

**Ernesta & Ors v Appasamy & Or
(2004) SLR 30**

Frank ELIZABETH for the Plaintiffs
Anthony JULIETTE for the Defendants

Judgment delivered on 16 June 2004 by:

PERERA J: This is a delictual case in which the Plaintiffs claim damages for shock distress, anxiety, trauma and headache allegedly caused by an Act of the First Defendant. It is averred that on 7th January 1999, the First Defendant, who was a Police Officer at that time, gave the first package said to contain babies' nappies to be given to one Yacinthe Bouchereau of La Digue.

It is further averred that later in the day, at the residence of the Third Plaintiff, the First Plaintiff opened the package on the advice of the Second Plaintiff. The Third Plaintiff an Ex-Police Officer, suspecting the material in the package to be hashish telephoned SP Ronnie Mousbe. It is also averred that the First and Second Plaintiffs suffered shock and distress and was treated at the Victoria Hospital. Although it is not averred that the Third Plaintiff was medically treated, he too claims damages for shock, and has produced a medical certificate.

The Plaintiff avers that at the time he received the package, he was unaware of its contents, whereas the First Defendant knew or ought to have known that the package contained an illegal substance and that if he was arrested and convicted, he would be liable to a minimum term of 8 years imprisonment. The Plaintiffs further aver that the Police investigated the complaint, and consequently the First Defendant was dismissed from the Police Force.

The First Defendant had raised a plea in limine litis that the plaint does not disclose any cause of action for the Second and Third Plaintiffs as against him. He further denied that he gave any illegal substance to the First Plaintiff, nor had any dealings with him or the Second Plaintiff.

The Second Defendant, who is sued in a vicarious capacity admits that as at 7 January 1998, the First Defendant was a Police Officer attached to the drug squad. He admits the averments in paragraph 2, 3, 4, 5 and 7 of the plaint. The admission of these averments involve the admission that the First Defendant handed over a package of hashish to the First Plaintiff, that it was opened in the house of the Second Plaintiff as averred, that S.P Mousbe was informed about the discovery, and that the First Defendant was dismissed from the Police Force consequent to an inquiry into the complaint. The Second Defendant however avers that at the material time, the First Defendant was not acting within the scope of his employment, and that the alleged Act was a "deliberate Act on his part contrary to the express instructions given by him, and that that Act was not incidental to the First Defendant's service or employment as a

Police Officer." In these circumstances the Second Defendant denies vicarious liability under Article 1384(3) of the Civil Code.

By a ruling dated 29 September 2000, the plea in limine litis was dismissed.

At the hearing, the First Plaintiff testified that the First Defendant requested him to carry a package to one Yacinthe Bouchereau, whom he himself knew in La Digue. He told him that the package contained babies' nappies. He took the package to the house of the Third Plaintiff. The Second Plaintiff was also present there. Later he and the Second Plaintiff had to go to the Airport to get a flight to Praslin, and as his bag was full, he gave the package to the Second Plaintiff. He asked him what it contained, and the First Plaintiff told him that he did not know. Then the Second Plaintiff opened it and found something wrapped in foil and newspaper. The Third Plaintiff also saw the package still wrapped in a red wrapping, and stated it was "chalias". He then informed SP Mousbe, who took possession of the package and recorded their statements. Thereafter he went to the Mont Fleuri hospital as he was in a state of shock.

Andrew Ernesta, the Second Plaintiff stated that he saw the First Defendant handing over a package to the First Plaintiff that day. Before both of them went to the Airport, the First Plaintiff gave him that package to carry. When he asked him what it contained, he said babies' nappies. Then he said Yacinthe does not have babies, and so decided to open the package. Then he saw "chalias" wrapped in newspaper and brown paper. The Third Plaintiff identified the substance as hashish. The Second Plaintiff also stated that he went to the hospital for treatment as he was in a state of shock. He contradicted the First Plaintiff and stated that he went to the Police Station after attending the hospital in the morning. He explained that the shock was due to the realization that if he was arrested for being in possession of drugs, his life would have been ruined.

The Third Plaintiff corroborated the evidence of the First and Second Plaintiffs. He stated that with his experience as a Police Officer for 7 years and a half years, he suspected that material in the package to be hashish. He went to the Drug Squad Office at the New Port to complain to S.P Mousbe, but instead he overheard the First Defendant speaking to someone on the telephone saying "I have already given it to them. They are coming at such a time on the boat". He then went to the house of S.P Mousbe and reported the matter. The package was taken away by him.

The Third Plaintiff's case is also that the First Defendant by handing over an unlawful substance to the First Plaintiff, and by the subsequent handing by himself and the Second Plaintiff, exposed all of them to be arrested and prosecuted, and if convicted, could have been liable to be sentenced to imprisonment.

Dr. Philip Gobine, the principal Bio-chemist called by the Plaintiffs testified that he had analysed several exhibits of hashish referred to him by the Police, but could not state whether the package involved in the present case was analysed, unless the C.B. number was given. He explained that the term hashish was used to describe the substance extracted from fruiting and flowering tops of the cannabis plant.

Superintendent Antoine Belmont testified that the First Defendant was dismissed from the Police service as he had stolen a piece of cannabis resin from the Drug Squad Office. He further stated that the enquiry commenced consequent to the Plaintiffs making a complaint regarding the handing over of a package of cannabis resin by the First Defendant. He however stated that the contents of that package were not analysed, but the Police Commissioner decided to dismiss him without prosecuting. He stated that from his experience the substance was cannabis resin.

Superintendent Ronnie Mousbe, corroborated the evidence of the Third Plaintiff that he brought a package to his residence early in the morning of 7 January 1998, and informed him that the First Defendant had given it to somebody and wanted him to examine the contents. He saw a dark substance, which he suspected to be cannabis resin. He took it to the Drug Squad Office and made a report to the Commissioner of Police. He stated that the size of the substance in the package was about 8 centimeters long and 4 centimeters broad, and that there were other smaller pieces of the same exhibit in the exhibits cupboard from where it had been stolen.

Dr. Hassian Alt, produced a medical report stated 29th October 2001 (PI) issued to the Third Plaintiff. He stated that the patient "complained of a headache after noticing that a parcel handed over to his cousin to be delivered at La Digue contained drugs which he thought was hashish". On clinical examination, the patient had no abnormalities. He was given paracetamol and advised to report back to the clinic if his headache persisted. On being cross-examined, the doctor stated that a complaint of headache could not be medically diagnosed.

Neither the First Defendant nor the Second Defendant called any evidence.

On a consideration of the evidence in the case it has been established that the First Defendant had removed a piece of cannabis resin from the exhibit store of the Drug Squad Office, and that consequently he was dismissed from the Police Force. Accordingly, the Second Defendant cannot be held vicariously liable for any Act done by the Police Officer outside the scope of his duties. There is no evidence to show that the First Plaintiff to whom the package was handed over by the First Defendant, was an accomplice.

There is also no evidence that the First Defendant was aware that the package would be handled and opened by the Second and Third Plaintiffs. Article 1382(4) of the Civil Code provides that-

A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.

According to the evidence, the First Plaintiff undertook to handle the package on the basis of the First Defendant's statement that it contained babies' nappies. It was opened

only at the instance of the Second Plaintiff. The Third Plaintiff who is an Ex-Police Officer confirmed their suspicions that the substance in the package was hashish.

In psychiatric injury cases, English Law recognizes two categories; the primary victim, who is directly involved in the accident and is well within the range of foreseeable physical injury and the secondary victim who is not directly involved but who suffers from what he sees or hears.

French Law of delict is based on fault, and requires that there should be a causal connection between the act for which the Defendant was responsible and the damage. Further, it is inadequate to prove that the Defendant committed the fault; it must appear in addition that the accident was caused by that fault. The concept of moral damages in French Law includes mental suffering occasioned by death or injury to a member of the immediate family, or pain and suffering inflicted to oneself by another. In this respect the English Law concept is not very much different.

In the case of *McLoughlin v. O'Brian* (1982) 2. A.E.R. 298 the House of Lords held that there should be a limitation on the extent of admissible claims as "shock" in its nature was capable of affecting a wide range of people. The House held that there were three elements inherent in such a claim-

- (1) The class of persons whose claims should be recognised.
- (2) The proximity of such persons to the accident.
- (3) The means by which the shock was caused.

As regards the class of persons, it was held that the possible range was between the closest of family ties, like of parent and child or husband and wife, and the ordinary bystander. The board recognized claims from the first category, but as regards bystanders stated that claims should be denied either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure calamities of modern life or that the Defendants cannot be expected to compensate the world at large.

In the present case, the three Plaintiffs claim to be cousins. That is not a close family tie for purposes of suffering a nervous shock.

As regards the package, there is the admission of the Second Defendant that it contained hashish and the evidence of S.P Mousbe and S.P Belmont that the First Defendant was dismissed from the Police Force consequent to the incident. A person entrusted with a parcel which is said to contain babies' nappies, but turns out to be prohibited drugs could be said to have been in possession of drugs, but such inference could be rebutted by evidence that although he was in possession, he was completely mistaken as to its contents and could not have accepted possession had he known what the package in fact contained. In the present case, on a balance of probabilities, the First Plaintiff was not aware that the parcel contained cannabis resin. Hence the First Defendant had put him in a state potential danger of being involved in a serious

criminal offence. As Lord Denning stated in the case of *King v. Philips* [1953] 1.A.E.R. 617 at 623 "the test of liability for shock is foreseeability of injury by shock". Hence the claim of the First Plaintiff for shock and distress is justified. As regards the Second and the Third Plaintiffs however, the First Defendant cannot be held liable as he could not have foreseen that that parcel would have been handled by several persons. As was held in the case of *McLoughlin* (supra), the Defendant cannot be expected to compensate the world at large. Hence the claims of the Second and Third Plaintiffs cannot succeed, and are hereby dismissed.

Damages

There is no evidence that the First Plaintiff suffered any psychiatric injury. It is averred that he suffered shock and distress and was treated at the Victoria hospital. There is no medical evidence of any treatment given nor indeed of his attending the hospital. However he stated in evidence that he went to the hospital after the package was handed over to S.P. Mousbe and making a Police statement. The First Plaintiff was acting innocently, and took immediate steps to hand over the illegal substance to the proper authorities. In the interim period he would have suffered shock and distress, although there is no medical evidence to support that. However due to the trivial nature of the harm suffered, only nominal damages are payable.

Accordingly, judgment is entered in favour of the First Plaintiff against only the first Defendant in a sum of R1,000, and costs fixed at R500. As the claim was highly exaggerated, only a sum of R250 will become payable in respect of disbursements.

The case against the Second Defendant is dismissed with costs payable by the First, Second and Third Plaintiffs jointly and severally in a sum of R1,000.

Record: Civil Side No 125 of 1998