SUPREME COURT OF SEYCHELLES

Reportable
[2023] .....
CS87/2018

In the matter between:

DONALD CAMILLE **Plaintiff**
(rep. by S. Rajasundaram)

and

WIND FRED JOSEPH JEALL ROSE **Defendant**
(rep. by Karen Domingue)

Neutral Citation:	*Camille v Rose* (CS 87/2013) [2023] ..... (14th December 2023).
Before:	Pillay J
Summary:	Road Traffic Accident – Damages for Injuries – Cumul d'indemnites
Heard:	23rd October 2020, 14th December 2021 and 20th March 2023
Delivered:	14th December 2023

ORDER

[1] Judgment is entered in favour of the Plaintiff against the Defendant in the sum of SCR 95, 000.00

[2] Costs are awarded to the Plaintiff.

JUDGMENT

PILLAY J:

[1] The Plaintiff seeks an order against the Defendant directing him to pay the Plaintiff the sum of SCR 1, 000, 000.00 as well as the costs of the suit.

[2] The undisputed facts on the pleadings are as follows:

1. The Plaintiff at all material times was a resident of La Digue Island.
2. The Defendant on 23rd October 2015 at around 3.30pm caused an accident to the Plaintiff while driving his vehicle [redacted] on La Digue Island and the Plaintiff sustained injuries multiple injuries, more specifically on his right leg.
3. The Plaintiff's injuries resulted in air lifting him on emergency to Victoria Hospital, Mahe.

[3] The Plaintiff claims that the Defendant's act of causing the accident is a faute in law for which he is liable in the sum of SCR 1, 000, 000.00. The Plaintiff further claims that the Defendant admitted his responsibility in causing the accident and accepted to pay for all necessary financial assistance for treatment and other damages.

[4] The Defendant denied all the claims of the Plaintiff and his repeat averment is that he "agreed to assist the Plaintiff for his injury which payment was made to the Plaintiff".

[5] Since there is no dispute about the accident and the Plaintiff having to be transported to the Victoria Hospital for treatment I do not propose to rehearse the evidence of the Plaintiff as regards either issue. At the time he gave evidence the Plaintiff was a 67 years old pensioner. Until retirement he had been self-employed as a carpenter and mason specifically covering houses. He testified that when he was in hospital he was in too much pain. He was in hospital for 7 days before being operated on. During the time he was in hospital he was not earning any money. His partner had to finish the job he had been doing. After the accident the Defendant came to see and offered to give him SCR 15, 000 per month. They made an agreement in writing. The Defendant paid him a total SCR 155, 000.00 then stopped. He went to see the Defendant to renegotiate and they agreed that the Defendant would give him SCR 400, 000.00 but he only paid SCR 25, 000.00 and then stopped. After he was discharged from hospital the Plaintiff had to use crutches on both sides for support. He was in continuous pain. He could not work. When he was working he would earn around 18, 000SCR to 20, 000SCR per month. The metal plate remained in his leg for 2 years

because the doctors could not operate. As a result of the accident he had to sleep in a room on his own because he would make too much noise from the pain. One leg is longer than the other. Sometimes he can walk without crutches but his hips are painful. He goes to physio at Eden Island and English River Health Centre. He asked his lawyer to write to the Defendant's insurance company. It was his evidence that he is claiming SCR 400, 000 for loss of income, SCR 200, 000 for mental agony and distress, SCR 200, 000 pain, SCR 200, 000 for partial disability.

[6] In cross-examination he stated that at the time the accident occurred he was actively working. He stated that sometimes his earnings could fluctuate and go down to SCR 15, 000 and could be as low as SCR 12, 000.00. He explained that at the time of the accident he had returned his tax book and was working at home and doing gardening. He testified that he got invalidity benefits from the government which stopped when he reached 63 years when he got his social security benefits.

[7] The physiotherapist deponed that he has treated the Plaintiff for a post-operative case referred from specialist to rehabilitate his muscles. He assessed the Plaintiff on 5th June 2018 which revealed that he had restriction of the left knee flexion and upon flexion there was pain. There was muscular dysfunction in quadriceps, hip felxors, calf and gluteal group of muscles. There were functional disabilities in walking, climbing, prolonged standing was difficult with pain. He was treated by way of electro therapy along with active and strengthening exercises. His last treatment was 14th June 2019. In October 2018 there was improvement in his walking, climbing stairs and standing compared to his first day.

[8] In cross examination he explained that the issues that the Plaintiff was having with walking, climbing stairs and pain in ower back from prolong sitting was consistent with the surgery. He explained that the weakness is as a result of the surgery where muscles are cut so patients need physio to regain the strength of the muscles. As of 2018 he assessed the Plaintiff's recovery as 60% and stated that if the Plaintiff continued with physio he could be healed 80 to 85%.

[9] Dr Paul Victor Benjamin produced the report of Dr Betsy who was doing a post-graduate course in Armenia. It was his evidence that according to the report one Donald Camille

aged 64 years old was brought to Casualty on 23rd October 2015. X-ray was done and a deformity in his right thigh was seen. The x-ray showed a distal femur fracture. There was no external wound. On 29th October 2015 he was taken into the operating theatre whereby the skin was opened and the fracture was fixed with plate and screws. On 2nd November 2015 he started physiotherapy.

[10] In cross examination the doctor stated that it could have taken six days for the Plaintiff to be taken for surgery because of tests being done or him being on painkillers. He explained that deep vein thrombosis can occur as a result of old age where the blood supply is not good or it can happen when a patient is injured with a fracture. But he could not say for sure what caused the Plaintiff's deep vein thrombosis. He explained that the screws could have been displaced as a result of the patient starting to walk too early or he could have fallen down or somebody hit him in the same place.

[11] The Defendant testified that he took responsibility for the accident which was why he assisted the Plaintiff to go to hospital and gave him a sum of money while he was in hospital until now. The Plaintiff had lawyers write to him requesting SCR 600, 000.00 and then SCR 550, 000.00. Following those requests SACOS Insurance offered the Plaintiff SCR 45, 000.00. He stated that he could not pay the Plaintiff the sum of SCR 1, 000, 000.00 unless insurance accepts to pay that money.

[12] In cross examination he accepted that the Plaintiff should receive SCR 400, 000.00 but that it should be SACOS who should settle that balance. He accepted that the Plaintiff is using crutches but added that it's not all the time that he uses crutches. They cross paths and walk together. It was his testimony that the Plaintiff rides a bicycle.

[13] The Learned counsel for the Plaintiff submitted that paragraph 10 of the Defence is pertinent in that it is prima facie an unambiguous admission of the liability on the part of the Defendant. Learned counsel submits that in "paragraph 11 of the Defence the Defendant further admits that as per the agreement he entered into with the Plaintiff, the Defendant agrees to settle." He submits that "there is no term shown by the Defendant that SR 155, 000.00 is the full and final payment of settlement. This sum was and is only part payment agreed to be p aid."

[14] In terms of quantum, Learned counsel submits that the claim of SCR 1, 000, 000.00 is justified on the basis of ***Sullivan v Magnan and Anor (unreported) [2016] SCSC 491 Twomey CJ***, ***United Concrete Product v M Albert, SCA 19 of 1994***, ***Labiche v FS Management Trading (CS 109/2018) [2019] SCSC 529 (24 June 2019)***, ***Laporte v Rosebelle (Pty) Ltd (CS63/2018) [2019] SCSC 1135 (4 December 2019)***, ***Otieno v SPTC [2017] SCSC 85, Tirant v Banane [1977] SLR 219*** and ***William & Anor v Abel & Anor (CS 112/2017) [2021]***.

[15] Learned counsel further submitted that the Court in assessing the right amount of damages to be awarded to the Plaintiff "for the types of injuries he sustained, continues to suffer, his age at the time of the accident and his future dependency" should consider that the rupee devaluation is three times higher than it was in late 1990s.

[16] No submissions were forthcoming from the defence side.

[17] The Defendant having accepted that he caused an accident to the Plaintiff on the stated date a result of which the Plaintiff sustained injuries to his leg it follows that the Defendant has accepted liability meaning that his act of causing the accident is a faute in law.

[18] Article 1382 of the Civil Code reads as follows:

> 1. *Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
>
> 2. *Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.*
>
> 3. *Fault may consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.*
> 4. *A person shall only be responsible for fault to the extent that his is capable of discernment; provided that he did not knowingly deprive himself of his power f discernment.*

5. *Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.*

[19] Article 1383 provides thus:

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

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.*

3. *The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English Law.*

[20] Having admitted that he caused the accident while driving his vehicle, which resulted in the Plaintiff's injuries the Defendant is liable to compensate the Plaintiff pursuant to the above mentioned articles

[21] Per Adeline J in ***Gabriel v Vidot (CS 83 of 2022) [2023] SCSC 44 (27 January 2023)***

> *a claim founded on the law of delict ... generally means, that the burden of proof is on the Plaintiff to prove three elements, namely, fault, damage and the causal link between the two on the balance of the probabilities in order to render the Defendant liable. The case of* ***Constance v Grandcourt (unreportted) [2016] SCSC 868*** *is the case law authority supporting the proposition that, a victim of road traffic accident may proceed with a claim under Articles 1382, 1383 or 1384 of the Civil Code of Seychelles Act ("the Act").The matter in issue is the quantum.*

[22] The Defendant's position, per paragraph 10 of the Plaint, is that he "agreed to settle as per the agreement with the Plaintiff and the claim of the Plaintiff was not justified."

[23] The agreement referred to above was exhibited as PE1. It is reproduced below:

ROAD ACCIDENT OVER AT LA DIGUE ISLAND ON THE 23.10.15

AN AGREEMENT MADE THIS 9TH NOVEMBER 2015

BETWEEN

Mr. Donald Camille** of **Quincy Village, Mahe
NIN [redacted]

AND

***Myself Mr. Wind-Fred, Joseph, Jeall Rose** of La Digue Island*
NIN [redacted]

A road accident happened on the 23rd October 2015 on La Digue Island at around 3.3opm. While I was following a funeral service, from the church to the cemetery, I lost control of my vehicle (Club Car) [redacted]
*I run over **Mr. Donald Camille** and injured his right leg. He had to take emergency plane to Mahe hospital for treatment.*

NOW THEREFORE WE HAVE AGREED AS FOLLOWS

1. *That I **Mr. Wind-Fred, Joseph, Jeall Rose** do confirmed that I shall take the full responsibility and to assist **Mr. Donald Camille** a financial assistant for the injury I caused him.*

2. *That I shall pay **Mr. Camille** the sum of **Fifteen thousand Seychelles Rupees (SR 15000.00)** per month as a temporary financial assistant until such time that **Mr. Camille** could be able to work properly and been declared fit.*

3. *The first payment is to be made on the signing hereof and subsequent payment on the first day of each succeeding month. The said sum **(SR15000.00)** shall be paid into account **No.*** [redacted] ***Bank.***

4. *That I shall contribute towards any further treatment, requested by the specialist.*

5. *As witness the hand of the parties the day and year first above written before me.*

Original Signed

Mr. Wind-Fred, Joseph, Jeall Rose — *Mr. Donald Camille*

Witness

[24] It is noted that at paragraph 2, the parties agreed to the payments being "temporary", until such time that the Plaintiff could work again.

[25] It is noted that at the time of the accident the Plaintiff was 62 years old. In as much as he was self-employed he could not have been expected to be earning the same salary he would have been earning during his prime especially given the nature of his work. Furthermore, judicial notice is taken that nationally one is classified a pensioner at 63 years of age. In any event there is no evidence of his earnings by way of tax records or any other evidence whatsoever but his word.

[26] Per PE2, on 5th April 2018 the Plaintiff was admitted for post-operative surgery of his right femur, for removal of plate and screws. He was subsequently released on 9th April 2018. As of that date the Plaintiff was 65 years old.

[27] The medical report dated 21st November 2017, exhibited as P9, shows that the Plaintiff was seen at Casualty by Orthopedic on 23rd October 2015. Surgery was done on 29th October 2015 and started physio on 2nd November 2015. On 5th November 2015 he was diagnosed with Deep Vein Thrombosis (DVT) for which he was treated. On 11th November 2015 he was transferred to male medical ward for further management of the DVT. On 24th February 2016 he was seen by the Orthopedic specialist. The x-ray showed displacement of the fracture and loose distal screws however though removal of plate and screws were planned that could not be done until 6th April 2018 when he taken off the Warfrin therapy for DVT.

[28] In the medical report dated 23rd May 2018, exhibited as PE8, the Physiotherapist noted that the Plaintiff had shown improvement in walking, climbing stairs and standing. The Plaintiff had regained "above 60% of functional activities". The Plaintiff was advised to "continue the exercise and physio" for complete recovery.

[29] In the case of ***Madeleine v Land Marine Ltd (CS 73/2018) [2021] SCSC 106 (26 March 2021)*** Govinden J considered the below case in a bid to come to a fair assessment of the damages to be awarded.

> ***David & Ors v Government of Seychelles (2007) SCSC 43*** *held that:*
> *'As a rule, when there has been a fluctuation in the cost of living, prejudice the plaintiff may suffer, must be evaluated carefully as at the date of judgment. But damages must be assessed in such a manner that the plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the Judge even though such assessment is bound to be arbitrary. See, Fanchette Vs. Attorney General SLR (1968). Moreover, it is pertinent to observe here that the continuous fall in the value of money leads to a continuing reassessment of the awards set by precedents of our case law. See, Sedgwick vs. Government of Seychelles SLR (1990).'*

[30] In the case of ***Marguerite vs Alcindor (CC 06.2013) [2014] SCSC 68 (20 February 2014)*** the Court found the words of Lord Goddard, C.J.in ***Bonham-Carter vHyde Park Hotel Ltd.(1948) 64 TLR 177at page 178,*** to be apt in this case where he opined that.

> *"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars and, so to speak, throw the mat at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."*

The Court in Marguerite above further implored that "similarly parties and more particularly their legal advisors and attorneys at law should bear in mind the words of Bowen LJ in ***Ratcliffe v Evans(1892) 2QB524 at page 532***:

> *"As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage was done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

[31] In the case of ***Mondon v Georges & Anor*** **(CS 120/2019) [2020] SCSC 707 (29 September 2020)** Twomey CJ as she then was awarded the Plaintiff the sum of SCR 80,000 for his injury and SCR100, 000 for moral damage and SCR 5,000 for his transportation costs as well as SCR 30, 000 for ancillary costs to treatment. In total SCR

215, 000 with costs. Liability was not an issue in the case leaving only the issue of quantum to be decided.

[32] In arriving at the sums she did the Learned Chief Justice used as guide the comparative awards in the cases of ***Labiche v FS Management Trading (CS 109/2018) [2019] SCSC*** 529 (24 June 2019), for an ankle injury this Court taking into account the deformity to the ankle awarded the sum of SR250, 000 and a further sum of SR100, 000 for moral damages. In ***Laporte v Rosebelle (Pty) Ltd) (CS 63/2018) [2019] SCSC 1135 (04 December 2019),*** the Court granted SCR 225, 000 for a fracture and deformity to the plaintiff's left leg and further SR75, 000 for pain and suffering, loss of enjoyment of sports and mobility impairment. In ***Otieno v SPTC [2017] SCSC 85***, the Plaintiff sustained a broken left leg and continued to have a limp. He was awarded a global sum of SR180, 000.

[33] In the case of ***Antonio Ruiz vs Jean Borreman, SCA 22 of 1994***, the court said that, when assessing damages to injuries sustained, the main factors the court ought to consider is the nature of the injuries and the age of the injured person.

[34] In ***Gabriel v Vidot*** above the Plaintiff was awarded a sum of SCR 35, 000.00 for the injuries he sustained as a result of the road traffic accident. The Plaintiff had sustained fractures to his left ankle and had claimed SCR 400, 000.00 in damages for those specific injuries.

[35] In ***Tucker and Another v La Digue Island Lodge (Civil Side 343 of 2009) [2011] SCSC 98 (2 December 2011)*** The plaintiff no.1 suffered a fracture that healed well. There was though residual swelling at the right knee. There was some discomfort and clicking in his knee. He was likely to develop osteoarthritis and suffer all this for the rest of his lifetime. He had limitations of movement to the left knee. His discomfort was estimated to be between minor and moderate. In light of those circumstances the Court was satisfied that a compound award of SCR190,000.00 would be sufficient recompense for all the injuries that the plaintiff no.1 suffered and would continue to suffer from in the future on account of the injuries he sustained on Coco Island.

[36] With the above in mind, in consideration of the injuries sustained by the Plaintiff, his age at the time of the accident, that he has regained 60% of his functional activities with a

prognosis of full recovery should he continue physio but a limping with prolonged walking and pain in lower back on lifting weights, I find that a reasonable award is a global sum of SCR 250, 000.00.

[37] The Defence raised is that the Defendant agreed to compensate the Plaintiff which payment was made. To my mind that would raise the defence of cumul d'indemnite. In explaining the application of the doctrine of *cumul d' indemnités*, Karunakaran J in ***Jacques v Property Management Corporation (2011) SLR 7*** stated that:

> *when the insurance company paid compensation to Sinon (the injured party), the company paid its own debt payable under her own contract with the insurance company. In fact, the company did not pay her the debt of Chang Leng, the tortfeasor, or that of any third party; nor did it pay her the debt on behalf of any third party whom it had indemnified under any contract of insurance which is made compulsory in terms of the Motor Vehicle Insurance (Third-Party Risks) Act. Hence, in such cases, the tortfeasor is not exonerated from his tortious liability. The doctrine of "cumul d'indemnités", or the "entitlement of double claim" if I may say so, applies and the injured party may benefit twice.*
>
> *However, this doctrine shall not apply to cases where the claimant had already received compensation either directly from the tortfeasor (the author of a "délit") or indirectly from the insurance company of the tortfeasor as has happened in the instant case. Legally speaking, when an insurance company pays the debt to the claimant, it makes payment for and on behalf of its client, the insured. In such cases, the liability of the tortfeasor is extinguished or reduced in proportion to the amount received by the claimant from the insurer of the tortfeasor. At the same time, it should not be misconstrued that any payment received by the claimant from the insurer of the tortfeasor would automatically exonerate the tortfeasor from total liability. Only when the claim is fully paid or so declared by the court, the tortfeasor's liability shall extinguish.*

[38] In the case of ***United Concrete Products (Sey) Ltd v Albert (SCA 19 of 1994) [1995] SCCA 22 (12 May 1995)*** Ayoola JA referenced the case of ***Hodgson v Tropp (1988) 3 WLR 1281*** where the House of Lords in allowing the appeal ruled that "*if, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie those receipts are to be set against the aggregate of the plaintiff's losses and expense in arriving at the measure of damages...*". He opined that

*"the rational of the doctrine of cumul d'indemnites as described in Encyclopdia Dalloz – Civil ... does not seem much different from the above [**Hodgson**]. Cumulative indemnity stops where it becomes evident that double compensation starts."*

[39] It is not disputed that the Defendant has paid the Plaintiff the sum of SR 155, 000.00 by way of instalments.

[40] On the basis of the above, in my view, the payments received by the Plaintiff does not bar him from claiming further sums from the Defendant as there was no provision made in the agreement between the parties that whatever sums paid subsequent to the agreement would be in full and final settlement of all claims against the Defendant. The sum of SCR 155, 000 already paid should however be taken into account and deducted from the Court pronounced award against the Defendant. So I find.

[41] I accordingly enter judgment in favour of the Plaintiff against the Defendant in the sum of SCR 95, 000.00

[42] Costs are awarded to the Plaintiff.

Signed, dated and delivered at Ile du Port on ....14th.. December 2023

Pillay J