Joanneau v Government of Seychelles
(2007) SLR 99

Antony DERJACQUES for the plaintiffs
Ronny GOVINDEN for the defendants

Judgment delivered on 19 January 2007 by:

PERERA J: This is a delictual action wherein the plaintiffs are claiming damages from the defendants in their own capacities, as well as heirs, legal representatives and *ayant droits* of the deceased person. The defendants have conceded liability for the death of one Robin Jourdan Henriette which occurred on 12 January 2005 at Morne Blanc, Port Glaud consequent to police officers, in the course of their duties shooting with firearms.

The second plaintiff is the mother of the said *de cujus* while third and fourth plaintiffs are his minor children. The fifth and sixth plaintiffs are brothers of the deceased, the seventh plaintiff is a half-brother, while eight, ninth, tenth and eleventh plaintiffs are his sisters. The twelfth plaintiff is the common law wife of the deceased person.

Damages

Liability being admitted, the assessment of damages in a case of this nature is dependant on whether the *de cujus* died instantly or sometime after the fatal injury. In this respect, Sauzier J in the case of *Elizabeth v Morel* (1979) SLR 25, cited *Le Tourneau, Le Responsabilite Civil* (2nd ed), para 171, 172, 173 and 174 -

> In law, the heirs of a deceased are entitled to claim in that capacity, damages for prejudice, material and moral, suffered by the deceased before and until his death and resulting from a tortious act whether he had, or had not commenced an action for damages in respect of the tortious act before his death, provided he had not renounced it. When death is concomitant with the injuries resulting from the tortious act, the heirs cannot claim in that capacity and may only claim in their own capacity as in such a case, the cause of action of the deceased would not have arisen before he died.

In the instant case, the medical report (P2) certifies that the deceased when admitted to the Casualty Unit of the Victoria Hospital at 10.35 am on 2 January 2005, was already dead. He had a lacerated wound in the right side of the chest (4 x 1 cms) and a lacerated wound in the left anterior axillary area (3 x 2 cms) in the left rib. Dr Patrick Commettant, who produced the said report of Dr KJ Joseph testified that the post mortem examination had revealed internal thoracic bleeding. He stated that in such case, it would take some time for bleeding to accumulate and cause eventual death. He was however not prepared to speculate as to how long the deceased person would have lived subsequent to the injuries.

Nelson Henriette (PW4), a brother of the deceased person testified that the shooting took place around 8.30 am that day, but he was unable to go near his brother as he was being guarded by a policeman. After about one hour, three more policeman came to the scene, but did nothing to assist the injured man. Thereafter a doctor arrived with a nurse, half an hour later. He helped them to put his brother on a stretcher, and at that time he recognised him and told him to place a pillow under his head. Hence there is uncontradicted evidence that the deceased person lived for at least one hour after receiving the gun shot injuries. Consequently the heirs of the deceased person would be entitled to claim for material and moral prejudice caused to the deceased person before he died.

The Awards

The first plaintiff claims in her capacity as mother of the deceased person, and the administrator of his estate. The deceased was a self-employed farmer. There is no evidence regarding his income. However, he was 25 years old at the time of his death. He had a Common Law wife and two children to support. As regards loss of expectation of life, although Sauzier J in the case of *De Sylva v D'offay* (1970) SLR 99 made an award, the Supreme Court of Mauritius sitting in appeal over that case set it aside on the ground that there was no juridical foundation.

The quantum of damages payable would therefore be limited to the prejudice caused to the deceased by way of pain and suffering, anxiety arising from his impending death, and shock. In this respect, a sum of R50,000 is claimed. I consider this to be a reasonable amount in all the circumstances of the case. Accordingly a sum of R50,000 is awarded. From this amount, the third and fourth plaintiffs the two minor children as heirs, will be entitled to R25,000 each, the amounts to be deposited in minors' accounts.

The mother of the deceased also claims in her own capacity as the second plaintiff in respect of distress, anxiety and shock, a sum of R40,000. She is 58 years old. She did not see the shooting, but saw her son in hospital.

She testified that when she heard that her son had died, she suffered shock. This would undoubtedly be the natural feeling of a mother. In the circumstances I consider a sum of R10,000 to be a suitable award.

As regards the other plaintiffs, the fifth and sixth plaintiffs and eighth to eleventh plaintiffs are full brothers and sisters of the deceased person. They testified that they suffered mental pain and grief consequent on the sudden death of their brother. They claim R30,000 each. These brothers and sisters are all above 30 years, and are living independently. However the prejudice they suffered could not be as much as that suffered by the mother. As was held in *Choonia v Pitot* 1914 MR 53, the Court in making awards in these circumstances should bear in mind that the claims should not be made "an occasion of coining profit out of affliction and turning family bereavement into pecuniary advantage'. Taking all factors into consideration, I award nominal damages in a sum of R2,000 each to the fifth, sixth, and eighth to eleventh, plaintiffs.

The seventh plaintiff Rerens Hortere is a half-brother of the deceased. He did not appear in Court on the hearing day to testify. Hence no award is made.

As regards the twelfth plaintiff, the Common Law wife of the deceased, the Courts in Mauritius adopted a strict approach in the case of *Naikoo v Societe Heritiers Bhogun* 1972 MR 66, the Court held thus –

> It seems clear that a concubine is not entitled to moral damages as such. As for material damages, the question is not free from difficulty, but the better opinion seems to be that the concubine cannot recover such damages, not because concubinage is illegal or immoral, but because it is not a relation protected by law. In other words, the action of the concubine fails <u>not because it is a moral fault, but because it is a legal fault;</u> the parties by their own choice have placed themselves outside the protection which the law offered to them within the marriage bond.

Sauzier JA, in the case of *Hallock v. D'offay* 3 SCAR (vol 1) 295 explained the reluctance of the Courts in Seychelles to extend the scope of legal and juridical rights of married persons to cohabitees. He stated –

> In Seychelles, the Courts have tended to follow the jurisprudence of the French Courts and have not forged any solutions along new paths. If no remedy exists in French jurisprudence, then no remedy could be had by the co-habitee who applied to the Court for redress. This reluctance may be due to the moral and sociological issues raised by cohabitation and the fear that a status might be given to it which would undermine the institution of marriage. However the policy of turning a blind eye to the legal problems thrown up by cohabitation have certainly not helped to discourage it, for after 175 and more years that the Civil Code of the French has been in force in Seychelles, there are less married couples than couples cohabiting.

The learned Justice of Appeal, in his dissenting judgment exercised equitable powers under section 5 of the Courts Act, as the law in Seychelles was silent as regards the problems thrown up by cohabitation. He stated that it would be a denial of justice to decline to use such powers on the ground that there was on remedy in law, and the solution to them should be left to the legislator.

This Court had an opportunity in the case of *Marthe Albert v. Kevan Hoareau* (unreported) CS 78/1992 to consider the liberal view of Sauzier JA in the *Hallock* case (supra) which was based on division of property, to a delictual claim filed by the Common Law wife of a deceased person. The attention of Abban CJ was drawn to the Administration of Justice Act 1982 (UK) which amended the Fatal Accidents Act 1882 - 1976, and made provision for a co-habitee to be treated as a dependent who could claim compensation from a tortfeasor.

Section 3 of that Act, defined a "dependent" as any person living with the deceased in

the same household at the time of the death of the deceased. It was also submitted by counsel for the plaintiff that in Seychelles, the Social Security Act and the Tenant's Rights Act recognised the rights of cohabitees. The Chief Justice stated-

> I must confess that I almost gave in to the request of learned counsel for the plaintiff, but after giving further thought to the matter, I had to decline the invitation. I strongly felt that such radical departure from the law, as it stands now in Seychelles, ought to be made by the legislature and not by Judge made law.

Accordingly, the claim of a cohabitee, who had lived in a Common Law relationship with the deceased for a period of 12 years, and who had been totally dependent on him, was dismissed.

However could this reluctance to deviate from the rigid application of French principles in claims for moral damages in delictual cases be perpetuated in view of article 32 of the Constitution which provides for protection of families. The prescribed derogations are marriages between persons of the same sex, and persons within certain family degrees. Under that fundamental right, the state undertakes to promote the legal, economic and social protection of the family. No distinction is drawn between families composed of married persons and persons in a common law relationship.

The State has already provided legal protection to a co-habitee as a dependent for benefits under the Social Security Act, and under the Tenants' Rights Act (now abolished, save for limited purposes). There may be a justification to insist on legislation in respect of property rights accruing to a cohabitee as provisions of the Civil Code would need amendment.

However, when moral damages are claimed in a delictual action in respect of grief and sorrow, mental agony, anxiety, and shock, there is no legal or moral jurisdiction to draw a distinction between a surviving married spouse, and an unmarried spouse. It is of interest that the word *"dommage'* in Article 1382 of Code Napoleon (the word *"damage"* in the same Article in the Civil Code of Seychelles) was considered in the case of *Gopal v Mooneeram* 1936 MR 36 Le Conte J stated thus -

> The law speaks of a *"dommage",* i.e of some prejudice. To say that the word *"dommage"* refers solely to material prejudice, or that although it includes moral suffering, such suffering cannot constitute a right of action unless it has engendered pecuniary loss, is not, in my judgment, interpreting the law, but unduly restricting its meaning. Moral suffering is a very serious *"dommage'* indeed, so much so that it often brings about disease, inability to work, and, as a consequence, pecuniary loss; but even when it does not, the mental agony, the heartache, the loneliness and wretchedness one feels after the loss of a dear relative who has prematurely met with his death through the wickedness, or simply the carelessness or recklessness of others, that is a great and real *"dommage".* Its pecuniary equivalent, is not easy to assess, because there is no instrument yet enabling us to gauge the

> human heart with anything like accuracy, and also because no monetary relief can make up for the loss of those to whom we were fondly attached.

This view that moral prejudice does by itself give rise to damages, independently of material damage, and moral damages should be assessed by the judge rather arbitrarily if need be, but without allowing family bereavement to be made an occasion for coining profit, was followed with approval in the case of *Rohimun v K Gopal* 1937 MR 100**.**

Hence I am fortified in the view that a concubine should be entitled to moral damages even where material damage has not been established. Accordingly I award the twelfth Plaintiff, a sum of R5,000 as moral damages for distress, anxiety and shock.

Judgment is accordingly entered in favour of the plaintiffs, save the seventh plaintiff, in a total sum of R77,000, together with interest and costs.

Record: Civil Side No 12 of 2005