

Adonis v Ramphal

(2013) SLR 387

Egonda-Ntende CJ

30 September 2013

CS 159/2009

Counsel F Elizabeth for plaintiff

C Andre for defendants

EGONDA-NTENDE CJ

[1] The plaintiff is the mother and executor of the estate of the late Lisette Larue who died intestate on 7 May 2011 and brings this action on behalf of the estate of the deceased in respect of a running down case that occurred on 21 November 2008 at Barbarons, Mahe, Seychelles. The first defendant is sued as the owner of the motorcycle registration no S14923 which was being ridden by the late Joseph Ramphal. The second defendant is the estate of the late Joseph Ramphal, son of the first defendant.

[2] It is contended for the plaintiff that on or about 21 November 2008 the deceased Joseph Ramphal was riding a motorcycle no S14923 at Barbarons, Mahe, Seychelles owned by the first defendant when he hit the plaintiff's daughter in a road traffic accident. The road fund licence and insurance for the motorcycle had expired at the time of the accident. It is further contended that this accident was solely caused by the fault, act or omission of the deceased and that the both defendants are jointly and severally liable to the plaintiff.

[3] The particulars of fault of the first defendant are that the first defendant: (a) allowed the deceased to drive the said motorcycle on the main road when she knew or ought to have known that the said motorcycle was neither insured nor licensed to be driven on the main public road; (b) neglected to ensure that the said motorcycle was licensed and insured at all material times; (c) was reckless and negligent by not stopping and preventing the deceased from driving the motorcycle on the main public road; (d) was reckless and negligent in not stopping the deceased from getting to the keys of the motorcycle for him to operate it on the road; and lastly (f) failed to do everything in her power to prevent the deceased from taking over care, control and possession of the said motorcycle.

[4] The particulars of the fault of the second defendant were that the second defendant: (a) drove the said motorcycle when he knew it was not licensed; (b) failed to heed the presence of the plaintiff on the road; (c) was driving too fast in all the circumstances of the case and was unable to maintain proper control of the said motorcycle; (d) failed to keep any proper lookout; and (e) failed to stop, slow down, swerve or otherwise steer or control the motorcycle in a way so as to avoid colliding with the deceased.

[5] By the reason of the defendants' foregoing actions it is contended that the deceased suffered severe injuries and went into a paraplegic coma in a vegetative state until her death. The plaintiff claims moral damages for pain, suffering, emotional distress, mental anguish and trauma in the sum of R 400,000.00; loss of quality of life R 200,000.00 and loss of amenities in the sum of R 200,000.00; all totalling R 800,000.00 together with interest and costs.

[6] The defendants, who are really one person sued both in her personal capacity and as a representative of the estate of her late son,

the rider of the motorbike, deny liability for the plaintiff's claim and assert a counter claim. On their defence it is admitted that the said accident occurred but not on account of their negligence and thereof she is not liable in law to the plaintiff. The plaintiff was put to strict proof of her claims. It was further contended for the defendant that the late Joseph Ramphal was on the road, riding his motorcycle when the plaintiff/deceased suddenly crossed the road in front of the deceased's motorcycle. Due to the fault of the plaintiff, a total of R 3,000,000.00 is claimed by the defendant from the plaintiff on account of moral damages and for the first defendant's granddaughter who was born fatherless on account of this accident. This counter claim was abandoned at the close of hearing of the case.

The case for the plaintiff

[7] The plaintiff called three witnesses, including herself, Natasha Nourrice and Marcus Evans. The only eyewitness account of the accident is the testimonies of PW2 Natasha Nourrice and PW3 Marcus Evans. It is clear that on the fateful day the deceased, Joseph Ramphal, was riding a motorcycle which was neither insured nor licensed when he collided with a pedestrian, the daughter of the plaintiff, who was crossing the road. This was on 21 November 2008. The accident occurred at Barbarons next to an Indian shop.

[8] The deceased victim, Lisette Larue, was taken to Mont Fleur hospital from the scene of the accident where she was admitted and was under intensive care for 22 days. During this period she could not breathe on her own. She was on life support machine. She was then moved to the ward after she slightly improved where she stayed until February 2009. She was then moved to North East Point hospital. She was in North East Point hospital until her death on 7 May 2011.

[9] The only medical report that was admitted in evidence as exhibit P5 states that the patient was admitted with a Glasgow coma scale of 3/15. On examination she had laceration left frontal scalp, laceration upper lip; chest – decreased breath sounds; right leg – 3cm laceration, with bleeding and deformity; left elbow—3 cm laceration. X-ray revealed a fracture left femur (shaft), comminuted fracture shaft right tibia of fibula. The CT Brain scan revealed hemorrhagic contusion right frontal lobe; fracture left orbit lateral and medial wall; and intraventricular haemorrhage. The CT Thorax scan revealed Pneumothorax with collapse of lower lobes both lungs. She was diagnosed with Hemorrhagic contusion right frontal lobe; intraventricular haemorrhage; fracture left orbit; left 2 fracture; bilateral Pneumothorax; fracture shaft right femur; open fracture shaft right tibia and fibula.

[10] The medical report further states:

Patient was managed in ICU. It was decided that due to this patient poor condition open reduction of fixation of the femur and tibia fracture was impossible at this time. A POP cast was applied instead and patient was transferred out of ICU on 14.12.08. POP was removed on 21.01.09 and check X-ray showed good callous formation at the femur and tibia fracture. The patient was transferred to North East Point Hospital on 23/01/09 for further Physio and Rehabilitation.

[11] The deceased victim was survived by two children who are both minors. The older child is living with her paternal grandparents while the younger child, about 10 years old, is living with the maternal grandmother, the plaintiff in this case. She receives some

assistance from the social welfare agency for this child.

[12] The plaintiff claims moral damages of R 400,000.00 on account of the pain, suffering, emotional distress, mental anguish and trauma suffered by the deceased victim. The plaintiff testified that she saw her daughter in a lot of pain. She was suffering as she could not eat or drink except through a tube and she had suffered a lot of injuries on her body. R 200,000.00 was claimed on account of loss of amenities and R 200,000.00 was claimed for loss of quality of life.

The Case for the Defendant

[13] Mrs May Ramphal testified on her own behalf and she was the only witness for the defence. She did not witness the accident. On the fateful day she left her son, Joseph, at home. She left him money for transport and lunch in case he was coming to town. She returned home at about 6.00 pm and did not find Joseph at home. Neither was the motorcycle. She called her son who told her he was at a friend's place in La Misere. She called him back home.

[14] At about 6.30 pm someone called her and told her that Joseph had been involved in an accident. A neighbour drove her to the hospital and she found her son dead. He was 22 years old at the time of his death.

[15] She admitted that she was the registered owner of the motorcycle that was involved in the accident. The motorcycle was for use by her son. The motorcycle was under repair and it had neither a licence nor insurance. She was waiting for the repairs to be completed before she would have it licensed again and the insurance paid. She had told her son not to ride the motorbike until it had been repaired. There were some spare parts that they had been waiting for.

Submission of Counsel

[16] Mr Andre, counsel for the defendants submitted that this case had not been proven against the defendants. He submitted that the only two eyewitnesses to the accident had contradicted each other on where the deceased victim was at the time of the accident. They should not be believed. Secondly that the first defendant had not authorised the use of the motorcycle though it was in her names. She had in fact provided to her son, Joseph, money for transport, and food in case he was to come to town on the day that the accident had occurred. He prayed that this action should be dismissed.

[17] Mr Elizabeth, counsel for the plaintiffs, submitted that the first defendant was liable for the accident as she had failed to ensure that the Joseph did not ride the motorcycle and that the estate of Joseph was liable for the accident as Joseph had driven the motorcycle negligently and at high speed. Had Joseph not been negligent this accident would have been avoided. Secondly on this point he submitted that in light of art 1383(2) of the Civil Code of Seychelles there was a presumption of fault on part of a driver of a vehicle which caused injury to another.

Analysis

[18] Article 1383(2) of the Civil Code of Seychelles states:

The driver of a motor vehicle which, by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall be accordingly liable unless he can prove that the damage was solely due to the negligence of the injured party or the act of a third party or an act of God external to the operation

or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God.

[19] It is not in dispute that Joseph was riding the motorcycle that was involved in the accident on the material day. It has not been the case for his estate that there was any act of God or of a third party that caused the accident. The claim that the deceased victim had negligently been the sole cause of the accident was unsupported by any evidence. The presumption in this case that arises by virtue of art 1383(2) of the Civil Code of Seychelles has not been rebutted.

[20] I am satisfied that this accident occurred on account of the deceased, Joseph Ramphal's fault, in light of, not only the unrebutted presumption that he was at fault, but the unchallenged evidence by the plaintiff's witnesses. I reject the claim by counsel for the defendants that this evidence was in conflict or contradictory in a material particular. Both witnesses indicated that she was hit while on the road at Barbarons. One specified that the rider of the motorcycle came at high speed and collided into the deceased victim.

[21] As against the first defendant I am satisfied that no case has been made out against her. The deceased Joseph Ramphal was an adult at the time of this accident. He was 22 years old. He was of age. Much as he lived with his mother this cannot be treated as being in the custody of his mother. He was an adult living with his mother. His mother did not take responsibility for his own conduct.

[22] It is uncontested that the first defendant was the owner of the motorcycle in question which she had bought for her son. The motorcycle was registered in her name. She had expressly told her son not to use it until the repairs were complete and it had been

licensed and insured. In choosing to ride the motorcycle that day Joseph violated his mother's instructions. The mother cannot be held liable for the independent conduct of her son, who was of age. In riding the motorcycle Joseph was not doing so on account of the first defendant. Ownership alone is not sufficient to infer vicarious liability. In any case what was alleged against the first defendant was not vicarious liability for the acts of the son but direct liability for her own actions or omissions.

Quantum of damages

[23] The plaintiff has claimed moral damages for pain, suffering, emotional distress, loss of quality of life and loss of amenities of life due to the estate of the Lisette Larue, now deceased, in the total sum of R 800,000.00. Given the fact that the liability has only been established against the estate of a young man, now deceased, who was riding an uninsured vehicle, it is possible that there might be no avenue from which to recover whatever amount may be awarded to the plaintiff. Notwithstanding that it is incumbent upon this Court to evaluate the claim for moral damages and come to its conclusion without regard to the foregoing matter.

[24] The basic head of claim before me is for moral damages or non-pecuniary loss. There is no claim for pecuniary loss of any nature. It is not in question whether or not the deceased victim suffered moral prejudice before her death on this account. Moral prejudice has been established from the evidence that was adduced on record. The plaintiff saw her daughter in hospital and she was in pain and suffering. It is also implicit by the very nature of injuries the victim suffered which lead to loss of amenities of life and confinement to hospital until her death. The deceased's estate is entitled to recover compensation for the same.

[25] However the quandary is in determining the amount of award. As was noted in a Canadian case, *Andrews v Grand & Toy Alberta* [1978] 2 SCR 229 at page 262 by Dickson, J:

Andrews used to be a healthy young man, athletically active and socially congenial.

Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide for restitution.

The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms.

[26] This question was grappled with by the Supreme Court of Canada in *Quebec (Public Curator) v Syndicat national des employes de l'hopital St-Ferdinand* [1996] 3 SCR 211 in it was held:

Quebec civil law supports the conception that the right to compensation for moral prejudice is not conditional on the victim's ability to profit or benefit from monetary compensation. This objective

characterization of moral prejudice is more consistent with the fundamental principles of civil liability than the subjective conception. In Quebec, the primary function of the rules of civil liability is to compensate for prejudice. This objective requires that there be compensation for the loss suffered because of the wrongful conduct, regardless of whether the victim is capable of enjoying the substitute pleasures. In order to characterize the nature of the moral prejudice for purposes of compensation, the purely subjective conception thus has no place in the civil law, since the reason that damages may be recovered is not because the victim may benefit from them, but rather because of the very fact that there is moral prejudice. The victim's condition or capacity to perceive are irrelevant in relation to the right to compensation for the moral prejudice.

[27] With respect to the evaluation of moral prejudice, although the functional approach does not apply in Quebec civil law to the determination of the right to moral damages, it is nonetheless relevant, together with the conceptual and personal approaches, when it comes to the calculation of such damage. In Quebec civil law, these three approaches, when it comes to calculating the amount necessary to compensate for moral prejudice apply jointly and thereby encourage a personalised evaluation of the moral prejudice.

[28] The foregoing remarks are equally applicable in this jurisdiction where compensation is compensatory in nature. See arts 1382–1386 of the Civil Code of Seychelles. The obligation on the tortfeasor is to ‘repair’ the damage he has caused.

[29] In determining the quantum of damages a court needs to have regard to comparable cases. See *Seychelles Breweries v Sabadin* SCA 21/2004. No previous cases of a similar nature as the case at bar in relation to award of moral damages in this jurisdiction have been drawn to my attention by counsel. Nor have I been able to come across any local cases to provide a comparative guide.

[30] The deceased victim was 46 years of age at the time she died. There has been very little information provided in evidence about her life. We do not know if she was working or not. She lived with her mother and had two children. To that extent we know that she led an 'ordinary' life and had responsibilities in this world. She had a family too. After the accident she never left hospital. The plaint described her condition in hospital at the time of filing this action in paragraph 8 thereof as, "currently paraplegic in a coma at North East Point hospital in a permanent vegetative state." The written statement of defence did not specifically deny this paragraph of the plaint but only stated that the plaintiff is put to strict proof of paragraphs 7, 8 and 9.

[31] PW1, the plaintiff, in her testimony stated that she was told, on transfer of her daughter to North East Point hospital that her daughter was going to die, and was being taken there to rest. The medical report stated that she was admitted in hospital while in coma but does not state whether she improved from her comatose state at all.

[32] I note with regret that the evidence with regard to the condition of the deceased victim is rather incomplete in rendering a true understanding of her condition both before and after the accident. Nevertheless it is clear that she suffered life-threatening injuries that left her in a comatose state from which she apparently did not recover, eventually succumbing to her death. The question of suffering moral prejudice is established. This is so regardless of

whether she could feel the pain or not given her comatose state. Literally the accident destroyed her happiness and her life.

[33] In this case the claim was split into three parts; one for pain, suffering, emotional distress, mental anguish and trauma; another for loss of quality of life and the last for loss of amenities. There is no evidence to support emotional distress and mental anguish of the deceased victim. Loss of quality of life and loss of amenities are so intertwined that it is difficult to separate them. As was noted by Dickson, J, in *Andrews v Grand & Toy Alberta* (supra) at page 264:

It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that the losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.

[34] I am inclined to adopt the same approach and provide a composite award for moral prejudice for the same reasons. Though in this particular case it must be acknowledged that if the deceased victim was in a comatose state right from admission to hospital to her subsequent death three years later, one cannot assert emotional distress and mental anguish for that period. Perhaps it could have been the mother of the deceased to claim for emotional distress and

mental anguish that she suffered on seeing her daughter in such a state but that was not the claim before me. No doubt there must have been suffering and trauma inflicted on the victim. I shall take into account that this claim is limited by its nature from the date of the accident up to the death of the deceased victim; that is from 21 November 2008 to 7 May 2011.

[35] I note that the claim for moral damages or damages of any sort did not extend to the damages for loss of expectation of life, especially in relation to the two young children of the deceased, who were robbed of their mother, and now have to plod through this world without their mother. I know that the claim was filed before the death of the deceased but after her death the claim could have been amended accordingly to include a claim for loss of expectation of life or any pecuniary loss the estate and heirs of the deceased suffered since the deceased never recovered from her injuries, was never discharged and died in hospital, presumably from her injuries, unless counsel were aware that the cause of death was not related to the injuries she received from the accident. I must admit that in this case no evidence was ever adduced related to the cause of death.

Decision

[36] Doing the best I can in the circumstance of this case I award the estate of the deceased victim the sum of R 250,000.00 as moral damages for suffering trauma, loss of quality of life and loss of amenities against the estate of the late Joseph Ramphal together with costs of this action and interest at legal rate from today till payment in full. For avoidance of doubt I wish to state that this action has succeeded, not against the first defendant, but against the estate of the deceased Joseph Ramphal, the second defendant. The action against the first defendant is dismissed.

