

IN THE SEYCHELLES COURT OF APPEAL

[**Coram:** F. MacGregor (PCA), A. Fernando (J.A), M. Twomey JA.]

Civil Appeal SCA 13/2017

(Appeal from Supreme Court Decision CS 08/2015)

Jean Charles Artaud

Appellant

Versus

Laxmanbhai & Co. Seychelles Limited

Respondent

Heard: 09 August 2019

Counsel: Mr Serge Rouillon for the Appellant.

Mr Olivier Chang-Leng for the Respondent.

Delivered: 23 August 2019.

JUDGMENT

F. MacGregor (PCA)

[1] The Appellant, a consultant architectural engineer, sustained injuries in the course of his employment at a construction site where the Respondent was the main contractor. The Appellant filed a plaint before the Supreme Court, which, upon hearing the matter, determined that while the Respondent failed to provide a safe system of work, the greater blame fell on the Appellant. The Court determined the blame in this matter to be 67% attributable to the Appellant and apportioned the award of compensation accordingly, awarding the Appellant a sum of Euros 36,000/-.

[2] Grounds of Appeal are as follows:

The Appellant has brought forward five grounds of appeal:

1. The learned judge erred in law in making a judgment apportioning the blame and reducing the award for contributory negligence by the Plaintiff when this was not pleaded by the Respondent in their defence.
2. The learned judge has erred in fact and law by accepting and relying on the following evidence in reaching his conclusion;
 - a. The evidence and the credibility of the witness Mr Hirani Navin for the Respondent when this witness was clearly not a credible or convincing witness.
 - b. The evidence of the witness Mr Hirani Navin as the only eye witness when the pleadings of the Defendant speaks of “the instructions of the Defendant’s workers”
 - c. In accepting the evidence of the Respondent from persons not specified or mentioned in the accident report complied by the Defendant following the accident.
3. The learned judge erred in fact and law in failing to note and taking into account that the Respondents pleadings did not disclose a full distinct defence to the Appellant’s claims and their whole case was based on mere denials and putting the blame squarely on the Appellant.
4. The learned judge erred in fact and law in failing to note the taking into account unspecific general details of the Respondent were not sufficient to make out a defence to the Appellant’s claims.
5. The learned judge erred in fact and law in not paying enough or any attention to the specific claims of the Appellant in terms of his claims for damages and medical and

travelling costs when reaching his decision of how much to award the Appellant as damages and costs.

- [3] In dealing with the first ground of appeal, the court must assess the apportionment of blame that the Learned Trial Judge placed on both parties. Then, the Court must analyse the damages that have been previously awarded by the Learned Trial Judge to the Appellant.
- [4] It is clear from the evidence that the Appellant suffered a fall while at a construction site at Val Mer, Baie Lazare, causing injury to both his shoulders and a laceration to his left eyelid. The Appellant suffered an acromioclavicular dislocation of his left shoulder and tearing of tendons in his right shoulder. He was unable to use his upper limbs for three months, which rendered him completely dependent on others for assistance with getting dressed, washing and eating. As a result of the injuries sustained, the Appellant now suffers from post-traumatic arthritis in his both his shoulders and the residual disability was determined to be 30% in a medical report dated 12th June 2013.
- [5] On three occasions, the Appellant attempted to communicate with the Respondent regarding its insurance claim to cover the accident. The Court must take into consideration that the matter of claiming insurance should have been a priority of the Respondent and it should have been dealt with immediately. However, instead the Respondent not only failed to acknowledge the Appellant's correspondence, but also failed to receive insurance cover for the Appellant's accident.
- [6] The evidence of Trevor Kolodzies, a senior employee of the Respondent who had prepared and signed a report on the accident, has not been contested by the Appellant. However, this accident report is incomplete in its last paragraph, preceded by one stating that the Architect appeared not to have heard the warning about standing on the cement board. The paragraph in question starts by referring to apparent injuries sustained and then the writing by the Defendant is illegible thereon, with no plausible explanation.
- [7] We can consider these 2 conducts of the Respondent, as being irresponsible in those circumstances.

[8] It is not contested that the Respondent had failed to display warning signs or construct barriers around the area where the re-flooring was taking place. It has also been found that the Respondent had failed to provide planking which would have allowed the Appellant to walk across the open-joists safely. Had such measures been taken, the danger would have been obvious to not only the Appellant, but to any person on the site..

[9] The relevant provisions of the Civil Code of Seychelles regarding delictual and quasi-delictual liability are as follows –

Article 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.*

Article 1383

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

Article 1384

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.

[10] The Respondent, as the main contractor, and therefore “*le gardien de la chose*” by virtue of exercising effective control over the construction site, is responsible for ensuring the safety of the site. The Respondent should have provided adequate planking to enable a person to walk safely over joists, displaying warning signs and establishing barriers in its construction site to ensure that all persons at the construction site were aware of the dangers around them. Through the evidence provided, it is clear that, despite serious safety breaches

on the construction site in question had been previously highlighted during weekly site meetings, these breaches were not amended by the Respondent.

[11] In the Defence, the Respondent pleaded that the accident occurred due to the Appellant's own negligence as he failed to adhere to the instructions of the Respondent's workers and conducted himself in a manner which was dangerous to himself. The Learned trial judge found that the Appellant did make a conscious decision to walk on the joists with no assistance. At the hearing, when asked by his counsel if he believed it was his fault that he fell, the Appellant replied "Yes and No". As a qualified architect with over 40 years of experience in the construction field, the Appellant should have been more aware of the dangers surrounding him and should have exercised caution. I therefore find that the Appellant was negligent. However, the ultimate duty of care remained on the Respondent. Due to the Respondent's failure to display warning signs and establish barriers in its construction site to ensure that employees are aware of the dangers around them, and the Respondent's failure to provide adequate planking to enable a person to walk safely over joists, the Respondent must also be held responsible.

[12] In reference to article 1384(1), *Dalloz Encyclopedie de Droit Civil* 2^{eme} ed., Tome VI, Verbo Responsabilité du Fait des choses inanimées, note 573, provides that –

'Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, à l'exclusion d'une exonération partielle, le fait ou la faute de la victime pourra entraîner aussi bien une exonération partielle qu'une exonération totale de la responsabilité, le problème ne se présentant pas de la même façon que pour le fait d'un tiers.'

[13] Further, in Mazeaud *Traité Theorique et Pratique de la Responsabilité Civile*, Tome II, note 1527 at page 637:

'Aujourd'hui les arrêts affirment que le gardien doit être exonéré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relève à l'encontre de la victime, quoique non imprévisible ni irrésistible, a cependant contribué à la production du dommage.'

[14] In the present case, we find that there was indeed contributory negligence on the part of the Appellant and that 35% of the liability is attributable to him, while 65% of the liability is attributable to the Respondent.

[15] Now, the Court must proceed to the assessment of damages. In the case of *Barbe v Laurence* (2017) SCSC 408 at para 16-18, the Court clarified that there are ultimately three heads of damages in delict cases. These heads are corporal damage, material damage and moral damage. The difference between these heads were discussed by the Court as follows:

‘The corporal damage or injury is the bodily injury caused to the victim... In some cases it can be the death of a person. These damages are meant to compensate for the diminution in the enjoyment of life of the victim. It includes the physical pain and suffering of the victim.

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.

The moral damage reflects the moral and/or psychological suffering, pain, trauma and anguish suffered by the victim as a result of the delict.’

[16] The Appellant before us today has outlined the various components of his financial claim. In relation to corporal damage, it is clear through the medical evidence provided that the appellant suffered severe injuries to his shoulders and a laceration of his left eyelid. It has also been proven that, as a result of this accident, the Appellant has developed a permanent disability of post-traumatic arthritis in both his shoulders, while also suffering from a scar under his left eyelid. While the Appellant has claimed that he has suffered material damage through a loss of earnings during his first three months of his injuries, this is not specifically proven. Therefore, I am unable to award damages in relation to this.

[17] Under Article 1149 (2) of the Civil Code of the Seychelles Act:

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

[18] Moral damages has been described by Pillay J in *Chanyumwai v Seychelles Yacht Club* (2017) as damages that:

'are in the category of an award designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrong doer. Moral damages are not punitive in nature but are designed to compensate and alleviate the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar harm unjustly caused to a person.'

[19] It has been emphasised by the Court in *Michel & Ors v Talma & Anor* (2010) that it is a difficult task to determine the exact amount of moral damages that should be rewarded to a suffering applicant. For the Court to place a price on the suffering of an individual is extremely challenging.

[20] When looking at past negligence cases, there is a wide contrast in moral damages awarded. For example, in *Farabeau v Casamar Seychelles Ltd* (2012), a plaintiff was awarded Rs.350,000 for continued pain and suffering after fracturing his left patella which ultimately led to a permanent disability. In *Tucker & Anor v La Digue Island Lodge* (2009), the plaintiff was awarded Sr.190,000 after suffering a fractured knee which restricted his movement. This injury was likely to become worse with the development of osteoarthritis. While in *Vital v the Attorney of General* (2009), the plaintiff was awarded Rs.200,000 after suffering a fracture of his right femur. In *Fanchette v Dream Yatcht Charter* (2008), the plaintiff was awarded Rs.140,000 after suffering injuries to his head and neck and fracture the left pedicle of the C7 vertebra in his neck.

[21] When making a determination on damages, the Court now must take into consideration the rising cost of living standards. In *David v Government of Seychelles* (2008), it was highlighted that in making a reasonable assessment, the court has a duty to take into account all relevant circumstances, especially the cost-of-living index and the rate of inflation, as they exist at the date of hearing. Similarly, in *Government of Seychelles v Rose* (2012), it was held that damages should be awarded in light of the social and economic times that we live in and that a departure from smaller awards may be justified under these circumstances.

[22] In the case of *Ventigadoo v The Government of Seychelles* (1998) D Karunakaran J stated that:

'As regards the assessment of damages, it should be noted that in a case of tort, damages are compensatory and not punitive. As a rule, when there has been a fluctuation in the cost of living, prejudice the plaintiff may suffer, must be evaluated as at the date of judgment.... 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 note that the 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)'

[23] In relation to moral damages, it is clear that, as a result of this accident, the Appellant needed assistance to carry out simple everyday tasks for a total of three months. Due to the Appellant's traumatic arthritis in both his shoulders he must only sleep on his back, he has now suffered a permanent loss of amenities of life, loss of sexual enjoyment and is in need of continued assistance for one hour each day. It had also taken a toll on his professional career as he had to reduce his construction site visits due to his inability to travel, hold a camera, or climb a ladder. He is also unable to lift any object heavier than 1kg.

[24] Previously, the Supreme Court had awarded €50,000 in respect to pain and suffering and €50,000 in regards to continued disability and discomfort. However, we must take into account that the Appellant is residing in France. Considering the current standard of living in that country and the continuing rise in medical expenses, I find that the damages awarded by the Supreme Court must be reconsidered and that Court must depart from smaller awards that have been granted in the past.

[25] In these circumstances, I make an award of €66,000 for corporal damages and €54,000 for moral damages, making a total award of €120,000. As I have found that the Appellant is 35% liable for the accident, and thus 65% of the blame lies on the Respondent, the total amount payable to him by the Respondent is €78,000.

[26] We consider all the other grounds without merit, and that the merits of ground one does justice to the appeal.

F. MacGregor (PCA)

I concur:.

Fernando JA.

I concur:.

Twomey JA.

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019