IN THE COURT OF APPEAL OF SEYCHELLES

THE GOVERNMENT OF SEYCHELLES **APPELLANT**

v.

HEIRS PHILIBERT JULIENNE **RESPONDENT**

SCA No: 07 of 2012

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Before: **MacGregor P, Domah and Twomey JJA**

Counsel: **Mr. D. Esparon for Appellant**
Mr. F. Elizabeth for Respondent

Date of Hearing: **6 August 2014**
Date of Judgment: **14 August 2014**

JUDGMENT

DOMAH, JA.

[1] This is an appeal against the decision of the learned Judge of the Supreme Court who gave judgment in favour of the respondents in the total sum of SR275,000.00 with interest and cost. The respondents are the members of the family who were suing the Government for vicariously causing an untimely death of the bread winner of the family by medical negligence at the public hospital. The learned judge awarded them damages as follows: SR25,000.00 for each of the children as moral damages for pain, suffering, bereavement and loss of father making a total of SR175,000.00; SR50,000 as moral damages for the widow; pain and pain and suffering of deceased before death SR50,000.00.

GROUNDS OF APPEAL

[2] Government has appealed against the decision and the award. It has put up the following 8 grounds of appeal:

1. *The learned trial Judge erred in law and on the facts of the case in relying on the hearsay evidence of witnesses: namely, Marinette Julienne and Cindy Pothin in his judgment;*
2. *The learned trial Judge erred in law in relying in his judgment on the medical evidence of Cindy Pothin who was not an expert in the field;*
3. *The learned trial Judge erred in law and on the facts of the case in holding that the evidence of Dr Sherma amounts to neither more nor less than hearsay evidence when it relates to the actual situation of the deceased;*
4. *The learned trial Judge erred in law and on the facts of the case when he stated in his judgment that as a matter of evidence, exhibits D1 carries no weight as the author who actually drew up the exhibit was not subjected to any cross examination;*

5. *The learned trial Judge erred on the facts of the case in holding that the evidences (sic) now available for this court to base its findings upon in order to reach its conclusions are in the main, only the evidences of the witnesses of the plaintiffs which stand "uncontroverted;"*
6. *The learned trial Judge erred on the facts of the case and in law and holding that the plaintiff have satisfied this court and proven their claim on a balance of probabilities that the defendant vicariously committed a fault in law by actions and omissions of its employees, servants, agents, or préposée,and that as such the plaintiffs are therefore entitled to judgment in their favour;*
7. *The learned trial Judge erred on the facts of the case and in law when he awarded moral damages for pain, suffering, bereavement and loss of a father at Rs25,000 per child, Rs 50,000 for wife since the plaintiffs have not proved on a balance of probabilities that they have grieved;*
8. *The learned trial Judge erred on the facts of the case and in law in awarding Rs275,000.00 in damages since the amount of damages is manifestly excessive and exorbitant in all circumstances of the case.*

[3] The respondents are resisting the appeal and have submitted, as a further preliminary objection, that the appellant, having failed to comply with **Practice Direction 1 of 2014** to file Heads of Argument within 30 days before Roll Call is not entitled to be heard on this appeal. The respondents have a point. However, since the Practice Direction was only recently issued, we do think that a drastic application of it with rigor would not be judicious. We would, accordingly, proceed to the merits of the appeal.

[4] Philibert Julienne died on 28 April 2005 at 59 years of age. He had retired as a Customs Officer on medical grounds. He was a diabetic patient, suffering at the same time from hypertension. He had been amputated of his right leg some years earlier. He developed some blisters on his left leg which burst overnight. The family took him to the doctor whom he trusted and who had carried out his amputation. The latter referred him straight to the hospital where he was admitted directly to the ward, on 6 April 2005. He was treated with antibiotics. On 11 April, the state of the patient was not getting any better but worse. Cindy Pothin, one of the daughters who is a qualified nurse strove her way to meet, discuss and secure the necessary attention from a responsible doctor. On 14 April, the decision was taken to amputate the left leg. After surgery, the patient was admitted to the ICU where he died on 28 April 2005.

[5] The evidence in this case for the plaintiffs had been adduced by two of his daughters. One was Marienette Julienne, a social worker, exposed to some extent for having interacted with the personnel of the medical and nursing professions through her work as a social worker in related fields. The other was Cindy Annette Julienne, herself a qualified Nurse, sufficiently knowledgeable in matters of the shared responsibility of the nursing staff and the medical staff in ensuring proper treatment of patients.

[6] It is the case of the defendant that Philibert Julienne was given all the attention and care he deserved; that there was no medical negligence from anyone in the medical or nursing teams in dealing with the deceased who had been given professional, diligent and efficient treatment; that they had made the correct diagnosis and imparted the correct information so that the standard of a good skilled, competent and qualified practitioners had been fully observed and met in the case: see **Charles Vengadoo v Government of Seychelles SCA 20(a) of 2006; Attorney General v Roch Labonte & Ors SCA 24 of 2007.**

[7] All the 8 grounds of appeal deal with mixed issues of law and fact: namely whether the learned judge relied on hearsay evidence of the two witnesses of the plaintiffs (Ground 1); whether the evidence of those two witnesses were those of expert evidence, therefore inadmissible (Ground 2); whether the evidence of Dr Sherma could be considered as hearsay evidence as was stated by the learned judge (Grounds 3 and 4); whether the evidence of the two witnesses of plaintiffs stood uncontroverted as the learned judged decided (Ground 5); whether the evidence of the two witnesses for the plaintiffs having rested without any expert evidence could be said to have been proved at all on a balance of probabilities (Ground 6); whether there was evidence of grief for the award of the damages (Ground 7); whether the damages awarded were not excessive (Ground 8).

[8] The above grounds do not raise issues of law *per se* but the application of the law to the facts. On such appeals, the task of an appellate court is to ensure that the judge correctly understood the law applicable and correctly applied it to the facts of the case.

GROUND 1

[9] Did the learned judge misunderstand the law as to hearsay? The arguments of the appellant show that the appellant is putting his case too high. In an adversarial system of justice, material facts are adduced by oral evidence. Witnesses who come to give oral evidence should depose from what they have themselves seen or experienced. If they depose from whatever they have heard, it is hearsay. Hearsay, as a rule, is not admissible unless a number of conditions are satisfied. From what we read from the record, it cannot be said that the learned judge misapprehended the law on hearsay. The two witnesses, Marienette Julienne and Cindy Pothin, had been with their father, the deceased, at hospital at all material times and they deposed from their personal and direct experience of what they had seen with their own eyes and heard with their own ears. True it is that their account is not without some personal comments and some exchanges which took place between third parties. But the appellant had to show us that the learned judge relied on these not for the fact of having been overheard but for the truth of what had been overheard to reach the conclusion he did. A judicial conclusion is erroneous if any

admitted hearsay is taken for the truth of whatever was overheard rather than for the fact of its having been overheard. Ground 1 has no merit. It is dismissed.

GROUND 2

[10] On Ground 2, the testimony of Cindy Pothin is being challenged on the ground that she deposed as a expert evidence without being an expert in the medical field.

[11] Properly analyzed, Cindy Pothin did not give evidence as an expert witness. She was a witness of facts for having been present at all material times with respect to the matters she deposed to. She had the added advantage of being “au fait” with hospital surroundings and the interaction and co-ordination that should exist between the nursing staff and the medical staff. She was authentic in her deposition which added to her credibility. An expert evidence is evidence of a witness who may not have any personal knowledge of the case but is only apprised of the relevant objective facts from which he/she draws a scientific conclusion from his or her expertise. If Cindy Pothin had been called without her having been directly involved in the matter, then she would have deposed as an expert witness. Ground 2 has no merit and is dismissed.

GROUNDS 3 AND 4

[12] Ground 3 and 4 may be taken together. Appellant has raised an objection that the learned Judge wrongly rejected the evidence of Dr Sherma as hearsay. Dr Sherma did say, in so many words, that he had no personal knowledge of the facts. The relevant Ministry was summoned to produce the case file of the patient from which the material facts could be ascertained for a determination. They did not do that. They chose to rest content with just delegating a doctor who had no knowledge of the case at all to produce a report of Dr Sanyal, document D1 refers (“the Report”). The report would have had its weight in gold if what it contained had been backed up by the patient’s file. In the absence of the patient’s file, there should have been an objection to the admissibility of this report. But there was none, probably in anticipation of the fact that the full case file would be forthcoming in support of what the report contained. In the light of the fact that the hospital file was never produced, the report even if admissible, remained hearsay, in the circumstances, and could not be acted upon by the learned Judge.

[13] Nor could D1 be regarded as expert evidence. It lacked the objective reliable facts from which a logical conclusion could be drawn. Whatever material facts it alluded to lacked independent support from a reliable record. It contained a number of factual information which were obviously in dispute and had been made a live issue in examination in chief, in cross-

examination as well as in re-examination. For example, did the patient attend a private clinic on the 2 April 2005 before being admitted to hospital on 6 April? The appellant had made it an important issue in support of its case. Were the members of the family indulging in a blame game for the loss of a dear one?

[14] One added reason for the rejection of the report is that it was not subjected to cross examination. It is trite law that admissibility of a document is one thing and evaluation of what it contains is quite another. If it was admitted in the hope that the respondent would support its content with the hospital file and the file was not produced, the probative weight of the report is tenuous. The learned judge could not be said to have erred on that issue. We are not aware whether that the office of the Attorney-General brought to the attention of the Ministry the risk which the missing file posed to the appellant's case. The same goes for the lack of explanation of its disappearance. It was simply improper for the Ministry to play hide and seek with the Court Summons to produce it. If the Office of the Attorney General did not take the Ministry to task for such an attitude, that is to be deeply regretted. If it did, and the Ministry still wanted to appeal against the decision, the Office should have simply declined to do so. In our democratic legal system, sometimes we need to remind the Executive that the office of the Attorney-General is not a Ministry or Department. It is the legal adviser to Government. And the Courts are the Courts. Legal and judicial officers stand by the law. No more. No less. Ground 3 and 4 are, accordingly, dismissed for want of merit.

GROUND 5

[15] Ground 5 challenges the decision of the learned Judge that the depositions of the two witnesses stood uncontroverted. Learned counsel for the appellant may be correct in his submission that the learned judge went too far in making that comment. While it is true that the appellant rested content with just calling Dr Sherma who knew nothing of the case to produce a report which turned out to be of no probative value, there was a thorough cross examination of the two witnesses. The answers to the cross examination obtained by a party are as good as answers obtained from one's own witness. To that extent, it cannot be said that the evidence of the two witnesses were uncontroverted.

[16] However, that slip did not affect the conclusion. The evidence reveals that the prognosis of the patient was poor at the very outset of his admission. The question which arose, at that stage, is the usual question to doctors in such a situation: do we save the leg or do we save the life? Before a doctor decides to cut off a limb – the second limb at that - his protocol demands that he should first be satisfied that this has become absolutely necessary to save life. The necessity to do so demands trying proper conservative treatment first. Witness Cyndy relied on

the British National Formulary to back up her complaint that her father was not given the treatment that his condition necessitated: neither in terms of the urgency, nor in terms of the antibiotics nor in terms of the special sustained attention. Nobody knew who was in charge of this patient who seems to have been left to his lot.

[17] Diabetes and hypertension are two known killers, the more so at that advanced age. With such a patient, the medical and the nursing team are between the devil and the deep blue sea. There arises a particular need for that reason to follow the patient during the time an appraisal is being made whether the patient is responding to the conservative treatment. The decision to save his leg demands a prompt and regular attention as well as sustained specialized treatment. If that is lacking, the patient's condition will worsen unnoticed and he will be due for surgery.

[18] We do not think much of the protracted discussion which occurred before the surgery was carried out. Admitting such a patient, with a chronic hypertension, to the Operation Theatre is not without risks. The patient has to be fit for intrusive treatment in the first place. No anesthetist will risk giving general anesthesia to a patient on his way to surgery who at that moment in time shows a hypertensive condition on account of the real probability of an ensuing cardiac arrest occurring on the operating table.

[19] Irrespective of the above, it is clear from the evidence adduced that what the plaintiffs were complaining about in support of their averments in the plaint is: that the staff was incompetent, reckless and negligent in the treatment and care given; that they should have known that amputation was necessary to save the patient's life but they did not immediately proceed to do so; that the treatment and attention administered was wrong, inappropriate or inadequate; the sub-standard attention was apparent by the fact that the temperature of the deceased had peaked to well above 40 degrees Celcius and this had passed unnoticed despite all visible signs and symptoms by way of delirium and limb movement to that effect; that the amputation was done in two phases as it were; etc. etc.

[20] The two plaintiffs went to lengths to show that their father on admission did not receive the attention required. Witness Mariennette spoke of the regular soaking which should have been done but which had been done only once. Witness Cindy spoke of the protocol which should have been followed as per the British National Formulary. True it is that she also spoke highly of the treatment that her father received after the second surgery but that was only after harm had been done so to speak. They spoke of a second admission to the Operation Theatre subjecting this 59 year-old patient with diabetes and hypertension to a second trauma.

[21] Instead of discharging the legal and evidential burden which rested upon them, the defendant, on the evidence, opted to come up with half truths. Half truths are tantamount to lies.

In terms of procedure and pleadings, they remained content with just a general denial of the averments. All that they come up with, in terms of plea, is that they attended the case in a professional, diligent and efficient manner and gave the appropriate treatment; that they made the correct diagnosis; that the plaintiffs were duly informed about the prognosis and that they did not fall below the standard required of a good, skilled, competent and qualified team. It is trite law that a general denial amounts to no plea at all and may constitute an acceptance of the averments of the plaintiffs. One should not merely aver. One should come up with the material facts in support of the averments which should be proved by adducing such evidence as support the averments.

[22] It is the argument of the respondent that the content of the report is not hearsay evidence in the light of the provisions of section 14 and 17 of the Evidence Act. Section 14 and 17 of the Evidence Act deals with the issue of admissibility of a report by another witness in circumstances where the maker of the report is not available on grounds specified in the section itself. While section 14 deals with the admissibility of a statement contained in a document as evidence of any fact stated therein of which direct oral evidence would be admissible, section 17 deals with the admissibility of expert opinion. But, importantly, both documents relate to admissibility only. The question of the weight to be attached to the content of the admissible documents continues to be a matter for judicial appreciation in all the circumstances of the case, once they are admitted under section 14 and 17 of the Evidence Act. And this is exactly what the learned Judge did.

[23] What was the weight which could be attached to the content of D1? Till today, we are unable to find in what circumstances D1 was prepared? Was the document, for example, “part of a record compiled by a person acting under a duty” to do so? It looks like it was a measured response to allegations of medical negligence with a number of subjective and controversial matters, the determination of the truth of which could only have been done by cross-examination. Was it part of a record? Which record? Were the information contained therein culled out from the patient’s file? Or plucked from mid-air in anticipation of litigation? Despite several attempts to ascertain the fate of the patient file by counsel and court, it was not produced. Neither to the plaintiffs, nor to the defendant, still less to the Court. No matter how brilliant the case is constructed in favour of the defendant, it hangs in mid-air. The content of D1 was admitted for the facts contained therein but not for the truth therein. The truth of the content has to be judicially ascertained. This is what the learned judge did.

[24] Learned counsel, appearing for the respondent attempted to salvage the lapses in the conduct of this case at the trial below by arguing that the legal burden rested on the plaintiffs to prove the case against the defendant for medical negligence. We pointed it out to him that, the plaintiffs had duly assumed the legal burden by making the material averments and supporting them by the deposition of two witnesses. It, thereafter, fell upon the defendant to rebut the

evidential burden which shifted upon them. Their failure to rebut lay in this: their plea was a general plea which amounted in law to no plea at all; they called no witness with respect to those matters which the witnesses spoke about of things they had seen: the soaking which had taken place once instead of regularly, the feverish state of the patient as the days progressed, the absence of attention by nursing staff to the deteriorating health condition of the deceased and the lack of communication with the medical staff which prompted the family members to chase the personnel on their own. Had the record been produced, it would have shown what were the instructions as regards the soaking, the temperature and other conditions of the patient, the communication between the teams to challenge the versions given by the two daughters as to whether they were overreacting or were speaking from their actual experience of what they saw, they did and they heard. D1 suggests that theirs was a natural response *"of family members … grief-stricken at the loss of their beloved member … their perspective …. coloured by their emotions."* The witness they called stated so candidly that he could not comment upon the medical part, he could not comment on the truth of what it contained because the medical file has not been found. All in all, the appellant came up with no material facts to destroy the evidence of the case for the plaintiffs.

[25] The oral evidence of lack of patient supervision and proper follow-up could have been confirmed or contradicted by the record. It was a live issue in cross-examination. Learned counsel for the respondent relied on it to show – as is evident by his question in cross examination – that the patient was admitted on 2 April to a private clinic which referred him on 6 April to the hospital. This obviously taken from the report needed to be cleared and could have been cleared if the file existed. It was a live issue to the Court which wanted to be satisfied whether it existed or had simply disappeared. Dr Sanyal could only have relied on the notes on the file to produce his report. Where did he obtain the information from to produce his report?

[26] For those reasons, we have no difficulty in coming to the final conclusion – equally reached by the learned Judge - that the plaintiffs had proved the case against the defendant on a balance of probabilities. The law applicable is found in article 1384 of the Seychelles Civil Code which reads:

> *"1. A person is liable not only 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."*
> *2. ….*
> *3. Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment."*

[27] The standard used to test whether professionals in the exercise of their professions have met the level required in proffering their services is as laid down in the case of **Attorney-General v Labonte SCA 24 of 2007**. Our courts have made the decision in the English case of **Bolam v.**

Frien Hospital Management Committee, QBD [1957] 2 All E.R. 118 their own: **see Mervin Vel v. Jaffar Benjee and the Government of Seychelles, Supreme Court No. 84 of 2004.**

[28] It is interesting to note that all that victims under article 1384 (3) need to do is to establish the material facts from which the fault of the Master or Employer may be deduced. In this respect, this régime is different from the regime of 1382. As Encyclopédie Dalloz, Responsabilité du fait d'autrui, at paragraph 364, puts it:

> *"La responsabilité des commettants pour les dommages causé par leurs préposés est profondément différent de la responsabilité du droit commun prévue par l'article 1382 du code civil. Nous savons, en effet, que non seulement la faute du commettant n'a pas a etre prouvée par la victime mais encore que le commettant ne peut échapper a sa responsabilité en prouvant son absence de faute dans le choix ou la surveillance du préposé."*

It only suffices that the fault of the *préposé* is deduced from the material facts of the case.

[29] In terms of the quantum, we note that the learned judge awarded SR50,000 for pain and suffering of the deceased before death. Since this was not a case which had been started by the deceased before he died, this award was clearly *ultra petita*.

[30] Subject to our comments on the reasons for the decision given by the learned judge, we confirm the conclusion reached in his judgment.

[31] With regard to the quantum, we allow the appeal on item (b) of the decision as *ultra petita.*

[32] We, accordingly, amend the quantum of damages as follows. Defendant to pay to each of the plaintiffs the sum of SR25,000, with SR50,000 for the wife. Making a total of SR225,000.00 in total. On account of the attitude of the Ministry concerned in this case, the appellants are entitled to the full costs of the appeal.

F. MacGregor	**S. B. Domah**	**M. Twomey**
President	**Judge of Appeal**	**Judge of Appeal**

Dated this 14 August 2014, Ile du Port, Mahé, Seychelles