IN THE SUPREME COURT OF SEYCHELLES

Olaf Louis Payet of
Pascal Village, Mahe **Plaintiff**

Vs

Donald Pierre of
Pascal Village, Mahe **Defendant**

Civil Side No: 213 of 2005

Mr. F. Bonte for the plaintiff
Defendant in person

D. Karunakaran, J

JUDGMENT

The plaintiff in this action seeks the Court for a judgment ordering the defendant to pay the plaintiff the sum of R85, 000/ towards loss and damages, which the plaintiff allegedly suffered as a result of a "fault" committed by the defendant. The fault alleged is that the defendant on the 7th February 2005 at Pascal Village unlawfully assaulted the plaintiff causing him injuries in the right hand and the plaintiff is still undergoing physiotherapy following those injuries.

The plaintiff has averred in the plaint that consequent upon an unlawful assault by the defendant, the plaintiff suffered the following bodily injuries:

(i) *Laceration in right hand with injury to extensor tendon 2nd and 3rd finger*

(ii) Laceration on the right wrist.

Because of the said injuries, the plaintiff suffered loss and damages as Particularized below:

(a) For injuries to the right arm	*Rs 35,000. 00*
(b) For pain and suffering	*Rs 15,000. 00*
(c) For trespass to person	*Rs 35,000. 00*
Total	***Rs 85, 000. 00***

Therefore, the plaintiff claims that the defendant is liable to compensate him for the said loss and damages estimated in the sum of Rs 85, 000/- with interest and costs of this action. On the other hand, the defendant denies liability putting the plaintiff to the strict proof of all the allegations made against him.

The facts of the case are briefly these:

It is not in dispute that the plaintiff and the defendant are residents of Pascal Village, Mahe. They are neighbours and were once friends. According to the plaintiff, he sold a piece of land to the defendant for Rs30, 000/- The defendant paid only Rs 25,000/- and was refusing to settle the balance of the purchase price Rs 5,000/- Consequently, their friendship got strained and they were not in good terms. The plaintiff testified that the defendant on 7th of February 2005 made telephone calls and insulted him using bad languages, inter alia, called him a homosexual. In the afternoon, the plaintiff went out with a machete (big knife) in order to cut some banana leaves, which were overhanging and blocking the traffic on the main road, close to the defendant's residence. While the plaintiff was standing in the main road, with that knife in his hand, the defendant came out of his house with a piece of iron bar in his hand and hit the plaintiff and caused injuries on his right hand fingers. The plaintiff lost consciousness and fell down. The defendant dragged the plaintiff on the road and hit him with bottles and stones resulting injuries all over his body with visible marks particularly, over his legs. During the assault, the defendant was shouting that he was only waiting for the day to kill the plaintiff. Following the injuries the plaintiff was immediately, taken by an ambulance to the Victoria Hospital for medical treatment. The defendant had 17 stitches on his right wrist where, the tendon had been cut. He was admitted in hospital for two days. In support of his testimony as to injuries and treatment, the plaintiff also produced a medical report dated 16th May, 2005 in exhibit P1, the contents of which reads thus:

"Patient's name: Olaf Louis Payet
Address: Pascal Village
D.O.B: 16-10-34

The above named patient was seen at Casualty Unit on 07-02-05. He was assaulted by somebody with machete, and sustained laceration in right hand and was complaining of pain in right hand.

On Physical Examination:

There were bleedings, tenderness, and laceration in the base of the 2nd and 3rd finger posterior aspect and laceration on right wrist with restriction of movement of 2nd and 3 fingers.

Investigation:
X-Ray was done and no fracture showed.
Diagnosis:
1) Laceration on right hand with injury of extensor tendon of 2nd and 3rd Finger.
2) Laceration on the right wrist.

Plan:
Suturing of tendon was done under Local Aesthesia in Casualty Unit with toilette (Betadine, Peroxide and normal saline0. Plaster of Paris (P.O.P) was applied and he was admitted in D'Offay Ward for observation and put on antibiotics and was discharged on 09-02-05. He was followed up in the Surgical Out-Patient Department and he is doing Physiotherapy.

(Sd) Dr Salomon Gomero
ORTHOPEADIC SURGEON"

Moreover, the plaintiff produced in evidence eight photographs - collectively marked as Exhibit P2 - showing the injuries on his right arm with sutures and scars. As a result of these injuries, according to the plaintiff, he is still unable to fold and stretch the 2nd and 3rd fingers in his right hand. In the circumstances, the plaintiff claims that he suffered loss and damages in the total sum of Rs 85,000/- as particularized supra and the defendant is liable to make good for the same. Hence, he seeks this Court for a judgment against the defendant accordingly.

On the other side, the defendant testified in defence denying liability in this matter. In fact, the defendant gave a different version as to the cause of hostility between the parties and as to the sequence of events that led to the unpleasant occurrence, which resulted in injuries to both parties. According to the defendant, once the plaintiff was his close friend. A couple of months prior to the alleged incident, he sold a set of sofa and a mattress to the plaintiff, who agreed to pay the price by monthly installments. Then the parties had some argument regarding banana trees. Thereafter, on the Sunday before the incident the plaintiff while returning from church, saw the defendant on his way and started swearing at him using bad languages. The next day, the defendant on his return from work, he saw the mattress he sold to the plaintiff had been placed outside his house. So, the defendant telephoned the plaintiff and asked about the mattress left outside. The plaintiff got angry and slammed the phone down and in no time came out of his house with a long knife in his hand and went to defendant' place and fought with him. Seeing the long knife in plaintiff's hand, the defendant moved backward and in the process fell down. The plaintiff came closer on defendant's property and attempted to cut him with the knife. The defendant's daughter having witnessed the scary scene screamed that the plaintiff was going to kill her father. The evidence of the defendant in this crucial aspect of his defence runs (in verbatim) thus:

"When he (the plaintiff) hit the first time with a knife, he hit the washing ropes (sic). Luckily, when he hit that, I got up and grabbed two empty bottles from the shelf there and I hit him with it. I hit him once and then I gave another hit and I took (removed) his panga (an African knife with a long broad heavy blade, often used for cutting down sugar cane. Then my daughter called the police. The police came and took the knife and my T-shirt and pants with all the blood on it…. He threw a hit at me and hit ropes and then he got cut with the iron sheets standing there. He injured himself.

I phoned the police. The police came and took him to Beau Vallon and took him to hospital and then they put me in jail. I spent a night in jail without even going for a dressing or anything,. The police came and looked (at the scene) and saw the blood and everything. They were about 10 of them. How can he say it was in the public road?"

In view of all the above, the defendant claims no fault on his part and raises "self-defence" and "provocation" in justification of his acts and consequently denies liability to pay any damages to the plaintiff.

Having agreed to leave the appreciation of evidence to the Court, counsel for the plaintiff moved the Court for a judgment against the defendant as prayed for in the plaint. I meticulously, perused the pleadings and the evidence on record. Although the defendant raised "self-defence" and "provocation" as defence in his evidence, he did not specifically plead them in his statement of defence. Obviously, the defendant was unrepresented and conducted his own defence without any assistance from counsel to advise him on procedural technicalities. Hence, I believe, the Court should not exclude these two aspects of his defences from its consideration in this matter. These issues indeed, are based on points of law and as such pose the following questions for determination namely,

(i) *Is the defence of "self-defence" available to a defendant in a delictual action, in our jurisdiction?*

(ii) *If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a defence of* ***contributory negligence****?*

(iii) *Is the defence of "Provocation" available to a defendant in a delictual action, in our jurisdiction?*

(iv) *If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a defence of* ***contributory negligence****?*

Before finding answers to these questions, it is important to examine the position of law in our jurisprudence with respect to "self-defence" and "provocation" especially, in delictual actions. In fact, delictual liability in Seychelles is basically governed by Article 1382 of the Civil Code of

Seychelles. This is the most famous of all the articles of the Civil Code as it embodies the codified law of delict, which has a more limited and rational character than its un-codified counterpart namely, "tort" under the English legal system. Paragraph 1 of this article, lays down the general rule for all torts, which is that liability rests on the general concept of fault. This paragraph is obviously - word by word - a replica of the corresponding article in the French Civil Code, which was in force prior to the present Civil Code. In fact, "fault" is defined in paragraph 2 of this Article as being 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 also stresses that the fault may be the result of a positive act or omission. Paragraph 3 of the said Article completes the definition and states as follows:

> *"Fault may also consist of an act or 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"*

Paragraph 4 thereof, reads thus:

> *"A person shall only be responsible for fault to the extent he is capable of discernment: provided that he did not knowingly deprive himself of his power of discernment"*

Paragraph 5 thereof provides that liability may not be excluded by agreement except for the voluntary assumption of risk. Be that as it may.

Our Civil Code came into force January 1, 1976. Although the Code is based on and is largely a translation of the French Civil Code, the latter was repealed by Act 13 of 1975, which stated that the former shall be deemed for all purposes to be an original text and shall not be construed or interpreted as a translated text. However, it is pertinent to note here that the original article 1382 found in the French Civil Code is preserved under paragraph 1 in our Civil Code, whereas four other paragraphs 2-5 (inclusive) in our Code, have been added to it. Undoubtedly, these additional paragraphs have been tailored and incorporated in our Civil Code in order to meet the changing needs of our time and Seychellois society. Therefore, in my considered view,

although all these additional paragraphs including paragraph 3 and 4 quoted supra have their origin in French jurisprudence, they should be interpreted independently formulating legal principles on their own, in the context of our unique Seychellois jurisprudence without mechanically, resorting to the French Code and Jurisprudence, unless an inherent ambiguity in our provision necessitates us to do otherwise.

In the light of the above provisions of law, I now approach the issue on hand. Under the French jurisprudence, obviously it is trite and settled law that self-defence is a valid and total defence to a delict - *responsabilité délictuelle.* Hence, if such a defence is proved in a delictual action, it would constitute a complete defence in France and exonerate a defendant from total liability, as it applies in criminal cases See, nos. 633 & 637 of Alex Weill & Francois Terre - Droit Civil, Les Obligations - précis Dalloz. Indeed, it is settled French case law << … … *légitime defence constitue un fait justificatif excluant toute faute et ne peut donner lieu a une action en dommage intérêts en faveur des ayants cause de celui l' a rendue nécessaire par son action*… >> (Tribunal Civil Strasbourg 10 mars 1953).

However, it is evident from paragraph 3 under Article 1382 of our Civil Code - quoted supra - that even if it appears that a defendant had acted in the exercise of his legitimate interest so to say, to protect his life, body or property in self-defence, still his act would constitute a "fault" if the dominant purpose of his act was to cause harm to the plaintiff. Hence, as I see it, ***our law does not recognize an act of self-defence as a total defence to delict unlike its French counterpart,*** simply because it satisfies the usual tests required in criminal law such as, the necessity of the situation, reasonableness, degree and proportionality of the force used, contemporaniety etc. Therefore, the primary test required to be applied here in Seychelles to render an act of *self-defence* a total defence to delictual liability, is **the test of dominant purpose**. The Court has to be satisfied that the dominant purpose of the act in question was not to cause harm to the plaintiff, even if it appears that the defendant had acted in self defence. Hence, I hold that the defence of self-defence normally we encounter in criminal cases, cannot as such constitute a total defence to delictual liability unless the act in question passes the primary test propounded supra. If it does, then it would constitute a total defence in consonant with the position of law in the French jurisprudence.

On the other hand, a situation may arise wherein the act in question may pass the usual tests required in criminal law but may fail the primary test hereinbefore mentioned. In such cases, it would still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra. That is, the ***defendant shall only be responsible for fault to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.***

On the question of "provocation" too, for identical reasons stated supra, I hold that the defence of "provocation" normally we encounter in criminal cases, cannot constitute a total defence to delictual liability unless the act in question passes the primary test propounded supra. However, it would still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra. That is, ***the defendant shall only be responsible for fault to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.***

In view of all the above, I find the answers to the above questions as follows:

(i) *The defence of "self-defence" is available to a defendant in a delictual action, in our jurisdiction.*

(ii) *It would constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitute a defence of* ***contributory negligence*** and reduce the quantum of damages.

(iii) *Likewise, the defence of "Provocation" is also available to a defendant in a delictual action, in our jurisdiction.*

(iv) *It would also constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitutes a defence of* ***contributory negligence*** and reduce the quantum of damages accordingly.

Having thus set the position of law on the issues, I will now move on to examine the evidence on record. On the issue of self-defence, it is so obvious from the evidence of the defendant that he

had time, opportunity and circumstances to avoid the alleged threat of the plaintiff and move away from the scene. However, he elected to remain in the scene and moreover, picked up allegedly an iron rod from somewhere, (admittedly, bottles and stones) approached the plaintiff and admittedly hit him, although the circumstances did not warrant such a course of action, such a higher degree of force and necessity. Besides, it is evident from the medical evidence that the injuries the plaintiff had sustained were lacerations and not cut injuries. This corroborates the version of the plaintiff that it was the defendant who hit him with an iron bar. The nature of injuries is in fact, inconsistent with the version of the defendant in that, he claimed that the plaintiff *got cut with the iron sheet standing there*, which is a sharp-edged object that evidently, cannot cause laceration but only cut injuries.

In the circumstances, I find that the defendant did not act in self-defence in the entire episode. He hit the plaintiff with an iron rod and the dominant purpose of his act was to cause bodily harm to the plaintiff. Hence, the alleged act of self-defence put up by the defendant in this action does not constitute a complete defence to exonerate him from total delictual liability. However, having regard to all the circumstances of the case, the defendant, who failed in his duty to retreat, appears to have acted in the exercise of his legitimate interest to protect against possible threat issued out by the plaintiff. Therefore, I find *it would only constitute a defence of* ***contributory negligence*** and would proportionately reduce the quantum of compensation payable to the plaintiff for delict.

As regards the issue of provocation, I find that the plaintiff did provoke the defendant by insulting him with bad languages, calling him a *pillon*, and leaving the mattress at the residence of the defendant without his knowledge and above all by throwing the machete in front of the defendant. As I discussed supra, provocation *would constitute a complete defence and exonerate the defendant from total liability, if and only if the dominant purpose of the defendant's act had been not to cause harm to the plaintiff. However, on evidence I am satisfied that the defendant's dominant purpose herein was to cause harm to the plaintiff. Therefore, I find that the provocation in the circumstances of the present case, would only constitutes a defence of* ***contributory negligence*** and reduce the quantum of damages accordingly.

In the final analysis, I hold that the defendant is liable in delict to compensate the plaintiff, for the consequential loss and damages. However, the amount claimed by the plaintiff under each head of loss and damage, appears to be unreasonable, exorbitant and disproportionate to the actual injuries he suffered. Besides, to my mind, the plaintiff suffered those injuries not solely due to the fault of the defendant, but also due to his own contributory negligence in depriving the defendant of his power of discernment for which I would apportion the blame to 50%.

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. *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).* The injuries in the present case are obviously, not of sever in degree and nature, although there appears to be some *restriction of movement on 2nd and 3 finger in the right arm.*

In view of all the above, I award the plaintiff following sums:

(a) For injuries to the right arm	*Rs 12,000. 00*
(b) For pain and suffering	*Rs 5,000. 00*
(c) For trespass to person	*Rs 3,000. 00*
Total	***Rs 20, 000. 00***

Accordingly, I enter judgment for the plaintiff and against the defendant in the sum of Rs20, 000/ with interest at 4% per annum - the legal rate - on the said sum as from the date of the plaint and with costs, which shall be taxed in the Magistrate's Court Scale.

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D. Karunakaran

Judge

Dated this 26TH September 2007