IN THE SUPREME COURT OF SEYCHELLES

1. **Franky David**

(acting in his capacity as the father, next of kin and administrator of the estate of the deceased Mr. Ron David)

2. **Franky David**

Edwina David

Ms. Ruby Therese David

All of Takamaka, Mahé **Plaintiffs**

v***s***

The Government of Seychelles

Represented by the Attorney General

of National House, Victoria **Defendant**

Civil Side No: 199 of 2007

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Mr. A. Derjacque for the Plaintiffs

Ms. F. Laporte for the Defendant

D. Karunakaran, J. **JUDGMENT**

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Ron David, a young man - aged 22 - hereinafter referred to as “the deceased” was at all material times a resident of Takamaka. He was not married nor had any children. Since birth he had been living with his parents and his sister Ruby, in their family home at Takamaka. He was working as a plumber with Public Utilities Corporation and was devoted and hardworking. He was earning a monthly salary of Rs2, 600/-. However, when he worked overtime he was getting Rs 3600/- to 3800/- per month. According to his parents, the deceased was a good boy. He was a very responsible son. He was very close and affectionate towards his parents as well as to his sister. He was contributing around Rs 1000/- per month for the family maintenance and was very helpful not only to his family members but also to his friends and neighbours. Sometimes, he used to do even haircut for others. The deceased was loved by all members of his family and friends. Physically, he was healthy, young and energetic. He liked to play football like most of the youngsters do. It is said “Whom the God loves die young”. It may be an aphorism but in the case of the deceased, it became true. Indeed, he died young at the age of 22. He died on the 7th April, 2007 at the ICU of the Victoria Central Hospital. Behind his death, there is a story of tragedy. Although sad to hear, his parents had to tell me that story shedding tears in Court. The story was all about a *bourgeois* fish bone,

which the deceased had swallowed while eating food on the 26th of March 2007, and about the medical negligence of the doctors, which eventually devoured the very life of the deceased. We will revert to that story later. Some of you may not like to hear, and others may find it difficult to digest, nevertheless the story has to be retold to gauge the degree of "pain and suffering" the plaintiffs should have undergone in order for the Court to appreciate and make right assessment of damages claimed by them in this matter.

Be that as it may, the parents and the sister of the deceased have now brought this action in delict, claiming damages in the total sum of R600, 000/- from the defendant, the Government of Seychelles. The suit is based on *vicarious liability* of the Government for the alleged *medical negligence* of the doctors it has employed at the Victoria Central Hospital. In this action, the plaintiffs are claiming damages - in their own capacity as well as heirs, legal representatives and *ayant droit* of the deceased. The defendant does not deny liability for the medical negligence of its doctors, but only disputes the quantum of damages claimed by the plaintiffs in this matter.

The undisputed facts of the case are these:

The 1st and the 2nd plaintiffs are respectively, the father and mother, whereas the 3rd plaintiff the elder sister of the deceased. The defendant herein is the Government of Seychelles, which having established, owns and administers the Victoria Central Hospital at Mont Fleuri, Mahé, and also other peripheral medical clinics in various districts within the Republic of Seychelles, including the ones at

Takamaka and Anse Royale Districts. All these medical establishments are managed, administered and controlled by the Ministry of Health.

On the 26th of March 2007, the deceased Mr Ron David, approximately at 1715 hours, visited the medical clinic of Anse Royale, and was referred to the casualty department of Victoria Central Hospital, with the medical history of having swallowed a fish bone of a “bourgeois species”. He was accompanied by his mother. At the Anse Royale medical clinic as well as at the Victoria Hospital, the deceased was medically examined by nurses and doctors. The deceased told them that he had swallowed a fish bone, which had been stuck in his throat, pointing at his chest area, and which was extremely painful. The doctor and the medical staff conducted an X-ray of the deceased’s throat and chest area and stated that there was no fish bone stuck in his oesophagus and sent the deceased back home after giving some painkillers.

The following day, on the 27th of March 2007, the deceased, in extreme pain, visited the Takamaka District medical clinic and was again referred to the Victoria Hospital. The doctor and the medical staff at the Victoria Hospital conducted a second X-ray of the deceased’s oesophagus, in the chest area, and again stated that the test did not show any fish bone in his oesophagus. However, the medical doctor, who was present at that time, having conducted the clinical examination, stated that the throat area was simply “scratched”. The deceased stated again that the fish bone had been stuck in his oesophagus, which pricked and hurt him each time he made movements. Only when he was still or bending down in a particular position there was some relief. The deceased repeatedly told the doctor that he did not wish to die by a fish bone like his friend one Media Bristol of Takamaka, who died two years ago of a similar trauma. The deceased begged the doctor for a medical scan and not only for an X-ray. His mother also begged the doctor for an endoscopic examination of the deceased’s oesophagus. Nevertheless, the doctor insisted that there was no fish bone and refused to carry out the necessary scan or endoscopic examination to rule out what the patient was repeatedly complaining. The doctor again sent the deceased back home after giving the usual painkillers.

On the 2nd April 2007, the deceased, who was still in terrible pain, visited the private clinic of one Doctor Marie and was injected with

further painkillers. The pain never subsided but rather intensified. He spent sleepless nights at home and his parents too, looking at the suffering of their beloved son. On the 5th April 2007, the deceased, in extreme pain, vomited blood, and practically unable to move due to unbearable agony and suffering. The deceased with intense pain visited the Anse Royale District clinic. He was again referred to the Victoria Hospital and was transported by an ambulance. In the Victoria Hospital the deceased was further medically examined and admitted to D'offay Ward. He was given I.V fluids and placed on "observation" status. The deceased was given medication for the pain. No scan, endoscopic examination or surgery was performed nor started any other treatment.

On the 6th of April 2007, deceased suffered extreme pain. He started bleeding through nose, vomited blood, passed blackened stool and sweated profusely. On the 7th April 2007, all came to an end; the deceased died of internal bleeding as a result of the penetration of the oesophagus and aorta by the fish bone. Admittedly, the medical staffs, including the nurses, doctors and surgeons were acting during the course of their duties with the defendant as employees, servants and agents of the same. The said acts and/or omissions of the said medical staff, nurses, doctors and surgeons of the medical clinics and Victoria Hospital, undisputedly, amount to a faute, which resulted in the death of the deceased. In view of all the above, the plaintiffs have now come before this Court seeking compensation from the defendant for loss and damage they suffered, which are particularised in the plaint as follows:

(i) The 1st plaintiff in his capacity as administrator and next of kin of the deceased - on behalf of the deceased - claims Rs100, 000/- for the pain and suffering the deceased personally underwent and the distress he suffered from his knowledge of impending death.

(ii) The 1st plaintiff being the father of the deceased, in his own capacity claims Rs60, 000/- for moral damages he suffered from distress, shock and depression following the death of his young son.

(iii) The 2nd plaintiff being the mother of the deceased in her own capacity claims Rs60, 000/- for moral damages she suffered from distress, shock and depression following the death of her young son.

The 3rd plaintiff being the sister of the deceased in her own capacity claims Rs30, 000/- for moral damages in respect of the distress, shock and depression she suffered consequent upon the death of her younger brother.

(iv) The 1st and the 2nd plaintiff in their personal capacity claims Rs320, 000/- for economic loss calculated at the rate of Rs 1000/- per month for 40 years less 1/3 in the projected financial contribution to the family by the deceased.

(v) The plaintiffs claim special damages in the sum of Rs30, 000/- for funeral, flowers, transport, advertisement, the wake and construction of a tomb.

Thus, the plaintiffs claim in all, the total sum of Rs 600,000/- from the defendant as damages, with interest and costs. However, the defendant contended that the amount Rs600, 000/ claimed by the plaintiffs in the given circumstances of the case, is not reasonable and

manifestly excessive. Hence, counsel on both sides invited the Court to assess the quantum of damages payable by the defendant and enter judgment fixing the sum on the fair, just and reasonable assessment of the defendant's liability.

I carefully perused the entire evidence on record and the precedents cited by Mr. Derjacques, learned counsel for the plaintiffs on quantum and assessment of damages. I diligently went through several decisions of our Courts in this respect. In fact, most of them have been determined in the 20th century. Although the principles and assessment-criteria applied by the Courts in those cases of the 20th century, are still valid and relevant today, the quantum of damages awarded therein, have now become obsolete because of the erratic behaviour of the primary determinants namely, the "cost-of-living index" and the "rate of inflation" over the passage of time. These factors have indeed, tremendously gone through the roof over the decades, making "comparative assessments" virtually impossible for the Court. In the circumstances, the Court ought to make "subjective assessment" of damages in each case as it deals with from time to time. In making such assessments, it is in my opinion perfectly clear that the duty of the Judge is to take into account all relevant circumstances, especially, the *cost-of-living index* and the *rate of inflation*, as they exist at the date of the hearing. He ought to do so in a broad commonsense way as a man of the world and come to his conclusion on reasonable assessment giving such weight as he thinks right to the various factors in the situation. As Lord Green (M. R) stated - in *Cumming vs. Janson 1942 2All E R* - that some factors may have little or no weight others may be decisive but it is quite wrong for him to exclude from his consideration matters, which he ought to take into account. In this respect, I would add that the *cost-of-living index* and the *rate of inflation are the primary factors* and matters, which the Court ought to take into account as they exist at the date of hearing.

At the same ti me, one should bear in mind, in a case of tort, damages are compensatory and not punitive. As a rule, when there has been a fluctuation in the cost of living, prejudice the plaintiff may suffer, must be evaluated carefully as at the date of judgment. But damages must be assessed in such a manner that the plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the

Judge even though such assessment is bound to be arbitrary. *See, Fanchette Vs. Attorney General SLR (1968).* Moreover, it is pertinent to observe here that the continuous fall in the value of money leads to a continuing reassessment of the awards set by precedents of our case law. See, *Sedgwick* vs. *Government of Seychelles SLR (1990).*

Having said that, I am reminded of what Justice Sauzier had to state in *Elizabeth V Morel C. S 45 of 1978, SLR 1979*, on the question of damages, which the heirs of the deceased are entitled to claim from the tortfeasor. His dictum therein reads thus:

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

In the case of *Elizabeth (supra),* the deceased only lived for one hour after receiving her multiple injuries resulting from a road traffic accident. Justice Sauzier awarded R.6, 000/- moral damages for pain and suffering that lasted only for one hour and R.300/- for her damaged clothing. This was awarded almost 30 years ago obviously, to suit the social necessities and to commensurate with the socio-economic condition, the standard-of-living index and the rate of inflation, which prevailed in Seychelles during the second half of the 20^{th} century.

In the case of *Fanchette and others v/s The Attorney General SLR 1968* the Supreme Court awarded R1500/- as moral damages to the widow of a person who died in a road traffic accident and R1000/- to each of his two children. This was awarded almost 40 years ago.

In the case of *Josephine Mederick and others V. France Monthy SLR 1983 p48,* a seventeen-year-old girl died of multiple injuries sustained in a road traffic accident. Her mother and siblings claimed moral damages from the defendant. It is interesting to note, Justice Wood held therein:

(a) where death was concomitant with the injuries, the heirs may claim

only in their own capacity for moral damages.

(b) As the deceased was unconscious throughout 14 hours after she received the injuries, she in fact suffered no pain, suffering or anxiety and the heirs could only be awarded nominal damages.

Accordingly, Justice Wood awarded the brothers and sisters of the deceased R. 2000/- each and the mother R. 4000/- for the grief, which they suffered as a result of the death of the deceased.

In the case of *Rosalie and Another vs. Duane and another SLR 1987 p121,* an 11-year-old child died after being knocked down by a motor vehicle. Her parents claimed moral damages from the defendants. The Court having awarded a total of Rs 25,000/- in damages held:

(a) *moral damages are awarded for the grief suffered by the plaintiffs at the death of the deceased;*

(b) *previous judgments on quantum of damages would be a useful guide;*

in so doing rate of inflation would be a reasonable consideration;

(c) *social development with its economic implications, development of the tourist industry with an increase and the number of vehicles and greater risk of accidents and the rate of insurance premiums were elements to be reckoned in deciding quantum of damages;*

(d) *special legislation of other countries ought not to be followed blindly without regard to the marked differences between the countries.*

I - Non-pecuniary damages

Coming back to the case on hand, the deceased was a young man, aged only 22 and died in his prime youth. Obviously, his death was not concomitant with the injuries. He survived two weeks undergoing sever physiological pain as well as psychological trauma, so to say, dying everyday with the fear that he was also going to die like his friend Media Bristol because of the fish bone, since the doctors did not carryout proper diagnosis and treatment. Moreover, in the absence of any other evidence to the contrary and on a balance of probabilities, I conclude that the deceased despite painkillers, did suffer acute and sever pain throughout the period of two weeks because of the fish bone that had entangled in his oesophagus and of the consequent complication that arose therefrom. Therefore, the deceased is entitled to damages for the pain and suffering he underwent from the trauma.

Frankly speaking, it is impossible to use an exact mathematical standard to measure with precision the amount that an injured person

is entitled to recover for physical and mental pain and suffering and loss of normal state of mind. Legally speaking, "pain and suffering" aren't two separate concepts. Instead, it is one compound idea. Awards for "pain and suffering" are not apportioned into separate amounts; one for pain and one for suffering. Pain and suffering is a phrase that is always used as a single unit in legal terminology. While there may be real differences between "pain" and "suffering", it is legally impossible to separate the two, when trying to award damages *vide Ventigadoo vs. Government of Seychelles Civil Side No: 407 of 1998.*

Be that as it may, on the face of the evidence, I find that the defendant is liable to pay damages to each of the plaintiffs as per his/her entitlement being "ayant droit" of the deceased. However, on a careful consideration of the entire circumstances of the case, it appears to me, the quantum claimed by the plaintiff at Rs100, 000/- in this respect is exaggerated and unreasonable. Taking all the relevant factors into account in my considered view the sum of Rs.75, 000/- would be just, reasonable and adequate in the modern context. Accordingly, I award this sum to all three plaintiffs as heirs of the deceased, to be divided among them according to their respective share entitlement.

I will now deal with the plaintiffs' claim for damages, in their own capacity for the distress, shock, depression and grief they personally and individually suffered at the death of the deceased. In this regard, I am satisfied on evidence that the deceased formed part of a very close household of the plaintiffs. He was very affectionate to and so loved by all members of his family. Hence, his parents must have suffered irreparable loss of their only son and the sister, of her only brother. Certainly, they should have gone through extreme mental agony, depression and grief at the unexpected and untimely death of the deceased. Therefore, the plaintiffs are entitled to moral damages in their own capacity for such mental agony and grief and so I find. However, the quantum of damages claimed by each plaintiff appears to be on the higher side and disproportionate to the actual damage in

my view, each could have suffered. Having given a diligent thought to all the circumstances of the case, and to the precedents cited supra I would award the parents namely, the 1st and the 2nd plaintiff damages in the sum of R30, 000/- each and the sister of the deceased namely, the 3rd plaintiff the sum of Rs25, 000/- for the distress, shock, depression and grief they individually suffered at the death of the deceased.

II – Pecuniary/ Economic Loss

Loss of financial contribution*:* Under this head the plaintiffs, the parents of the deceased claim economic loss in the total sum of Rs 320,000/- calculated at the rate of Rs1, 000/- per month being the financial contribution the deceased was making towards the maintenance of the family. This has been calculated for a period of 40 years, minus 1/3 from the total amount arrived at. It appears, since the deceased was only 22 at the time of death, his expectation of life being the maximum, the multiplier of 40 has been used by Mr. Derjacques in his calculation. According to Ms. Laporte, learned counsel for the defendant, when considering all the circumstances of the case, the amount claimed by the plaintiffs in this respect based on that multiplier is unreasonable. Further she argued that this Court should also adopt the same approach adopted by the Court in the case of *Fanchette (supra),* with respect to the pecuniary loss of widow, wherein the Court held thus:

"Such loss should be calculated on the amount the deceased normally

expended for her, multiplied by a given number of years purchase, which purchase should have regard to the age of the deceased and his condition. This then should be scaled down to take into account contingencies such as widow's possibility of remarrying. That the same approach should be adopted for the children, but that the number of years' purchase should be related to the period of time during which the children might have reasonably expected their father to support and maintain them"

I gave meticulous thought to the approach suggested in *Fanchette*. However, I note, the claimant in that case was the widow, who was then a dependent of the deceased, whereas in the case on hand, the parents were not dependent nor had to live solely on the financial contribution made by the deceased. In fact, the father testified that he is self employed. He is working as a farmer as well as a fisherman earning Rs6000/- per month. Moreover, it seems to me, the multiplier used by the plaintiffs for the calculation based on the life expectancy of the deceased is inappropriate for the following reasons:

(1) the period of time, during which the parents may need financial support from the child (the deceased) depends on the life expectancy of the parents, not that of the children. In fact, the probabilities are higher for the parents to predecease the children, raher than the other way around.

(2) The probability of the child (the deceased) remaining at the family home with parents to continue the financial support for the rest of their life should also be taken into account, since there is no guarantee that the child (the deceased) would continue to live with the parents throughout his life time and continue making financial contribution.

Hence, I find that the *multiplier method* used to calculate the prospective loss of financial contribution as suggested by the plaintiff's counsel may not be appropriate here as this formula is generally used to calculate the prospective total loss of earning of a deceased person or loss of earning capacity of an injured person. According to ***Michael Jones on Medical Negligence*** at page 474,at 1st paragraph on loss of earning capacity as compared to loss of earning, *"In practice, award for loss of earning capacity are more impressionistic and less susceptible to the multiplier method of calculation.(the multiplier) – the solution is to award only moderate sum in this situation, although there is no tariff or conventional award for loss of earning capacity and each case is to be based on its own facts. Vide Forster Vs. Tyne and Wear Country Council [1986] ALLER 7"*.

Therefore, I find that the plaintiffs' claim in the sum of Rs320, 000/- for economic loss calculated on the basis of *multiplier method* is in appropriate, unreasonable and excessive. Since the plaintiffs' claim under this head depends on several probabilities and contingencies, in my judgment the Court ought to make "subjective assessment" of the said loss after taking into account all relevant facts and circumstances, especially, the *cost-of-living index* and the *rate of inflation*, as they exist at the date of the hearing. As I stated supra, the Judge ought to do so in a broad commonsense way as a man of the world and come to

his conclusion on reasonable assessment giving such weight as he thinks right to the various factors in the situation.

Thus, taking all these factors into account including the probabilities and making adjustments for all the contingencies, I am of the view that the sum of Rs 250,000/- should be appropriate, fair and reasonable, which sum I award for the prospective economic loss of the parents namely, the 1st and 2nd plaintiff, in this matter.

The plaintiffs' claim in the sum of Rs 30,000/- as special damages for funeral, flowers, transport, advertisement, the wake and construction of the tomb, appears to be exorbitant. Having given due consideration to all circumstances surrounding this claim, I award a global sum of Rs15, 000.00 to the plaintiffs.

Wherefore, in summing up, I award damages to each plaintiff as follows:

1st plaintiff

(a) For distress, shock, depression and grief Rs 30, 000. 00

As a legal heir of the deceased ayant droit- share entitlement from damages due to the deceased Rs 25,000. 00

(b) Economic loss Rs 125, 000. 00; and

Special damages for funeral, flowers etc. Rs 5,000. 00

Total Rs 185, 000. 00

2nd plaintiff

(a) For distress, shock, depression and grief Rs 30, 000. 00

As a legal heir of the deceased ayant droit- share entitlement from damages due to the deceased Rs 25,000. 00

(b) Economic loss Rs 125, 000. 00; and

Special damages for funeral, flowers etc. Rs 5,000. 00

Total Rs 185, 000. 00

3rd plaintiff

(a) For distress, shock, depression and grief Rs 25, 000. 00

As a legal heir of the deceased ayant droit- share entitlement from damages due to the deceased Rs 25,000. 00; and

(c) Special damages for funeral, flowers etc. Rs 5, 000. 00

Total Rs 55, 000. 00

In the final analysis and for reasons stated hereinbefore, I enter judgment for the plaintiffs and against the defendant in the total sum of Rs 425, 000/- with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

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D. Karunakaran

Judge

Dated this 28th day of November, 2008