(16)

IN THE SEYCHELLES COURT OF APPEAL

SIMON EMMANUEL
ATTORNEY GENERAL **APPELANTS**

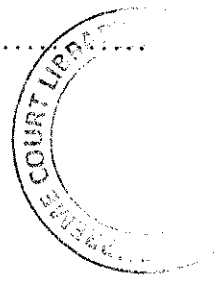
Versus

EDISON JOUBERT **RESPONDENT**

Civil Appeal No:49 of 1996

(Before Goburdhun, P, Ayoola, Adam JJ.A)

Mr. A. Fernando for the appellants
Mr. J. Hodoul for the respondent



JUDGMENT OF THE COURT

Delivered by Ayoola, J.A.

The action by the plaintiff in the Court below arose out of an incident which occurred on 20th February 1993, at New Port, Mahe, when the 1st defendant who was at the material time in the employment of the Government of Seychelles and acting in the course of his employment fired, at and shot the plaintiff in his left leg. The plaintiff alleged by his plaint, that the incident was caused by the fault and negligence of the 1st defendant and that the 2nd defendant was vicariously liable for the acts of the 1st defendant.

The action was commenced by a plaint dated 31st January 1994. In it, damages were claimed in the sum of Rs.280,000, on account of the injury caused to him by the 1st defendant, by the use a firearm.

The fact was not disputed, that on the morning of 20th February 1993, the 1st defendant, a national guard in the employment of the 2nd defendant, shot and wounded the plaintiff, who was among a crowd of about 50 persons who were attempting to gain entry into the premises of the Union Lighterage Company (U.L.C). The 1st defendant had been entrusted, along with others, with the responsibility of providing security to the staff of the U.L.C and the building.

In their defence, the defendants pleaded inter alia that:

> "This action cannot be entertained by Court against the defendants as the claim sought to be enforced are acts done or omitted to be done by a public officer in the execution of his office and therefore would be prescribed under Section 4(a) of the Public Officers (Protection) Act of 1976." ("the Act") Section 4(a) is now Section 3(a).

There was no dispute that the 1st defendant was a public officer at the material time, within the meaning of the Act or that he was acting within the scope of his employment with the Government of Seychelles ("the Government").

Section 3 of the Act reads thus:

> "No action to enforce any claim in respect of -
> (a) any act done or omitted to be done by a public officer in the execution of his office.
> (b) .....
> (c) .....
> shall be entertained by a Court unless the action is commenced not later than six months after the claim arose."

Rejecting the plea of prescription founded on Section 3 of the Act, Amerasinghe J held that:

> "The word 'claim' in the provisions of the Act is not found in isolation but related to the action to enforce the claim. Therefore it is my view that claim with reference to the Act should be reasonably capable of being identified by the plaintiff to include the damages that he is entitled to claim as he has the burden of satisfying the requirement of Section 72 of the Seychelles Code of Civil Procedure, which reads thus:

> 'If the plaintiff seeks the recovery of money, the plaint must state the precise amount, so far as the case admits.'
>
> "There is no doubt for the plaintiff to state a precise amount of money as damages occurrence of a cause of action or the incident alone may not be always sufficient. In personal injury cases a layman without the assistance of a medical officer or at least a report, cannot be said to be in a position to determine the extent of the injury, any permanent disability has resulted etc."

Being of the opinion as above, Amerasinghe J held that:

> "The date the 'claim arose' is not the same as the date the 'cause of action arose'. It is peculiar to the plaintiff indicative of what stage he was able to make a precise statement in the plaint in respect of the claim in which the defendant is sued to recover damages."

Having reasoned thus, the learned Judge concluded that the claim did not arise until the plaintiff was able to obtain the medical certificate he had needed to quantify his loss. The date when the medical certificate was received, 27th September 1993, according to the learned Judge, was "considered the beginning of the prescribed period of six months." He held that the claim lodged on the 3rd of February 1994 was within the period of six months after the "claim arose". As earlier stated, he rejected the defence founded on prescription.

The other arm of the defendants' defence, that the 1st defendant acted in self defence, was also rejected by the learned Judge. In the result, he found the claim proved against both defendants and awarded damages in the total sum of Rs.50,000.00.

This is an appeal from that decision. The appellants were the defendants and the respondent was the plaintiff. For convenience, the appellants will continue to be referred to as "the defendants", while the respondent is referred to as "the plaintiff". The defendants argued on this appeal that the

construction put on Section 3(a) of the Act by the learned Judge was erroneous. It was argued by Mr. Fernando, learned Senior State Counsel, that the error emanated from the confusion of the learned Judge equating "after the claim arose" with "after the claim is made."

Section 3(a) of the Act contemplates the existence of an "act done or omitted to be done by a public officer in the execution of his office", which must have given rise to a claim. What is barred by Section 3(a) is an action to enforce such claims six months after the claim arose.

The decisive question is when does a claim arise? In the ordinary sense a claim is a demand for an entitlement. In legal parlance a claim is made when a demand is made in the enforcement of a right or a redress is sought for a wrong. A claim arises when facts exist, which give right or occasion to make a demand or seek a redress. When a claim arises depends on the nature of the obligation. Where, for instance, the obligation consists of an obligation to refrain from doing something, in terms of Article 1145 of the Civil Code, liability for damages arises by the mere fact of the violation. In such a case a claim would arise in respect of the act, when liability, for the prohibited act arises, that is to say, on the date of the mere fact of the violation. The main principle of liability for tort in the Civil Code is Article 1382(1), which provides that:

> "Every act whatsoever of man that causes damages to another obliges him by whose fault it occurs to repair it."

An act in the context of Article 1382(1) and (2) can be something omitted as well as committed. In Section 3(a) of the Act it was explicitly stated that the claim should be in respect of "any act done or omitted". It is clear that a claim cannot be based on Article 1382(1) of the Civil Code, unless act and injury or damage co-existed and there is a causal link between the act and the injury or damage. As to the nature of actionable act, Article 1382(2) of the Civil Code provides that:

> "Fault is an error of conduct which would not have been committed by prudent person in the special circumstances in which damage was caused. It may be the result of a positive act or an omission."

The three elements which therefore make a claim arise in respect of a delictual act are fault, injury or damage and the causal link. The claim arises at the earliest time when these three co-exist and it is from that time that it is open to the aggrieved person to bring an action to enforce the claim that has thus arisen. Put otherwise, the "claim arises" when facts exist which give rise to the liability of the defendant. The question of liability for an act or omission should not be confused with that of the proof of assessment of the quantum of loss or damages. The coming into existence of liability to make good a loss is not normally dependent on but precedes the assessment of the quantum of loss. Liability must exist before question of proof of quantum of loss would arise.

The error which the learned Judge seemed to have fallen into was in confusing the question of facts which give rise to liability with question of the quantum of the loss that had been occasioned by the act or omission on which liability is founded. A claim in respect of an act or omission arises when facts on which liability can be founded exists. The coming into being of such claim cannot be delayed to await the ascertainment of the quantum of loss. Where loss is of the essence of liability as in claims based on Article 1382 all that is required for a claim to arise is that loss has been caused by the fault of the other party.

In the present case, the claim in respect of which the action has been brought arose when the alleged negligent act of the 1st plaintiff, consisting of a firing of a shot at the plaintiff, occasioned damage, consisting of personal injury, to the plaintiff. As pleaded by the plaintiff, that incident occurred on 20th February 1993. The action instituted by the plaintiff on 31st January 1994 evidently commenced well six months after the claim arose.

It is manifest that Amerasinghe, J came to a wrong conclusion in holding, first that there is a difference in substance between the phase "claim arose" and "cause of action", and in equating claim arising with the plaintiff being able to "make a precise claim." It is not the ability of the plaintiff to make a claim that determines when a claim arises in the context of the Act but, as has been said, the co-existence of facts which show liability of the defendant to repair the damage he had caused.

It is clear that the plaintiff's action was prescribed by section 3(a) of the Act and that the learned judge was in error in not so holding. As this issue is sufficient to dispose of the action it is not necessary to consider the other

question raised on the appeal, namely, whether the defence of self defence should have been upheld.

In the result, this appeal succeeds. The appeal is allowed. The judgment entered for the plaintiff by Amerasinghe, J is set aside. The plaintiff's action is dismissed. Each party should bear his own costs.

Dated at Victoria this 25th day of November 1997.

H. GOBURDHUN	E.O. AYOOLA	M. A. ADAM
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Judgment handed down
Adam JA