



## JUDGMENT

### KANGALOO J.A.

On the 7<sup>th</sup> October 1998 Peter Seepersad was driving his taxi, motor vehicle HAN 4075 along Freeport Mission Road, Freeport when motor vehicle PAP 5085 owned and driven by Theophilus Persad ran off the Sir Solomon Hochoy Highway, somersaulted in the air and fell on top of Peter Seepersad's taxi, killing two of his passengers and causing personal injury to Seepersad. Seepersad obtained judgment in default of defence against Persad on the 16<sup>th</sup> April 1999 and against Capital Insurance Limited on the 22<sup>nd</sup> October 1999, when Capital Insurance Limited was ordered by consent to indemnify Persad and pay to Seepersad any judgment, interest and costs awarded to Seepersad pursuant and subject to the provisions of the Motor Vehicle Insurance (Third Party Risks) Act as amended.

The assessment of damages was eventually commenced before Lucky J. (as he then was) on the 15<sup>th</sup> March 2000. These two appeals (both coincidentally filed on the same day, the 25<sup>th</sup> July 2000) arise from the decisions of the learned judge given on the 16<sup>th</sup> June 2000 in respect of the quantum of damages and on the 20<sup>th</sup> June 2000 in respect of costs. Seepersad in his appeal has appealed against both decisions.

In his reserved judgment the learned judge said:

*“ For the reasons set out above, I award damages as follows:*

<i>Special Damages</i>	<i>\$ 45,491.00</i>
<i>General Damages</i>	<i>\$150,000.00</i>
<i>Loss of Future Earnings</i>	<i>\$ 95,000.00”</i>

It is to be noted that certain items of Special Damages were agreed, totalling \$45,991.45. These were as follows:

<i>“Loss of Motor Vehicle agreed at</i>	<i>\$28,500.00</i>
<i>Medication and Bills</i>	<i>\$16,991.45</i>
<i>Travelling agreed at</i>	<i>\$ 500.00”</i>

It follows that in the award of Special Damages there was no sum allowed for loss of earnings from the date of the accident until the trial, although this was pleaded in the statement of claim.

Seepersad (‘the appellant’) appealed all three of the awards set out above as well the learned judge’s decision of the 20<sup>th</sup> June 2000 to award costs fit for only one counsel. His main ground of appeal is that the awards were inordinately low in that the learned judge

- “(a) underestimated the extent of injury suffered by the Appellant and the time during which the Appellant will undergo pain, suffering and loss of amenity (sic);*
  
- (b) underestimated the appellant’s loss of income as a taxi driver and mechanic. (The judge had wrongly refused an amendment to include loss as a mechanic);*
  
- (c) considered that the Appellant would suffer financial loss as a taxi driver and mechanic but did not attempt to adjudicate upon the loss to find a multiplicand and did not adjudicate upon a multiplier both of which were necessary for a proper adjudication of the Appellant’s damages in respect of loss of earning capacity.”*

At the hearing of the appeal senior counsel for the appellant sought and obtained without objection leave to amend his notice of appeal to include in the grounds of appeal the complaint that *“the learned judge made no award*

*for damages for the appellant's loss of earnings from the 7<sup>th</sup> October 1998 to the date of judgment."*

On the other hand Persad and the Insurance Company ('the respondents') contend in their notice of appeal that the awards for general damages and loss of future earnings are inordinately high and against the weight of evidence.

The issues therefore which arise for determination are as follows:

1. Whether the award for general damages for pain and suffering and loss of amenities (exclusive of loss of future earnings) is inordinately low or inordinately high.
2. Whether the award for special damages should be increased by a sum representing the appellant's loss of earnings from the date of the accident to the trial.
3. Whether the award for loss of future earnings is inordinately low or inordinately high and more specifically, whether a multiplier and a multiplicand should have been used by the learned judge to quantify this head of damages.
4. Whether the learned judge erred in the exercise of his discretion by awarding costs fit for one counsel only.

### **General Damages**

*"The classic statement of the grounds upon which the Court of Appeal will interfere by reassessment of the damages appears in the judgment of Greer LJ in Flint v Lovell (1935) 1KB 354 'This Court' he said:*

*'will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled'.*

*This statement was approved and adopted in the House of Lords in **Davies v Powell Duffryn Collieries** (1942) AC 601 by Lord Wright and by Lord Porter and again by the Judicial Committee of the Privy Council in **Nance v British Columbia Electric Ry** (1951) AC 601". See McGregor on Damages 14<sup>th</sup> Ed. Para. 1568.*

I respectfully adopt Greer LJ's statement in **Flint v Lovell**.

Before the learned trial judge Dr. Rasheed Adam, a specialist in neurosurgery and neurology as well as Dr. Stephen Ramroop, a consultant orthopaedic surgeon and trauma surgeon testified on behalf of the appellant. Dr. Krishna Maharaj a neurosurgeon who had examined the appellant at the respondents' request testified on their behalf. In addition the learned judge had in evidence:

- (i) a medical report of Dr. Siuchan Sookhoo, a house officer of the neurosurgery department of the Port of Spain General Hospital to which the appellant was admitted on the 7<sup>th</sup> October 1998;
- (ii) the medical report of Dr. Stephen Ramroop dated the 23<sup>rd</sup> August 1999 attached to which were the doctor's notes;
- (iii) a medical report of Dr. Steve A. Mahadeo, a neurosurgeon dated the 6<sup>th</sup> January 1999;

- (iv) the report of Dr. Krishna Maharaj dated the 24<sup>th</sup> January 2000;
- (v) the report of Dr. Rasheed Adam dated the 9<sup>th</sup> December 1999;
- (vi) the report of Dr. Rasheed Adam dated the 10<sup>th</sup> January 2000; and
- (vii) a report of Dr. Parmanand Maharaj, a radiologist, on an MRI scan of the appellant.

It is a fair assessment of the medical evidence to say that the main cause of the appellant's continuing complaints is an L5 S1 disc herniation and to a lesser extent a wedge fracture at the T12/L1 level. As the learned judge noted "*each of the medical experts saw the Plaintiff on different dates and their findings were substantially the same.*" Where the medical experts parted company was in respect of an assessment of "*permanent partial disability*". Each expert with the exception of Dr. Sookhoo gave an estimate of the appellant's permanent partial disability. For Dr. Ramroop it was 48%, for Dr. Mahadeo it was 45%, for Dr. Krishna Maharaj it was 29% and for Dr. Adam it was 50%. In assessing the medical evidence the learned judge said: "*All the consultant experts were very helpful. However I find that Dr. Maharaj's evidence, which amplified and explained his written report to be of assistance to the Court.... Dr. Maharaj's expertise in his field was evident, not only did he simplify and explain the medical terminology but he also related his medical findings to his keen sense of observation prior to during and immediately after examination of the patient. In a matter such as the instant case where several experts have provided reports and given evidence, the judge, not being a medical expert ought not to be judgmental and accept the evidence of one expert and reject or partially reject the others.*" The judge therefore in proceeding to assess the damages was largely guided by the evidence of Dr. Maharaj. However the learned judge gave no reason for disregarding the evidence of any of the other doctors. In this case the real difference among the doctors was in the extent of

the permanent partial disability, but in the learned judge's reasons there is nothing to indicate a basis for rejecting Dr. Adams' 50% assessment or Dr. Ramroop's 48% or Dr. Mahadeo's 45%. Presumably the learned judge's reference to Dr. Maharaj's keen sense of observation was in respect of that aspect of Dr. Maharaj's report which said that the appellant *"sat in and got out of the chair quite easily with no obvious discomfort and without using the arm rests of the chair. He was able to sit in the chair, flex his right thigh, lean forward flexing his neck and untie the shoelace and remove his right shoe with no obvious discomfort. He was able to do same on the left with no obvious discomfort. He removed his soft cervical collar very easily and was able to flex his neck very easily to look at the buckles of his lumbar brace while removing the lumbar brace. Mr. Seepersad was able to manage monopodal stance adequately on either leg, while standing on his right leg he flexed his right knee and then straightened his right lower limb while bearing his entire body weight on the right lower limb."*

The learned trial judge was perfectly entitled to find that the appellant exaggerated the effect of his injuries and that this exaggeration was discerned by Dr. Maharaj because of his keen sense of observation and not by the other doctors if one is to judge by their evidence.

On the issue of *"permanent partial disability"* I have noted that doctors generally in their medical reports resort to an assessment of a plaintiff's disability in terms of a percentage figure. I have no doubt that the origin of this practice is to be found in the Workmen's Compensation Act where the amount of compensation payable to a workman injured at work is determined by a mathematical formula, one element of which is the percentage of incapacity caused by the injury. In the Act the term used is *"partial disablement"* which is defined solely by reference to earning capacity. *'Permanent partial disability'* is not a term of art in the context of the assessment of damages at common law and one wonders whether doctors

have a common understanding of what it means as they tend to give percentage assessments which differ markedly, as in the instant case. The case of **Victor Cornilliac v Griffith St. Louis** (1965) 7 WIR 491 sets out the matters to be considered by a Court in assessing damages for personal injury.

They are as follows:

- (a) The nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability;
- (c) the pain and suffering endured;
- (d) the loss of amenities suffered; and
- (e) the extent to which consequentially, the plaintiff's pecuniary prospects have been materially affected.

The “*permanent partial disability*” percentage is relevant to consideration (e) and possibly in a very general way to (b). An explanation of the effect of injuries on a person's earning capacity in words as opposed to figures, would be of greater use to the Courts in their assessment of damage at common law. It is suggested respectfully that doctors set out in their reports, together with the basis for their conclusions, their opinion on how the injury suffered is likely to affect the lifestyle and earning capacity of the injured Plaintiff, and leave percentages of incapacity for Workmen's Compensation cases.

In his judgment, the learned judge referred to no local authorities in which the injuries were similar to those suffered by the appellant. The case of **Selvanayagan v U.W.I.** (1983) 1 WLR 824 at 828e is in effect an authority for the proposition that awards for general damages for pain and suffering and loss of amenities must be in keeping with the trend of local awards for similar injuries. Similarly, senior counsel for the appellant did not refer either in his skeleton arguments or in his oral presentation, to any trend of local awards for injuries similar to those suffered by the appellant. Counsel for the respondents referred the Court to several. The first was **H.C.A. No. 810/72 Valdez v Samlal** where the injury was disc herniations at the lumbar 4<sup>th</sup> and

5<sup>th</sup> and lumbar 5<sup>th</sup> and sacral 1<sup>st</sup> levels. The plaintiff was awarded \$8,000 for pain and suffering and loss of amenities in 1976. This figure updated to October 2000 is \$63,172, according to counsel. He next referred to **H.C.A. No. 2341/79 Deyalsingh v Mayor & Ors. of Port of Spain** where the Plaintiff suffered a wedge compression fracture of the twelfth thoracic vertebra. There was no hope of the Plaintiff's condition improving and it was inoperable. There was the possibility of the Plaintiff eventually not being able to work at all. He suffered a personality change. He was awarded \$25,000 for pain and suffering and loss of amenities in 1980. This award updated to October 2000, Counsel says, is \$117,128. Counsel then referred to **H.C.A. No. S2620 of 1987 Anjanie Balkaran v Billy Ramhit & Or.** The Plaintiff there suffered a wedge compression fracture of the 12<sup>th</sup> thoracic vertebra and a C6, 7 fusion at the subluxation site. She was awarded \$45,000 in 1989 for pain and suffering and loss of amenities which Counsel says is \$84,048 when updated to October 2000. Another case referred to by Counsel was **H.C.A. S883/88 Nerahoo Sookoo v P.T.S.C.** in which the injuries were very similar to those suffered by the appellant. The Plaintiff there while at work fell down 12 steps and suffered a herniated disc at the L5/S1 level. He was awarded \$36,200 as general damages for pain and suffering and loss of amenities in January 1993. This award was affirmed by the Court of Appeal in 1998 and Hamel-Smith JA said that while he might have awarded a lower figure, he could not say that the award of the trial judge was inordinately high. Counsel contends that the updated figure to October 2000 is \$40,525. Other cases referred to by Counsel were **H.C.A. 696/96 Richardson & Ors v Kiss Baking Company Limited** in which Counsel agrees the back injuries sustained were less severe than in the instant case and an award of \$35,000 was made in January 2000; and **H.C.A. No. 6036/88 A. Pemberton v Hi Lo Food Stores Ltd.** in which the Plaintiff slipped and fell and thereby aggravated an existing degenerating disc problem. He was placed in a plaster of paris cast for 5 months and suffered dizziness and headaches. He was awarded \$85,000 in April 1995 which is \$105,422 updated to October 2000.

Such is the state of the authorities from which any discernible trend is to be gleaned.

In the case of **Aziz Ahamad Ltd. v Raghubar (1976) 21 WIR 357** Wooding CJ said “... *in looking at past cases it is essential to remember that they serve no more than as a guide. They so to speak provide a general standard or judicial consensus, but are nevertheless referable to their own particular facts... in weighing up all the relevant considerations it should be borne in mind that every decision may have some effect one way or the other in establishing a trend. Indeed past decisions are helpful only when they establish a trend.*”

Given these authorities I think that the range of awards for this type of injury is between \$40,000 and \$120,000, ranging from that class of case with moderate lasting effect to the most severe consequences of a back injury. It follows that the award of \$150,000 is grossly excessive.

The evidence revealed that as a result of the accident, the appellant was hospitalised from 7<sup>th</sup> October 1998 to 12<sup>th</sup> October 1998 when he was discharged to the out-patients' clinic. At the hospital he was diagnosed as having cerebral concussion and was referred to the neurosurgical unit. At that unit he was assessed as having suffered a whiplash injury and the x-rays revealed pre-vertebral swelling. Due to the pain he was unable to ambulate independently. At the hospital he was placed in a cervical collar and treated with anti-spasmodic agents to facilitate adequate pain relief. He later saw Dr. Stephen Ramroop who diagnosed him as having suffered a disc herniation at the L5 S1 level which caused moderate to severe pains and stiffness with depressed reflexes and paraesthesia in the left and right feet. According to Dr. Ramroop his condition was only expected to improve slightly. Dr. Ramroop recommended physical therapy and rehabilitation of his muscles. He

concluded that the appellant also needed psychological rehabilitation to come to terms with the accident and the injury. He thought that the appellant would need further care of his back in the form of trigger point injection or epidurals and even surgery in the future. Dr. Krishna Maharaj concluded that the herniated degenerated lumbar disc was the appellant's main problem. He thought that this lesion would most probably deteriorate in the future. The appellant's weight would accelerate the deterioration and he might have compression of both S1 nerves in the future. In his evidence, the appellant testified that he was given a neck collar to relieve the pain but he did not like to wear it. He also said he was given a brace to hold his ribs and spine together which he had to wear if he was out for long hours. He could not wear these items when he slept. He had problems sleeping and used sedatives to help. He said he could not bathe himself as he could not bend. His wife had to assist him. He could not bend over the sink. He could not sit or walk for very long. When he lay down someone had to help him to get up. It was painful to have sex. He got nightmares and was depressed. He had put on weight since the accident because he could not exercise.

The appellant suffered these injuries in a very traumatic accident. Undeniably he still suffers pain, though not to the extent which he claims, as discerned by Dr. Maharaj. Kerwin Simmons, a witness for the respondents, observed the movements of the appellant at his home on the 23<sup>rd</sup> November 1999. He saw the appellant walk down the front stairs of his house lifting his two-year old daughter in his arms. He saw him put down the girl and bend and open the front gate. He again bent and closed the gate, bent again and lifted his daughter and walked about 200 yards to a bar where he purchased a soft drink for the child. He then walked back home, bent and opened the gate and lifted the child to take her up the stairs. Simmons observed that the appellant had a slight limp but was not wearing the cervical collar. Simmons later observed the appellant come down the stairs open the gate as before and drive a motor vehicle to a grocery where he stayed for about ten minutes before emerging

carrying two medium sized grocery bags. The evidence of Simmons substantiates Dr. Maharaj's conclusion that the appellant exaggerated the effects of his injuries.

The appellant led evidence of the medicines he has to take for relief of his pain. He uses valium, a sedative and voltaren, a muscle relaxant which cost respectively \$1.20 and \$8.00 per tablet. Additionally both Dr. Maharaj and Dr. Ramroop in their reports were of the view that surgery might be necessary sometime in the future, though Dr. Maharaj conceded that there are always risks associated with surgery and Dr. Ramroop thought that surgery "*may assist in some of his pain*". There was no evidence led of the cost of the surgery to relieve the pain associated with the disc herniation but Dr. Ramroop testified that if spinal fusion surgery is needed the cost could range from \$25,000 to \$65,000. There was no evidence that spinal fusion surgery was necessary either at present or in the future.

In the circumstances I am of the view that an award of \$75,000 for the non-pecuniary loss of the appellant would meet the justice of the case. Included in that figure is a small amount for the cost of future medical treatment based on the evidence led.

#### **Special Damages/Pretrial Loss**

It is conceded by the respondents that the learned judge fell into error by not making an award for loss of earnings up to the date of trial. Counsel for the respondents also concedes that \$200 per day is a fair estimate of the appellant's pre-accident net earnings from the operation of his taxi but argues that this figure should be reduced by 25% to take account of taxes, holidays and sickness. Some allowance must also be made for times when the vehicle would be undergoing repairs or maintenance. I agree with Mr. Sanguinette that the figure of \$200 per day should be discounted by at least 25% to take account of these matters. A more difficult problem arises with respect to the

claim for loss of earnings as a mechanic. The appellant had not pleaded in his statement of claim that he was a mechanic. The evidence was led apparently without objection that he was a mechanic. He said *“I also worked as a mechanic. Since 1990 I started a garage. Before I worked for other people. I started to do mechanic when I left school. I was 14 years.”* The appellant then gave evidence of his earnings as a taxi driver but when he attempted to give his earnings as a mechanic the objection was taken that this was not pleaded. An application to amend the statement of claim for this purpose was refused. It should be noted that the appellant’s evidence came on the third day of the assessment which started on the 15<sup>th</sup> March 2000 and continued on the 16<sup>th</sup> March when it was adjourned to the 21<sup>st</sup> March. On that day after the appellant’s case was closed Dr. Maharaj gave evidence and the matter was adjourned to the 23<sup>rd</sup> March for Kerwin Simmons to give evidence on behalf of the respondents. The matter was then further adjourned to the 28<sup>th</sup> March for addresses which continued on the 29<sup>th</sup> March when judgment was reserved.

I am of the view that the learned judge erred in refusing to grant leave to amend the statement of claim. To do so would not have caused any prejudice to the respondents that could not have been adequately remedied by appropriate orders. The respondents could quite reasonably say that they were taken by surprise by the amendment and needed to obtain particulars of the appellant's occupation as a mechanic, - e.g. where his shop was located, who his customers were and the like. These particulars could have been ordered and ought to have been available almost immediately. Most likely an opportunity would have been sought by the respondents to verify these particulars. All of this could have been accommodated by a short adjournment. Such an adjournment need not have delayed the completion of the assessment more than marginally given the course which the hearing in fact followed thereafter as set out above.

It must not be thought that I am condoning the lack of proper preparation by attorneys of their clients' cases. Surely if the appellant's case had been properly prepared, his proof of evidence would have mentioned that he was a mechanic and the Statement of Claim would have contained that plea. But the Court's purpose is to avoid injustice being suffered by one party as a result of his attorney's default if that can be achieved without causing injustice to his opponent or subverting the authority of the Court's procedural rules. If the appellant were debarred from recovering damages for loss of a significant part of his livelihood, that would constitute a serious injustice.

Notwithstanding that the amendment was not granted the learned judge received the following evidence from the appellant: *"I worked as a mechanic six (6) days. I do small jobs. I turned up cars, checked the suspension... ...it will be very hard to work as a mechanic. I cannot sit for long. To work as a mechanic you need to lift. If I had to work as a mechanic I would make an average \$120 - \$150 per day."* It is to be noted that this evidence was not tested in cross-examination presumably because of the ruling of the learned judge. It is to be noted that despite his ruling the judge included in his award for future loss of earnings compensation for the appellant's loss of earnings as a mechanic. This highlights the incongruity of refusing to include it in the award of damages for accrued loss of earnings.

Taking into account the appellant's propensity to exaggerate it is not unreasonable to take the sum of \$100 per day as representing his earnings as a mechanic prior to the accident. This sum, like the \$200 per day as a taxi driver, should be discounted by 25% to take account of taxes, holidays and sickness. The evidence from the appellant is that he did not work as late on Saturdays so that his net earnings as a taxi driver on Saturday could reasonably be taken at \$100 and as a mechanic at \$50. Applying these figures his net earnings would have amounted to \$1,650 per week. This has to be discounted by 25% so that his weekly loss was \$1,237.50. Using the rounded

off figure of \$1,240 and applying it to the period of 77 weeks, from 7<sup>th</sup> October 1998 to the 29<sup>th</sup> March 2000 (the date on which judgment was reserved) produces a figure of \$95,287.50 for the appellant's loss of earnings up to the date of trial.

### **Loss of Future Earnings**

In his judgment the learned judge says after making the award of \$95,000 for loss of future earnings: *“This is based upon the Plaintiff's evidence that he was a part-time mechanic and full-time taxi driver. He can no longer work as a mechanic. I rely upon the evidence of Dr. K. Maharaj who found there is 29% total disability.”* This was the only explanation the judge gave for his award of \$95,000 for loss of future earnings.

*“The Courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the Plaintiff has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the Plaintiff's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has now come to be referred to as the multiplicand. Further adjustments, however, may have to be made to multiplicand or multiplier on account of a variety of factors, viz. the probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidence of inflation and taxation....”*

**See McGregor on Damages 14<sup>th</sup> Ed. Para. 1164**

The appellant testified that he was unable to work anymore as a taxi driver or mechanic because of the pain he suffered as a result of his injuries. Dr. Ramsahoye contends that his client cannot work for the rest of his life as he

left school at age 14, and cannot be retrained now. The only thing that he is capable of doing besides what he was actually doing before the accident, is to work as a labourer and since he cannot now lift heavy objects, that is out of the question. Dr. Maharaj's evidence in chief in answer to the question whether the appellant could drive his taxi was: *"If he sits for six to eight hours he will have pain. He can manage for four hours."*

The appellant's evidence is that he drove his taxi for a total of 6 ½ hours (in two spells) in the course of a day. Dr. Maharaj says that he will be able to drive for 4 hours. If that is right, it means that the appellant has lost 38% of his earning capacity as a taxi-driver. Similarly in answer to the Court as to whether he could work as a mechanic he said: *"it will be very hard to work as a mechanic"* but he did not rule it out altogether. In any event the appellant has been awarded a sum of \$95,287.50 as his pre trial loss of earnings and he has also been awarded \$28,500 for the loss of his taxi, not to mention the \$75,000 for pain and suffering and loss of amenities. It would be open to him to employ someone to operate his taxi either full-time or in tandem with him. Similarly he could re-open his mechanic shop and employ an assistant to work under his supervision and direction. I do not agree therefore that the appellant is wholly incapable of earning an income. The income that he can earn will undoubtedly be reduced by the need to employ someone to do at least part of what he used to do himself. Guided by Dr. Maharaj's evidence (which the judge evidently preferred to that of the other doctors) I would use a multiplicand of \$23,000 per annum which represents slightly more than 35 per cent of the estimate I have already made of the appellant's pre-trial loss of earnings. At the date of the trial the appellant was 37 years old. No evidence was led about the age at which taxi drivers retire if they ever do, nor of the risks incidental to that type of occupation, which however cannot be insignificant in this country these days. It is conceded that the selection of a multiplier is a somewhat arbitrary process but I am of the view that a multiplier of 10 is not unreasonable in this case. Using this approach the

appellant's loss of future earnings will be \$230,000 instead of the \$95,000 awarded by the learned trial judge.

### **Costs**

The learned judge gave his decision on costs on the 20<sup>th</sup> June 2000 after argument by junior counsel for the appellant and instructing attorney for the respondents. The learned judge said:

*“Costs are in the discretion of the judge who is guided by the principles set out in Order 62 of the Rules of the Supreme Court.”*

In exercising his discretion the learned judge specifically examined two issues viz.:

- “1. The complexity of the matter and difficulty or novelty of the questions of law involved.*
- 2. The skill, specialised knowledge and responsibility required of and time and labour expended by counsel.”*

Having examined these factors the learned judge awarded costs fit for one counsel only.

Dr. Ramsahoye before us supplied the authority of **Kroehn v Kroehn (1912) 15 CLR 137** which sets out the test as follows:

*“The test for determining whether the costs of a second counsel should be allowed is whether a prudent man not compelled by poverty would have ventured into Court without two counsel.”*

The law as it relates to an appeal from an order made in the exercise of a judge's discretion is set out in **The Supreme Court Practice 1997, Volume 1 at page 947, 59/1/59:**

*“There are many authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he exercised his discretion under a mistake of law or in disregard of principle or under a misapprehension as to the facts, or that he took into account irrelevant matters or failed to exercise his discretion or the conclusion which the judge reached in the exercise of his discretion was 'outside the generous ambit within which a reasonable disagreement is possible'.”*

Dr. Ramsahoye says only that the judge was wrong in holding that it was not necessary for senior counsel to represent the Plaintiff.

It is my view that the learned judge gave his reasons for limiting costs to one counsel and that in so doing he committed none of the transgressions enumerated in the passage quoted above from the Supreme Court Practice. Even if the learned judge did not expressly state and apply the test in **Kroehn v Kroehn**, the reasons he did give indicate that even if he had, his conclusion would have been the same. In the circumstances I find no merit in this ground of appeal.

For the reasons I have set out I would allow the appellant's appeal in part

- (a) by increasing the award of Special Damages by \$95,287.50. The total award for Special Damages is now therefore \$140,778.50 which will attract interest at the rate of 3% per annum from the 7<sup>th</sup> October 1998 to the 16<sup>th</sup> June 2000 and thereafter at the relevant statutory rate.
- (b) by substituting the figure of \$230,000 for the figure of \$95,000 awarded by the judge for loss of future earnings. This sum will not attract interest.

I would also allow in part the respondents' appeal by substituting the figure of \$75,000 as damages for pain and suffering and loss of amenities for the sum of \$150,000 awarded by the judge. This figure of \$75,000 attracts interest at the rate of 6% from the date of service of the writ of summons until the 16<sup>th</sup> June 2000 and thereafter at the relevant statutory rate.

The awards are therefore as follows:

- (a) Damages for pain and suffering and loss of amenities:  
\$75,000 with interest at the rate of 6 per cent per annum from the date of service of the writ of summons until the 16<sup>th</sup> June 2000 and thereafter at the relevant statutory rate.
  
- (b) Special damages in the sum of \$140,778.50 together with interest thereon at the rate of 3 per cent per annum from the 7<sup>th</sup> October 1998 to 16<sup>th</sup> June 2000 and thereafter at the relevant statutory rate.
  
- (c) Damages for loss of future earnings in the sum of \$230,000. This sum will not attract interest.

As a result of the conclusions I have come to I am of the view that the respondents should pay the appellant one half of the appellant's costs of both appeals.

These costs are to be taxed in default of agreement certified fit for one Counsel.

Wendell N. Kangaloo  
Justice of Appeal

