

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), A. Fernando (J.A), M. Twomey (J.A)]

Civil Appeal SCA02/2017

(Appeal from Supreme Court Decision CS 43 & 55/2015)

Marlene Maria

Appellant

Versus

Health Care Agency

Government of Seychelles

Respondents

Heard: 29 April 2019

Counsel: Ms. A. Benoiton for the Appellant

Mr. A. Subramaniam for the Respondent

Delivered: 10 May 2019

JUDGMENT

A.Fernando (J.A)

1. The Appellant has appealed against that part of the judgment in regards to the amount of damages awarded by the Supreme Court, wherein the Appellant had been awarded a sum of SR 30,000 for injuries caused to her left forearm as a result of a sliding window which came of its rail, broke and fell on the Appellant's forearm. The incident had taken place at the hospice located at North East Point operated and administered by the Respondents. According to the Plaintiff at the time of the accident the Respondents had been the proprietor and one who had custody and control of the premises. It is for that reason that the Appellant had averred in her Plaintiff that the Respondents or alternatively

their employees are responsible and/or vicariously responsible for her injuries, loss and damage. As per the recorded proceedings in this case, originally the Appellant had filed action against the two Respondents separately but had subsequently consolidated the two actions. The proprietor of the hospice located at North East Point is undoubtedly the Government of Seychelles and the Health Care Agency was merely administering the hospice.

Facts in Brief:

2. I set out briefly how the accident took place as set out in the judgment of the Supreme Court:

“Briefly the facts were that the Plaintiff, fifty years of age, was visiting a relative at the North East Point Hospice on twenty fourth December 2014. As it was getting dark she decided to close a sliding window in the bedroom. While she attempted to do so the window came off the rails, struck the Plaintiff on the left arm causing bleeding and injury. She received immediate treatment from the staff at the hospice and was referred to the English River Medical Centre. The wound on her arm was stitched and she was given painkillers and anti-inflammatory tablets. The injury was monitored by medical staff.”

3. The negligence/impudence/fault of the Respondents had been particularized as follows by the Appellant in the Plaint:

“Particulars of Negligence/Imprudence/Fault

The Defendant, its employees or agents were negligent/imprudent/at faute in law in that they:

- (a) failed or omitted to ensure the sliding window was securely attached to its rail;
- (b) failed adequately or at all to repair and maintain the sliding window of the premises;
- (c) failed to warn the visitors, including the Plaintiff of the danger in that the sliding window was faulty and/or broken and that no precautions had been taken by them to render it safe;
- (d) failed to keep the Plaintiff and other visitors away from the faulty/dangerous sliding window and/or direct them to use an alternative entry and/or exit;
- (e) allowed or permitted visitors to the premises, including the Plaintiff, to use the sliding window when they knew or ought to have known that the door maybe faulty and/or broken and that no or insufficient precautions had been taken;
- (f) failed to maintain the structure of their premises in a reasonably safe condition; and
- (g) failed in all the circumstances to take reasonable care to ensure the safety of visitors to its premises.”

4. It is clear from the Plaint that this action had been based in failing to maintain the hospice located at North East Point operated and administered by the Respondents, in a secure and suitable condition, which is under **article 1386 of the Civil Code of Seychelles Act**. Article 1386 reads as follows: *“The owner of a building shall be liable for damage caused by its ruinous state when it occurs as a result of neglect or by fault of construction”*. The Appellant in her Written Submissions filed before this Court at paragraph 1 has confirmed this. It must be stated that the consolidation of the cases as referred to at paragraph one above is incorrect, for as stated in ‘**Introduction**

to French Law’ by Amos and Walton, 3rd edition, “It is the proprietor alone who may be sued under article 1386.”

5. The injury suffered by the Appellant had been particularized as follows in the
Plaint:

“Particulars of Injury

- (i) Lacerations to left forearm;
- (ii) Swelling and pain to left forearm in area of injury;
- (iii) Post traumatic inflammatory reaction;
- (iv) Foreign body embedded in the injury site; and
- (v) Permanent and unsightly scarring.

In particularising the injuries it is only the scarring that has been referred to as a permanent injury.

6. The Appellant while claiming a total sum of SR 600,000/- had particularized her loss and damage as follows in the Plaint:

“Particulars of Loss and Damage

Pain and suffering	SR 250,000/-
Aesthetic loss (Permanent scarring)	SR 100,000/-
Loss of amenities	SR 100,000/-
Distress and inconvenience	SR 150,000/-”

Damages claimed for loss of amenities fall into the category of le dommage materiel (material damage), while the rest under le dommage moral (moral damage). Pain and suffering, distress and inconvenience may also be categorized as ‘corporal damage’.

7. According to the recorded proceedings of the 8th of September 2016, the issue of liability had been admitted by the Respondents and what had proceeded to trial was the quantum of damages that was being disputed. Liability of the Respondents according to paragraphs 3 and 4 above was as stated earlier on the failure to maintain the hospice in a secure and suitable condition. This is what had been admitted by the Respondents. Appellant's counsel had confirmed this when she challenged the Respondent's counsel when the Respondent's counsel had attempted to question the Appellant about the manner the Appellant closed the window.

8. The Appellant had raised the following grounds of appeal:
 1. The Learned Trial Judge's calculation of the award was wholly erroneous as the award is unreasonably low and unsubstantiated in the circumstances of the case.
 2. The award is wrong as the Learned Trial Judge fails to base his award on any identifiable criteria nor does he cite any precedents to support his assessment;
 3. The Learned trial Judge failed to consider recent case law which shows a pattern of an increased award of compensation to take into account inflation and cost of living;
 4. The Learned Trial Judge has failed to demonstrate out of the award SR 30,000/-, which portion was allocated to the heads of damage claimed by the Appellant and the award is therefore unreasonable, unclear and unsupported in all the circumstances of the case;
 5. The Honourable Judge erred in law and principle that the award does not correctly or adequately reflect the damages and injury suffered by the Appellant.”

Evidence in Brief:

9. The Appellant testifying before the Court had stated that she is 52 years old. She had then gone on to narrate how she sustained the injury while closing the window. The nurse at the North East Point Hospice had given her the necessary first aid and advised her to go to the Casualty. When she came to the Casualty at English River the doctor in attendance had cleaned her wound as there was glass on it, sutured the wound and placed a bandage on it. Seven stitches had been placed. She had been given Panadol for the pain and asked to go home and rest. She had been advised to come in 8 days time to remove the stitches. There is no evidence on record about the Appellant going to have her stitches removed but all that I find from the recoded proceedings is that the Appellant had noticed about 19 days after the incident that one of the stitches had not been removed but had come out on its own when she was having a shower.

10. According to the Appellant the pain had continued and she had therefore sought medical advice from a private clinic, namely 'Eureka'. The date she sought advice is not clearly stated by her. According to her evidence a Cuban doctor at the clinic had then performed a surgery on her hand on the 15th of August 2016. When questioned by her Counsel as to how she felt after the surgery her response had been: "After the surgery I continued having problems with my arm a lot of problems, the problem was not helpful it weakened." (emphasis added by me) She had been advised to go for physiotherapy after surgery, which according to her had not helped her. The Appellant had described to court the sensations she feels on her arm as follows: "I get electric shocks and at the end of my finger tips are very numb. The arm gets swollen every day." She had gone on to say: "...where they

conducted the surgery it is where I feel the electrical shock more and it becomes swollen”.

11. As a result of the pain the Appellant had stated that she cannot carry out her daily household chores and has to depend on her cousin who she pays for helping her out. She had also said that she is now unable to help her 75-year old mother, who is a pensioner, and that the Appellant has to pay someone to take care of the mother. I however take note of the fact that Social Services takes care of the aged and the Appellant’s own evidence that the mother is a pensioner. She cannot carry bags and push carts while going marketing and has therefore to depend on her husband which is an inconvenience for him. The Appellant had said that she cannot point her arm straight. In describing the appearance of the wound physically the Appellant had stated that it is a “small cut”. The Appellant had then gone on to explain the amounts she was claiming under the various headings as stated at paragraph 6 above and the basis for such claims. The reasons given by her for the claims under loss of amenities and distress and inconvenience in my view are the same.
12. Under cross-examination the Appellant had admitted that she is a right handed person and she thus can carry out simple household tasks. She had admitted that she works with her husband who handles financial projects. She does typing, filing of his documents and attends to monthly payments. The Appellant had also stated in cross-examination that she sought medical attention from a private institution three months after she had been attended to by the Government hospital.
13. The Appellant’s own evidence referred to at paragraph 10 above in relation to the after effects of the surgery, namely: “After the surgery I continued having problems with my arm a lot of problems” and “where they conducted the

surgery it is where I feel the electrical shock more and it becomes swollen”; casts doubts as to whether the injuries particularized under (ii) and (iii), for which damages have been sought can be attributed to the falling of the glass window on her arm.

14. In this case it is only the evidence of the doctor who examined the Appellant at the private clinic that had been led. The Appellant had not led any evidence of the doctors who attended to her at the English River Clinic to speak about the injury suffered by her as a result of the falling glass. She had only led in evidence two medical reports dated 20/01/2015 and 28/01/2015 issued by the Health Care Agency as exhibits P3. The report dated 20/01/2015 makes mention of three lacerations on the left arm and states “able to move fingers”. It further states that the wound had been dressed and sutured and she had been given pain killers. She had been informed of the removal of stitches in 8 days. The report dated 28/01/2015 stated that the Appellant had returned to the hospital 18 days after having received the injury complaining of pain in the laceration site of left forearm. On examination her left forearm was swollen at sutured site. She had been sent for ultrasound to rule out suture line hematoma. No further evidence is available from the Government hospital. That evidence was necessary to establish the causal link between the injury from the falling glass to the injuries particularized under (ii) and (iii) in the Complaint, for which damages have been sought. It is trite that in order to establish liability under delict; fault, damage and a causal link must be established and the burden of establishing the three elements is on the one who brings the action, namely the Appellant in this case.

15. The doctor who examined the Appellant at the private clinic of Dr. Felix about 8 months after the accident had stated that the Appellant had among other ailments post-traumatic inflammatory reaction on her left arm. Her other

ailments were spondylosis lumbar spine and disc prolapse causing lower back pain and pain and numbness in the left leg, which are unconnected to the injury on the left forearm. Her injury in the leg was a result of a laceration and when the wounds healed had produced a fibrosis which caused inflammatory reaction with pain and numbness. The doctor had explained that fibrosis is a normal reaction of the body when you have a wound.

16. The doctor had come to the conclusion that the injury to her left arm had resulted in a medial nerve injury. The evidence at paragraph 13 above casts doubt as to whether this injury can be attributed to the falling glass pane. He had also been of the view that there was a foreign body in the left arm. He had therefore recommended surgery for exploration of the nerve. He had removed the fat tissue fibrosis that was compressing the nerve, but had not found any foreign body. He had stated that the injury to the nerve was superficial. In explaining this further the doctor had said there was no injury to the nerve but only compressed. On being questioned whether the Appellant would be left with a permanent disability the doctor had said that she would not have 100% recovery, but had not given any percentage of the disability as is normally done, which would have been helpful in assessing damages. He had however expressed an opinion that the Appellant would have to live with the sensation because there is no medicine to cure the problem. I have already stated at paragraph 5 above that there is no relief sought on the basis of permanent disability, discomfort or pain.

17. In considering the opinion of the doctor a court is entitled to take into consideration as correctly submitted by the Counsel for the Respondents that spondylosis lumbar spine and disc prolapse could cause numbness in the hand. It is evident from exhibit P1, a report produced by the doctor who examined the Appellant and testified at the trial, that the Appellant had been

complaining of lower back pain and difficulty in walking associated with numbness of left leg in November 2015.

18. An appellate court needs to be guided by the following legal principles, set out in several decided cases, when considering the adequacy or inadequacy of an award of damages, namely:

- i. Whether the trial court had acted on a wrong principle,
- ii. Whether the amount awarded is manifestly high or low,
- iii. That the circumstances of each case have to be taken into account,
- iv. The court needs to have regard to comparable cases as there must be consistency,
- v. Give due consideration to the rate of inflation and the socio-economic situation reflected in the increase in the cost of living,

19. Counsel for the Respondent in this case has rightly conceded that the damages awarded are “considerably low”. I am in agreement with the Respondent’s submission and therefore quash the amount awarded as damages and have decided to have a re-look at the quantum of damages to be awarded. At the hearing before us Counsel for the Respondent submitted that a total sum between SR 95,000 – RS 140,000 would be appropriate.

20. I am of the view that the following factors have a bearing on the assessment of damages:

- a) The Appellant had been 51 years at the time of the incident,
- b) There is no clear medical evidence to establish the causal link between the falling glass pane and the pain to the left forearm the Appellant is

complaining of, in view of what is stated at paragraphs 10 and 14 above,

- c) It was only three months after the incident that the Appellant had sought medical attention from a private institution,
- d) In particularising the injuries it is only the scarring that has been referred to as a permanent injury as referred to at paragraph 5 above. In describing the appearance of the wound physically the Appellant had stated that it is a “small cut”. No relief had been sought on the basis of permanent disability, discomfort or pain.
- e) There was no injury to the nerve but only compressed due to the fibrosis which is a natural reaction when there is an injury,
- f) There is no evidence in regard to the assessment of any percentage of any permanent disability,
- g) The court is entitled to take into consideration that spondylosis lumbar spine and disc prolapse the Appellant was suffering from could also cause numbness in the hand.
- h) There was no foreign body embedded in the injury site as particularised as (iv) under the particulars of injury as referred to at paragraph 5 above,
- i) The loss of amenities, distress and inconvenience she has complained about is her inability to carry out her household chores and to carry her shopping bag, and pushing the cart while marketing and having to depend on her husband,
- j) The Appellant had however admitted that she is a right handed person and she thus can carry out simple household tasks. She had admitted that she works with her husband who handles financial projects. She does typing, filing of his documents and attends to monthly payments for him.

21. Taking the above matters into consideration I make the following awards:

Pain and suffering, distress and inconvenience	SR 70,000
Aesthetic loss (Permanent scaring)	SR 15,000
Loss of amenities	SR 15,000
Total	SR 100,000

22. I order that a sum of SR 70,000 to be paid with interest from the 30th of September 2015, when the two cases were consolidated up to the date of payment under this judgment and SR 30,000 which was awarded by the judgment of the Supreme Court appealed against; to be paid with interest from the 30th of September 2015, up to the date the judgment of the Supreme Court, namely the 16th of January 2017. I do not make any award as to costs.

A.Fernando (J.A)

I concur:. F. MacGregor (PCA)

I concur:. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019