

IN THE SUPREME COURT OF SEYCHELLES

- 1. FRANCOISE LABICHE**
- 2. LOUIS ELIZABETH**
- 3. WILVEN ELIZABETH**

PLAINTIFFS

VERSUS

MR BRIAN LAPORTE

DEFENDANT

Civil Side No 22 2000

Mr. F. Bonte for the Plaintiffs
Mr. R. Valabhji for the Defendant

JUDGMENT

Perera J

This is a delictual action based on Article 1383(2) of the Civil Code. The plaintiffs are the mother, father and the brother of one Louis Guy Elizabeth who died on 19th September 1996. It is averred that he was knocked down by a vehicle bearing no. S. 10048, driven by the defendant.

It has since been disclosed that the second plaintiff died pending the determination of this case. Pursuant to Section 176 of the Code of Civil Procedure, where the death of a party occurs between the hearing and the judgment, the cause, in relation to that party does not abate. However, the claim must be established by the surviving heirs.

The 1st plaintiff, the mother of Louis Guy Elizabeth testified that, her son who was 38 years old at the time of his death was employed at Hunt Deltel & Co. Ltd, and earned around Rs.4000 to Rs5000 per month. She stated that he gave her about Rs.1000 every week for the maintenance of the family. She produced a copy of the judgment of the Magistrates' Court in case no. T. 51/97

wherein the defendant was acquitted on a charge of negligent driving, but was convicted for the offence of failing to stop when an accident had occurred, which is an offence, specified in Section 24(1) (g) of the Road Transport Act (Cap 206).

The third plaintiff, the brother who claims Rs.50,000 for loss of brother did not testify.

The defendant was examined by Learned Counsel for the plaintiffs on his personal answers. Thereafter, in his evidence in chief at the end of the plaintiffs' case, he adopted that evidence on oath. He denied that he knocked down any pedestrian on the material day, although he was convicted for failing to stop after an accident had occurred. He however stated that he paid the fine of Rs1500 imposed on him by the Magistrate.

The defendant further testified that he was the driver of vehicle S. 10048 which was a bus belonging to "Premier Holidays". That night two other buses belonging to other Tour Operators also picked up tourists from a flight and were transporting them from the Airport to Hotels on the West Coast of Mahe. The three buses left the Airport at about 10 minute intervals. His bus was second to leave, and the 3rd bus was driven by one Selby Joseph. The defendant stated the following-

"When I reached home, Selby Joseph of Takamaka, called me and told me, why didn't I pick up somebody on the road. I told him that I saw somebody on the road, but I did not pick him. Every time I go down, I can see that person sleeping, and there were three buses coming down."

Consequent to statements of four clients being recorded by the Police, the bus was taken to the Police Station for investigation.

The defendant was questioned by Court as to why Selby Joseph should ask him why he did not pick up the man, he replied-

“Because it was Selby Joseph who had seen everything. After I had passed, Selby was behind me”.

The defendant was charged before the Magistrates’ Court with the offence of negligent driving, and not with the offence of causing death by reckless or dangerous driving under Section 25 of the said Act. The judgment of the Magistrates’ Court (P1) shows that the defendant had reported to the Police Station, the same night and made a statement that while he was negotiating a bend, he suddenly felt the left rear wheel of the bus going over something on the road. From the left front mirror, he saw two dark human feet and a person wearing red and black clothes fallen down. He was afraid, and so continued his journey towards Anse Boileau.

It is pertinent to note that a Criminal Court decides a charge on proof beyond a reasonable doubt, while a Civil Court has only to find proof on a balance of probabilities. As regards the charge of negligent driving, the Learned Magistrate held that there was no direct or circumstantial evidence to prove beyond a reasonable doubt that the defendant fell below the standard of a prudent driver. It appears that evidence in the case that the deceased when drunk used to sleep on the road weighed heavily in the mind of the Magistrate in that respect. However in a Civil action the burden is much lighter. In the present case, the defendant admitted knowledge that the deceased usually slept on the road. He also admitted that he told Selby Joseph that he saw somebody on the road. Further, he admittedly drove off after he realised that he had run over a human being. Section 24(1)(g) of the Road Transport Act under which he was convicted for failing to stop, applied to a driver of a vehicle who causes an accident and not to any other motorist. Pursuant to Section 24(1) of the Evidence (*Amendment*) Act no. 7 of 1990 the fact that a person has been convicted of an offence shall be admissible in evidence for the

purpose of proving that he committed that offence whether or not any other evidence of his having committed that offence is given. Accordingly the fact of conviction of the defendant on the charge of failing to stop after an accident, would be proof that it was he who was involved in the accident which caused the death of Louis Guy Elizabeth. A mere passer by, who fails to be a good samaritan does not commit a criminal offence.

Article 1383(2) raises a presumption of fault against the driver of a motor vehicle for any damage caused to persons or property unless he can prove that the damage was solely due to the negligence of the injured party. The defence is one of complete denial of the accident. Even if the deceased had been sleeping on the road at that time, as that fact had not been pleaded, and as there is no averment to rebut the presumption, the case has to be decided on basis of the defence filed in the case. As was held in the case of ***Tirant v. Banane (1977) S.L.R. 219***, a party cannot at the trial give evidence of facts not pleaded. The evidence in the case does not substantiate the defence pleaded that the said deceased was not knocked down by the vehicle driven by the defendant. Hence the presumption under Article 1383(2) remains unrebutted, and accordingly the defendant is held liable in damages.

Damages

It is settled law that parents of a deceased victim in a situation of this nature, are entitled to damages for both material and moral, and that collaterals, such as brothers and sisters are also entitled to moral damages in respect of their deceased brother or sister.

The 1st plaintiff, the mother claimed that the deceased, who was living with her contributed about Rs1000 per week. This was not challenged by the defence. However I would consider that on a reasonable estimate she received about Rs500 per month. The 1st plaintiff's age was not stated to Court, but as the son was 38 years old at the time of his death, she would have been at least 58 years old then. Hence on a consideration of the uncertainties of life of

both the mother and son, I would limit the award under the head of loss of financial support to five years at the rate of Rs500 per month. Accordingly I award a sum of Rs30,000 under that head.

As regards moral damages, the 1st plaintiff, as the mother would have suffered mental anguish at the loss of her son. Hence I award her a sum of Rs.10,000 under that head.

As the 2nd plaintiff died pending the disposal of this case, and as no substitution was made, the Court will not make an award on his claim.

The 3rd plaintiff, a brother of the deceased claimed Rs50,000 as moral damages. It is natural that a brother would be emotionally affected by the death of another brother. The Court is aware that grief and affliction should not offer an opportunity to turn family bereavements into pecuniary advantage. However I award a sum of Rs.5000

Accordingly judgment is entered as follows-

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| 1. | 1 st Plaintiff | - | Rs. 40,000 |
| 2. | 2 nd Plaintiff | - | no award |
| 3. | 3 rd Plaintiff | - | <u>Rs. 5,000</u> |
| | | | <u>Rs. 45,000</u> |

Judgment is accordingly entered against the defendant in a total sum of Rs.45,000, together with interest and costs on a pro-rata basis.

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A.R. PERERA

JUDGE

Dated this 5th day of May 2005