IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 52/90

BETWEEN **NARII PIERRE** of Rarotonga, Prison Officer

FIRST PLAINTIFF

A N D **TEREAPII ENUA** of Rarotonga, Public Servant

SECOND PLAINTIFF

A N D **TEREMOANA TOPA RAVENGA** of Maraerenga, Rarotonga, Storeman

FIRST DEFENDANT

A N D **COOK ISLANDS TRADING CORPORATION LIMITED** a duly incorporated company having its registered office at its company premises, Avarua, Rarotonga

SECOND DEFENDANT

Mr Sceats for First and Second Plaintiffs
Mr Arnold for First and Second Defendants

Date of Judgment : 31 August 1992

JUDGMENT OF DILLON J.

This claim results from an accident between a Yamaha TT225 motorbike ridden by the First Plaintiff, and a Toyota truck driven by the First Defendant and owned by the Second Defendant. The accident occurred on 7 January 1989 at an intersection on the back road at Tupapa on Rarotonga.

It is acknowledged by Mr Arnold that the First Defendant was driving the truck in the course of his employment with the Second Defendant; that the Second Defendant accepts vicarious liability for the actions of the First Defendant; and that the Second Defendant admits liability for the injuries sustained by the First Plaintiff but does not admit liability for all the consequential claims alleged to have been incurred by the Second Plaintiff.

While the claim is limited to quantum only and not liability insofar as the First Plaintiff is concerned, there are nevertheless unusual features to the claim included in the action by the Second Plaintiff, the mother of the First Plaintiff.

As a result of the accident the First Plaintiff alleges that he sustained the following injuries :

(a) Gross muscle deep laceration on his right foot including laceration of extensor muscles and tendons resulting in foot drop.
(b) Tearing away of skin on right foot and ankle of right foot.
(c) Muscle deep laceration of right leg.
(d) Fracture dislocation of right second metatarsal of right foot.
(e) Dislocation of third proximal phallanx right foot.
(f) Laceration of web between second and third toe right foot.
(g) Disruption of lymphatic drainage.
(h) Dermatitis and infection of skin on foot.

Those injuries referred to above form part of the pleadings. In subsequent comprehensive submissions it is suggested that :

"The largest part of the First Plaintiff's claim comes under the heads of pain and suffering and loss of amenities to life.

Under the head of pain and suffering it is submitted the evidence shows that as a result of the Defendant's negligence the First Plaintiff suffered or continues to suffers :

(a) Considerable pain at the time of the accident.
(b) Shock and distress at the time of the accident.
(c) Considerable pain during the period of two months immediately following the accident.
(d) Pain during and after surgery resulting from the First Plaintiff's injuries.
(e) To the present day pain in the mornings and after periods of exercise.
(f) Anxiety as to the extent of injuries and likelihood of recovery and concern over future employment.
(g) Embarrassment as a result of walking with a limp.

(h) The inconvenience of being hospitalised for a period of ten weeks.

(i) In addition to the above there is the possibility that further surgery may be required causing the First Plaintiff further pain.

Under the head of loss of amenities it is submitted the evidence shows that as a result of the Defendant's negligence the First Plaintiff has suffered and continues to suffer in that :

(a) He is no longer able to play competitive rugby or cricket.

(b) He is no longer able to take part in social sports.

(c) He is unable to run properly and is not able to walk for any extended period or carry heavy loads.

(d) His fitness generally has suffered as a result of his restricted activities."

Based on those allegations the First Plaintiff now claims the sum of $2,290 by way of special damages for loss of wages and the cost of repairs to his motorbike; and the sum of $50,000 by way of general damages for discomfort, pain and suffering, loss of enjoyment of life, and loss of amenities of life.

In the same proceedings the Second Plaintiff claims a total of $1,859.90 to cover the expenses she incurred in providing for her son, that is the First Plaintiff, hospital and specialist medical and physiotherapy care and attention in New Zealand.

I shall proceed now to consider the injuries sustained by the First Plaintiff; the treatment of those injuries both in Rarotonga and New Zealand; the medical reports relating to the injuries; and from that information an evaluation of an appropriate award of damages. It has often been said that no amount of monetary consideration will compensate for injuries suffered in motor vehicle or factory or other such accidents. While that is true, nevertheless the Courts must proceed to a finite award as best it can based on comparative injuries and comparative awards. Both Counsel agreed that the recent decision of the High Court in the case of Harmon v Kiikoro and Estate (Plaint No. 3/88 - a decision of Quilliam J.) was an award which provided criteria and standards for assessment of damages for the personal injury claim that is involved in this case. At the time of this hearing that case was subject to appeal. The Court of Appeal has since this hearing delivered a Judgment confirming the original

decision of Quilliam J. and the award in that case of $40,000 general damages for the injuries sustained by Mr Harmon.

Mr Sceats, while referring to the Harmon award, nevertheless suggests that because there is a "general lack of Cook Islands precedents for personal injury cases the Plaintiffs make reference to some overseas cases". He then refers to a number of Australian cases where awards of $35,000; $88,000; $25,000; $20,000; $9,500; and $55,000 were ordered. A comparison of Australian cases will not be of assistance, I believe, in arriving at a fair, just and compensatory award in the Cook Islands. And since New Zealand no longer has personal injury claims as in the Cook Islands there can be no assistance from that direction. However we do have a definitive and detailed exposition of the standards to be applied in the Cook Islands from the Court of Appeal decision in Harmon's case. Mr Sceats, however, appears reluctant to rely on that decision and has suggested the alternative Australian awards as the guidelines. I cannot agree, and so I proceed to a comparison of the injuries sustained by Mr Pierre and of those suffered by Mr Harmon which resulted in his award of $40,000.

In this context Mr Arnold has included in his detailed submissions a comparison of the respective injuries which Mr Sceats has not questioned or criticised, and which I therefore accept as fairly detailing the injuries suffered by each.

Item	Pierre	Harmon
Thighbone injury	Nil	Severe compound fracture of thigh
Pelvic injuries	Nil	Dislocation of pelvis
Injuries to foot/ lower leg	Fracture dislocation of two bones in foot	Severe compound fractures of both bones of lower leg
Muscle Damage	Deep muscle lacerations of right foot and leg	Muscle lacerations requiring muscle flap graft
Tendon Damage	Tendon lacerations	Unknown
General complications/ infection	Disruption of lymphatic drainage, dermatitis and infection	Miscellaneous excrescence of dead bone, ulcer wound, sloughing skin graft, etc
Inpatient status	77 days	152 days

Outpatient status	Unknown	2 - 2½ months
Operations	3 (tendon repair and skin graft)	7 "several of them of a major nature" (Quilliam J.) (including skin grafts but extending to pinning and rodding of bones, bone grafts and other reconstructive surgery)
Mobility after discharge	Crutches for an unknown period	Crutches used for 17 months after accident
Scarring	Scarring to foot from injuries and operative procedures	"Gross disfigurement to his leg from the multiple scarring both from the injuries and from the operative procedures" (Quilliam J.)
Bone Shortening	Nil	3 centimetre shortening of right leg
Present injury	"a weakened right foot .. limited movement of that foot" (Bhuyan)	"Permanent limitation in the movement of the right knee and deformities of the right pelvis" (Quilliam J.)
Future prospects of arthritis	Possibility of arthritis in foot	"Will almost certainly develop arthritis resulting from the injuries" (Quilliam J.)
Other future complications	Nil	"Likely that he will suffer some degree of scoliosis or hunch back" (Quilliam J.)

Mr Arnold, in his submissions, suggested that from that comparison it is clear that Mr Harmon's injuries, which resulted in an award of $40,000 in his favour, "were of an order of magnitude several times greater than those suffered by the Plaintiff in this case". There can be no doubt that Mr Harmon's injuries were more serious than those suffered by the First Plaintiff. The critical question of course is by how much are the injuries sustained by the First Plaintiff less than Mr Harmon where an award has been fixed by this Court and approved by the Court of Appeal.

Mr Arnold's tabulated comparisons are listed under 15 headings. The First Plaintiff has not been affected insofar as four of those headings are concerned; inpatient status and operations and possibly outpatient status amount to only half of Mr Harmon's experience; of the remaining eight categories listed the description of the First Plaintiff's injuries are less and in some cases substantially less than those similar comparisons of Mr Harmon. For example, I refer to scarring only - the First Plaintiff has suffered "scarring to foot from injuries and operative procedures"; Mr Harmon's injuries in this context are described as "gross disfigurement to his leg from the multiple scarring both from the injuries and from the operative procedures".

I have no difficulty in accepting that the injuries sustained by the First Plaintiff were certainly less than those suffered by Mr Harmon. By how much less is what I must try and resolve.

Medical Reports

There have been filed two medical reports in affidavit form and it is appropriate to refer to those now. The first affidavit is by Dr Bhuyan who was working in Rarotonga at the time of the accident as a United Nations Volunteer Surgeon. Dr Bhuyan holds the degree of Master of Surgery and had worked as a Surgical Specialist in India since 1981. He attended on the First Plaintiff upon admission after the accident.

Dr Bhuyan described the injuries sustained; the period of one month in Hospital; the inability to operate by the visiting orthopaedic surgeon, Dr Esser, in August 1989 because of swelling and festering of the leg; the one tendon repair and skin grafting operation by Dr Esser in November 1989; and his final diagnosis of the permanent injuries the First Plaintiff has suffered. He put it this way :

> "Mr Pierre presently has a weakened right foot. He also has limited movement of that foot and is not able to run. This is consistent with the injury he has received. It is also consistent with the injury that Mr Pierre would feel some pain and tiredness in the foot if he walked for any length of time or put a load on it."

"... Mr Pierre's present condition is permanent and that he is unlikely to ever regain the full use of his foot even if further surgery is carried out."

The second medical report is again in affidavit form and is by Dr Thurston of Wellington who is a specialist orthopaedic surgeon and the Senior Lecturer in Orthopaedic Surgery at the Wellington School of Medicine. Dr Thurston examined Mr Pierre on 6 April 1990. He states in part as follows :

"Mr Pierre's complaints were of a persisting right foot drop, numbness over the dorsal aspect of the foot and an inability to run."

"Examination of the muscles of the lower leg revealed normal muscle function but the absence of the long extension tendons prevented extension of the toes. The tibialis anterior tendon was considered to be of power 4 - (MRC grading) giving weak dorsiflexion and some inversion only."

"I would regard this present state as being permanent and therefore there is unlikely to be any improvement in the future unless further surgery is carried out. I also think it unlikely that he will ever regain full use of his foot regardless of whether surgery is carried out in the future or not."

Dr Thurston prescribed an ankle/foot orthosis to help correct the foot drop.

In addition to those two medical reports Dr Noovao, a Surgeon at the Rarotongan Hospital since July 1990, also gave evidence. He had reviewed all the medical records at the Hospital; examined all the x-rays on Mr Pierre's injuries; and provided details of the further injuries suffered as a result of a second accident in which Mr Pierre was involved on 15 July 1991 when it is alleged that further damage was caused to his previous injured toe and foot.

Mr Pierre's involvement in this second accident; his absconding from hospital; his interference with remedial measures adopted by the Hospital; and his failure or refusal to wear the orthosis prescribed by Dr Thurston I propose to disregard since those incidents have all occurred since Dr Thurston carried out his examination on 6 April 1990.

The First Plaintiff's Claim for $50,000 General Damages

Mr Sceats has filed two sets of submissions, the second in reply to those filed by Mr Arnold. He acknowledges and concedes that "The largest part of the First Plaintiff's claim comes under the heads of pain and suffering and loss of amenities to life."

In dealing with pain and suffering, Mr Sceats points to the undoubted pain sustained at the accident and during part of the one month he spent in Hospital following the accident. There would have been pain associated with the two operations in November and December 1989. He refers to further surgery but this is discounted in the medical reports.

Mr Sceats also refers to the embarrassment of walking with a limp; anxiety over future employment; and pain after periods of exercise.

In referring to the loss of amenities Mr Sceats refers to Mr Pierre being unable to compete in those sports in which he was previously interested; and that his fitness generally has suffered. Normally one would expect the possibility of loss of future earnings. However Mr Pierre has been employed since the accident with no reduction in income and his employment abilities unaffected by his accident injuries. Accordingly he makes no claim for loss of future earnings because there is none. However I must bear in mind, and must include an allowance in any final award, that the First Plaintiff's injuries may some time in the future place him at a disadvantage on the labour or employment market.

Mr Sceats has suggested a somewhat novel approach to the assessment of inconvenience as forming part of pain and suffering. He puts it this way :

> "This is a separate matter from the question of the pain during hospitalisation and the loss of income. In the Cook Islands, hospital facilities are fairly rudimentary. In this context the First Plaintiff's period in hospital constitutes a significant amount of suffering and inconvenience."

Inconvenience in having to go to hospital it may be; pain and suffering because of the facilities at the Rarotongan Hospital I reject completely.

Mr Sceats with a degree of dividence accepts that within the Cook Islands there should be consistency in awards for personal injury. He discusses the Harmon case but then sets it aside to consider numerous Australian cases, their circumstances and the resultant awards. Of course at the trial of this action the Court of Appeal had not heard the Harmon Appeal lodged by Mr Sceats who in that case acted for the Defendant at the original trial. His roles are reversed in these proceedings. However, the Court of Appeal has now delivered its judgment and has confirmed the original High Court award of $40,000.

I adopt the view that the Harmon decision provides a benchmark award which establishes an initial basic criteria upon which comparative personal injury claims can be evaluated in order to provide the measure of consistency appropriate to the Cook Islands jurisdiction. I accordingly disregard the Australian awards as being of any assistance in the fixing of the award of damages in this case.

The First and Second Defendants' Defence of $8,500 General Damages

Mr Arnold has filed detailed submissions which conclude that based on the Court of Appeal decision of Harmon; the injuries sustained by Mr Pierre; the pain and suffering experienced; and the amenities of life he has lost; would justify an award by way of general damages of $8,500.

Mr Arnold accepts the injuries suffered by Mr Pierre but refers to them as of a "relatively minor nature"; he agrees that the injuries preclude the competitive rugby and cricket that Mr Pierre previously enjoyed; but suggests he take up "golf, bowls, sailing etc"; and rejects "the suggestion of any "special" sporting ability on the part of Mr Pierre". I believe that is too simplistic an approach to what is a fair assessment for a person who has sustained acknowledged injuries from an accident not of his making. Mr Pierre did take part in competitive sporting activities; and now he is prevented by the injuries he has suffered. This is the approach I make to those injuries.

Mr Pierre claims the injuries have caused a dramatic weight gain which, because of the injuries, he has not been able to control. Mr Arnold takes issue with this and I believe with some justification. He refers to amputees and paraplegics who are able to overcome that problem of overweight. It may be that Mr Pierre's attitude does not include an enthusiasm or incentive to counter the

weight problem to which he referred. It must be remembered that he was reluctant to wear the corrected brace supplied by the Hospital. In any case there was no medical evidence that suggested the weight problem was in any way related to the injuries. This is a matter clearly within Mr Pierre's control.

Summary of Counsels' Submissions on General Damages

Mr Sceats acknowledges that the sum of $50,000 is claimed in the main for :

(1) pain and suffering;
(2) loss of amenities to life.

Mr Arnold acknowledges that there is :

(1) some pain and suffering but considerably less than suffered by Mr Harmon;
(2) loss of sporting activities previous undertaken which can easily be replaced by others;

he assesses the general damages at $8,500.

The Court of Appeal decision in Harmon's case assessed general damages at $40,000 on a claim for $50,000.

There can be no dispute I believe that Mr Pierre's injuries of "a weakened right foot" cannot compare with those sustained by Mr Harmon when his injuries affected his thigh; pelvis; lower leg; resulted in gross disfigurement; shortening of the right leg; permanent limitation of the right knee; deformities of the right pelvis; and suffers a hunch back etc.

Claim by Second Plaintiff

Before proceeding to a final determination of the general damages appropriate to the injuries sustained I shall now consider the claims by the Second Plaintiff.

This relates to expenses incurred in traveling to New Zealand in order to secure a second medical opinion by a mother on her son's condition. There is conflicting evidence from the Second Plaintiff and Dr Noovao from the Rarotonga

Hospital. I am satisfied the position is as follows :

1. Mrs Enua was entitled to seek a second medical opinion;

2. She was told by Dr Bhuyan at the time of Dr Esser's visit in November and December 1989 that Dr Esser would not be returning to the Cook Islands. On that information she was justified in making enquiries about seeking further medical advice in New Zealand.

3. Mrs Enua used to work in the Department of Health. She would have ready access to the procedures freely available for New Zealand medical aid.

4. Dr Noovao explained Government policy which enabled the Hospital to provide transportation; medical attention either in Hospital or as an outpatient; and other associated facilities comparable to the private arrangements made by Mrs Enua but without any consultation at all with the Hospital authorities. Clearly such a consultation would have avoided the delay of some four months in New Zealand before finally seeing a specialist.

5. There is a well recognised arrangement between the Cook Islands Government and the New Zealand Government for further medical assistance to be available to Cook Islanders in New Zealand. This process naturally is handled by the Health Department. Mrs Enua was a member of the Health Department. If a request for an independent second opinion had been declined by the Health Department Mrs Enua would have been perfectly justified in proceeding herself to New Zealand and making a claim subsequently against the Department. If that situation had occurred in this case; and the Health Department had declined to arrange the second medical opinion in New Zealand; I would have had no hesitation in making an award in Mrs Enua's favour.

6. However, she failed or refused to utilise that medical facility provided by the Health Department and of which she as a Departmental employee would have knowledge.

I must therefore disallow her claim for airfare and departure tax.

She has claimed boarding expenses of $600 for the four months in New Zealand. Insofar as Mr Pierre's claim for loss of wages while in New Zealand is concerned, he has agreed this be reduced to a loss of wages for two weeks - a similar two weeks for boarding expenses would approximate $80. The Defendants, however, have offered $150 together with a refund of the physiotherapy and radiography charges - these total $349.90 - which shall be allowed to the Second Defendant.

Special Damages Claimed by First Plaintiff

It is now agreed that special damages in favour of the First Plaintiff should be as follows :

1.	Loss of wages	330.00
2.	Loss of wages while in New Zealand	300.00
3.	Cost of repairs to cycle	200.00
		$830.00

General Damages

I have considered the medical reports in detail; I have been assisted by the excellent submissions presented by both Counsel; I have seen and listened to the evidence of Mr Pierre and his mother. I again turn to and rely upon the medical reports, as I must since it is those reports which in the final analysis provide the basis of an award of damages appropriate to the injuries sustained.

Dr Thurston described the injuries as follows :

> "Examination of the muscles of the lower leg revealed normal muscle function but the absence of the long extensor tendons prevented extension of the toes."

Dr Bhuyan described the injuries this way :

> "Mr Pierre presently has a weakened right foot. He also has limited movement of that foot and is not able to run."

I have compared that injury with the multiple injuries of a much more serious degree sustained by Mr Harmon for which the Court of Appeal has approved the original award of $40,000.

My assessment of Mr Pierre's injuries when compared with Mr Harmon's injuries is possibly 20% but not more than 25%.

I adopt the higher percentage of 25 and fix the amount of general damages at $10,000.

Accordingly there will be :

1. Judgment for the First Plaintiff against the Second Defendant for a total of $10,830 together with costs, disbursements and witness expenses as fixed by the Registrar.

2. Judgment for the Second Plaintiff against the Second Defendant for a total of $349.90 together with costs, disbursements and witness expenses as fixed by the Registrar.

3. Mr Arnold accepts the basis of interest entitlement as set out in Mr Sceats' submissions paragraph 17. Cognisance however must be taken of when the $10,000 was paid into Court by the Second Defendant and when was the $9,000 already paid to the Plaintiffs. In the event of Counsel failing to agree upon the amount of any interest, payable leave is granted to refer to the Court for determination.

Jacobs J.