

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 92/2015

[2018] SCSC 708

Winsley Mousmie

Plaintiff

versus

Hussel Boniface

Ronny Lime

Seychelles Public Transport Corporation

Defendants

Heard: 28 May-30 May 2018, Submissions 20 June 2018.

Counsel: Mr. Nichol Gabriel for plaintiff
Mr. Kieran Shah and Ms. Kelly Kim-Koon for first and third defendants
Mr. Elvis Chetty for second defendant

Delivered: 25 July 2018

JUDGMENT

M. TWOMEY, CJ

The Pleadings of the Parties

[1] The Plaintiff, a security officer, was a passenger in a pickup truck being driven by the Second Defendant from Au Cap towards Victoria on 25 January 2015 when it was involved in an accident with a bus driven by the First Defendant and owned by the Third Defendant.

- [2] In his Complaint, the Plaintiff averred that the bus driven by the First Defendant had stopped at a bus stop at Anse Aux Pins when it suddenly took off by turning to the right hand side of the road, colliding with the pickup truck which was overtaking it at the time.
- [3] As a result of the collision, he sustained severe injuries resulting in his admission to hospital for treatment during eighteen days, including three days in the intensive care unit.
- [4] He also averred that the accident was the fault of the First and Second Defendants and that the third Defendant was vicariously liable for the actions of the First Defendant. He claimed that as a result, he suffered loss and damage in the total sum of SR800, 000.
- [5] The First and Third Defendants denied that the First Defendant drove on the wrong side of the road and averred instead that while the First Defendant was driving on the correct side of the road, the Plaintiff tried to overtake him and then suddenly attempted to swerve into its correct lane to avoid colliding with an oncoming vehicle being driven in the opposite direction, and in the process collided against the front of the bus, lost control and hit against a wall.
- [6] The First and Third Defendants aver that they were not negligent, but in the alternative that they were contributorily negligent with the Plaintiff in that he failed to wear a seat belt.
- [7] The Second Defendant denies all allegations of his negligence but claims instead that he had driven his pickup correctly to overtake the bus and when he had almost completed the manoeuvre, the First Defendant suddenly and without any warning started to drive off and as result the bus collided with his pickup.

The Evidence

- [8] The Plaintiff is 51 years old and was working as a security officer at the time of the accident. He stated that on 25 January 2015 he was going to do a night shift at the Financial Services Authority. He asked the Second Defendant who is living with him, to drop him at the bus stop at Au Cap as it was raining a little. As they arrived there, the bus passed the bus stop so they decided to proceed to the next bus stop to catch the bus.

- [9] When they reached Lalla Panzi, they saw that the bus had stopped. The Second Defendant had almost passed the bus when the bus took off. He then heard a large bang and felt the pickup hit a pole. He passed out and when he came to, he heard someone calling his name. He was disorientated and didn't know who took him out of the pickup to transport him to hospital.
- [10] He spent eighteen days there including three days in the intensive care unit. He had metal rods inserted into his leg. He was then followed by the outpatients department for seven months. He showed the court his scars arising from his injuries. There are three scars: one running from his buttock, a curved scar of about 30cm and a second scar about 15 cm. A third scar of about 15cm in length on his forearm was observed by the court.
- [11] In the end he was out of work for seven months and still experiences some difficulty in mobility.
- [12] When cross examined, he admitted that the accident took place where the road had a solid line but stated that as the bus had stopped it was normal for it to be overtaken. He asserted that the bus was stationary at the bus-stop at Lalla Panzi and that the pickup in which he was travelling had nearly overtaken the bus, when an oncoming car was sighted while the bus started taking off. The Second Defendant had accelerated to complete the manoeuvre but was not at fault.
- [13] Dr. Dinayaga Moorthy Chetty testified that he was an orthopaedic surgeon and worked under Dr. Abdel Haq and produced a report he had completed on 3 March 2015. The report confirmed that the Plaintiff had been involved in a road traffic accident as a result of which he was hospitalised in intensive care for three days. He had sustained the following injuries: a head injury (fracture of the left ethmoid and maxillary wall and foreign bodies on the surface of his left eyeball and left frontal scalp); a wound to the lateral side of his left thigh with a fractured femur; and fracture of the left ulna.
- [14] These wounds were debrided and the left thigh had a nail inserted for realignment and traction done. A plate and screws were inserted for the fracture to the ulna. There was no

deformity to the face from the head injuries but there was swelling and oedema with a laceration on his upper left eye lid and diplopia.

- [15] The Plaintiff was discharged after eighteen days but when he was followed up after two weeks he was still suffering pain and an x ray revealed that the plate and screws in his ulna had broken. He was taken back to theatre, the old plate removed and a stronger one inserted.
- [16] As for his left femur, the healing was slow initially but gradually improved and it was decided not to remove the implants. He was started on intensive physiotherapy. The Plaintiff experienced some pain. There were no further follow ups after the year 2017 and no further complications reported.
- [17] The First Defendant gave evidence stating that he was a bus driver employed by the Third Defendant since June 2006. On the day of the accident he was driving a big bus, 7 to 8 meters in length, with a passenger capacity of 80 on route 6 from Baie Lazare to Victoria. He stopped the bus at Pointe au Sel near the crèche. On reaching Au Cap School, he saw some people at the bus shelter with a pickup parked in the lay by. He slowed down but no one indicated that they wanted to embark so he didn't stop.
- [18] He observed the road and continued on his journey, not stopping at the Green Estate either. On reaching the bend near Reef Estate, he heard an impact with the pickup passing by at high speed, saw it twisting on the road and hitting against a wall. As he was going at the right speed, he managed to apply the brakes and not crash into the vehicle.
- [19] He stated that it was the pickup which made impact with the bus, its rear side bumper touching with the front right side of his bumper. He observed an oncoming car about 25 metres away. He denied that he was not being observant or that he was negligent. He admitted that when the accident happened he had been working for nearly eleven hours. He did however get a 4 hour break during the shift.
- [20] In cross examination he admitted being involved in minor road traffic accidents before including accidents with third parties. He denied observing the pickup overtaking the bus he was driving and stated that if his evidence differed from his pleadings it was because his lawyer had written it.

- [21] Louina Didon, a police sergeant attached to Anse aux Pins Police Station also testified. She prepared an accident report of the incident of 25 January 2015. She stated that the report was sought by one Jeris Dogley of the SPTC. She took a statement from the First Defendant only but did speak to the Second Defendant and other police officers who did not witness the accident.
- [22] She had implied in the report (Exhibit D1 (2)) that the Second Defendant was responsible for the accident based on police officers' reports who went to the scene. She admitted that the Second Defendant had told her that the accident as reported was not correct but did not accept that the report was imbalanced.
- [23] Jude Pool witnessed the accident. He was driving south along the Au Cap road. At the bend the road after Reef Hotel, he noticed a bus coming and pickup overtaking it. He was about 25 to 30 metres from the vehicles. He could see that the pickup would not be able to complete the manoeuvre, so he stopped his car. The pickup passed too close to the bus and scraped it. He did not know whether the bus had stopped and was moving away from the bus stop but when he came across the vehicles, the bus had left the bus stop and was on its way.
- [24] He saw the damage to the vehicles but did not see the Plaintiff's injuries but knows he had passed out.
- [25] Chantal Nourrice, a security supervisor working at the Third Defendant's premises, but also a passenger in the bus driven by the First Defendant on the day also testified. She said that on the day in question she started work at 3pm. She had boarded the bus at Anse Gaulettes and was seated on the third row of seats from the back. She confirmed that the First Defendant stopped at the Au Cap bus stop but not at the next bus stop. She noticed a pickup truck overtaking the bus and being driven very fast. She suddenly heard a knock at the front of the bus. It was raining at the time. When she next looked the pickup truck had crashed into a wall on the opposite side of the road and was facing south.
- [26] She alighted from the bus and saw that a passenger in the pickup was injured. A towel was put on the passenger and she took her umbrella to shield him from the rain.

- [27] In cross examination, she said she took the bus so as to be in Victoria for her shift at 3pm. She denied that the accident happened at 5.30 pm but much earlier as she had left Anse Gaulettes at about 1.50 pm. She admitted knowing the First Defendant and said she knows him as he also resides at Anse Gaulettes.
- [28] Jovana Stephen, a Public Relation Officer with the Third Defendant stated that she was also travelling on the bus on the day of the accident. She was seated at the right side of the bus at the rear. She could not recall the last stop the bus had made but when it reached Reef Hotel a white pickup overtook it and the rear part of the pickup hit the bus. She heard the bang and saw the pickup swerve and turn around on the road.
- [29] In cross examination she admitted having spent the day with Chantal Nourrice who lives at Anse Gaulettes and that she also knows the First Defendant. She could not remember what time she had left Anse Gaulettes.
- [30] The Second Defendant stated that he was the Plaintiff's father-in-law. He had eight years' experience driving and confirmed that he was taking the Plaintiff to the bus stop on the day of the accident. The bus did not stop at au Cap School where there were ten persons waiting but instead sped past. He then followed the bus to Lalla Panzi at the Green Estate bus stop to try and catch it.
- [31] It stopped there and he put on his indicator to overtake the stationary bus. As he was overtaking the bus it started moving, so he accelerated to continue his manoeuvre but the bus accelerated as well. He was a red car on the bend of the road ahead. He was checking his mirror to see if he could get past the bus in time when he heard a large bang. He lost control of the pickup and hit a wall.
- [32] In cross examination he conceded that he was driving faster than the bus but stated he did so in order to overtake it. He admitted that the bus was driving on the correct side of the road. He also stated that both he and the Plaintiff were wearing seat belts at the time of the accident.

The Law

[33] I have summarised the law relating to road traffic accidents in Seychelles in many previous cases. With special relevance to this case is the decision in *Constance v Grandcourt* (CS107/2014) [2016] SCSC 868 (11 November 2016). I explained that the relevant provisions of the law applicable are found in Title IV, Chapter II of the Civil Code of Seychelles, more specifically in Articles 1382-1384 which provide in relevant part:

1382 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...

1383(2) 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...

1384(1) A person is liable 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...

[34] I went on to state that:

“Articles 1382 and 1383 of the Civil Code of Seychelles deal with human acts (le fait de l’homme), where liability is based on fault and which consists of damage caused by one person to another by a positive act or an omission either by negligence or imprudence.”

- [35] A defendant can, under the provisions of Article 1382, be absolved totally or partially. This is the case where there is an act exterior to his actions or where there are delictual acts of the victim.
- [36] In relation to the act of a thing (*le fait de la chose*) such as vehicles in motor accidents, Lalouette JA *The Attorney General rep. Government of Seychelles v Jumaye* (1978-1982) SCAR 348 stated that in France, liability under Article 1384 of the French Civil Code is not based on *faute* (fault) but on “objective liability independent of *faute*”. This principle of strict liability in cases of damage caused by things under the custody of persons was established by the *Arrêt Jand'heur, Cass. Ch. Réunies, 13 février 1930*.
- [37] Article 1383(2) of the Civil Code of Seychelles imported into Seychelles the principles established under Article 1384 of the French Civil Code and the authority of Jand'heur. Hence, in car accidents the victim of the damage must allege and establish only the causal role of the *chose* (thing) by which the damage has occurred. Neither statute nor case law has given a precise definition of what constitutes a direct causal relationship. The courts have therefore broad discretion.
- [38] I also stated in *Constance* that in Seychelles a victim of an accident has the choice to proceed under Articles 1382, 1383 or 1384 (supra) and liability without the need to find fault (strict liability) is imposed upon a custodian for injuries caused by an object in his custody or under his control. However, while 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.
- [39] Hence, although Article 1383(2) does not specifically provide for an apportionment of damages where there is contributory negligence, jurisprudence has established the principle in Seychelles (See *Pon Wayne v Chetty* (1971) SLR 209, *Esparon v Chetty* (1976) SLR 74).

Applying the law to the present case

- [40] The Plaintiff was a passenger in a pickup driven by the Second Defendant. Although the First and Third Defendant in their pleadings aver that the Plaintiff was not wearing a seat belt on the day in question, they adduced no evidence to that effect. Further, in closing submissions, Mr. Shah has stated that the Plaintiff must bear some responsibility for the accident as he was urging the Second Defendant to go faster so as to catch the bus. In this regard, apart from these averments there has been no evidence to this effect. I therefore do not take into account such considerations and do not find any contributory negligence on the Plaintiff's part for the injuries he sustained.
- [41] It is also clear that the evidence of the two alleged passengers in the bus cannot be relied on as their credibility was severely affected given the fact that they did not know when the accident had happened and that they were friendly with the bus driver.
- [42] It is also incredible that the bus had not stopped at any bus stop after Pointe au Sel when there were passengers at the bus stop at Anse aux Pins. I also take into account that the First Defendant was finishing a very long shift and had been on duty for eleven hours. Even if he had a break this decidedly had an impact on his driving abilities.
- [43] The police witness was not at the scene and made a report based on reports made to her, with no accident scene diagram. It leaves much to be desired.
- [44] It is not disputed that it was raining on the day in question; that the Second Defendant was trying to catch up with the bus; and that it was a particularly long bus being driven by the First Defendant. He must have been driving at considerable speed.
- [45] After listening to the evidence and observing all the witnesses, I find that the most reliable witness was the driver of the oncoming vehicle approaching Reef Hotel from Victoria, that is, Mr Jude Pool. He has nothing to gain from the case and his candour was striking. All he saw was the pickup overtaking the bus and gauged that if he didn't stop his car there would be a collision with his car by the pickup. He did not see the bus pulling out of the bus stop. He had arrived subsequent to the bus passing the bus stop and could not say if it had stopped there.

- [46] In the circumstances, I am left with no alternative but to find both the bus driver and the driver of the pickup truck responsible for the collision. I apportion their fault at 50/50. The Third Defendant is obviously vicariously liable for the acts of his *preposé*, the First Defendant.
- [47] The Plaintiff has established the causal link between the Defendants' operation of their vehicles and his injury. He suffered very serious injuries and spent considerable time in hospital. The scars left by those injuries were observed by the court. He seems however to have provided the court with some recent authorities on quantum for damages. In *Etheve v William and Mauritius Commercial Bank (Limited)* [2018] SCSC 36 SR100,000 was awarded for a right foot fracture an SR 15,000 for anxiety, stress and depression. In *Otienno v SPTC* [2017] 85, a global sum of SR180,000 was awarded a fractured leg which resulted in a limp. The court granted SR500,000 for a fracture of the left femur, diffuse axonal injury and severe traumatic head injuries in the case of *Mathiot v Camille and SPTC* [2017] SCSC1001 and a further sum of SR 100,000 for moral damages.
- [48] Mr. Gabriel for the Plaintiff has also cited the case of *Jacques v Property Management Corporation* [2011] SCSC 13. This was a case where the plaintiff had suffered horrific injuries resulting in tetraplegia and was awarded SR 1.6 million. In *Dodin v Geers* [2017] SCSC 158 an award of SR760,200 was made for a fracture of the patella which would result in difficulty climbing stairs and the knee remaining swollen and the development of osteoarthritis; and an injury to the eyelid which would continue to need regular epilation. In *Morel v Simeon* [2018] SCSC 123, a global sum of SR250,000 was awarded to the plaintiff for lacerated wounds to his face together with multiple lacerations to most parts of his body. A CT scan showed brain contusion in the frontal lobes and the left front-temporal parietal region. He also had contusion to his right lung. He was treated and hospitalised for four days.
- [49] As I have said the injuries to the Plaintiff in the present case were very serious. He was seven months out of work. He needs two separate operations on his arm. He had very serious injuries to his leg and pins inserted remain in situ. However, he seems to have made a complete recovery. I also find that he has made his claim for moral damages.

Finding and Orders of the Court

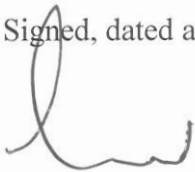
[50] In the circumstances I award the Plaintiff SR600, 000 for his injuries and SR50, 00 for moral damages. The First and Second Defendants are liable for 50% each of the global sum of SR650, 000 awarded, that is, SR325, 000 each.

[51] The Third Defendant is to pay the Plaintiff R325, 000 with interests.

[52] The First and Third Defendants are jointly and severally liable to the Plaintiff in the sum of SR350, 000 with interests.

[53] I grant the Plaintiff his costs.

Signed, dated and delivered at Ile du Port on 25 July 2018.



M. TWOMEY
Chief Justice