

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 950
CS/33/2015

In the matter between

1. UNA ESTHER
2. LIAM BRISTOL (a minor represented by his guardian UNA ESTHER)
3. MARIE-ANGE BRISTOL
4. NANET BRISTOL
5. MICHEL BRISTOL
6. JOSEPH BRISTOL
(rep. by Alexandra Benoiton)

Plaintiffs

and

1. PUBLIC UTILITIES CORPORATION
(rep. by Somasundaram Rajasundaram)
2. ERLINE BRISTOL
(rep. by Edith Wong)

Defendants

Neutral Citation: *Esther & Ors v Public Utilities Corporation & Anor* (CS 33/2015) [2019] SCSC 950 (7 November 2019)

Before: Twomey CJ

Summary: Articles 1383(1), 1384 Civil Code of Seychelles- delictual action for electrocution - responsibility for *le fait des choses* - strict liability, inert objects - non-pecuniary (moral damages) under one head only- material loss-life expectancy

Heard: March 2019 - September 2019

Delivered: 7 November 2019

ORDER

- (1) The First Plaintiff is awarded SR200,000 for moral damage and SR200,000 for pecuniary damage
- (2) The Second Plaintiff is awarded SR 200,000 for moral damage and SR300,000 for pecuniary damage
- (3) The Third Plaintiff is awarded SR150,000 moral damage and SR50,000 for pecuniary damage
- (4) The Fourth Plaintiff is awarded SR100,000 for moral damage

- (5) The Fourth Plaintiff is awarded SR100,000 for moral damage
- (6) The Fourth Plaintiff is awarded SR100,000 for moral damage

The whole with costs.

JUDGMENT

TWOMEY CJ

Background

- [1] This is a tragic case. The First to the Sixth Plaintiffs are respectively the common law widow, son, mother, and siblings of one Alex Bristol (hereinafter the Deceased) who was electrocuted and died at Pointe Conan, Mahé on 5 November 2014.
- [2] As his *ayants cause*, they sue the First and Second Defendants in delict for the First Defendant's omissions in not repositioning a high voltage electricity line at the Second Defendant's house where the Deceased had been working. They also aver inter alia that notification of the danger from the line was not made to the Second Defendant and the Deceased and that the danger was in any case not mitigated in any way.
- [3] In the original plaint before Robinson J, (later amended) the suit was prosecuted against the First Defendant only. However, the First Defendant applied on 20 September 2016 pursuant to sections 109 and 115 of the Seychelles Code of Civil Procedure to have the Second Defendant, the owner of the property, on which the Deceased was killed, joined as a defendant, which application was granted.
- [4] The First Defendant, Public Utilities company (Company hereinafter PUC) has denied liability and has averred that the Second Defendant and the Deceased neglected to heed the presence of the high voltage line and contributed by their negligence to the accident. It further avers that the Second Defendant is solely responsible for the accident and that

she had been repeatedly warned of the dangers posed by the line but had neglected to make the statutory payment for its relocation.

- [5] The Second Defendant denied responsibility for the Deceased's death and avers that the fee for relocation of the pole had been paid on 10 October 2014, but the First Defendant had neglected to relocate the line and pole despite repeated requests. She further avers that the failure of the First Defendant to timeously relocate the high voltage line was the direct and sole cause of the death of the Deceased.

The evidence

- [6] The matter was part heard by Nunkoo J, but on his departure the parties requested that I rehear the evidence. The case, therefore, was reheard, starting on 1 March 2019.

Evidence of the Third Plaintiff, Marie-Ange Bristol,

- [7] Mrs. Bristol, the Deceased's mother, related the tragic events of 5 November 2014. In relaying the incident, she stated that she had had a very strong bond with the Deceased as he was a very much planned and wanted first-born. He was an exemplary brother to his siblings and a young man who always knew what he wanted. After her husband passed away in 2011, the Deceased stepped into his shoes and was a great support to all the family members. He had been contributing SR2000 to household expenses, like his other siblings. He worked as a building contractor but also used his skills around the house for small construction and maintenance jobs. He had a son with the First Plaintiff, who only lived five minutes away. When the baby arrived, he moved in with her, but would always come to the family home in the morning to drop the baby as the witness cared for him during the day.

- [8] On the day of the incident, he brought the baby around in the morning as usual and took a lift into town with his brother, Michael. She also cared for another granddaughter. While she was feeding the two infants lunch, her two sisters-in-law arrived and immediately from their expression she knew something was wrong. She was told that the Deceased had had a small accident. She had difficulty remembering what then unfolded as when she was brought to English River Clinic and showed her son's body, she broke down. She has no recollection of the subsequent funeral arrangements.

- [9] She misses her son. He was the one she confided in after her husband passed away. She now also needs to care for her grandson financially. She has missed her son's contribution to the household. Her son had started building his home for his family and it had reached the lintels. The half built house is now a constant reminder of her son's untimely passing.
- [10] She brings the case for damages in the sum of SR200,000 against the First Defendant as a result of her son's electrocution by one of its high powered lines. She had gone with her lawyer to see Mr. Morin at the PUC, but she was dismissed and told that he would see them in court.
- [11] After the accident, she learnt that her sister-in-law had been urging PUC to move the pole near the house that caused her son's death. She was not of the view the Second Defendant, that is, her sister-in-law, was responsible for her son's death.

Evidence of the Sixth Plaintiff, Joseph Bristol

- [12] Mr. Joseph Bristol, a 27-year-old airside operations officer working for Seychelles Civil Aviation Authority, the brother of the Deceased, testified about his relationship to the Deceased. They lived in the same household and were close. They were both musicians and they played the guitar together. He looked up to his brother when their father died. He was a role model and they were emotionally very close in a tight knit family He was working as an immigration officer at the airport on the day in question when he was called by his mother, who informed him that the Deceased had been involved in an accident. He eventually met his family at English River clinic and cried when he saw his brother's body. He was released from work for the next few days. He was emotionally strained and remained in a state of depression for a while.
- [13] His brother, Michael, has since moved out. He lives alone with his mother who is trying to cope with the distress and grief caused to her. Like his siblings, he claims SR100, 000 in moral damages, although any amount of money would not be able to cover the loss of his brother.

Evidence of the First Plaintiff, Una Esther

- [14] Ms. Esther is the common law widow of the Deceased with whom she has a five-year-old son. She had been in a relationship with the Deceased since 2009. He moved in with her when they had the baby. He was good partner; they had a very close and very romantic relationship. He was good at home and very helpful with the baby. He worked as a building contractor. He contributed SR 2000 for household expenses and would give her money whenever he finished a job.
- [15] On 5 November at 9:30 am she received a call at work to tell her that the Deceased had had an accident and was at English River clinic. When she got there, she saw his sister and a nurse standing in front of the Deceased's bed. She was told he had passed away. She cried. Her son was only 11 months at the time.
- [16] She went home and could not sleep in the bedroom she had shared with the Deceased so she slept with her mother. She took time off work and spent time at the Deceased's mother's house. She could not do much for her son as he reminded her of his father each time she looked at him.
- [17] The plan had been to have a house next to the Deceased's mother's house. They never finished the house. Her son asks about his father. She was the executrix of the Deceased's estate and he had left a substantial amount in the bank which she would use for her son's upkeep. Her son now stays with his grandmother during school days and with her for weekends. He is a comfort to his grandmother.
- [18] She had attended the meeting at Mr. Morin of PUC. He showed no compassion. He said that PUC was not liable for the Deceased's death. She remembered that a week after the Deceased had passed away, the PUC moved the pole.
- [19] PUC had held the Second Defendant responsible for the death. She accepted that the Deceased had been working on the Second Defendant's house. There were letters that stated that the Second Defendant had delayed in making the statutory payment for the repositioning of the pole but she did not agree that the Second Defendant was responsible

in whole or in part for the accident. She claimed SR 600,000 on behalf of her son and SR300, 000 for her own loss from the First Defendant.

Evidence of Michel Bristol, the Fifth Plaintiff

- [20] Mr. Bristol is the brother of the Deceased and is a civil engineer by profession. He is employed by PUC. The Deceased was his oldest brother and he looked up to him. He was his role model. After their father's death, it was the Deceased who became head of the house and looked after the family financially and also in terms of the maintenance and upkeep of the family home. He had qualified as a mason but was an experienced carpenter and plumber. He assisted the Deceased with technical aspects of his work. They spent a lot of time together. It was his brother who would wake him up every morning.
- [21] On the day of the accident, the Deceased waited for him as he was going to the bank and needed a lift. He dropped him near the Savings Bank and went off to PUC for his work. Later that day, he received a call from his sister who told him that the Deceased had passed away. He was asked to come to the family home at Mont Buxton and to collect his mother to bring to hospital before telling her that the Deceased had passed away. When he got there, he met other members of the family and they were all very distressed. He believed that this mother knew his brother had died but no one had told her. They all went to English River Clinic. There, he met his brother, Joseph, who was crying. He stayed with his brother, while his mother, sister, and Una went inside. He cried and felt that the whole thing was unreal, especially so soon after losing his father.
- [22] He found out after the autopsy was done that his brother had been electrocuted. He has found it difficult to get on with his life. The Deceased's son, Liam, lives at the family home during the week and with his mother during the weekend. He assists in the boy's maintenance. During the first year when the boy was attending day care, he was contributing SR 5000 monthly and, after he went to preschool, SR 4000 monthly.
- [23] He also had a power of attorney for his sister Nanet. She had been very close to the Deceased and she missed him. She moved to Australia two years ago.

[24] He was of the view that his brother's death was caused by the overhead power line. He was claiming moral damages for himself and his sister in the sum of SR 100,000 each.

[25] He was aware that his aunt had been advised by PUC to pay the necessary charges for the relocation and diversion of the overhead line near her home. However, it was his view that the asset belonged to PUC and if they had not relocated the line they could have stopped the construction of the house at least.

Evidence of Dr. Vanessa Telemaque, Family Medicine Doctor

[26] Dr. Vanessa Telemaque testified that on 5 November 2014 she was working at English River Clinic in the Emergency Rooms when she was informed by the nurse manager that there had been a person electrocuted and to prepare for his arrival. Unfortunately, the patient arrived in a body bag. She confirmed that he was dead. The time of his confirmed death was 11.35 am.

Evidence of Dr. Paresh Bharia, pathologist

[27] Dr. Bharia was asked to produce and interpret the notes of the pathologist, Dr. Sandra Aguilla, who had carried out a post mortem examination on the body of the Deceased and who has since left Seychelles. The cause of death is entered as visceral burning injuries, pulmonary and hepatic injuries consistent with electric shock. Both hands were clenched, and there were skin lesions consistent with burning aspects. In electrocution cases, there is a point of entry and a point of exit as was present on the body of the Deceased. The exit point is normally a part of the body closest to the ground. In this case, it was the left knee, whereas the entry point was his fingers.

The First Defendant's Evidence

Evidence of Dr. Daniel Assan, electrical engineer

[28] Mr. Assan has worked for PUC since December 2004 as an electrical engineer. Currently, he is the Transmission and Distribution Manager in the Electricity Distribution Section.

[29] He was aware of the incident that caused the death of the Deceased. There had been an application for a high voltage land diversion at Pointe Conan by the Second Defendant.

Normally, when such an application is made, a survey is carried out and the work for the relocation costed. This involved an 11,000 voltage line (the distribution line), which also bore the conductor, and the low voltage line of 240 volts (the domestic line) as well. These wires are live.

[30] A letter was sent by PUC to the Second Defendant on 27 October 2011 with the cost of relocation quoted at SR 26,097.50. This was revised in a further letter on 11 June 2014 with the quote for the works revised to SR 19,002.50, and on 1 October 2014 to SR 12,900.13. The amount was paid on 10 October 2014.

[31] He visited the site of the accident with the health and safety manager. The house under construction was one storey. The line was one metre away from the house. He recommended that the construction work stop as walking into the house close to the live wire was risky.

[32] He had previously received a letter from the Planning Department notifying PUC about the application for planning permission for the house. In the end, the relocation was carried out after the death of the Deceased. In cross-examination, he stated that relocation normally occurs about a month after an application is made, but it would depend on the difficulty of the terrain. In this case, the line was moved on 13 November 2014 after the death of the Deceased on 5 November 2014. He was of the view that moving a pole a month and three days after payment for its relocation was made is a reasonable time period.

Evidence of Mr. Said Abdelhaq Salih, Development Control Officer, Seychelles Planning Authority

[33] Mr. Salih has worked for the Planning Authority for the past five years. As a Development Control Officer, he appraises new planning applications and monitors approved planning applications. He also investigates different complaints in relation to developments being undertaken. He was aware of a planning application, numbered DC/322/07 submitted by Mrs. Erline Bristol in May 20017. As usual, the application was circulated to the different concerned agencies, namely the Department of the

Environment, the Land Use Section of the Planning Authority, the Transport Division and the Water and Electricity Divisions of PUC.

[34] A letter was received from Mr. Singh, the Managing Director of PUC, who pointed out that high and low voltage lines crossed the proposed construction site and a safe distance of 3 metres would have to be maintained between the existing electricity lines and the development. It asked that the letter be copied to the Second Defendant.

[35] The project was approved for commencement but he was not aware that the condition imposed by PUC was respected. He visited the site on 25 March 2009 and submitted a report on 2 April 2009, in which he noted that the Second Defendant's agent, Mr. Pragassen, who had submitted the construction plans, had not indicated the overhead power cables crossing the site. He stated that the electricity supply to the existing building needed to be disconnected before undertaking any extension works. The letter was copied to the Applicant. He was unaware whether his recommendations were carried out.

[36] In cross-examination, he admitted that the planning approval letter did not list as a condition the relocation of the electricity line despite the adverse comment by the PUC. He was aware of only one visit carried out by the Planning Authority after the commencement of the works and that was in relation to a wall on the site. He confirmed that he received nothing from PUC to stop the works.

Evidence of Mr. Anil Kumar Singh, Consultant to the PUC.

[37] Mr. Singh confirmed that he had responded to the application for a line diversion at Pointe Conan on property belonging to the Second Defendant. The matter had been pending since 2011 as the Second Defendant had been unable to pay the cost of the works and the cost was revised. A number of meetings had been held with the plot owner. The original quote for SR 26,097 sent in 2011 had been revised to SR 19,000 in 2012 and subsequently to SR 12,900.

[38] The line was diverted in November 2014 after a fatal accident on the site. He denied that it was the fault of PUC as the line had been there for a long time and the accident

happened as a result of the Deceased touching the line. He also confirmed that PUC follows up on the recommendations they make to the Planning Authority by making a first site visit and then another on completion of the works. The monitoring of PUC's recommendations is made by the Planning Authority. They therefore do not know if their recommendations are being respected until at the completion of the works. PUC was not aware that construction was going on in this case.

Evidence of the Second Defendant

- [39] Mrs. Erline Bristol testified that the Deceased was her nephew. She had picked him as her contractor as he was building his own house at the time and the money he earned from her house construction would enable him to build his own house.
- [40] She had purchased the land in 1982 and moved into her home in 1984. At some point in time after moving into her home, there was a fatal accident on the main road when a truck hit the main electricity pole. As they replaced the pole on the road which had broken, she asked them to also remove the pole on her land, which was close to her house. It was not done, but after negotiations with the engineer they relocated it to a higher point on her land. She carried on fighting PUC on this issue. She foresaw a tragedy and begged Mr Singh to move the pole. When the construction was going ahead she took a photo and brought it to Mr. Singh but nothing was done. She wrote to various persons. They had first quoted her SR 97,000 to move the pole. In 2014 they changed the cost to SR 26,000 and then eventually to SR 12,900. She borrowed the money from the Development Bank of Seychelles in October 2014 and paid them. She was promised that things would move quickly then for the relocation of the pole. But nothing happened.
- [41] On the Tuesday before the incident, she discussed the building work with the Deceased, who gave her a list of quantities and materials necessary to finish the construction. He had told her that he would not be coming the next day. He last spoke to her on the day of the incident, a Wednesday at around 8 or 9 am in relation to the purchase of ceramic tiles. He was then supposed to go to the bank. She received a phone call about his death at around 10 am.

[42] She had paid SR 12,900.13 for the removal and relocation of the pole on 10 October 2014 from money obtained from a loan from the bank. After paying she would phone often, sometimes every two days, asking the secretary to the CEO of PUC to ensure that the relocation was done. In the end it was only done after the Deceased passed away. She felt she had done everything in her power to have the pole moved and did not feel responsible for the Deceased's death.

[43] In cross-examination, she agreed that the overhead cables were a visible danger but could not recall if she had asked the Deceased not to proceed with the works. She had received the invoice of PUC for the relocation of the pole on 1 October 2019 and had paid it on 10 October 2019. She disagreed that she had refused or delayed in paying the bill. She just could not pay the bill. She also disagreed that she had failed to warn the Deceased about the potential danger. She did not know why he went there on that day. He was not supposed to be there. She was very distressed about what had happened.

Closing submissions

[44] The Plaintiffs have relied on Article 1384 of the Civil Code and the authorities of *De Commarmond v Government of Seychelles and anor* (1983-1987) 3 SCAR (Vol 1) and *Cooposamy v Delhomme* (1964) SLR 82 for the proposition that a person is liable for the damage caused by things in his custody, with custody having the meaning of a thing a person would normally have the use, direction and control of. They submit that in the circumstances the First Defendant was, and continues to be, the owner and custodian of all poles and electricity lines in the country. The point is underscored by the fact that permission of the First Defendant had to be sought and a fee paid to the First Defendant for the relocation of a pole.

[45] It is a result of their lack of mitigation of the risk posed to the public that the Deceased passed away. They submit that the uninsulated lines close to habitation and the PUC's refusal to remove the pole even after payment are the sole reasons for the death of the Deceased.

[46] As regards the contributory negligence of the Deceased and /or the Second Defendant, although this is alluded to in the evidence there is no such pleading in the First

Defendant's defence and consequently is not a matter the court can entertain. In the Court of Appeal case of *Vandagne Plant Hire Ltd v Camille* [2015] SCCA 17, it was emphasized that contributory negligence should be first raised as an issue in the pleadings before the Court may pronounce itself thereon.

[47] In any case, they submit the First Defendant's liability is absolute since the Plaintiffs have been able to establish damage and causation between damage and the thing that caused it, and the First Defendant has not been able to rebut the presumption to prove that the damage was solely due to either of three intervening factors, namely that the damage was as a result of the act of the victim, the act of a third party, or by *force majeure*. With regard to the damages claimed, the amounts applied for material damages bear out what would have been expected in the circumstances given the employ of the Deceased and his maintenance of his partner, child and mother. Both the First and Second Plaintiffs would have expected to have been maintained by the Deceased: The First Plaintiff has claimed SR3000 per month for a period of eight years, which is based on the contribution that the Deceased used to make to the household expenses; the Second Plaintiff has claimed the sum of SR 3000 for seventeen years until the age of maturity.

[48] With regard to corporal damages, the Second Plaintiff as the Deceased's *ayant droit* claims SR 200,000 for the pain, suffering and distress suffered by the Deceased before his death.

[49] In respect of moral damages, the First and Second Plaintiff also claim damages for loss in relation to life expectancy of the Deceased as his partner and his parent respectively and in the sums of SR200, 000 and SR 300,000 respectively. The Third Plaintiff claims SR200, 000 for the loss of her eldest son and the Fourth, Fifth and Sixth Plaintiffs SR150, 000 each as the siblings of the Deceased.

[50] The First Defendant has submitted that that the Second Defendant is solely responsible for the death of the Deceased and /or alternatively the Deceased himself for his negligent acts on the site of construction. In its submission it states that the Deceased had been the building contractor on the site for a number of years and was well aware of the overhead high power lines and had even discussed the same with the Second Defendant who had warned him and told him of the imminent relocation of the electricity pole.

[51] With regard to the claim that its delay in relocating the pole was the cause of the Deceased's death, the First Defendant submits that it is the Second Defendant's delay in paying the fee for the relocation of the pole that is to blame.

- [52] Further, they submit that pursuant to Article 1384 (2) of the Civil Code, the Second Defendant as the Deceased's employer is liable for the damage caused by the act of persons for whom she is responsible. It relies on the authority of *Adolphe v Donkin* (1983) SLR 125 for the proposition that an employer is bound to provide a safe system of work for its employees.
- [53] The Second Defendant has also relied on Articles 1382 (1) and 1384 (1) for the fact that she is not liable for the Deceased's death. She submits that Article 1384(1) after the *Arrêt Teffaine* is restricted to dangerous things and that there is a presumption of *faute* on the part of the custodian of the dangerous thing (*la chose*) causing the damage unless he can prove that an external factor caused the damage. The custodian of the thing cannot be exonerated solely by the negative proof of absence of impudence or negligence on his part. The only exception to this principle would be in the case of intervening factors, namely that the damage was as a result of a *cas fortuit* or *force majeure*.
- [54] In defining custodian, she submits that the custody of the thing means either that the person who is the owner is also its custodian or the person who has its effective control regardless of ownership is the custodian.
- [55] With regard to *le fait de la chose* (the act of a thing), the Second Defendant submits that doctrine dictates that in order for its custodian to be held liable the Plaintiff has either to prove that the thing played an active role in the damage caused to the victim or in a case of an inert object, the victim must prove that the damage was caused by an abnormality due to its structure, function or position.

[56] Relying on the above principles, the Second Defendant submits that as it is not disputed that the Deceased died as a result of the electrical pole on the Second Defendant's land and that both Defendants were aware of the danger posed by the pole to life, in the circumstances whichever principle of custody is presumed, it is accepted that the custodian of the pole is the First Defendant. The pole for which a fee was payable for its relocation was in an abnormal position and played an active role in the death of the Deceased. It is therefore the First Defendant who is liable for the damage it caused and that there are no external factors to allow it to shift the blame to the Second Defendant.

The issues for the court

[57] The issues to be determined by this Court are:

(7) *Who or what caused the death of the Deceased?*

(8) *Are damages due to his ayants cause?*

(9) *If so, how much?*

(1) Who or what caused the death of the Deceased?

[58] I find it established from the evidence that the Deceased passed away as a result of being electrocuted by coming into contact with a high voltage line over the Second Defendant's land. This fact has not been disputed by any of the parties. What is being disputed is who was responsible for the Deceased coming into contact with the high voltage line that caused his death.

[59] While the Plaintiffs and the Defendants have been at pains to explain doctrine and principles regarding the consequences of being the custodian of a *thing*, in this case the high voltage line or the electricity pole, I do not see that the First Defendant has disputed that the electricity line and pole was its property. In any case, it must be noted that section 5(a) of the Public Utilities Act provides the functions of the First Defendant as inter alia the supplier of electricity to the Seychellois public.

Further, section 70 of the Energy Act 2012 provides in unequivocal terms that:

*“Any electrical supply lines, meters, fittings, works
or apparatus belonging to an operator and lawfully placed or*

*installed in or on any premises whether or not it is fixed to any part of such premises shall-
(a) remain the property of, and may be removed by the operator...”*

[60] However, while it is unequivocal that it is the First Defendant who was the owner and therefore custodian of both the electricity pole and high voltage line that caused the Deceased’s death, the issue that remains to be decided is whether, as the owner and custodian of these *things*, it caused the death of the Deceased.

[61] Article 1384 on which the all the parties have relied provides in relevant part:

“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.” (emphasis added).

...

Article 1383 (1) provides:

“1. Every person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence.”

[62] In explaining the relationship between these meagre articles of the Civil Code which set out the French law of delict, Professor Edward Tomlinson explains:

“Article 1382 proclaimed the fault principle: one must make reparation for injuries caused by one's fault. Article 1383 then defined fault to include negligence. The remaining three articles imposed liability based on the defendant's relationship to some other person or thing. Article 1384 defined those situations where one person is liable for injuries caused by another (e.g., by one's child, employer or pupil), and articles 1385 and 1386 imposed liability for injuries caused by one's animals and by the collapse of one's buildings. The original texts thus adopted a dual approach: liability was either fault-based or based on the defendant's relationship with the injury-causing person or thing” (Edward A. Tomlinson, Tort Liability in France for the Act of Things: A Study of Judicial Law-making, 48 La. L. Rev. (1988).

- [63] It must also be noted that while the Civil Code made specific provision for liability by the owner of some *things*, such as damage caused by the operation of motor vehicles in Article 1383(2) or animals in Article 1385 and buildings in Article 1386, there are other unenumerated *things* that have the possibility of imposing liability based on the defendant's relationship with them.
- [64] In a series of cases in France, the courts held the custodian or guardian of *things* responsible for damage they caused under Article 1384-1. In the first instance, when a tugboat's boiler exploded and killed an employee (Cour de cassation chambre civile 16 juin 1896, *arrêt Teffaine*), secondly when an uncovered shipment of resin caught fire and destroyed adjoining property (127. Cass. civ., 16 Nov. 1920, 1920 D. Jur. I 169 (note Savatier), 1922 S. Jur. I 97 (note Hugueney) and thirdly, when a truck driven by a department store's deliveryman ran over a young girl (*Jand'heur v. Les Galeries Belfortaises*, Judgment of 13 fevr. 1930, Cass. ch. reun.D.1930.1.57 note Ripert, S.1930.1.121 note Esmein) the owners and custodians of these *things* were held responsible.
- [65] In the Seychellois case of *The Attorney General rep. Government of Seychelles v Jumaye (1978-1982) SCAR 348*, Lalouette JA stated that in France, liability under Article 1384 was not based on *faute* (fault) but on “objective liability independent of *faute*”. Hence, in such cases, the victim of the damage had only to allege and establish the causal role of the *chose* (thing) by which the damage has occurred. Otherwise, he benefits from a presumption of causality (responsibility) by the custodian. The custodian of the thing may be exonerated fully or partially only 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 leading to the accident.
- [66] In applying these principles to Seychellois law, the first sentence of Article 1384 constitutes the legal basis of a general and autonomous strict liability for all things. In such cases, the claimant must only prove that the *thing* caused him damage or an injury under Article 1384. Under that provision, the person who is the custodian of the *thing* is liable unless he can prove liability by an act exterior to the thing in his custody.

“Custody” is defined by case law as “powers of use, control and management of the thing” (*Connot c Franck* Ch reun 2 Dec 1941, S 1941 I 217).

- [67] I am therefore in agreement with the Plaintiffs' and Second Defendant's submissions on this point. Having found therefore that the First Defendant, the PUC, was the custodian of the pole and high power voltage line that caused the death of the Deceased, the First Defendant can however be partly or totally exonerated if it can show that there was an intervening act, either by a third party or the act of the victim himself leading to the accident.
- [68] The First Defendant in its Amended Defence has pleaded that the Deceased and /or the Second Defendant were contributorily negligent and "invited risk jointly and severally themselves, resulting in the accident." It has specified that the Deceased ought to have taken note of the live high voltage electricity line and that the Second Defendant should not have allowed work on her land before the line had been relocated.
- [69] On the other hand, as I have stated, the Second Defendant has submitted that by making payment to have the pole repositioned, there was a recognition by the First Defendant that the pole was in an *abnormal* position and it behoved the First Defendant to move it and, in its failure to do so, that solely occasioned the death of the Deceased.
- [70] There is no evidence adduced as to how the Deceased was electrocuted. I cannot therefore find that he contributed negligently to his own death. He may, for instance, have tripped while walking and carrying an object that came into contact with the line. The First Defendant has also submitted that the Second Defendant exposed the Deceased to the risk of electrocution by permitting the building work to go ahead when the house was so proximate to the dangerous electricity line. I cannot make this finding in the absence of evidence that she gave him instructions to work near the line.

[71] There is another element in this case which is a cause for concern and has led the Court to further consideration. The Second Defendant did everything in her power to have the pole moved. She negotiated the price of repositioning the pole over a decade so that she could afford it. I am in this respect unable to agree with PUC that it is the owner of the land who should have the responsibility for moving dangerous high voltage lines, which are its property. I would agree that where a landowner for aesthetic reasons requires the repositioning of a pole that poses no danger, the cost for that repositioning should be borne by the landowner. However, I cannot agree that PUC should pass the cost of repositioning dangerous high power lines and poles onto landowners on which they are situated. As custodians and guardians of the *thing* that, by reason of its very nature, poses a risk to persons, it is PUC's responsibility to ensure that the *thing* complies with health and safety guidelines. The logic of this argument is supported by the fact that impecunious landowners remain exposed to risks that pecunious landowners otherwise would not, as the latter would have the means of paying for the relocation of a dangerous line or pole.

[72] I endorse the Second Defendant's submission on the principle that when an inert thing (the electricity) has an 'abnormal' facet (its positioning) its guardian is liable for damage it causes. Hence, while strict liability is the general rule for the operator of moving objects, with respect to inert things, a guardian is subject to a presumption of responsibility for damage caused by inert objects, which can be rebutted only if they can prove that the accident could neither have been foreseen nor avoided. In such cases, the plaintiff has to prove that the thing that caused damage would not have done so if its positioning had not been abnormal (see 6 Civ (2) 19 March 1980, JCP 1980 IV 216, D 1980 IR 414).

[73] In addition to the abnormality of the position of the pole, the Second Defendant is also exonerated of responsibility given the abnormality of the *structure* and *function* of the high voltage line. In the case of *Oxygène Liquide* Civ 2ème 5 janvier 1956, an action was brought pursuant to Article 1384(1) when a metallic bottle of liquid oxygen exploded and caused injury to several workers after having been transported by rail and then collected by a lorry for delivery. The French Court of Appeal found the injured workers transporting the bottle liable for their own injuries since in having the bottle in their custody they also had its supervision and control, but the French Cour de Cassation overturned the decision finding that:

“La responsabilité du dommage causé par le fait d'une chose inanimée est liée à l'usage ainsi qu'au pouvoir de surveillance et de contrôle qui caractérisent essentiellement la garde. A ce titre, sauf l'effet de stipulations contraires valables entre les parties, le propriétaire de la chose ne cesse d'en être responsable que s'il est établi que celui à qui il l'a confiée a reçu corrélativement toute possibilité de prévenir lui-même le préjudice qu'elle peut causer. En conséquence doit être cassé l'arrêt, qui dans l'accident occasionné par l'explosion en cours de transport d'une bouteille remplie d'oxygène comprimé, déboute les victimes de leurs actions intentées en vertu de l'article 1384 alinéa 1er du Code civil contre la société propriétaire et expéditrice de la bouteille, au motif que seul celui qui a la garde matérielle d'une chose inanimée peut être responsable de cette chose, alors que les juges du fond devaient, à la lumière des faits de la cause et compte tenu de la nature particulière des récipients transportés et de leur conditionnement, rechercher si le détenteur, auquel la garde aurait été transférée, avait l'usage de l'objet qui a causé le préjudice ainsi que le pouvoir de surveiller et d'en contrôler tous les éléments.”

[74] Hence, the court ruled that material custody of the *thing*, in this case by the workers, did not extend to its effective custody in the sense of having the use of it and power to supervise and control it. Effective custody of the bottle of oxygen remained with the company, the manufacturer and transporter of the bottle of liquid oxygen.

[75] I find similarly in this case that although the high voltage line and electricity pole werewerfe on the property of the Second Defendant, she had no control or effective custody of them and could not be responsible for the consequences of damage they caused. The custodian of the pole and line being PUC, it alone was wholly responsible for any consequences arising out of their position, structure and function and the damage they caused.

[76] The answer to the first question posed, therefore, is that the First Defendant was wholly and solely responsible for the death of the Deceased.

(2) Are damages due to the Deceased's ayants cause?

[77] The Plaintiffs are respectively the common law widow, the son, the mother and the siblings of the Deceased. The First Defendant has averred that the First Plaintiff is not the legal heir of the Deceased and cannot claim any damages in this respect.

[78] I cannot agree with the submission. The case of *Joanneau v Government of Seychelles* (2007) SLR 99 has long established that the surviving common law spouse can claim compensation for moral damages as well as for the loss of maintenance and support on the death of her partner.

[79] All the Plaintiffs acquire a right to damages as a result of their connection with the Deceased as his immediate relatives (*Fanchette v AG* (1968) SLR 111, *Camille & Others vs Mare De Sergio* (SCA 3 /2003) [2003] SCCA 2 (05 December 2003). With regard to their claims in general, Sauzier J in the case of *Elizabeth v Morel* (1979) SLR 25, cited *Le Tourneau*, *La Responsabilité Civile* 2^e Edition, para 171, 172, 173 and 174 – stating that:

“In law, the heirs of a deceased are entitled to claim in that capacity, damages for prejudice, material and moral, suffered by the deceased before and until his

death and resulting from a tortious act whether he had, or had not commenced an action for damages in respect of the tortious act before his death, provided he had not renounced it. When death is concomitant with the injuries resulting from the tortious act, the heirs cannot claim in that capacity and may only claim in their own capacity as in such a case, the cause of action of the deceased would not have arisen before he died.”

[80] I find that in the present case, the claim has been rightly brought by the Plaintiffs in their own capacity for the pain and grief they have themselves suffered as a result of the Deceased’s death. No evidence has been adduced to show that the Deceased survived for any length of time before his passing and I cannot therefore award any damages for pain, distress or anxiety he may have suffered before his death as claimed.

3. How much damages are due to the Plaintiffs?

[81] Damages in delict such as the present case are purely compensatory. Article 1149 of the Civil Code provides in relevant part:

“2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.”

[82] In *Government of Seychelles v Rose* (2012) SLR 364, Msoffe JA stated:

“It is generally accepted that damages in [...] death cases are designed to compensate for losses resulting from the death of a family member. Of course ... whatever sum of money is awarded as compensation for the loss of a loved one, really the sum will never heal the loss of a loved one because once human life is lost it can never be returned or paid back.”

[83] He also went on to state the Court of Appeal’s approach to damages:

“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 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.”

- [84] This will be one of the principles I bear in mind in assessing the quantum of damages in the present case. Life is precious and the death of a loved one particularly hard to bear. Damages awarded must reflect this fact.
- [85] In *Barbé v Laurence* (CS 118/2013) [2017] SCSC 408 (17 May 2017), this Court explained that there are three types of damages in cases of delictual harm: corporal damage, material damage and moral damage. Corporal damage or injury is the bodily injury caused to the victim. In the present case, it is the death of a person and would have included the physical pain and suffering of the victim had evidence been adduced that he survived his injuries before death.
- [86] 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.
- [87] The moral damage reflects the moral and/or psychological suffering, pain, trauma and anguish suffered by the Plaintiffs as a result of the delict.
- [88] As I have previously stated, it has become a habit of late in pleadings to express the moral damages under various heads. That is not correct - non-pecuniary damages should be expressed under one head. In *Adonis v Ramphal* (2013) SLR 387 *Egonda-Ntende CJ* quoted Dickson J in the Quebecois case of *Andrews v Grand & Toy Alberta* [1978] 2 SCR 229 that:

“It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one’s expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that the losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses (p. 264).

- [89] I am of the firm view that pain, suffering, anxiety and distress – all non-pecuniary losses –should be recovered under one head only - moral damage.
- [90] In *Davidson and ors v Surf and Cerf Properties and ors* (unreported) CS 41/2014, following *Government of Seychelles v Rose* (2012) SLR 364, I stated that a departure from small awards was justified and awarded moral damages SR 100, 000 for each of the Deceased’ parents. That award was made based on the fact that only that amount had been claimed.
- [91] In the present case, the First Plaintiff, the Deceased’s partner, has claimed SR 300,000 globally for her moral damages, but also for the loss of the Deceased’s contribution to the household and a further SR 200,00 in relation to his life expectancy. In the claim for moral damages, a non-pecuniary loss is mixed up with a claim for pecuniary loss. This is confusing.
- [92] With regard to moral damages, her testimony of the pain and distress she suffered as a result of the loss of her partner was not contested. Her grief was clear to everyone in court. She described a loving and romantic relationship with the Deceased, her happiness as the mother of his baby and the excitement of the prospect of building a home together. I award her SR200, 000 for moral damage.
- [93] With regard to material loss, that is the economic loss she has suffered as a result of the Deceased’s contribution to the household, I accept her uncontroverted evidence that he was contributing SR 3000 per month. The Deceased was thirty-four years of age when he died and was a building contractor. She has claimed SR 3000 monthly for eight years. I am satisfied that the sum of SR 3000 per month for eight years is reasonable and justified and would have awarded a further sum of SR 288,000 in total for the loss of this contribution to the household. However, I find that claim duplicated under a different head in the Plaint, that is, under SR 200,000 for “loss suffered in relation to life expectancy of concubine spouse”.

- [94] Loss from life expectancy or loss of expectation of life is explained in *Fanchette and Ors v Attorney General* (1968) SLR 111 as the material damages or pecuniary loss suffered by the surviving spouse assessed on the amount the Deceased normally expended on the survivor multiplied by a given number of years purchase, which purchase should have regard to the age and wealth of the Deceased. This should then be scaled down to take into account contingencies, such as the surviving spouse's possibilities of remarrying. The same approach is adopted for children, but the number of years' purchase should be related to the period of time during which the children might reasonably have expected the deceased parent to have supported and maintained them.
- [95] However, in *Hardie v Costain Civil Engineering* (1972) SLR 74, Sauzier J stated that the heirs of a deceased cannot claim for loss of his life expectancy. In *Chang Yune v Costain Civil Engineering* (1973) SLR 259, the court again grappled with the assessment of future loss of earnings and referring to the Mauritian case of *Jahul & ors v Bangard* (1938) MLR 255, found that the trial judge has complete latitude as regards the fixing of such damages and adopted the English multiplier multiplicand assessment of such damages. However, in a number of cases, *UCPS v Mark Albert* (unreported) SCA 19/1994, *SACOS v Gustave Fontaine* (unreported) SCA 41/ 1997, *David v Government of Seychelles* (2008) SLR 46 it was held that the multiplier-multiplicand method was not appropriate to calculate the prospective financial loss of a deceased in relation to the maintenance of his family as it was dependent on too many contingencies. In *Banane v Government of Seychelles* (2011) SLR 271, an arbitrary sum of SR20, 000 was awarded to the deceased's father, the family member with whom he resided. The deceased in that case was a 26-year-old plumber and had contributed SR1000 to SR1200 to the household expenses.
- [96] There is therefore no uniform or consistent approach in Seychelles with respect to loss resulting from the life expectancy of a deceased. I must therefore follow the principle that the trial judge has complete latitude in calculating such damages. The First Plaintiff has however claimed twice for pecuniary damages arising out of the death of the Deceased – for loss of contribution to the household and for loss suffered in relation to his life expectancy. I cannot grant the award twice. I find that the sum of SR 3000 monthly

claimed for eight years was not contested and reasonable in the circumstances given the possibility of her finding another partner. I therefore award her the sum of SR200, 000 under that head as that was the maximum claimed.

[97] With regard to the Second Plaintiff, the minor infant son of the Deceased, he is represented by his mother and guardian, the First Plaintiff who claims a global sum of SR 600, 000 for moral damages and loss of dependency and another SR 300,000 for loss suffered in relation to his father's life expectancy. The same difficulties I have expressed in relation to this claim with respect to the First Plaintiff's claim apply to the Second Plaintiff's pecuniary loss.

[98] With regard to his pecuniary loss, I have no means of computing this loss without any evidence being brought. I therefore make an arbitrary award of SR 300, 000, which I find reasonable in the circumstances.

[99] With regard to his non-pecuniary loss, he has without doubt suffered grief, pain and distress. He will have to live without the love and tenderness of his father. I therefore award him SR 200, 00 for moral damage.

[100] The Third Plaintiff, the Deceased's mother, has claimed SR 200,000 globally for moral damage, but also for the loss of his contribution to the household. She has not particularised these claims. A child predeceasing his parent must be very painful and the distress, grief and anguish of the Third Plaintiff was plainly visible in court. I am of the view that SR 150, 000 is a reasonable sum to award to her for moral damage and SR 50,000 for pecuniary loss.

[101] The Fourth, Fifth and Sixth Plaintiffs are the siblings of the Deceased and testified in respect of the closeness they had with him and their grief at his passing. The evidence suggests a close-knit family and I have no doubt that the Plaintiffs suffered moral damage. I award them SR 100,000 each.

[102] I dismiss the case against the Second Defendant for the reasons I have explained.

[103] Ultimately, the following awards are ordered against the First Defendant:

- (1) *The First Plaintiff is awarded SR200,000 for moral damage and SR200,000 for pecuniary damage;*
- (2) *The Second Plaintiff is awarded SR 200,000 for moral damage and SR300,000 for pecuniary damage;*
- (3) *The Third Plaintiff is awarded SR150,000 moral damage and SR50,000 for pecuniary damage;*
- (4) *The Fourth Plaintiff is awarded SR100,000 for moral damage;*
- (5) *The Fifth Plaintiff is awarded SR100,000 for moral damage; and*
- (6) *The Sixth Plaintiff is awarded SR100,000 for moral damage*

[104] The whole with costs.

[105] Finally, although it was not raised in the pleadings, for the sake of completeness and in order to avoid the repetition of such tragic events, I am duty bound to make the following observation. PUC has a statutory obligation to ensure the safety of its electricity installations under the PUC Act and the Electricity Regulations. With respect to the present case, Dr. Daniel Assan, PUC's own electrical engineer, testified that an 11,000 voltage line was one metre away from the Second Defendant's house. Regulation 26 provides that the height from the ground of any overhead conductor or earth of wire or auxiliary conductor at any point on the span at a temperature of one hundred and twenty-two degrees Fahrenheit shall not, except overhead with the consent of the Chief Electrical Inspector, be less than 19 feet (5.8 metres) over a main road height for an 11,000 voltage line. The regulation also states that where it is proposed to erect a building subsequent to the installation of the high voltage line, the work may not commence unless and until an electrical inspector has certified that neither during nor after the execution of the work will the overhead supply line be accessible. PUC's witness testified that this was raised with the Planning Authority in the present case. However, this was neither communicated to the First Defendant nor at the very least made a condition for planning permission. Even more disturbing is the fact that the distance between the line and the house even before the vertical extension may well have been less than the clearing distance stipulated in the regulations. This was an accident waiting to happen.

[106] I therefore direct that a copy of this decision is served personally on Mr. Morin of PUC.

Signed, dated and delivered at Ile du Port on 7 November 2019

Twomey CJ