UDC 343.222(698.2); 347.512(698.2)

CERIF: S 130

DOI: 10.51204/Anali_PFUB_20409A

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MAURITIAN TORT LAW

According to the general tort law of Mauritius (articles 1382 through 1384 of the Mauritian Civil Code), three conditions must be met before tort liability may be implemented, namely the existence of harm, the existence of a causal link, and the existence of a harmful event. This paper contains an analysis of the fundamentals of the tort law of Mauritius, which is based on Mauritian case law and French case law and French doctrine, which are considered a persuasive authority in Mauritian Civil Law.

Key words: *Mauritian. – Tort. – Law. – Liability. – Harm. – Causal.*

1. INTRODUCTION

1.1. Definition of Tort Liability

In Mauritian law, tort liability is defined as an obligation, imposed by law on one person (an individual or a corporate body), to compensate harm suffered by another person (Cabrillac 2020, 222, para. 219; Porchy-Simon 2020, 349, para. 671). Indeed, civil liability is split into two constituent blocks: there is, on one hand, contractual liability, and on the other hand—tort liability.

It should be noted from the outset that Mauritian civil law has a well-established rule of non-accumulation of contractual liability (Chénédé 2018, 139 subs.) and tort liability (Cabrillac 2020, 223, para. 220; Porchy-Simon 2020, 349, para. 671). Thus, a victim of harm cannot

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freely choose the type of liability that will be applied to his case, nor combine the rules of two types of liability (see also: Seube 2019, part II).[1]

1.2. Functions of Tort Liability

Tort liability fulfils several functions in Mauritian law. First of all, there is the compensatory function: the main mission of tort liability in Mauritian law is to ensure the compensation of harms suffered by the victims.[2] Moreover, one of the functions of the tort liability in Mauritian law is the normative one, which consists in letting everyone know which behaviors are the socially acceptable ones. This function is fulfilled through legal sanctions and the repression of faulty behaviors, i.e. abnormal acts committed by a wrongdoer. Finally, the third function of the tort liability in Mauritian law is directly linked to the abovementioned normative function, and this third function is called *preventive function*. One of the purposes of the tort liability in Mauritian law is to warn potential wrongdoers about the consequences that they will face, should they cause unlawful harm to a third party. In conclusion, the tort law of Mauritius aims, among others, to reduce the number of harms caused, by encouraging all persons and legal entities to behave cautiously.

1.3. Reparable Harm and Irreparable Harm

It should be noted that the foundations of tort liability in Mauritian law are laid down in articles 1382 through 1386 of the Mauritian Civil Code (compare with Latina, Chantepie 2018, 649–650). One of the conditions stemming from the abovementioned articles is reparable harm. In other words, Mauritian civil law does not provide compensation for all the harm likely to occur in the territory of the Republic of Mauritius. There are also harms for which the victim cannot be compensated and whose burden the victim must bear themselves.[3]

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[1] See the judgments of the Supreme Court of Mauritius in *Air Austral v. Hurjuk A. H. I* 2010 SCJ 202; *Sotramon Ltd v. Mediterranean Shipping Company S. A.* 2015 SCJ 109; *Vestalane Investments (Pty) Ltd v. Federal Trust (Mauritius) Ltd.* 2013 SCJ 217.

[2] See the judgment of the Supreme Court of Mauritius in *The Municipal Council of Curepipe v. Ganessan Murday* 2011 SCJ 362. – See also: Civ. 2nd ch., 9 July 1981, Appeal No. 80–12142.

[3] Thus, there exists harms that is considered to have been legitimately caused. This harm cannot be compensated under articles 1382 through 1386 of the Mauritian Civil Code. For instance, a successful merchant who develops his client base will certainly cause financial harm to his competitors, whose income will decrease. However, the former will not be required to compensate the latter as long as the competition game is in conformity with the law.

2. THE CONDITIONS FOR THE IMPLEMENTATION OF TORT LIABILITY

In the general tort law of Mauritius (articles 1382 through 1384 of the Mauritian Civil Code), three conditions must be met before tort liability may be implemented, namely the existence of harm, the existence of a causal link, and the existence of a harmful event.

2.1. Harm

Harm is defined in Mauritian tort law as an injury to a legally protected interest. More specifically, harm may consist either of an attack on a person's property (this type of harm is material or patrimonial)[4] or of an injury of a person's extra-patrimonial interests (this type of harm is the moral or extra-patrimonial one). The harm is usually directly caused to a victim, but sometimes, the persons close to the victim of harm may be suffering their own, personal harm (*victims by ricochet*), arising from the harm inflicted to the abovementioned direct victim.

2.1.1. Harm Suffered by Direct Victims

The harm suffered by a direct victim can be either material or moral. Material harm consists of any harm directly liable to financial assessment, suffered by an individual or legal entity. This type of harm can take several forms, namely the forms of *material loss suffered* (*perte faite*), *missed gain* (*gain manqué*) and *loss of an opportunity* (*perte d'une chance*). Material loss suffered consists of the decrease in the property of the victim of harm.[5] The missed gain is an enrichment on which the victim could have legitimately counted, if there had not been any harmful fact. This definition of the missed gain was laid down in the judgment of the Supreme Court of Mauritius in *Dabee v. Ramtohul* 1967 MR 8.[6] Mauritian tort law also provides compensation for the loss of a serious chance to make a profit[7] or to avoid a

[4] See the Supreme Court of Mauritius judgment in *l'Inattendu Co. Ltd. v. Cargo Express Co. Ltd.* 2001 SCJ 7.

[5] For example, a material loss is suffered in the case of destruction or damage to an object belonging to the victim (vehicle, house, etc.). The destruction or deterioration of the object reduces the property of its owner, as the owner loses all or a part of the economic value of the object.

[6] Thus, the professional income of a victim, which could not be gained because of a civil fault of the wrongdoer, qualifies as missed gain. However, this income has to be certain, otherwise, the harm is considered to be a mere possibility (*préjudice éventuel*) and will not be repaired.

[7] For example, a litigant has lost a serious chance to make a profit, which constitutes reparable harm, when it became impossible for them to use their procedural rights, due to a fault of their legal representative (attorney), whereas the litigant had a

loss.[8] Thus, there exists the loss of a serious reparable chance when a candidate, having had the necessary skills and knowledge, could not sit for an examination or participate in a competition because of the wrongful event. This rule has been laid down in the judgment of the Intermediate Court of Mauritius in *Calleechurn Ashwin Kumar v. Bhoyro Satteedeo* & ORS of 2007 INT 63.

Moral harm is defined in Mauritian tort law as an injury to a person's extra-patrimonial aspects. It consists of the suffering of a victim, and the abovementioned suffering is sometimes mental and sometimes it may be physical. Moral damage may result from the violation of the right to honor (defamation),[9] of the right to name (name usurpation) or of the right to privacy (unauthorized revelations). In such cases, mental suffering arises from the violation of the aforementioned rights. For instance, in the Supreme Court's judgment in *La Sentinelle Ltd v. JR Dayal* of 2000 (SCJ 092) the letters MACRO,[10] added after the name of the Commissioner of Police at the time, in an article published in the newspaper *l'Express* on 13 June 1996, were qualified as insult, having damaged the honor of the victim. He was awarded 100,000 rupees as compensation for the moral injury by the Commissioner of Police. It should also be noted that in Mauritian law there is also the right to compensation for moral damage caused by an attack on the right to reputation, consideration or honor of a legal entity[11] that is not a living being.[12] The direct victim can also be compensated for the mental suffering stemming from their inability to engage in an activity that they regularly practiced before the harm was caused[13] (e.g. doing sports, going fishing with their children, etc.). This type of moral harm is called *loss of pleasure* (*préjudice d'agrément*).[14] The victim of a road accident or other unfortunate event is also entitled to

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serious chance of winning the case (Cass. 1st ch., 18 November 1975, D. 1976, IR, 38; Cass. 1st ch., 16 March 1965, D. 1965, 425).

[8] *cf.* Crim. Ch. 10 January 1996, Appeal No. 95–80686; Cass. 1st ch., 21 November 2006, Bull. civ. I, No. 498; Cass. 1st ch. 22 March 2012, Appeal No. 11–10935 and 11–11237.

[9] *cf.* Cass. com. ch. 26 April 1994, Appeal No. 92–15884; Cass. com. ch. 1 February 1994, Appeal No. 92–11171.

[10] In Mauritian Creole language, which is the dialect spoken in Mauritius, "macro" means a pimp.

[11] In fact, in such cases, the moral harm is suffered by the persons who are closely involved in the functioning of the company, such as its executives.

[12] *Police v. Bundhoo Mohamed Ali Dilshad & ANOR* 2007 INT 296. In this case, a company suffered moral harm because its reputation in the United States of America had been tarnished by the wrongdoing (forgery) by an employee of that company.

[13] See the Supreme Court of Mauritius judgment in *Dabee v. Ramtohul* 1967 MR 8.

[14] Thus, in a judgment of the Plenary Assembly of the French Court of Cassation dated 19 December 2003, one can read: "(...) the loss of pleasure is a subjective injury of

compensation for mental pain caused by being mutilated or disfigured. This kind of moral damage is called *aesthetic harm*. Moreover, in Mauritian civil law, the moral harm of the direct victim can also consist of the physical suffering caused by an attack on their physical integrity.[15] This rule is clearly stated in the Supreme Court judgments in *Mohonee K. v. New India Assurance Co. Ltd* 2019 SCJ 16 and *Dabee v. Ramtohul* 1967 MR 8. It should be noted that in the judgment in *Boodhoo v. Ramsamy & Anor* 1985 SCJ 22, the Supreme Court of Mauritius found that the right of the direct victim to compensation for moral harm, conceived as physical suffering, can be transmitted to their heirs.[16]

2.1.2. Damage Suffered by Victims by Ricochet

The harm suffered by a victim by ricochet, which is an autonomous harm derived from the harm caused to a direct victim, can be material or moral. It may happen that the link between the direct victim and victim by ricochet consists of a maintenance claim that the latter has towards the former. According to Article 203 of the Mauritian Civil Code, parents owe maintenance to their minor children. The same legal obligation applies to spouses, who owe each other fidelity, relief and assistance, according to Article 212 of the Mauritius Civil Code. Thus, when a young child is deprived of financial support, because of the death of a parent who generated professional income, the wrongdoer guilty of their death will have to compensate for the material harm caused to the child by the loss of the parent's financial support. If the accident had not happened, the financial support provided to the child by the parent would have been maintained. The harm suffered by the child is qualified as missed gain. Mauritian case law is clearly set in this direction, and the Supreme Court judgments in *Boodhoo v. Ramsamy & ANOR* 1985 SCJ 22 and *Gokhool SD v. Groupement français d'assurances* 2009 SCJ 412 are a clear proof of this orientation.

The same solution should be adopted in cases where the victim by ricochet did not have any maintenance claim towards the direct victim provided for by law, but benefited from voluntary and regular financial assistance by the latter.[17]

a person resulting from the disturbances experienced in the conditions of a person's existence." (translated by author) (Appeal No. 02–14783).

[15] Cass. 2nd ch., 11 October 2005, Appeal No. 04–30360.

[16] This principle is reaffirmed in the decisions of the Intermediate Court of Mauritius *Lal Mahomed Bibi Mymoon v. Mauritius Union Assurance Co. Ltd.* 2007 INT 68.

[17] If the direct victim had not been killed, the victim by ricochet would have continued to receive the financial aid from the direct victim. The loss of this voluntary aid constitutes material harm suffered by the victim by ricochet (missed gain). See: Cass. crim. ch. 2 May 1983, Appeal No. 80–95264.

It should be noted that the Supreme Court of Mauritius refused long ago to award compensation for material and moral harm suffered by the concubine, in case of the death of their partner. This position stems from the judgments in *Lingel-Roy M. J. E. M. & Ors v. The State of Mauritius & Anor* 2017 SCJ 411, *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & ANOR* 2007 SCJ 106, *Naikoo v. Société Héritiers Bhogun* 1972 MR 66, and *Moutou v. Mauritius Government Railways* 1933 MR 102 (for an academic analysis of the legal grounds put forward by the Supreme Court of Mauritius, see: Georgijevic 2019, 3–20).

The harm caused to the direct victim is very often likely to create mental suffering for a person close to them (victim by ricochet). When the moral harm of the victim by ricochet stems from the death of the direct victim, Mauritian civil law presumes that a blood relative or an ally of the direct victim has actually suffered moral harm because of the abovementioned death. This presumption is not absolute, and can be overturned by the defendant, i.e. the wrongdoer. Thus, the Mauritian Supreme Court has, for example, refused to allow compensation for non-pecuniary (moral) harm to a wife *de facto* separated for years from her deceased husband and living in cohabitation with another man. Given the circumstances of the case, she was not able to prove the moral (mental) suffering that her spouse's death caused her. This rule was laid down in the judgment of the Supreme Court of Mauritius in *Scott v. Brasse* of 1968 MR 31. On the other hand, there are numerous judgments in which the surviving wife and children were awarded compensation for non-pecuniary harm by ricochet, for example, *Gutty & Ors. v. Eleonore* 1980 SCJ 312, para. 17 *in Gokhool S D v. Groupement français d'assurances* 2009 SCJ 412. The moral harm stemming from the infirmity of the direct victim is also a reparable one, and the abovementioned infirmity does not have to be exceptionally serious.[18]

2.2. Causality Link

In Mauritian Tort law there are two conceivable modes of appreciation of the causal link: on one hand, there is the theory of equivalence of conditions (*théorie de l'équivalence des conditions*) and, on the other hand, there is also the theory of adequate causality (*théorie de la causalité adéquate*). Whichever theory is applied by Mauritian courts, the causal link must be proven by the plaintiff, and this link cannot be presumed.

2.2.1. The Theory of Equivalence of Conditions

According to the theory of equivalence of conditions, the legal cause of harm is any event without which the harm would not have

[18] Cass. 2nd ch. 1 July 2010, Appeal No. 09–15907; Cass. 2nd ch., 8 December 1971, Appeal No. 70–12550.

occurred. If the event in question had not occurred, the harm would not have occurred neither. On the other hand, if the harm would have occurred even in the absence of an event, that event is not its legal cause. Those rules are clearly stated in the Mauritian Supreme Court's judgments in *Beau Plan Sugar Estate v. WW S. Pultee* 1994 SCJ 399[19] and *Caprede v. State of Mauritius* 2010 SCJ 147.[20]

2.2.2. The Theory of Adequate Causality

According to the theory of adequate causality, not all event, in the absence of which the harm would not have occurred, are necessarily legal cause for damages. The cause of harm is an event which, *in the normal course of events*, would have entailed harm. On the other hand, events which are not, in the usual course of events, considered to be the cause of harm will remain outside the causal link. Thus, the existence of the causal link between the harm and an event is assessed from the point of view of a good family father (*bon père de famille*), i.e. from the point of view of a reasonable and prudent man or woman. If for an average and reasonable person the harm is the normal result of an event, the latter will be considered as the adequate cause of the former. The theory of the adequate causality was implicitly applied in the judgment of the Supreme Court of Mauritius in *Parmessur V K P & Ors v. Beeharee V & Anor* 2014 SCJ 135. Theft, committed by a third party, of the personal belongings of a driver involved in a traffic accident cannot be the civil liability of the other driver involved in the same accident, whose fault for the accident has not been contested. The theft of a person's personal belongings is not the normal, usual result of a road accident in which the person has been involved.

2.2.3. Proof of Causal Link

According to Mauritian tort law, the burden of proof of the causal link lies with the plaintiff, i.e. on the alleged victim of harm, in accordance

[19] In this judgment a spouse, whose husband has already deceased, brought an action before the Supreme Court of Mauritius against her late husband's employer and asked for the compensation of the harm stemming from the death of the husband. She asserted that his was due to the refusal by the employer, three years prior to the death of the employee, to approve sick leave for the latter's back pains. The Court rejected this request of the wife: the refusal to grant sick leave was not a necessary a factor in the death of the employee. Thus, there was no causal link between the two.

[20] In this judgment a mother, whose son hanged himself while in police custody, brought an action before the Supreme Court of Mauritius against the State of Mauritius and sought compensation of the harm stemming from the death of her son. She asserted that his death was due to the fault of a police officer who did not check the prisoners as often as he should have done (as per the Police Regulations). The Court rejected this request of the mother: the fault of the police officer was not a necessary factor in the death of the prisoner. Thus, there was no causal link between the two.

with the adage *actori incumbit probatio*. As the causal link is a legal fact, the means of proof are not limited,[21] and the plaintiff can use all possible means of proof (writings, testimony, etc.) in order to prove their harm. Judges or magistrates may have recourse to presumptions of fact, provided those presumptions are serious, precise and consistent. The Intermediate Court of Mauritius confirmed this rule in its judgment in *L. Iyemparooma v. CIP Ltee* of 2010 INT 178.[22]

2.2.4. Causal Link in Case of Several Wrongdoers Causing the Same Harm

It may happen that two or more persons carry out the same activity in a group, and that harm is caused by one of the members of that group, without knowing exactly which one caused it. According to the current Civil Code of Mauritius, all members of the group are considered not to be liable in tort, given the fact that it is impossible to precisely identify the wrongdoer. This principle is laid down in the Supreme Court's judgment in *Emamally and ORS v. Patun and ANOR* of 1975 SCJ 34. Two hunters participated in the same hunt and one of them accidentally killed a person who was walking not far from the two of them. It was impossible to establish which one exactly killed the victim, which is why the Supreme Court exonerated both hunters from the liability in tort. This solution seems to be very harsh on the victim of harm, and maybe it would be better to declare all the members of the group liable *in solidum* for harm instead of exonerating them.

2.3. Harmful Event

In Mauritian tort law, there are three potential harmful events that may give rise to the tort liability of a wrongdoer: a fault (*faute*), an act by an object (*fait des choses*), and an act by another person (*fait d'autrui*).

2.3.1. Fault

Fault, one amongst the events giving rise to tort liability in Mauritian law, is dealt with in articles 1382 and 1383 of the Mauritian Civil Code. However, these articles do not give any legal definition of

[21] *cf.* Artt. 1341 subs. of the Mauritian Civil Code applying to the existence and content of contract.

[22] In this judgment the plaintiff asserted that he suffered harm due to a food poisoning and that the cause of that poisoning was the consumption of bottles of water bought at a supermarket. Thus, he sued the supermarket and asked for compensation of his harm. The Court rejected his request because there was no serious, precise and consistent presumptions of facts that would allow the Court to establish the existence of the causal link. In fact, there were too many potential sources of the plaintiff's food poisoning such as poorly washed vegetables that he ate.

fault (Porchy-Simon 2020, 363, para. 697). In Mauritian tort law, it is not necessary to look for a specific legal provision in order to establish the existence of civil fault. Civil fault is defined as the violation of the general principle of not harming others unfairly (*ne pas nuire injustement à autrui*) (Cabrillac 2020, 237, para. 241). Fault is an error in the behavior of a wrongdoer (Cabrillac 2020, 238, para. 241).

In Mauritian civil law, the burden of proof of the existence of civil fault lies with the alleged victim, in accordance with the adage *actori incumbit probatio*. Since civil fault is a legal fact (*fait juridique*), and not a legal act (*acte juridique*), all means of proof, including witnesses, are allowed.

Traditionally, it is considered that the capacity for discernment of a wrongdoer, is a building block of the notion of civil fault, because it gives a moral dimension to the fault. A person unable to differentiate between right and wrong cannot be held liable in tort. Nevertheless, one may notice this in the Mauritian Supreme Court judgment in *Medine Sugar Estates Co. Ltd v. Anthony* of 1990 SCJ 334 this condition has been abandoned (Jeanne, Touzain 2020, 210 subs.). Thus, despite the lack of capacity for discernment, a 3-year-old child may commit a civil fault, when going over a zoo fence that is 74 cm high, entering the tiger enclosure and getting injured by the animal. On the other hand, a misconduct, i.e. an error in the behavior of a wrongdoer, is a building block of the notion of civil fault in Mauritian tort law. The fault is the deviation in the behavior of the wrongdoer from the behavior that is deemed to be correct.[23] In Mauritian civil law, civil fault is assessed *in abstracto* (Cabrillac 2020, 238, para. 241; Porchy-Simon 2020, 365, para. 798; Jeanne, Touzain 2020, 213). This rule is clearly laid down in the judgment of the Supreme Court of Mauritius in *Neron Publications Co Ltd v. La Sentinelle Ltd & Ors* 2020 SCJ 63 as well as in the judgment of the Intermediate Court in *D. Hurnam v. D. K. Dabee* 2010 INT 244. The assessment of the civil fault *in abstracto* is about comparing the behavior of the wrongdoer with the behavior of an abstract and average person, a person that is "reasonably careful and wise". Nevertheless, it has to be highlighted that in the *in abstracto* assessment of fault, a diligent and prudent person exercising the same activity is taken as the model for the comparison. For example, the behavior of a doctor who is an alleged wrongdoer is compared to that of an abstract, prudent and wise doctor; the behavior of a worker whose fault is being alleged is compared to the behavior of an abstract prudent and wise worker. Professional qualification is therefore a concrete element that permeates the *in abstracto* assessment

[23] See the judgments in *Mohun v. Jugnah & ANOR* of 2002 SCJ 36; *Ramchurn Uma Parvati & ORS v. Sahadeo Ashok & ANOR* of 2008 INT 192.

of civil fault. In addition, in the *in abstracto* assessment of civil fault, the circumstances of the case are taken into account, and a judge or a magistrate must ask themselves the question what a good family father (a careful and reasonable person) would have done in the same circumstances.

It should be noted that the fault of a victim may entail the partial exemption of the person liable in tort for the harm suffered by the victim. The exemption of liability will be proportionate to the gravity of the victim's fault. The Supreme Court of Mauritius sets our clearly those rules in its judgments in *Coonjah v. Soap and Allied Industries Ltd.* of 1977 MR 309,[24] *M. & A. Aluminum Center Ltd. v. The Mauritius Commercial Bank Ltd.* of 2009 SCJ 52, and *Press Distribution Co. Ltd. v. CEB and Ors* 2014 SCJ 58.

Mauritian civil law takes into account not only faults by commission but also faults by omission. Civil fault by commission is an act that one committed, where one should not have committed it. In contrast, fault by omission consists in not doing something that one should have done. When an omission contravenes a legal or regulatory duty to act, it certainly constitutes a civil fault.[25] On the other hand, when an omission does not contravene a legal or regulatory duty, such an omission may be considered a civil fault, provided that it is contrary to a professional duty, other than a legal or regulatory duty (Cabrillac 2020, 240, para. 244; Porchy-Simon 2020, 365, para. 796; Jeanne, Touzain 2020, 211).[26] In its judgment in *Rouillon Marie Josee Raymonde v. Utchanah Jef* 2007 INT 250, the Intermediate Court of Mauritius states that a hairdresser did not commit civil fault because they she does not install surveillance cameras in their hair salon. There is no professional obligation to do so.

Finally, according to Mauritian case law, the way in which subjective rights (*droit subjectifs*) are exercised may amount to a civil fault, in spite of the fact that the exercise of subjective rights is *a priori* free and the compensation for the harm resulting from the abovementioned exercise cannot be awarded. This is particularly true when a subjective right is exercised with the intention of harming others (*intention de nuire*) (Cabrillac 2020, 242 s., para. 249 s.; Jeanne, Touzain 2020, 212), as

[24] In this case, the fault of the victim, who is the ex-employee of the person liable in tort, consisted in not wearing a protective mask in the workplace. This fault reduced the tort liability of the former employer of the victim by 25%.

[25] For example, Article 39 A (2) of the Mauritian Penal Code stipulates that "any person who willfully omits to provide to a person in danger such assistance as he could, without any risk to himself or to a third party, provide to that person by his own intervention or by calling for help, shall be punished by a fine not exceeding 10,000 rupees and by imprisonment for a term not exceeding 2 years." This culpable omission is not only a criminal fault but also a civil fault.

[26] Comp. with: Cass. 1st ch., 22 January 2014, *Recueil Dalloz*, 2014, 276.

evidenced by the judgments of the Intermediate Court in *Gendoo v. Razbully* of 2010 INT 149 and *Hurloll Leelder v. Choolun Anandissan* of 2007.[27]

2.3.2. Act by an Object

In Mauritian civil law the act by an object is a harmful event that may lead to tort liability (see: Batteur 2020, 292 subs.). This type of liability is called *strict (full) liability*. There is the common law of liability for an act by an object, arising from Article 1384 paragraphs 5 and 6 of the Mauritian Civil Code. The abovementioned common law applies in all cases, except in cases where the Civil Code has provided a special regime of tort liability for acts of objects (articles 1385 and 1386, liability for an act by an animal and liability for the damage caused by the ruin or poor maintenance of a building). The judgment that introduced to Mauritian law the objective tort liability for harm resulting from acts of objects was the Supreme Court's judgment in *Rose Belle S.E. Board v. Chateauneuf Ltd.* of 1990 MR 9 and 16.[28]

The implementation of strict (objective) liability for acts of objects in Mauritian common tort law requires fulfillment of three conditions: the object, its act, and the identification of the person responsible for the abovementioned act. In principle, any object may give rise to objective liability for an act by an object, under Article 1384 of the Mauritian Civil Code, but on condition that a person has control over that object. In other words, there must be a person who exercises the power of control and direction over the object. Article 1384 of the Mauritian Civil Code applies to both movable and immovable property (Cabrillac 2020, 245–247, para. 253–257; Jeanne, Touzain 2020, 235), with the exception of those falling under articles 1385 and 1386 of the Civil Code[29]. The act by an object (Cabrillac 2020, 238, para. 247–248, 258–259; Jeanne, Touzain 2020, 236–237) designates the causal link between the object and the seat of harm.[30] It is up to the alleged victim to prove the act by an object, in

[27] In two cases cited above, civil fault consisted of the misuse of the right to report a criminal offense to the police. This misuse was motivated by the desire to take revenge on the victim of the false denunciation.

[28] In the same vein, there is also the judgment of the Supreme Court of Mauritius in *Compagnie Sucrière de Bel Ombre v. Vishnoo Bungaroo* of 2000 SCJ 308 as well as the judgment of the Intermediate Court of Mauritius in *Mauritius Union Assurance v. T. Raghu & Cie* of 2011 INT 27.

[29] The harm caused by the ruin of a building is reparable under a special regime provided for in article 1386 of the Mauritian Civil Code. Moreover, the harm caused by the act of an animal falls under the special regime contained in article 1385 of the Mauritian Civil Code.

[30] The seat of harm is sometimes the thing destroyed or damaged, and sometimes the body of the victim of harm.

accordance with the adage *actori incumbit probatio*. When there is no contact between the object and the seat of harm, *a priori* there is no act by an object, and the object cannot be considered the legal cause of the harm. However, the situation is different when the harm has been caused by an abnormality in the positioning of the object or by an abnormality in its condition. On the other hand, if there is contact between the object and the seat of harm, two situations must be distinguished. On one hand, it may happen that contact has occurred between a moving object and the seat of harm. On the other hand, contact involves sometimes an inert object and the seat of harm. When there was contact between a moving object and the seat of harm, the victim of the harm needs simply to prove contact. The presumption of the act by an object, i.e. the causal link between the object and the harm will be deduced from the proof of contact between the object and the seat of harm. The presumption is a simple one and it means that the guardian of the object can override it by providing proof of force majeure (or other exonerating circumstances). The Intermediate Court of Mauritius laid down the abovementioned rule in clear and straightforward terms in the judgment in *Mauritius Union Assurance v. T. Raghu & Cie* of 2011. On the other hand, when there is contact between an inert object and the seat of harm, the alleged victim must prove either the abnormality of the positioning of the object or the abnormality of its condition.[31] The principle is clearly stated in the decisions of the Intermediate Court of Mauritius in *Mauritius Union Assurance v. Municipal Council of Beau-Bassin-Rose Hill* of 2011 INT 28 and *Gunnoo Robin v. Mahatma Gandhi Institute* of 2006 INT 73.[32]

According to Article 1384 of the Mauritian Civil Code, the guardian of the object is liable for the harm stemming from the act by an object (Cabrillac 2020, 248 s., para. 260 s.; Jeanne, Touzain 2020, 237–240). The guardian can be defined as the person who has the independent power, whether this power is in accordance with the law or not, to use, direct and control the object. The natural guardian of the object is its owner, because they have legal power over it, conferred upon them by article 544 of the Civil Code. This principle is set out in the judgments of the Intermediate Court of Mauritius in *MADMR Mohamed & ANOR v. S. Virginie & ANOR* of 2010 INT 240 and *Mauritius Union Assurance v. T. Raghu & Cie* of 2011. On the other hand, an agent (*préposé*), and in particular an employee, cannot be considered the guardian of an object within the meaning of Article 1384 of the Mauritian Civil Code. They work under the orders of others (for example, employees obey the orders

[31] Comp. with: Cass. 2nd ch., 15 June 2000, Bull. civ. II, No. 103; 25 October 2001, Bull. civ. II, No. 162; 18 September. 2003, Bull. civ. II, No. 287; 24 February 2005.

[32] In those two judgments, an abnormality of the object (a metal gate and a staircase) was noted, and it made it possible to apply the full (objective) liability of its guardian.

of their employer) and do not have the independent power to use the object, control it, and direct it.[33]

A thief can be considered as guardian of an object, because they have independent power, although it is not in compliance with the law, to use the object, to control it, and to direct it. Furthermore, in the event of theft, the owner loses custody of the object and ceases to be liable for the harm caused by it. These principles are clearly stated in the judgments of the Supreme Court of Mauritius in *Appasawmy v. The Albatross Insurance Co* 1997 MR 98, *Yip Tat Chung Sichi & Anor v. Cargo Handling Corporation & Anor* 2006 SCJ 127, as well as in the judgment of the Intermediate Court in *Mauritius Union Insurance v. T. Raghu & Cie* of 2011. Finally, there may also be people to whom the owner entrusts the object, and who can become guardians of it, within the meaning of Article 1384 of the Mauritian Civil Code. Some contracts[34] entail transfer of the legal power to use, direct and control the object. Therefore, the owner of the object ceases to be its guardian, and the person to whom the power of mastery over the object has been transferred becomes its guardian. This principle is clearly stated in the judgments of the Supreme Court of Mauritius in *J. Mohulu v. H. Musruck* of 1996 SCJ 306 and *Chetty N. v. Gaindoo B. & Ors* 2015 SCJ 366.

The guardian of the object cannot be exonerated from their tort liability by proving that they were not at fault. Thus, the guardian of the object is not allowed to provide proof that they properly supervised the object, and that the harm was caused by an undetectable defect in it. The Supreme Court of Mauritius cites this rule in the judgment in *General Construction Co. Ltd. v. Ibrahim Cassam & Co. Ltd* of 2011. In Mauritian civil law, there are three grounds that exclude liability for act by an object: force majeure, fault of the victim, and fault of a third party. Force majeure is an external, reasonably unforeseeable and irresistible event. This definition is given in the Supreme Court of Mauritius judgments in *Fatehmamode & Co. Ltd. v. United Docs* of 1979 SCJ 430 and *General Construction Co. Ltd. v. Ibrahim Cassam & Co. Ltd* from 2011 SCJ 19. Fault of the victim indicates their abnormal behavior, i.e. behavior contrary to that of a good family father (careful and reasonable person). Following the judgment of the French Court of Cassation dated 13 April 1934, and another judgment of the same Court dated 13 December 1936, fault of the victim can entail the complete exoneration of the guardian of an object, if the abovementioned fault was the sole cause of the harm. In other words, fault of the victim presenting all the characteristics of a force majeure will completely exonerate the guardian of an object. The victim's

[33] See the judgments in *L. Appasawmy v. The Albatross Insurance Co.* de 1997 *MR 98*; *Sun Insurance Co. Ltd v. Government of Mauritius SCJ 85; General Leasing Co. Ltd. & ANOR v. State of Mauritius* of 2008.

[34] Contract of lease and contract of deposit, for example.

fault must therefore have been reasonably unpredictable and irresistible from the point of view of the guardian, i.e. from the point of view of a reasonably careful person. The principle is adopted by the Supreme Court of Mauritius as evidenced by its decisions in *Rose Belle S.E. Board v. Chateauneuf Ltd.* of 1990, *Medine Sugar Estates Co. Ltd v. Anthony* of 1990, *Veeren V. v. State Insurance Company of Mauritius (Sicom) Ltd & Anor* 2019 SCJ 267, and *Toorab F.B v. La Prudence Mauricienne Assurance Co. Ltd* 2016 SCJ 370. The victim's fault that is not normally unpredictable and irresistible, from the point of view of the guardian of the object, may partially exonerate the latter from their liability. The guardian will be exonerated proportionally to the seriousness of the victim's fault. The rule is laid down in the Supreme Court's judgment in *Rose Belle S.E. Board v. Chateauneuf Ltd.* 1990, and was repeated in *Brette N. R. & Ors v. Harvey J. L. P. & Anor* 2018 SCJ 80. Finally, the fault of a third party will entail the total exemption of the guardian, if this fault has all the characteristics of a force majeure. On the other hand, if the fault of a third party is not normally unforeseeable and irresistible, the guardian of the object will not be exonerated at all.

2.3.3. Act by Another Person

Tort liability of parents for acts of their children. In Mauritian civil law, the father and mother are liable for the harm stemming from the acts of their minor children. According to Article 1384 paragraph 2 of the Mauritian Civil Code, "the father and mother, as long as they exercise guardianship rights, are jointly liable for the harm caused by their minor children living with them" (translated by author). Paragraph 6 of Article 1384 adds that parents can exonerate themselves if they can prove that they could not prevent the act that gave rise to their liability. In Mauritian tort law, parents are considered to be liable for the harm caused by their minor child by virtue of a presumption of fault. There is a presumption that a child has caused harm to others, because they have been poorly supervised or poorly educated by their parents. However, the abovementioned presumption of fault is not absolute and may be overturned, if the parents provide proof that they have not committed any fault, i.e. that they have appropriate supervised and properly educated their child who has caused harm to others. The principle is clearly stated in the Supreme Court of Mauritius judgment in *Rabaille v. Boodhun* 1978 MR 34.[35]

[35] A major turnaround occurred in France in 1997 in a judgment known as *Bertrand* (Cass. 2 19 February 1997) of the second civil chamber of the Court of Cassation: parents' liability is now a strict (objective) liability, implicitly based on the idea of risk. Parents can only be exonerated from their liability by providing proof of force majeure or proof of fault of the victim (which then amounts to force majeure). Conversely, it is no longer possible for parents to be exonerated from their liability by proving the absence of their fault, i.e. by providing proof that they have properly educated and supervised their

The constitutive elements of parental liability for the harm stemming from the acts of their children are the guardianship rights over the child, the minority of the child, the cohabitation between the child and the parents, as well as the wrongdoing of the child.

Article 1384 paragraph 2 of the Mauritian Civil Code applies only to the father and mother. It does not apply to other legal guardians or to grandparents of the child under the roof of whom the child might be at the time of causing harm to others (Ancel 2020, 469). According to Article 1384 paragraph 2, the father and mother are liable for the harm caused by their child as long as they have custody of it (Ancel 2020, 469).[36] Article 1384 paragraph 2 of the Mauritius Civil Code states also that parents are liable for the harm caused by their minor child (Ancel 2020, 469).[37] The child must be a minor at the time it caused the harm to the third person.[38] It does not matter whether the child has become adult at the moment when compensation for the harm is requested. On the other hand, it should be noted that if the minor child is emancipated by marriage,[39] its parents cease to be liable for the harm caused by this child.[40] Parents are liable in tort only for the harm caused by their minor

child and that they have committed no fault pertaining to the harm caused by their child. The new case law is the consequence of a new interpretation of the rule in the French Civil Code according to which the parents may be exonerated from their liability by proving that they were not able to prevent the act of their child (in Mauritius, paragraph 6 of Article 1384 of the Mauritius Civil Code is identical to the abovementioned rule in the French Civil Code).

[36] Married parents, as well as parents living in a notorious cohabitation in Mauritius, jointly exercise parental authority over their minor children. Thus, article 372 of the Mauritian Civil Code stipulates that during marriage, the father and mother jointly exercise parental authority. In addition, article 374 of the Civil Code stipulates that if two parents who are not married have recognized the natural child and if they live together (notorious cohabitation) they exercise parental authority jointly. In these cases, both parents exercise parental authority, and both have custody of the child. Therefore, both are liable for the harm caused to others by the minor child. Their liability is joint and several. In the event of a *de facto* separation of married parents, one of the parents will have custody and the other the right of visitation and accommodation. This is provided by article 372 of the Mauritian Civil Code, which authorizes judges to rule on the custody of the child. In this case, whoever has custody of the child will be responsible for the harm caused by the minor child. Article 373–2 of the Mauritian Civil Code stipulates that in the event of divorce or legal separation, parental authority will be exercised by the parent on whom the judge has conferred custody. This parent will be civilly liable for the harm caused by the child.

[37] According to Article 388 of the Mauritian Civil Code, a child is minor until the age of 18.

[38] Cass. 2nd ch., 25 October 1989, Bull. civ. II, No. 194.

[39] Artt. 476–478 of the Mauritian Civil Code.

[40] This is the consequence of the autonomy of an emancipated child, and of the fact that it is no longer the object of parental authority. Parents are therefore not liable for acts of their emancipated minor child.

children living with them at the moment when the harm was caused. In other words, there must be a community of life under the same roof between the child and the parents at the moment the harm occurs. Community of life refers to the fact that the parents and the child were living under the same roof at the time moment the harm has occurred.[41] This condition is compatible with parental liability based on a presumption of fault, such a presumption being the positive law of Mauritius, as per the previously mentioned judgment in *Rabaille*. If the child cohabits with its parents, they have the opportunity to educate and supervise the child well. However, if the parents do not educate their child and do not supervise it, they commit a civil fault and will be liable in tort for the harm caused to a third person by their child.[42] French case law (a persuasive authority in Mauritian civil law) specifies that the termination of community of life between the parents and a child, without parental authorization, does not exonerate the parents of their civil liability, because it is deemed that the community of life never ceased.[43] Parents are responsible only for damage caused by a fault (a wrongful act) of their minor child. Indeed, it would be illogical to declare the parents liable for damage for which the child cannot be liable itself (on that issue see: Ancel 2020, 469).[44]

The tort liability of the father and mother is not incompatible with the liability of their minor child. The latter is liable for harm stemming from its civil fault. There will be an addition of tort liabilities, not a substitution of one tort liability by another. The parents and their child are jointly liable for harm and the victim will be able to choose the person, a parent or a child, who will be sued in torts before a court of justice.[45]

Parents will be exonerated from their tort liability for an act by their minor child if they are able to prove that the damage caused by the

[41] Compare with the judgment of the second civil chamber of the Court of Cassation dated 19 February 1997 and known as *Samda*. See also: Cass. 2nd ch. 9 March 2000, Bull. civ. II, No. 44; Cass. crim. ch. Feb 8 2005, JCP 2005, II, 10049.

[42] Examples, Cass. 1st ch., 2 July 1991, Bull. civ. I, No. 224; Cass. 2nd ch., 24 April 1989, D. 1990, 519.

[43] Cass. crim. ch. 21 August 1996.

[44] French case law (persuasive authority) has ended up declaring parents liable in tort for the acts of their children, even when a child has not committed a civil fault, i.e. even when his behavior has not been abnormal. See the judgment of the Plenary Assembly of the French Court of Cassation, dated 9 May 1984, known as *Fullenwarth*; see also two judgments of the Plenary Assembly of the Court of Cassation, dated 13 December 2002, and the judgment in *Levert* which is a judgment of the second civil chamber of the Court de Cassation, dated 10 May 2001, Bull. civ. II, No. 96.

[45] In general, the victim of harm will sue in tort the person who is the most solvent, and most in most cases the person sued in tort will be one of the parents, but one never knows... Young minors may be sometimes rich heirs, and it will be in the best interest of the victim to sue the minor who caused harm.

child is due to a *force majeure*. In Mauritian Tort Law, a *force majeure* may be defined as an event external to the parents, normally unforeseeable and normally irresistible. Moreover, in Mauritian civil law, parents can exonerate themselves from their tort liability by providing proof that the act by their child was unforeseeable and irresistible to them. In other words, the parents can exonerate themselves from their liability by proving that they did not commit a civil fault, and that they have properly supervised and educated the child. This rule was laid down in the mentioned Supreme Court of Mauritius judgment in *Rabaille*. Finally, a civil fault of the victim, which is an abnormal behavior, entails either the total exoneration or the partial exoneration of the parents.[46]

Tort liability of the principal for an act by their agent. Article 1384 paragraph 3 of the Mauritian Civil Code provides that principals are liable in tort for damages caused by their agents (e.g. employees) in the fulfilment of the functions for which they have been employed. Certain conditions must be met in order to apply the liability of a principal. Moreover, once these conditions are met, it is necessary to determine how to coordinate the tort liability of the principal and the liability of the agent.

First of all, a principal's tort liability depends on the existence of a principal-agent relationship, also known as preposition report (*rapport de préposition*) (Terré *et al*. 2019, 1125–1126, No. 1060). Secondly, there must also exist a wrongful act by the agent (Terré *et al*. 2019, 1129–1130, No. 1064) and thirdly, there must be a sufficient relationship between the wrongful act by the agent and their function (Tranchant, Egéa 2020, 133–135; Terré *et al*. 2019, 1130–1133, No. 1065). The relationship between the agent and the principal is called *relationship of preposition* or *bond of preposition*.[47] Traditionally, it is deemed that the essential element of the abovementioned relationship is the power (right) of the principal to give orders to the agent regarding the work to be done. The bond of preposition is therefore a bond of authority, i.e. a bond of subordination between the agent and the principal. Thus, the principal has the right to give orders and instructions on how the agent will perform their duties. On one hand, the principal determines the goal to be achieved, and, on the other hand, the principle provides the agent the means to achieve the goal. The contracts that generate the bond of preposition are, in particular, the employment

[46] The exemption from tort liability of the parents will be complete when the fault of the victim takes on the characteristics of a *force majeure*, i.e. if the abovementioned fault is unpredictable and irresistible from the point of view of the child that caused the damage. Conversely, if the victim's fault is normally foreseeable and resistible, the exemption of parents will be partial, and the extent of that exemption will depend on the seriousness of the victim's fault.

[47] See the judgment of the Supreme Court of Mauritius in *Dassruth R. P. v. Femi Publishing Co. Ltd. & Ors* 2016 SCJ 56.

contract and the agency contract,[48] unlike the contract of enterprise. The principal is liable in tort for an act for which the agent would be responsible themself, i.e. for a wrongful act (a civil fault). Article 1384 paragraph 3 of the Mauritian Civil Code does not mention explicitly civil fault of the agent, but this condition for the tort liability of the principal results from the common sense.[49] Mauritian courts insist on the requirement of the civil fault of the agent, as evidenced by the judgments in *Gowry v. The State* 1996 SCJ 135, *Vikas Trading Co. Ltd v. The Government of Mauritius* 2001 SCJ 237 and *Dassruth R. P. v. Femi Publishing Co. Ltd. & Or*s 2016 SCJ 56. The principal will be liable under Article 1384 of the Mauritian Civil Code when the agent has committed a civil fault in the performance of a mission entrusted to them. On the other hand, the principal will not be liable in tort for an act by the agent in case of the abuse of functions committed by the latter. Abuse of functions means that the act by an agent has a certain proximity to the functions (regarding the place, time or means used) but was performed outside the functions, without the authorization of the principal and for a self-serving purpose. The non-liability in tort of the principal in the case of abuse of functions committed by the agent was laid down in the judgment by the Supreme Court of Mauritius in *Dookhy M. & ORS v. SBM* 2007 SCJ 1, where a bank employee had embezzled a sum of 300,000 rupees, without authorization from the bank. The liability in tort of the latter, as principal, could therefore not be applied. The notion of abuse of functions has also been addressed or mentioned in the Supreme Court's decisions *Beau Villa v. Chuckowree and Lamco Insurance Ltd.* 1992 SCJ 83 and *Dassruth R. P. v. Femi Publishing Co. Ltd. & Ors* 2016 SCJ 56.

In Mauritian law, the tort liability of the principal is added to the liability of the agent (Tranchant, Egéa 2020, 135). The agent's liability is based on their civil fault, as per Article 1382 of the Mauritian Civil Code, and the liability of the principal is a vicarious liability, based on Article 1384 of the Mauritian Civil Code. Both the principal and the agent are jointly liable and the victim can sue either the principal or the agent for damages (depending on their solvency, i.e. financial situation) and seek compensation of the entire damages suffered. This solution results from the judgments of the Supreme Court of Mauritius in *Vikas Trading Co. Ltd v. The Government of Mauritius* 2001 SCJ 237 and *Beau Villa v. Chuckowree and Lamco Insurance Ltd.* 1992 SCJ 83.[50]

[48] French civil law (persuasive authority in Mauritius) has broadened the classic definition of the relationship of preposition. This relationship exists not only when one person has the right to give orders to another, but also if *de facto* one person gives orders to the other. A friend or relative who gives orders to another as part of voluntary aid provided by the latter will be considered as principal within the meaning of Article 1384 of the Mauritian Civil Code.

[49] See: Cass. 2nd ch., 8 April 2004, Bull. civ. II, No. 194.

[50] *cf.* Plen. Ass. 25 February 2000 (judgment known as *Costedoat*); Plen. Ass. 14 December 2001 (judgment known as *Cousin*) and Cass. crim. ch. 12 November 2008.

3. ADMINISTRATIVE TORT LIABILITY

Administrative tort liability (on that notion in France see: Ricci, Lombard 2018, 277 subs.) in Mauritian law is also governed by Article 1384 of the Mauritian Civil Code. The abovementioned article applies to the principal, i.e. public administration, and the agent, i.e. an employee of the public administration (on the special legislation in Mauritian law that refers to Article 1384 of the Mauritian Civil Code, see: Knetsch, 92 subs.). However, there is an important specificity of the administrative tort liability of the State as principal for the faults committed by its employees: the State will be liable in tort only in the event of serious fault of its agent, and this fault is sovereignly appreciated by judges. The State will not be liable in case of simple negligence or recklessness on the part of its agent. This is clearly stated in the judgments of the Supreme Court of Mauritius in *Transpacific Export Services Ltd v. The State of Mauritius & Anor* 2016 SCJ 407, *Transpacific Export Services Ltd v. The State & Anor* 2018 PC 28, *Senarain M. v. The Commissioner of Police & Anor* 2019 SCJ 72, and *Mario Alain Chung Ching Ah Sue v. The State of Mauritius* 2015 SCJ 110.

4. CONCLUSION

In this paper, it has been explained that many key institutions of the Mauritian tort law are borrowed from the French tort law, which is clearly a persuasive authority in Mauritius. Thus, the categories such as material and moral harms, victim by ricochet, theory of equivalence of conditions, theory of adequate causality, harmful event, etc. exist both in Mauritian and French tort law. However, as it has been shown in this paper, Mauritian tort law is perfectly autonomous and independent from French tort law. The Mauritian Supreme Court does not have any formal obligation to follow the French case law on torts. Thus, the Mauritian Supreme Court denies to a concubine, as a victim by ricochet, the right to be compensated for her material and moral losses, whereas the French Court of Cassation has conferred such rights upon the concubine since 1970. Moreover, when a harm is caused by an unidentified wrongdoer forming part of a group, Mauritian tort law denies the right to compensation to the victim, whereas French tort law ensures compensation *via* the tort liability *in solidum* of all members of the group. Mauritian tort law differs also from French tort law regarding the nature of the liability of parents for the harm to third persons caused by their minor children. In Mauritius, the liability of parents is subjective, based on the presumption of fault, whereas in France, since the *Bertrand* judgment in 1997, the tort liability of parents is strict (objective), based on the idea of risk being controlled by the parents.

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Article history:
Received: 13. 10. 2020.
Accepted: 2. 11. 2020.