

**Francourt v Didon & Ors
(2006) SLR 186**

Anthony JULIETTE for the Plaintiff
France BONTÉ for the First and Second Defendants
Pesi PARDIWALLA for the Third Defendant
Ronny GOVINDEN for the Fourth Defendant

Judgment delivered on 1 March 2006 by:

KARUNAKARAN J: This is an action in delict. The Plaintiff in this action claims a sum of R1.5 million from all four Defendants jointly and severally towards loss and damage, which the former allegedly suffered from bodily injuries the latter had unlawfully inflicted on him. The Defendants contested the entire claim of the Plaintiff denying liability and disputing the quantum of damages.

It is not in dispute that the Plaintiff was at all material times a 44 year-old mason of La Louise, Mahé. The First, Second and Third Defendants were at all material times employed as police officers and the Fourth Defendant was and is the Commissioner of Police. It is averred in the plaint that on 14 March 1998, the First, Second, and Third Defendants during the course of their employment, unlawfully assaulted and wounded the Plaintiff at Inter Island Quay, Victoria, Mahé. The said unlawful acts of the First, Second and Third Defendants, who were the préposés, agents, employees and or servants of the Fourth Defendant, amount to a “faute” in law for which according to the Plaintiff, all the four Defendants are jointly and severally liable including the Fourth Defendant, who is vicariously liable for the acts of the first three. It is the case of the Plaintiff that as a result of the said unlawful acts of the Defendants, the Plaintiff sustained bodily injuries to his penis and head. Consequently, the Plaintiff claims that he suffered loss and damages as follows:

Moral damage for pain and suffering	R500, 000-00
Moral damage for permanent disability	R500, 000-00
Moral damage for inconvenience, anxiety, Stress, embarrassment and anguish	R300, 000-00
Loss of earnings on account of inability to work	R200, 000-00
Total	<u>R1500, 000-00</u>

Moreover, it is the case of the Plaintiff that on 19 of January 1999 the First, Second, and Third Defendants were convicted by the Supreme Court of the offence of committing acts intended to maim, disfigure disable or to do grievous harm to the Plaintiff, contrary to section 219 (a) of the Penal Code, read with section 23 thereof. The convicted Defendants appealed to the Seychelles Court of Appeal against the said conviction and the Court of Appeal on the 12 August 1999 dismissed the said appeal. In these

circumstances, the Plaintiff seeks this Court for a judgment against the Defendants jointly and severally in the sum of R1.5 million with costs.

On the other hand, the First, Second, and Third Defendants in their statement of defence have denied liability stating that on 14 March 1998, they were only acting in the course of their employment with the Fourth Defendant. Besides, according to the Defendants, if the Plaintiff had been injured at all as alleged it must have been either solely through his own acts or through his contributory negligence. The Fourth Defendant also denies liability stating that the First, Second and Third Defendants were not at all acting within the scope of their employment at the material time and place and the alleged act was not incidental to the service or employment of the Fourth Defendant. In any event, according to the Defendants the sums claimed by the Plaintiff under each head are excessive and grossly exaggerated. Thus the Defendants deny total liability and seek dismissal of the action.

The facts that transpire from the evidence on record including the exhibits are these.

The Plaintiff, a resident of Mahé wanted to participate in a political rally, which had been organised in Praslin for 14 March 1998. The previous night, on 13 March 1998, at about 7.30 p. m, the Plaintiff went to the Inter Island quay with the intention of taking an early morning boat to Praslin. He slept inside a boat until about 3 p. m and woke up. After some time, he wanted to buy lemonade from “Le Marinier” and hence was walking towards the yachts near the “Sunsail” office. As he was walking he heard someone, whom he identified as the First Defendant Gaetan Didon shouting “La I la” (Here he is!). The First Defendant grabbed the Plaintiff by the collar of his T-shirt and dragged him towards a cargo container near the “Sunsail” office, where the Second Defendant was standing. The Second Defendant Desire Boniface, held him by the arm, and the Third Defendant Gaetan Rene came from behind saying “This is the brother of Jimmy Francourt, we have to kill him.” Then all the three Defendants started to assault and kick him. The First Defendant punched his left eye causing the lens of his spectacle to crack and also causing an injury close to the bridge of his nose. The Third Defendant grabbed his head and hit it against the container. He felt faint, but did not lose consciousness. The Third Defendant then started to remove the Plaintiff’s pair of shorts. The Plaintiff asked him “What are you doing to me?” The three Defendants kept on asking him to speak, but the Plaintiff replied that he had nothing to say except that he was going to Praslin to attend a political rally. The Plaintiff then felt his underwear being cut or torn and something cold touching his body. Then someone started to cut his penis with a sharp weapon like a knife. After the wounding was done, he pretended to be dead. He heard someone saying “stop beating him up, don’t you see he is dead.” Thereupon the three Defendants left him lying there and one of them said “Let us go that fool is dead.”

After the injury had been inflicted upon him, the Plaintiff got up and went to the bench where some people were seated, told them that he was assaulted by “police officers” and showed them the injury to his penis. Two police officers on patrol duty arrived at the quay and the Plaintiff showed them the injury and told them that it was caused by three police officers. He was taken to the Central Police Station where he gave the names of

the assailants. The Plaintiff was thereafter taken to Victoria Hospital where he was treated by one Dr Layo Ajewole (PW2), the medical officer on duty at the casualty. In fact, the doctor sutured the cut injury seen over the shaft of the penis of the Plaintiff and allowed him to go home with advice that he should have follow-ups at Les Mamelles Clinic. After two days the Plaintiff started to feel severe pain over his private part as the wound got infected. On 16th of March 1998 the Plaintiff was admitted in Victoria Central Hospital for further treatment. According to the medical report dated 26 March 1998 in exhibit P3 since the wound, which was sutured in casualty, had been infected, the Plaintiff presented with cellulitis necessitating further treatments. However, the Plaintiff was passing urine well. Intravenous antibiotics and daily saline soaking of the infection were given as treatment. He was discharged on 18 March, with oral antibiotics. The Plaintiff was readmitted with the same problem. The infection got worse and the penis was swollen. Soluble penicillin and flucloxacillin were given intravenously. Later he developed paraphimosis which was reduced on the ward on 24 March 1998 and was discharged on 25 March 1998 with an appointment for review in surgical Outpatient Department. On 1 December 1998 the Plaintiff's condition was reviewed. The wound was completely healed and the Plaintiff had come back to his normal life. However, the Plaintiff claimed that as a result of the injury he suffered pain, permanent disability, inconvenience, anxiety, stress, embarrassment, anguish and loss of earning on account of inability to work. Besides, the Plaintiff testified that he had difficulty passing urine and also could not enjoy his sex-life and became impotent as his penis did not get erection, which according to him, is a permanent disability affecting his normal life. Hence, he claims damages from the Defendants as hereinbefore mentioned.

With regard to the nature of injury to the private part, Dr Layo Ajewole testified that the injury was only superficial and was not so deep to affect the urethra. The secondary infection the Plaintiff had developed after suturing was due to Plaintiff's own unhygienic practice and conduct, which indeed, had led to swelling and undesirable post-traumatic consequences. The doctor further stated that the injury in question had nothing to do with the passage of urine. The doctor also testified that the superficial laceration the Plaintiff had suffered over the penis could not have been the cause for his alleged impotency and loss of an erection. According to doctor the process of sexual intercourse involves a very complicated psychological process. Erection is only one of the phases of successful sexual intercourse. When a man gets erection it is a combined product of several stimulants that emanate from proper functioning of the heart, brain and spinal cord. These stimulants cause the desire to have sex. It also depends upon the perception and the psychological input from the woman and the environment. If the man is alcoholic or even diabetic he may not get libido and erection. Therefore, the doctor concluded that the alleged loss of erection, loss of libido and impotency have nothing to do with the injury to the genital organ.

On the other side, the Defendants did not dispute the fact that the Plaintiff sustained the alleged injury and the Defendants were convicted by the Supreme Court of the offence of causing grievous harm to the Plaintiff in this matter. The first three Defendants however, claimed that at the time of the alleged incident they were all police officers and were attempting to apprehend the Plaintiff in performance of their duties in the scope of

their employment. As the Plaintiff at the time of apprehension, had a knife in his possession, that, had allegedly caused the injury to his private part as they were arresting the Plaintiff. In any event, the Defendants in effect claimed that at the material time since they were employed by the Government of Seychelles, their employer is vicariously liable for their acts.

Firstly, as regards the alleged infliction of the injury, the Plaintiff categorically testified that the first three Defendants did inflict the injury on him deliberately, at the material time and place, apparently for no reason. The Defendants on the other hand, denied the version of the Plaintiff and joined issue stating that they did not inflict the injury, but it was the Plaintiff, who through his own fault, caused the injury to himself, when the Defendants were arresting him in the execution of their duties. Obviously, the issue herein revolves around the credibility of the witnesses, who gave contradictory versions as to how the Plaintiff sustained the injury in question. Having observed the demeanour and deportment, I believe the Plaintiff in every aspect of his testimony. He appeared to be credible and speaking the truth to the Court. On the other hand, I disbelieve the Defendants, whose version seems to be unbelievable, inconsistent and illogical considering the entire circumstances of the case. Given the nature, extent and location of the wound, it is physically impossible for the Plaintiff or anyone for that matter to self-inflict such an injury on oneself accidentally or otherwise. In any event, the Plaintiff's version as to the circumstances and the manner in which he claimed to have received that injury, to my mind, is more probable, more accurate, more reliable, more consistent and more logical than the version given by the Defendants in this respect. Hence, I find that the first three Defendants did inflict the said injury on the Plaintiff deliberately at the alleged place and time for reasons best known to them only. The finding of this Court based on a civil standard of proof in this respect is aptly corroborated by the finding of Perera, J. in the related Criminal Case No. 28 of 1998. Be that as it may. As regards the Plaintiff's claim as to lack of erection and sex-life and the alleged permanent disability due to the injury to his private part, I accept the medical opinion given by the doctor. In that respect, I find that the alleged loss of erection, loss of libido and impotency have nothing to do with the injury in question. Dr Layo Ajewole in fact, testified that the injury was only superficial and was not so deep to affect the urethra. The secondary infection the Plaintiff had developed after suturing was solely due to Plaintiff's own unhygienic practice and conduct and so I find. As regards the alleged contributory negligence, I find on record not even a scintilla of evidence to substantiate this defence.

I now turn to the question of liability. Whatever might have been the reason, whether the Defendants had been acting at the material time in the execution of their duty as police officers or not, whether their common intention was to apprehend the Plaintiff or not, the fact remains, they have indeed, committed an unlawful act as they jointly inflicted a grievous bodily harm to the Plaintiff without any justification - at any rate - there is no evidence on record to show any justification recognised by law. Even if one assumes for a moment that the Defendants being police officers, were only apprehending the Plaintiff using force as contemplated in section 10 (2) of the Criminal Procedure Code, at the material time in the legitimate interest of performing their duties, obviously the degree and nature of force they used with such a lethal weapon - to say the least - has

been totally unreasonable, brutally unnecessary and glaringly unlawful. Undoubtedly, the dominant purpose of the Defendants' unlawful act in the circumstances was to cause harm to the Plaintiff rather than effecting the arrest and so I find. Besides, the very use of such unreasonable, unnecessary and unlawful force to the extent of causing a grievous harm to the private part of the Plaintiff, ipso facto, in my judgment constitutes a faute - even if it appears to have been done in the exercise of a legitimate interest - in terms of article 1382 (3) of the Civil Code, which inter alia, reads thus:

Fault may also 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.

I will now move on to the question of vicarious liability alleged against the Fourth Defendant. Although the first three Defendants were in service or employment as police officers during the relevant period, the act of "causing grievous bodily harm" to the Plaintiff or to anyone for that matter, can no way be said to form part of their duty nor was that act incidental to the service or employment or performance of their duties as police officers in maintenance of law and order in the country. Therefore, I find that the first three Defendants were not acting within the scope of their employment when they had engaged themselves in the unauthorised and unlawful act of causing bodily harm to the Plaintiff. Neither were the first three Defendants the "préposés" of the Fourth Defendant nor was the Fourth Defendant the "Commettant" of the first three Defendants at the material time. Hence, as I see it, the said unlawful act shall not render the master or employer liable in law in view of Article 1384 (3) of the Civil Code, which reads thus:

Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.

Moreover, for a person to be a préposé of another, three elements are required: (i) the employer must have chosen his servant (ii) the servant must be under the control and supervision of the employer, and (iii) the servant must have done the act in the exercise of his functions. A policeman's authority is original, not delegated and is exercised at his own discretion by virtue of his office, and he is accordingly not a servant under the direct control of his supervisor. Hence, in the case of *Payet v Attorney-General* (1956-1962) SLR the Court held that the policeman was not the préposé of the Government. In view of all the above, I conclude that the Fourth Defendant is not vicariously liable for the unauthorised and unlawful acts committed by the first three Defendants against the Plaintiff in this matter. For these reasons, I hold that only the first three Defendants are jointly and severally liable in tort to compensate the Plaintiff for all the consequential loss and damages he suffered.

The only issue that now remains to be determined is the quantum of damages payable

to the Plaintiff. Needless to say, the Plaintiff is not relatively young. He is above 50. He has 7 children all of them are now adults. In the past, he was working as mason; presently, unemployed. Apart from loss of employment at present, the Plaintiff's employability and prospects of getting a normal job in the world of work, in my view, is not as bright as that of any other able man in good health, because of his drinking habit and alcoholism as transpired from evidence.

Coming to the principles applicable to 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. 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, as was held in *Fanchette v Attorney-General* (1968) SLR. 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 v Government of Seychelles* (1990) SLR.

In the instant case, for the right assessment of damages, I take into account the guidelines and the quantum of damages awarded in the following cases of previous decisions:

- (1) *Harry Hoareau v Joseph Mein*, CS No: 16 of 1988, where the Plaintiff was awarded a global sum of R30,000 for a simple leg injury caused by a very large stone. That was awarded about 18 years back.
- (2) *Francois Savy v Willy Sangouin*, CS No: 229 Of 1983, where a 60 year old Plaintiff was awarded R50,000 for loss of a leg. That was awarded about 21 years back.
- (3) *Antoine Esparon v UCPS*, CS No. 118 of 1983, where R50,000 was awarded for hand injury resulting in 50% disability and the Plaintiff was restricted to light work only. This sum was awarded about 22 years back.
- (4) In an English case, *Robinson v Leyland Motors Ltd C. A 357A of 1974* (see Kemp & Kemp on *Damages* Vol 2 at 9164 - the Plaintiff was aged 21 years and was employed by the Defendant as a fitter. As a result of the accident at work the Plaintiff's left arm was amputated above the elbow. The Court awarded a total sum of £13,000 as damages in respect of pain and suffering and loss of amenity and earning capacity.
- (5) In *Jude Bristol v Sodepak Industries Limited*, Civil Side No.126 of 2002, where R160,000 was awarded for an injury that resulted in amputation of distal part of the right forearm of the Plaintiff.

The injury in the present case is relatively, not severe in degree or nature. The wound is now completely healed and the male organ remains intact except for a circular scar, which stays just close to the pubic area. The injury, in my finding did not affect the Plaintiff's sex life nor has it deprived him of his erotic experiences. In the circumstances, the amount claimed by the Plaintiff under each head for loss and damages is highly exaggerated and unreasonable. Having regard to all the circumstances, for pain and suffering I would therefore, award R80,000 In respect of moral damage for inconvenience, anxiety, stress, embarrassment, anguish and distress the sum of R60,000 would in my view, be reasonable and just. For loss of amenities, loss of earnings and loss of enjoyment of life, due to temporary partial disability suffered during the period of hospitalisation and recuperation I would award the sum of R60,000, which figure in my considered opinion, is reasonable, in view of the fact that the Plaintiff did not suffer any permanent disability due to the injury in question. Moreover, I find the Plaintiff through his unhygienic practice, had partly contributed to the secondary infection that developed from the injury. This should proportionately reduce the quantum of damages payable to the Plaintiff.

In the final analysis, and for the reasons stated hereinbefore, I enter judgment for the Plaintiff and against the First, Second, and Third Defendants jointly and severally in the sum of R200,000 with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

Record: Civil Side No 273 of 1998