-standing case of neckache which worsened after Road Traffic Incident. Clinically we noted that there were a swelling on right temporal region and mild tenderness on C5, C6 spine without any neurological deficit.*

... ..

*On the 5<sup>th</sup> February 2005, he turned up to A&E Department due to persistent neckache associated with nerve compression symptoms.*

*Due to that he was referred to Neurosurgery Department in RIPAS for further investigation and treatment.”*

Contrary to the last two sentences of the report, Dr Pillay, the neurosurgeon who saw him, said in his report that the plaintiff was referred “for symptom of pain and stiffness of neck and intermittent numbness of left upper limb” and the plaintiff said something similar. When Dr Pillay saw the plaintiff on 15 February 2005, the plaintiff also complained of non-progressive weakness of his left upper limb. Dr Pillay then thought that the plaintiff had sustained an injury to his left brachial plexus at the time of the accident, his history before and since the accident, the symptoms of which he complained, his examination of the plaintiff and his assessment of the radiological evidence which consisted of x-rays and an MRI. Dr Pillay was the only specialist neurologist whose evidence was before the Registrar and the Court. Nor was the evidence of Dr Sardin or the radiological evidence inconsistent with Dr Pillay's opinion. It is therefore understand that the Registrar accepted that opinion and difficult to understand why the Intermediate Court Judge did not do so.

There appear to have been three reasons for this. The first is that Dr Sardin did not, at the time of the plaintiff's admission immediately after the accident, record any complaint of weakness in the plaintiff's left arm or the plaintiff's complaint that he could not turn his head left or right. From this failure the learned judge inferred that no such complaint had been made. She then said:

*“Delay complaint of any pain only raises the suspicion that it is an afterthought, tailored and fabricated to suit the occasion”.*

There are, however, a number of possible innocent explanations for this failure. One is that the plaintiff did not immediately notice this (he was, no doubt, in shock and considerable pain) or that it developed a little later. Another is that the doctor did not ask sufficient questions, or record all of the plaintiff's answers, either of which is credible in a busy emergency department. But we do not think that the absence of such a record is evidence from which an inference should be drawn that no such injury was suffered.

The second reason is that the Intermediate Court Judge saw some inconsistency between, on the other hand, the x-rays and MRI as read by the radiologist, and, on the other, as interpreted by Dr Pillay. In particular, the learned judge thought that Dr Pillay did not appreciate that the radiologist's report had said “nerve root compression is more on the right side” which did not rule out compression on the left side as well. More to the point, in our view, is that the radiologist did not say in that report that there was any nerve root compression on the left side and was not called to give evidence. Consequently, the only expert evidence as to the source of the plaintiff's arm weakness was that of Dr Pillay. And Dr Pillay said:

*“Cervical spondylosis does not give rise to the plaintiff's condition – the disc prolapse is on the right side and relates to cervical spondylosis. The b.p. is on the left.”*

And the third reason which appears to have induced the learned judge to reject the evidence of Dr Pillay is the suspicion that some even after the accident may have caused the symptom of weakness in the left arm. However there was no evidence of any such possible event and that possibility was not even put in the plaintiff.

It follows from what we have said so far that these reasons were not, in our view, sufficient either separately or together to justify rejecting the evidence of Dr Pillay.

There is one further consideration which appears to have wrongly influenced the learned judge in her decision to reject the evidence of Dr Pillay. Both parties put before the court documents the source of which was not proved. Some of these appear to be medical texts; one, we were told, was wikipedia. None of them appear to have been put to Dr Pillay, yet some appear to have found their way into the judgment of the learned judge. One of them, in particular, appears to have influenced the learned judge as the following passage from her judgment illustrates:

“For patients suffering from cervical spondylosis, the common symptoms are:

1. neck pain
2. loss of sensation or numbness in the neck and arms
3. weakness of the arms
4. neck stiffness that progressively worsens

At the time of the accident, the first respondent was already suffering from the first listed symptom, namely a long-standing neckache. Therefore, Dr Saidin’s conclusion that the first respondent suffers from a moderate cervical spondylosis is supported by the x-ray and MRI which spell out a further serious problem of myelopathy, a later stage of cervical spondylosis. When he was examined by Dr Pillay, he complained of stiffness of the neck, intermittent numbness and mild weakness of his left upper limb. These are respectively, item 4, 2 and 3 symptoms listed above.”

In this passage the learned judge appears to be substituting her own diagnosis for that of Dr Pillay. This illustrates the danger of admitting into evidence opinions the authenticity and expertise of which have not been proved. None of these documents should have been admitted into evidence unless and until they had been put to and accepted by a properly qualified expert.

It follows that we think of the learned judge erred in failing to accept the opinion of Dr Pillay and consequently in overruling the award of damages for pain and suffering and loss of amenities in consequence of the traction injury. We think that, with one qualification, the amount awarded under these headings by the Registrar, namely \$15,000 for pain and suffering and \$4,000 for loss of amenities were appropriate. We do not think that there should be separate awards for pain and suffering for the traction injury and for mild weakness in the left arm which was a consequence of the traction injury; that would be doubly compensating the plaintiff for the same thing. We think that the amount of \$12,000 is a sufficient amount for pain and suffering from this injury and its consequences.

### ***The second plaintiff***

General damages in respect of this plaintiff were agreed at \$3500; \$2000 for right lower rib pain and \$1500 for a small bruise on her thumb. The defendant contested that this plaintiff also had bruising on the right thigh and right arm. The Registrar accepted the plaintiff’s evidence about this and awarded an additional \$2000; \$1000 for each bruise.

The learned judge rejected the plaintiffs claim in respect of bruising on the right thigh and right arm. The basis for this rejection appears to have been the absence of any notation by Dr Saidin of bruising in either of these areas. The reason for this, as explained by the plaintiff, was that the bruising appeared only a couple of days later.

The learned judge said:

*“Dr Saidin in his medical report of 7 February 2005 merely recorded small bruise on her right thumb and insignificant pain on her right lower ribs. The damages in respect of these two heads have been agreed. Subsequently, on 3<sup>rd</sup> July 2006, as I understand it on the persistence of Ms Veerasamy, Dr Saidin again made another report where he said ‘patient was not suffering from any bruises on her ribs, thigh or arm as a result of 6<sup>th</sup> December 2004 road traffic accident. However, there is a small possibility of developing a delayed bruise onto any parts of her body several days after the trauma.’*

*This general statement ‘a small possibility of developing a delayed bruise’ seems to have swayed the Learned Registrar into awarding damages for bruises. She has ignored the doctor’s emphatic statement that there were no bruises on her thigh or arm. The second respondent’s evidence is not supported by the medical report and there is no medical evidence that generally, the second respondent has a propensity to delayed bruising. She has failed to prove the facts of her claim on the balance of probabilities.”*

It is a matter of common knowledge, not requiring any medical opinion, that bruising in consequence of trauma may appear hours or even days after the trauma. We do not think that it is necessary to show any peculiar propensity to delayed bruising before accepting the evidence of a person who said that bruising appeared several days later. There being no other reason to disbelieve the plaintiff, we think that her evidence in this respect should have been accepted.

We think that \$1000 for each of these bruises was an appropriate award.

### **Orders**

1. Allow the appeal;
2. Set aside the orders made by the Learned Intermediate Court Judge;
3. Give judgment for the first plaintiff for \$25,802.00 made up as follows:
  - (a) general damages – for pain and suffering \$20,000.00  
- for loss of amenities \$ 4,000.00
  - (b) special damages - \$ 1,802.00
4. Give judgment for the second plaintiff for \$5,500.
5. Order that the respondents pay the appellants’ costs here and below.
6. Order that the respondents pay interest as following:

- a) 6% per annum on the awards for general damages from the date of accident (6<sup>th</sup> December 2004) to the date of judgment (5<sup>th</sup> March 2007);
- b) 3% per annum on the awards for special damages from the date of accident (6<sup>th</sup> December 2004) to the date of judgment (5<sup>th</sup> March 2007);
- c) Statutory interest of 6% per annum on all judgment sums from the date of Judgment (5<sup>th</sup> March 2007) to the date of full and final settlement.

7. Order that the appellant have interest on

- a) their costs before the Registrar from 5 March 2007
- b) their costs before the Intermediate Court from 28 July 2007
- c) their costs before this Court from 22 May 2008.

8. This Court is concerned that some of the written material before this Court was unnecessary for the decision of this Court on appeal. The Court directs that the Taxing Master give close attention to this question when assessing costs.