IN THE SEYCHELLES COURT OF APPEAL-

ATTORNEY GENERAL — APPELLANT

V/S

RAY VOYSEY	1ST RESPONDENT
DENISE VOYSEY	2ND RESPONDENT
ELIZABETH VOYSEY	3RD RESPONDENT
STEVEN VOYSEY	4TH RESPONDENT

Civil Appeal No. 12 of 1995

Before Goburdhun, P., Silungwe and Ayoola, JJ.A.

Mr. A. Fernando for the Appellant
Mr. B. Georges for the Respondent

JUDGMENT OF SILUNGWE, J.A.

This is an appeal against a ruling of the Supreme Court wherein it was held that the action of the plaintiffs, now the respondents, was not time-barred.

The defendant and the plaintiffs in the Court below are now the appellant and the respondents, respectively, and will henceforth be referred to as such in this judgment.

It is not in dispute that one 2nd Lt. Mark William Voysey, now deceased, was at the material time employed by the Government of the Republc of Seychelles as an Air Force Pilot; and that on August 30, 1987, being a duty officer, and whilst he was piloting a helicopter belonging to the Government aforesaid on a mercy mission to La Digue in response to a request from the hospital, he died when the helicopter crashed off Praslin.

On August 8, 1994, nearly seven years after the

fateful event, the respondents (being the father, the mother, the wife and the son, respectively, of the deceased as heirs and ayants) filed a plaint in the Supreme Court against the appellant for the recovery of damages and pleaded, inter alia, as follows:-

> "4. The plaintiffs aver that the defendant is liable for the death of the deceased whether because the helicopter crashed because it was faulty (which the plaintiffs have no way of knowing) or because the work of the deceased with the defendant was dangerous.
>
> 5. As a result of the death of the deceased the plaintiffs have suffered loss and damage as particularised hereunder:"

In a statement of defence, however, the appellant made, inter alia, the following averment:

> "(6) By way of further answer the Defendant states that:-
>
> (i) this action cannot be maintained in court as it is prescribed under the Civil Code of Seychelles."

This additional averment was denied in an amended plaint.

The next thing that occurred was the raising by the appellant of the plea in limine litis and the hearing of submissions thereon from both sides. The Supreme Court then ruled against the appellant on the ground that the cause of the helicopter crash was ascertainable "only after a technical inquiry which the defendants were obliged to hold .... who alone could initiate a technical investigation." In conclusion, it was held that the respondents' delay in instituting proceedings in this case had "been caused by the absence of an official cause for the crash, which the defendants were obliged to provide and which was obviously within their knowledge. They cannot now

take advantage of the situation and plead prescription."

As regards the issue of the alleged concealment, the Supreme Court held that concealment involves a deliberate or reckless act with an element of fraud. The Court could not, however, find any element of fraud or a deliberate attempt to prevent the respondents from knowing the cause of the accident.

The predominant ground of appeal as canvassed by Mr. Fernando, learned counsel for the appellant, is that this is a clear case of a five year prescriptive period which falls within the provisions of Article 2271 of the Civil Code and which stipulate that -

> "2271 (1) All rights of action shall be subject to prescription after a period of five years except as provided in Articles 2262 and 2265 of the Code."

(Article 2262 provides for a twenty year prescription as regards real actions in respect of ownership of, and interests in, land; while Article 2265 relates to a ten year prescription concerning a title acquired for value and in good faith).

Mr. Fernando's resolute stand is that the five year prescription began to run from August 30, 1987 when the helicopter crashed and killed the deceased; and consequently that the entry of the plaint on August 8, 1994, occurred long after the requisite prescriptive period had expired. This is so, he argues, because the right of action arose when the accident and the deceased's death took place.

For his part, Mr. Georges contends that the respondents could not have known the real cause of the crash in the absence of an accident report following a technical enquiry which the appellant alone was obliged to institute.

It was not until the appellant, by letter dated October 15, 1993 (Exhibit 5) "disclosed for the first time", after much prompting (by the respondents' learned counsel, that the weather on the night of the accident had been bad and that the helicopter had not been "equipped for instrumental flight conditions", though this might not have been the reason for the accident. Additionally, the appellant, by letter dated December 9, 1993, furnished further information in these terms:

> "Whilst there is no indication that there was a malfunction, it is not possible to say with absolute certainty that there was not either."

The central issue in this case is not whether the respondents were justified to await receipt of an official report as to the cause of the helicopter crash before they could commence civil action against the appellant, but rather when did the cause of action arise; in other words, when did time begin to run against the respondents?

In determining when the cause of action arose in the instant case, my mind is drawn to Article 1382(1) of the Civil Code which stipulates that -

> "1. Every act whichever of man that causes damage to another obliges him by whose fault it occurs to repair it."

This article defines fault (vide paragraph 2 thereof) as meaning "an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission." Clearly, the act complained of here is the helicopter crash which culminated in the deceased's death; and the resultant damage is the loss which the respondents suffered thereby and for which the appellant

was allegedly liable. Mr. Georges hit the nail on the head when he stated this (at page 71 of the record of appeal) during argument in the Court below:

> "I say the averment in paragraph 4 is that the defendant is liable for the death of the deceased. I really do not need to aver any more on that --- I aver the crash, I aver the defendant was liable and then I aver loss and damage. That is all I need to do in the plaint. I do not need to give any more information as to why I aver there is liability for the death. That is left up to me to then bring out in evidence."

There can thus be no doubt that the cause of action here arose on August 30, 1987 when the fateful event occurred.

In the course of its ruling, the Supreme Court made reference to section 120 of the Louisianna Civil Law Treatise (Vol. 12) which states that:

> "Where the damage is not immediately apparent, prescription begins to run only from the time that the plaintiff is conscious or aware, as would a reasonable person under similar circumstances, of both the tort and damage." --- The rationale of the applicable jurisprudence appears to be that where commission of a tort does not per se give rise to an action in damages. To entitle one to sue on a tort, he must allege and prove the sustaining loss or damage as a result therefrom ...."

In the circumstances of this matter, it cannot conceivably be argued that the damage was "not immediately apparent" as the contrary was the case. The respondents were "conscious or aware" of both the delict (negligence i.e. fault) and the damage that they had consequently suffered. The effect of this is that the respondents should have instituted their action against the appellant within the prescriptive period

of five years; and that the waiting for the official information on the helicopter crash was done at their peril since they had obviously known all along that their case lay in negligence. The official report was seemingly intended to confirm the respondents' case.

In any event, the fact that a plaintiff might have a weak, though not a helpless or frivolous case, cannot per se preclude him/her from prosecuting it.

I would venture to say that where a prospective plaintiff is not certain whether or not he/she can maintain an action in court which action is subject to prescription he/she should take appropriate steps to preserve his/her rights by, for instance, commencing the action, even if this might necessitate requesting the Supreme Court Registry to delay service of the court process where this is legally permissible.

I am satisfied that the action by the respondents was time-barred. The appeal succeeds and the ruling of the Supreme Court is set aside.

The record of appeal shows that the respondents have been paid some compensation by the appellant which is obviously regarded as inadequate. The Government may consider that this is a suitable case for it to make an appropriate ex gratia payment, of course, taking into account the compensation already paid.

I will make no order as to costs.

Delivered on the 1st day of March 1996.

.....JUSTICE OF APPEAL

(A.M. SILUNGWE)