

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) ,A.Fernando (J.A) ,M. Twomey (J.A)

Civil Appeal SCA 2/2014

(Appeal from Supreme Court Decision 356/2010)

Stella Hertel

Appellant

Versu
s

The Government of Seychelles

Respondent

Heard: 01 December 2016

Counsel: Mr. Anthony Derjacques for the Appellant

Mr. Vipin Benjamin for the Respondent

Delivered: 09 December 2016

JUDGMENT

M. Twomey (J.A)

- [1] The Appellant, a 34 year old suffering from Grave's disease, was referred to Victoria Hospital in September 2010. She was found to have hoarseness of voice, tachycardia (rapid heartbeat), sweaty palms and exophthalmos (bulging eyes) which indicated that she had thyrotoxicosis.
- [2] She had been conservatively treated for the preceding four years with medication but had responded poorly. In August 2009, she was further treated for exudative tonsillitis and in March 2010 for acute exacerbation of her hyperthyroidism.
- [3] A thyroidectomy was performed on 17 November 2010. The medical report prepared by Doctor Felix Suarez Rosabal, a general surgeon, is to the effect that the procedure was difficult as the thyroid gland was big, highly vascular and adherent to the trachea.

- [4] Doctor Alexander Bonda, a consultant general surgeon assisted Dr. Rosabal in the operation. He explained that the procedure in this case was of a lifesaving nature as the Appellant's illness had not been controlled by tablets and unless the goiter was removed she would die. In his words, it was known that the procedure would be "hard, complicated and difficult" but the intervention was essential to save her life.
- [5] He further testified that it was difficult to see the surrounding area of the throat as the goiter had become so big and there was extreme bleeding because of the thyrotoxicosis, the highly vascular nature of the thyroid gland in question and the fact that it was stuck to the trachea. He explained the vascularity of the Appellant's gland as follows:
- "...in this condition we had to deal with many extra vessels, even if they [were] very small, very thin and [there were]... half a million of them and it [was] like a net."*
- [6] In the event, at the slightest touch the thyroid began to bleed profusely and there was much cutting, ligation and cauterisation to stem the haemorrhage. It was impossible to say which nerve or blood vessel had been cut. Eventually haemostasis was secured and a minivac drain was left in situ.
- [7] On the 29 November, the Appellant underwent a tracheostomy to enable her to breathe. The tracheostomy tube was later replaced by a tracheofix. However, on a laryngoscopy being performed subsequently it was discovered that the Appellant's vocal cords were immobile. She had effectively lost her ability to speak.
- [8] She sued the Respondent vicariously for the fault of its servants and employees, specifically the surgeons and medical officers of Victoria Hospital, claiming a total sum of SR 2,177,448.00 damages.
- [9] In his decision given on the 6 December 2013, the learned Judge Burhan found that the Appellant had failed to prove the negligence of the Respondent and dismissed the case.
- [10] The Appellant has put up five grounds of appeal which summarised are as follows:

1. *The learned judge erred in determining that the Appellant had failed to prove her case on a balance of probabilities and had instead demonstrably favoured the evidence of the Respondent.*

2. *The learned judge erred in failing to appreciate that the cutting of one nerve during the thyroidectomy might have been accidental but to sever both nerves on either side of the thyroid proved negligence.*

3. *The Learned judge erred in failing to find fault proven by the fact that the Dr. Bonda who was more experienced than Dr. Rosabal did not take over or assist during the difficult medical operation.*

[11] In approaching this appeal we have been guided by the principles of jurisprudence in this area of law. In *Nanon & Or v Health Services & Ors* [2015] SCCA 47, MacGregor PCA, stated that

“[i]n a medical malpractice case based on diagnostic error, the patient must prove that a doctor in the special circumstances, that is, in a similar specialty, under similar circumstances, would not have misdiagnosed the patient's illness or condition.”

It is our view that in parallel, in cases of medical intervention, the patient must prove that a doctor in the special circumstances, with a similar specialty, under similar circumstances would not have mistreated the patient. As was pointed out in the *Arrêt Mercier* (Cass. civ. 20/05/1936), the doctor in treating a patient is not expected to perform a cure but rather is charged with the duty to provide the most conscientious and attentive care which conforms to scientific knowledge and data.

[12] In terms of the burden of proof, French doctrine has made a clear distinction of the circumstances in which the onus of proof passes to the medical practitioner. It has been pointed out that in the first place there is an onus on the patient to show that the result expected from the treatment was not attained. As has been pointed out:

“La responsabilite medicale implique l’inexecution d’une obligation par le debiteur. S’il est tenu d’une obligation de resultat, la preuve résulte, au moins dans un premier temps de

la démarche, que l'objectif n'a pas été atteint. Si c'est une obligation de moyens, encore faut-il que le demandeur prouve, outre l'inexécution, l'imprudence ou la négligence du débiteur."(Terré, Simler, Lequette, *Droit Civil les Obligations*, 10^e édition para 1005).

[13] In the case of *Octobre v Government of Seychelles* SC 17/2002, the Supreme Court relied on *Nanon* to further develop the law of medical liability. It stated that since Seychellois delictual law was similar to France's and that Articles 1382 and 1384 were verbatim those of the French Civil Code, it should adopt a distinction between those medical interventions involving an *obligation de résultat* and those involving an *obligation de moyens*.

[14] In normal situations it is an *obligation de moyens* on the part of the medical practitioner which is triggered. While jurisprudence has incrementally favoured the patient in terms of its onus of proof, there is however a need to guard against imposing a too heavy burden on medical practitioners in the ordinary exercise of their duties. The Cour de Cassation in the *Arrêt Bonicci* (21 mai 1996) limited cases triggering an *obligation de résultat* to those of hospital acquired infections. The case of *Morisot/Delsart* (Cass.1ère 9/11/1999) in which Mrs. Morisot fell off a radiographic table, extended it to cases involving materials, products or instruments used by doctors in the execution of their duties.

[15] The landmark case of *Bianchi* (Conseil d'Etat Assemblée 9 avril 1993) further expanded the liability of medical practitioners in certain situations. The test in *Bianchi* as translated into English is worth reciting. It provides that :

When a medical act, necessary for the diagnosis or for the treatment of the patient, presents a risk, the existence of which is known but the occurrence of which is exceptional, and there is no evidence to suggest that the patient is particularly exposed to such risk, the public hospital services are deemed responsible if the execution of the act is the direct cause of harm unrelated to the initial state of the patient as with the foreseeable evolution of that state, presenting characteristics of extreme gravity.

[16] *Octobre*, because of its special circumstances, applied the *Bianchi* test to impose on the medical practitioner an obligation of result. Where there are no special circumstances and the damage or loss to the patient is not as a direct result of the medical act or intervention,

the application of the *Bianchi* test will not result in any increased burden on the medical profession.

[17] It can be distinguished from the present case where medical risks and their occurrence were known to the patient and in which circumstances she nevertheless consented to the procedure. We do not accept that every single risk had to be spelt out as it was the evidence of the doctors and the nurse that the seriousness of her condition and the serious risks involved in the operation were explained in Creole to the Appellant.

[18] The Appellant's underlying condition, extreme thyrotoxicosis, necessitated the medical intervention as a matter of life and death. However, once the medical intervention took place, it was clear that the removal of the thyroid was one issue but that of Appellant's exsanguination a further complication leading to an additional life and death situation. There was ultimately no proven direct causal relationship between the damage that occurred and fault on the part of the doctors to trigger their liability.

[19] The evidence of Doctor Banda who assisted Doctor Rosabal in explaining the difficult surgery to remove the goitre and then the extreme bleeding is quite telling:

"You cannot see, you know it is the right room and you open the door and you find something there. You know it is supposed to be there but really it may have moved to the right, moved to the left...that is one thing. And another thing since during the course it was bleeding, bleeding through many, many points...normally it bleeds but not dramatically. This case the bleeding was serious (sic)..

... It was bleeding abnormally... [Verbatim, transcript of proceedings Pages91-92]

[20] Further in his testimony, he refers to the Appellant's thyroid as a broken pipe which bled at the slightest touch and which was stuck to the trachea enveloped in a net of capillaries and blood vessels. It was therefore after much effort that haemostasis was achieved. It is clear from his testimony that his actions and those of Dr. Rosabal had not only resulted in the removal of the diseased thyroid gland but also in saving the Appellant's life from death by blood loss.

[21] The severing of the laryngeal nerves was in the circumstances not deliberate but understandable given the amount of bleeding in the area and the priority of the doctors to transact, ligate or cauterise all blood vessels to prevent the Appellant bleeding to death.

[22] The evidence is to the effect that although Dr. Banda was more experienced than Dr. Rosabal, there was nothing that the former did that he wouldn't haven't done. Referring to the actions of Dr. Rosabal, Dr. Banda stated:

“He was not negligent. I cannot blame him and say I told you not to do this and you did and now look.”

He went on to express his regret as to how things turned out but stated that despite all the precautionary measures being taken, the Appellant's thyroid was really compromised and the complications occurred because of it. They did their best in the circumstances.

[23] In *Nanon*, MacGregor PCA citing the South African case of *Broude v McIntosh and Others* 1998 (3) SA 60 SCA borrowed the words of Marais JA which are equally applicable to this case:

“When a patient has suffered greatly because of something that has occurred during an operation a court must guard against its understandable sympathy for the blameless patient tempting it to infer negligence more readily than the evidence objectively justifies, and more readily than it would have done in a case not involving personal injury. Any such approach to the matter would be subversive of the undoubted incidence of the onus of proof of negligence in our law in an action such as this.”

[24] This is an extraordinarily sad case. A young woman lost her voice during an operation to save her life. She has failed however to prove that the injury she suffered was the direct consequence of the fault of the surgeons who operated on her. Her claim was turned down understandably. There is in any case no proof of the permanent immobilisation of her vocal chords or the tracheofix. Her Counsel admitted at the hearing of the appeal that she is now speaking although with hoarseness. This development, although tendered from the bar, is problematic in terms of the way her claim is drafted as she has claimed damages for permanent disability.

[25] None of the grounds of the appeal are made out. In the circumstances the appeal is dismissed in its entirety but we make no order as to costs.

[26] We would like to make a final point. It is becoming increasingly obvious that it is not viable to expect victims of medical malpractice to seek the expertise of a medical practitioner from the same facility in which they were treated to explain the incident or to support their claim; this given the constraints of a small country with a single secondary medical care facility and the absence of alternatives. We urge trial judges to consider the appointment of court appointed medical experts in such cases. The court would then be entitled to form its own view of the current and future disability of the victim described in the report although not be bound by the findings in any medical report. Similar approaches have been adopted in other legal areas where claims for damages are involved.

M. Twomey (J.A)

I concur:.	F. MacGregor (PCA)
I concur:.	A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016