
(1980) 09 GUJ CK 0016
In the Gujarat High Court

Tribhovandas Kishibhai Patel

APPELLANT

Vs

Iven Daulal Raubens and Another

RESPONDENT

Date of Decision : 15-09-1980

Acts Referred:

Motor Vehicles Act, 1988 — Section 110D, 110D

Citation : (1982) ACJ 625 : (1983) 2 GLR 1194

Hon'ble Judges : S.L. Talati, J;S.B. Majmudar, J

Bench : Division Bench

Judgement

S.L Talati, J.—This is an appeal u/s 110-D of the Motor Vehicles Act presented by an injured who was the petitioner in M.A.C.T. Application No. 12 of 1976 before the Motor Accident Claims Tribunal (1-A), Ahmedabad City.

2. According to the petitioner while he was crossing the road on 11-9-1975 at Maninagar, opponent No. 1 dashed from behind while driving the scooter bearing registration No. G. J. G. 3858 and that resulted in fracture of the left femur bone and he was required to be treated at the Nursing Home in Ahmedabad. The claimant claimed an amount of Rs. 75,000/- as compensation from driver of the scooter who was joined as opponent No. 1 and from the Insurance Company who was joined as opponent No.2.

3. Both the opponents filed a joint written statement at exh. 15. According to the opponents the accident occurred because of the utter disregard of the traffic rules and own safety of the applicant himself. They averred in paragraph 7 of the written statement that the applicant got down from the car from the right hand side of the car instead of left hand side without taking care of the scooter approaching the car which was being driven by opponent No. 1 very carefully on the correct side of the road with very slow speed. It was further stated that opponent No. 1 had blown the horn and applied brakes but the applicant proceeded without paying any heed to the same and, therefore, the said accident had occurred. In paragraph 8 it was stated that if the Tribunal came to the conclusion that opponent No. 1 was negligent to some extent, the applicant also

by his negligence contributed to the accident and, therefore, he is liable for contributory negligence. So far as the amount of compensation is concerned, in the written-statement the opponents denied their responsibility in regard to the compensation and also stated that the applicant was not entitled to the amount stated in the application.

4. The learned Member of the Tribunal framed issues at exh. 24. The learned Member of the Tribunal came to the conclusion that the accident was caused due to rash and negligent driving of the scooter by opponent No. 1. The learned Member of the Tribunal came to the conclusion that the applicant was not guilty of any contributory negligence. In those circumstances the learned Member of the Tribunal came to the conclusion that the applicant was entitled to compensation. The learned Member of the Tribunal, therefore, awarded the following amounts:

Rs. 2500-00 for pain and suffering Rs. 2500-00 for loss of amenities to life Rs. 60-00 for expenses for special diet Rs. 150-00 for transport charges Rs. 3825-00 for medical expenses. Rs. 9035-00

Thus an award for a sum of Rs. 9035-00 was passed in favour of the applicant with running interest at 6% from the date of the application till payment and costs on the claim allowed. This award is challenged by the applicant by filing appeal as rest of the claim of Rs. 65965/- was not allowed.

5. On behalf of the opponents Cross-objections are filed and they are valued at a sum of Rs. 4500 and the basis is that the applicant was guilty of contributory negligence and, therefore, out of a sum of Rs. 9035/- which was awarded, Rs. 4500/- should have been cut down on the basis that the applicant was also negligent.

6. We have heard the learned Advocate Shri J. P. Patel for the appellant and Shri M. D. Pandya for the respondents at great length. Before we go to the question of compensation we would first deal with the question of negligence.

7. The applicant is examined at exh. 25. According to him on 11-9-1975 in the evening he went to Maninagar from Bhadra in a car. He wanted to go to the bungalow of Dr. Kantilal. According to him the car was stopped on the road on the opposite side of the bungalow of Dr. Kantilal and he got down near opposite foot-path and thereafter he started crossing the road for going to the opposite side. According to him while he was crossing the road from east and was going to the west, a scooter came from the northern direction and the handle of the scooter dashed against him on his left side hip. At that point of time, according to him he had crossed about one-third of the road. In cross-examination he denied the suggestion that he had got down from the car by right hand side of the door. According to him he had not seen scooter while it emerged from the bye-lane. According to him he had not seen scooter at all before the impact. He also denied the suggestion that on seeing the scooter he was fumbled and that he fell down and that there was no impact with the scooter. On behalf of the

applicant no other evidence is led on this aspect of the case.

8. Opponent No. 1 gave his evidence at exh. 31. According to him on the date of the accident he was coming from Katcha road on his scooter. He was returning on the scooter from where he was serving. He further stated that he came from katcha road and took a right side turn on the main road. According to him he came from west to east and took turn to the right side in the southern direction. According to him at that time the car which was facing south came in reverse and some one got down. He further stated that the applicant was waiting from east to west. According to him he took a turn to the left in order to allow him to pass through but the applicant stood and then retreated. Thereafter according to him he applied brakes. He stated that there was no impact between his scooter and the applicant but he thought that the applicant must have been frightened and fell down.

9. The panchnama of the place of the scene of the accident is produced at exh. 55. From the panchnama it appears that the width of the road is 35 ft. The accident according to the panchnama happened at a place which is at a distance of about 12 ft. from the eastern corner of the road and the western corner of the road is at a distance of 23 ft. According to the applicant there was no other traffic on the road at that time and dash was with full force.

10. From the above evidence it clearly appears that what the applicant has stated is correct. The version of the applicant gets support from the panchnama exh. 55. The version given by opponent No. 1 is entirely different from one which he gave at the time when he filed written statement.

11. The learned advocate Shri Pandya drew our attention to the fact that the injured was on the right side and, therefore, the version given by the driver should be accepted when he says that the applicant must be retreating on the road and at that time the incident must have occurred. It is noteworthy that the road is 35 ft. in width. The applicant had crossed one-third of the road. Opponent No. 1 emerged from a bye-lane. There was no other traffic on the road. His version in the written-statement was given up by him and no suggestion was put to the applicant in cross-examination that he retreated. The only suggestion that was put to him was that he was fumbled and he fell down. The applicant denied this suggestion. The version of opponent No. 1 is that there was no impact but that while retreating the applicant fell down. The learned Member of the Tribunal, therefore, while appreciating the above evidence came to the correct conclusion that the applicant was not guilty of contributory negligence and the accident occurred because of the sole negligence of opponent No. 1. On a wide road when a scooter enters from a bye-lane he clearly Sections the pedestrians crossing the roads The car in which the applicant had come from Bhadra had already left according to the applicant. He got down. It is immaterial whether he got down from one door or the other but he was crossing the road and was going to the bungalow of Dr. Kantilal and he was walking from east to west. He had crossed one-third of the road. It is nobody's case that the car was stopped in the middle

of the road and the applicant got down there. The car naturally stood near the footpath where the applicant got down. Thereafter he started walking. He wanted to cross the road. The birth date of the applicant is brought on record. He was born in 1903. He was, therefore, 72 years old on the date of the accident. It cannot be suggested that he was walking very fast or running. Therefore, when an old person was walking on a road on which there was no traffic and the scooterist emerged from a bye-lane it was not difficult for him to have seen the pedestrian and he could have averted accident if he was alert. It appears that he was driving the vehicle in excessive speed, unmindful of the pedestrians and, therefore, the accident was caused. Under the circumstances opponent No. 1 is the only person responsible for the accident and would be liable for compensation which may be determined. Opponent No. 2 Being the Insurance Company would be also liable to pay the said amount jointly and severally.

12. The next important question which is required to be decided is as to what should be the compensation. Here it may be stated that so far as the learned Member of the Tribunal is concerned, the Tribunal awarded full damages which were asked for on two heads and those two heads are the expenses incurred for transport and diet and also medical expenses. The learned Member of the Tribunal also awarded a sum of Rs. 2500/- for pain and suffering and further awarded a sum of Rs. 2500/- for loss of amenities to life. The learned Member of the Tribunal did not award anything on the head of loss of income, present or future. Under the circumstances lengthy arguments were advanced in regard to this head only. The real question, therefore, which is required to be decided in this appeal is as to whether the amount awarded on the head of pain and suffering and loss of amenities to life is adequate ? The second question which is required to be decided is as to whether the applicant is entitled to any amount on the head of loss of present or future income ?

13. Now in order to arrive at a correct conclusion in regard to the above two questions it may be stated that the dash of the scooter was on the left side hip. The accident occurred on 11-9-1975. Immediately after the accident he was required to be removed in a chair to the bungalow of Dr. Kantilal. From that place the applicant was taken in an Ambulance to Dr. Narendra Patel where X-ray was taken. After taking the X-ray the applicant was taken to Dr. Prabod Desai. The fracture of the bone was detected. Thereafter the applicant was taken to Harivallabh Nursing Home for operation. He was required to be kept in that Nursing Home for twelve days. On 14th the applicant was operated under anaesthesia and a metal rod was inserted at the fractured portion. On 23rd the applicant was discharged from Nursing Home. He was advised to sleep flat and not to make movements. After one month Dr. Prabod Desai went to Anand and saw the applicant in Dairy Rest House where he was resting. Thereafter he was allowed to change the sides. Fifteen days thereafter again Dr. Prabod Desai saw him and under his advise he started walking with the help of a crutch for about fortnight. The result was that he got swelling on the leg. So he was advised not to walk. After three months in the Rest House he went home and thereafter he

curtailed long walking. According to him till he was examined in court on 17th September, 1976 he had swelling. According to him he gets swelling whenever he keeps standing. He also stated that he felt pain on his left side hip while changing sides and while sleeping. According to him he was not in a position to sit on the ground and he is required to sit on the chair for the purpose of taking food and for passing the stool.

14. Dr. Desai is examined at exh. 35. He is Orthopaedic Surgeon and in his evidence he stated that he had examined the applicant at his private clinic. According to him he had found that the applicant had a fracture of the neck of femur on the left side. Thereafter, according to him he got him admitted in Harivallabh Nursing Home and he operated him on the 14th. According to him by operation he removed the fractured head of femur and replaced it by a metal head with a long stem. He was advised to take rest in the hospital and thereafter again for about another four weeks' rest. Thereafter Dr. Desai saw him on 23-10-1975 at Anand and he advised him to do some exercise but not to walk for another six weeks. Mr. Desai further stated that in case of such operation he normally allows the patient to change sides after about 2 to 2 1/2 months. According to him when he saw him at Anand he had some swelling on the leg and restriction of the movement of the hip joint along with the slight discomfort. Therefore, he advised him to walk with stick. He also advised him that he should not walk long distance. According to him he assessed the permanent disability at 35 % for the left lower limb. He issued the certificate exh. 36. According to Dr. Desai, the applicant could not squat or sit with crossed-legs and could not undertake any strenuous activities. According to him he will feel pain if he keeps standing for a long time. He also stated that it was likely that the hip joint might become very stiff and painful during the period of 5 to 10 years and may require another operation to restore useful function. In cross-examination Dr. Desai stated that as far as walking is concerned, the patient is likely to feel pain. According to him the patient had made complaint of pain and, therefore, in his evidence he stated that the patient had pain. The learned Member of the Tribunal did not agree with the opinion given by Dr. Desai. He did not agree that the disability would be 35% so far as the lower limb is concerned. No reasons are given for such disagreement. There is nothing in the cross-examination of Doctor Desai from which one could come to the conclusion that there was no such disability as suggested by Dr. Desai. It is clear from the evidence of the applicant and Dr. Desai that for a period of about six months from the date of the application the applicant has to undergo severe pain and was required to lie down in bed for several months even without changing the sides. He had to undergo an operation where a rod was required to be inserted. The fracture involved was a fracture of the left hip. There is also a permanent disability left because the patient cannot squat and cannot sit with crossed-legs and he cannot undertake any strenuous activity.

15. In a case of Babu Mansa v. Ahmedabad Municipal Corporation reported in 19 G.L.R. at page 492, a sum of Rs. 15,000/- was awarded for pain, suffering and

loss of amenities and enjoyment of life. It was a case of a young person and there was permanent partial disability of the right leg and it was assessed at 20%. Here in this case the person involved is an old person. But it may be stated that so far as pain and suffering, concerned, it is perhaps more when the person is old. The reason is obvious. The bones of an old man are brittle. They require more time to heal. The capacity of an old man to bear pain is also less. This was a case where the applicant had to undergo severe pain for six months. In these circumstances we feel that a sum of Rs. 2,500/- which is awarded for pain and suffering is very much less and it is required to be substantially increased. The permanent partial disability in this particular case is also 35% while in the case of Babu Mansa it was 20%. Babu was a young boy of 15 years. Therefore, so far as the loss of amenities and enjoyment of life are concerned for a very long period Babu Mansa will have to undergo that suffering with the physical handicap which he had in the right leg. In this particular case though the permanent partial disability is 35% the person involved is an old person and, therefore, he will not have to undergo suffering or physical handicap for a very long period. Considering the circumstances, therefore, we do not feel that this is a case where we should award a sum of Rs. 15,000/- for pain, suffering and loss of amenities to life but to award a sum of Rs. 2,500/- for loss of amenities to life we feel that the amount is on lower side. We, therefore, increase both these amounts as under:

We allow as Rs. 6,000/- on the head of pain and suffering and Rs. 4,000/- on the head of loss of amenities to life.

16. That takes us to the next question as to what should be awarded on the head of loss of earning capacity. Before we enter into the submissions which are made before us certain facts in regard to this particular applicant are required to be stated. Along with the application, biodata of the applicant was given and which was proved at exh. 21. From the biodata it appears that the applicant was born on 22nd October, 1903. He had joined D. N. High School and had started Kaira District Co-operative Milk Producers' Union Ltd. at Anand from 1947 and he was Chairman of that Organisation for a number of years. He was Director or Chairman of several committees and organisations in Kaira District and also in the State of Gujarat He was Director of the Gujarat State Fertilizer Co. Ltd. since 1965 and was Vice-Chairman of National Agriculture Co-operative Marketing Federation, Delhi since 1965. He was also a member of National Cooperative Union, Delhi and Director, Central Bank of India from 1968 to 1969. He was elected in July, 1967 and was re-elected in April, 1968. In connection with the above activities he had travelled at various places outside the country and in particular Holland, U. K., Denmark, Switzerland, Sweden, France, West Germany, Italy and Philippines. According to him his special interest was co-operatives and politics. In his evidence he stated that at the time when he gave evidence he was Director of several Companies and Agriculture Produce Market Committees. According to him on the next date of the accident he was to go to Mehsana to attend the meeting of the Board of Directors at Mehsana Dudh Sagar Dairy. In

his evidence he stated that he was taking part in banking institutions, marketing societies and in co-operative activities and was taking part in the activities of different educational institutions. In cross-examination it was tried to show that even after the accident after a period of six months rest he could attend meetings and this is what he stated in his cross-examination. He stated that "after I started moving out, six months after this accident, I have attended meetings of the Board of Directors at Mehsana Dudh Sagar Dairy, thrice." It was also brought out in his cross-examination that he attended the meetings of the Board of Directors of Anand Taluka Sale and Purchase Samiti and also attended the monthly meetings of the Board of Directors of the Gujarat State Fertilizers Company at Bajwa. He admitted in cross-examination that he had attended the meetings of educational institutions at Nadiad and at Anand. Now, therefore, it was not the case put in cross-examination that he had retired from politics . or co-operative movement. It was only tried to be shown that even after the accident it was possible for him to attend the meetings while according to the applicant he could not attend the meetings as often as he used to attend before. According to him at Mehsana he attended the meetings thrice. Considering the fact that he was in bed for six months and considering further the fact that he was giving evidence in the month of September, 1976 it appears to us that after he got out of his bed atleast six meetings were held and he could attend only three The further fact which appears clearly is that he could attend the meetings at Anand, Nadiad or Bajwa places which were very near to Anand. These are the facts which are required to be considered for the purpose of determining the earning capacity of the applicant. The learned advocate Shri J. P. Patel who appeared on behalf of the applicant stated that the capacity of the applicant should be assessed atleast-at Rs. 3000/- per month. This according to him would be the net amount after paying Income Tax. He submitted that as there was 35% disability it should be considered that there was loss of atleast of Rs. 1000/- per month in the earning capacity of the applicant. On behalf of the opponents the learned advocate Shri Pandya submitted that this person was devoted to public life particularly to politics and cooperatives, and had absolutely nothing to do with private sector. It was also submitted that though he could not attend certain meetings and he could attend certain meetings he never suggested as to what sitting fees he got at each meeting and, therefore, according to the learned" advocate Shri Pandya there was no data on the record by which one could arrive at any figure. He did not submit that there could not be any loss but according to him that loss could be "X" and what that "X" could be the question of evidence and as the applicant did not produce evidence he should fail.

17. The learned advocate Shri Pandya drew our attention to certain paragraphs appearing in the book "Damages for Personal Injuries and Death", written by John Munkman, Fifth Edition, 1973. On page 12 of that book the main elements in damages for personal injuries are discussed and it is observed as under:

In every case of personal injuries, there are two main factors which have to be taken into account in assessing the damages.

On the one hand, there is the personal injury itself, ranging from the loss of a limb or other part of the body to slight cuts or bruises, and involving not only pain and hardship, but also the loss of the pleasures of life. On the other hand there is the financial loss.

These two factors were distinguished by Cockburn, C. J. in *Fair v. London and North Western Rail. Co.* (1869) 21, L. T. 326 where he observed as under:

In assessing the compensation the jury should take into account two things; first, the pecuniary loss the plaintiff sustains by the accident; secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only, his present loss, but his incapacity to earn a future improved income.

Thereafter he drew our attention to paragraph appearing on page 51 where it is stated by the learned Author as under:

An estimate of prospective loss must be based, in the first instance, on a foundation of solid facts: otherwise it is not an estimate, but a guess. It is therefore important that evidence should be given to the court of as many solid facts as possible. When it is shown that the plaintiff was earning money at a specified rate at the time of the injury, the ordinary presumption of the law is that he would have continued to earn at the same rate. If the plaintiff claims that he would have earned more, he must prove relevant facts, for example by showing that he was on a regular ladder of promotion, or in a trade where rates of pay are increased from time to time, or that he had special merits or qualifications or opportunities which would have led to an improvement. Evidence may be given of a probable increase of productivity in his particular industry or trade, and therefore of real earnings, but evidence of a probable increase in national productivity - and therefore of "real" earnings all round-is too speculative to carry any weight.

18. Our attention was also drawn to page 61 where the learned Author has stated as under:

There are two ways of looking at the assessment of damages for the loss of future earnings. One way is to concentrate on earning capacity, and value this as a capital asset destroyed or diminished by the accident.

On page 66 on the hearing "The starting-points of the calculation: probable future earnings, actual earning power after the accident, and duration of incapacity", the learned Author stated as under:

Before the loss of earning capacity can be converted into a capital sum, the judge has to consider the evidence and probabilities in the case, and arrive at firm conclusions upon three things. First, what would be the plaintiff probably have been able to earn in the future, if he had not been injured; secondly, how long will his incapacity continue; and thirdly, how much (if anything) is he still able to earn?

On page 70 it is stated that the rule applies that a plaintiff must mitigate his loss by doing whatever work he is reasonably able to do, and failing that by applying for unemployment benefit: the question for the court is not what in fact he is earning, but what he is able to earn.

19. On page 86 the learned Author discussed unused earning capacity of a person where the learned Author stated as under:

While loss of actual earnings and loss of earning capacity are alternative approaches to assessment, there are few English decisions on compensation for loss of an earning capacity which is not used or is used in a way which does not involve the earning of money.

A plaintiff is not entitled to damages for loss of capacity to earn money unless it is established that he would, but for his injuries, have exercised that capacity in order to earn money.

Thereafter several cases are discussed. One of the cases is of a person who is a member of a religious order. He takes a vow of poverty and does his work for nothing, giving his salary to the order. At one stage such a person may be working in a college or hospital and receiving a salary, at another time he may be doing exactly the same work for nothing, in the order's own houses or on foreign missions. By the accident he is deprived of the power to continue his work and give it freely. There is no difference in principle between earning a salary and handing it over, and giving valuable work without payments. As a matter of principle, the work done in such a case should be valued at the market rate and capitalised. There is real deprivation of a capacity which is fully used, and the arrangement by which it is used without remuneration is wholly collateral so far as a defendant is concerned.

20. Another case discussed is a case of an artist where he spent his time on unremunerative but satisfying paintings. The opinion expressed was that compensation should be assessed on the basis of what he could have earned with commercially saleable work.

21. On the basis of the above paragraphs the learned advocate Shri Pandya urged that the real question posed was whether the injured had any earning capacity and whether there was any data on the record. He vehemently submitted that a person who had devoted his life to co-operatives and public sector and had decided not to operate on a private sector and as there was no evidence as to what earnings he was making and in particular there was no evidence as to whether any sitting fees were attached to the meetings which he attended and in absence of any such data even if one comes to the conclusion that some remuneration was attached to the meetings which he attended it could have been proved and in this case as the applicant did not choose to prove he should not succeed. Some authorities also were cited.

22. The first Authority is the case of *Browning v. War Office* and *Anr.* reported in

1962 (3) All ELR 1089. The observation which was relied upon appears on page 1095. It is as under:

In the case of "special damages" where the plaintiff has in fact acted reasonably, only the former factor in the subtraction sum is a matter of assessment; the latter is a matter of ascertainment. In the case of "general damages", both factors are a matter of assessment. To call this damages for "loss of earning capacity" is, in my view, erroneous. A plaintiff is not entitled to damages for loss of capacity to earn money unless it is established that he would, but for his injuries, have exercised that capacity in order to earn money.

23. The second case on which reliance was placed is a case of *Moeliker v. A Reyrolle and Co. Ltd.* reported in 1977 (1) All ELR 9. Our attention was drawn to the observations made on page 15 which are as under:

Counsel asked us to give guidance about the principles on which such damages should be assessed. It seems to me that any guidance can only be on very broad lines, because the facts of particular cases may vary almost infinitely. I think it is entirely the wrong approach to take *Mrs. Smith* as a yardstick, and try to assess whether the plaintiff, in another case, is in a better or worse position than she was. As I have said, this problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he is then earning as much as he was earning before the accident and injury (as in the present case), or more, he has no claim for loss of future earnings. If he is earning less than he was earning before the accident as in *Nicholls v. National Coal Board* he has a claim for loss of future earning which is assessed on the ordinary multiplier/multiplicand basis. But he may have a claim, or an additional claim, for loss of earning capacity if he should ever lose his present job.

In *Smith v. Manchester Corpn.* Scarman, LJ said that it was wrong to describe this sort of loss of earning capacity as a "possible loss" and that:

It is an existing loss the plaintiff is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market." But what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market. As Orr, LJ said in *Clarke v. Rotax Aircraft Equipment Ltd.*

It is true, as stated by Scarman LJ in *Smith v. Manchester Corpn.* that the loss of earning capacity has arisen at the time of and in consequence of the accident, but its financial consequences may or may not arise at all or may arise at any future time.

24. Where a plaintiff is in work at the date of the trial, the first question on this head of damage is : what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the

question is whether this is a "substantial risk" or is it a "speculative" or "fanciful" risk see *Davies v. Taylor* per Lord Reid and Lord Simon of Glaisdale). Scarman LJ in *Smith v. Manchester Corpn.* referred to a "real risk, which I think is the same test. In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employers' business; the plaintiffs age and qualifications; his length of service" his remaining length of working life; the nature of his disabilities; and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no "substantial" or "real" risk of the plaintiffs losing his present job in the rest of his working life, no damages will be recoverable under this head.

25. But if the court decides that there is a risk which is "substantial" or "real", the court has somehow to assess this risk and quantify it in damages. Difficult as this is, the courts sometimes have to assess the money value of a chance in other contexts see, for example *Chaplin v. Hicks* and *Otter v. Church, Adams, Tatham & Co.* Clearly no mathematical calculation is possible. Edmund Davies and Scarman LJ said in *Smith v. Manchester Corpn.* that the multiplier/multiplicand approach was impossible or "inappropriate" but I do not think that they meant that the court should have no regard to the amount of earnings which a plaintiff may lose in the future, nor to the period during which he may lose them. What I think they meant was that the multiplier/multiplicand method cannot provide a complete answer to this problem because of the many uncertainties involved. The Court must start somewhere, and I think the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life. This stage of the assessment will not have been reached unless the court has already decided that there is a "substantial or" -real" risk that a plaintiff will lose his present job at some time before the end of his working life, but it will now be necessary to go on and consider (a) how great this risk is and (b) when it may materialise, remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job and then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market, that is, what would be his chances of getting a job, and an equally well paid job. Again, all sorts of variable factors will, or may, be relevant in particular cases, for example, a plaintiffs age; his skills; the nature of his disability; whether he is only capable of one type of work or whether he is, or could become, capable of others, whether he is tied to working in one particular area; the general employment situation in his trade or his area, or both. The Court will have to make the usual discounts for the immediate receipt of a lump sum and for the general chances of life."

26. Our attention was also drawn to the *Corpus Juris Secundum* Volume XXV at page 496. The relevant paragraph reads as under:

However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guess work or inference: without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered : and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved even in action of tort.

Our attention was also drawn to page 510. The paragraph reads as under:

The pecuniary injury of time lost by plaintiff in consequence of the injury is a proper element of recovery, even though he was not working for a fixed salary or certain wages. So it is generally declared that loss of earnings is an element of damages which should be considered, although it has been held that wages lost are not recoverable as such, but that in cases where it is permitted to prove the amount of wages lost, such evidence is admissible as a measure of the value of plaintiff's time of which he has been deprived.

Thereafter our attention was drawn to paragraph appearing on page 619. It begins as under:

87. Impairment of Earning Capacity. Stated in general terms, the measure of damages for impairment of earning capacity is the difference between the amount plaintiff was capable of earning before his injury and that which he is capable of earning thereafter. In general terms, the measure of damages for impairment of earning capacity may be stated to be the difference between the amount which plaintiff was capable of earning before his injury and that which he is capable of earning thereafter. It must be noted, however, that there can be no fixed rule by which the amount of damages for impairment of earning capacity may be definitely measured.

Damages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury, and the difference in the actual earnings of plaintiff before and after the injury does not constitute the measure; hence the amount which plaintiff is capable of earning and not that which he has actually earned since the injury is to be taken for the purpose of comparison with his previous earnings as showing the diminution of earning capacity, evidence as to actual earnings subsequent to the injury being received not as tending to mitigate damages but to establish plaintiff's earning powers. Accordingly, recovery may be had for impairment or diminution of earning ability or power, even though it should not be shown that plaintiff has in the past earned anything or been engaged in a remunerative or compensable pursuit. Likewise, diminution of earning capacity is not, of necessity measured by its diminution in the particular calling in which plaintiff was engaged at the time of the injury. Hence, plaintiff may show that he was capable of earning more than he was earning at the time of the injury, and the jury may consider what plaintiff

might have been able to earn but for the injury in any employment for which he was fitted, or what he may be able to earn in spite of the injury in any such employment.

There is another paragraph appearing at page 623:

Necessity of proof as to amount. Evidence from which the amount may be determined is essential to an award for impairment or destruction of earning capacity. An award cannot be made from mere conjecture or without proper data furnished as evidence, although the evidence need not be clear and indubitable to entitle it to go to the jury, and the law exacts only the kind of proof of which the fact to be proved is susceptible. An award for diminution of prospective earning capacity may be made, although there is no direct evidence as to the amount of loss.

27. The learned advocate Shri Patel, however, relied upon the authority on the case of *Amul Rameshchandra Gandhi v. Abbasbhai Kasambhai Diwan and Ors.* reported in 19 G.L.R 721 and 723 it is observed as under.

Compensation under the head of pecuniary loss is divisible into two categories—one negative and another positive. In the first category falls the deprivation of earnings or other items which would have been received but for the accident and have now been taken away. In the second category is comprised the new positive burden of expenses required to be incurred as a result of the accident. For the assessment under the first sub-head, an estimate of the probable future earnings had there been no accident and the actual earning power at the accident has to be made and the difference between the two is the loss of earning capacity which will have to be justly compensated. Several factors such as reduced eligibility for employment or loss of chances of favourable employment and loss of career will have to be considered. However, it is not easy to make such an estimate in the case of a young boy about whose prospective earning and probable loss one has only to make an estimate often a very rough estimate based purely on guess work. There are several uncertainties, and imponderables involved. Under the other subhead, namely, the new prospective burden of expenses to be incurred as a result of the accident, the costs of medical expenses, if any, which the injured person might be required to incur in future and his need of nursing and constant attendance and extra nourishment, if any, have to be taken into account. In the instant case, the Tribunal erred in principle in ignoring altogether the second subhead of loss and in not awarding any compensation to the appellant in that behalf. Besides, the assessment of the Tribunal in respect of the loss of earning capacity is based on a gross underestimate. In these days, to assess the prospective income of a boy aged about 12 under these circumstances at Rs. 300/- per month, is to make a gross underestimate. Likewise, to assess the loss of earning capacity at 250/a only in the case of loss of a vital limb, which brings about permanent disability is also a gross underestimate. As pointed out in *Bhiraf Premji's* case, in estimating the future loss of income, the primary consideration must be the nature and extent of the

disablement of the limb permanent or temporary-total or partial and its likely resultant effect on the earning capacity in the chosen avocation, profession or employment. It is, therefore, not right to treat "this problem as an abstract inthemiticil exercise." Therefore, the estimitel lots of earning capacity in the sum of Rs. 75/- per month where there is amputation of right leg below knee of a boy with this family background is also not realistic.

In the circumstances such as are present in this case, the best method to opt would be to make a global assessment under both the sub-heads and to award compensation for pecuniary loss taking into account all the relevant factors enumerated above. The appellant's eligibility for employment, assuming that in his future life he would have sought ernoloyment, is bound to be reduced, la any case, any person not suffering such disability would be preferred and, therefore, there is a loss of chance of favourable employment. Even assuming that the appellant would not have sought employment but taken to some profession, there is no manner of doubt that even if there be no total loss of career, there will be considerable handicap in pursuing that career. But this is not all. The appellant will constantly need some attendance. He any also have to periodically incur expenditure on new crutches. The artificial limb will have to be replaced from time to time as the appellant grows in age and physical changes occur. The surgical boot would also for the same reason need to be replaced. On probabilities, some expenditure even on medicines and nourishment cannot be ruled out. For all this also the appellant has to be compensated, the pecuniary loss of the appellant must, therefore, be estimated at Rs. 250/- per month, that is to say, at Rs. 3,0001- per annum. In case of a young boy age 12 the multiple to be adopted cannot be less than 15. On the aforesaid basis, the pecuniary loss would come to Rs. 45,000/ - and compensation under this head must be in the said sum.

28. The principles discussed are required to be applied to the facts appearing in this particular case. Here is a case of a person who met with an accident at the age of 72. He led an active life throughout his life and as a result he was a pioneer of Amul Dairy and as a result he cams to be connected with Mehsana Dairy and was also Director and he did attend meetings of Mehsana even after the accident. He was also Director of Gujarat State Fertiliser Corporation and the applicant attended the meetings even after the accident. He was a Member of Rajya Sabha and from exh. 21 it appears that his main interest was politics and co-operatives. It clearly appears to us that a man of 72 even after the accident and after he was required to take rest for a period of six months immediately thereafter started attending the meetings and taking active part as far as he can in the organisations where he was on the date of the accident. It is clear that in public life and amongst professions, people-seldom retire. There are cases where the people do retire, but it is common experience that the people do not retire till they are completely disabled or dead. This happens amongst the professionals and amongst people who are in public life. Here is a classic example where a person after the accident after he was required to take rent for six months

immediately began an active life. His age and the accident could not completely shut him in his house. Though there was impairment, though he was not in a position to attend all the meetings, yet an endeavour was made and he started practically attending all the meetings at Anand, Nadiad and Bajwa and some meetings at Mehsana. In a life which a professional or politician leads ups and downs to come. But a person who has not given up earnings and who has not taken a vow being a religious order where he accepts and even a person who earns and gives up, is entitled to compensation because he has earning capacity which he has not given up and which is not destroyed and which by any vow he has not given up. Therefore, a person desirous of leading active public life and a person who in fact is leading such a life is a person before us and that man's earning capacity is required to be considered. It appears that he is a man of the world. He has invested his savings and he is earning dividends to the tune of Rs. 1423-95 which clearly appears from the list which he produced at exh. 40. This man also has agricultural lands in Anand and there are three survey Nos. viz. 2143, 2142 and 2141. He gave evidence that all the three survey numbers are under his personal cultivation and he supervises the cultivation. He further gave evidence that now it would not be possible for him to supervise the agricultural operations and if he engaged a servant he would be required to pay atleast a sum of Rs. 200/- to Rs. 300/- per month. According to him the annual income from agriculture is Rs. 5,000/-. When the total annual income is Rs. 5,000/- it would not be economical to engage a person on monthly basis and pay him Rs. 200/- or Rs. 300/- per month and, therefore, he did not do it and he chose to give the supervision work to his brother and his brother is supervising the agricultural operations of the fields. Even if the brother of the plaintiff does the work of the plaintiff, the tortfeasor cannot get the advantage of the same. It is clear that the applicant never wanted to spend Rs. 200/- per month. He would not give Rs. 200/- to his brother, he would give something less. It will be reasonable to infer that atleast one-third of Rs. 5,000/- should go to the brother and the rest to the applicant. Therefore, so far as loss of agricultural income is concerned there is proper evidence on record by which we can easily come to the conclusion that the loss is Rs. 1650/- per year. However, the learned advocate Mr. Pandya is correct when he says that full facts which could bring about real data, bringing on record the real income of the person at the time of accident and after the accident is not brought on record. Only his activities are brought on record and, therefore, he submitted that from such activities a person could earn, but that amount could not be worked out for want of evidence and it was strenuously urged that no guess work could be done. As observed in 19 G.L.R. 721 (supra) at times [he guess becomes necessary. 19 G.L.R. 721 (supra) was a case where a minor was involved. He could not have any income. A guess work was required to be done. That guess work was done by gathering facts from record and the facts show that the father was a person who had studied upto first year B.Com. and he wanted that his son should be Doctor or Engineer or Officer. It was inferred that atleast he would become a graduate and would earn certain amount. So ultimately the minor had a potential capacity to become a

graduate and he had also future capacity to earn before he dies. In this particular case the man is already working. He is leading an active life. By leading active life he is supporting his family. From what is stated above it can never be suggested that the applicant is a person who has no earning capacity. That earning capacity to our mind could have been far more when he was young but we are dealing with him when he is 72. If he were a Government servant or a servant in any other organisation he would have retired and drawn pension but as we have observed earlier such persons who are not in Government but who are professional or in public life seldom retire and he is a person who has not retired. His earning capacity, therefore, could at least be Rs. 1,500/- to Rs. 2,000/- per month. However, we are not impressed with the argument that there is impairment of 35%). That 35% impairment is to the lower limb. Therefore 35%) could not be the impairment to the earning capacity. He was not earning by his leg. He was earning by his hands and brain: Therefore, his earning would be reduced because of the fact that he would not be able to take long journeys of Delhi and other far places but it would be possible for him to go to Mehsana, Bajwa, Nadiad and to carry on his activities. Taking the overall picture if we are to put a round figure taking into consideration the impairment which he might have in regard to his activities in future and further fact that he might have to undergo operation and he might develop stiffness at the place of operation as stated by Dr. Desai and considering all these factors together we put this figure at Rs. 200/- per month meaning thereby that the figure would be Rs. 2,400/- per year to which Rs. 1600/- may be added for agricultural loss. Thus the total would come to Rs. 4,000/-.

29. The next question which is required to be considered is what multiplier is required to be taken. The learned advocate Mr. Pandya referred to Halsbury's Laws of England, Vol. 12, Fourth Edition, page 453, Paragraph 1156 relevant for the purpose reads as under:

1156. Computation of future pecuniary loss : the multiplier and other factors. Since a plaintiff can invest his damages, the lump sum award in respect of future loss must be discounted to reflect his receipt of interest on invested funds, the intention being that the plaintiff will each year draw interest and some capital (the interest element decreasing and the capital drawings increasing with the passage of years), so that he is compensated each year for his annual loss, and the fund will be exhausted the age which the court assesses to be the correct as having regard to all contingencies.

30. The three factors in regard to this applicant are on record. One is that on the date of the accident he was aged 72 years. The other fact is that in year 1980 he is alive and therefore, his heirs are not required to be brought on record. And the third factor is that his mother died at the age of 90. Considering these factors if multiplier of 5 is taken it would be a proper multiplier. The amount would come to Rs. 20,000/-. We, therefore, allow the compensation as under:

(1) Rs. 6,000-00 for pain and suffering (2) Rs. 4,000-00 for loss of amenities to

life (3) Rs. 60-00 expenses as awarded by the learned Rs. 150-00 Member of the Tribunal. (4) Rs. 3,825-00 medical expenses (5) Rs. 20,000-00 for loss of agricultural income and further earning capacity. ----- Total Rs. 34,035-00 -----

31. We may here observe that we have not allowed any amount on the present loss of earning that is from the date of the accident to the date on which he gave evidence. That actual economic loss we have not allowed in view of the meagre evidence on record and further fact that when we are considering the future pecuniary loss we are awarding the figure considering the overall considerations. The learned Member of the Tribunal awarded Rs. 9,035-00.

32. The additional award would come to Rs. 25,000/-. The appeal is, therefore, partly allowed. Cross-objections are dismissed with no order as to costs and the applicant is further entitled to additional amount of Rs. 25,000/- with running interest at 60/o from the date of the application till realisation with proportion ate costs throughout. On the claim disallowed there will be no order as to costs.