[2012] UKPC 18
Privy Council Appeal No 0079 of 2011

JUDGMENT

Sakoor Dawood Patel, Mrs Bilkiss Banu Patel and Mohamed Patel (Appellants) *v* Anandsing Beenessreesingh and SICOM Ltd (Respondents)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Brown
Lord Mance
Lord Dyson
Lord Sumption

JUDGMENT DELIVERED BY LORD SUMPTION ON

23 MAY 2012

Heard on 26-27 March 2012

Appellant	*Respondent*
Yanilla Moonshiram Mithilesh Lallah Subash Lallah SC	Antoine Domingue SC
(Instructed by MA Law (Solicitors) LLP)	(Instructed by Edwin Coe LLP)

LORD SUMPTION:

Introduction

1. Litigation about personal injuries, generally arising out of traffic accidents or accidents at work, is likely become an increasingly important part of the work of the courts of Mauritius as it has in other jurisdictions. There is, however, only limited authority on the computation of damages in Mauritius, and none that deals with the matter at the level of general principle.

2. On 13 August 2002, Shabana Patel was a passenger in a vehicle driven by Miss Kaleena Beenessreesingh, when it was involved in a collision with another car near Bambous in Mauritius. She was seriously injured. Miss Mannick, another passenger travelling with her, was killed. The present actions were brought by her father in his capacity as her provisional administrator, and by her father, mother and brother in their personal capacities. The first Defendant, Anandsing Beenessreesingh, was the owner of the car, and the second Defendant is his liability insurer. The third and fourth Defendants were respectively Mr. Koenig, the driver of the other car, and Mr. Koenig's insurer. The trial judge found that the collision was entirely due to the negligence of Miss Beenessreesingh, and that finding is now accepted. The Second Defendant ultimately accepted liability under the policy shortly before the trial. It follows that the third and fourth Defendants are no longer involved in these proceedings. The sole outstanding issues are the quantum of damages awardable against the first Defendant and the question what if any interest should be awarded upon those damages.

3. The events of August 2002 have had tragic consequences for Shabana. At the time of the accident she was eighteen years-old. She had recently passed her baccalauréat. She had been offered places to read law by four distinguished universities in the United Kingdom in addition to a place at Nantes University, which she had accepted. A bright future seemed to lie ahead of her. This prospect is now almost certainly dashed. She has sustained serious brain damage and multiple injuries to her head, collarbone and pelvis. For a month after the accident she remained in a deep coma, and she was semi-comatose for four months thereafter. Throughout this period she was in intensive care, dependent on mechanical life support. The evidence of Dr. May, the neurosurgeon who has treated her in Mauritius since November 2002, was that after recovering consciousness she was in need of "constant rehabilitation". Facilities for providing it are not available in Mauritius. She was therefore taken in February 2003 to India, where she spent two years, from February 2003 to January 2005, in a treatment and rehabilitation facility at the Christian Medical Institute at Vellore. During this period, she recovered the ability to swallow semi-solid foods and

to breathe without the aid of life-support equipment. A further period of a year was spent at Vellore between January 2006 and February 2007.

4. Her condition and prognosis at the time of the trial in 2008 was described by the Judge on the basis of Dr. May's evidence as follows:

> "However as at today, six years after the accident, she is still 100% incapacitated and dependent. She needs twenty-four hour care and is unable to do any single thing by herself, she has to be fed, bathed, cleaned and needs permanent care and attention. Medically speaking, there is not much hope that she will make a complete recovery and according to Dr May, the neurosurgeon who is treating her in Mauritius, it is difficult to envisage that she will ever be able to completely take care of herself. The maximum physical improvement in the long term, as to which there is only a hope, is that she is able to stand up, walk a few steps and say a few words, express herself and respond better. She has, according to the doctor, a good level of understanding, a good memory and she remembers people and previous experiences, she understands much more than she can express. The discrepancy between what she understands and what she can express, is a great distress to her. However her mental level cannot be tested because she must improve physically in the first place so that she is physically able to use her mental development. In fact, according to her mother, Shabana knows in what state she is and suffers when she sees herself in that condition. This stresses her, at night she is often found staring at the ceiling and unable to sleep."

5. As to the future, Dr. May's evidence was that Miss Patel would require continued rehabilitation if she was to avoid a deterioration of her current clinical condition and to have any prospect of even the limited degree of improvement envisaged in the judge's summary. Because of the need to travel to India for this purpose, and the time required for her to adapt to her new surroundings after travelling, the most satisfactory course was to take her to India for rehabilitation for a continuous period of six months in each year. It is impossible to say how long this will continue to be necessary, but it is likely to be a considerable period.

6. On 5 September 2008, Mrs. Justice Mungly-Gulbul gave a combined judgment in the present action and two other actions arising out of the same collision. In the present action, she awarded a total of Rs. 23,195,727 in damages. She declined to award statutory interest on that sum. On appeal, the Court of Appeal reduced the award of damages to a total of Rs. 9,850,000. They affirmed the Judge's decision about interest.

Damages: general

7. The fundamental rule of Mauritian civil law, derived from French jurisprudence, is that civil responsibility for personal injury extends to all pecuniary prejudice suffered by the claimant which would not have been suffered but for the injurious act: Le Roy, *L'évaluation du préjudice corporelle*, 19th ed. (2011), para. 3. While there is no general duty of mitigation of the kind recognised by English common law, a loss will not be treated as flowing from the delict so far as it arises from extravagant choices due solely to the personal will of the victim: Trib. Chartres, 28 oct. 1938, *D.H.* 1939, 31.

8. Damages for personal injury are likely to fall under one or more of four main heads, each of which will need, in the generality of cases to be separately considered and quantified. They are (i) material (i.e. pecuniary) damage in respect of (a) expenditure occasioned by the injury up to the date of judgment, (b) future costs of care and treatment and (c) loss of earnings both before and after judgment; (ii) moral damages, representing physical and mental suffering, loss of amenity, and, more generally, what the Court de Cassation has recently called "loss of quality of life and of its normal pleasures": Cass. 2e civ., 28 mai 2009. It is important to note that in contrast to English common law, many civil law systems, including that of France which is the foundation of the law of Mauritius, allow the recovery of moral damages by a limited category of persons close to the principal victim who have been seriously affected by the latter's injury. The case-law of Mauritius to which the Board has been referred suggests that practitioners and judges have not always been as careful as they should be in distinguishing between these heads. There has been a tendency to make global estimates covering more than one head. In the Board's opinion, this can only cause confusion, by making it difficult to know how any particular award has been arrived at. It can also, as this particular case demonstrates, lead to important parts of a claimant's loss being overlooked or understated and to relevant evidence not being put before the court.

Material damages up to judgment

9. In their original plaint served in September 2003, the Plaintiffs claimed Rs. 20,000,000 on behalf of Shabana. This was later particularised as representing "damages for loss of her prospect of life and that she will be permanently disabled and unable to lead a normal life and would for the rest of her life be handicapped." This claim was capable of covering moral damages and arguably all future material losses but not, on the face of it, material losses to date. There were further claims for Rs. 5,000,000 each by Mr. And Mrs. Patel personally, and for Rs. 1,000,000 by their son Adil. These claims were later particularised as being for moral damages. It must have been obvious to the Defendants that the Plaintiffs would be claiming expenditure occasioned by Shabana's injuries. But this was not unequivocally confirmed, nor was

there any attempt to quantify that expenditure, until Mr. Patel gave his evidence in chief and produced a schedule of such expenditure, identified at the trial as "P20". No objection was taken at the time to the introduction of P20, nor to Mr. Patel giving evidence by reference to it. Objection was, however, taken in the course of final submissions, and as a result that the Plaintiffs applied for and received leave to amend their plaint to add a claim for Rs. 20,000,000 for "material loss and expenses defrayed in respect of Shabana Fatema Shakoor Patel", both past and future. Even after the amendment, no attempt was made to formulate a claim for loss of future earnings, notwithstanding that the losses under this head in the case of a talented young woman at the threshold of a promising legal career would on the face of it have been very substantial. This is not a happy story.

10. In order to understand the judge's approach to the claim for past material damage, it is necessary to say something about the way in which this issue was approached by the Defendants at the trial. The expenditure listed at P20 comprised: (i) air fares between Mauritius and India, (ii) hospital charges, additional medicines and equipment, and ambulance charges in India, (iii) accommodation for Mrs. Patel at the Royal Hotel in Vellore while Shabana was being treated at the Christian Medical Institute, (iv) the cost of employing a night nurse, Mrs. Shobha Devi, who was hired in India and attended to Shabana for four years in India and Mauritius, and (v) the cost of alterations to the family home to accommodate Shabana's special needs. When Mr. Patel first gave evidence in support of his claim, there was no cross-examination at all on P20 or on the various documents produced to support it. It was only after the plaint was amended that he was recalled for cross-examination on past material damage. The main point on which P20 was challenged was that it was not sufficiently supported by documentary proof. In the case of the medical expenses, hotel accommodation and alteration costs there were invoices but no receipts evidencing actual payment apart from three relatively small sums relating to ambulance charges, botox injections and transport charges. In the case of the air fares and the payments to Mrs. Shobha Devi, there were neither invoices nor receipts. Mr. Patel's evidence was that while in India he had accumulated a mass of financial documentation, but their physical condition deteriorated and they became too bulky to be conveniently brought back to Mauritius. So at his request the hospital (and, it seems other suppliers such as the hotel at Vellore and the supplier of medication and equipment) prepared a single retrospective invoice covering all supplies. Mr. Patel regarded this as a sufficient receipt. He said that had tried to obtain computer records from Air Mauritius to show that he had paid for the air tickets. But in the absence of a personal cheque facility with Air Mauritius he had been obliged to pay cash, and the airline could not generate information from their computer system to identify specific payments of cash. His evidence was that he had paid all of the amounts listed in P20, except for the cost of the alterations to the family home. This work had been done by a Mr. Lepoigneur, with whom he had a business connection. Mr. Lepoigneur invoiced him for the work but was willing to defer payment to help him out financially. Mr. D'Unienville SC, who then appeared for the first and second Defendants, cross-examined Mr. Patel on these matters on a very narrow basis. He did not challenge Mr. Patel's explanation of the absence of vouchers.

There was no challenge to the authenticity of the documents produced by Mr. Patel. He challenged the expenditure on air tickets on the ground that although according to Mr. Patel's evidence, some of them were business class and some economy, all of them had been counted at the same rate of Rs. 30,000 per round trip. He also suggested (but without any supporting evidence of his own) that the true price of a return ticket was Rs. 16,000 in business class. Mr. Patel denied it. Otherwise, Mr. D'Unienville did not challenge Mr. Patel's evidence that he had incurred all of the expenditure listed in P20 and paid it with the exception of Mr. Lepoigneur's bill for alterations to the family home. Indeed, he expressly disclaimed in the course of his cross-examination any suggestion that "the history in the background of this case" had been "made up". He said that his point was that the claim was technically defective in point of law for want of documentary proof.

11. The trial judge rejected the argument that the claim was technically defective, and Mr. Domingue SC, who appeared for the Defendants before the Board, conceded that the argument could not be supported. In those circumstances, the judge had to consider whether the claim made in P20 was sufficiently proved by the documents that Mr. Patel had produced, together with the explanations and expansions given in his oral evidence. She found Mr. Patel to be a reliable witness, and accepted his evidence. She therefore awarded as past material damage Rs. 7,895,727, which was the entirety of the expenditure listed in P20.

12. In the Court of Appeal matters took a different turn. They attacked P20 and the evidence of Mr. Patel on a far wider basis than Mr. D'Unienville had done at the trial or indeed Counsel had done in argument on the appeal. They made the following points about it:

(1) They made the same point as Mr. D'Unienville had made about the use of a uniform price for both business and economy class air tickets.

(2) The records of the immigration authorities showed 11 round trips to India by Mr. Patel and 9 by Adil Patel, as against the 13 and 11 round trips which they claimed to have made. The Court of Appeal added that the trial judge had "failed to consider the necessity of all these visits [to India] and their duration"

(3) They referred to evidence by Mr. Patel that he had received payments from the government of Mauritius of Rs. 200,000 a month towards the hospital bills, and the cost of the air fares, for which no credit had been given.

(4) There was a minor multiplication error in Document P20 (the amount of the global invoice from the Hotel Royal at Vellor, namely Rs. 3,868,509, was said to be Rs. 3,680 x 1051 days, when it was in fact slightly more than that). The Hotel invoice had described the total as

"amount due" when at the date of issue (February 2007) it must already have been paid.

(5) The amount charged for hospital bills, at I.Rs. 2,700,000, was said to represent 36 months at I.Rs. 75,000 per month. However, the latter figure was based not on an invoice but on a projection of costs prepared by the hospital in October 2005, shortly before Shabana's second stay at Vellore. It was unclear whether an "in-patient discharge bill" recording expenditure in the last week of Shabana's second stay in Vellore together with the cumulative balance of previous bills related to services supplied separately or to supplies covered by the I.Rs. 75,000 per month of estimated hospital charges.

(6) A global statement from Metro Medicals for I.Rs. 488,444 for the supply of medicines and equipment did not identify the patient.

(7) No attempt had been made to explain why Mrs. Patel had not found cheaper accommodation at Vellore than the Hotel Royal.

(8) Mrs. Shobha Devi was alleged to have worked for the Patels for 48 months, but was in Mauritius for only 21 months. In the absence of documentary evidence of the sums paid to her, it would be necessary to guess what she was paid during whatever period she was really employed.

(9) Mr. Lepoigneur's bill for the works at the family home was insufficiently detailed, and Mr. Patel had not paid it.

13. The Court of Appeal proceeded to substitute their own figure of Rs. 3,500,000 for past material damage, for the figure of Rs. 7,895,727 awarded by the judge. There is unfortunately no indication in their judgment of how they arrived at this figure, apart from the large statement that the lower figure would be "fair and reasonable one in the circumstances". However, it may be inferred from the fact that they held that "all sums claimed as material damages must be supported by '*justificatifs*'" (i.e. vouchers) that they rejected the claims for air fares and for Mrs. Shobha Devi's salary in their entirety, since these were not vouched. They then appear to have written down the rest of the claim for past material damages to reflect their view that the *justificatifs* produced in support of the other items in P20 contained unexplained inconsistencies, omissions, and mathematical errors, which made them unreliable. They rejected Mr. Patel's evidence on the ground that he "appeared bent on exaggerating the figures claimed", and that the figures in P20 were "shown to have been grossly exaggerated".

14. The Board has carefully considered all of these points, but they are less impressed by them than the Court of Appeal was. The requirement for documentary *justificatifs* is an important feature of the French law of evidence, in which oral evidence has a more limited place than it does in common law countries, especially when it is given by the Plaintiff. The law of evidence in Mauritius is, however,

primarily derived from English practice, and allows a more prominent place to oral evidence. There is no rule of law in Mauritius that a claim for damages representing expenditure incurred cannot be proved without receipts evidencing actual payment. Evidence of a liability is sufficient to establish a loss, whether the liability has been discharged or not. Nor is there any rule of law that the existence of the liability must be supported by documentary evidence. Plainly, if the liability is of a kind that one would expect to be documented, a Plaintiff who fails to produce the documentation has a burden of explanation which may be more or less heavy. The thinner the documentary evidence, the more sceptical the court is entitled to be about the credibility of oral evidence on the point. But ultimately the question is whether the loss has been proved and, so far as it is based on oral evidence, whether the court believes it. The trial judge had every opportunity to assess the credibility of Mr. Patel, and she believed him.

15. An appellate court should not interfere with a finding based on witness evidence unless the trial judge has overlooked or misunderstood the material in some relevant respect, or has accepted evidence which was manifestly incredible. An appellate court should be particularly circumspect about interfering with a finding on a basis which was not canvassed with the relevant witness at the trial. In rare cases, it may be possible to demonstrate in an appellate court that some matter which was not put to a witness conclusively discredits his evidence because there is no realistic possibility of a credible explanation that is consistent with it. But this is not that kind of case, nor did the Court of Appeal suggest that it was. The burden of their criticism of Mr. Patel's evidence was not that it had been conclusively discredited, but that it left too many questions unanswered. That was, however, because the Defendants never asked those questions, as it was incumbent on them to do if they proposed to challenge the evidence. In the Board's opinion, it was wrong in principle for the Court of Appeal to reverse the judge's finding about Mr. Patel's evidence on a basis which (apart from the point about the uniform price of the air tickets) had never been put to him. In particular, it was unfair to describe Mr. Patel as being "bent on exaggerating the figures claimed" in circumstances where not only had no such suggestion been made at the trial, but Counsel for the Defendants had expressly disavowed it.

16. The Board considers that there are only two respects in which the quantification of past material damage in P20 can properly be criticised, neither of which justifies its wholesale rejection. In the first place, there is considerable force in the criticism of the use of a standard figure of Rs. 30,000 for 37 return air tickets purchased over a period of four years, some of which were business class tickets and others economy. This criticism stands on a different footing from the others, because it was the one point taken by the Court of Appeal that was unequivocally put to Mr. Patel in cross-examination. Mr. Patel maintained his evidence that he had paid Rs. 30,000 per round trip, but he did not have an explanation for the use of a standard price. The inescapable conclusion is that Rs. 30,000 was an estimate prepared some years after the tickets had been purchased, at a time when Mr. Patel had no documents to remind him of the exact price that he had paid at different times. There is, as the

Board has already observed, no reason to doubt that Mr. Patel was doing his honest best. But these factors justify a degree of doubt about the accuracy of the figure, which warrants a discount in order to ensure that the Defendant is not overcharged. The Board considers that the total of Rs. 1,110,000 for air fares claimed in P20 should be reduced by a quarter, and will substitute a figure of Rs. 832,500. Second, Mr. Patel freely admitted in cross-examination that his daughter had received some state funding towards her rehabilitation costs and air fares. There was some confusion in Mr. Patel's evidence about their precise amount, and his Counsel Ms. Moonshiram applied for leave to put before the Board a short statement from the relevant government department. The Board has examined this document without prejudice to the question whether it should be admitted, but in view of the absence of any cross-examination on this issue at the trial, they have no doubt that it should be. It establishes that Shabana received a one-off payment of Rs. 200,000 in January 2003. This sum included the cost of two air tickets to India, the rest being paid directly to the hospital in Vellore. This sum appears to have been overlooked by the trial judge, but it must plainly be taken into account in assessing Shabana's loss. With these two adjustments, the amount awarded by the trial judge in respect of past material damage falls to be reduced by Rs. 477,500 to Rs. 7,418,227.

17. In the Board's opinion there is no proper basis for any further reduction in the award for past material damage. They would comment as follows on the points made by the Court of Appeal summarised at paragraph 12 above. Following the same sub-paragraph numbering:

(1), (3) These points have been dealt with above, and to some extent accepted.

(2) Mr. Patel and Adil gave unchallenged evidence that they had made 13 and 11 round trips to Vellore respectively. It is true that this does not match the records produced by the immigration officer, which showed 11 and 9 trips respectively. The Board does not know what the explanation is, and it is not inclined to speculate given that the question was not explored at the trial with Mr. Patel, Adil or the immigration officer. As to the number of visits by Mr. Patel and Adil, there was some evidence that Shabana needed visits from her family during the long period that she had to spend in rehabilitation far from home. That evidence might or might not have withstood a strong challenge by the Defendants, but the fact is that it was not challenged at all.

(4), (6) These points appear to the Board to be insubstantial. They afford no ground for impugning the authenticity or evidential value of the documents. The items listed in the Metro Medicals invoice are consistent with the known needs of Shabana while she was at Vellore, as are the dates on which they are said to have been supplied.

(5) This is on its face a more substantial complaint, but it was not pursued in cross-examination of Mr. Patel beyond a wholly general suggestion

that it was unbusinesslike, unprofessional or negligent for Mr. Patel to have retained no further documentation. In response, Mr. Patel candidly acknowledged that he might have been negligent in failing to produce more, but he said that Rs. 75,000 a month was the average that he had had to pay for treatment in a Deluxe room. Turning to the in-patient discharge bill, Mr. Patel said that the Rehabilitation Institute, which had produced the projection of Rs. 75,000 a month, was attached to the Christian Medical College which had produced the discharge bill, but that it was a distinct department. The discharge bill related to extras including electro-stimulation treatment, MRI scans and the like, which was payable on top of the basic rate for treatment in the Rehabilitation Institute. Cross-examining counsel left it at that. It is fair to say that some of the items in the discharge bill are things that one would expect to be included in the basic rate per month for treatment, but the position is by no means clear. Since this matter was not explored any further at the trial, the Board is not willing to make assumptions adverse to Mr. Patel or to reduce the award on that account below the figure which the judge awarded.

(7) It was never suggested at the trial that Mrs. Patel's accommodation at the Hotel Royal was unduly expensive. There was no evidence that suitable alternative accommodation was available more cheaply. The evidence was that she paid a discounted price, which was not obviously excessive. It can certainly not be called extravagant on the limited evidence before the judge. If the Defendants had wished to suggest otherwise, they would have had the burden of proving it and could reasonably have been expected to lead evidence to that effect.

(8) The Court of Appeal referred to the fact that Mrs. Shobha Devi spent only 21 months in Mauritius as if this was inconsistent with Mr. Patel's claim that he employed her for 48 months. In fact, the evidence was that she was hired in India and had attended to Shabana at night at Vellore as well as in Mauritius. Mr. Patel's evidence that he paid her Rs. 14,000 a month was not challenged in cross-examination. He was merely criticised for not having documented it.

(9) Mr. Lepoigneur's bill for the alterations to the family home appears to the Board to have identified the works in sufficient detail to demonstrate that they were related to Shabana's needs. No one has suggested at any stage that these works were not necessary, or that they were not in fact carried out, or that a liability to Mr. Lepoigneur was not incurred in the amount invoiced.

Future material damages

18. The correct approach, given that there is no difference of principle between English and French law on the point, may conveniently be taken from the decision in the House of Lords in *Wells v.* Wells [1999] 1 AC 345, subject to the modifications required to allow for the fact that sufficiently secure inflation-linked securities may

not be available in Mauritius. In summary, it is necessary to estimate the victim's current expectation of life and her annual care costs. A multiplier must be applied to the expected annual cost of the victim's care, so as to calculate the capital sum that would produce a return sufficient to fund that cost over the expected duration of the victim's life. The multiplier is determined by a combination of the Plaintiff's life expectancy and a discount for accelerated receipt which reflects the assumed rate of return on the capital. The object is to arrive at an amount which will generate the necessary annual amounts, allowing for future inflation and income tax, on the assumption that the victim will draw on the whole of the income and a sufficient proportion of the capital to exhaust it at the expected time of her death.

19. A corresponding procedure would have been followed to arrive at a figure for lost future earnings, had a claim for these been made. For this purpose, it would be necessary to estimate the victim's future annual earnings and the number of years during which she would have worked after the accident. The multiplier in this case is applied to the expected annual earnings of the victim so as to calculate the capital sum that will produce an equivalent income over the period during which she would have worked. The multiplier is determined by the number of years of earning and a discount for accelerated receipt reflecting the same assumed rate of return on capital. As with damages for future care costs, the object is to arrive at an amount which will generate the necessary annual amounts, allowing for future inflation and income tax, on the assumption that the victim will draw on the whole of the income and a sufficient proportion of the capital to exhaust it at the expected time of her retirement.

20. Mr. Patel's claim on his daughter's behalf for future material damage was confined to the future costs of care. In support of that claim he prepared a schedule quantifying his primary claim under this head at Rs. 37,000,000. This was said to be the capital fund required to generate an income of Rs. 3,000,000, which appears to have represented Mr. Patel's estimate of the income necessary to support Shabana in rehabilitation all the year round. There was an alternative claim for Rs. 23,250,000, this being the capital fund required to generate an income of Rs. 1,860,000 a year, on the footing that Shabana spent six months each year in rehabilitation and the rest of her time at home. Both figures were calculated on the assumption that the money was invested in fixed term deposits at an assumed return of 8%. Mr. Patel's evidence was that this was an average of the rates available at the time from HSBC. The main problems about this calculation are the difficulty of ascertaining how Mr. Patel has arrived at his very high estimate of the annual cost of future care; and the fact that, inflation apart, it would have left the capital intact on Shabana's eventual death whereas the correct measure of damages must assume that the capital will be run down to zero over her anticipated lifetime.

21. The Judge did not accept Mr. Patel's calculation. She awarded Rs. 6,000,000, which was about a quarter of his alternative claim. In her view this was a sum which "if properly invested will yield an adequate return for her future expenses".

Unfortunately she did not explain what income she was seeking to generate or what rate of return she was assuming. The Court of Appeal was even less scientific. They appear to have started from the judge's figure and halved it to Rs. 3,000,000 in order to allow for what they regarded as the exaggerations and omissions of Mr. Patel. They explained their reasons as follows:

> "Bearing in mind that (a) there was already on record a letter dated 06 October 2005 that the cost of treatment and rehabilitation in a Deluxe room in the Rehabilitation Unit of the Christian Medical College, Vellore is Rs 75,000 per month exclusive of food, medicine and investigation; (b) the evidence of Dr. May that the condition of Ms Shabana Patel, although still in need of constant care and personal attention, has improved and will continue to improve; (c) our legislation already provides for the payment of a basic invalidity pension and a carer's allowance and it was conceded that Ms Shabana Patel was in receipt of both benefits; (d) the learned trial Judge wrongly referred to "moral elements which might be suffered by the parents" when assessing the amount of material damages for future treatment; (e) Mr Sakoor Patel appeared bent on exaggerating the figures claimed; and (f) the sums claimed for expenses already incurred have been shown to have been grossly exaggerated and have been reduced, we take the view that an award of Rs 3 million for future expenses in relation to the continued treatment of Ms Shabana Patel would be a fair and reasonable one in the circumstances."

22. The Board is unable to accept this analysis. In the first place, it will be apparent from the view which it has taken about Shabana's past material damages that it does not regard Mr. Patel's claims as grossly, let alone deliberately, exaggerated. In particular, the Board has rejected the criticism of the medical bills at Vellore. Second, the Court of Appeal misstated the effect of Dr. May's evidence when they referred to the prospect of improvement in Shabana's condition. The improvements which Dr. May was able to envisage were comparatively minor, unlikely to have a significant impact on the cost of her care, and achievable, if at all, over a considerable period. Third, the trial judge did not refer to "moral elements which might be suffered by the parents". These words were taken from the Defendants' skeleton argument in the appeal, and the Board can find nothing in the judgment which warrants this particular criticism. All that the judge said was that because of the "loss of dignity or additional anxiety and stress" for Shabana's parents which followed from their having to borrow and scrape for funds to pay Shabana's care costs, she should receive a sum which fully compensated her for having those costs. This was no more than she was entitled to under the general law of damages. It follows that of the six reasons given for their decision by the Court of Appeal, only one, namely the receipt of state benefits, had any substance.

23. The material is not available to perform an exact calculation of the capital fund required to generate a return sufficient to pay for Shabana's care costs over the rest of her life. The Board is, however, satisfied that it could not be less that the Rs. 6,000,000 awarded by the trial judge, and in the absence of any cross-appeal to increase the award, that is enough for present purposes. Mr. Patel gave evidence that average fixed term deposit rates available at the time of the trial were about 8%. The average annual rate of inflation in Mauritius over the past decade has been just under 6%. A capital fund of Rs. 6,000,000, if deposited with a bank, would be likely to lose a high proportion of its value over Shabana's lifetime. If the fund were invested in assets that could be expected to retain their real value, allowing for inflation, and to generate a real return to fund her care costs, then that return would certainly be very much less than 8%, even on the assumption that capital withdrawals were added to the income so as to deplete the fund to zero over the rest of Shabana's life. Yet even an assumed annual contribution of 8% of Rs. 6,000,000 plus Rs. 40,800 year in state disability payments would cover only about 60% of the cost of six months each year of rehabilitation in India including hotel accommodation for Mrs. Patel. This takes no account of air fares, visits by any other members of the family, extra nursing assistance and medical supplies and equipment, or any of the costs that would be incurred in looking after Shabana during the remaining six months of the year when she would be at home. It takes no account of the likelihood that additional paid help may be required as Mrs. Patel gets older and after her death Nor does it allow for the fall in returns on investable assets which has occurred since 2008 or for tax payable on the income generated by the fund. In the opinion of the Board, the judge's award of Rs. 6,000,000 to fund future care costs may well have been too low. It was certainly not too high. The Board will therefore reinstate that award.

Moral damages

24. Mauritian law has derived from French law the concept of moral damage, comprising non-pecuniary damage suffered by the victim of a delict. In the case of personal injury, it reflects pain, emotional distress and loss of physical and mental amenity. The terminology of the common law is different, but the concept is much the same. Unlike the common law, however, the civil law also recognises the right of third parties ("victimes par ricochet"), who are generally but not necessarily close family members, to claim both material and moral damage arising from the injury to the principal victim. The moral damage awardable to third parties reflects the indirect psychological impact which the suffering and loss of amenity of the principal victim has indirectly had on those close to her: Dalloz, Rep. Civ., Droit à Réparation, Notes 69-73; Le Roy, *L'évaluation du prejudice corporelle*, 19th ed. (2011), paras. 180-2. Indirect victims of this kind have on a number of occasions been awarded moral damages by the courts of Mauritius.

25. In the nature of things moral damage is incapable of precise assessment, and there is inevitably a large subjective element in the process. But where a consistent pattern can be discerned in past awards of moral damage by the courts of Mauritius,

the award should broadly follow that pattern, subject to adjustments reflecting (i) relevant differences in the facts, and (ii) any decline in the value of money since the earlier decisions. The assessment of moral damage is not, strictly speaking a matter for the judge's discretion. But it resembles the exercise of a discretion in being essentially a question of judgment. It follows that an appellate court should not normally interfere with it unless either the judge has made some error of principle or misunderstood the facts, or else the award is manifestly insufficient or excessive.

26. The judge assessed the moral damage suffered by Shabana at Rs. 6,000,000. Her award was based on the evidence which she had heard about the devastating impact of Shabana's injury and disability on her. The distress arising from her earlier prospects, her current disability, and her consciousness of both needs no elaboration. The Court of Appeal did not differ from the judge's assessment of the relevant facts. But after reviewing previous awards of moral damage made by the courts of Mauritius in personal injury cases they reduced the judge's award to Rs. 3,000,000, "having regard to the awards made in previous cases and bearing in mind that each case is to be viewed on its own merits." The Board has reviewed the same decisions, and some additional ones which the researches of Counsel have identified. They are not numerous enough to exhibit a consistent pattern, and none of them is precisely comparable to the present case. The closest case on its facts was *Favory v. Government of Mauritius* (1999) MR 249, in which moral damage of Rs. 2,000,000 was awarded to a young child who was permanently paralysed from the waist down, but suffered no mental impairment. Bearing in mind inflation since 1999, this award was worth about Rs. 4,000,000 in 2008 money. Given that Shabana has suffered both mental impairment and a greater degree of physical incapacitation, it seems broadly comparable to the award made in the present case. The Board was also referred by Mr. Domingue SC to *Government of Mauritius v. Robert* (1992) MR 253 which although further from the facts of the present case is of interest as being a decision of the Court of Civil Appeal. The Court varied an award an award of Rs. 2,000,000 moral damages in a case of partial (37%) physical incapacity in 1992, substituting an award of Rs. 800,000 in 1992 money. As Mr. Domingue very fairly acknowledged, Shabana's significantly greater physical incapacity, her mental impairment and inflation since 1992 all tend to support the award of Rs. 6,000,000 as moral damage in the present case. It seems possible that in comparing the present case with previous cases to come before the courts, the Court of Appeal failed to take account of inflation or the absence of mental impairment in the earlier cases. But however that may be, the Board is satisfied that when all of these circumstances are taken into account, Mrs. Justice Mungly-Gulbul's award under this head cannot be faulted.

27. The Board regards the awards of moral damage in favour of Mrs. and Mr. Patel and Adil, as more problematical. They received judgment for Rs. 2,000,000, Rs. 1,000,000 and Rs. 300,000 respectively. These sums are considerably in excess of any sums previously awarded in Mauritius to victims of personal injury "par ricochet". Indeed, although the very different social and economic conditions in Europe make French decisions an uncertain guide, it is right to point out that the award in favour of

Mrs. Patel is in excess of the general level of awards in France as reflected in a substantial body of appellate decisions: see the table in Leroy, *op. cit.*, p. 207. Nevertheless, in the wholly exceptional circumstances of this case, the Board considers that the judge's awards should be restored. The judge heard evidence from all three of the family claimants, as well as from third parties. The impact of Shabana's incapacitation and treatment on Mrs. Patel could hardly have been more serious. In addition to the daily contemplation of what Shabana has lost in terms of enjoyment of life, Mrs. Patel has had to spend a total of three years in India, away from her home and the rest of her family except during their relatively brief visits. She has devoted her entire life since the accident to attending to her daughter in hospitals and rehabilitation units or looking after her basic bodily needs at home. On the medical evidence, this situation is likely to persist indefinitely. Mr. Patel has had to sell assets and borrow from relatives to fund Shabana's care costs. His morale has suffered. The effect on his business has been very serious, as both his evidence and that of clients demonstrated. Adil, who was fifteen years-old at the time of the accident, was affected by the sufferings of his sister and the absence of his mother during the long periods when she was with Shabana at Vellore. He has had to put off plans for professional training abroad in order to support his parents. It may well be that in spite of these factors the Board would itself have made smaller awards than the judge did. But it cannot be said that the judge's awards were manifestly excessive. In those circumstances, there was no proper basis for reducing them.

Interest

28. The courts of Mauritius have in practice exercised an inherent jurisdiction to award interest on damages, as an integral part of the compensation due to the Plaintiff. Interest on this basis is generally awarded in respect of the period between the commencement of proceedings and the date of judgment: see *Manan v. Sun Insurance Co. Ltd* [2003] SCJ 83, *Kooduruth v. Gorayah* [2008] SCJ 42. Interest is payable in respect of the period after judgment under Article 1153 of the Mauritian Civil Code, which applies to the delayed performance of purely monetary obligations, and provides for the payment of interest at the legal rate fixed from time to time by the Ministry of Finance.

29. These rules are in principle applicable to actions for damages for personal injury. However, in cases arising from road accidents or accidents at work, they are in practice superseded by the more beneficial regime provided for by section 197A of the Courts Act. This provides:

> "Notwithstanding any other enactment, where any person is adjudged by a Court to be liable in damages pursuant to article 1382, 1383 or 1384 of the Code Civil Mauricien in respect of a road accident or an accident at work, the Court may order that he shall pay interest on the judgment debt at 15 per cent or such other rate as may be prescribed by Rules of

> Court made by the Judges from the day on which the action was started unless the Court is satisfied that there are good reasons for ordering such payment from the date on which the pleadings were closed, up to the date of payment."

The power is discretionary ("may"). But if the section is read literally, it is a somewhat inflexible discretion. The only rate prescribed is 15%, no alternative rate having been prescribed by rules of court. There are only two permissible starting points for the running of interest, namely the commencement of proceedings and the close of pleadings. Interest, if it is awarded at all, is on the face of it to be awarded on the whole of the damages ("on the judgment debt"). However, the Board is satisfied that these results, which would oblige a court to award too little interest or too much, cannot have been intended. The prescribed rate must, it considers, be regarded as a maximum. And, while the commencement date for the running of interest under section 197A is prescribed by the section, it must in the Board's opinion be open to a court to award interest up to judgment only, on the footing that interest will run thereafter under Article 1153 of the Civil Code. Moreover, where different parts of the damages for which judgment is given have accrued at different times, a court may award interest on some parts but not on others. The Board is confirmed in this opinion by those decisions of the courts of Mauritius which show that that is how the section has in practice been applied. It has been held that interest under section 197A should not be awarded on moral damages in respect of any period before judgment: see *Central Electricity Board v Munian* [1998] SCJ 255, and *Houareau v. Paul et Virginie* [1976] MR 44. The same rule has been held to apply to damages representing the loss of future earnings: *Manan v Sun Insurance Company* [2003] SCJ 83.

30. The trial judge declined to award interest and her decision on this point was affirmed by the Court of Appeal. Two reasons were given, which are rather more fully explained by the Court of Appeal. The first was that the Plaintiffs had added Mr. Koenig and his insurer as additional Defendants in 2005, which meant that pleadings did not close until 2007 and the trial was correspondingly delayed. Second, the Plaintiffs had amended their Plaint in the course of final submissions to add an explicit claim for material damage. The Court of Appeal observed that the amendment was necessary in order to correct a "glaring error in the plaint" "indicative of the laxity in the drafting of the pleadings, and the levity with which this case was conducted before the learned trial judge". They added that it also occasioned argument on the amendment and a request for particulars.

31. The Board is conscious that the judge's decision on this point was an exercise of discretion, but in their opinion the reasons given were incapable of justifying the refusal of interest.

32. The starting point is that interest, on whatever legal basis it is awarded, is compensation for the Defendant's delay in meeting their legal obligation to indemnify the Plaintiff after the claim has been sufficiently clearly brought to his attention. The Defendants have been in default of that obligation throughout the period since the commencement of these proceedings. They have also had the use of the money during that period. It may sometimes be appropriate to withhold an award of interest on the ground that the conduct of the Plaintiff has left the Defendant in ignorance of his liability. But otherwise it is no part of the purpose of the discretion in respect of interest to enable the Court to penalise a successful Plaintiff for the manner in which he has conducted the litigation. If he has conducted it unreasonably, the Court can mark its disapproval by withholding part of the costs.

33. In the Board's opinion, the addition of Mr. Koenig and his insurer as Defendants in 2005 was not in any event unreasonable, nor was it open to criticism. The proceedings were begun on the basis that the collision was due to the negligence of Miss Beenessreesingh. That was a wholly proper basis on which to begin them, which has been vindicated by the judge's findings at the trial. The defences were not served until 24 February 2005 in the case of Miss Beenessreesingh and 1 March 2005 in the case of his insurers. Miss Beenessreesingh pleaded that the collision had occurred by the negligence of Mr. Koenig. He was alleged to have been "driving dangerously and/or in a reckless manner and at an excessive speed." Miss Beenessreesingh's insurers pleaded that Mr. Koenig's alleged negligence "contributed substantially to the accident" and sought an apportionment. The Plaintiffs responded on 19 July 2005 by adding Mr. Koenig and his insurers as Defendants, and bringing an alternative claim against them in the event that he was held to have caused or contributed to the collision. The Board can readily accept that the addition of two defendants at this stage delayed the close of pleadings and the trial of the action. It was, however, a reasonable and prompt response to the service by the existing Defendants of pleadings attempting to cast all or part of the blame upon Mr. Koenig without, as it has turned out, any justification.

34. Turning to the amendment at the end of the trial, the Board is inclined to agree that the Plaintiffs' failure to plead material damage previously was a serious error, although they would not go so far as to say that it indicated "levity" on their part. However, the Board is unable to attribute to this error the significance attached to it by the judge. She had allowed the amendment on the ground that it was

> "... not substantial and does not raise entirely new issues which are different from or inconsistent with the issues in the original plaint. Indeed evidence relating to material damages was adduced in the course of the trial without any objection from the Defendants. Allowing the amendment will in fact merely bring the pleadings in line with the evidence on the record."

At the most, the amendment may have extended the trial for some three months from March 2008, when the application to amend was made, to June 2008 when, after the amendment was allowed, Mr. Patel was recalled for further cross-examination upon it. However, the effect of the Court's decision not to award interest, if it stands, will be to deprive the Plaintiffs of compensation for being kept out of the money due to them for a period of at least nine years. The financial impact of that decision on them is altogether disproportionate to any consequences which can be attributed to the delay in pleading material damage.

35. In these circumstances, the judge's exercise of her discretion cannot stand, and the Board must exercise it afresh. In the absence of any reason for withholding an award of interest altogether, the only real question is whether it should run from the commencement of the proceedings or from the close of pleadings, those being the only alternatives permitted by section 197A of the Courts Act. As the language of the section shows, the ordinary course should be to award interest from the commencement of the proceedings. "Good reasons" are required to justify an award of interest from the close of pleadings. In the great majority of cases these "good reasons" will consist in the absence from the originating plaint of sufficient particulars, when taken together with other knowledge available to the Defendants, to enable them to make a broad assessment of their potential liability. In the present case, the Board considers that the plaint lodged at the commencement of these proceedings was sufficient notice of the basis of the claim, except in relation to material damage. Material damage was not originally claimed in terms, and much of it had yet to be incurred when the proceedings started. Taking all these considerations together, the Board proposes to award interest on that part of the judgment in favour of Mr. Patel in his capacity as his daughter's administrator which represents material damage already incurred at the date of judgment. The interest will run from the close of pleadings until the date of payment at the rate fixed by the Ministry of Finance for the time being for the purpose of Article 1153 of the Civil Code, up to a maximum of 15%,. No interest will be awarded in respect of the period before Mrs. Justice Mungly-Gulbul's judgment on the remainder of Shabana's damage, nor on the damages awarded to Mr. and Mrs. Patel and Adil in their personal capacities, because these elements of the judgment represent moral damage and future loss, which were assessed as at the date of judgment. There will, however be interest on these elements at the same rate under Article 1153, from the date of Mrs. Justice Mungly-Gulbul's judgment until the date of payment.

Conclusion

36. The Board will therefore set aside the order of the Court of Appeal. The order of Mrs. Justice Mungly-Gulbul will be restored, but varied so that Mr. Patel will have judgment in his capacity as his daughter's provisional administrator, in the principal amount of Rs. 19,418,227. The orders of the trial judge in favour of Mr. and Mrs.

Patel and Adil Patel in their personal capacities will be restored. Interest will be awarded on Rs. 7,418,227 of that amount, being the material damage suffered by Shabana Patel, from the date of the close of pleadings (which the Board understands to be 6 June 2007) until the date of payment. On all other amounts due to the Plaintiffs under the judgment of Mrs. Justice Mungly-Gulbul as varied by this judgment, interest will be payable from 5 September 2008 when she gave judgment. All interest, both before and after that date, will be payable at the legal rate prescribed by the Ministry of Finance for the time being for the purposes of Article 1153 of the Civil Code.

37. The Respondents must pay the costs of the appeals to the Court of Appeal and the Privy Council. The trial judge's order for costs will stand.

38. The Board would not wish to part with this case without commenting on one feature of the present litigation which has not been the subject of appeal but which is on any view unsatisfactory. The appeal to the Court of Appeal was initiated by a proecipe dated 23 September 2008. Argument was heard on it on 23 and 24 March 2009. However, judgment was not delivered until 18 November 2010, some twenty months after the completion of the argument. In a case like this, where the evidence showed that the delay in recovering compensation had caused significant hardship to the Plaintiffs, this is very unfortunate. The long gap between argument and judgment on the appeal may also explain, at least in part, why the Court of Appeal's treatment of the issues differed so markedly from the basis on which the case was argued. In the Board's opinion it is only in the most difficult and complex cases that judgment on an appeal should be reserved for more than three months, and intervals of more than six months should be altogether exceptional.

39. The Board is extremely grateful to Counsel on both sides for their assistance in this difficult case, and would wish in particular to mention the sensitive and responsible line taken throughout by the Defendant insurers.