Seraphine v Sultan
(2001) SLR 71

Frank ELIZABETH for the plaintiff
Phillippe BOULLE for the defendant

Judgment delivered on 26 March 2001 by:

PERERA J: The plaintiff claims damages for personal injuries suffered consequent to a road accident. The case for the plaintiff is that around 9.00 pm on 30 November 1995, he was driving along Francis Rachel Street towards Mont Fleuri when he saw that two other vehicles had been involved in an accident near the shop of Chaka Brothers. He was asked by a Russian person who was the driver of one of those vehicles, to inform the Central Police Station. After doing so he returned to the scene of the accident. He was once again asked by the same Russian person to put on the parking lights of his car. That car was on the land side of the road, so he came to the middle of the road to do so, as that car, which was a right hand driven vehicle was facing the area of the clock tower. He bent down and switched on the lights, and when he stood upright thereafter, a vehicle on the opposite side of the road coming from the clock tower area towards Mont Fleuri, hit him on his right hand side and proceeded without stopping. The plaintiff testified that the traffic lane to Mont Fleuri was clear but the driver of the vehicle that collided with him drove close to the center of the road without keeping more on his left side. The plaintiff further testified that he did not identify the vehicle or its driver as he became unconscious. He regained consciousness only in hospital.

Gleg Kouzime (Pw1), the Russian person who was involved in the collision between the two vehicles, corroborated the plaintiff that he came to assist him. He stated that he saw a red vehicle coming at a fast speed from the clock tower end of the road and hitting the plaintiff. He was at that time near the shop. There was another car in front of him, but he saw the accident. The red coloured vehicle went without stopping. He did not identify the driver nor was he able to note the number of that vehicle.

Gilbert Larue (Pw2) testified that he was passing the scene of the accident involving the two vehicles. He stood there for a moment, and saw the plaintiff putting on the parking lights of the Russian person's car, and when he was about to go to the rear of that car, a red coloured jeep came from the direction of the clock tower, collided with that car and also with the plaintiff who was thrown a distance and lay fallen. As the jeep did not stop, he noted the number as S3895. He also saw the driver who was "a short chubby person with curly hair". The next day he saw the same jeep coming down at La Louise near Baba's shop. He identified the driver as the person whom he saw driving the red coloured jeep that knocked down the plaintiff. He identified the plaintiff, who fitted the description, in Court as well. Cross-examined by Mr Boulle, he stated that he did not notice anything written on the jeep to indicate that it belonged to "Petit Car Hire", as it was dark, but he noted the number and also that it had the yellow number plates of a

hiring vehicle. He also stated that he did not notice the company name the next day, although he saw the jeep around 9 o'clock in the morning.

SP Roger Legras, (Pw3) who was in charge of the Traffic Division at the time of the accident testified that at the request of the State Assurance Corporation (SACOS) he sent a letter dated 28 August 1996 (exhibit P3) wherein he stated-

> Please be informed that police investigation has proved a case and Mr Gilbert Sultan has been charged with negligent driving. Case has been dispatched to AGs Chambers for process. You shall be informed of the outcome as soon as it is completely concluded.

Later, by a further letter dated 17 October 1997 (exhibit P4), he confirmed to SACOS that Mr Gilbert Sultan was charged with negligent driving and that the case had been dispatched for process. He stated that his investigation officer advised him that there was a prima facie case against Mr Sultan, and that he too, on a perusal of the case file was satisfied that there was sufficient evidence to warrant proceedings against him. However he was not certain whether Mr Sultan was ultimately charged after the case was sent to the Attorney's Department.

Mr Boulle, counsel for the defendant objected to his evidence and the two letters P3 and P4, on the ground of hearsay. He submitted that in the absence of evidence that the defendant was charged and convicted, the evidence of Mr Legras would remain an opinion which was inadmissible. The two letters were marked in evidence as exhibits subject to the Court considering the objection in the course of this judgment.

The aspect of hearsay depends on the purpose for which the two exhibits and the evidence of SP Legras are sought to be admitted. Counsel for the plaintiff submitted that the purpose was limited to the issue of identification of the defendant as the driver of the vehicle and nothing more. It was for this limited purpose that exhibits P3 and P4 were initially admitted at the hearing. Mr Legras testified that he was the officer in charge of the Traffic Division at the material time and that the investigation commenced on his directions. Although not directly involved in the investigation, he had sent P3 and P4 to SACOS on the basis of the investigations he had initiated, and the material in the file. Hence, in the absence of proof of the defendant being charged and convicted, the admission of correspondence based on an official record would not offend the heresay rule to the extent that it identified the defendant as the person investigated in connection with the accident. Although that would not be conclusive proof of identity, yet would be one of the circumstances that the Court may consider in relation to the issue of the identity of the driver of the vehicle involved in the accident.

Ms. Lidia Evenor (Pw4), representing SACOS, testified that the plaintiff made a claim in respect of an accident involving vehicle no S3895. She produced a statement made by the defendant in connection with that claim (exhibit P5) which reads as follows -

> I, the under-signed Gilbert Sultan Beaudouin certifies (sic) that I drove a

Petit Car jeep during the period 28 – 30 November 1995 inclusive.
As I stated in my statement to the police, I did not involve myself in any accident, otherwise I would have stopped. “I can't say the time" I said to the police, because I did not have a watch.

- Sg Gilbert R Sultan Beaudouin

Jimmy Mein, (Pw5) Managing Director of Petit Car Hire, testified that the vehicle S3895 was owned by his company. He stated that that vehicle was hired to the Ministry of Employment and Social Affairs from 28 to 30 November 1995 and that it was collected by Mr Beaudouin, the defendant in the case. He further testified that after the hire, the vehicle was left somewhere in the Bodco area, and his office was requested to take it back. After the police came on investigation it was noticed that the right hand side of the vehicle had a dent. Mr Beaudouin was contacted about it, but he denied being involved in an accident. He testified that it was Mr Beaudouin who was supposed to drive that vehicle although hired to MESA.

The defendant's evidence was very brief. In his examination-in-chief, he stated that he was the Executive Secretary of the Employers' Federation, that he heard the evidence regarding an accident but he was never involved in it. He therefore relied on a complete denial.

On being cross-examined, he stated that he was not employed with MESA but admitted picking up vehicle S3895 from Petit Car Hire on 28 November 1995 on behalf of MESA on the instructions of one Mr Anaclet Tirant of the Ministry. He further stated that the vehicle was hired by MESA for a 3 day seminar, where he was to be a lecturer. He stated that the Ministry hired the vehicle for use at the seminar, and partly for his personal use. He also admitted that on some days he used it to go home in the night and return back the following day. But he denied that "at the time of the accident" he was driving that vehicle. Questioned as to the dates on which he drove the vehicle, he stated that on 28 November 1995, he took the vehicle home and returned the following morning. He did not drive the jeep the whole of 29 November, and Anaclet Tirant, the organiser of the seminar, gave him a lift home in the same jeep. He stated that on 30 November, he came to his office by bus, and was picked up by Mr Tirant in the same jeep and was taken to the Coral Strand Hotel where the seminar was held. He drove the jeep during day time that day. He could not recall how he got home. But he maintained that he did not use the jeep.

As regards 30 November 1995, the day material to this case, he testified that he came to his office in the morning by bus and was taken to Coral Strand Hotel by Mr Tirant in the jeep S3895. He stated that he went back home that day around 6.30 pm by taxi. He stated that the day after the seminar, the jeep had been parked overnight at his office and after the Security Guard handed the key to him on his arrival that morning, he telephoned Petit Cars to come and collect the vehicle. He stated that he did not ask the Security Guard as to who brought the jeep there and gave him the key.

Before liability under article 1384(2) of the Civil Code is considered, it is necessary for

the plaintiff to establish the identity of the driver, and in the present case, the identity of the vehicle as well.

The undisputed facts in the case are-

1. A red coloured jeep bearing no S3895 belongs to Petit Car Hire Company.

2. It was hired to the Ministry of Employment and Social Affairs from 28 - 30 November 1995.

3. The said jeep was returned to Petit Car Hire on 1December 1995, with a slight dent on the right hand side of the vehicle.

4. The defendant admits that he was authorised by MESA to collect the vehicle from Petit Car Hire.

5. The defendant also admits that he drove the said jeep during the period 28 – 30 November 1995, both days inclusive (exhibit P5).

In the case of *Francis Low v Andre Beaufond* (1979) SLR 118, another hit and run case, the vehicle was identified but not the driver. The owner of the vehicle admitted ownership, but denied that he was the driver of the car at the material time. The Court applied the presumption under article 1353 of the Civil Code and held that the fact of ownership was some evidence that at the material time the car was being driven by the owner or by his servant or employee. As the defendant failed to give evidence in that case, the Court held that that presumption had not been rebutted.

In the instant case, ownership of the vehicle is admittedly with Petit Car Hire. At the material time, it was on hire to MESA. The defendant has admitted that the vehicle was being driven by him 'from 28 – 30 November 1995 inclusive." Hence, subject to proof that it was jeep bearing no S3895 which was the vehicle involved in the accident, the defendant should be presumed to be the driver.

Although the evidence may be insufficient to establish liability on the basis of proof beyond a reasonable doubt in criminal proceedings, there is sufficient coincidence of facts to establish liability on a balance of probabilities. First, Oleg Kouzime, the Russian person who was involved in the traffic accident definitely saw a red coloured vehicle knocking down the plaintiff. Second, Gilbert Laure was a passerby, and through curiosity stood there observing the two vehicles involved in the accident. He had therefore ample opportunity to have more than a “fleeting glance" of the red coloured jeep that hit the plaintiff. In this context I accept his evidence that he was able to note the number of the vehicle and also to make the observations he stated in his evidence. He was also able to observe the bare features of the driver, and his observations were confirmed the next day when he saw the red coloured jeep bearing the number he noted being driven by the person whom he identified as the same person he saw at the

scene of the accident. Third, after Gilbert Laure had made a statement to the police the following day, the police commenced investigations by interviewing Mr Mein of Petit Car Hire, and the defendant who was supposed to have been driving the vehicle at the material time. That would have obviously been done as by then they aware of the number of the vehicle. Otherwise there may be several red other coloured jeeps in the island. Fourthly, the defendant has in his statement to SACOS (exhibit P5) admitted driving the vehicle from "28 – 30 November 1995 inclusive". In these circumstances his evidence that he went home on 30 November by taxi and returned to his office on the following day by bus is not reliable in the absence of evidence as to how the jeep came to be parked overnight at his office, as claimed by him.

Article 1353 of the Civil Code provides that –

> Presumptions which do not apply by operation of law are left to the knowledge and wisdom of the judge, who shall only admit presumptions which are serious, precise and consistent and only in cases in which the law admits oral evidence.

Article 1349 defines presumptions as follows -"presumptions are the inferences which the law or the judge draws from a known fact in respect of an unknown fact".

Accordingly the known facts in the case permit this Court on a balance of probabilities to come to the conclusion that the vehicle involved in the accident was the jeep bearing no S3895 and that it was driven by the defendant at the material time.

The plaintiff was a pedestrian at the time of the accident. Article 1383(2) of the Civil Code provides that –

> 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…….

In the present case the Defendant having relied solely on a denial of causing the accident, has failed to rebut that presumption. Hence he is liable in damages.

Quantum of Damages

According to the medical report furnished by Dr Alexander, the Consultant Orthopedic Surgeon (exhibit P3), the plaintiff who was then 36 years old, had the following injuries on admission -

- Abrasion in the back of the right shoulder
- Limitative movements of the right shoulder
- Swelling and abrasion over right shoulder
- Swelling of the right knee.

It was certified that there was no deformity of the right knee, although there was tenderness and restricted movements. That knee was immobilised by a plaster cast for 5 weeks. He was warded in hospital from 30 November 1995 to 9 December 1995. He was advised for arthroscopy of the right knee. Dr Alexander testified that the plaintiff did not come for such examination. Although Dr Alexander was not asked to explain the meaning of that term, Black's Medical Dictionary defines it as –

> Arthroscope is an instrument that enables the operator to see inside a joint cavity and, if necessary, take a biopsy or carry out an operation.

Hence what was proposed was an exploratory procedure to diagnose any internal injury, with a view for treatment if necessary.

The plaintiff in his testimony stated that he is a fish Inspector and had to enter cold stores for the purpose of his job. He stated that he could not do so now as his knee becomes painful. He further stated that he cannot bend the knee properly and that he could not play football as he used to do.

The plaintiff claims R50,000 as moral damages for pain and suffering. Medically, he has no deformity, or permanent disability. If the plaintiff still suffers discomfort and pain, he may have been able to obtain proper treatment had he consented to arthroscopic examination, and thus mitigated the damages.

The medical report confirms the plaintiff's assertion that he lost consciousness as soon as he was knocked down. He would have suffered immense trauma to be in that condition. However the injuries were mainly to his right shoulder and the right knee. On a consideration of the nature of injuries suffered by plaintiffs in traffic accidents, the injuries of the instant plaintiff fall into the category of cases where "pain and suffering" is the main element in damages. Although damages payable are "at large" the Court has to maintain a certain degree of uniformity, by reference to previous awards reflecting the consensus of judicial opinion. In this respect, Lord Morris stated thus, in the case of *Sing v Toong Fong Omnibus Co* [1964] 3 All ER 925 (PC) -

> If however, it is shown that cases bear the reasonable measure of similarity, then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized, or that there should be any attempt at rigid classification. It is but to recognize that, since in a Court of law compensation for physical injury can only be assessed and fixed in monetary terms, the best that Courts can do is to hope to achieve some measure of uniformity, by paying heed to any current trend of considered opinion. As far as possible, it is desirable that two litigants whose claims correspond should receive similar treatment, just as it is desirable that they should both receive fair treatment.

The plaintiff received abrasions on his right shoulder and the right knee, but no

fractures. However the abrasion on the knee required immobilisation by plaster cast for 5 weeks. That was due to the tenderness in that joint.

Considering some of the cases in which there was injury to limbs. In the case of *Simon Maillet v Louise* (unreported) CS 177/1990 the plaintiff suffered a fracture of the left tibia and fibula and spent some time in traction. He had a permanent disability of 25% and a permanent limp and was incapacitated for 6 months. I awarded a sum of R30,000 for pain and suffering and the permanent disability and R10,000 for loss of amenities and enjoyment of life.

In a similar case, Simon v Kilindo (unreported) CS 225/1992 where there was also a fracture of the tibia and fibula, I awarded a total sum of R35,000 for pain and suffering, permanent disability and loss of amenities of life.

In the case of *Danny Mousbe v Jimmy Elizabeth* (unreported) SCA 14/1993 the Court of Appeal affirmed an award of R40,000 made in respect of a plaintiff who had a compound fracture of the right tibia and fibula, and swelling and effusion of the knee. By the time the case was heard, he had completely recovered from his injuries.

In the case of Brigette Servina v Rita Jupiter (SCA 18/ 1994 where the plaintiff suffered abrasions to the head, cheek and lips and bruises on the calf consequent to an assault, the Court of Appeal reduced an award made by this Court from R17,500 to R10,000, mainly on the ground that the trial judge had awarded two sets of damages against two tortfeasors in respect of one tortious act. However in the recent case of Therese Louise v Yvon Denis (unreported) CS 262/1998 a motor car knocked down the plaintiff and ran over her feet. There was no clinical evidence of a fracture. She had a superficial abrasion of the left big toe, superficial abrasion of the right big toe and a deep abrasion on the medical side of the right foot. As a residual disability, she suffers a weakness of the right foot. On a consideration of previous awards for injuries to limbs, I awarded a sum of R20,000 under the general head of moral damages.

The injuries suffered by the plaintiff in the present case are much less severe than those suffered by the plaintiffs in the first three cases mentioned above. On the other hand, the injuries suffered by the plaintiffs in the two latter cases cited above are comparatively less severe than suffered by the plaintiff in the present case. Hence considering the residual pain and discomfort the plaintiff is suffering at present, I award a sum of R25,000 under the head of pain and suffering. As regards the head of loss of amenities of life, he testified that he is now unable to play football during his leisure time. His present discomfort may have been avoided had he agreed to an arthroscopy and received treatment. Hence I would award a sum of R5000 as damages under that head. However R1000 paid for the medical report as per exhibit P1 is awarded in full.

Accordingly, judgment is entered in favour of the plaintiff in a sum of R31,000, together with interest and costs.

Record: Civil Side No 214 of 1998