

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS107/2014**

[2016] SCSC 868

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Gretel Constance                  Plaintiff

versus

Alvina Grandcourt                Defendant

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Heard:            10<sup>th</sup> June 2016, 14<sup>th</sup> October 2016, 27<sup>th</sup> October 2016 (locus in quo)

Counsel        Guy Ferley for plaintiff

                  Elvis Chetty for defendant

Delivered:     11<sup>th</sup> November 2016

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**JUDGMENT**

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**M. TWOMEY, CJ**

[1]     This is a claim arising from a road traffic accident. The Plaintiff was a twenty-three year old pedestrian crossing the road at around seven p.m. on 3rd April 2012 at Roche Caiman, Mahé and the Defendant, the driver of a motor vehicle, which collided with the Plaintiff.

[2]     The Plaintiff claims that the Defendant drove at excessive speed and failed to take any precautionary actions to avoid hitting her and in any event drove recklessly. As a result

of the collision she claims that she suffered injuries inter alia, multiple lacerations, haemorrhage, contusion in both lungs, fractures of the left humerus and shaft and of the tibia. Her condition was so critical that she was placed on a life support machine and remained in a sub conscious state until 3<sup>rd</sup> May 2012, that is, a month after the collision. She was transferred on 23<sup>rd</sup> April 2012 to the North East Point Hospital where she remained until her discharge on 24<sup>th</sup> August 2012.

[3] The Defendant claims that the collision happened solely as a result of the fault and negligence of the Plaintiff who suddenly and without warning ran naked across the road without heeding the traffic. She therefore denies being liable for the damages occasioned by the injury suffered by the Plaintiff in the accident.

[4] *The evidence*

[5] The evidence in this matter was partly heard by Karunakaran J and on his subsequent unavailability; the parties unanimously agreed to the transcript of evidence being adopted for the matter to proceed before Twomey CJ. The Deputy Registrar, Jeanine Lepathy produced the transcript of evidence formally.

[6] The Plaintiff testified that she lived with her mother and children at Kosovo, Roche Caiman near Eden Island. On the night in question, she was coming from the beach at Eden and was crossing the road in the direction of the mountainside to reach her mother's house. She reached the white line of the hard shoulder of the side of the road going north when she was struck by the Defendant's car. At the time of the collision she was running very fast. The following excerpt is verbatim her evidence:

*Q: Gretel you stated that you were running across the road. Why were you running across the road?*

*A: I was running fast because there were vehicles coming and I could see vehicles coming from very far. They were not close to me but I run very fast normally. Every day I would cross the road the same way I did that day.*

[7] In cross examination the following exchange took place:

*Q: Why were you running?*

*A: Because of cars.*

*Q: You just wanted to quickly cross the road?*

*A: Yes.*

*Q: To avoid any collisions?*

*A: Yes.*

- [8] The Plaintiff explained that she would cross the road at that point and then walk alongside a footpath for about a hundred metres to access a gap in the walled estate to access her mother's house. She couldn't recall which part of the vehicle hit her but knows she was hit on her left hand side because that is the part of her body most affected. She couldn't recall what happened to her after that as she only came to a month later. She suffered a broken arm and leg, injuries to her head and some internal injuries.
- [9] She explained that at the time of the accident she had two children and since the accident she has had another baby. She cannot take care of them and they are minded by her mother. She is left handed and her arm was injured in the accident which makes ordinary tasks difficult for her. She used to braid hair and make about SR4000 a month. As she now cannot work she receives social security benefits amounting to SR5050 a month.
- [10] She was claiming SR350, 000 for permanent disablement as she could not walk very fast anymore and was not as active as she used to be. She was claiming a further SR400, 000 for loss of future earnings, SR500, 000 for pain and suffering and SR 100,000 for loss of amenities and enjoyment of life, making a total of SR2, 600,000 and with interest and costs.
- [11] Didier Morel a sixty year old taxi driver testified on behalf of the Plaintiff. He recalled the accident on 3<sup>rd</sup> April 2012. He was travelling from Victoria towards the south at around 6.30 to 7 p.m. and in it was still a bit light and there were few vehicles on the road. There were no lights in the area where the accident took place. He saw a girl

coming from the seaside running across the road. He slowed down and let her pass and in the opposite direction he saw another car coming and flashed his lights but the car proceeded at the same speed.

[12] He stated that the girl kept running and she had almost reached the other side of the road when she was hit and was dragged about 3 metres. He disembarked from his car and went to the accident scene. The Defendant had placed both her hands on top of her head and was screaming. She said she thought she hit a dog. In his view she could have avoided the accident by slowing down and paying attention. He agreed that everything happened in a matter of seconds.

[13] In cross-examination, he agreed that there was little traffic at the time and there was no reason for the Plaintiff to run when she could have waited for the traffic to pass. The following exchange also took place:

*Q: So, it is reasonable to suggest that a pedestrian will wait for all the traffic to go by and then she crosses (sic)*

*A: Yes at times it happens that people make mistakes. Sometimes people will come to cross the road despite and that day I do not know what happened to her that she was running, crossing the road but as drivers we have to take care of those situations when it comes and not just go and hit somebody.*

*Q: So you believe that on that day the plaintiff made a mistake to cross the road at that point in time?*

*A: Yes I do not know what has happened to her but she did cross the road.*

*Q: Now when you told us you saw the plaintiff cross the road, did you stop completely or did you slow down to let her cross the road?*

*A: I slowed down to let her pass because I already saw that she was not going to stop by the way she was running.*

- [14] Dr.Vinyaga Moorthy of Seychelles Hospital testified on behalf of the Plaintiff. He is a consultant in orthopaedic surgery. He treated the Plaintiff and produced a medical report of his findings and treatment. When he saw the Plaintiff on 3<sup>rd</sup> April 2016 she was unconscious and only scored 6/15 on the GlasgowComa Scale, which he stated was a very bad score. She was intubated and was seen by multiple specialists. He described the specialist care she received over the period she spent in the hospital. In summary she suffered a left subarachnoid haemorrhage, slight contusion in both lungs, fracture of right transvers process of the 4<sup>th</sup> lumbar vertebra, free fluid in her pelvis, fractures in the shaft of her left humerus, shaft of her left femur and shaft of her left tibia for which injuries she was treated.
- [15] She was transferred from the Intensive Care Unit to the female surgical ward on 17<sup>th</sup> April 2012. She remained in a subconscious state but had eye and right upper limb movements. Eventually she became haemodynamically stable and was transferred to North East Point Hospital on 23<sup>rd</sup> April and by the 3<sup>rd</sup> of May 2012 was very alert.
- [16] No evidence was adduced in relation to the Plaintiff's treatment at North East Point hospital apart from the fact that she recovered and was discharged.
- [17] The Defendant also testified. She left work at Sunshine House at Providence and was heading home. It was around 7 pm and it was dark. Her headlights were turned on, she reduced her speed as she was getting closer to the roundabout and she felt a bump against her car out of the blue and saw an elbow go through her windscreen. She braked at that point. She stepped out of the car and saw a naked girl on the ground. She called the police and the hospital. One of the onlookers gave her a bed sheet to cover the girl. The whole incident happened within seconds.
- [18] In cross examination she maintained that she was not going very fast and did not see the girl at all as it was dark and the girl was not wearing any clothing.
- [19] The law

- [20] The applicable legal provisions in road traffic accidents are found in Title IV, Chapter II of the Civil Code of Seychelles, more specifically in Articles 1382-1384 which provide in relevant part:

*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...*

*1383(2) 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 or the act of a third party or an act of God external to the operation or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God...*

*1384(1) 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...*

- [21] Articles 1382 and 1383 of the Civil Code of Seychelles deal with human acts (*le fait de l'homme*), where liability is based on fault and which consists of damage caused by one person to another by a positive act or an omission either by negligence or imprudence. Liability of a defendant under Article 1382 can however be absolved totally or partially. This is the case where there is an act exterior to the actions of the defendant or by reason of the acts of the victim.

- [22] In relation to the act of a thing (*le fait de la chose*) such as in motor accidents, Lalouette JA in the case of *The Attorney General rep. Government of Seychelles v Jumaye* (1978-1982) SCAR 348 stated that in France, liability under Article 1384 of the French Civil Code is not based on *faute* (fault) but on “objective liability independent of *faute*”. This

principle of strict liability in cases of damage caused by things under the custody of persons was established by the Arrêt Jand'heur, Cass. Ch. Réunies, 13 février 1930.

[23] Article 1383(2) of the Civil Code of Seychelles is equivalent to the position under Article 1384 of the French Civil Code and the authority of Jand'heur. In car accidents, the victim of the damage must allege and establish only the causal role of the *chose* (thing) by which the damage has occurred. Neither statute nor case law has given a precise definition of what constitutes a direct causal relationship. The courts have therefore broad discretion in this regard.

[24] In summary, in Seychelles, a victim of an accident has the choice to proceed under Articles 1382, 1383 or 1384 (supra) and liability without the need to find fault (strict liability) is imposed upon a custodian for injuries caused by an object in his custody or under his control. However, while the victim of the damage benefits from a presumption of causality (responsibility) by the custodian, the latter may be exonerated fully or partially if he can show that there existed natural events (e.g. vis major), the intervening act of a third party or the act of the victim himself (See *Laramé v Antoine* (1982) SLR 456).

[25] Further, although Article 1383(2) does not specifically provide for an apportionment of damages, where there is contributory negligence, jurisprudence has established the principle in Seychelles (See *PonWaye v Chetty* (1971) SLR 209, *Vel v Tirant* (1978) SLR 7, *Esparon v Chetty* (1976) SLR 74).

[26] *Applying the law to the facts in this case*

[27] In her Complaint, the Plaintiff has averred that at the time of the accident, the Defendant's vehicle was in operation and it was a result of the negligent operation of the vehicle that the accident happened. She is therefore without stating it, basing her claim on the provisions of Article 1382(2) of the Civil Code (supra).

[28] Those provisions transposed into the present factual situation necessitate the Plaintiff only proving that the injury she suffered was as a result of the operation of the car by the

Defendant. Having discharged that burden she only has to prove the quantum of damages she claims for her injuries.

[29] The Plaintiff has therefore attempted to establish that it was the Defendant's operation of her vehicle that caused her injuries.

[30] However, to exonerate herself from the strict liability regime in this area of delict, the Defendant has brought evidence to establish that the act of the Plaintiff running naked across the road in front of her car on a dark night resulted in the accident. The question that needs to be resolved therefore is whether the act of the Plaintiff is sufficient to exonerate the Defendant fully or partially of liability.

[31] The consideration of this fact has exercised my mind considerably. I have in this endeavour not allowed my mind to be clouded by the horrific injuries suffered by the Plaintiff.

[32] I have for assistance in my deliberations examined the Road Transport Act and subsidiary legislation made pursuant to it. The following provisions have a bearing on the present case insofar as they provide a useful comparison in terms of what is deemed to be criminal negligence liability in traffic accidents:

*The Road Transport Act*

*s. 24 (1) A person shall be deemed to commit an offence under this Act if—*

*(a) he commits an offence under the regulations;*

*(b) he drives a motor vehicle on a road recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road;*

...

*s. 29. Nothing in this Act shall affect any liability, whether criminal or civil, of the driver or owner of the vehicle by virtue of any law or Act for the time being in force:*

...



*s. 76(1) Subject to any speed limit imposed by the Road Transport Commissioner under section 22 of the Act, and to subregulation (2), no person shall drive a motor vehicle—*

...

*(ii) on any road, other than in Greater Victoria, on the island of Mahe, at a speed exceeding 80 kilometres per hour;*

...

*The Road Transport Act, Subsidiary Legislation: Control of Movement of Pedestrians on Roads Regulations*

...

*s. 5 A pedestrian on a road shall not—*

*(a) wilfully cause unreasonable obstruction to vehicular traffic; or*

*(b) act or walk negligently, or in such a way that a road accident is caused or is likely to be caused thereby*

...

[33] In criminal law, it would seem, there is a duty on both drivers and pedestrians to conduct themselves in a manner that is neither reckless nor negligent on thorough fares. There are in many respects parallels that can be drawn between the civil and criminal regimes of liability in Seychellois law, especially in the area of negligence and delict. The burden of proof that needs to be discharged by parties may be different but the concepts are similar. Moreover, the law of evidence permits the admission of evidence of criminal convictions to prove liability in civil suits (see section 7 of the Evidence Act).

[34] Whilst neither party in the present case was prosecuted for any road traffic offence, the correlation between the regimes of civil and criminal law in this regard, allow the court to examine the requisite ingredients of negligent acts in criminal law and apply them to civil law situations. This is especially useful given the fact that in road traffic accidents Article

1382 (2) of the Civil Code imposes a regime of strict liability on the custodian of the vehicle.

- [35] Using the Road Transport Act provisions above but also the actions of a prudent man (*le bon père de famille*) I do not find it established that the Defendant acted in a way that was negligent to so result in a collision between her car and the Plaintiff. She did not exceed the speed limit; she did not drive in a negligent manner. The evidence is that she drove between 50-60 kmph while the speed limit in the area is 80kmph (see s 71 (1) (ii) of the Road Transport Act, *supra*).
- [36] Nor is there any evidence that she did not exercise proper care and control when driving. Mr. Morel's evidence in this respect is not helpful. While he can state that the Respondent should have slowed down, and this would have been the case had she observed the Plaintiff on the road, it has not been established that the Plaintiff was visible. I certainly have great difficulty in imagining whether I would notice a woman with very dark skin colour without any clothing on crossing an unlit road unless she was directly in front of the headlights of a car. The visit to the locus in quo in broad daylight in this respect was not helpful, nor was the fact that the accident report by the police who it would seem attended the scene never adduced in evidence.
- [37] What is interesting is the Defendant's adamant statement, despite robust cross-examination that it was the Plaintiff who collided with her. I found her to be a strong and honest witness who was very forthright in her answers. I believe her testimony.
- [38] There is also ample evidence that the Defendant crossed the road without paying any notice to vehicles on the thoroughfare. The transcript of evidence that I have reproduced above bears that out. She had no regard for the vehicles on the road. She herself stated that she ran across the road and that was the way she normally crossed the road. Her own witness stated that he saw that she was not going to stop by the way she was running.
- [39] In similar fashion to the exercise I carried out in terms of examining the acts of the Defendant through the prism of the Road Transport Act, especially section 5 of The Road Transport Act, Subsidiary Legislation: Control of Movement of Pedestrians on

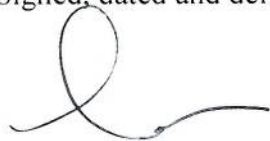
Roads Regulations I cannot but come to the conclusion that it was the Plaintiff's own negligent act when crossing the road that caused the collision. She has therefore failed to establish the causal link between the Defendant's operation of her vehicle and her injury. Her injuries were caused, it would appear to me by her own rash and deliberate action of running across one of the busiest thoroughfares of Seychelles.

[40] For the court to find otherwise given the glaring evidence in this case and to apply strict liability to custodians of vehicles in such circumstances would be tantamount to granting the licence to anyone to walk or run across roads, in any manner they wished, suffer injury and claim compensation from drivers of vehicles. That could not have been the intention of the legislator and it is not an effect the court can give to the provisions of Article 1383 (2) of the Civil Code.

[41] In the circumstances I do not find the Defendant liable for the damage caused to the Plaintiff. I do not propose therefore to consider the quantum of damages as claimed. I need to observe however that quantum was not proved in any way whatsoever in this case.

[42] For the reasons I have outlined above I dismiss the plaint with costs.

Signed, dated and delivered at Ile du Port on 11th November 2016.



**M. TWOMEY**  
Chief Justice

