

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS 79/2014**

**[2017] SCSC 53**

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**BARRY BARRA**

Plaintiff

versus

**KENNETH MADELEINE  
NATIONAL DRUG ENFORCEMENT AGENCY**  
Defendants

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Heard:

Counsel: Mr. B. Georges for plaintiff

Mr. Benjamin for defendants

Delivered: 30 January 2017

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**JUDGMENT**

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**Renaud J**

**Background**

[1] At the material times the Plaintiff was the owner and operator of motorcycle S2017 and the 1st Defendant was the driver and operator of motor vehicle S8402 in the course of his employment with the 2nd Defendant. Motor vehicle S8402 was hired by the 2nd

Defendant from Premium Car Hire. In the evening of 23rd March, 2014 the motorcycle and the motor vehicle collided at Amitie, Praslin.

- [2] The 1st Defendant and his colleagues Mr. Collin Adrienne and Mr. Terry Madeleine who are NDEA Agents were on patrol in the vicinity of Amitie, Praslin and he was the one driving motor vehicle S8402.
- [3] The Defendants contended that the accident did not occur at 5.45 pm as alleged by the Plaintiff in his Complaint but it occurred at around 7.00 to 7.15 pm when he was turning onto the right side of the road in order to reach Tambi's shop which is on the sea side of the road. The Plaintiff was, at that time, coming from the opposite direction and they collided with each other.
- [4] The Defendants denied the claims of damages made by the Plaintiff, as he maintained that he was not at fault in causing the collision.

### **The Facts**

- [5] At the hearing, the Plaintiff testified on his own behalf and produced five exhibits. He also adduced the evidence of two witnesses in support of his case. The 1st Defendant testified and produced one exhibit. The latter did not adduce evidence from any witness.
- [6] The evidence established that on 23rd March, 2014 at around 7 pm the Plaintiff was riding his Suzuki EN125 motorcycle S2017 in the vicinity of Tambi's Shop at Amitie, Praslin when the 1st Defendant who was driving motor vehicle S8402 and coming from the opposite direction, without indicating, crossed the Plaintiff's lane to go towards Tambi's Shop and collided with the Plaintiff's motorcycle. The 1st Defendant admitted that he indeed was crossing from his lane across the lane of incoming traffic in order to reach the shop on the other side of the road.
- [7] On that particular reasonably straight stretch of road it is permissible for the 1st Defendant to cross from his left side lane across the lane of on-coming traffic in order to go to the shop, provided that before doing so the 1st Defendant had made sure that there was no on-coming traffic using the other lane. In the instant case the 1st Defendant

maintained that he did not see the on-coming motorcycle of the Plaintiff because the latter was riding without headlight and that was how the two ended up in a collision.

[8] The Plaintiff maintained that the headlight of his motorcycle was on, but the 1st Defendant stated that there was no headlight on the motorcycle thus he could not see the oncoming motorcycle and that led to the collision.

[9] The Plaintiff testified that he was on his way home from the Petrol Station at Grand' Anse, Praslin that before passing in front of the Grand' Anse Police Station, he recalled putting his cycle's headlight on and kept it on as it was getting dark.

[10] An eye witness, Mr. Maxime Telemaque, testified that he personally saw the collision when he was standing outside of Tambi's shop at around 7 pm. He saw motor vehicle S8402 driven by the 1st Defendant, without indication, turned to the right across the lane of the Plaintiff. At that time the Plaintiff was coming on his motorcycle with its headlight on and the 1st Defendant's car collided with the Plaintiff's oncoming motorcycle operated by the Plaintiff. The collision occurred in the lane of the Plaintiff.

[11] The Plaintiff testified that after buying petrol at Grand' Anse and before passing in front of the Grand' Anse Police Station, he switched on the headlight of his motorcycle as it was getting dark by then. I take judicial notice that in Seychelles it does not get dark at 5.45 pm necessitating the use of headlights on vehicle. The witness of the Plaintiff testified that at the time of the collision the headlight on the motorcycle was on.

[12] On the basis of the evidence of the 1st Defendant as corroborated by the evidence of the Plaintiff and his witness, I conclude that the collision occurred at around 7.00 to 7.15 pm and not at around 5.45 pm as pleaded by the Plaintiff. I also conclude and find that at the time of the collision the headlight on the motorcycle was on.

[13] The Plaintiff, the 1st Defendant and the witness indicated that both the Plaintiff on his motorcycle and the 1st Defendant were going at normal speed. I believe that, because had the Plaintiff been riding at an unreasonable speed he would have possibly suffered more serious injuries arising out of this collision. That was not the case.

## **The Law**

[14] Delictual and quasi delictual liability is governed by Article 1382(1) and (2) of the Civil Code of Seychelles (CCSey) worded follows:

[15] Article 1382 (1) of the CCSey states that-

*“Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.”*

[16] In general, faute is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused.

[17] However, the existence of injury to a Plaintiff does not automatically render someone to be at fault. Faute is defined in Article 1382(2) of CCSey as follows:

[18] Article 1382 (2)

*“Fault is 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 may be the result of a positive act or omission.”*

[19] The three necessary elements when making a claim of delict, are -“fault, injury or damage and the causal link.” (See the case of Emmanuel v. Joubert, [1996] SCCA 49, 5)

[20] It is Article 1383(2) of the CCSey which is applicable here. It reads as follows:

*“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 accordingly be 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.”*

[21] This Court has in various instances interpreted that provision of law to mean that when a pedestrian is involved in an accident with a motor vehicle, the driver of the vehicle is liable for any damages caused to the pedestrian unless the driver of the vehicle can prove that the accident was caused solely by the negligence of the other party. The collision

occurred between two motor vehicles in operation and no pedestrian was involved. However, the property of the Plaintiff was involved and was damaged.

[22] In the instant suit the provision of Article 1384 of CCSeY also comes into play. The relevant parts of Article 1384 read as follows:

*“1. A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.”*

2. ....

*3. Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment.”*

[23] Under Article 1384(3), all the Plaintiffs have to do is to establish the material facts from which the fault of the Master or Employer may be deducted. In this respect, this regime is different from the regime of Article 1382. As Encyclopedie Dalloz Responsabilite du fait d'autui, at para 364, puts it:

[24] *“La responsabilite des commettants pour les dommages cause par leurs preposes est profondement different de la responsabilite du droit common prevue par l'article 1382 du code civil. Nous savons, en effect, que non seulement la faute du commettant n'a pas a etre prouvee par la victim main encore que le commettant ne peut echapper a sa responsabilite en prouvant son absence de faute dans le choix ou la surveillance du prepose.”*

## **Conclusions**

[25] I find and conclude that on 23rd March, 2014 at around 7 pm in the vicinity of Amitie, Praslin, the Plaintiff was riding his motorcycle S2017 at a normal speed coming from the direction of Grand Anse Praslin and the 1st Defendant was driving his hired car S8402 also at normal speed coming from the opposite direction. The Plaintiff was riding his motor cycle with its headlight switched on. The road was dry and it was getting dark. There was nothing that prevented the 1st Defendant from observing the oncoming

motorcycle which makes noise when in motion. The 1st Defendant should have heard the noise of the oncoming motorcycle. The 1st Defendant upon arriving opposite the shop of Tambi which is on the opposite side of the road, decided to abruptly turn his car across the lane of the oncoming Plaintiff in order to go to the shop on the seaside. His decision to do so was miscalculated and did not make provision for the oncoming motorcycle. The 1st Defendant did not keep a proper look out for the Plaintiff and ended in colliding with the motorcycle of the Plaintiff. The collision resulted in the Plaintiff suffering minor injuries but his motorcycle was a write-off as confirmed by the mechanic. The Defendants did not plead contributory negligence, which, in any event I find none to exist.

[26] I find on a balance of probability that the 1st Defendant was at fault in causing the collision and is accordingly liable to the Plaintiff in law.

[27] The collision occurred during the course of the employment of the 1st Defendant with the 2nd Defendant whilst driving a car hired by the 2nd Defendant to facilitate the employment of the 1st Defendant.

[28] I therefore also find that in the circumstances the 2nd Defendant is vicariously liable for the act and/or omissions of the 1st Defendant which amounted to a faute in law.

[29] I enter judgment in favour of the Plaintiff as against the 1st and 2nd Defendant jointly and severally.

### **Damages**

[30] As a result of the collision the Plaintiff suffered lacerations, abrasions and recurrent pain in the limbs and his motor cycle was written off as a result.

[31] Damage is awarded on the basis of reasonably ascertainable and quantifiable claim and not for uncertain claim. In cases of delict, damages are compensatory, not punitive. Damages are assessed in such a manner that the Plaintiff suffers no loss, but at the same time makes no profit out of the unfortunate situation.

- [32] The Plaintiff stated that he was traumatized by the accident and physically unable to fulfil obligations and deadlines as a performing arts professional, which ineluctably led to his suffering pecuniary loss notably a cancelled show at Oxygen Nightclub on 28th March 2014 in the sum of SR12,000.00, as well as, three stalled albums estimated to be worth SR300,000.00. He is claiming for the written-off value of his motor cycle at SR44,750.00, plus VAT of SR5,896.96. As alternative personal transportation from 24th March 2014 to 1st May 2014 he is claiming SR25,900.00 and finally SR15,000.00 as moral damages, making a total of SR403,486.96 from the Defendants jointly and severally, all with interests and costs.
- [33] The Plaintiff pleaded that he is an award-winning musician and is self-employed as owner of a music recording-studio at his home in Praslin. He writes songs and makes musical arrangement, record the songs on CD which he sells. He also staged public musical shows.
- [34] Loss of SR12,000.00 due to a cancelled show at Oxygen Nightclub is a loss that may be claimable if indeed the Plaintiff had to cancel it in view of his injuries. To organize such show he must have invested time and money in its organization. If he had to cancel it at the last minute because of the injuries he received arising out of the accident, then this head of claim is acceptable provided proof of such loss or at least proof that such show was scheduled and publicized and thereafter cancelled. The Plaintiff did not produce any form of evidence to prove that head of claim as a pecuniary loss.
- [35] Likewise the Plaintiff did not produce the slightest factual evidence in support of his claim of SR300,000.00 for loss of earnings from 3 stalled albums. Some form of evidence that such albums were in the making and which had to be completely abandoned because of the accident ought to have been adduced. Furthermore, the Court would expect some form of evidence of how much he previously earned on the production of such kind of music album. Unfortunately, this head of claim is not maintainable in the absence of proof of this pecuniary loss.
- [36] The Plaintiff claimed SR44,750.00 plus VAT of SR5,896.96 being the written-off value of his motor-cycle. Exhibit P4A is a pro-forma invoice from Kim Koon Motors, the local importer of spare parts for the type of motor-cycle owned by the Plaintiff shows that

spares to the value of SR44,750.00 plus VAT of SR5,896.96 would be required to repair the damages to the Plaintiff's motor-cycle. I have no reason to disallow this claim as such I will award the Plaintiff the sum of SR50,650.00 under this head of claim.

[37] The Plaintiff's claim of SR25,000.00 for use of alternative transport is considered to be fair and reasonable and so also his claim of SR15,000.00 as moral damages. I will allow both these head of claims.

[38] In the final analysis I enter judgment in favour of the Plaintiff as against the Defendants and hereby order the Defendants jointly and severally to pay the Plaintiff the total sum of SR90,650.00 as damages, with interest and costs.

Signed, dated and delivered at Ile du Port on 30 January 2017

**B. Renaud**  
**Judge of the Supreme Court**