

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 64/2012

[2017] SCSC

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BRIAN MATHIOT

Plaintiff
versus

JASON CAMILLE

1st Defendant

SEYCHELLES PUBLIC TRANSPORT CORPORATION

2nd Defendant

TREVOR ROLODZIEJ

3rd Defendant

LAXMANBHAI AND COMPANY SEYCHELLES (PTY) LIMITED

4th Defendant

Heard: 17 March 2014 -6 September 2017

Counsel: Mr. Nichol Gabriel for the Plaintiff
Ms. Kelly Kim Koon and Mr. Kieran Shah for the First and Second Defendants
Mr. Danny Lucas for the Fourth Defendant.

Delivered: 30 October 2017

JUDGMENT

M. Twomey CJ

[1] In an Amended Plaint dated 10 October 2012, the Plaintiff claimed against the four Defendants a sum of SR1, 300, 350 for injuries suffered as a result of an accident on 15 June 2010.

- [2] The Plaintiff claimed that on 15 June 2010 he had been travelling on a bus driven by the First Defendant and owned by the Second Defendant. He alighted from the bus after the First Defendant opened the automatic door and was subsequently struck by a pickup driven by the Third Defendant and owned by the Fourth Defendant.
- [3] The Plaintiff claimed that the First Defendant had been negligent in activating the door when the bus was still in operation and that the Third Defendant had failed to heed sufficiently the presence of pedestrians on the road and the Second and Fourth Defendants were vicariously liable for the acts of their *préposés*.
- [4] The hearing of the evidence in this suit was initially undertaken by my brother E. S. De Silva J but on grounds of ill health resigned from his post. Subsequently, on the agreement of the parties this Court adopted the evidence adduced and proceeded to complete the hearing of the evidence.
- [5] Sergeant Doudée testified on behalf of the Plaintiff that on 15 June 2010 he was on road patrol. He was travelling on the highway near Barclays Bank when he noticed a traffic jam and someone squatting on the side of the road. On disembarking he found the Plaintiff with his feet under his stomach and his face nearly touching the ground. He saw a bus and a pickup at the scene of the accident. He preserved the scene and called the ambulance.
- [6] On checking the door of the bus, the driver told him that the door could not always be opened properly when activated by a switch. However, when the mechanism was demonstrated to him it operated correctly. He was in charge of the investigation and subsequently charged the First and Third Defendants but was not aware whether they had been convicted. A transcript of the ruling of the Magistrates' Court dated 3 July 2013 in a traffic case in which the Third Defendant was charged with negligent driving and acquitted Exhibit D4(1) was subsequently produced.
- [7] Sergeant Doudée of the Traffic Division of the Police Force stated that the accident occurred where the highway had three lanes with the bus driven by the First Defendant in the middle lane and the pick-up driven by the Third Defendant in the lane closest to the

mountainside but he could not remember in which lane the Plaintiff was. In cross examination he stated that the Plaintiff was on the road in front of the pickup.

- [8]** Constable Eddy Racombo was a passenger on the bus driven by the First Defendant on the day of the accident. He witnessed two boys also on the bus shouting at the driver to stop at Providence. The driver did not hear them and the bus passed the bus stop. The boys continued to shout and then the driver stopped the bus in the middle of the road on the highway and one of the boys alighted and was hit by the pickup driven by the Third Defendant. A sketch plan (Exhibit 1) was drawn by the Court and the witness indicated that the Plaintiff lay next to the back door of the bus in front of the pickup in the lane next to the grass verge about fifteen metres away from the bus stop.
- [9]** Judeley Jean-Baptiste who was accompanying the Plaintiff on the bus also testified. He said that he was a childhood friend of the Plaintiff. He had travelled with the Plaintiff from the airport and they were going to Providence. On reaching their destination they had pressed the buzzer but it had not worked. They had therefore shouted three times to the driver to stop the bus but he passed the bus stop. So they shouted louder and the bus stopped about twenty-five metres ahead of the bus stop in the middle of the road. The Plaintiff alighted and was struck by a grey pickup.
- [10]** Dr. Mickey Noel, a consultant anaesthetist and critical care specialist also testified. He had cared for the Plaintiff in the Intensive Care Unit. The Plaintiff had sustained a head injury, a fracture of the left femur, a laceration on the forehead and facial bruises. He was intubated and put onto a ventilator.
- [11]** He was stabilised and referred to the orthopaedic surgeon who repaired the fracture of the femur. He was extubated a week later and was a bit agitated. He did not respond well to verbal commands. He received physiotherapy on a daily basis. His recovery was slow but he was eventually discharged to the d'Offay Ward.
- [12]** A medical report made by Dr. Caridad Hernandez confirms the evidence of Dr. Mickey Noel. Dr. Hernandez stated that the Plaintiff was transferred on 16 July 2010 to North East Point Rehabilitation Hospital for a rehabilitation programme and although unable to walk then was conscious and alert and communicating well verbally. The Plaintiff

subsequently regained ambulation and was discharged home on 6 August 2010. He did not attend follow up appointments but was readmitted for removal of plate and screws in his leg on 6 June 2014 and discharged on 9 June 2014.

- [13]** At the time of the hearing the Court was informed that the Third Defendant had passed away and that the Plaintiff would not be proceeding against him in the action filed.
- [14]** The First Defendant testified that he had been working as a driver for the Seychelles Public Transport Company (SPTC) for 27 years and that he had never had a traffic accident. On the day of the incident he was coming from Baie Lazare to Victoria and had not stopped at Providence. He had been driving at a speed of about 20 km/h on a highway on which the speed limit was 80km/h. After the bus stop and the roundabout he slowed down the bus as he heard swearing inside the bus. He then noticed a pickup passing the bus on the left and the Plaintiff being propelled forwards by the pickup. He assumed that when he had pressed the footbrake to slow down the bus the door had somehow opened and the Plaintiff had alighted from the bus. He was adamant that he had not opened the door which is operated by hand control and that he had not heard the Plaintiff asking him to stop the bus.
- [15]** A statement by the SPTC was produced in which Sergeant Doudée, Daniel Joseph and Anne Elizabeth, (the latter two being employees of SPTC) had stated that the bus had been tested on 4 July 2010 and that although it was made to slow down at intervals, the rear door did not open unless the door lever was manipulated by the driver. The First Defendant remained adamant that on the day of the incident the door did open when the bus slowed down.
- [16]** Mr. Jean-Claude Rosine testified on behalf of the First and Second Defendants. He was a supervisor mechanic in charge of the maintenance section and supervised a staff of 30 persons. He was familiar with the bus involved in the incident, a Tata bus model 1316. The doors were mechanical and operated pneumatically by a push button pressed by the driver. He explained that the doors are operated by air cylinders which are filled with compressed air. A compressor compresses air which then goes through a 4-way valve supplying the auxillary air door. He admitted that although rare there was a possibility

that the door could open without the push button being operated. He was aware that this had happened before.

[17] He gave instances which would cause this to happen: the feed air tube to the cylinder being broken or where the air condenses and produces water which would interfere with the mechanism. This would mean that if the brake was applied the door would open automatically as the air would not be going through the cylinder.

[18] In cross examination, he admitted that he did not examine the bus involved in the incident to confirm whether the air tube was faulty. He also admitted that a passenger on the bus cannot activate the push button operating the door. It was explained to the court that the mechanic who had examined the mechanism had also passed away.

[19] Walter Labrosse testified on behalf of the Fourth Defendant. The pick-up involved in the accident was tested. Apart from the bonnet being dented by the impact of the collision with the Plaintiff and a rear shackle pin in the pickup beginning to wear, the vehicle was in good working order as confirmed by the vehicle inspection report (Exhibit D4(2)). He could not explain how the Plaintiff had ended up on the bonnet of the pickup as he had not been present. He could only presume that he could have landed there after alighting from the bus.

[20] There were no closing submissions from the Plaintiff but the First, Second and Fourth Defendants made written submissions.

[21] The First and Second Defendants have submitted that the claim founded on delict necessitates the proving of three elements: fault, damage and a causal link between the two.

[22] I agree with this submission on the law. However, in *Constance v Grandcourt* (unreported) [2016] SCSC 868, I explained that under our laws a victim of a road traffic accident had the choice to proceed under Articles 1382, 1383 or 1384 of the Civil Code. Article 1383(2) deals specifically with motor accidents and 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 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.”

[23] I reiterate that a regime of strict liability operates under Article 1383(2) in that the victim of the damage must allege and establish only the causal role of the *chose* (thing - here the bus) operated by the custodian by which the damage has occurred (See *Vel v Tirant* (1978) SLR 7).

[24] In *Sullivan v Magnan* [2016] SCSC 491, I stated:

“[W]hile the victim of the damage benefits from a presumption of causality (responsibility) by the custodian, the latter may be exonerated fully or partially if he can show that there existed natural events (e.g. vis major), the intervening act of a third party or the act of the victim himself.

[25] In applying these legal principles first to the Fourth Defendant who in this case is being held by the Plaintiff to be vicariously liable for the accident, learned Counsel for the Fourth Defendant, Mr. Lucas, submitted that since the Third Defendant was acquitted by the Magistrates Court on 3 July 2013 of negligent driving, that finding estops the retrial of the issue in the Supreme Court, albeit in a civil case. That submission is not sustainable as it is not the law in Seychelles. I explained the probative distinction between a conviction and an acquittal in the case of *Marie and ors v Cafrine* (unreported) CS 64/2012.

[26] Further, 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 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.”

[27] Section 29 expresses statutorily the concept in common law which prevents 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. However, equally applicable is the distinction between criminal convictions and acquittals in subsequent proceedings. In *Marie* (supra), I provided jurisprudence on this issue to show 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.

[28] I also stated that the specific wording of the provision of section 29 also makes it clear that the probative value accorded to a conviction does not apply to an acquittal of a defendant. The Third Defendant’s acquittal in the Magistrates’ Court cannot therefore be relied on to fully exonerate the Fourth Defendant’s vicarious liability in the present case.

[29] However, I do find that on the evidence adduced in the present case the Fourth Defendant has successfully rebutted the presumption of fault against the Third Defendant and itself. A vehicle observing the traffic code to drive on the left and travelling within the speed

limit on the highway cannot be expected to foresee or see passengers alighting from a bus into its right hand path especially from the fast lane in traffic.

- [30] As the Defendant committed no fault, the Fourth Defendant's liability for the accident is not established.
- [31] I have already alluded to the strict liability regime imposed by Article 1383(2) of the Civil Code on the custodian of the vehicle being operated. I have also explained that this liability is rebuttable when it can be shown that the fault may have been due to an extraneous occurrence.
- [32] In the present case, evidence was adduced by the First and Second Defendants as to the mechanical state of the bus and the actions of the Plaintiff. There was evidence that directly after the accident the bus was examined and door was observed to open normally. This is corroborated by a statement from SPTC that when a further test was carried out "the bus slowed down at intervals during the journey but the rear door did not open [and that] the open door lever had to be manipulated by the driver for it to open."
- [33] Although, Mr. Rosine testified that on rare occasions the rear doors of such buses had opened without the door lever being manipulated by the driver if the air cylinder was faulty, he admitted that he had not examined the bus involved in the incident.
- [34] The Roman maxim *actor incumbit probatio* or "he who avers must prove" is incorporated in our laws, namely in Article 1315 of the Seychelles Civil Code. In civil cases the Plaintiff must prove on a balance of probability that a certain incident occurred. We must ordinarily balance the Plaintiff's claim against the Defendant's defence, and decide which of their versions is more likely to be true. In the present case with the strict liability regime in operation, the burden (on the same standard of proof) shifts onto the Defendants to show that the accident causing the injury to the Plaintiff happened through an event outside their control.
- [35] In *Suleman v Joubert (unreported) SCA 27/2010* the Court of Appeal quoted with approval *Re B (Children) [2008] UKHL 35* whereby Lord Hoffman using a mathematical analogy in explaining the burden of proof stated:

“If a legal rule requires a fact to be proved (a ‘fact in issue’), a Judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened” (paragraph 2).

[36] Similarly and in even clearer terms Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 stated:

"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not"(Page 374).

[37] Having weighed the evidence I am not of the view that the First and Second Defendants have succeeded in discharging the burden of proof in order to escape the strict liability regime imposed by Article 1383(2).

[38] Even if I were to believe that the door mechanism failed on the fateful day that of its own will not succeed to exonerate the First and Second Defendants as the proviso to Article 1383(2) provides that: *“Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God”*.

[39] Moreover, the First and Second Defendants have failed to establish the reason for the driver slowing or stopping in the middle lane of a busy highway. That of its own amounts to a fault on the part of the First Defendant. Whether he was disturbed by swearing or the Plaintiff’s calls to stop, as a responsible driver his duty ought to have been to move the bus to the left hand lane and eventually where appropriate onto the hard shoulder to come to a complete stop to allow the Plaintiff to alight safely. There is in any case the evidence of two witnesses that the bus came to a complete stop in the middle lane and the evidence of one of those witnesses was that of an off duty police officer who had no reason to be

partial to the Plaintiff. In the circumstances, I find the liability of the First Defendant established for which the vicarious liability of the Second Defendant is also established.

[40] The question still arises as to contributory negligence of the Plaintiff for his injuries. The cases of *Gonsalvez v Wilson* (1978) SLR 202 and *Laramé v Antoine* (1982) SLR 456 establishing the apportionment of fault under the principles of contributory negligence are instructive on this point.

[41] The evidence adduced in the present case is that the Plaintiff exited the bus in the middle of the highway onto the path of oncoming vehicles. That is not the act of a prudent man and since that fact is not rebutted in any way it establishes his contributory negligence to the accident and his injuries which I assess at 25%.

[42] I now turn to the issue of quantum of damages to be awarded in the present case. The First and Second Defendants have submitted that although the Plaintiff suffered a fracture of the left femur, diffuse axonal injury to the nervous system and a severe traumatic head injury there is no follow up report to establish his present level of disability, if any. He stated that he is able to walk and work and he has not shown how he has suffered anxiety, distress or depression. The Third Defendant has submitted that there is no evidence of any permanent incapacity suffered by the Plaintiff.

[43] It has often been stated in this court that in the absence of the Plaintiff bringing evidence and authorities to support quantum of damages the Court may only award a sum of damages, estimated to the best of its abilities. I also note that compensation in such cases is purely compensatory.

[44] I disregard the cases cited by Counsel for the First and Second Defendants prior to 2010 which I believe do not reflect the current standard of living. In *Tucker and Another v La Digue Island Lodge* [2011] SCSC 98 the Plaintiff was awarded a global sum of SR190, 000 for a fracture of the knee and permanent disability. *William v Joseph* (unreported) CS 299/2010 was decided in 2014 and the Court therein awarded SR90, 000 for pain and suffering and SR25, 000 for moral damages. In that case the Plaintiff suffered a fracture of the left wrist, injured his back and had a stiff neck which prevented him from resuming his fishing activities by which he earned his living. In *Otieno v SPTC*

[2017] SCSC 85 the Plaintiff sustained a broken left leg and continues to have a limp. He was awarded a global sum of SR180, 000.

[45] In *Jacques v Property Management Corporation* [2011] SCSC 13 the Plaintiff sustained horrific injuries resulting in tetraplegia. Specifically for pain and suffering he was awarded SR200, 000 and SR 100,000 for moral damage. In *Maria vs Valencia* [2014] SCSC 295 the Court awarded SR300, 000 for injury to the Plaintiff's coccyx and a further sum of SR200, 000 for moral damage. In that case there was evidence that her injury was degenerative and could eventually result into paralysis.

[46] In *Charles vs Constance* [2014] SCSC 229, the Plaintiff although fully recovered and in fulltime work had suffered contusion of both lungs and numerous fractures of the ribs spending fifteen days in the Intensive Care Unit as result of a road traffic accident. She was awarded the sum of SR150, 000 for her pain and suffering and SR50, 000 for moral damages. In *Low Toy v Manikon and Anor* [2015] SCSC 173, the Plaintiff was awarded SR50, 000 for pain and suffering, SR100, 000 for partial permanent disability to the right hip and SR20, 000 for moral damages. He had suffered dislocation of the right hip, fracture of the anterior column of the right acetabulum with fragment dislocation with resulting deformity of the right hip and the limitation on a range of movements and tenderness and inability to move his right foot.

[47] In *Dodin v Geers* [2017] SCSC 157 however, the Supreme Court noted that there was an upward trend in the quantum of damages to be awarded in road traffic accidents. In that case the Plaintiff suffered injuries to his eye and his knee and received the global sum of SR760, 200. There was permanent disability sustained by the Plaintiff in this case.

[48] Based on the figures in the above-mentioned cases, it would appear that award for severe injuries in the past five years have been in the region of SR250, 000 to SR500, 000 with *Dodin* this year being the highest award at SR760, 200. The trend in awards is definitely upward to reflect costs and standards of living.

[49] I believe that since no permanent disability was sustained by the Plaintiff that a fair award for his injury would be SR500, 000. I also find that the sum of SR 100,000 for

moral damages would be fair. He is entitled to the cost of the medical report for which he was charged SR350.

[50] The total award in this case amounts to SR600, 350. Since the Plaintiff's contributory negligence is assessed at 25% I order that the **First and Second Defendants** jointly and severally pay him the sum of SR450, 262.50 with costs.

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

M. Twomey, CJ
Chief Justice