THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.4438 of 2004

JUDGMENT:

Having not been satisfied with the quantum of compensation awarded, the injured claimant had preferred this appeal, under Section 173 of the Motor Vehicles Act, 1988, ('the Act' for short), assailing the award, dated 03.08.2004, in OP.No.943 of 2002 passed by the learned Chairman, Motor Accidents Claims Tribunal-cum- District Judge, Adilabad.

2. I have heard the submissions of the learned counsel for the appellant/claimant ('the claimant' for brevity) and of the learned counsel for the second respondent/insurance company ('insurance company' for brevity). This appeal against the 1st respondent/owner-cum-insured was dismissed for default. Even though this the appeal is dismissed against the owner-cum-insured of the vehicle, the statutory liability of the insurance company survives for consideration and there is no need for the presence of the owner of the vehicle to decide the question of statutory liability of the insurance company at the appellate stage in the cases wherever the Tribunal had recorded a finding that the accident had taken place due to the rash and/or negligent driving of the driver of the motor vehicle and if the said finding is not challenged either by the owner of the vehicle or by the insurance company in view of a judgment of a Division Bench of this Court in Meka Chakra Rao v. Yelubandi Babu Rao @ Reddemma and others[1].

3. The case of the claimant on the relevant aspect may be stated, in brief, as follows: - 'At the relevant time, the claimant was of 20 years of age and used to work as an auto driver and earn Rs.3,000/- per month. He was hale and healthy at the time of the pleaded accident. In the subject accident, he

[1] 2001(1) ALD 453 (DB)

sustained fracture of bones below right knee of the right leg, comminuted fracture of shaft femur (left) middle third (open grade-II), fracture of middle 3rd right femur shaft; fracture of radius distal end; fracture of both bones of leg; fracture of right orbital bone lateral wall; besides other injuries on the other parts of the body. He sustained total and permanent disability and is unable to move out of the bed. For the rest of the life he has to live with the said disability and shall remain confined to bed. He is taking the assistance of an attendant for each and every activity. He has to depend upon the attendant in future also. On the date of filing the claim petition, there is no progress or improvement in his physical condition. His life has come to a stand still. He became a parasite. He is unable to sit, stand and walk. He already incurred huge amount on treatment and medicines. Yet there is no improvement in his physical condition. He is leading a miserable life and he is suffering from poverty. Unbearable pain and suffering being experienced by him are in-explainable. Hence, the claim petition is filed claiming a compensation of Rs.3,00,000/-.'

4. The defence of the insurance company is in the nature of total denial and the insurance company had put the claimant to strict proof of the averments in the petition and his entitlement to the claim and denied the allegations that the claimant suffered loss on account of the injuries; that he suffered total permanent disability; that the injuries and alleged disability affected his earnings and the earning capacity of the claimant.

5. The Tribunal recorded common evidence in this OP and OP.No.944 of 2002. The wife of the deceased in OP.No.944 of 2002 was examined as PW1 and the present claimant was examined as PW2. The Sarpanch of the village was examined as PW3. Dr.Lakshminarayana, who treated the claimant herein in MGM hospital, was examined as PW4. Exhibits A1 to 15 were marked. No evidence is adduced on the side of the 2nd respondent insurance company.

6. On merits and by the award impugned in this appeal, the Tribunal partly allowed the instant claim petition with proportionate costs and granted a compensation of Rs.1,15,821/- and fastened joint and several liability on respondents 1 & 2 to pay the said compensation. The claimant, who is not satisfied with the said compensation amount awarded, preferred this appeal.

7. Learned counsel for the claimant contended as follows: 'The claimant sustained six fractures/grievous injuries in the subject accident. He received inpatient treatment for a long time. He also received out patient treatment. Still he is receiving treatment. He has to undergo one more operation in future for removal of implants in his lower limb. He suffered permanent and partial disability. The Tribunal without considering the length of the treatment (inpatient and outpatient) and the requirement of future treatment awarded a meagre amount of Rs.3,000/- and odd towards cost of medicines and attendant charges and further awarded another meagre amount of Rs.2,000/- towards loss of earnings though it could be visualised that the fracture injuries take a minimum of six months time for complete healing and it is possible to accept that the claimant was out of his self employment for a period of more than six months. Award of a meagre amount of Rs.2,000/- for injury no.1 and Rs.15,000/- each for injuries 2 to 5 and Rs.20,000/- for injury no.6 under the head 'injury, pain and suffering' is unjust and unfair. The petitioner is entitled to more compensation under the said head. The Tribunal failed to take note of the fact that percentage of disability of 30% mentioned in the disability certificate cannot be taken as the loss of earning capacity in view of the number of fractures sustained by the claimant and the further fact that the said injuries resulted in permanent total disability and the claimant became unfit for driving an auto. The Tribunal ought to have noted that the disability impacted his earning capacity and that the loss of earning capacity is 100% The Tribunal erroneously took the disability of 30% as a disability with reference to left lower limb only and erroneously scaled down the percentage

of disability to 3% and awarded a meagre compensation of Rs.15,000/- under the head 'permanent disability'. The Tribunal failed to properly appreciate the oral evidence adduced through PW4, who deposed that the claimant underwent three operations, and awarded a meagre compensation of Rs.10,000/- for the ordeal of undergoing operation and eventually awarded a total compensation Rs.1,15,821/- though the claimant is entitled to more compensation than claimed. The Tribunal, in any view of the matter ought to have awarded at least the compensation of Rs.3.00 lakhs as claimed in the claim petition. The Tribunal failed to award compensation under all the eligible heads. No compensation is awarded under the group of heads 'loss of prospects of life, loss of amenities of life, loss of enjoyment of life, loss of opportunities of life (economical, political and social), loss of pleasures of life, loss of expectation of life and social disability' and other group of heads. The compensation awarded is not just, fair and reasonable in the facts and circumstances of the case. Hence, the appeal may be allowed and the compensation to which the claimant is entitled to or the compensation of Rs.3.00 lakhs as claimed may be awarded having regard to the facts and circumstances of the case.'

8. Learned counsel for the insurance company would contend as follows: -
'For injury no.1, which is a closed head injury, Rs.2,000/- was awarded and for other injuries 2 to 5, which are fractures, a compensation of Rs.15,000/- each was awarded and for the injury no.6, which is a major fracture, Rs.20,000/ was awarded by taking into consideration the aspect of pain and suffering as well. Adequate compensation was thus awarded. The evidence on record shows that the disability is only 30% and that too it is with reference to only one injury to the left lower limb. The disability is not with reference to the entire body. Hence, the Tribunal rightly scaled down the percentage of disability. No inpatient record from any hospital is filed except Exhibit A13, case sheet issued by MGM hospital. The Tribunal awarded compensation towards medicines and attendant charges by properly considering the facts and the evidence adduced.

Without adducing any evidence, the claimant is not entitled to claim that he suffered total permanent disability and that the said disability impacted his earning capacity by 100%. Even an additional sum of Rs.10,000/- was awarded taking into consideration that he underwent an operation. Hence, by any standards, the compensation awarded by the learned Chairman of the Tribunal is just and fair and needs no upward revision. The appeal is devoid of merit and is liable to be dismissed.'

9. The points that arise for determination are:

> Whether the compensation awarded by the Tribunal is not reasonable, just and fair in the facts and circumstances urged by the claimant? And, if so, what shall be the reasonable, just and fair compensation to be awarded to the claimant? To what relief?

10. <u>POINTS:</u>

10.1 Dealing first with aspect of the amount of compensation to be awarded under the heads 'injury', 'shock' 'pain & suffering', it is to be noted that the evidence brought on record including the testimonies of PW2, the claimant, PW4, Dr.Lakshminarayana, and the injury certificate, exhibit A11, disclose that the claimant sustained the following injuries:

1. Closed head injury
2. Comminuted fracture shaft femur middle 3rd left compound grade II
3. Transfers fracture patella right
4. Fractural shaft femur middle lower 3rd right
5. Fracture radius distal end right
6. Fracture of both bones leg middle and left.

10.2 It is common knowledge that even simple injuries cause painful experience to the victim and take a minimum of two to three weeks time for complete healing. Major injuries like fractures take 4 to 6 weeks or 6 to 8 weeks time for total healing depending upon the nature of the fracture and other factors. A further time of one or two months is generally required for physiotherapy and getting normal movements of the limb. The shock, pain and suffering at the time of accident; pain, discomfort and inconvenience during the period of treatment, hospitalisation, bed rest and physiotherapy can be visualised taking into consideration the day to day human experience. In the considered view of this Court, the compensation of Rs.2,000/- for the first injury and Rs.15,000/- each for the fracture injuries 2 to 5 as awarded by the Tribunal under the above heads are reasonable sums. However, for the sixth injury, which is a major fracture involving both bones of lower limb, it is reasonable to award a compensation of Rs.30,000/- instead of Rs.20,000/-. Therefore, Rs.92,000/- is accordingly awarded under the heads 'injuries', 'shock' and 'pain and suffering'.

10.3 As regards the claims under the heads 'hospital, medical, extra nourishment, attendant's, transport and incidental charges including future expenses', it is to be noted that the Tribunal awarded Rs.3,321.40 ps towards medical expenses and Rs.3,500/- towards attendant charges besides Rs.10,000/- as compensation for the ordeal of undergoing surgery. In this regard, it is to be noted that PW2, the claimant, deposed that he sustained six grievous injuries and incurred an expenditure of Rs.80,000/- on treatment, medical and extra nourishment charges etcetera and that even after his discharge he visited the hospital for follow up treatment as advised and that he is visiting MGM hospital every month for check ups even by the date of his testimony and that he is unable to walk and that an operation was performed to correct the fracture of bones in his left leg and that three nails were inserted in his left leg. He filed a bunch of medical bills under exhibit A12 and his case sheet, exhibit A13. PW4, the Doctor, testified that he treated PW2, on 09.02.2002, for fractures femur left by means of open reduction and internal fixation with 'K' nails and that right fracture of right femur was operated upon, on 06.03.2002, and that open reduction and internal fixation with 'K' nails was done and that the fractures of both bones of left leg and fracture of radius right hand & fracture patella right were conservatively treated and that the patient was discharged, on 19.03.2002, with satisfactory general condition, but, with an advise to come after one month for follow up. He further deposed that on examination of PW2, he found that there is diffusion of left knee and stiffness of left knee joint and hip joint with infected nails on left side with discharging sinus in the left gential region and that PW2 may become better with physiotherapy and that it will be difficult for him to work as a driver and that the disability is 30%. PW4 also deposed that nails, which were inserted, need to be removed at a later stage and that exhibit A13 case sheet was issued by his hospital and that PW2 requires the assistance of an attendant for performing his day to day activities and that all fractures are grievous in nature. Thus, it is borne out by record that the claimant received inpatient treatment for 40 days and that he also received out patient treatment on the advise of the Doctor to come for follow up and that he underwent major operations and that he has to undergo one more operation in future for removal of the nails inserted in his lower limb. He filed exhibit A12, medical bills, the total value of which, as noted by the Tribunal, is Rs.3,321.40 ps. It is common knowledge that even patients receiving treatment in Government Hospital also incur expenditure on transport, extra nourishment, medicines purchased from outside, attendant, besides other incidental charges. Hence, even if PW2 undergoes the future operation in a Government hospital, he has to spend some money on the said counts cannot be disputed. During the period of hospitalisation and bed rest, a person might have attended upon the claimant cannot be disputed. In a decision in Managing Director, APSRTC v. Kathavath Gopal and another,[2] this Court held that compensation towards

[2] 2003(5) ALD 198

expenditure incurred on extra nourishment and transport cannot be denied even though treatment was given in Government Hospital and one cannot expect positive evidence proving actual expenditure and hence some reasonable hypothesis cannot be ruled out. In the facts and circumstances of the case, a sum of Rs.40,000/- is awardable as compensation under the group of heads 'hospital, medical, extra nourishment, attendant's, transport and incidental charges including future medical expenses for future operation for removal of nails/implants'. The said sum is accordingly awarded.

10.4 As regards the claim of compensation under the head 'loss of earnings (past)', it is reasonable to accept that the claimant was out of work for at-least for six months. Accepting his earnings at Rs.3,000/- per month as pleaded by him, a sum of Rs.18,000/- is awarded as compensation under the head 'loss of earnings (past).'

10.5 Coming to the claim of compensation under the head 'loss of earnings (present & future)', since PW4, the Doctor, deposed that the disability is 30% of the left lower limb, the Tribunal considering it as disability with reference to a part of the body scaled down the percentage of disability to 3% and awarded a compensation of Rs.15,000/-. Learned counsel for the claimant submits that the Tribunal committed a gross error in scaling down the percentage of disability. Learned standing counsel for the insurance company supported the finding of the Tribunal. The Doctor testified that on examination of PW2 he found that there is diffusion of left knee and stiffness of left knee joint and hip joint with infected nails on left side with discharging sinus in the left gential region and that PW2 may become better with physiotherapy and that it will be difficult for him to work as a driver. As rightly pointed by the learned counsel for the insurance company, the Doctor did not say that the claimant cannot drive a vehicle. Therefore, it is possible to hold that the claimant may be able to drive an auto with difficulty and may not be able to drive the auto as efficiently as in the past. The disability may also not come in the way of his making a living by doing any other work, if not driving. It is not the case of the claimant that he cannot undertake any other work. PW 4 also stated that PW2 may become better with physiotherapy. As a sequel it is to be held that the disability suffered has not totally impacted his functional or earning capacity. Further, in Raj Kumar v. Ajay Kumar[3], the Supreme Court, while considering award of compensation for loss of future earnings due to some permanent physical disability, observed as follows:

> "Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency)."

A person required to drive an auto must be in normal physical health. Therefore, if the disability suffered presents difficulty in driving, it will have an impact of on functional capacity and/or earning capacity. Hence, the contention of the claimant that the claimant who had suffered some extent of disability cannot work as in the past and that the disability suffered will have an impact on his functional capacity and earning capacity can be accepted.

[3] (2011) 1 SCC 343

Consequently, the functional disability or loss of earning capacity is determined at 30%. In the medical record, his age was mentioned as less than 20 years. However, the age of the claimant at the time of accident is 20 years as per the pleaded case of the claimant. Therefore, the appropriate multiplier as per the ratio in Sarala Verma v. Delhi Transport Corporation[4] is '18' (eighteen). The monthly income of the claimant was already determined at Rs.3,000/-. Since the claimant is aged below 40 years, an addition of 40% to the actual income of the claimant towards future prospects is to be made as he is self employed. Therefore, the monthly income of the claimant works out to Rs.4,200/-. Accordingly, the annual income of the claimant works out to Rs.50,400/- (12 x Rs.4,200/-). The compensation awardable in case of 100% functional disability would be Rs.50,400/- x 18 = Rs.9,07,200/-. Since the functional disability is determined at 30%, the said sum, if scaled down comes to Rs.2,72,160/-. The said sum is accordingly awarded under the head 'loss of earnings (present & future)'.

10.6 Coming to the claim for compensation under the group of heads 'loss of prospects of life, loss of amenities of life, loss of enjoyment of life, loss of opportunities of life (economical, political and social), loss of pleasures of life, loss of expectation of life and social disability' and other group of heads, this Court had already discussed the evidence in detail and determined the functional disability of the claimant at 30%. The petitioner has to live with some disability for the rest of his life. Having regard to the facts, the evidence adverted to and the findings recorded supra, in the well considered view of this Court, it is reasonable to award Rs.30,000/- as compensation under the aforementioned group of heads. The said sum is accordingly awarded.

[4] 2009 ACJ 1298

10.7 Accordingly, the claimant is held entitled to the following compensation amounts:

Sl. No.	Head of compensation	Amount (in Rs.)
(1)	Injury, shock, pain and suffering	92,000-00
(2)	Hospital, medical, extra nourishment, attendant's, transport and incidental charges including future medical expenditure	40,000-00
(3)	Loss of earnings(past)	18,000-00
(4)	Loss of earnings(present and future)	2,72,160-00
(3)	Loss of amenities of life, loss of expectation of life and social disability	30,000-00
	Total	4,52,160-00

(Rupees Four Lakhs Fifty Two Thousands and One Hundred and Sixty only)

The claimant claimed compensation of Rs.3,00,000/-. The compensation as determined and to be awarded worked out to Rs.4,52,160/-, which is more than the amount claimed by the claimant. The law is now well settled that if the facts of the case so warrant, more compensation than claimed can be awarded. In the decision in the case of Nagappa v. Gurudayal Singh and others[5] it was held that under the M.V Act there is no restriction that Tribunal/Court cannot award compensation amount exceeding the claimed amount and that the function of the Tribunal/Court is to award just compensation which is reasonable on the basis of the evidence produced on record.

10.8 Accordingly, an amount of Rs.4,52,160/- is awarded to the claimant. Under the present law and in the facts and circumstances, the claimant is not entitled to any other compensation amount. The points are accordingly answered.

[5] AIR 2003 SC 674

10.9 Coming to the rate of interest on the enhanced portion of the compensation, it is just and fair to award interest at the rate of 7.5% per annum simple on the said enhanced compensation amount.

10.10 Since the Insurance Company did not prefer any appeal assailing its liability to pay the compensation and the only question involved in this appeal is in regard to the quantum of compensation, there are no other issues to be adverted to and decided in this appeal. Therefore, it follows that the respondents 1 and 2 are jointly and severally liable to pay the additional compensation amount awarded to the claimants. The points are accordingly answered.

11. In the result, the appeal is allowed with costs awarding a total compensation of Rs.4,52,160/- (Rupees Four Lakhs Fifty Two Thousands and One Hundred and Sixty only). On the compensation already awarded, the trial Court had granted interest at 9% per annum simple. The insurance company is directed to deposit before the Tribunal, within two months from the date of the receipt of a copy of this judgment, the enhanced portion of compensation i.e., Rs.3,36,339/- (Rupees Three Lakhs Thirty Six Thousands and Three Hundred and Thirty nine only) (Rs.4,52,160/- - Rs.1,15,821/-) with interest at 7.5% per annum simple from the date of the original petition till the date of deposit. The already awarded compensation or any portion thereof, if not already paid or deposited as per the award of the Tribunal, the same may also be deposited accordingly. The claimant shall pay, as per the procedure, the deficit court fee on the difference compensation amount i.e., the amount awarded in excess of the amount claimed. After deposit of the said sums before the Tribunal, the claimant is entitled to receive 50% of the entire deposited amount without furnishing any security. The balance amount of the claimant shall be invested in a fixed deposit in his name in a nationalised bank

as per practice and procedure with auto renewal facility till it is released in his favour as per procedure.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

22.02.2018
Vjl