

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS23/2013

[2017] SCSC

JEAN MARC BENSTRONG

Plaintiff

versus

ANDREW LOBBAN

Defendant

Heard:

Counsel: Mr. Joel Camille for the plaintiff

Unrepresented for the defendant

Delivered: 11 May 2017

JUDGMENT

F. ROBINSON, JUDGE

[1] Introduction

[2] This is a claim arising out of a road traffic accident which occurred at Point Larue on 5 August, 2012. The plaint sets out the circumstances of the road traffic accident, the injuries suffered by Plaintiff, the treatment that Plaintiff had to undergo and the lasting effects on him.

[3] The circumstances of the road traffic accident are as set out at paragraph 1 of the plaint

"On the 5th August 2012, at around 05.40 hours as Plaintiff was driving vehicle registered number S 16507 at Pointe Larue in the direction of Anse Aux Pins, vehicle registered number S 17812, driven at the material time by the Defendant, at the opposite directions, collided with Plaintiff's vehicle thereby causing an accident."

[4] Defendant filed a defence. The case proceeded *ex parte* against Defendant.

[5] **Case for Plaintiff**

[6] Plaintiff explains the circumstances of the road traffic accident. Plaintiff works with the Tourism Department as a driver. On 5 August, 2012, a Sunday, Plaintiff was on duty. At about 5:30 a.m. to 6 a.m., Plaintiff was driving a "terios jeep" bearing registration number S16507, along the Pointe Larue road and was proceeding towards Anse Aux Pins, at about 45 kmph. Plaintiff was passing the airport and approaching the UCPS building when he saw a vehicle coming towards him, in his lane of traffic, at about more than 40 kmph. Because of the speed that the other vehicle was moving at, he could not avoid it. A collision resulted. The collision caused Plaintiff's "terios jeep" to run off the road into a fence along the side of the road. The vehicle landed in his lane of traffic. After recovering consciousness Plaintiff saw a lot of smoke in the "terios jeep". Plaintiff dragged himself out of the "terios jeep" because he feared that it would catch fire. Plaintiff could not stand. Firemen helped him to the ambulance and he was driven to the hospital. Plaintiff saw Defendant at the hospital. He did not talk to Defendant.

[7] Under "*PARTICULARS OF PERSONAL INJURY*" Plaintiff pleads the following —

"immediately after the accident, Plaintiff was brought to the Accident and Emergency Unit at the Seychelles Hospital, whereupon he was diagnosed to have multiple bleeding abrasions over his scalp and various parts of his body and a laceration over his right knee. Swelling over his right shoulder and right thigh were observed. Plaintiff had also suffered a deformity of the right thigh.

A CT scan revealed that Plaintiff sustained a fracture of the upper diaphysis of the right femur with a dislocation. Plaintiff had to undergo surgery for the above injuries and was admitted on ward until he was discharged on the 14th August 2012. Plaintiff is today

receiving physiotherapy treatment at the Surgical Clinic and to date is not fully recovered. He makes use of crutches for everyday movement."

[8] Plaintiff contends that he sustained pain and sufferings and under that head of claim, Plaintiff claims Seychelles rupees 300,000.00/-. Plaintiff pleads "*anxiety, stress and depression*" and claims Seychelles rupees 100,000.00/-. Plaintiff paid for the medical report and claims Seychelles rupees 350.00/-. Plaintiff also pleads a written notice of "*mise en demeure*" (exhibit P3).

[9] As regards the injuries he sustained he claims that other than the injuries to his right leg, he suffered no other injuries. Plaintiff was in severe pain. Plaintiff went to the hospital where he was admitted for two days "*to stabilize [his] leg*" (*proceedings of 6 October, at 9 a.m., p 6 of 21*). On the following Tuesday he underwent surgery. He could not recall how many days he spent in the hospital after surgery. Plaintiff was discharged. Thereafter, Plaintiff felt pain in his leg. X-tray showed "*four pins in [his] legs had been broken*" (*proceedings of 6 October, 2015, at 9 a.m., p7 of 21*). He underwent a second surgery. He was admitted for two weeks and then discharged. After surgery Plaintiff had severe pain in his leg. Upon returning to the Victoria Hospital he was seen by Doctor Louange. He underwent a third surgery. He felt better. However, Plaintiff was still in pain. He could not recall how many days he remained in the hospital after surgery.

[10] Plaintiff does not know whether the police attended the scene. Plaintiff was not present when the police drew a sketch of the scene of the road accident. The sketch is not an exhibit before the court. Plaintiff gave a police statement after his first surgery, which is before the court as exhibit P2. Plaintiff produces one photograph of the scene of the road accident, which is before the court as exhibit P1. He identifies the "*terrios jeep*" by its red registration plate.

[11] Plaintiff explains how the injuries have affected his lifestyle as follows. Plaintiff now walks with a limp. Plaintiff has returned to work and still works as a driver. However, Plaintiff is incapable of doing "*dispatch*" work. He now drives workers to their work site and back. Plaintiff feels pain in his leg, habitually in the morning, when he wakes up. He has trouble walking in the morning, whereas late in the afternoon he manages to walk "*a*

little bit much better" (proceedings of 6 October, 2015, at 9 a.m., p8 of 21). Plaintiff is incapable of going to his kitchen, which is located outside of his house, because of stairs leading to it. Consequently, Plaintiff remains in the house all the time. After the first two surgical operations, Plaintiff could not bathe himself because the "feray" in his leg prevented any bending (*proceedings of 6 October, 2015, at 9 a.m., p10 of 21*). His wife assisted him. Plaintiff complains of a diminished sex life. He experiences pain after sex. Prior to the road accident, Plaintiff earned Seychelles rupees 2500.00/- monthly from coaching the Lions Club. After the road accident, Plaintiff is incapable of coaching because the injuries prevent any activities on hard surfaces. Plaintiff loves the sea; he loves fishing, but due to his injuries he does not "*feel comfortable*" going out at sea (*proceedings of 6 October, 2015, at 9 a.m., p11 of 21*).

[12] Plaintiff avers that Defendant negligently engaged on the road by speeding and consequently colliding with his "*terrios jeep*".

[13] Plaintiff is asking the court to order Defendant to pay him Seychelles rupees 300,000.00/- because he will have to undergo constant examinations on his leg. As regards "*anxiety, stress and depression*", he is claiming, under that head, because he is not capable of doing the things that he used to do.

[14] After numerous adjournments, the court heard the evidence of Doctor Danny Louange (*hereafter "Doctor Louange"*).

[15] Doctor Louange is the Deputy Chief Executive Officer of the Health Care Agency. He is an orthopaedic and spine surgeon. Exhibit P4 states that Plaintiff was involved in a road traffic accident. Doctor Louange states that on examination (exhibit P4) —

"vital signs were within normal limits, he was conscious, alert, cooperative, oriented. Glasgow Coma scale was 15/15, pupils equals and reactive. Chest and abdomen examinations were unremarkable. There were multiple abrasions over the scalp and various parts of the body and a laceration over the right knee and swelling of right shoulder. The right thigh was swollen, deformed with abnormal movement, bone crepitation and tenderness.

X ray of right femur showed comminuted fracture with distal displacement of the fragment... fracture of the upper diaphysis of right femur with dislocation."

In his opinion Plaintiff was not in a life threatening condition.

[16] Plaintiff was admitted on 5 August, 2012, and *"open reduction and internal fixation were performed in the operating theatre"* (exhibit P4) - *"open reduction ... means that you open the thigh, reduce the fracture ... and internal fixation means that you are fixing a bone internally"* (proceedings of 1 April, 2016, at 1 22 p.m., p 11 of 18). He started physiotherapy on 9 August, 2012. Plaintiff was discharged on 14 August, 2012. On 6 September, 2012, Plaintiff was re-admitted because of severe pain in his right leg. According to exhibit P4 *"[o]n examination right lower limb was with external rotation and painful on palpation"*. Doctor Louange opines that it would be related to the accident. X-ray showed that *"the right bone of the right thigh had re-fractured and the screws were broken"*. On 11 September, 2012, *"reosteosintesis was performed"* – i.e., *"re-fixation of the bone"* (proceedings of 1 April, 2016, at 1 22 p.m., p 13 of 18). After the surgical operation, Plaintiff had no complications. Plaintiff started physiotherapy. Plaintiff was discharged on 17 September, 2012, on *"analgesic treatment, and followed up after one month at SOPD orthopaedic clinic ..."*. He was to continue physiotherapy as an outpatient. Plaintiff underwent another surgery on 29 January, 2013, to remove the *"hip screw"*, which was showed by x-ray, to be *"inside the hip joint"*. He was discharged on 1 February, 2013. According to exhibit P4, upon review, x-ray showed callus formation. Doctor Louange explains that *"callus is a term used for new bone formation and this can be seen on x-ray ... [i]t is normal. It is expected."* (proceedings of Friday 1 April, 2016, at 1 22 p.m., p 14 of 18). Plaintiff was to continue his physiotherapy as an outpatient and follows-up at SOPD.

[17] **Discussion**

[18] Article 1383 (2) of the Civil Code of Seychelles Act provides —

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] In line with Article 1383 (2) the court has to consider who is liable for the accident and bears the responsibility for the same.
- [20] It is to be noted with regret that learned counsel did not present the officer who drew the sketch as a witness in as much as the evidence of the officer would have greatly shed light with respect to the circumstances of the accident. On the crucial aspect with respect to how the accident happen Plaintiff gives a basic account. Nevertheless has Plaintiff been able to prove that the responsibility for the accident rests with Defendant on a balance of probability? The court has weighed up the evidence of Plaintiff and is satisfied that it is reliable with respect to the circumstances of the accident and other aspects of his evidence. The court is satisfied that Plaintiff has proven on a balance of probability that Defendant was at fault.
- [21] The court deals with the quantum of damages. In respect of delicts, damages are compensatory and not punitive. As regards pain and sufferings Plaintiff claims a global sum of Seychelles rupees 300,000.00/- which includes damages for injury, economic loss and moral damages. Plaintiff claims Seychelles rupees 100, 000.00/- for "*anxiety, stress and depression*". The court considers the two heads of claim together. The court accepts that Plaintiff has suffered right femur fracture, pain and anxiety. Plaintiff testifies that he has not recovered completely; and that his pain continues. It is regrettable that there is no expert evidence which would have shed light on whether Plaintiff will fully recover.
- [22] In *Seychelles Breweries v Sabadin SCA 21/2004* the Court of Appeal stated that in determining the quantum of damages, a court needs to have regard to comparable cases. The court has considered the relevant aspects particularly of the following precedents of the Seychelles courts to come to a fair decision on this issue.

- [23] In ***Rene Youpa v Y Jupiter (unreported) CS 28/1992*** the plaintiff was a reputed sportsman in the field of body building and weight lifting and was also a physiotherapist. He suffered a fracture of his leg which required the insertion of a metal pin. After the plaster cast was removed he fractured the same leg again while walking. He was later treated outside Seychelles. The Supreme Court awarded him Seychelles rupees 20,000.00/- for pain and suffering and Seychelles rupees 10,000.00/- for the permanent disability and Seychelles rupees 15,000.00/- for loss of amenities, prospects and enjoyment of life.
- [24] ***Cathleen Harry and another v Nella Hoareau C. S No: 393 of 1997*** in which the Plaintiff had injury to right knee, fracture of right tibia plateau, a compound fracture of left tibia and fibula with possibility of early arthritis with very slow healing. The court awarded Seychelles rupees 35,000.00/- for pain, suffering, distress, discomfort and Seychelles rupees 15,000.00/- for loss of amenities and loss of equipment.
- [25] ***Jocelyn Nicette v Ralf Valmont C. S No: 395 of 1997*** in which for permanent limp in right leg the Court awarded Seychelles rupees 15,000.00/-.
- [26] ***Harry Confiance v Allied Builders C. S No:226 of 1997*** - a cut injury to patella tendon penetrating into the joint of right knee; cut injury to the muscular quadriceps and muscular vastus medialis in the right leg, that was the same main muscle of the leg Residual disability of the right leg by 10%. Injury to joint that may cause osteoarthritis. Muscle wasting on right thigh. Diameter of right thigh became less than left thigh. Awarded R15,000.00/- for pain, suffering, distress and discomfort; and Seychelles rupees 25,000.00/- for permanent disability, infirmity and loss of amenities of life.
- [27] ***Daphne Louis Azemia v Nishesh Parikh C. S No: 433 of 1998*** in which the Plaintiff had traverse fracture of midshaft, tibia, fibula and comminuted fracture of cuboids with no residual disability. The Supreme Court awarded Seychelles rupees 30,000.00/- moral damages and loss of amenities of life.
- [28] ***Monica Kilindo v Morel C. S. Appeal No: 2 of 2000*** - Comminuted fracture of the left knee, three surgical operations including knee replacement. Moral damage for injuries,

pain, sufferings, loss of amenities of life, inconvenience, anxiety and distress. Permanent disability of 40%. Award of Seychelles rupees 140,000.00/- by the Supreme Court was increased by the Court of Appeal of Seychelles to Seychelles rupees 180,000.00/-.

[29] The court awards Plaintiff the global sum of Seychelles rupees 90, 350.00/- made up as follows — (1) Seychelles rupees 50,000.00/- for pain, sufferings and anxiety; (2) Seychelles rupees 40,000.00/- for the loss of his quality of life; (3) Seychelles rupees 350.00/- for the medical report. The paucity of the evidence with regards to economic loss prevents the court from computing a figure.

[30] The court awards Plaintiff legal interests on the award to be calculated from the time he filed the suit till payment in full with costs.

Signed, dated and delivered at Ile du Port on 11 May, 2017.

F.ROBINSON
JUDGE OF THE SUPREME COURT