IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS /69/2015

[2017] SCSC 553

(IN FORMA PAUPERIS)

1. Juliana Marie (acting in her capacity as Executrix of the Estate of the late Georges Robert)
2. Trisha Robert (a minor represented by Juliana Marie)
3. Rebecca Robert (a minor represented by Juliana Marie)
4. George Robert (a minor represented by Juliana Marie)
5. Jason Rangasamy
6. Roddy Robert
7. Angela Marie
8. Sandra Marie — Plaintiffs

versus

Christian Cafrine — Defendant

Heard: 3 March 2017- 7 March 2017, Submissions 24 May 2017.

Counsel: Mr. Serge Rouillon for plaintiff

Mr. Anthony Juliette for defendant

Delivered: 30 June 2017

JUDGMENT

M. TWOMEY, CJ

[1] Georges Robert (hereinafter the Deceased) died as a result of a stabbing incident on 10 November 2013. He had arrived in the afternoon at a family picnic to celebrate the confirmation of his nephew. His *ayants droit* (in *forma pauperis*) claim damages from the Defendant in the total sum of SR1, 115,000 for his death.

Agreed Facts

[2] The First Plaintiff is the mother of the Deceased who was the father of three minor children, the Second, Third and Fourth Plaintiffs aged ten years, nine years and three weeks old respectively. She is also the Executrix of his Estate as per Supreme Court appointment dated 26 March 2014, and in that capacity represents his Estate, the Second to Fourth Plaintiffs inclusive.

[3] The Fifth to Eighth Plaintiffs are the siblings of the Deceased.

[4] The parties agree to the admission of the Criminal File transcript of record in Cr. Side 72/2013 including all exhibits wherein the Defendant was acquitted of the offence of murder by the jury.

Issues to be Determined

[5] The Parties are agreed that the following issues stand to be determined by the Court:

1. *Whether the stabbing of the Deceased was unlawful or an act of self-defence and therefore lawful in the circumstances.*

2. *If the stabbing was unlawful, what quantum of damages is payable to the Plaintiffs.*

The Evidence

[6] The transcript of the criminal case of *R v Christian Paulin Cafrine* was produced to this Court. It contains the evidence of twenty-one witnesses for the prosecution of the Defendant for the murder of the Deceased.

[7] In the criminal trial the Defendant opted to remain silent.

[8] Of the prosecution witnesses who testified in the criminal trial, Dr. Mariya Zlatkovic, the state pathologist, confirmed that the Deceased had a stab injury to the right side of his neck. This had resulted in the rupture of the right common carotid artery, the right superior thyroid artery and the right jugular vein resulting in hypovolemic shock and external bleeding. The trachea was also dissected.

[9] She testified that that the cut was very deep, and the wound was oval in shape (7 cm long 6 cm wide and 13 cm deep); and that the knife blade which was 19 cm long and which had a handle of 13 cm (Exhibit P13) was capable of causing the injury as seen on the Deceased. She also testified that the force applied from the knife was from assailant to victim and not vice versa and that the impact was at close proximity.

[10] In the present civil trial, Mr. Cafrine was called on personal answers. He stated that as a result of a phone call from one Daniella Balette telling him that his partner, Angela Marie, had fallen and injured her arm, he went to the beach at Anse Parnelles to collect her to bring her to hospital. He was accompanied by Debra Azemia. They were both aggressed when they got there.

[11] He had disembarked from the car to talk to his partner Angela Marie but by the time he had got to the back of the car she had already reached the front passenger door and was shouting that she would not get into the car when his girlfriend was there. She had then assaulted Debra Azemia.

[12] Sandra Marie and Juliana Marie approached him asking why he had not dropped off Debra Azemia before coming to pick up Angela Marie. Subsequently, Angela

Marie and her brother Jason Rangasamy who were both aggressive were dragged away from the car in which he had re-embarked. He closed his window. He had his seatbelt on and somebody signalled to him to open the window which he did.

[13] The following is his evidence on the incident:

> *"After the person signalled for me to wind down the window which I did immediately that person shoved his hand into the car and I recall him saying by the way this is my sister and before I could answer anything I was slapped twice, once on one side of the face and on the other and when I tried to put up my hand to defend (sic), the person had already borne down on me in the car and was trying to push me down and strangle me and I was cutting my seatbelt because I couldn't defend myself because when you tried (sic) to move forward in the seatbelt I was locked in place and I was actually pushed down"* (verbatim Page 9 of transcript of proceedings of 3 March 2017).

[14] He was questioned as to what he did next. He stated:

> *"When I was pressed down and I was being choked I sort of reached around and I felt because there was a knife there, I felt there was an object and this is the time when in the struggle I just have done it so fast because when I realised that I felt that the person was moving away from the car because my hand came up fast because I couldn't stop him with one hand and when I picked up the knife this is when he was injured (sic)*
>
> ...
>
> *Q. You thrust it all the way up when-*
>
> *A. No my hand obviously was going up because I couldn't hold the guy with one hand because he was bearing down heavily and so in the attempt to push up my hand to try and get him off me this is why he must have been*

injured." (verbatim Page 11 -12 of transcript of proceedings of 3 March 2017).

[15] He also stated that the stabbing was not a conscious act on his part to defend himself by inflicting an injury "somewhere specific" and he immediately drove away. The knife was in his car together with other knives and fishing gear as he was taking part in a photographic competition involving fishing on that day.

[16] The First Plaintiff testified. She testified as to the moral prejudice she and the minor children had all suffered as result of the Deceased's violent death. She said the minors were receiving social assistance and lived with their mother but stayed with her at weekends and during holidays. She produced bank accounts in respect of the Second, Third and Fourth Defendants in which she said she placed an average of SR500 to SR1000 a month.

[17] She described the relationship between the Defendant and the Seventh Plaintiff. It was, to say the least, tempestuous. The Defendant had another girlfriend besides her daughter. Her daughter and the Defendant had been living together at Hermitage. He had thrown her out of the house previously, that is, in September 2013 after she had assaulted his other girlfriend, Debra.

[18] She did not witness the stabbing incident but had been present at the family picnic. The Defendant had come to the beach on the day of the stabbing with his other girlfriend and this had angered her daughter's siblings. She denied that she had inflamed the situation.

[19] Mr. Marcelin Joseph also testified on behalf of the Plaintiffs. He had been at the picnic on the day when the Deceased died. At some point he saw the Deceased talking to the Defendant in the car. The Deceased was leaning on the car with his hands and arms leaning on the door of the Defendant's car and then he saw the Deceased turning away and pressing his hand against his neck where blood was coming out.

[20] Daniella Ballette, a nursing assistant by profession, also testified. She was present at the stabbing incident. She saw the Deceased go to the driver's window of the car. She spoke to the Defendant and asked him to leave. He said to wait a moment and then he raised his arm. The Deceased leaned to the right and walked to the other side of the road where the car was parked and collapsed. The Defendant then left in his car. A lot of blood was pouring out of the Deceased's wound and she applied a cap and a towel to stem the blood. He was then lifted and put in a vehicle and driven off. She did not see a struggle between the Deceased and the Defendant. She confirmed that people had consumed alcohol at the picnic but they were not drunk.

[21] She did hear comments being made that the Defendant was passing on the road with another woman in his car. With regard to the contradictions about her testimony in the present case and the testimony she had given at the criminal trial in reference to whether the other persons had fought with the Defendant or other such matters she stated that she could not quite remember the details and this would explain minor discrepancies in her testimony.

[22] With regard to the actual stabbing she stated that she did not see the actual stabbing but observed the Defendant's hand coming up and the Deceased holding his neck and leaning backwards and falling.

[23] Jason Rangasamy, the Fifth Plaintiff also testified. He stated that he had suffered distress, anxiety and mental pain from the death of his younger brother. He did not see the Defendant at the stabbing incident. He was restrained by his family from approaching him.

[24] In cross examination it was put to him that although he had originally testified in the murder trial that the area where the stabbing took place was lit by an electricity post, no such post had been observed at the *locus in quo*. He replied that he might have been mistaken as he "was in a bad state" that night.

[25] Roddy Robert, the Sixth Plaintiff also testified. He described his grief and pain in relation to his brother's passing.

[26] Angela Marie, the Seventh Plaintiff testified. She described the activities of the 10 November 2013. She had been at the picnic and had gone to urinate behind some rocks and had slipped and fallen, breaking her wrist in the process. Daniella Balette had applied a sling to it and had called the Defendant. She was not sure if her brother the Deceased had been at Daniella's house at the time but she did not see him. She had not expected her boyfriend, the Defendant to come and pick her up with another woman in the car. When she opened the passenger car to get in she saw Debra, the woman with whom he was having an affair. She shouted at the Defendant and told him to get his concubine out of the car and then slapped her. She was restrained by Daniella Balette and in the process fell into the shrubs by the gutter on the road. There was a lot of noise and commotion that ensued but she did not see how the Deceased was stabbed.

[27] Sandra Marie, the Eighth Plaintiff also gave evidence. She stated that when her sister started screaming at the Defendant, she went to the Defendant and put her arm around him and asked him to leave. He went into the car and she saw the Deceased go the car window where the Defendant was sitting. The Deceased's arm was on the door of the vehicle and they were talking. She then just saw him press his neck and leaning backward. She screamed and said "Jason he has hit our brother."

[28] She was tormented by his death and it has continued to affect her. In her own words "it has bruised [her] heart and left a scar on [her] heart."

[29] In cross examination, she admitted that she had called her sister an idiot and told her she was stupid as her husband was driving past with another woman in the car. She also admitted that she did not know how her brother received the injury but was adamant that he must been injured by someone inside the car.

[30] As I have stated, there is also the evidence in the criminal trial (CR 92/2013) which is brought for the consideration of this court. I shall address this evidence in my discussion of the evidence below.

[31] The Defendant did not call any evidence either in the criminal case or in the present suit. His only evidence is that he provided in personal answers.

Submissions

[32] In closing submissions Mr. Juliette for the Defendant points out that the First, Fourth, Fifth, Seventh, Eighth Plaintiffs and Daniella Balette gave evidence in both the criminal trial and in the present suit. In particular he highlights the fact that no witness saw the stabbing. He submitted that the investigating officer Inspector France Octobre confirmed in the criminal trial that no one knew what had happened and who had killed the Deceased. Both Inspector Octobre and Sergeant Ralph Agathine (the forensic expect) confirmed that the car in which the Defendant was seated was a low profile car and that the Deceased was a bulky/burly man and there was more concentrated splatters of blood inside the car.

[33] He also submitted that the Defendant voluntarily reported to Central Police Station according to Woman Police Constable Maria Woodcock who had added that that was at 7.50 pm of the night of the stabbing.

[34] Other witnesses at the criminal trial namely Michel Youpa and Mangel Adonis all testified as to the commotion at the picnic and the aggression of Juliana Marie and Jason Adonis. The pathologist's evidence in his submission also supports the fact that the wound was on the upper body and the impact caused by close proximity.

[35] It is Mr. Juliette's submission that the Defendant was led away and the family of the Deceased was restrained and that these point to the fact that the Defendant acted in self-defence when he was attacked by the Deceased.

[36] He also submits that in the circumstances the Defendant is not liable for the Deceased's death and therefore no damages is payable.

[37] Mr. Rouillon for the Plaintiff has submitted extensively on the law. He states first of all that the Defendant admits killing the Deceased but states that this was in self-defence. As this admission was made in personal answers it is his view that it was therefore prejudicial to his cause and substantiates the Plaintiffs' case.

[38] It is also his submission that the Defendant failed to rebut the Plaintiffs' case in that he did not call any witnesses.

[39] As regards the Defendant's defence of self-defence he relies on the authorities of *Payet v Pierre* (2007) SLR 130 and *Omath v Charles* (2008) SLR 269 for the principle that one can be exonerated totally from liability if the dominant purpose of the act by the Defendant was not to cause harm to the victim or else it would only constitute a defence of contributory negligence and reduce the quantum of damages. Similarly for provocation. Relying on Morel *v Lestang* (1960) SLR 7, *Tirant v Banane* (1977) SLR 219 and *Lee v Zheng* (unreported) CS 54/2002, he further submits that since the Defendant only affirms in his pleadings that he acted in self-defence and no particulars of the same were provided, he is precluded from relying on that defence.

[40] Insofar as the acquittal of the Defendant in the criminal trial is relied on to exonerate his of liability in the present civil suit, the Plaintiffs submit that that is not sufficient since the criminal trial aimed at acquitting the Defendant rather than establishing a defence. He further submits that the availability of a weapon is not fully explained.

[41] Finally, he submits that the evidential burden having shifted onto the Defendant, it was onerous on the Defendant to show that the facts as proved by the Plaintiffs did not happen as they did, which he failed to disprove and which he had not in any case specially and distinctly denied in his pleadings.

[42] As regards compensation, Mr. Rouillon has relied on the recent cases of *Government of Seychelles v Rose and Ors* SCA 14/2011 and *Davidson and others v Cerf and Surf Properties Ltd* (unreported) CS 303/2014 for the proposition that moral damages must reflect the social and economic times in which we live and take into account the grief of the Plaintiffs over the passing of the Deceased.

The Law

[43] This is a delictual action and the applicable provisions are found in Article 1382 of the Civil Code which provide in relevant part that:

> *"1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
>
> *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 an omission.*
>
> *3. Fault may also consist of an act or an 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.*
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> ...

[44] The acquittal of the Defendant in a previous trial for the murder of the Deceased together with the evidence produced in the case has also been brought into evidence before the court and it is important that I refer to the law in this regard.

[45] Article 1351 of the Civil Code of Seychelles provides in relevant part:

> *"3. The admissibility and effect of judgments given by a Court of criminal jurisdiction shall, in civil matters be governed by and decided in accordance with the principles of English law."*

[46] In Seychelles, evidence from a criminal trial is admissible to prove certain relevant facts in a civil case. Section 29 of our Evidence Act provides in relevant part:

> *(1) In a trial the fact that a person, other than, in the case of a criminal trial, the accused, has been convicted of an offence by or before any court in the Republic shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in the trial, that that person committed the offence or otherwise, whether or not any other evidence of his having committed that offence is given.*
>
> *(2) In a trial, other than in a civil trial for defamation, in which by virtue of this section a person, other than, in the case of a criminal trial, the accused, is proved to have been convicted of an offence by or before a court in the Republic, he shall be taken to have committed that offence unless the contrary is proved.*
>
> ...
>
> *5) Where evidence that a person has been convicted of an offence is admissible under this section, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based*
>
> *(a) the contents of any document which is admissible as evidence of the conviction; and*
>
> *(b) the contents of the information, complaint or charge sheet on which the person was convicted,*
>
> *shall be admissible in evidence for that purpose."*

[47] In *Solo v Payet* (unreported) CS 24/2014, I outlined the history of the introduction of these statutory provisions in our law. I reproduce the following extract from that decision which I believe is significant in respect of the present case:

"14. The applicable English law on this issue was explored by Perera J (as he then was) in Saunders and Or v Loizeau (1992) SLR 214. The rule against the inadmissibility of such evidence to prove a civil case was contained in Hollington v Hewthorn (1943) KB 587. The rule however was abrogated by section 11(1) the English Civil Evidence Act of 1968 which made admissible a conviction for proving that a defendant in a civil action committed the act for which he was convicted. The Act was adopted in the jurisprudence of Seychelles by virtue of the fact that applicable English law in Seychelles in terms of evidence is that in force when Seychelles became independent on 1st January 1976 (See Kimkoon and Co v R (1965) SCAR 64, Vel v Tirant and or (1978) SLR 9, Bouchereau v Francois and ors (1980) SLR 77).

15. The Seychellois Evidence Act by amendment in 1990 imported this statutory provision of the English Civil Evidence Act 1968 into our laws.

[48] The effect of section 29 of our Evidence Act, as unclearly worded as it is, relates to issue estoppel, that is, the concept in common law preventing a party in court proceedings from contradicting a finding of fact or law that has already been determined in previous court proceedings between the same parties. By extension, the principle now enshrined in our statute, allows the admission of evidence of criminal convictions in civil proceedings. First, it must be emphasised that the evidence of the conviction is probative and not conclusive in the subsequent civil trial as the provision allows for a rebuttal of the finding. Second, more importantly, it must be emphasised that the principle only relates to convictions, not acquittals. The distinction between criminal convictions and acquittals putting paid the issue of culpability in subsequent civil proceedings and the fact that the conviction only has probative value has been explained in a number of decisions of other Commonwealth jurisdictions.

[49] In the two UK cases of *McIlkenny v Chief Constable of the West Midlands* CA 1980 and *Hunter v Chief Constable of West Midlands* [1981] 3All ER 727 issue

estoppel was used in order to prevent a collateral attack by way of a civil claim for damages in respect of injury suffered during the obtention of a confession which confession had been deemed admissible in a previous criminal trial. Lord Diplock stated at p. 734, letters: f, g, h):

> *"My Lords, this is the first case to be reported in which the final decision against which it is sought to initiate a collateral attack by means of a civil action has been a final decision reached by a court of criminal jurisdiction. This raises a possible complication that the onus of proof of facts that lies on the prosecution in criminal proceedings is higher than that required of parties to civil proceedings who seek in those proceedings to prove facts on which they rely. Thus a decision in a criminal case on a particular question in favour of a Defendant, whether by way of acquittal or a ruling on a voir dire, is not inconsistent with the fact that the decision would have been against him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the Civil Evidence Act 1968. In contrast to this, a decision on a particular question against a Defendant in a criminal case, such as Bridge J's ruling on the voir dire in the murder trial is reached on the higher criminal standard of proof beyond all reasonable doubt, and is wholly inconsistent with any possibility that the decision would not have been against him if the same question had fallen to be decided in civil proceeding instead of criminal. That is why convictions were made admissible in evidence in civil proceedings by the Civil Evidence Act 1968."*

[50] In the Belize case of *Social Security Board v W. H Courtenay and Co and anor* SC 206/1997, Gonzalez J referred to *Hunter* with approval and cited Phipson on Evidence (14th Edn.) para 33-68:

> *"It is thought that the decision in Hunter v Chief Constable does not give rise to a general prohibition on the raising of issues in civil cases which have already been the subject of a conviction in criminal proceedings. The interests*

of finality are not so powerful as to require an accused to accept his conviction as correct for all purposes, nor does the Civil Evidence Act envisage that they should. The case is aimed at the abuse of the process by convicted persons. The principle laid down has no application to a finding in favour of a Defendant in a criminal trial."

[51] The difficulties in the principle of estopping the trial of an issue settled by a previous criminal conviction is also raised in the Botswanian case of *AG v G. Malokwane* 1971 (2) BLR 15 (HC) in which Young CJ stated:

"The fact of a conviction in former proceedings is in common sense probative of the truth and therefore ought to be admissible. On the other hand, the value to be attached to the evidence must depend on the circumstances...

Assuming issue estoppel in criminal proceedings extends beyond the double jeopardy concept, can the doctrine cross the border between criminal and civil proceedings? There are *at least two objections that I can see in the way of such mobility:*

(1) Although the state is the prosecutor in the criminal case and the claimant in the civil case, criminal and civil proceedings are of a different order; the causes of action are wholly different and the rule of public policy that there should be finality in litigation hardly applies.

(2) The converse case would not apply, that is, if there had been an acquittal in the criminal case that would not have inhibited a civil suit by the state, because the standard of proof is different. The usual reciprocity of a rule of law is wanting."

[52] In Canada, it is trite that an acquittal on a criminal charge does not have the same evidentiary impact on a subsequent civil proceeding as a conviction has and it does not estop an issue in the subsequent proceeding (See Donald Lange, The Doctrine of Res Judicata in Canada, 4th ed. (Markham: LexisNexis Canada,

2015) at 552, *R. v. Mahalingan*, 2008 SCC 63, at paras. 26, 56 and *Polgrain Estate v. Toronto East General Hospital*, 2008 ONCA 427 at paras. 33-35).

[53] Much as section 29 of the Seychellois Evidence Act makes it clear that evidence of a former conviction estops the reopening of the issue in a subsequent civil trial unless there is rebuttal evidence, the specific wording of the provision, also makes it clear that the same does not apply to an acquittal of a defendant. I therefore do not find that the acquittal of the Defendant in the murder trial establishes the absence of *faute* on his part in the present case where damages is claimed for his killing of the Deceased. However, since the whole criminal file has been admitted as evidence for consideration in the present case it will be treated in the same way as other evidence in this trial in establishing the liability of the Defendant and if the same is established, the quantum of damages arising from such liability.

Discussion

Issue 1 – liability of the Defendant.

[54] The Defendant's only pleaded defence is that of self-defence. The cases of *Rideau v Mend* (unreported) 1992 CS 144/1992 *Payet v Pierre* (2007) SLR 130, *Lee v Zheng* (unreported) CS 54/1992, *Omath v Charles* (2009) SLR 269 are all decided *per incuriam* on the issue of self-defence as contained in Article 1382 (3) and should therefore not be followed.

[55] Unlike what is stated in the abovementioned cases, the Seychellois Article 1382 (3) does not provide a different regime to that that is obtained under the French Article 1382 (now Article 1240 in the 2016 Civil Code of France). All it does is codify French jurisprudence on the principle of self-defence. The principle is as expressed by Terré, Simler and Lequette that:

> *"L'état du legitime defense de soi-même ou d'autrui efface la culpabilité de l'auteur du dommage. Traditionellement, l'auteur du dommage n'est pas fautif si, compte tenu des circonstances, il ne pouvait agir autrement pour se défendre contre une attaque injuste et si la defense était proportionelle à*

l'attaque. Si elle ne l'est pas, plus précisément si elle est plus forte que l'attaque, la jurisprudence est conduite à retenir un partage de responsibilités. (Francois Terré, Philippe Simler and Yves Lequette, Droit Civil: Les Obligations Dalloz 10e edition, paragraph 737).

[56] Hence, pursuant to the wording of our Article 1382(3), if the dominant purpose of one's action is to legitimately defend oneself from an attack, one is only liable for damages arising out of such action if such action is out of proportion with the exigency of the situation. The fault of the victim (the Deceased in this case) is assessed to consider whether it amounts to shared liability or complete exoneration of the fault of the Defendant.

[57] In the examination of the evidence to decide the first issue, that is, whether the stabbing of the Deceased was unlawful or an act of self-defence and therefore lawful in the circumstances I note that few people witnessed the actual stabbing of the Deceased by the Defendant:

1. Juliana Marie did not witness the stabbing incident but had been present at the scene.

2. Mr. Marcelin Joseph had been at the scene and saw the Deceased at the car his hands and arms leaning on the door of the Defendant's car and then he saw the Deceased turning away and pressing his hand against his neck where blood was coming out.

3. Daniella Ballette was present and saw the Deceased go to the Defendant's car window. She saw the Defendant raise his arm and then the Deceased leaning to the right, walking to the other side of the road and collapsing.

4. Jason Rangasamy, Roddy Robert and Angela Marie also did not witness the actual stabbing.

5. Sandra Marie did see the Deceased go the Defendant's car window where the Defendant. She stated that Deceased's arm was on the door of the vehicle and they were talking and then she saw the Deceased press his neck and lean backward

[58] That was the evidence of the Plaintiffs and their witnesses. On the other hand the court only has the unsworn personal answers of the Defendant who states that he was being strangled, felt around for a knife and raised it to the Deceased to fight him off who then got stabbed. That evidence I have reproduced verbatim at paragraphs 13 and 14 above.

[59] It was open to the Defendant to bring evidence in rebuttal of the Plaintiff's evidence. He chose not to. He could for example have testified and also called his companion Debra Azemia to explain the circumstances of the stabbing so as to establish his defence of self-defence. He chose not to. He seems to allege from his personal answers that his act was one of automatism and yet that is never pleaded in his Statement of Defence. The cross examination led by the Defendant's lawyer seems to invite the consideration of provocation and yet that again is not pleaded in the Statement of Defence.

[60] In terms of the evidence adduced in this context, the weight of the Defendant's unsworn personal answers and the evidence under oath of the Plaintiffs and their witnesses and that of the prosecution witnesses in the criminal trial which I have considered, is against the Defendant on a balance of probabilities.

[61] The Court therefore is satisfied on the evidence adduced that the Plaintiffs have established their case for which the Defendant has not been able to rebut. I am not satisfied on the evidence adduced by the Defendant that he acted in self-defence. I therefore find that the Defendant is liable for the death of the Deceased for which the Deceased's *ayants cause* should be compensated.

Issue 2- Quantum of Damages to be awarded

[62] Despite some cross examination of the Plaintiffs challenging their grief, mental distress or moral damages, I do not find it seriously disputed that the Plaintiffs, namely the mother of the Deceased, his children and his siblings have a right to claim compensation (see *James v Jumeau* (1966) SLR 260). I have however not been provided with any authorities on the issue of quantum of such compensation.

[63] I have nevertheless tried to guide myself by previous authorities in the absence of which I would have to resort to an arbitrary award which might be deemed unreasonable. In *Ventigadoo v Government of Seychelles* SCAR (2006 -2007) 113, the appellant's arm was amputated following the occurrence of gangrene in a wound. He sued the Government of Seychelles for vicarious liability claiming a total sum of SR918, 000. His suit was initially dismissed but on appeal the Court of Appeal entered a judgment in his favour and ordered the trial court to assess damages and costs. In its judgment, the Supreme Court assessed the damages at R500, 000 with interest on the said sum at 4% per annum - the legal rate – as from the date of the plaint, and with costs. On appeal, the Court of Appeal in *Government of Seychelles v Ventigadoo* SCAR (2008 -2009)1 sustained the award but amended the last sentence of the above judgment to read in part - "as from the date of the service of the plaint until the final payment of the total award, and with costs".

[64] In *Government of Seychelles v Rose* (2012) SLR 364, when considering damages due to the relatives of a young man who had met his death in a police cell the Court of Appeal (per Msoffe JA) stated at page 370 :

> *"Our view is that since then there have been many changes in society such that there is now a need to approach the issue of damages for personal injury cases with a new, fresh and different view point and outlook. We think that although finally each case has to be decided on the basis of its own facts the time is now ripe to award damages which reflect the socio-economic situation of the day and the seriousness of the injury in question.*

In this sense, there is need to ensure that damages reflect this reality of life and hence be on the higher side in order to redress losses for personal injuries, particularly where death is involved...

Two, without prejudice to our view on One above, we note that in Ventigadoo (supra) a sum of R500, 000 was awarded for an amputated limb. That was on 25 April 2008 - vide this court's decision in SCA No 28 of 2007. The point to note here is that a sum of R500, 000 was awarded for the loss of a limb. Surely, that loss cannot be equated or compared to the loss of human life, as happened in this case. In this sense, the sum of R940, 000 awarded in this case on 25 March 2011, which was about four years or so after Ventigadoo (supra) is not manifestly excessive. It is a very fair sum in the circumstances of the case."

[65] In *Davidson and ors v Cerf and Surf* and ors (unreported) CS 41/2014, I granted a total of SR 1, 252,032.501 for the accidental death of a daughter and sister which sum included moral damages of SR 100,000 for each parent and SR75,000 for each sister of the Deceased.

My Decision

[66] In the circumstances, I find the claim by the mother of the deceased, that is the First Plaintiff, for SR 75,000 for her moral damages expressed in her Plaint as distress, anxiety, mental pain, shock and bereavement, reasonable as are the claims for SR 50,000 for each of the Fifth, Sixth, Seventh and Eight Plaintiffs who are the siblings of the Deceased for their moral damage.

[67] In regard to the respective claims of the Second, Third and Fourth Plaintiffs for SR 192,000, SR 216,000 and SR 432,000 I am uncertain as to how these claims lumped together under one head, namely for "loss of financial support at SR2000 per month, loss of love and attention, distress, anxiety, mental pain, shock and bereavement" can be assessed accurately by the Court.

[68] In *Barbé v Laurence* (unreported) CS 118/2013, I explained that there is in effect three types of damages in cases of delictual harm: corporal damage, material damage and moral damage. In explaining the differences between those three different heads of damages I stated:

> *"[16] The corporal damage or injury is the bodily injury caused to the victim... In some cases it can be the death of a person. These damages are meant to compensate for the diminution in the enjoyment of life of the victim. It includes the physical pain and suffering of the victim.*
>
> *[17] The material damage can be the destruction of things caused by the delict but also economic damage brought about by the inability of the victim to work or make a living.*
>
> *[18] The moral damage reflects the moral and/or psychological suffering, pain, trauma and anguish suffered by the victim as a result of the delict."*

[69] I add that the material damage may include economic damage or loss of revenue to the children (namely the Second, Third and Fourth Plaintiffs) during their years of dependency on their father.

[70] As early as 1968 our courts have recognised the principle that pecuniary damage may be awarded. In *Fanchette and ors v Attorney General* (1968) SLR 111 such an award for a widow was calculated on the amount the deceased normally expended for her, multiplied by a given number of years' purchase which purchase would have regard to the age of the deceased and his condition. This could be scaled down based on certain factors. For the minor children of the deceased Souyave J stated:

> *"I think that [they] are entitled to be compensated for the pecuniary loss which they may reasonably expect to suffer until the age of 18 years when they will be old enough to be able to support themselves."*

[71] I note from the evidence that the Deceased was either 29 or 30 years old when he passed away and was blind in one eye. I have not been given any evidence of the Deceased's earnings, but from what has been adduced uncontested is that he was self-employed in the field of water treatment. Nevertheless, I have to take into consideration the authorities of *Cable and Wireless v Michel* (1966) 253 and *Fanchette* (supra) that the difficulty in assessing damages does not bar them.

[72] The Schedule to the Social Security Act provides the benefit for an orphaned child at the rate of SR1, 230 monthly. The First Plaintiff confirmed that the children were receiving social security benefits. Without any evidence of the Deceased's earnings I have to make an arbitrary calculation.

[73] I take as the starting point of my calculation the fact that the average wage in Seychelles between 2013 and 2016 was SR11, 436 monthly (see National Bureau of Statistics) hence SR137, 232 annually. It is reasonable to expect that a sum of SR 1,500 (this is the amount awarded by the Family Tribunal for child support when a parent has a similar wage) would have been expended by the Deceased towards each of his children's monthly upkeep.

[74] I have not been given any indication of the fluctuation that might occur in wages for the next ten years or so and therefore have to arbitrarily adopt that same figure for my calculations. On that basis the Second Plaintiff who was 10 years old at the time of her father's death would expect to receive the sum of SR 144,000 (18,000 x 8) from which the amount received from Social Security has to be deducted (14,760 x 8 = 118,080) giving SR 25,920 as the total for pecuniary damage.

[75] On the same basis, given that the Third Plaintiff was 9 years old at the time of her father's death, I award her the sum of SR 29,160 for pecuniary damage.

[76] The Fourth Plaintiff was only 3 weeks old at the time of his father's death. On the same basis I award him the sum of SR 58,320.

[77] Insofar as moral damages are concerned for the children of the Deceased, I am of the view that the first two children would remember their father and would have ordinarily have had a close bond with him and are no doubt grief stricken and missing his love and affection. I award the Second and Third plaintiffs the sum of SR 75,000 each for moral damages in this respect.

[78] The Fourth Plaintiff will not remember his father but will now in any case be deprived of the love and affection of a father. I grant him the sum of SR 40,000 moral damages

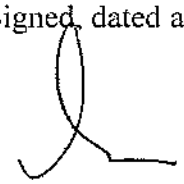
My Orders

[79] I therefore make the following orders: The Defendant is to pay

1. the First Plaintiff the sum of SR 75,000
2. the Second Plaintiff the total sum of SR 100,920
3. the Third Plaintiff the total sum of SR 104,160
4. the Fourth Plaintiff the total sum of SR 98,320
5. the Fifth Plaintiff the sum of SR 50,000
6. the Sixth Plaintiff the sum of SR 50,000
7. the Seventh Plaintiff the sum of SR 50,000
8. The Eighth Plaintiff the sum SR 50,000

[80] I therefore Order the Defendant to pay a total sum of SR578, 400 to the Plaintiffs as broken down above with costs.

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



M. TWOMEY
Chief Justice