

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 153/2008

[2015] SCSC 125

MR JUDE FANCHETTE

Plaintiff

versus

DREAM YACHT CHARTER (SEYCHELLES)LTD

Defendant

Heard: 26th May 2010, 9th March 2011, 23rd January 2012

Counsel: Ms. L. Pool for plaintiff

Mr. D. Sabino for defendant

Delivered: 4th May 2015

JUDGMENT

D. Karunakaran, Acting Chief Justice

[1] This is a claim for personal injuries suffered the by Plaintiff, a marine mechanic in the employ of the Defendant at all relevant times.

[2] The Plaintiff fell off a ladder whilst climbing onto the Defendant's boat. The Plaintiff had been repairing the boat for the Defendant during the day at the Naval Services Yard on Mahe, and having missed his transport back to Praslin, was to sleep on the boat and continue work on it the following day. Access to the boat was via a lightweight

stepladder on wheels that was positioned next to the boat. The ladder toppled over when the Plaintiff was stepping across the short distance onto the boat. As a result of his fall the plaintiff suffered injuries to the head and neck and a fracture to the left pedicle of the C7 vertebra in his neck. The plaintiff required overseas surgery for stenosis in his spine, and suffers ongoing pain and discomfort as a result of the injury.

[3] The Plaintiff is claiming a total of Rs. 350,200 from the defendant. In its Complaint, the plaintiff avers that this injury occurred in the course of the plaintiff's employment with the Defendant and that the accident was caused by the fault and negligence of the Defendant, its servants or agents.

[4] Particularly, plaintiff alleges Defendant's fault and negligence in that:

(a) *it failed to operate a safe system of work for its employees which included the Plaintiff*

(b) *it failed to provide the Plaintiff with a safe place to work*

(c) *it failed to supervise its employees*

(d) *it failed to give proper direction to its employees*

(e) *it failed in all the circumstances to take reasonable care for the safety of the Plaintiff*

(f) *it was negligent or reckless in the circumstances of the case.*

by reason of the matters aforesaid the plaintiff has suffered injury, loss and damage.

[5] Therefore, Plaintiff claims damages as follows:

<i>Pain and Suffering:</i>	<i>Rs 200,000</i>
<i>Loss of enjoyment of life</i>	<i>Rs 100,000</i>
<i>Moral damage for distress and inconvenience</i>	<i>Rs 50,000</i>
<i>Medical report</i>	<i>Rs 200</i>
Total:	Rs 350,200

Plus interests and costs.

[6] The Defendant's position is that:

- a. it was Ocean Yacht Charter Limited that actually employed the Plaintiff, and the defendant is therefore suing the wrong party by suing 'Dream Yacht Charter (Seychelles)';
- b. the accident was not within the course of the plaintiff's employment as the injuries sustained at the premises of a third party, using a ladder of belonging to that third party and whilst not in an act of employment;
- c. the accident was caused by the plaintiff himself;
- d. the plaintiff failed to adduce whether the ladder was defective or faulty or not fit for use as required under Article 1384-1 of the Civil Code; and
- e. the Defendant was not responsible for the ladder, but rather that Naval Services was responsible for the ladder.

Facts

[7] The Plaintiff is presently a 44/45 year old marine mechanic; he was 38 years' old at the time, living and working for the Defendant on Praslin as a marine mechanic with several mechanics reporting to him. The contract between the Defendant and the Plaintiff did not state specific work hours, and the Plaintiff led evidence to say that his working hours were whenever he was called to work. Testimony on behalf of the defendant corroborated that the Plaintiff was usually required to work 9am to 5pm. However, when he was required to work longer or other hours he was expected to be available.

[8] On 27 June 2007, the Plaintiff had been sent by the Defendant to Mahe to work on a boat belonging to the Defendant. The boat was stationed at Naval Services, which facilities the Defendant rents to service its boats. The boat was already out of the water and awaiting repairs, with the ladder positioned next to it at the time that the Plaintiff arrived in the morning.

- [9] The Plaintiff was due to return to Praslin late that afternoon by boat. However, the repairs on the boat were unable to be completed that same day and the Plaintiff, having missed his transport to Praslin, was required to stay over on Mahe. There was some dispute about whether the Plaintiff was required to stay over by his superiors, or whether he chose to stay over. The Plaintiff testified that as he had missed the ferry, he asked permission where to sleep as it was the practice of the Defendant for employees who were required to stay on Mahe to stay in a smaller boat belonging to the Managing Director of the Defendant. The Plaintiff had never stayed on this particular boat before, but there was no offer of alternative accommodation. Counsel for the Defendant produced an employee of the Defendant's who stated that the Plaintiff has chosen to stay in Mahe, however, her evidence was purely hearsay, based only on what she had been told by other employees and therefore holds no weight to refute the version of the Plaintiff. It is undisputed that the Defendant's employee, a Mr. Ian Boyer, who was the base manager in Mahe, in a superior position within the company to the Plaintiff, provided the Plaintiff with pillows and sheets so that he could sleep the night on the boat.
- [10] To access the boat, the Plaintiff was required to climb the ladder which was about two metres high. This ladder was provided by Naval Services and had been positioned next to the boat in the morning before the Plaintiff had arrived. Mr. Boyer would have known that the Plaintiff would be required to use the ladder in order to access the boat and would also have been aware of the fact that there were no facilities on the boat, meaning that the Plaintiff would be required to leave the boat to go to the toilet in the Naval Services yard. The Plaintiff led evidence that in order to get onto the boat from the ladder, he was required to jump or skip from the ladder onto the boat.
- [11] At about 23:00 pm the Plaintiff was returning from relieving himself in the facilities in the Naval Services Yard. He mounted the steps to the boat, and as he had reached the top of the ladder and was about to step on the boat, the ladder toppled and he fell awkwardly from a height of approximately two metres onto his face causing injury to his face, ear and neck. The Plaintiff was unable to explain why the ladder toppled and conjectured that it may have been a result of his weight as he prepared to skip onto the boat.

[12] The Plaintiff used his mobile phone to call for help and was collected by an ambulance and seen by a casualty doctor at about 3.40am on 28 June 2007. Upon examination it transpired that the Plaintiff had received injuries to the head and a fracture to the left pedicle of his C7 vertebra. The Plaintiff was admitted to hospital and discharged on 1 July 2007, five days later with instructions to wear a neck brace for three months, refrain from moving his neck or doing any strenuous work.

[13] The Plaintiff was on sick leave for some time after the injury, and then went back to work, but was involved in another incident and allegedly fearing that he was at risk of serious disability or death from continuing in the same working conditions, he resigned effective 1 January 2008.

[14] The Plaintiff experienced ongoing pain due to the fracture and damage to his neck. On or about 27 February 2008, he was examined by Dr. Danny Louange, an Orthopedic Surgeon, who recorded his findings as follows:

The neck pain had recurred and he was having discomfort in both upper limbs. On physical examination, there was evidence of early cervical myelopathy. The MRI scan showed significant stenosis at C5/6 and C6/7. We recommend overseas surgical treatment.

[15] The Plaintiff travelled to India and underwent an operation to place a plate with three screws into his neck to relieve the pain and prevent the stenosis. He was again recommended to wear a cervical collar from 3 months, not to bend the neck or to lift heavy objects.

[16] On follow up, his doctor stated that the plaintiff still suffers some pain in his neck, however he has movement. The Plaintiff testified that he was unable to work for six months after resigning from the Defendant's employ. Although he has since obtained another job working as a marine mechanic and in the same function as before, he testified that he is unable to progress his career as a result of the injury, stating that he is in constant pain, has to request help frequently and feels scared to do some of the work that is required. It is clear that the Plaintiff has suffered considerable pain as a result of his injury and will continue to experience discomfort and aching.

Issues

- [17] In order to decide whether the Plaintiff is able to succeed with his case, several contentious issues arise which I will address in turn.
- [18] The first question is a mere practicality of whether the Defendant is properly suited. Defendant brought evidence through Ms. Zelda Stravens, from the Administration and Accounts section of the Defendant. It was Ms. Stravens' evidence that Ocean Yacht Charter Limited is the company which owns Dream Yacht, and trades as Dream Yacht. Therefore, she stated that it was Ocean Yacht Charter Limited which was the actual employer of the Plaintiff, and therefore the incorrect party was being sued for damages. By her own admission, there is little separation between the two entities, Ocean Yacht and Dream Yacht company. Ms. Stravens stated that at the time that the Plaintiff was working for the company, they used both company names on their documents, and so some documents were under Dream Yacht, and others under the name of Ocean Yacht "but both is legal". For all intents and purpose these two entities are the same, even if they have different names. That Ocean Yacht may have paid the salaries does not invalidate the Plaintiff's contract of employment with the Defendant's name on it, nor the evidence produced by the Defendant's own witness. The Defendant even seemed to accept this in its closing written submission. Therefore I consider this a non-issue. The Defendant is properly suited as the employer of the Plaintiff at the material time.
- [19] The second question is whether the Plaintiff's injury occurred within the scope of his employment. It is true that the accident happened outside of work hours, whilst the Plaintiff was not actively engaged in work for the Defendant. However, he was accessing the Defendant's boat in order to sleep in it, as directed by the Defendant, and only as a result of undertaking the work for the Defendant. I am satisfied that the Plaintiff's injury was within the scope of his employment as he was staying on the boat at the Defendant's knowledge and direction. This is further bolstered by the fact that Mr. Boyer provided the Plaintiff with pillows and sheets for while he stayed on the boat.
- [20] The next matter which arises is the correct application of Article 1384(1). Article 1384(1) holds a person liable for damages caused to a third party by the act of a person for whom he is responsible or to someone by things in his control. The question therefore is whether

the ladder which collapsed was in the control of the Defendant? In *De Commarmond v Government of Seychelles and another* (1983-1987) 3 SCAR (Vol 1) 135 at 155 Sauzier JA stated that

[t]he person who normally has the use, direction and control of the thing is the owner of the thing. There is, therefore a prima facie presumption that the owner of the thing is the person who has the custody of the thing. That presumption may be rebutted by the facts of a particular case where it is shown that the owner has handed over the thing to someone else and has no powers of direction and control over it.

Furthermore, the court held, at 156 that “although it may be useful to follow the guidelines laid down in French jurisprudence, ..., [the question of custody] must remain one of common sense to be determined by the trial court in accordance with the facts of each particular case”.

[21] The Defendant had rented the premises which included the use of the all of the facilities at Naval Services. The plaintiff testified that all he was required to do was to arrive with his toolbox. Once the Defendant’s boat was situated at the premises, it assumed control of the whole space around the boat, and had use of any facilities which it may need. Having taken usage of the premises, as well as items and services at the Naval Services Yard, including the ladder, I hold that the Defendant was in custody of the part of the yard where the boat was being services, this includes the space around the boat, as well as all tools and facilities which were being used to fix the boat. This includes the ladder which was placed next to the boat to allow access thereto, as these facilities were specifically designated to the Defendant agreement between the Defendant and the Naval Services.

[22] Thus, having considered the question of custody, we must turn to whether that custody gives rise to liability. There is a presumption of liability raised against the person who has the custody of the thing by which the damage is caused. Such presumption may be rebutted in three cases only, that is, if the person against whom the presumption operates can prove that the damage was solely due: (1) to the act of the victim; or (2) to the act of a third party; or (3) to an act of God (force majeure) external to the thing itself, [Sauzier and GoburdhunJJ in *De Commarmond* (supra, at 154)]. In *Joubert v Sulman* (2010) SLR

248 the Court held that “liability under Article 1384(1) is near absolute” and the defendants are required to rebut the presumption “by adducing evidence or at any rate by any substantive evidence, to prove that the damage was solely due to any of the said three factors.”

[23] During the trial, the Plaintiff was unable to give a reason why the ladder toppled over, he said that it was lightweight and narrow, but also that some force was required to jump from the ladder to the boat which may have caused it to topple, or it may have toppled on its own under the Plaintiff’s weight at he reached the top of the ladder. Furthermore, no witness was able to give evidence of how or why the ladder toppled over as the Plaintiff climbed up to the boat. However, there is no indication that the Plaintiff performed any imprudent or unreasonable act and there is nothing to indicate that the ladder had been tampered with or affected by human intervention.

[24] In the case of *Servina v W & C French Co* (1968) SLR 127, Souyave J held that “I do not think that the Plaintiff has the burden of going to the extent of proving what exactly caused the accident. I believe that he has only to prove that the work he was asked to do was dangerous and whilst doing so and following instructions given him, he was injured.” I am convinced that having to skip from a lightweight ladder onto a boat from two metres up is potentially dangerous, and to do so in the dark, increases this danger.

[25] In *Esparon v Bristol* (2001) SLR 152 Perera J:

The ratio of these cases is that, where an employee is engaged in a potentially dangerous occupation, especially using machinery belonging to the employer, it is the duty of the employer to provide a safe system for the employee to use that machinery and also provide correct and safe instructions as to how such machinery is to be used. If he fails to do so, he would be liable for the "things in his custody" under Article 1384(1). However, where a safe system had been provided and proper instructions given, an accident occurs due to the direct intervention of the worker, as in Hoareau, then the Defendant employer is released from liability.

By failing to ensure that the Plaintiff had a safe and secure means of accessing the boat, during the night, the Defendant failed in its duty in taking all reasonable precautions to ensure the Plaintiff's health and safety in the employment.

[26] Plaintiff claims damages as follows:

- <i>Pain and Suffering:</i>	<i>Rs 200,000</i>
- <i>Loss of enjoyment of life</i>	<i>Rs 100,000</i>
- <i>Moral damage for distress and inconvenience</i>	<i>Rs 50,000</i>
- <i>Medical report</i>	<i>Rs 200</i>
<i>Total:</i>	<i>Rs 350,200</i>

Plus interests and costs.

[27] We need to consider comparable cases, which are an important and useful guide on the correct sum to grant.

- a. **In *Farabeau v Casamar Seychelles Ltd (2012) SLR 170***, the Court granted a joint award of Rs.350,000 to a plaintiff who had fallen, suffered a fractured patella, with permanent disability, and inability to work further as recompense for injuries that the plaintiff suffered and continued to suffer by reason of the accident.
- b. In *Alan Tucker and Anor v La Digue Island Lodge* Civil Side No 343 of 2009 the Supreme Court awarded R190,000 to a plaintiff that had suffered a fracture of the knee with residual swelling and impairment of movement which was likely to grow worse with the development of osteoarthritis
- c. In *Bristol v United Concrete*: the Court granted Rs. 211,456 to a Plaintiff sustained central and left sided disc protrusion and diffuse central bulge in disc, as well as, lumbar canal stenosis, and disc prolapsed. He also suffered low back pain with associated left sided sciatica which necessitated surgical operation in Singapore. Thereafter, he could not go back to work because he was almost

paralysed in his lower body. The Plaintiff's marital life had been adversely affected. His personality had changed for the worse. He was unable to earn the level of wages that he had previously.

- d. In *Hoareau v Land Marine Ltd*[2007] SCSC 13The Plaintiff had fallen onto his left hand while working in a forklift. He sustained injury to his left wrist, a suspected fracture. The plaintiff contended that he suffered consequential pain, suffering and impaired ability to lift heavy objects. Court granted the Plaintiff Rs.20,000 for pain and suffering, Rs. 10,000 for disfigurement and Rs. 10,000 for distress and inconvenience.

[28] In the present case, the Plaintiff has experienced pain and suffering throughout the injury and recovery which was ongoing at the time of trial, including the operation in India and months of physiotherapy. Moreover, the testimony of the doctors in this court room explained that he will suffer with pains and aches in the long term, which will continue to need to be managed with painkillers and physiotherapy (in rare circumstances, another operation may be required). However, this pain does not prevent him from being able to earn a living in the same type of role that he previously held, although he testified that he has to ask for assistance when lifting heavy objects. He will however always have the surgical plate in this neck from the operation in India, and this causes him discomfort and he does have to exercise additional caution. He states that he is unable to swim or do sports for pleasure, he can no longer lift weights or fish as he used to. He is unable to spend prolonged periods on the computer either. He testified that he is constantly worried that something will happen to him.

[29] In the circumstances I make an award as follows:

Pain and suffering:	Rs.100,000.00
Loss of enjoyment of life:	Rs. 10,000.00

Distress and inconvenience: Rs. 30,000.00

Medical report: Rs 200.00

Order

[30] For these reasons, I enter judgment for the plaintiff and against the defendant in the total sum of Rs 140,200/- with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

Judgment entered accordingly.

Signed, dated and delivered at Ile du Port on 4th May 2015.

D Karunakaran
Acting Chief Justice