LAPORTE v FANCHETTE

(2013) SLR 593

KB Shah for the appellant
A Benoiton and F Ally for the respondent

MacGregor PCA, Domah, Twomey JJA

6 December 2013 SCA 57/2011

The judgment of the Court was delivered by TWOMEY JA

[1] There is an old English proverb which asserts that, "Sticks and stones may break my bones but names will never hurt me" but which is contradicted by another English proverb which states that, “The tongue is not steel but it cuts,” proving generally that wisdom is often situational. Generally, however, common law jurisdictions refuse to recognise an independent cause of action for mental suffering caused by insulting or abusive language. One can only recover damages for verbal abuse in English common law in limited cases of trespass to the person (*Tuberville v Savage* (1669) 1 Mod Rep 3) and for emotional suffering where the damage amounts to a medically recognised condition and not mere distress (*Wainright v Home Office* [2003] 3 All ER 943). The matter is slightly more nuanced in civilist countries. As a mixed jurisdiction with French tort law but English defamation rules and a Constitution recognising the right to freedom of expression, Seychellois law on the subject matter is dynamic.

[2] The facts of the case from which this appeal arose are that the appellant, Mr Fanchette, went to the Casino des Iles at Cote d’Or, Praslin where the respondent, Mr Laporte, worked as the manager. He was denied entry to the premises as he had not buttoned his shirt. An altercation took place as a result of which it is averred by the respondent that the appellant stated “I bon oupiti in bezmor” (it’s a damn good thing that your child has died). The respondent sued the plaintiff for damages suffered as a result of these words based on the provisions of art 1382 of the Civil Code of Seychelles. The trial Court found liability proven and ordered the respondent to pay R 100,000 in moral damages.

[3] The appellant has now appealed to this Court on two grounds:

> 1) The trial Judge was in error to find that the words allegedly uttered by the appellant to the Respondent were unlawful and amounted to a faute and such words are not an actionable wrong entitling the respondent to damages
>
> 2) Alternatively the award of R 100,000 in damages is manifestly excessive and should be reduced considerably, having regards to all the circumstances of the case.

[4] As far as ground 1 is concerned, our law on the matter has its own legal history

and jurisprudence. In French law on which our Civil Code is based, all rights and interests are protected under the provisions relating to delicts and quasi-delicts. In such cases all actions are actionable per se and no special damage need be proved. Article 1382(1) provides that:

> Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.
>
> Article 1382(3) on which the present claim is based states:
>
> Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.
>
> Article 1383(1) also makes it clear that: Every person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence.

[5] Mr Shah, for the appellant contends however, that where abusive, opprobrious and insulting oral language causes injury to feelings and mental distress the claim for damages could only be based on defamation and not art 1382. He submits there are areas of human conduct which the law should not seek to regulate and that where the damage is physical or economic, the matter would have to be sufficiently serious to justify the intervention of the law. Hence, where the consequence of one's action is hurt feelings, the matter is not serious enough to justify legal intervention. He submitted that the case of *Lunus* (Cass. Civ. 16.1.1962) in which the owner of a horse who died by electrocution was able to recover damages for the distress caused by the death of a horse, to which he was much attached, has attracted much academic criticism and has not been consistently followed. Ms Benoiton relying on the case of *Desaubin v UCPS* (1977) SLR 164 has urged us to give a wide interpretation to the concept of fault and admit any prejudicial act including words to indemnify the person hurt emotionally or mentally.

[6] Unlike the French Code Civil, the Seychelles Civil Code makes direct provision for the recovery of damages in delict. Hence, art 1149(2) provides that damages are recoverable for any injury or loss of rights of personality. It also states that these include rights which cannot be measured in money such as pain and suffering. Hence our law considers mental injury just as real as material or physical injury and as deserving of monetary reparation. Similarly, French jurisprudence moved towards the recognition of damages for emotional distress and moral injury. Capitant makes it clear that damages are recoverable for mental injury arising out of defamation or injurious words:

> La jurisprudence a toujoursaccordé des dommages-intérêtspour le prejudice d'ordre moral resultant, par exemple, de propos oud'écritsinjurieuxoudiffamatoires…
>
> (Henri Capitant, Alex Weill et François Terré *Les Grands Arrêts de la Jurisprudence Civile* (Henri Capitant, 7e edn, Dalloz, 1976), 414)

[7] The laws of defamation of Seychelles are governed by English law (art 1383(3)

Civil Code of Seychelles). It is true that in this case an action for slander could have been instituted instead. In cases of slander, however, there are few actions that are actionable per se and it is doubtful if the respondent in this case could have recovered unless he could show special damage: *Renaud v Arnefy* (1974) SLR 98, *Couck v Sinon* (1990) SCAR. It is in any case extremely doubtful that our law of defamation would grant relief for purely abusive and insulting language and mental suffering as these have not in the past been treated as special damage: *Allsop v Allsop* (1860) 5 H & N 534.

[8] In France, a distinction is now made in actions arising out of injurious words where these do not amount to defamation. The factor that comes into play is the freedom of expression which is also protected under our Constitution. A number of Cassation cases in France from 2000 onwards (Ass. plén., 12 juill. 2000; Cass. 1re civ., 27 septembre 2005, espèce n 16) decided that actions for abuses of the freedom of expression should proceed under the provisions of the Press Law of 1881 and not under the provisions of art 1382.

However, it qualified this general rule in 2008, stating that where the provisions of the Press Law did not apply, actions could be based simply on the provisions of art 1382. (Civ. 1re, 30 oct. 2008, JCP 2009, II, note E. Dreyer). In 2011, the Cour de Cassation again stated that:

> que les abus de la libertéd'expressionprévus et réprimés par la loi du 29 juillet 1881 telsque les propos litigieux, qui portent atteinte à la considération et partantsontsusceptibles de constituer des diffamations, ne peuventêtreréparéssur le fondement de l'article 1382 du code civil
>
> (Civ. 1re, 28 sept.2011, n° 10-11.547, AJ fam. 2011. 546, obs. L. Briand).

[9] While the above statement makes it clear that the where words are capable of constituting defamation an action lies under the Press Law and not art 1382, what can also be read into this statement is that offences and delicts not provided for in the Press Law do not circumscribe the protection given by art 1382. Article 1382 continues to deal with all kinds of damage resulting from delicts. The French Press Law of 1881 (loi du 29 juillet 1881) was never applicable in Seychelles; old French laws based on the Declaration of the Rights of Man and of the Citizen, adopted during the French Revolution in 1789 continued to apply until the Seychelles Ordinance of 1948 which in its s 2 provided that:

> The civil law of defamation shall mutatis mutandis be the English law of libel and slander for the time being.

[10] This provision was incorporated in art 1383(3) of the Seychelles Civil Code by Chloros which therefore only makes a distinction between defamation (where the English law applies) and delictual actions under art 1382. The jurisprudential adventures of the Cour de Cassation in trying to make a distinction in cases arising from breaches of the freedom of expression have a Seychellois parallel only insofar

as our civil law similarly makes a distinction between defamation and the written or spoken word that do not necessarily defame but nevertheless cause hurt which is reparable under art 1382.

[11] The respondent's plaint and testimony do not aver that the statements by the appellant were defamatory or that they were calculated to degrade or disparage him in his professional, public and private life. He simply states that the words were uttered with deliberate intention to cause him pain, suffering, anguish, distress and to hurt his feelings in relation to the traumatic death of his son. He stated in his plaint that the appellant's "act, conduct and words … are unlawful and unjustified and amount to a faute in law". It is therefore an action clearly grounded in delict under art 1382 of the Civil Code and which cannot be ousted by art 1383(3).

[12] The appellant in any case does not claim a defence under his constitutional right to freedom of expression (albeit of horizontal application) which might in any case have been trumped by the respondent's right to dignity. His defence is that the words he used were slightly milder: "San mem bon dye in pranoupiti, outroinsiltedimoun" (this is why God has taken your child, because you insult people to much).

[13] Further, in his cross-examination he accepted intending to hurt the respondent:

> Q. So because he insulted you as a pig, you want to wound and hurt him by saying this to him?
> A. Exactly like he hurt me and I hurt him.
>
> [Verbatim, page 28, transcript of Supreme Court proceedings]

Clearly, the fact that the words were intended has a bearing in this case. It would distinguish it from cases where words are said in anger or distress but with no intention to hurt.

[14] Further, it is clear that the respondent suffered mental pain. It is borne out by the following extracts from pages 6, 7 and 9 of the transcript of proceedings:

> Q. So how did you feel exactly? Can you tell the court when you were told that it is damn good that your child has died and you said he said further more to you but you do not recall, how did you feel at the time?
>
> A. One thing I would say to the court when someone says something to you like this about your child, which I am still mourning my son, you feel as if you want to kill that person and pain, anguish and I believe the day of the incident at that point when he said this.
>
> Q. How did he say it to you, do you recall?
>
> A. Yes, he said it in a very loud voice and in a vicious manner meaning to hurt me.

Q. Was he able to hurt you?
A. Yes he did, very deep. I loved my son very dearly …

Q. How have you been affected by what Mr. Laporte said to you and his behaviour to you for you to quantify your loss in such a sum?

A. At this I have suffered anguish, pain, humiliation and all manner people telling me that this is not an incident that should happen and continue to suffer because of that morally and my work also is affected since that day.

Q. When you look at the gentleman over there, how do you feel towards him after what he said to you? Are you able to look at him and talk to him?

A. No, I cannot. I cannot stand in front of him and talk to him because he does not know what I am going into, in the beginning I went for counselling as well.

Q. The beginning of what?

A. After my son passed away.

Q. So you were deeply affected after your son passed away and how did you view Mr.Laporte's reminder of that tragic incident?

A. Hateful person, this has nothing to do with my son when he comes to the casino.

[Verbatim, transcript of Supreme Court proceedings]

[15] We note that the Chief Justice in the case of *Esparon v Savy* SC 20/2008 which facts are similar to this case was of the opinion that cases of verbal abuse may well be de minimis non curat lex. Given the legal provisions in our Code, we are unable to agree with him. We are of the view that the totality of the provisions of arts 1382 and 1383 of our Code mean that where a defendant intentionally or negligently does an act, including uttering or writing words, he is liable to repair the injury or damage he has caused by these words or acts. The gravity or minimality of the harm is only reflected in the damages awarded and not in liability. For these reasons we are of the view that liability in this case clearly arises and find no merit in the first ground of appeal.

[16] The second ground of appeal raises the issue of quantum in moral damage. While it may be easier to prove physical damage or pecuniary loss, moral damage is not so easily assessed. It is damage that is characterised by an injury to a person's non-pecuniary interest and oftentimes to a person's feelings as in the present case.

However the Court has on many occasions stated that the difficulty in assessing intangible injury must not be a bar to an award of damages, see *Cable and Wireless v Michel* (1966) SLR 253, *Fanchette v Attorney-General* (1968) SLR 111.

[17] It is clearly the plaintiff in a civil suit who has the burden of proving on the balance of probability that he suffered damage as a result of the defendant's action. He could only bring such evidence by recounting the pain he suffered which he did. The Court cannot ascertain such damage in any other way. No expert can tell us what and how much mental pain, suffering or distress a person is experiencing. Awards in this case can only be made by the trial Judge assessing the credibility of a plaintiff's evidence and appraising the mental injury related. It is a subjective assessment. The respondent's evidence was not challenged. He was neither cross-examined on the issue of moral damage nor quantum. In his closing submission Mr Shah for the appellant stated that the claim for damages is in any event grossly exaggerated and only merits an apology. The trial Judge, Renaud J agreed to some extent with this submission but stated in his judgment:

> Such fault of the Defendant caused the Plaintiff to severely suffer and continue to severely suffer morally. The Plaintiff has quantified the moral damage he suffered in the sum of SR500,000 and continuing and which the Defendant is liable to make good to the Plaintiff. I am of the considered judgment that the amount is very much on the high side and a reasonable award would be SR100,000 which sum I hereby award the plaintiff as moral damages.

[18] It is a indeed a principle of French law that the trial judge has sovereign discretion in assessing moral damage and the Cour de Cassation has even dispensed with the need for the claimant to show proof of specific préjudice morale; see Comm. 22 octobre 1985. Bull. civ., IV No. 245 *Société Génerale Mécanographie v Société Sainte-Etienne Bureau*. It is also true that damages should be compensatory and not punitive: *Francourt v Didon* (2006) SLR 186 and it is obvious that monetary damages could never repair injury to one's feelings.

[19] Two matters militate against this Court's interfering with the award, one of which we have outlined above already in terms of the better position of the trial Judge to assess the credibility of witnesses. It is a principle of our law that when assessing damages the court should make a subjective assessment of damages in each case: see *David v Government of Seychelles* (2008) SLR 47. Given that the trial Judge was best placed to observe the respondent in this case and appreciate through his testimony the pain and suffering he experienced and which was not challenged, we could only have interfered with the award if it was manifestly excessive: *Mousbé v Elizabeth* SCA 14/1993. By its very nature damage is a very elastic concept and there is a tendency rightly or wrongly by judges to award higher damages where harm is intentionally inflicted as opposed to when it is done negligently and unintentionally. We are of the view that the award is probably on the high side but we are not prepared to find that it is manifestly excessive. In these circumstances this ground of appeal also has no merit.

[20] For the reasons stated above, this appeal is dismissed with costs.