

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A), F. Robinson (J.A), L. Tibatemwa-Ekirikubinza J.A)]

Civil Appeal SCA 12/2017

(Appeal from Supreme Court Decision CS 41/2014)

Cerf and Surf Properties

Appellant

Versus

Ian Davidson

1st Respondent

Carolyn Davidson

2nd Respondent

Melissa Davidson

3rd Respondent

Catherine Davidson

4th Respondent

Heard: 03 December 2019

Counsel: Mr. B. Georges for the Appellant

Ms. T. Christen for the Respondents

Delivered: 17 December 2019

JUDGMENT

A.Fernando (J.A)

The Appeal:

1. The Appellant has appealed against “the part of the decision as grants damages to the Respondents upon the following grounds:

- a) R 139,939.07 for estate costs in Dubai. If the deceased had not died, the Respondents would not have inherited her estate, so they stood to benefit from her death, not be burdened with costs. This award gives them an extra benefit.

b) R 368,459 for trips to Seychelles. Save for the trip to testify, the other trips were unnecessary and ‘closure’ is not a claimable element.”

By way of relief, the Appellant has sought “an order allowing the appeal and reducing the award by the sums set out in the preceding paragraph, or by any sum as to this Court may seem meet.”

2. The Appellant is not contesting the fact that the amounts claimed and awarded for estate costs in Dubai and for trips to Seychelles were expenses incurred by the Respondents.
3. The Appellant in its Heads of Argument has stated “This appeal is limited to the quantum of damages awarded in respect of some heads of claim by the Respondents, then Plaintiffs. The findings of the trial court on liability are not disputed.” The Appellant had stated in its heads of arguments that one of the three grounds of appeal set out in its Notice of Appeal will not be pursued and thus I have not made reference to it.

The Award:

4. The learned Chief Justice had ordered the Appellant to pay the Respondents (NZ \$ 13,859.47) SR 139,939.07 “for closing the Deceased’s estate in Dubai” and (NZ 36,492) SR 368,459.72 “for travel to Seychelles for both trials”.
5. I bear in mind that before an appellate court interferes with an award of damages, the court must be satisfied as stated in **Government of Seychelles V Rose [2012] SLR 364:-**
 - a) The trial court acted on some wrong principle of law; or
 - b) The amount awarded was so high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled, i.e. the damages awarded is manifestly excessive or manifestly inadequate.

In the case of **Seychelles Breweries Ltd V Sabadin [2006-2007] SCAR 9** it was stated that an appellate court will be reluctant to review damages decided by a trial Judge, unless it is satisfied that there are good and valid reasons for doing so. In the case of **Ruiz V Borremans [1995] SCAR 81**, this Court stated that damages awarded in a trial court can

be reversed on the ground that it is manifestly excessive only if the trial court's assessment of damages was unreasonable and excessive.

Background to the appeal:

6. The appeal arises out of a civil suit brought by the parents and siblings of Ms. Rebecca Davidson, a New Zealand national, working in Dubai as a journalist who had come to Seychelles to cover the 'Carnaval International de Victoria' in February 2013. She had died as a result of a collision at sea wherein the Appellant's vessel had collided with the vessel in which the deceased was travelling, due to the negligence of the Appellant's employee.

The award by the Trial Court for closing the deceased's estate in Dubai:

7. The award made for the closing of the deceased's estate in Dubai is ultra petita as there was no claim in this regard in the Plaintiff, nor was it set out under 'Particulars of loss and damage' in paragraph 10 of the Plaintiff. This Court said in **Rose V Civil Construction Company Ltd (2012) SLR 207 (SC)**: "*One cannot be allowed to go outside the claim set out in one's pleadings.*" In **Monthy V Esparon [2012] SLR 104** this Court said: "*Courts cannot grant relief not sought in pleadings. (Barbe V Hoareau SCA 5,2001, Leon V Volare SCA 2,204). If they do they are acting ultra petita. In the case of Charlie V Françoise SCA 12/1994 this Court succinctly articulated the position when it stated: 'The system of civil justice does not permit the Court to formulate a case for the parties after listening to the evidence and to grant relief not sought by either of the parties.'*" I am surprised why the Appellant had not raised any objection when evidence in that regard was led at the trial and why it had not been referred to in the Appellant's Heads of Argument. However as a final appeal Court we have to ensure that relief can be granted only for what is claimed. In the case of **Equator Hotel V Minister of Employment and Social Affairs, Civil Appeal No. 8 of 1997** this Court said: "Failure or omission to object to the introduction of such issues during proceedings or in evidence cannot, and does not, have the effect of translating the said issues into pleadings or evidence." This was endorsed by this Court in **Marie Ange Pirame V Armano Peri SCA 16 of 2005**. I therefore have no hesitation in allowing ground (a) of appeal referred to at paragraph 1 above.

Basis for the award by the Trial Court for travel to Seychelles which is challenged in ground (b) and the responses of the Appellant and the Respondents in that regard:

8. The learned Chief Justice at paragraph 52 of her Judgment had stated: “Mr. Georges has submitted that air fares from New Zealand to Seychelles in respect of the First and Second Plaintiffs (*First and Second Respondents herein*) for their attendance at the criminal trial of Stephen Barreau (*the employee of the Appellant for whose negligence the Appellant had been found to be vicariously liable in the civil case*) were not necessary. He states that their attendance was not required as they were not witnesses at the trial. Ms. Christen has submitted that the Plaintiffs (Respondents) as parents of the deceased attended the trial to achieve a measure of closure and to understand the circumstances in which their daughter had died. I find this explanation reasonable and the incurred costs certain, direct and personal to the Plaintiffs in the event of the criminal trial arising from the manslaughter of their daughter.” (emphasis added)
9. The employee of the Appellant was charged with and convicted of the offence of manslaughter before the Supreme Court. The Appellant had not contested the amount pertaining to the costs involved in travel to Seychelles to testify at the civil trial by the Respondents, nor that the amount referred to in ground (b) was spent or that was in excess of what should have been normally spent on such travel. The Appellant’s argument in its Heads of Argument is there is no sufficient nexus between the desire to be present at the criminal trial, and the act of causing their daughter’s death and thus no legal justification for the Appellant to pay for these trips.
10. According to the Respondents Skeleton Arguments once the expenses of NZ\$ 13,395 = SCR 135,249 for the trip to testify at the civil trial is deducted, the amount that is left is, SCR 233,246, which is the amount that is been contested by the Appellant. The breakdown of the said amount is as follows: (i) NZ\$ 6,814.00 (SCR 68,801) for the 1st Respondent to travel to Seychelles to be present at the criminal trial against Stephan Barreau and (ii) NZ\$ 16,283.00 (SCR 164,409) for the 1st and 2nd Respondents to travel to Seychelles to be present at the delivery of the judgment in the said case.
11. Only the 1st Respondent attended the trial in the criminal case. Both 1st and 2nd Respondents

came for the delivery of the judgment in the criminal case. Counsel for the Appellant in cross-examination of 1st Respondent at the civil trial had suggested that there was no legal reason for 1st and 2nd Respondents to attend the criminal trial and come for the judgment. He had also suggested that the British High Commissioner for Seychelles and the Seychelles Tourism Board who had been helping the Respondents, would have kept the Respondents informed of the criminal trial and its outcome and thus there was no necessity for 1st and 2nd Respondents to attend the said trial and come for the delivery of the judgment in the criminal case. The 1st Respondent's response had been that "they did not sit through the case all the time. There were times that I was just there on my own representing Rebecca. I went there all the time just sitting and listening."

Evidence of the Respondents in relation to their travel to Seychelles:

12. I set out herein in brief the 1st Respondent's evidence in relation to his travel to Seychelles in connection with the criminal case. "It was my daughter that was killed and I needed to know the story. It had a horrendous impact and effect on all our family. I knew very little of what happened at that stage. I did not want to be in a situation of unknown for the rest of my life. It was part of the jigsaw putting together what happened as part of my healing process of myself. I wanted to trace the footsteps of my daughter. We felt on Rebecca's behalf as Rebecca's voice to attend the hearing. I felt an overpowering urge to be there as Rebecca's mouthpiece and to represent her at that case. For me not to be there I felt I would have abandoned my daughter. I felt it was my right to be there to support my daughter."
13. The 2nd Respondent's evidence had been on similar lines. "I came for the judgment to seek some measure of closure and also as representing Rebecca. Both Ian (*reference is to the 1st Respondent*) and I do not know the judicial system in Seychelles. We needed to see, I needed to see if Rebecca was going to be treated fairly, if there is going to be respect for Rebecca. We are Rebecca's parents, we would not abandon her."

14. The relevant article in the **Civil Code of Seychelles Act** which deals with damages pertinent to this case is **article 1149** which reads as follows:

“1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.

3. The damages payable under paragraphs 1 and 2 of this article, and as provided in the following articles, shall apply as appropriate to the breach of contract and the activity of the victim.

4. In the case of delicts, the award of damages may take the form of a lump sum or a periodic payment. In the latter case, the Court may order that the rate of the payments should be pegged to some recognised index, such as the cost of living index or other index appropriate to the activity of the victim.” (emphasis added)

15. In the case of **Belize V Nicette [2001] SLR 264**, it was held that damages under article 1149 of the Civil Code awarded are compensatory. In **Symphorien Lucas V Clement Delpech [1981] SLR 85**, it was stated that in awarding damages whether the rights of an aggrieved party are infringed deliberately, negligently, inadvertently, or mistakenly is immaterial. In **Government of Seychelles V Rose [2012] SLR 364**, it was stated that damages in wrongful death cases are designed to compensate for losses resulting from the death of a victim and that damages can be sought for both moral and material prejudice suffered. According to the decision, in this case the right to life is a foremost and fundamental human right and life being so precious, an award of damages involving loss of life should reflect this reality. The court went on to state: “*In the end, a reasonable person looking at the awarded sum should be in a position to look at the sum in question and sigh with a sense of relief, content and satisfaction that justice has not only been done but has manifestly seen to be done.*”

16. It was also noted in the case of Rose: “It is generally accepted that damages in wrongful death cases are designed to compensate for losses resulting from the death of a family member. Of course, if we may digress a bit here, whatever sum of money is awarded as compensation for the loss of a loved one, really the sum will never heal the loss of a loved one because once human life is lost it can never be returned or paid back. Anyhow, the losses come in various varieties. For example, direct expenses such as medical bills and funeral

expenses are easy to calculate because their records may easily be obtained from hospitals, funeral homes, etc. However, other damages under the general category of future damages i.e. loss of pension or retirement benefits and loss of future wages, etc. may not be easy to calculate.”.

17. The objective of damages under the common law as stated in **McGregor on Damages, 1-021**, is to grant compensation for the damage, loss or injury the claimant has suffered. The basic rule is that a claimant is entitled to, as stated by **Lord Blackburn in Livingstone V Rawyards Coal Co [1880] 5 App Cas 25**, “*that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation*”. French law recognises the principle of full compensation, the objective of which is to put the injured party in the position in which it would have been had the act that gave rise to the damage not occurred.
18. According to article 1149 referred to at paragraph 15 above, damages are recoverable in general for any injury or the loss a claimant has sustained and includes rights which cannot be measured in money such as pain and suffering. Injury, pain and suffering can be both physical and mental and permanent or temporary. A glance at the testimony of the parents of Rebecca Davidson, referred to at paragraph 12 and 13 above, shows that the mental agony they had to go through as a result of the untimely death of their daughter was a direct consequence of the negligence of the employee of the Appellant. In my view in respect of travel costs there is a ‘*une relation directe de cause a effet*’ between the ‘*faute*’ and the prejudice suffered by the Respondent. Sums expended by a parents to lessen the mental pain and suffering without having to live through the agony continuously of not knowing first hand of what happened to their beloved daughter; by witnessing the oral testimony of the witnesses who testified at the criminal trial, and having the satisfaction that they had done everything possible for the memory of their daughter to be kept alive at the criminal trial and ensure that justice was done in relation to her untimely death; are in my view claimable as damages. A court should be cautious in telling the parents how to mitigate the agony of loosing their daughter and that there was no necessity for them to attend the criminal trial since they could have found out about it from other sources; because the court is unable to

understand or measure the agony of parents, in coming to face with the untimely death of their child. It has not been suggested that the parents took undue advantage of the accident in order to have a free trip to the Seychelles.

19. In the case of **Jean Fontaine V Philip Lefevre and Another [1981] SLR 186, A Sauzier J** said:

*“I think it is important to consider what the position was with regard to delict before the enactment of the Civil Code of Seychelles. That position is tersely and correctly stated in the case of **Cervello and Others V The Vacoas Transport Co. Ltd 1963 MR 68** as follows:*

‘A tortfeasor is in law liable to compensate fully the consequence of his wrongdoing. The rule laid down in art 1150 of the Civil Code, which makes a distinction between what is foreseeable and what is not (previsible ou imprevisible) does not apply in the case of a ‘delit’ or quasi delit’. Nor does the gravity of the ‘faute’ affect the extent of civil responsibility. But it is settled by case law that the principle underlying article 1151 of the Civil Code applies in the case of responsibility for a ‘delit’ or ‘quasi delit’ so that the tortfeasor cannot be held responsible ad infinitum to the person injured by him for all the ulterior consequences of his wrongful act however remote in time or indirect in the chain of causation; there must be a direct causal relation between the ‘faute’ and the prejudice for which the compensation is claimed. No logical principle has been formulated to serve as a rule to distinguish one class of consequences from another; whether the causal relation is direct or remote is really a question of fact to be determined according to the circumstances of each particular case (see inter alios Planiol et Ripert-Traite Pratique de Droit Civil Francais- Vol 6 paragraphs 538 et seq; Dalloz Repertoire Pratique Vo. Responsibilite Civile, n. 626 et seq; Lalou Traite De LaResponsibilite Civile 5th ed., paragraphs 78-80, Dalloz Nouveau Code Civil Annote, art 1151 n. 7-10).’

I am of the opinion if the position was intended to be altered by the enactment of paragraph 3 of article 1149 more peremptory words would have been used than “shall apply as appropriate”. I am therefore of the opinion that the position is still as stated in the passage quoted from the case of Cervello. In other words the principle underlying article 1151 applies in the case of delict but not that contained in Article 1150. In the case of delict it is

immaterial whether the damage done or the prejudice suffered was foreseeable or not. The tortfeasor is liable to compensate fully the consequences of his wrong doing.” (emphasis by me)

20. I am of the view that we should consider that the attendance of the parents at the criminal trial was not experienced by them as a choice but rather as a moral obligation to be present for their daughter, and thus the causal link could be established. In Quebec civil law, the causal link is often drawn between the fault and the damages when the parents have perceived their actions as necessary.

21. In the Quebec Supreme Court case of **Martel-Tremblay c. Guay**, [1996] R.J.Q. 1259 (SC), P. Tremblay died as a result of an accident that occurred while he was a passenger in a vehicle owned by the defendant and driven by the co-defendant. Mr. Tremblay was hospitalized for three weeks until he died. His mother who visited him regularly at the hospital claimed reimbursement of her expenses for accommodation, travel, food, etc., made necessary by the defendants' tort. The court considered it reasonable to recognize the merits of the mother's claim for travel and transportation expenses. Similarly in **Larouchec. Simard**, 2009 QCCS 529(2011 QCCA 911), travel expenses were granted to the plaintiff since he went to see his wife at the hospital every week who was hospitalized and subsequently died as a result of the professional negligence of the employee of the defendant. According to **Professor Gardner in his book Le Prejudice Corporel 3rd edition 2009**, case law generally gives a favourable response when the claim is made by the parents of a minor child who indicate that the circumstances of the child's death have affected them to such an extent that their absence from work was necessary. The causal link is established because the damage is experienced as necessary by the parents. In the case of **Cliche c. Commission scolaire de la Baie James**, J.E. 2005-1692 (CS), confirmed by 2007 QCCA 406, it was held with respect to the claims for loss of wages, we are of the opinion that both Ms. Cliche and Mr. Landry were so affected by the circumstances of the death of their child Jonathan that their absence from work was necessary. There was evidence of psychological consequences that resulted from the death of the child. The Court held that the plaintiff was entitled to reimbursement of expenses pertaining to travel, accommodation and

meals as a result of the events that occurred. In the case of **ChakibEl Asrany (Succession de) c. Union Canadienne (L'), Compagnie D'assurance, [2000] RRA 470 (SC)**, Chakib died trapped inside an apartment which had caught fire due to the negligence of the owner of the building. In this case the Court awarded travel expenses for the repatriation of the victim's body as well as the cost of the air tickets for those accompanying the body, so that he could be buried in Morocco. Chakib's father and two of his brothers explained at length the importance of burying Chakib's body in Morocco, with the greatest respect for the purest Muslim traditions. It appears from their very detailed testimony that this choice was as much a matter of religious rites as it was of ancestral family practice. Although the Court recognized that this was a choice made by the family, it also recognized that it is part of a funeral rite and family practice. Thus a practice that is part of a grieving process could be considered to have a causal link. In the case of **St George V Turner [2003] CLY 936**, the deceased who was a Japanese was murdered by her English husband. An award of 50,000 pounds was granted for repatriation of the body to Japan for a Buddhist funeral, a Buddhist family altar and payment for Buddhist monks attendance at the funeral. In **Schneider V Eisovitch [1960] 2 QB 430**, damages were awarded to meet the expenses of two family members who travelled to France to arrange for the repatriation of the deceased's body.

22. I am of the view that the expenses incurred by the parents to travel to Seychelles to be in attendance at the criminal trial and listen to the judgment although was a choice made by them, was also a part of a grieving process and a moral obligation towards their daughter that could be considered to have a causal link to the faute and a direct consequence due to the negligence of the employee of the Appellant. It is in my view an expense reasonably and necessarily incurred as a result of the delict for which damages should have been awarded.

23. I therefore dismiss the appeal on ground (b) referred to at paragraph 1 above. I order costs in favour of the Respondents.

A.Fernando (J.A)

I concur:.

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F. Robinson (J.A)

I concur:.

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L. Tibatemwa-Ekirikubinza (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2019