

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 08.12.2016

Judgment Pronounced on : 30.06.2017

CORAM : THE HONOURABLE Mr. JUSTICE N.SESHASAYEE

CMA.Nos.253 of 2002 & 1574 of 2009**CMA.No253 of 2002 :**

- 1.Tamil Nadu Pollution Control Board,
Rep. by Senior Manager (P & A),
32, Santhome High Road, Chennai - 600 004.
- 2.The United India Insurance Company Ltd.,
38, Anna Salai,
Chennai - 600 002. ... Appellants

Vs.

- 1.Murtuza
(1st respondent declared as major and discharged the
the guardian from his guardianship vide order dated
21.4.2003 made in CMP.No.5274 of 2002)
- 2.M.Abdul Rehman
- 3.The Oriental Insurance Co. Ltd.,
8, Esplanade
Chennai - 600 108. ... Respondents

CMA.No1574 of 1999 :

- Murtuza
Rep. by its father & next friend M.Akbar ... Appellant

Vs.

- 1.Tamil Nadu Pollution Control Board,
Rep. by Senior Manager (P & A),
32, Santhome High Road, Chennai - 600 004.
- 2.The United India Insurance Company Ltd.,
38, Anna Salai, Chennai - 600 002.
- 3.M.Abdul Rahaman

4.The Oriental Insurance Co. Ltd.,
 Motor Third Party Cell,
 8, Esplanade Road, Chennai - 600 108. ... Respondents
 (Respondents 3 & 4 in MCOP are not necessary party
 in CMA and is hereby given up)

Common Prayer : Civil Miscellaneous Appeals filed under Section 173 of Motor Vehicles Act 1988 against the award and decree dated 30.3.1998 made in O.P.No.2111 of 1992 on the file of the Motor Accident Claims Tribunal , (IV Small Causes Court), Chennai.

In CMA.No.253 of 2002 : For Appellant :Ms.Sowmiya
 For Respondents :No appearance

In CMA.No.1574 of 2009 : For Appellant :Ms.A.Salomi
 for Mr.L.Mohan Rao
 For Respondents :No appearance

COMMON JUDGMENT

In a case where two vehicles were involved in an accident, the insurance company of one of the vehicles and the claimant have come forward with two separate appeals, the former for apportioning the liability and the latter for enhancing the compensation awarded.

2. On 10.04.1992 at about 8.50 a.m., an auto bearing No. TC V 1607 belonging to the third respondent before the Tribunal and insured with the fourth respondent, the Oriental Insurance Company, proceeded from north to south direction along Santhome High Road. When it reached the Pollution Control Board, the jeep bearing Registration No.TM G 4484 belonging to the Tamil Nadu Pollution Control Board came out of its office premises and as the auto crossed the jeep, the left leg of a certain child named Murtuza who is

seated inside the auto came into contact with the bumper of the jeep and in this accident the boy Murtuza eventually lost his left leg below the knee as the same required amputation. The boy was aged 11 years and was studying in VI standard in a premier school in the city and for the injuries suffered on various heads, compensation of Rs.3,55,000/- was sought before the Tribunal against which the Tribunal has passed an award of Rs.2,63,000/-. So far as the permanent disability of the child is concerned, the medical assessment made available through P.W.2 is 55% and the Tribunal has awarded consolidated sum of Rs.1,00,000/- on this head.

3. The learned counsel for the appellant argued that it is a case where the said auto was loaded heavily with school going children and was plying from north to south along Santhome High Road, and the driver of the jeep who was examined as R.W.1, took all the precautions before emerging from Pollution Control Board office on to the main road, and therefore, there was no negligence on his part. It is not a case argued the counsel where two vehicles came from opposite direction and the accident had occurred on an error of judgment of both the drivers, but it is an accident where the alleged offending vehicle was coming from inside the campus of Pollution Control Board on to the main road almost perpendicular to the line of motion of the auto and since the offending vehicle moved from a static position it could not have been driven rashly or negligently lest there would have been a major injury to all the inmates of the auto. It is in evidence that no damage was caused to both the vehicles and only the left leg of the claimant came hit on the bumper of the jeep resulting in the

accident. Could the accident have occasioned if the child's left leg was not protruding outside the auto? It is therefore obvious that the victim-boy could not even keep his limbs intact inside the auto and therefore the driver of the auto cannot escape liability arising out of his own negligence in not taking care of young children to who he owed special duty in law and therefore, that the liability fastened exclusively on the Pollution Control Board and its insurer namely the appellants in CMA.No.253 of 2002 must be reduced and shall be apportioned equally with the owner and the insurance company of the auto rickshaw.

4. Per contra, the learned counsel for the claimants contended that the entire negligence was on the driver of the appellant and in any case, it is a case of composite negligence of joint tort feasons and therefore drivers of both the vehicles might be responsible for the accident and hence both would be liable for to meet the claim jointly and severally and the claimant can opt to realise the amount from anyone of them. To fortify the arguments the counsel placed before the Court the authority of the Hon'ble Supreme Court in ***Khenyi Vs New India Assurance Co., Ltd., & Others*** [2015 ACJ 1441 : 2015 (1) TN MAC 801]

5. Turning to the quantum, the learned counsel claimant contended in support of his appeal in CMA.No1574 of 1999 that it was a case where a 11 year old boy has lost substantial opportunities in pursuing his career owing to loss of his leg. The Tribunal therefore should have been far more realistic in awarding the

compensation at such just and fair level instead of awarding a moderate and a consolidated amount of Rs.1,00,000/- Even on the heads of pain and suffering only Rs.15,000/- has been awarded, more so in a case where the boy had to be treated in the hospital for 33 days. In short, the learned counsel argued that every heads of compensation may be suitably enhanced to make it as just and as fair under circumstances consistent with the principles evolved in course of march of law. In aid of her submissions the learned counsel placed reliance on the authorities in ***R. Venkatesan Vs V. Jaganathan and others*** [2015 ACJ 747].

6. Dynamics of no accident can be explained with accuracy nor any accident can be recreated on a piece of paper to fix liability in law, since duty to care varies with and influenced by multiple factors converging at the moment of an accident. The soul of law of negligence is duty to care and hence an individual's role in an accident is judged essentially in terms of his opportunity to avoid an accident. This is an accepted rule of the thumb.

7. What therefore are the factors responsible for a young boy losing his leg and losing his future prospects in life? The appellant wants this Court to believe that the auto rickshaw driver's callousness in stuffing his auto with children to the extent that the victim's leg was caused to protrude or hang outside the auto has contributed in equal terms to the loss of the child's leg. That a child's right to safety receives little acknowledgment in public except when a calamity occurs is an unfortunate reality of the contemporary times. And the law

enforcing agency's enthusiasm to prevent a situation where a child's right to safety is breached has been sparse and largely selective. However, can callousness of one kind grant any licence to another to drive a vehicle to contribute to an accident. Here is a driver of a jeep who brings the vehicle from a stationary position on to the highway during peak hour when the road would be generally congested with vehicular traffic. His duty to care then ought to have informed him of the need to anticipate all that might be a familiar and a common place activity on a main road, and then to take such precaution as was required to be taken. In ordinary course of human life, duty to care manifests in one's ability to anticipate an accident and it should not be construed as a resulting residue of a post-accident analysis which Tribunals are required to engage in when called upon to fix responsibility for an accident. It is therefore necessary to consider whether in the ordinary course of human conduct could the driver of the offending vehicle have anticipated a situation that he encountered shortly before the accident, and was he or was he not in the best position to anticipate what might happen if he were to enter the main road without adequate precaution. On this parameter this Court holds that the driver of the offending vehicle had a greater opportunity to anticipate since an auto-rickshaw on the highway cannot possibly anticipate a vehicle to emerge on its line of motion. Accordingly, the driver of the offending vehicle had the last opportunity to avoid an accident and necessarily he failed in his duty to care. It must be stated that it operates de hors the alleged irresponsibility of the driver of the auto if any, in ensuring that the child-passenger in it was safe. Factually too, except the self serving evidence of the driver of the offending vehicle as

R.W.1., there is no other evidence that the boy's leg was hanging outside the auto. This Court therefore holds that there is hardly any material to interfere with the finding of the Tribunal below that negligence of the driver of the offending vehicle has resulted in the accident.

8. Turning to quantum, the approach of the Tribunal in awarding a consolidated amount could hardly be appreciated. It is not any *exgratia* amount that the Tribunal grants, but compensation awarded on just and fair evaluation of materials available. It's not the loss of a leg that is required to be priced by the Tribunal but award of compensation for the loss to quality of one's life owing to loss of leg. The boy's choices to pursue a course of his choice, his avocation, hobbies and interests, marital prospects are robbed from him. He could not dream of becoming a sportsman, nor could he be trek mountains easily. Can he join armed services? Here the Tribunal should have been far more sensitive to the realities that was thrust on a helpless child. It should have appreciated that the loss the boy was forced to endure is for the rest of his life and not just the possibility for an alternate avocation or studies. Who in this free country has the license to prescribe what one should do or should not except the law?

9. The boy was aged a bare 11 years at the time of accident and given his future career prospects, the compensation payable must be founded on loss of functional ability of the boy. This Court determines the same at 70%. Fixing

his income notionally at Rs.4,000/-, the total amount payable on the head of loss of earning capacity is determined at [Rs.4,000 x 12 x 18 x70%] is Rs. 6,04,800/-. On the head of pain and suffering the compensation is enhanced to Rs.1,00,000/- As to the rest, the award of the Tribunal is confirmed.

10. The total amount now awarded is tabulated as below:

Heads of compensation	Awarded by Tribunal (Rs.)	Awarded by this Court (Rs.)
Travelling Expenses	8000	8000
Extra Nourishment	5,000	5000
Loss of Education	10,000	10,000
Medical Expenses	80,000	80,000
Attender Charges	5,000	5,000
Pain and suffering	15,000	(+85,000)1,00,000
Disability	1,00,000	(-1,00,000)Nil
Loss of earning capacity	40,000	(+5,64,800)6,04,800
Total	2,63,000	8,12,800

11. In total the compensation amount is enhanced by Rs. 5,49,800/- and the total compensation amount is enhanced from Rs. 2,63,000/- to Rs. 8,12,800/-. The second respondent/insurance company in C.M.A.No.1574 of 1999 is directed to deposit the enhanced amount with interest at 7.5% per

annum and the same is directed to be deposited within four weeks from the date of receipt of a copy of this order, whereupon the claimant would be entitled to withdraw the same forthwith. The claimant is directed to pay necessary court fee for the enhanced portion of compensation.

12. In the result, C.M.A.No.253 of 2002 is dismissed and C.M.A.No.1574 of 1999 is allowed. No costs.

30.06.2017

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To:

1.The Motor Accident Claims Tribunal,
Small Causes Court No.IV, Chennai.

2.The Section Officer,
VR Section,
High Court, Madras.

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N.SESHASAYEE, J.

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CMA.Nos.253 of 2002 & 1574 of 2009

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