

Delhi High Court

Arun Sehgal vs Jai Ram Vashisht on 10 December, 2010

Author: J.R. Midha

*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FA0.No.120/1991

Reserved on : 23rd July, 2010

Date of Decision : 10th December, 2010

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ARUN SEHGAL

..... Appellant

Through : Mr. V.P. Chaudhary, Sr. Adv.
with Mr. Nitinjya Chaudhary
and Ms. Sushma, Advs.

versus

JAI RAM VASHISHT

..... Respondent

Through : Mr. L.K. Tyagi, Adv. for R-2.

CORAM :-

HON'BLE MR. JUSTICE J.R. MIDHA

- | | | |
|----|---|-----|
| 1. | Whether Reporters of Local papers may be allowed to see the Judgment? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

JUDGMENT

1. The appellant has challenged the award of the learned Tribunal whereby compensation of `61,936/- has been awarded to him. The appellant seeks enhancement of the award amount.

2. The accident dated 26th August, 1986 resulted in grievous injuries to the appellant. The appellant was travelling in scooter bearing No.DIK 5857 as a pillion rider when he was hit by car bearing No.DBA 9011. The appellant suffered lacerated wound in his left knee and compound fracture of lower 1/3rd of left leg. The appellant remained admitted in the base hospital from 26th August, 1986 to 9th September, 1986, from 22nd September, 1986 to 21st November, 1986 and thereafter from 6th January 1987 to 22nd January, 1987.

3. The appellant was aged 34 years at the time of the accident and was working as a Wireman with the Indian Air Force. The appellant had joined the Air Force on 6th January, 1972. The appellant was holding a Diploma in Electronics from Bangalore. As per the Service Rules of Air Force, the appellant opted for retirement upon completion of 15 years of service and was scheduled to retire on 31st January, 1987. The appellant had planned to secure suitable civil employment after his

retirement. However, before the date of retirement, the appellant suffered accident in question and was confined to bed from 26th August, 1986 to 22nd January, 1987. The appellant was retired by Air Force on 31st January, 1987.

4. The injuries suffered by the appellant resulted in disability which was assessed by the Medical Board of Air Force as 50% vide disability certificate, Ex.PW1/5. The appellant started walking with the help of crutches after 5th April, 1987 and remained on crutches for a period of two months. During this period, the appellant underwent physiotherapy and thereafter, he started walking with the help of stick for a period of one month. The appellant was drawing a salary of `2,120/- per month at the time of retirement from service. The appellant had planned to secure suitable civil employment after his retirement and he ultimately started private job at a salary of `800/- per month. However, after a period of ten months, the FAO.No.120/1991 Page 2 of 28 appellant started his own business of real estate.

5. The Claims Tribunal has awarded a sum of `35,000/- towards disability, reduction in earning capacity and loss of income during treatment considering that the appellant was getting a pension of `400/- per month and also had a private job of `800/- per month and later on he started his own business of real estate. The Claims Tribunal has further awarded `5,936/- towards loss of salary during treatment, `4,500/- towards special diet, `1,500/- towards conveyance and `15,000/- towards pain and suffering. The total compensation awarded is `61,936/-.

6. The learned senior counsel for the appellant has raised following grounds at the time of hearing of this appeal:-

- (i) The compensation be awarded for loss of earning capacity due to permanent disability.
- (ii) The compensation for special diet be enhanced.
- (iii) The compensation for conveyance be enhanced.
- (iv) The compensation for pain and suffering be enhanced.
- (v) The compensation be awarded for loss of amenities of life and disfiguration.

7. The principles for assessment of loss of future earnings due to permanent disability have been laid down by the Honâ ble Supreme Court in the recent case of Raj Kumar v. Ajay Kumar & Anr., MANU/SC/1018/2010 decided on 18th October, 2010 as under:-

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"General principles relating to compensation in injury cases

4. The provision of the Motor Vehicles Act, 1988 (â Actâ for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See C. K. Subramonia Iyer v. T. Kunhikuttan Nair - AIR 1970 SC 376, R. D. Hattangadi v. Pest Control (India) Ltd. - 1995 (1) SCC 551 and Baker v. Willoughby - 1970 AC

467).

5. The heads under which compensation is awarded in personal injury cases are the following :

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising :

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages) FAO.No.120/1991 Page 4 of 28

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and

(iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b),

(iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) - depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and

(vi) --involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case."

"Assessment of future loss of earnings due to permanent disability

6. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which FAO.No.120/1991 Page 5 of 28 is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions

that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (the Disabilities Act for short). But if any of the disabilities enumerated in section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

7. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

8. 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 terms (sic) of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra v. New India Assurance Co. Ltd. - 2010(10) SCALE 298 and Yadava Kumar v. D.M., National Insurance Co. Ltd. - 2010 (8) SCALE 567).

9. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the FAO.No.120/1991 Page 7 of 28 disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

10. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii)

whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, FAO.No.120/1991 Page 8 of 28 there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.

11. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an enquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with

personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and a Referencer for evaluation of permanent physical impairment (for example, the Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by American Academy of Orthopedic Surgeons or its Indian equivalent or other authorized texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the first schedule to the Workmen's Compensation Act, FAO.No.120/1991 Page 9 of 28 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen. If a Doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so the percentage.

12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give a ready to use disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

13. We may now summarise the principles discussed above :

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

14. The assessment of loss of future earnings is explained below with reference to the following illustrations:

Illustration A : The injured, a workman, was aged 30 years and earning `3000/- per month at the time of accident. As per Doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

a) Annual income before : `36,000/- the accident

b) Loss of future earning : ` 5400/-

per annum (15% of the prior annual income) FAO.No.120/1991 Page 11 of 28

c) Multiplier applicable : 17 with reference to age

d) Loss of future earnings : : ` 91,800/-

(5400 x 17) Illustration â Bâ : The injured was a driver aged 30 years, earning `3000/- per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

a) Annual income prior : `36,000/- to the accident

b) Loss of future earning : `27,000/-

per annum (75% of
the prior annual
income)

c) Multiplier applicable : 17
with reference to age

d) Loss of future : ` 4,59,000/-
earnings : (27000 x
17)

Illustration â Câ : The injured was 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

a) Minimum annual income : `60,000/- he would have got if had been employed as an Engineer

b) Loss of future earning : ` 42,000/-

per annum (70% of the
expected annual
income)

c) Multiplier applicable (25 : 18 years)

d) Loss of future earnings : : ` 7,56,000/- (42000 x 18) [Note : The figures adopted in illustrations (A) and (B) are hypothetical. The figures in Illustration (C), however, are based on actuals taken from the decision in Arvind Kumar Mishra (supra)].

15. After the insertion of section 163A in the Act (with effect from 14.11.1994), if a claim for compensation is made under that section by an injured alleging disability, and if the quantum of loss of future earning claimed, falls under the second schedule to the Act, the Tribunal may have to apply the following principles laid down in Note (5) of the Second Schedule to the Act to determine compensation :

"5. Disability in non-fatal accidents : The following compensation shall be payable in case of disability to the victim arising out of non- fatal accidents : -

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

PLUS either of the following :-

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmenâs Compensation Act, 1923."

16. We may in this context refer to the difficulties faced by claimants in securing the presence of busy Surgeons or treating Doctors FAO.No.120/1991 Page 13 of 28 who treated them, for giving evidence. Most of them are reluctant to appear before Tribunals for obvious reasons either because their entire day is likely to be wasted in attending the Tribunal to give evidence in a single case or because they are not shown any priority in recording evidence or because the claim petition is filed at a place far away from the place where the treatment was given. Many a time, the claimants are reluctant to take coercive steps for summoning the Doctors who treated them, out of respect and

gratitude towards them or for fear that if forced to come against their wishes, they may give evidence which may not be very favorable. This forces the injured claimants to approach a professional certificate givers whose evidence most of the time is found to be not satisfactory. Tribunals should realize that a busy Surgeon may be able to save ten lives or perform twenty surgeries in the time he spends to attend the Tribunal to give evidence in one accident case. Many busy Surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the Doctors to attend the Tribunal to give evidence. The solution lies in recognizing the valuable time of Doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating Doctors on commission, after ascertaining their convenient timings. Secondly, if the Doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the Doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 A.M. or 11.00 A.M. and wait in the Court Hall. Fourthly, in cases where the certificates are not contested by the respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that Courts/Tribunals show concern for litigants and witnesses.

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Assessment of compensation

17. In this case, the Tribunal acted on the disability certificate, but the High Court had reservations about its acceptability as it found that the injured had been treated in the Government Hospital in Delhi whereas the disability certificate was issued by a District Hospital in the State of Uttar Pradesh. The reason given by the High Court for rejection may not be sound for two reasons. Firstly though the accident occurred in Delhi and the injured claimant was treated in a Delhi Hospital after the accident, as he hailed from Chirori Mandi in the neighbouring District of Ghaziabad in Uttar Pradesh, situated on the outskirts of Delhi, he might have continued the treatment in the place where he resided. Secondly the certificate has been issued by the Chief Medical Officer, Ghaziabad, on the assessment made by the Medical Board which also consisted of an Orthopaedic Surgeon. We are

therefore of the view that the High Court ought not to have rejected the said disability certificate.

18. The Tribunal has proceeded on the basis that the permanent disability of the injured-claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the functional disability of the body nor could it be assumed to result in a corresponding extent of loss of earning capacity, as the disability would not have prevented him from carrying on his avocation as a cheese vendor, though it might impede in his smooth functioning. Normally, the absence of clear and sufficient evidence would have necessitated remand of the case for further evidence on this aspect. However, instead of remanding the matter for a finding on this issue, at this distance of time after nearly two decades, on the facts and circumstances, to do complete justice, we propose to assess the permanent functional disability of the body as 25% and the loss of future earning capacity as 20%.

19. The evidence showed that at the time of the accident, the appellant was aged around 25 years and was eking his livelihood as a cheese vendor. He claimed that he was earning a sum of `3000/- per month. The Tribunal held that as there was no acceptable evidence of income of the appellant, it FAO.No.120/1991 Page 15 of 28 should be assessed at `900/- per month as the minimum wage was `891 per month. It would be very difficult to expect a roadside vendor to have accounts or other documents regarding income. As the accident occurred in the year 1991, the Tribunal ought to have assumed the income as at least `1500/- per month (at the rate of `50/- per day) or `18,000/- per annum, even in the absence of specific documentary evidence regarding income.

20. In the case of an injured claimant with a disability, what is calculated is the future loss of earning of the claimant, payable to claimant, (as contrasted from loss of dependency calculated in a fatal accident, where the dependent family members of the deceased are the claimants). Therefore there is no need to deduct one-third or any other percentage from out of the income, towards the personal and living expenses.

21. As the income of the appellant is assessed at `18000/- per annum, the loss of earning due to functional disability would be 20% of

`18000/- which is `3600/- per annum. As the age of appellant at the time of accident was 25, the multiplier applicable would be

18. Therefore, the loss of future earnings would be $3600 \times 18 =$ `64,800/- (as against `55,080/- determined by the Tribunal). We are also of the view that the loss of earning during the period of treatment (1.10.1991 to 16.6.1992) should be `12750/- at the rate of `1500/- for eight and half months instead of `3600/- determined by the Tribunal. The increase under the two heads is rounded of to `20,000/-."

8. In Madan Lal Papneja v. State of Haryana & Ors., MANU/ PH/2408/2010, Punjab and Haryana High Court held as under:-

"VII. Disability assessment, as per government guidelines

8. In all cases resulting in grievous injuries that include fractures that further result in disablement, temporary or permanent, there is a practice to simply accept whatever the doctor assesses. There is hardly ever any cross examination in the disability assessment to the doctor, except a suggestion that his assessment is high. It is important to know how the FAO.No.120/1991 Page 16 of 28 assessment is made and what the percentage of disability signifies. In order to review the guidelines for evaluation of various disabilities and procedure for certification and to recommend appropriate modification/alterations, a committee was set up in 1988 by the Government of India, Ministry of Social Justice & Empowerment under the Chairmanship, DGHS, GOI with subcommittee, one each in the area of Mental Retardation, Locomotor/ Orthopaedic, Visual and Speech & Hearing disability. After considering the reports of committee, keeping in view the provisions of Persons with Disabilities (Equal opportunities Protection of rights and Full participation) Act 1995, guidelines for evaluation of following disabilities and procedure for certification was notified vide no. â The Gazette of India, Extra ordinary Part-II Section 1, Dated 13, June 2001â for:

1. Visual Impairment
2. Locomotor /Orthopedic Disability
3. Speech and Hearing Disability
4. Mental Retardation
5. Multiple Disabilities

9. In the guidelines, the functional (permanent physical impairment or PPI) due to congenital, post disease or trauma have been evaluated.

This is commonly interpreted as disability which is not so, in strict terms. In case of loco motor conditions, broadly, the body has been divided into upper limb, lower limb & trunk. In principle, the function of one part cannot be replaced by other, therefore each functional part in itself is 100% and thus loss of function/ PPI of that part is taken as 100%. On the other hand, the whole body value cannot exceed 100%. Thus in case the impairment is seen in more than one function or body part, the mathematical sum may exceed 100 but total of body/individual cannot exceed 100%. Thus a total of one or all segments of body cannot exceed 100% in any situation.

10. The guidelines shall be applied for determining the % of disability. If a doctor or a medical board makes an assessment there shall be no mistake in accepting the same, prima facie. However, if the assessment is doubted, it is necessary to cross-verify with the mode of assessment prescribed FAO.No.120/1991 Page 17 of 28 under the guidelines [The method of computation is meant only to provide a theoretical basis for an inquisitive judge/lawyer/litigant]. Broadly, it necessary to know that the injury to upper limb is assessed thus:

a) Upper limb assessment Upper Limb Arm Component Hand Component

(i) Prehension (ii) Sensation (iii) Strength

(i) Loss of motion (ii) Muscle Strength (iii) Co-ordinated activities
Assessment shall be done by

(i) Opposition (tested against thumb against all other fingers)

(ii) Lateral pinch (for e.g. grasping a key, holding a pen or pencil)

(iii) Cylindrical grasp

(iv) Spherical grasp

(v) Hook Grasp

11. (i) The value of maximum range of motion (ROM) in the arm component is 90%. Each of the three joints of the arm (shoulder, elbow and wrist) is weighed equally, i.e., 30% or 0.30. This could be

understood through an illustration. A fracture of the right shoulder may affect ROM so that active abduction (abduct is to draw away from the medial line of the body) is reduced to say, 90°. It is possible to take the arm thrown downwards from alongside the leg to touch the ear by abducting it to 180°. The relative loss is 50% of its efficacy, but in terms of the arm component, the % of loss shall be $50 \times 0.30 = 15\%$ loss of motion for the arm component. If more than one joint is involved, the same method is applied and the losses in each of the affected joints are added. If the loss of abduction of the shoulder is 60°, loss of extension of wrist (as opposed to bending, extending means straightening. Medically, they are referred respectively as palmar flexion and dorsi flexion) is 40°, then the loss of range of motion for the arm is $(60 \times 0.30) + (40 \times 0.30) = 30\%$.

ii) The strength of muscles could be tested by manual testing like 0-5 grading.

0. - 100% (complete paralysis)

1.- 80% (flicker of contraction only) FAO.No.120/1991 Page 18 of 28

2.- 60% (power detected when gravity is excluded, i.e., when the arm moves sideways and not upwards against gravity)

3. - 40% (movement against force of gravity but not against examiner's resistance)

4. - 20% (minimal weakness)

5. - 0% (normal strength) The mean percentage of muscle strength loss is multiplied by 0.30. If there has been a loss of muscle strength of more than one joint, the values are added as has been described for loss of ROM.

(iii) Principles of evaluation of co-ordinated activities shall be:

a. The total value for co-ordinate activities is 90% b. Each activity has value of 9%

(iv) Combining the values for the arm component:

The value of loss of function of arm component is obtained by combining the values of ROM, muscle strength and co-ordinated activities, using the following formula:

$a + b(90 - a)$, where 'a' will be the higher score and 'b' will be 90 the lower score.

12. The total value of hand component is 90%.

i) The principles of evaluation of prehension include:

a). Opposition (8%) tested against index finger (2%), middle finger (2%), ring finger (2%) and little finger (2%).

b). Lateral pinch (5%) tested by asking the patient to hold a key.

c). Cylindrical grasp (6%) tested for

(a) large object 4" size (3%) and small object 1" size (3%)

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d). Spherical grasp (6%) tested for

(a) large object 4" size (3%) and small object 1" size (3%) e.) Hook grasp (5%) tested by asking the patient to lift a bag.

ii) Principles of evaluation of sensations:

Total value of sensation is 30%. It includes, 1. Radial side of thumb (4.8%, that is the outer side), 2. Ulnar side of thumb (1.2%, that is the inner side), 3. radial side of each finger (4.8%) and 4. Ulnar side of each finger (1.2%). Total value of strength is 30%. It includes, 1. Grip strength (20%), 2. Pinch strength (10%). 10% additional weightage is to be given to the following factors viz., 1. Infection;

2. Deformity; 3. Mal-alignment; 4. Contractures; 5. Abnormal mobility (when a person has a wobbly hand, for example); 6. Dominant extremity (4%), i.e., depending on the lack of strength.

iii) Combining value of the hand component shall mean the final value or loss of function of hand component obtained by summing up of loss of prehension, sensation and strength.

iv) Applying the formula mentioned in the preceding paragraph, the % of disability for the combined arm and hand components could be calculated. If the impairment of the arm is say 27% and impairment of the hand is 64%, the combined value is: $27(90-64)$

$64----- = 71.8\%$, where 64 is the higher value 90 and 27

The mean % of muscle strength loss is first multiplied by 0.30. If there has been a loss of muscle strength of more than one joint, the values are added as described for ROM.

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(iii) Combining values of mobility component. Suppose an individual has a fracture of the right hip joint and has in addition to 16% loss of motion, 8% loss of strength muscles, combining the values, the disability is:

$$8(90-16) + 16 = 22.6\% \text{ of } 90$$

(iv) Principle of evaluating the stability component consists of taking the total value as 90% and tested on a scale method and clinical method.

c) Traumatic and non-traumatic lesions

14. Cervical spine fractures are assessed on the basis of evaluation of vertebral compressions, fragmentation, involvement of posterior elements, nerve root involvement of posterior elements and moderate neck rigidity. They are assessed by X ray examination and treated surgically. Cervical inter-vertebral disc disorders, thoracic and dorso-lumbar spine fractures resulting in acute pain, paraplegia, vertebral compression resulting in severe pain, neurogenic low back disc injuries resulting in severe pain are assessed on a scale of 0 to 100%. Without the accompaniment of any compression, fractures or lesions, there could be persistent muscle spasm, stiffness of spine with mild, moderate to severe radiological changes are assessed in the range of 0 to 30% .

VIII. Efficacy of disability of assessment

a) Assessment of compensation for pain.

15. In the manner of assessment of pain and suffering, the disability assessed will be a good guide to know how the particular injury affects performance in the work place and elsewhere. Head injury or spinal injury are sometimes regressive and lead to further complications like epilepsy, numbness, acute pain and spasms. There is a need to know the real sufferer from a malingerer. Expert's evidence through a doctor will help the tribunal in determining the appropriate response to prayer for compensation.

b) Translating disability into loss of earning power

16. All injuries and assessments of disability do not impact the earning capacity [Orissa State Road Transport Corporation v. Bhanu Prakash Joshi-(1994) 1 ACC 467

(Ori); *New India Insurance Company Ltd v. Rajauna*-(1996) 1 TAC 149 (Kant); *Balaiah (T.) v. Abdul Majeed*-AIR 1994 AP 354]; nor in a similar way. The disability has to be seen in the context of the particular occupation or calling that the victim is engaged in. For instance, a mal-union of fracture in the lower limb and stiffness at the knee for a professional driver of motor vehicle may completely make him unfit to be a driver. In *Oriental Insurance Company Limited v. Koti Koti Reddy*-2000(2) LLJ 552 (AP), the injuries caused to the claimant were on the forehead and right leg, particularly at joint and foot. The permanent disability was assessed at 30% by the doctor and due to calcanean fracture, it was in evidence that he could not work as driver. The WC Commissioner assessed the loss of earning capacity as 100% and the HC upheld the assessment. A deformity of the hand could affect a carpenter differently than how it may be irrelevant for, say, a telephone operator. In *Pratap Narain Singh Deo v. Srinvas Sabata*- AIR 1976 SC 222, an amputation of the arm of a carpenter was taken to result in 100% loss of earning capacity; In *Sadasihiv Krishan Adke v. M/s Time Traders*- 1992(1) LLJ 877, a coolie lost his leg. The injury to his leg resulted in his walking with crutches and the Court assessed the loss of earning capacity to be 100%. The attempt at the trial shall always be to elicit how the particular percentage of disability has affected the job that the person was doing and if not suitable for the same job, to what other type of employment that he or she is fit for, in the changed circumstances and what is likely FAO.No.120/1991 Page 23 of 28 to be the loss of income. With the passing of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, a person may continue in the same employment, notwithstanding such disability, the ascertainment of loss of earning capacity will still be relevant to know the employability of the person in open market with the particular disability. The continuance of employment despite the injury may not itself dis-entitle the person from claiming compensation. Posing the question what such injury results, the Madras High Court said in *The Management of Sree Lalithambika Enterprises, Salem v. S. Kailasam*- 1 988 (1) LLJ 63 that the employer may continue an injured person in employment and deny that any loss of earning capacity has resulted in spite of privation of an organ. This, the court said, could not be supported and cannot be the intendment of the WC Act . To the same effect, see *Executive Engineer, PWD, Udaipur v. Narain Lal*-(1977) 2 LLN 415, 1977 LIC 1827 (Raj). It must be noticed both the Workmen's Compensation Act and the MV Act use the expression loss of earning capacity differently from disability per se and without making reference to the claimant's evidence and the expert opinion of a doctor, it will be arbitrary to simply take the % of disability as % of loss of earning capacity. If a Tribunal assesses compensation at a fixed sum for every %of disability, it will result in overlapping of claims if assessment of loss of earning capacity is independently assessed. There are certain recent decisions of the Supreme Court itself [*Arvind Kumar Mishra v. New India Assurance Co Ltd* and another C.A.No.5510 of 2005 dated Sep.29, 2010; *Yadav Kumar v. The Divisional Manager, National Insurance Co. Ltd & another* C.A.No.7223 of 2010, dated Aug.31, 2010], where the % of disability assessed has been taken as synonymous with % of loss of earning power, but it must be assumed

that the court took the value of % of disability to be the same as % of earning power, having regard to the special facts and circumstances. When the loss of
FAO.No.120/1991 Page 24 of 28 earning power and compensation are determined, it is not necessary to make any deduction for personal expenses, as we do, for determining dependency for claimants in fatal accidents. The reason is obvious; the claimant is alive to receive the whole loss of income in injury cases and this principle has also been recognized in Oriental Insurance Co Ltd. v. Ram Prasad- (2009) 2 SCC 712.

IX. Future medical expenses

17. The question of providing for future medical expenses was specifically dealt with by the Supreme Court in Nagappa v. Gurudayal Singh - AIR 2003 SC 674, (2003) 2 SCC 274 when it observed that the MV Act does not provide for further award after a final award is passed. Therefore in a case where injury to a victim requires periodical medical expenses, fresh award cannot be passed or previous award cannot be reviewed, when medical expenses are incurred after finalization of the award. Hence, the only alternative is that at the time of passing of final award, the Tribunal should consider such eventuality and determine compensation accordingly. It is most desirable that the Tribunal elicits from the doctor himself if a future medical treatment shall be necessary and the likely expenses."

9. In the present case, the permanent disability of the appellant has not been proved. The appellant has neither been examined by the medical Board constituted by the competent authority under The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act 1995, nor any disability certificate has been issued by the any such authority. As per disability certificate - Ex.PW1/5, issued by Air Force Record Office, the appellant has suffered 50%
FAO.No.120/1991 Page 25 of 28 disability but the certificate does not specify whether the disability is permanent or temporary. The medical record - Ex.PW1/1 to Ex.PW1/4 records that the appellant suffered compound fracture of both bones of left leg. The copy of the medical Board proceedings was placed on record before this Court according to which the probable duration of the degree of disablement of the appellant is two years. The appellant has not led any evidence to prove his functional disability arising out of the permanent disability. In view of the above, the disability of the appellant is held to be temporary for a period of two years and the compensation of `35,000/- awarded by the Claims Tribunal towards temporary disability of two years, reduction in earning capacity and loss of income during treatment is held to be fair and reasonable and does not call for any enhancement.

10. The Claims Tribunal has awarded `5,936/- towards loss of salary during treatment and `4,500/- towards special diet which is also fair and reasonable and does not warrant any enhancement. The Claims Tribunal has awarded `1,500/- towards conveyance which appears to be on a lower side considering that the appellant remained under treatment for about five months and temporarily disabled for about two years and could not have been able to travel by public transport. The compensation towards conveyance is, therefore, enhanced from `1,500/- to `10,000/-.

11. The Claims Tribunal has awarded `15,000/- towards pain FAO.No.120/1991 Page 26 of 28 and suffering. Considering that the appellant suffered compound fracture of both bones of left leg and remained hospitalized for a long period and also temporarily disabled for two years, the compensation for pain and suffering is enhanced from `15,000/- to `25,000/-. The Claims Tribunal has not awarded any compensation for loss of amenities of life. `20,000/- is awarded towards loss of amenities of life.

12. The appellant is entitled to total compensation of `1,00,436/- as per break-up given hereunder:-
Compensation towards temporary disability, : `35,000/- reduction in earning capacity and loss of income during treatment
Compensation towards loss of salary : `5,936/- Compensation towards special diet : `4,500/-
Compensation towards conveyance : `10,000/- Compensation towards pain and suffering : `25,000/-
Compensation towards loss of amenities of life : `20,000/-

Total : `1,00,436/-

13. The appeal is allowed and the award amount is enhanced from `61,936/- to `1,00,436/-. The Claims Tribunal has awarded interest @10% per annum which is not disturbed on the original award amount of `61,936/-. However, on the enhanced award amount, the rate of interest shall be 7.5% per annum from the date of filing of the claim petition till notice of deposit under Order XXI Rule 1 of the Code of Civil Procedure.

14. The enhanced award amount along with interest be deposited by respondent No.2 with UCO Bank A/c Arun Sehgal, Delhi High Court Branch through Mr. Mr. M.M. Tandon, Member- Retail Team, UCO Bank Zonal, Parliament Street, New Delhi (Mobile No. 09310356400).

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15. Considering that this case relates to the accident dated 26th August, 1996 and the appellant is now about 58 years old, it is directed that upon the aforesaid amount being deposited, UCO Bank shall release the same to the claimant without any restriction of FDR.

16. Copy of this order be given â Dastiâ to learned counsel for the parties under signatures of Court Master.

J.R. MIDHA, J DECEMBER 10, 2010 FAO.No.120/1991 Page 28 of 28