

**IN THE SUPREME COURT OF SEYCHELLES*****Mrs. Yuping Lee***

of Mont Fleuri, Mahé, Seychelles

**Plaintiff**

Vs

***Mr. Wu Yao Zheng***

of Le Rocher, Mahé

**Defendant*****Civil Side No: 54 of 2002***

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Mr. A. Derjacques for the plaintiff  
Mr. P. Pardiwalla for the defendant

**D. Karunakaran, J****JUDGMENT**

The plaintiff in this suit is a middle-aged business-woman. She claims damages in sum of Rs 100,000/- from the defendant for a delict namely, an unlawful act of assault, he allegedly committed in public causing severe bodily injuries to her. Moreover, the plaintiff prays this Court for an order of permanent injunction to restrain the defendant from assaulting, threatening, communicating with her or approaching her residence at Mont Fleuri or her shop in Victoria.

Whereas the defendant in his statement of defence has totally denied that he committed any unlawful act of assault against the plaintiff or unlawfully caused any bodily injuries to her. Besides, the defendant has also made a counterclaim in his statement of defence against the plaintiff seeking damages in sum of Rs. 850,000/- for bodily injuries, which the plaintiff allegedly inflicted on him by causing severe trauma to his groin - right testicle - during an unlawful act of assault the

plaintiff committed against the defendant in public. Moreover, it is the case of the defendant that if at all the plaintiff had sustained any injury in the alleged incident of assault it was solely due to her own fault. The defendant was not at all responsible for those injuries since he was simply acting ***in self defence*** whilst being assaulted and ***provoked*** by the unlawful act of the plaintiff.

It is not in dispute that the plaintiff and the defendant were at all material times, shopkeepers and running their respective retail-business as general merchants in adjacent shop-premises situated at Victoria House, State House Avenue, in Town. Before the alleged incident, they had known each other personally since they had migrated from the same country that is, China (Mainland) and had been settled in Seychelles by virtue of their business ventures. Presumably, the plaintiff and the defendant had business-rivalry as they were engaged in the same kind of business and operating from adjacent shop-premises located in the same building and moreover importing goods from the same country of origin and manufacture.

The plaintiff testified in essence that she owns a shop *known as "Friendship Store"* in Victoria Building, State House Avenue. On the 5<sup>th</sup> March 2002 at around 3 p. m she came out of her shop with her handbag as she was planning to go to the Chinese Embassy in order to obtain a visa for her husband's stay in Seychelles. She was walking along the pedestrian platform close to the defendant's shop intending to go to the car park. While she was approaching the western corner of Victoria House, she saw the defendant suddenly emerged out from her left side, swore at her and started to assault her with repeated fist-blow and kicks. The plaintiff fell to the ground and the defendant, who was

then wearing leather-shoes, continued to kick her with his foot on her chest and on her head. According to the plaintiff, she felt an acute pain in her head due to heavy impact and then she fell unconscious. She could not recall what happened after that hit. Later, in the Victoria Hospital as and when she regained consciousness, she felt severe headache. She also noticed blood had oozed out from several scratches and lacerations on her face. She also had sustained injury to her right eyebrow, a lacerated left ear, and trauma to the back of her head, bruises on her chest area and to the left side of her face. She also suffered severe bodily pain and mental agony because of the injuries. After receiving medical treatment, she went to the Central Police Station and reported the incident. She also went to see her lawyer, who advised her to take photographs of the injuries. She got them photographed and produced those photographs in evidence - exhibit P5. By reason of the said unlawful assault, the plaintiff testified that she underwent pain, suffering and consequential loss and damages for which the defendant is liable in law to make good.

Plaintiff's witness - PW1 - Dr. Thedorovic, a general Surgeon, from Victoria Hospital testified that on the alleged date at around 3.20 p. m, he gave medical treatments to plaintiff for the injuries. The patient was sent to him with the history of having been assaulted by another person. She was seen distressed, anxious and crying. He examined the injuries. According to the surgeon, among the injuries he noticed a wound on her ear 2 c. m long and he sutured that wound and discharged her from hospital the same day. About a week later, on 12<sup>th</sup> March, 2002 he removed the stitches. The wounds were healed.

PW2, Mr. Ernest Quatre, Superintendent of Police - as was he then -

also testified that on the 5<sup>th</sup> March 2002, the plaintiff came to the Central Police Station and made a complaint against the defendant alleging that she was beaten up by him in public. He entrusted the matter to other police officers for investigation and action. PW3, Mr. Patrick Dugasse, a traffic warden, an eye witness to the alleged incident also testified corroborating the evidence of the plaintiff in all material particulars. The crucial part of his testimony reads thus:

“It was about 230 p.m. .... There was a crowd of people at the entrance of Victoria House where there are two shops. I cannot remember the names of the shops. I was on duty in that area and I saw the defendant kicking the plaintiff in her stomach and slapping her in the mouth. The lady was in pain but he continued slapping her. This was at the door in front of the shop. I held the defendant and pushed him inside the shop. He was arguing and insulting. The lady was still outside. There was a car coming from the state house and the driver transported the plaintiff to the hospital. I cannot tell how many kicks were given to the lady but they were several. They were very hard kicks. ... and her mouth was bleeding. She was lying on the ground facing the road. I had to apply force to take the defendant and push him in the shop. If I had not intervened he would have continued kicking her. When I pushed him inside the shop I had to remain inside there with him until the police came”

Another eye-witness one Mr. Jean Claude Bastienne - PW4 - also testified corroborating the evidence of the plaintiff regarding the incident of assault by the defendant. Likewise another traffic warden Patricia Michel - PW5 - also gave evidence in support of the plaintiff's case.

In view of all the above, the plaintiff now claims that she sustained loss and damages consequent upon the unlawful act of the defendant. According to the plaintiff's estimate the loss and damages are as follows:

a) Pain and suffering due to bodily injuries	Rs.
80,000.00	
b) Moral damages for distress, humiliation, mental anguish	Rs.
20,000.00	
Total	
<b><u>100,000.00</u></b>	

In the circumstances, the plaintiff prays this Court for a judgment

- 1) ordering the defendant to pay the total sum Rs 100,000.00 with interests and costs to the plaintiff: and
- 2) granting an injunction ordering the defendant not to assault, threaten, communicate to the plaintiff nor approach her residence at Mont Fleuri, or her shop "Friendship Store" in Victoria House, State House Avenue.

After the close of the case for the plaintiff, despite several adjournments sought at the instance of his counsel, the defendant did not elect to adduce any evidence in defence. However, Mr. Pardiwalla, Learned Counsel for the defendant with the consent of Mr. Derjacques, Learned Counsel for the plaintiff, produced from the Bar, a medical report on the bodily injuries, which the defendant allegedly sustained during the alleged incident. This report was also admitted in evidence and marked as exhibit D1 to form part of the evidence in support of matters pleaded by the defendant in his statement of defence. Also I

note, there is on record an affidavit dated 21<sup>st</sup> March 2002 deponed by the defendant in which he has categorically denied the plaintiff's allegations. In the same affidavit the defendant has also deponed that it was the plaintiff who **provoked** him by making defamatory remarks, started the fight and inflicted injuries to his groin.

In the circumstances, Learned Defence Counsel submitted that he was not proceeding against the plaintiff on the counterclaim of the defendant, but contended in substance that it was the plaintiff who **provoked** the defendant by grabbing his private part and the defendant naturally acted in **self-defence** to avoid the plaintiff's attack. Hence, according to Mr. Pardiwalla, if at all the plaintiff had sustained any injury in the episode, it was due to her own fault and the defendant only acted in self defence, which is justified in the circumstances and so urged the court to dismiss the plaint.

However, Mr. Derjacques contended in essence that the evidence on record clearly shows that the plaintiff never provoked or attacked the defendant so as to warrant him to act in self-defence or act in such a manner as he did, causing injuries to the plaintiff, especially to a woman, outraging her modesty in public. Besides, Mr. Derjacques submitted that the plaintiff being a woman suffered a higher degree of distress than any man would suffer from a similar incident of assault in public. According to Mr. Derjacques, women are frail and this is an aggravating factor, which attracts a higher amount of moral damages to the plaintiff than normally awarded to a man under similar circumstances. His effective submission in this respect runs thus:

“My Lord, the degree of humiliation is more on a woman than on a man.

They are more vulnerable; they are mentally more prone to humiliation. I 7  
 will argue therefore, they will suffer more distress. To beat up a football  
 player or a bodybuilder in a similar way as one beats up a frail young lady,  
 the Court can reflect (the degree of distress) (mine) in its award of  
 compensation. It is not to be discriminatory against a male but just to  
 reflect the true sense of humiliation and distress being more acute for  
 certain category of people vis-à-vis others. I therefore, pray that your  
 Lordship awards a proper compensatory award reflecting the variance in  
 the degree of distress”

Thus, Mr. Derjacques argued that the plaintiff should be adequately  
 and appropriately compensated for the injuries taking into account the  
 “frailty” of womanhood, which the plaintiff too, suffered from the  
 assault committed by the defendant in public. On the contrary, Mr.  
 Pardiwalla submitted in essence, that women are not frail nowadays. In  
 reality the situation is different. The Court therefore, should not  
 consider this as an aggravating factor in determining the quantum of  
 damages if any, awarded by the Court in favour of the plaintiff.

### **Ratio decidendi**

I diligently perused the evidence on record and the submissions made  
 by counsel on both sides. Their submissions obviously, give rise to a  
 number of issues pertaining to the line of defence taken by the  
 defendant in this matter. These issues indeed, are based on points of  
 law and raise the following questions for determination:

- (i) *Is the defence of “self-defence” available to a defendant in a delictual action, in our jurisdiction?*
- (ii) *If so, does it constitute a complete defence so as to exonerate*

*the defendant from total liability? Or does it only constitute a defence of **contributory negligence**?*

- (iii) *Is the defence of “Provocation” available to a defendant in a delictual action, in our jurisdiction?*
- (iv) *If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a defence of **contributory negligence**?*

Before finding answers to these questions, it is important to examine the position of law in our jurisprudence with respect to “**self-defence**” and “**provocation**” especially, in delictual actions. Forgive me for going back to the fundamentals of our jurisprudence. In this exercise, I would like restate what this Court has stated in *Edison Rideau Vs.*

*Richard Mend in Civil Side 144 of 1992 - vide judgment delivered 31<sup>st</sup> of October 2005.* In fact, delictual liability in Seychelles is basically governed by Article 1382 of the Civil Code of Seychelles. This is the most famous of all the articles of the Civil Code as it embodies the codified law of delict, which has a more limited and rational character than its un-codified counterpart namely, “**tort**” under English legal system. Paragraph 1 of this article, lays down the general rule for all torts, which is that liability rests on the general concept of **fault**. This paragraph is obviously - word by word - a replica of the corresponding article in the *French Civil Code*, which was in force prior to the coming into operation of our present Civil Code. Indeed, “*fault*” is defined in **paragraph 2** of this Article as being an error of conduct, which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It also stresses that

the fault may be the result of a positive act or omission.

**Paragraph 3** of the said Article completes the definition and states as follows:

“Fault may also consist of an act or omission **the dominant purpose** of which is to cause harm to another, even if it appears to have been done **in the exercise of a legitimate interest**”

**Paragraph 4** thereof, reads thus:

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

**Paragraph 5** thereof provides that liability may not be excluded by agreement except for the voluntary assumption of risk. Be that as it may.

Our Civil Code came into force January 1, 1976. Although the Code is based on and is largely a translation of the French Civil Code, the latter was repealed by Act 13 of 1975, which stated that the former shall be deemed for all purposes to be an original text and shall not be construed or interpreted as a translated text. However, it is pertinent to note here that the original article 1382 found in the French Civil Code is preserved under paragraph 1 in our Civil Code, whereas four other paragraphs 2-5 (inclusive) in our Code, have been added to it. Undoubtedly, these additional paragraphs have been tailored and incorporated in our Civil Code in order to cater for the changing needs of our time and Seychellois society. Therefore, in my considered view,

although all these additional paragraphs including paragraph 3 and 4 quoted supra have their origin in French jurisprudence, they should be interpreted independently formulating legal principles on their own, in the context of our unique Seychellois jurisprudence without mechanically, resorting to the French Code and Jurisprudence, unless an inherent ambiguity in our provision necessitates us to do otherwise.

In the light of the above jurisprudence and provisions of law, I now analyze the issues on hand. Under the French jurisprudence, obviously it is trite and settled law that **“self-defence”** is a valid and **total** defence to a delict - *responsabilité délictuelle*. Hence, if such a defence is proved in a delictual action, it would constitute **a complete defence** in France and exonerate a defendant from total liability, as it applies in criminal cases See, nos. 633 & 637 of Alex Weill & Francois Terre - Droit Civil, Les Obligations - précis Dalloz. Indeed, it is settled French case law that :

*<< ... .. légitime defence constitue un fait justificatif excluant toute faute et ne peut donner lieu a une action en dommage intérêts en faveur des ayants cause de celui l' a rendue nécessaire par son action... >>*

(Tribunal Civil Strasbourg 10 mars 1953).

However, it is evident from paragraph 3, Article 1382 of our Civil Code - quoted supra - that even if it appears that a defendant had acted in the exercise of his **legitimate interest** so to say, to protect his life, body or property in self-defence, still his act would constitute a **“fault”** if the **dominant purpose** of his act was to cause harm to the plaintiff. Hence, as I see it, our law does not render an act of **self-defence** a total defence to delict unlike its French counterpart, simply because

the act satisfies the usual tests required in criminal law, such that of the gravity and necessity of the situation, reasonableness, degree and proportionality of the force used, contemporaneity etc. Therefore, the **primary test** required to be applied to find out whether an act of **self-defence** constitutes a total defence to *responsabilité délictuelle*, is the **“test of dominant purpose”**, if I may say so.

In order for an alleged act of **self-defence** to constitute a total defence in law, the Court ought to be satisfied that the **dominant purpose** of the act in question was not to cause harm to the plaintiff, even if it appears that the defendant had acted **in the exercise of a legitimate interest in self defence**,” vide paragraph 3 supra. Hence, I hold that the defence of **“self-defence”** normally we encounter in criminal cases, cannot constitute a total defence as such, to **delictual liability**, unless the act in question passes the **primary test** propounded above. If it does, then that act would evidently constitute a total defence to delict, consonant with the position of law in the French jurisprudence.

On the other hand, a situation may arise wherein the act in question may pass the usual tests required in criminal law to constitute a valid **“self-defence”** but it may fail the **primary test** required in terms of paragraph 3 of article 1382. In such cases, it would still constitute a defence, but only to the extent of **contributory negligence** by virtue of paragraph 4 quoted supra. That is, the defendant shall only be responsible for **fault** to the extent that he was capable of discernment as his power of discernment is impaired commensurately with the gravity of the situation created by the act of the plaintiff.

On the question of **“provocation”** too, for identical reasons stated

above, I hold that the defence of “**provocation**” that normally we encounter in criminal cases, cannot constitute a total defence to delictual liability, unless the act in question passes the primary test propounded supra. However, it may still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra. That is, the defendant shall only be responsible for **fault** to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.

In view of all the above, I find the answers to the above questions as follows:

- (i) *The defence of “self-defence” is available to a defendant in a delictual action, in our jurisdiction.*
- (ii) *It would constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitute a defence of **contributory negligence** and would proportionately reduce the quantum of damages.*
- (iii) *Likewise, the defence of “Provocation” is also available to a defendant in a delictual action, in our jurisdiction.*
- (iv) *It would also constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitutes a defence of **contributory negligence** and would proportionately reduce the quantum of damages.*

Having thus set the position of law on these legal issues, I will now move on to examine the evidence on record. First, I believe the plaintiff in every aspect of her testimony attributing liability on the part of the defendant for starting the fight and causing her bodily injuries. I find on the strength of the uncontroverted evidence available on record, which is reliable, cogent, corroborative and consistent in that *the plaintiff has proved her case to the required degree in civil law.*

On the issue of **self-defence**, it is so obvious from the uncontroverted evidence of the plaintiff that the defendant had sufficient time, opportunity and circumstances to avoid the alleged threat if any, from the plaintiff and to move away from the scene. However, he chose to remain in the scene and more so continued to kick the plaintiff even after she had fallen to the ground with her handbag, although the circumstances did not warrant such a course of action and necessitate the use of such a higher degree of force, the defendant apparently used to inflict those injuries to the plaintiff at the material time. In any event, there arose no necessity for him to use such unreasonable force, which he did. Besides, it is evident that the bodily harm the plaintiff sustained has resulted in severe scratch marks on the plaintiff's face, chest and a scar on her left ear.

In the circumstances, I find that the defendant did not act in self-defence in the entire episode. He has started the fight, assaulted the plaintiff unlawfully, pushed her to the ground and continued to kick her with his foot allover her body and on her head. It is obvious that the dominant purpose of his acts was to cause bodily harm to the plaintiff. Hence, the alleged act of self-defence put up by the defendant in this action, does not in my judgment, constitute a complete defence to exonerate him from total delictual liability. However, having regard to

all the circumstances of the case, it seems to me that the defendant having failed in his prudence to retreat from the scene claims that he acted in self defence, when there was indeed, no need for him to defend himself against any threat issued out by the plaintiff. Even if we believe the defence version that the plaintiff grabbed the defendant's left testicle during the fight, it could have happened only after the fall of the plaintiff to the ground *a fortiori* while she was acting in self defence against the brutal attack by the defendant. Maybe, the defendant at that particular point in time acted in self defence and intensified his attack on the plaintiff. Therefore, I find the defendant's justification of **self-defence** would only constitute a defence of **contributory negligence** and would proportionately reduce the quantum of compensation payable to the plaintiff for delict.

Although the defence counsel has raised the issue of **provocation** in his closing submission, it has nowhere been pleaded in the written statement of defence save the fact that it appears only in the affidavit dated 21<sup>st</sup> March 2002 deposed by the defendant, which arguably, forms part of evidence in this matter. Strictly speaking, in the absence of any pleading, this Court cannot and should not consider the defence of the alleged provocation. The Court cannot formulate a case for the defendant from mere statements made by counsel in his submission. However, for the purpose of appeal preferred if any, by the parties against this judgment and with a view to give finality to all the issues raised this Court has entertained the legal aspect of this issue in this judgment. In any event, on a careful examination of the evidence on record, I do not find any scintilla evidence to suggest that the plaintiff said or did anything provoking the defendant to act and behave in the manner he did in public causing bodily harm and outraging the

modesty of the defendant as a woman, in public.

Finally, on the proposition of Mr. Derjacques inviting the Court to consider “frailty of womanhood” as an aggravating factor in the assessment of damages, Mr. Pardiwalla contended that it is contrary to the ground reality of the situation. Indeed, Mr. Pardiwalla poured scorn on this proposition and invited the Court to walk up the streets of Victoria and take judicial notice of the real-life situation on the ground. The submission of Mr. Pardiwalla on this point, though thorny, appears to be worth quoting, which run thus:

“Has your Lordship ever walked up the streets of Victoria, when the American Navy is here? Tell me if these are frail women walking around town? Those women grab huge guys, the marine police; they grab them and throw them out of the Barrel Night Club... I can give many examples; there are hundreds of women, who can beat me up”

I gave diligent thought to the rhetoric arguments advanced by both counsel on this issue. Whichever philosophy predominates the minds of counsel, feminism or male chauvinism or gender equality, the fact remains that when a woman is subjected to a physical assault in public, obviously, the modesty of her womanhood is wounded, not only her physique. Hence, in my considered view, the degree of humiliation is higher than that of a man, who is subjected to such assault under similar circumstances. It is truism that women are more vulnerable and less aggressive; they are defenseless; they are mentally more prone to **frailty** and humiliation than men in society. Alluding to the alleged inherent weakness in womanhood, **William Shakespeare** rightly generalized the norm, when he speaks thorough *Hamlet in Act 1, Scene 2* thus: -

“Frailty, thy name is woman!”

I am also a Hamlet man and would concur with the Shakespearean norm that a woman is metaphorically an embodiment of frailty. Herein, I am not referring to the kind of frailty the first woman suffered in the garden of Eden or to the frailty of the Biblical woman, whom the

disciple of Jesus referred to as the “weaker” vessel vide 1 Peter 3:7; but, I am referring to the frailty of modern woman, who is observably, more susceptible to emotional disturbances than her counterpart I mean, the other sex. I would therefore, subscribe to the proposition of Mr. Derjacques in this respect. Hence, in my considered view, the Court should also take into account the “frailty of womanhood” as a relevant factor amongst others, whilst making proper assessment of moral damages awardable to any member of the weaker sex, especially in cases of this nature. Having said that, I do agree with Mr. Pardiwalla in that, there are certain sections of modern women, a minority in society, who depart from the norm and behave differently from the rest - the majority - and do extraordinary things in the streets as learned counsel has observed. However, such minority in fact, constitutes only an exception to the rule. When there is a choice, it is always preferable to go along with the *rule*, not with an appalling *exception as canvassed by Mr Pardiwalla*. Be that as it may.

In the final analysis, I hold that the defendant is liable in delict to compensate the plaintiff, for the consequential loss and damages. However, the amount claimed by the plaintiff under each head of loss and damage, appears to be exaggerated, unreasonable, exorbitant and disproportionate to the actual injuries she suffered. Besides, I find on evidence that the plaintiff suffered those injuries, partly due to her own contributory act in depriving the defendant of his power of discernment, at a particular stage in the struggle, by grabbing his testicles, which act seems to be excessive in the circumstances. The nature and extent of the plaintiff’s attack in defence in this respect being excessive, I would apportion 25% blame on the part of the plaintiff. This would also proportionately, reduce the quantum of damages payable by the defendant.

Having considered all the above, I award plaintiff the following sums:

- |   |    |
|---|----|
| (a) Pain and suffering due to injuries to face, |    |
| chest, head and ear                             | SR |
| 20,000-00                                       |    |
| (b) Moral damages for distress, humiliation     |    |
| and mental anguish                              | SR |
| 10,000-00                                       |    |

Total

**SR****30,000-00**

Therefore, I enter judgment for the plaintiff and against the defendant in the sum of Rs30, 000/- with costs. In addition, I grant a permanent order of injunction restraining the defendant from assaulting, threatening, communicating with the plaintiff or approaching her residence at Mont Fleuri, or her shop "*Friendship Store*" situated at Victoria House. For avoidance of doubt, the defendant's counterclaim is dismissed accordingly.

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**D. Karunakaran**  
**Judge**

**Dated this 10<sup>th</sup> of May 2010**