

IN THE SUPREME COURT OF SEYCHELLES

GERARD FREMINOT

PLAINTIFF

VERSUS

PATRICK ALVIN AH-KON

DEFENDANT

Civil Side No 59 of 2003

Miss L. Pool for the Plaintiff

Mr. D. Lucas for the Defendant

JUDGMENT

Perera J

Two delictual claims have been made against the defendant Patrick Ah-Kon in respect of an accident which occurred on 1st November 2000 at Bois de Rose Avenue, Victoria. In case no. CS. 59 of 2003, the plaintiff Gerard Freminot claims compensation for damages allegedly caused to his vehicle bearing no. S. 636 as a result of the collision with vehicle no S. 12191 belonging to the defendant. In case no. C.S. 151 of 2002, Michel Suzette, a minor who was a passenger in vehicle S. 636, sues the defendant for damages in respect of personal bodily injuries suffered by him. Both cases were consolidated and tried as one suit, on the joint application of the parties, pursuant to Section 106 of the Code of Civil Procedure (*Cap 213*).

Gerard Freminot, a taxi driver was transporting three passengers, including Michel Suzette from La Louise to Bel Ombre around 10 p.m. to 11 p.m. on 1st November 2000. Michel was seated at the back, on the right hand side. Freminot testified that when passing the Flamboyant Discotheque, a pick up suddenly crossed the road from the opposite direction and collided with his vehicle which got thrown off the road and hit a tree. Although he was not personally injured, Michel Suzette's right arm was injured. His vehicle was however damaged. He noticed that the left side of the front grill of the pick up was also damaged. His vehicle was taken to the "Skill Auto Garage" owned by one Randolph Hoffman. The vehicle was in the garage for two months. He purchased the spare parts and paid the labour costs.

As regards the accident, he stated that although there is a bend near the SMB Factory, the road in front of the entrance to the Flamboyant Discotheque, from where the defendant's pick up emerged suddenly was straight. He saw the pick up at the entrance with its lights on but did not expect it to cross on to his lane quickly and collide with his vehicle. The collision was not "head on", but sideways. He denied that seeing the pick up partly on his lane, he tried to overtake it and thereby collided. He also denied driving at a high speed at that time.

Police Sergeant Mason Malbrook the Investigating Officer produced a letter dated 4th April 2002 sent to Learned Counsel for the plaintiff through the Commissioner of Police, stating that prosecution would be instituted against the defendant for negligent driving. He stated that no prosecution was instituted subsequently as no notice of intended prosecution had been issued to him within 14 days of the accident. In any event, I do not attach any evidentiary value to this document on the issue of liability of the defendant for the accident.

Jane Suzette, the sister of Michel was also a passenger in the vehicle of Gerard Freminot that night. She was seated in the front passenger seat. She testified that after passing the bend and proceeding along the straight stretch of road, she noticed a white pick up getting out of the entrance to the Flamboyant discotheque. When the car she was in, came opposite that entrance, she felt a collision and the vehicle got thrown against a tree. Her brother, Michel was injured and was taken to hospital. She denied that the car was speeding at the time of the accident. She saw other vehicles proceeding in the opposite direction. She also denied that the car was overtaking the pick up which was on the same lane partly.

Admittedly, P.C. Davies Simeon was the Officer who was assigned to investigate the accident. He had prepared a report of his investigation and drawn a sketch in the presence of the two drivers of the vehicles involved. However as he had resigned from the Police Force and left the country, those documents were produced by S.I. Sabury Khan. In his report, (P11) P.C. Davies has stated that when he arrived, the pick up of the defendant was on the mountain side of the road and facing Victoria, while the taxi car was further away and facing the road. The sketch plan (P12) shows that the pick up was at the time of investigation, completely straight on the mountainside lane while the taxi car which was 3.4 metres away was in a more angular position after the collision. P.C. Davies has, in his report noted the following damages to the two vehicles.

Pick Up S. 12191

- Front left panel, forced in
- Indicator light broken
Bumper dismantled
Grill forced in.

Taxi Car – S. 636

- Right and left side body forced in and scratched.

The damages to vehicle S. 636 as more particularly set out in the invoice from the “Skill Auto Garage” (P7) are damage to the right side quarter panel, right side rear door, right side front door, and the rear windscreen. The receipt from “Pelissier Auto Parts Pty Ltd” (P8) shows that

those spare parts were purchased at a total cost of Rs.23,650. The labour cost was Rs.15,000. Photographs P1 and P2 depict the damage to the right side of the vehicle and the rear windscreen. Photograph (P3) shows the damage to the left front door, consequent to that side hitting a tree. Photograph P4 shows the scene of the accident and the tree against which the taxi rested. This damage is consistent with a collision from a vehicle emerging from the right side.

The defendant in his testimony stated that the accident occurred between 8.30 p.m. – 9 p.m, near the exit gate of the discotheque, he stopped to allow traffic proceeding towards the South to pass. There was no car coming towards Victoria, hence as he had sufficient space, he moved out. However when his pick up was $\frac{3}{4}$ on the mountainside lane, the pick up shook due to an impact on its left front side. He saw a car passing, hitting a tree. He claimed that his vehicle did not collide with his vehicle. He stated that the bend opposite S.M.B. factory, was about 70-80 metres from the point of impact and as he saw no vehicle from the South, that car would have been speeding.

The defendant further stated that due to the length of the pick up, he entered the left lane in an angular position. It was then that the car overtook, and in the process collide with his vehicle. He denied that the front grill was forced in, as stated in the report of P.C. Davies.

Eddy Esther, a Cousin of the defendant was a passenger in the pick up that night. He corroborated the evidence of the defendant as regards the manner in which the accident occurred. He too stated that no vehicles were seen at the bend, and hence the road was clear for the pick up to enter that lane. He also stated that the car was speeding and that it was the car that collided with the pick up. He however stated that the grill of the pick up got bent but was adjusted and replaced.

Liability

I have considered both the oral and documentary evidence in the case. Admittedly both vehicles were moving bodies at the time of the impact. The plaintiff Gerard Freminot had the right of way. Rule 53 of the Seychelles Highway Code provides that when a right turn is made to enter the opposite lane, the motorist must first position his vehicle close to the center line without causing obstruction to oncoming traffic, and enter that lane only when there is a safe gap. At the locus in quo it was observed that the bend near the S.M.B. Factory was about 80 metres away

from the point of impact. On observing moving traffic on that lane at the time of the visit, it was assessed that a vehicle emerging from that bend at a speed of about 60 kph would take about 6 seconds to come to that spot. It is possible that the defendant saw no vehicle while he was still at the exit gate of the discotheque. He would have taken about 4 seconds to reach the center line. He claimed that $\frac{3}{4}$ of his pick up was on the lane to Victoria. Hence a vehicle that emerged from the bend at the authorised speed of 65 kpm should have been observed by the defendant before he entered that lane. The damage to the pick up shows that only the cabin portion, was beyond the center line. The defendant therefore was not properly observant and was negligent in entering that lane, obstructing the taxi car which had the right of way. Hence I have no hesitation in finding that the defendant was liable for negligent driving and thereby being solely responsible for the accident.

Damages

(1) C.S. 59 of 2003 – (Gerard Freminot v. P. Ahkon)

Particulars of loss and damage

1.	Damage to motor vehicle		
	Taxi no. S 636 – cost of repairs	-	Rs. 40,000
2.	Loss of earnings (2 months at		
	Rs. 25,000 per month	-	Rs. 50,000
3.	Moral damages	-	<u>Rs. 30,000</u>
			<u>Rs.120.000</u>

Randolph Hoffman, the proprietor of “Skill Auto Garage” testified that the three damaged doors could not be repaired, and hence were replaced with new doors. The rear windshield also was replaced. He charged Rs.15,000 as labour costs. This evidence was uncontradicted, and hence I make the following award under that head-

<i>Spare parts (exhibit P5)</i>	-	<i>Rs. 23,650</i>	
<i>Paint (exhibit P6)</i>	-		<i>Rs. 1,380</i>
<i>Labour costs (exhibit P7)</i>	-	<i><u>Rs. 15,000</u></i>	
			<u>Rs. 40,230</u>

However as only Rs. 40,000 is being claimed, the award will be limited to that amount.

As regards loss of earnings, Rs. 25,000 per month claimed amounts to about Rs.800 per day. On a consideration of the evidence without proof, I consider a sum of Rs. 300 per day to be a reasonable average amount to be considered as daily earnings. Hence for two months, the amount would be Rs.18,000.

On a consideration of the inconvenience caused to the plaintiff, I award a sum of Rs. 5000 as moral damages.

Hence the plaintiff Gerard Freminot is awarded a total sum of Rs. 63,000

(2) C.S. 151 of 2002 – (*Michel Suzette v. P. Ahkon*)

Particulars of loss and damages

1.	<i>Pain and suffering</i>	-	Rs. 50,000	
2.	<i>Loss of enjoyment of life</i>	-	Rs. 25,000	
3.	<i>Loss of future earning capability</i>	-	Rs. 50,000	
4.	<i>Moral damage</i>	-	<u>Rs. 50,000</u>	
				<u>Rs. 175,000</u>

According to the medical report (*exhibit P10*), the plaintiff suffered a fracture of the right radius and right ulna in proximal end. (*two bones in the forearm*) Dr. Jhowla Manoo, who produced the report of Dr. Alexander, explained that according to the diagnosis, the term “*open fracture of those two bones*” meant that the fracture could be seen through the laceration. An implant was made the same day, and it was removed nine months later. Thereafter he had 100 degree flexion of the right elbow. This meant that the plaintiff’s right hand had returned to normal.

Rosemary Suzette, the mother of the plaintiff testified that her son was in pain while in hospital for 15 days he was restless and could not sleep properly. Due to his injury, he could not attend school for one year. After leaving school three years later, he applied to join the army, but was unsuccessful as he had suffered a fracture of the arm. Later he joined the Civil Aviation Department and is now working as a Porter. However he complains of pain at night.

Jane Suzette, the sister of the plaintiff also testified and corroborated the evidence of her mother as regards the pain and suffering of her brother.

On a consideration of this evidence, I am satisfied that the plaintiff was in severe pain for about a week after the accident. Thereafter for about one month, the condition would have improved. Dr. Manoo stated that a fracture takes about 18 months to heal properly. Hence it would be reasonable to consider that the plaintiff had to suffer some degree of discomfort and pain during that period.

In computing the quantum of damages on the basis of comparative awards made by this Court in respect of fractures of limbs, I stated in Marie-Therese Alcindor v. Jean Claude Marcel (C.S. 238 of 1993) that in the case of injuries, such as a broken leg or arm from which the plaintiff recovers completely, pain and suffering is the main element in damages. In that case, the plaintiff fractured both legs and was awarded Rs.60,000 for pain and suffering and loss of amenities.

In Allain Sinon v. Armand Kilindo (C.S. 225/1992) the plaintiff suffered a compound comminuted fracture of the right tibia and fibula and was awarded Rs.15,000 for pain, anxiety, distress and discomfort. He also had a scar, and the leg was swollen for two years after the injury. He was unable to engage in many activities. A further sum of Rs.20,000 was awarded for loss of amenities and enjoyment of life.

On an assessment of the injury suffered by the present plaintiff, I award a sum of Rs 35,000 under the head of pain and suffering. As the fracture could have taken 18 months to heal properly, I accept that he was unable to attend to normal activities during that period as efficiently as he did before the accident, and consequently I award a sum of Rs.10,000 under the head of loss of enjoyment of life.

According to the evidence, the plaintiff is now engaged as a Porter at the Airport. In these circumstances, I do not find it appropriate to make any award under the head of loss of future earning capacity.

In view of the awards made for pain and suffering and loss of enjoyment of life, I make no other award under the head of moral damages.

Accordingly, I make the following awards in favour of the plaintiffs, Gerard Freminot and Michel Suzette as follows-

Gerard Freminot	-	Rs. 40,000
Michel Suzette	-	<u>Rs. 45,000</u>
		<u>Rs. 85,000</u>

Judgment is accordingly entered against the defendant in both cases, Patrick Ah-Kon in a total sum of Rs.85,000, together with interest on each sum, and one set of costs.

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A. R. PERERA

JUDGE

Dated this 22nd day of September 2006

IN THE SUPREME COURT OF SEYCHELLES

GERARD FREMINOT

PLAINTIFF

VERSUS

PATRICK ALVIN AH-KON

DEFENDANT

Civil Side No 59 of 2003

Miss L. Pool for the Applicant
Mr. D. Lucas for Respondent

ADDENDUM TO JUDGMENT DELIVERED ON 22ND SEPTEMBER 2006

Perera J

In the judgment dated 22nd September 2006, this Court awarded the plaintiff (*Gerard Freminot*), the following amounts-

- *Rs. 40,000 for damage to the motor car*
- *Rs. 18,000 for loss of earnings*
- Rs. 5,000 for moral damages.

Whereas the total award should have been Rs.63,000, this court inadvertently stated in summerising those awards, that the amount payable to Gerard Freminot was Rs.40,000. Hence with the award of Rs.45,000 to the plaintiff in the consolidated case (*case no C.S. 151/02*), the total award should be Rs.108,000 instead of Rs.85,000.

Application has been made under Section 147 of the Code of Civil Procedure for rectification of these figures on the ground of an arithmetical mistake arising from an accidental slip or omission. Counsel for the defendant has left it to the Court to make a suitable order.

The Court confirms that it was an arithmetical error, which does not prejudice the defendant in any way. Accordingly, acting in terms of Section 147, I hereby correct the award of Gerard Freminot to read as Rs.63,000, and the total awards in both cases to read as Rs108,000.

The Court regrets the inconvenience caused to both parties.

A.R. PERERA
JUDGE

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Dated this 10th November 2006