Gabriel v Government of Seychelles
(2001) SLR 94

Nichole TIRANT for the plaintiff
Lucie POOL for the defendant

Judgment delivered on 22 November 2001 by:

JUDDOO J: The plaintiff claims damages in the sum of R95,000 from the defendant for failing to provide him with proper medical care and attention following injuries sustained at his wrist and for having failed to inform him that two cuts will be performed at both his ankles prior to a third operation effected to his wrist on 7 July 1997. The claim is resisted by the defendant.

The plaintiff gave evidence that he suffered a wrist injury on 1 January 1997. He called to Anse Royale Clinic. There, a nursing officer wiped his arm clean and imposed one stitch to the wound. His arm was then bandaged and he was asked to attend to examination the next day. The plaintiff added that on 2 January he called again at the Clinic. His arm was examined by a different officer and he was told he could go away. On 3 January 1997, the plaintiff noticed that his arm was swollen and he once again called to the Clinic at Anse Royale. He was examined by a lady officer who immediately referred his case to the Victoria Hospital. Reaching there, he was ushered to the Casualty Department and examined by Dr Alexander Korytnicov, a medical specialist, who informed him that his nerve tendon at the wrist had been severed and there was necessity for an operation to repair the said tendon. He consented and was immediately taken to the operating theatre where surgery was performed. After the operation, his hand was plastered and he remained in hospital for a period of about two weeks.

The plaintiff explained that one month later he was still suffering from severe pain at his wrist. He went back to Victoria Hospital and was further examined by Dr Korytnicov who informed him that his wrist needed a second operation which was performed on 24 March 1997. He remained in hospital for about a period of three weeks. After the second operation the plaintiff followed physiotherapy treatment. However, he saw no improvement to the use of his fingers and subsequently, he was further examined by Dr Alexander Korytnicov who informed him that a third operation was needed. The third operation was carried out sometime in July 1997. When he woke up after the third operation, he felt pain at both his ankles and discovered that he had been operated at both his ankles in addition to his wrist. The plaintiff explained that he agreed to the three surgical operations at his wrist but was not informed that cuts would have to be made to his ankles to remove tendons for grafting to his wrist. He added that he has not fully recovered the use of the three middle fingers in his hand. They have become "stiff and are extremely sensitive." He cannot touch anything with them. He had been a stone-mason and cannot handle such type of work any longer. The place where cuts had been made at his ankle are also sensitive spots which have remained numb.

Dr Alexander Korytnicov, Consultant Orthopedic Surgeon, gave evidence on behalf of the defendant. He has been in service for about 25 years and attached with Victoria Hospital for the last 13 years. He examined the plaintiff on 3 January 1997. The latter had a cut injury at his right wrist. It was a very bad laceration, very deep to the bone and involved the tendon and the nerve. There was a stitch to his wound. The plaintiff was immediately admitted to the operation theatre and an operation was carried to repair the nerve and tendon. "The tendon was repaired very well, some nerve tissues were alright and the operation closed." After the first operation, the plaintiff had some movements in his hand. However, those movements were accompanied by severe pain in his wrist. Accordingly, a second operation was needed for th loration of the wrist and to review his wound. In his own words:

> The second operation was done and the wound was r od maybe scar tissue. We had to make some improvement to se e the scar tissue from the tendon. Some tendons were together separated them. The nerve was in the same place. The nerve repaired, healed and we cannot see inside.

The witness added that after the second operation, the plaintif still complaining of severe pain and it became necessary to perform a third oper . The purpose was once again to explore the wound, especially the nerve. After th und was opened, it was found that the plaintiff was suffering from neuroma. In the w s's own words:

> It was bad nerve, very painful and this nerve is not worki d we have to have incision on it. Maybe one cut of about two centime o remove the (neuroma) and a grafting should be done. That was take n his leg.

Neuroma is defined as "a tumour connected with a nerve, such urs being generally composed of fibrous tissue, and are of a painful nature" (*Black's ical Dictionary*).

A letter of correspondence from Dr T Wong, Acting Director Ge , Hospital Services, was produced by the plaintiff as exhibit P3 without objection. was in answer to a complaint written by the plaintiff. The relevant part of exhibits P3 ls:

> It is clear from the history and from your case notes tha have had a deep cut on your left wrist, that damage your medial ner ne nerve that control movements of your first four fingers) Dr Kor v attempted neural graft and failed. He said that he did not inform prior to the operation because he did not know how bad your nerve w amaged...

Dr Bernard Valentin gave evidence he was the Health Co-or or for Anse Royale Clinic at the material time. There is an entry in the casualty k that shortly after midnight of 1 January 1997 of the plaintiff attending the Clinic f atment. The patient was attended to by one Laura Valmont, senior staff nurse, wh amined the wound, put a single stitch on the laceration and asked the patient to ca in in the morning to

be examined by a medical officer. The patient was not immediately referred to a medical officer although a medical officer was on duty and residing at a premises not far from the Clinic. Additionally the witness could not say whether the plaintiff did not attend to the Clinic the next day as was requested and he added that if the plaintiff had called to the Clinic later in the morning there would be no entry in the casualty book.

Lastly, Laura Valmont gave evidence that she has been a nurse at Anse Royale Clinic for the past ten years. From the records of the Clinic, the witness agreed that she examined the plaintiff sometime in January 1997 and the latter had a laceration on his wrist. In her own words "I made a suture and then I informed the doctor on duty and the doctor told me to ask the patient to report the next morning to see him". The witness added that she only made an entry in the casualty book, left the Clinic at 8.00 am and could not say whether the plaintiff had attended to treatment as requested the next morning. Under cross-examination, the witness explained that it was a "small laceration" and the patient was not made to be examined by a doctor although one was on duty and that the wound was only "bleeding a little".

The liability issue raised in the plaint is twofold, as follows:

> 4. As a result of a wrongful diagnosis and/or error of judgment as to the nature and extent of the plaintiff's injury, the defendant failed to provide the plaintiff with the proper standard of care and attention that is expected from the defendant as a result of which the plaintiff was subjected to three separate surgical operations on his wrist on 3 January, 24 March and 7 July 1997, such failure amounting to a faute in law.
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> 5. On 7 July, the plaintiff underwent a third operation to his wrist and awoke to find that he has also been subject to two cuts on either side of the left ankle, the defendant having failed to inform the plaintiff, prior to the operation taking place, that cuts or any cut would be required.

I find it established from the evidence that the plaintiff called to Anse Royale Clinic sometime about midnight on 1 January 1997 with a deep cut injury to his wrist. He was examined in the early hours of 2 January 1997 by the nurse in charge, his wound was wiped clean and a stitch grafted to close the wound. He was not immediately referred for examination by the medical officer who was on duty but was instead required to call again later in the morning for further examination. The plaintiff's testimony that he called again on the morning of 2 January 1997 stands uncontradicted by the evidence adduced on behalf of the defendant. I believe his version on that score namely to the effect that he was examined once again and requested to return home. Upon the swelling which occurred to his arm, on 3 January 1997, the plaintiff called again at Anse Royale Clinic. Not only was he immediately referred from Anse Royale Clinic to Victoria Hospital, but he was examined by a specialist on admission to the ward at Victoria Hospital. The specialist found that there was a very bad laceration, very deep to the

bone involving the tendon and the nerve. After five minutes, he was taken to the operation theatre and surgery was performed by Dr Alexander Korytnicov to attempt to repair the severed tendon and nerve. The testimony of Dr Korytnicov when the patient was referred to him is very relevant. In his own words:

> the wound was very deep to the bone and the nurse or any doctor will not go inside. It should be the specialist. The contaminated stayed inside and it is impossible to clean the wound, only under anesthetic that we can clean it.... The doctor may be did not recognise it and put a stitch on the wound. It is more or less from infection of the person ……

Accordingly, I find that there was failure to determine the extent and nature of the wrist wound injury sustained by the plaintiff at the first and second time he called at Anse Royale Clinic and to take appropriate remedies at that material time to avoid further infection or contamination.

The second part of the plaintiff's claim is that he was only informed that a graft had been necessary after he woke up following the third operation on 7 July 1997. It has been pleaded, in defence, that the plaintiff while on the "operating table" was duly informed about the possible operation of his left leg and, additionally, that the defendant did all that was required of an ordinary competent doctor. At the outset, the testimony of Dr Koritnicov discloses that the plaintiff was not informed "while at the at the operating table" for his third operation that there was a risk of incisions being performed to his ankle for grafting. In his own words:

> for the first operation I told him. The second operation there was more discussion and on the third occasion may be discussion was not the same. The second time, neuroma, may be incision for grafting this I remember. The second operation I did not find any neuroma and I close the wound. The third time we had to do exploration again. He did not sign for grafting of the neuroma.

That the plaintiff was informed some weeks before his third operation about the 'grafting' has not been pleaded. Moreover, there was no objection to exhibit P3, referred earlier, stating that the patient was not so informed before the third operation. However, in view of the added averment under paragraph 6 of the defence that "the defendant did all that was required of an ordinary competent doctor" it needs to be determined whether the treating surgeon was at “faute” when he did not inform his patient about the incisions at the third operation.

It is generally necessary that the patient should be sufficiently informed of the treatment which is proposed and warned of any risks which are inherent in that treatment. An important reason for informing the patient of the nature of the treatment proposed and of the risks involved, is to enable him to decide whether to undergo that treatment. However, there is no duty to warn the patient of every risk involved in his treatment, however remote. In a recent case before the Supreme Court of Canada, the Court

formulated the duty of disclosure as follows, (vide: *Hopp v Lepp* (1980) 112 DLR (3d) 67):

> a surgeon, generally, should answer any specific question posed by the patient as to the risks involved and should disclose to him the nature of the proposed operation, its gravity, any material risks and special or unusual risks attendant upon the performance of the operation. However, having said that it should be added that the scope of the duty of disclosure and whether or not it had been breached are matters which must be decided in relation to the circumstances of each particular case.

A great deal of medical treatment, even if administered with all due care and skill, involves some degree of risk. On occasions medical treatment requires a choice to be made between competing risks. In *Mahon v Osborne* [1939] 2 KB 14, Scott LJ described the position of a surgeon in those terms:

> In applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. I will mention a few ...
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> (1) the multiform difficulties presented by the particular circumstances of the operation;
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> (2) the condition of the patient and the whole set of problems arising out of the risks to which he is being exposed;
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> (3) the difficulty of the surgeon's choice between risks;
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> (4) the paramount need of his discretion being unfettered if he thinks it right to take one risk to avoid greater...

Additionally, in *Encyclopedie Dalloz Droit Civil III* Verbo “Medicine” Note 193:

> Si le churigien doit, lorsque apparait une complication au cours d’une operation surseoir... à l'intervention pour consulter le patient sur la decision à adopter, dans le cas ou il n'y a pas peril immediat, it est au contraire fondé à agir sans prendre le temps de s'assurer de l’assentisement du malade ou de la famille quand il y a urgence à intervenir sans delai...

In the present circumstances, the version of the treating surgeon is that he was doing exploratory surgery to the plaintiff at the third operation when he discovered a neuroma. He had operated on the wound before and had not seen a neuroma. Accordingly, he did not reasonably foresee that such a tumor had formed inside the wound so as to warn the patient specifically of the resulting consequences of finding a ’neuroma'. At the operation theatre, the specialist surgeon felt that the wound being open and taking

cognisance that the patient had a tumor he decided to take one risk to avoid the greater. The urgency of the situation is summarised as follows:

> It was necessary to take a graft of about ten centimetres and put it on the wrist. This is very important for if we remove neuroma and we do not put a graft then there will be complete disability, there would not be any sensation or movement. ... It was necessary to take a graft, we know we cut his leg and this will not affect his leg .. when we carried out the operation, the patient was under anesthesia and it is impossible to wake him up. The wound is open and we cannot (wait) after 12 hours to ask him about the graft.

Accordingly, I do not find that there has been faute or negligence on behalf of the defendant in the above respect.

Having found earlier that liability of the defendant to be established on the failure to determine the extent and nature of the wound and to take appropriate remedial action, I now turn to the issue of damages resulting therefrom. In so doing I find that to a certain extent the pain, incisions and scars to the left leg are imputable to the liability so established under the first part of the plaint.

In *Suzette Hermitte v Philipe Dacambra & Others* (unreported) CS 261/1998 the plaintiff suffered a gunshot injury on her left leg having a residual disability to 15 %. In addition, the bullet had remained embedded in her thigh near arteries and veins and could not be removed. Her left femur was fractured by pellets and was shorter than the right femur. The Court added R60,000 in respect of the injuries, pain and suffering and R15 000 for loss of amenities of life.

In *Bouchereau v Panagary* (unreported) CS 160/1996 the plaintiff suffered a comminuted fracture of the right tibia and fibula, a fracture of the maxilla bone, multiple fracture of the rigs of the right chest and multiple laceration of the skull, body, limbs and right eye. There was also a residual incapacity on the right leg, weakness and defect in the eye sight and jaws. A total of R 85,000 was awarded in respect of the injuries, pain and suffering and loss of amenities of life.

In *Lucas v Government of Seychelles* (unreported) CS 67/1994 the plaintiff suffered an amputation of part of a finger. The Court awarded R10,000 for the amputation and R10,000 for pain and suffering.

In *Sinon v PUC* (unreported) CS 312/1999 the plaintiff suffered burn injury to both hands, his right index finger had become neurotic and hence had to be amputated. Skin grafting was done to areas with deep burns and the plaintiff stayed 55 days in hospital. In addition to the physiological component of the disfigurement, a residual disability of 15% of the right hand was estimated. The Court awarded R50,000 in respect of pain, suffering and disfigurement; R20,000 for loss of amenities of life.

In *Larame v Coco D'or* (unreported) CS 172/1998 the plaintiff suffered an amputation of his right arm below the elbow. The Court awarded R125,000 for pain, suffering and disfigurement.

In the present case, the medical report produced as exhibit P4, dated 4 November 1997, disclosed the following injuries and treatment to the plaintiff.

> On examination, there was a laceration of 4 cms transversely in the left wrist. Numbness of the 2nd and 3rd fingers of the hand. Operation was carried out on 3/10/97, 40 hours later after the assault had taken place.
>
> - Repair nervous medianus
>
> - Repair tendon in flexor digitorum longus
>
> During the post-operative period there was tenderness over the scar on the left wrist. There was restricted movements of the 2nd, 3rd and 4th fingers. Physiotherapy was advised.
>
> He was re-operated on 24/03/97 for examination of the tendons in flexor digitorum longus and on medianus.
>
> On 07/07/97 for exicision neurimonia of the medianus plus a graft to the n.shune [sic] from the left leg…….

and a further report dated 27 November 1997:

> The patient was examined in SOPD again. He is still complaining of the pain in the left wrist, weakness, of the left hand. There is restricted movement in the left hand, there is no sensation on the median and median nerve in the left hand. He is unable to do a previous job. He has permanent disability of 20%.

In the instant case the nature of injuries sustained by the plaintiff is of a lesser degree than in *Larame v Coco D'or* (supra) and *Sinon v PUC* (supra). The award in *Lucas v Government of Seychelles* need to take account of the inflationary trend since.

Taking account of all the circumstances of the present case and the medical evidence on record, I find it just and appropriate to award the plaintiff:-

(i) for partial loss of use of left hand, R25,000.

(ii) for scars on left ankle; R2,000.

(iii) for pain, suffering, anxiety, distress and discomfort, R10,000.

(iv) moral damages, R5000.

Accordingly I enter judgment in favour of the Plaintiff in the sum of R42,000 with interest and costs.

Record: Civil Side No 432 of 1997