IN THE SUPREME COURT OF SEYCHELLES

MS JOANNE BOUCHEREAU
A minor herein rep by her mother and legal
Guardian Mrs Josianne Bouchereau **PLAINTIFF**

VERSUS

1. **DR. MICHAEL THOMPSON UKPE**
2. **SEYCHELLES GOVERNMENT**
(herein rep by the Attorney General) **DEFENDANTS**

Civil

Side No 88 of 2001

Mr. P. Boulle for the Plaintiff
Miss F. Laporte for the Defendants

JUDGMENT

Perera J

The 1st plaintiff, a minor at the time the cause of action arose, sues the 1st defendant a Medical Practitioner, and the 2nd defendant, his employer for damages allegedly caused to her as a result of a failure to make a proper diagnosis. The 2nd plaintiff her mother claims moral damages and medical expenses incurred due to the alleged faute.

The Facts

On 10th September 2000 around 5 p.m., the 1st plaintiff was swimming in the sea when she stepped on some sharp object and experienced excruciating pain. She could not walk thereafter, and had to be carried home by one Vincent Azemia, a neighbour. From there, her mother took her to the Beau Vallon Clinic for treatment. The medical history Form *(D1)* shows that she arrived there at 5.33 p.m. and was seen at 5.43 p.m. by the 1st defendant. The diagnosis and treatment as recorded therein are as follows-

> *"Injury in the left foot. Patient was in the sea when she sustained injury on the sole of the foot.*

Most likely she stepped on the sea corals.

- *clean and dress*
- *paracetamol 500 mg*
- *amoxycillin 250 mg 3 times a day for 5 days*

Sgd. M. J. Ukpe".

According to the evidence of the 1st plaintiff, the 1st defendant upon being told by the mother that it could be a stone fish sting, stated "*this is not a stone fish, this is a dirty coral*". She was sent home with the prescribed medicine after the dressing. The pain remained unabated, and she was taken to the Casualty Section of the Victoria hospital the same evening. The medical history Form (D2) shows that she was seen by Dr. Zaw at 7.25 p.m. The diagnosis was "allergy sting injury left foot. She was given a hydrocortisone 200 mg injection, amoxycillin, piriton, flucloxacillin and prednesone. She was to continue treatment at the local Clinic. After returning home, she spent a sleepless night in pain. The next morning, she was taken to the Clinic of Dr. Jivan, a Private Practitioner, who immediately diagnosed the injury as a stone fish sting. He gave her analgesics and asked her to return two day later. During that period the pain subsided but the foot remained swollen. Dr. Jivan then decided that she should be admitted to hospital for surgery to remove the skin tissues that had become necrotic.

At the Victoria Hospital, she was seen by Dr. Balagurunathan who gave her a pencillin injection and admitted her. By then the area round the injury had turned black, and the foot was still swollen. Subsequently, surgery was performed and a skin graft was done. A second operation was done as the grafting had not set in well. After being discharged from hospital, one month later, she underwent physiotherapy treatment. Later the nerves on her leg got swollen, and Dr. Balagurunathan told her that the skin graft had not healed and set properly and hence a further surgical operation was necessary to set the nerves. She was afraid to get any more operations done locally, and her mother decided to take her to South Africa.

In South Africa, she was seen by Dr. Christo Wagenaar, who after examination issued the following certificate-

> "Joanne Bouchereau presented to me with a 1½ year history of edema of the left foot at …….. She had a skin graft done after a fish bite that became necrotic. Blood circulation to the left foot is normal. Venous drainage is probably impaired after severe sellulites and necrosis. She has no neuroma at the site of the scar. She is neurologically intact. This child should be given time. The drainage should improve in due time. She might develop a neuroma and that should then be dealt with. She *needs no further surgery. I will recommend for her to wear an ankle guard as necessary. Sellulites of the foot should be managed* in the normal way. Please feel free to contact me should it be necessary".

The 2nd plaintiff, in her testimony corroborated her daughter's evidence as regards the medical consultation subsequent to the injury. She maintained that the 1st defendant upon being told by her that it could be a stone fish bite, stated "*this is a dirty coral".* She further stated that a nurse, Mrs Gedeon also told the doctor "*why not give her a hydrocortisone injection", and he replied "no hydrocortisone".*

Rachel Gedeon, the nurse who attended on the 1st plaintiff testified that the mother of the child told her that it could be a stone fish sting and she in turn told the 1st defendant, but he only asked her to do the dressing and issue the medicine prescribed. The first defendant did not even ask her what a stone fish was. On being cross examined she stated -

"She (the 2nd *plaintiff) said it was a stone fish and I told the doctor it could be a stone fish and the mother also told the doctor the same thing".*

Mrs Gedeon, with 40 years experience as a nurse stated that in the case of a stone fish sting, the poison accumulates in the area, and hence an antibiotic like amoxycillin was unhelpful as the poison would not be removed.

Dr. P. K. Kandasamy was called to present the medical reports of the 1st defendant and Dr. Zaw, who have now left the Republic. He stated that the words "*most likely*" in the report of the 1st defendant indicated that the initial clinical presentation was obscure, and hence the diagnosis was vague and imprecise. He stated that the poison in a stone fish is on its spine and hence there could be multiple punch injuries. He further stated that with common medical knowledge, it would be possible to distinguish wounds inflicted by corals, sea urchins and stone fish by peculiar characteristics of the injuries. He also stated that in the case of a stone fish sting, there would be excruciating pain as a symptom. The first line treatment would be plain control and to surgically remove any pieces of the stone fish spine and poison by debrigement and irrigation. He also opined that if not managed properly in time, stone fish venom could lead to cardiac arrest, and sudden death. He said that in countries like Australia there was an anti venom serum for stone fish stings, but such venom could be denatured by immersing the affected area in hot water for about 1 hour. This, he stated was a common practice.

Dr. Harish Jivan, testified that when he examined the 1st plaintiff one day after the injury, he observed a punchured wound on sole of the left foot with a blood collection in the area. The leg was swollen, and around the injury there was a necrotic patch. He immediately diagnosed a stone fish sting from the nature of the puncture. As emergency treatment had been given, he had to deal with the infection and the tissue necrosis by prescribing antibiotics and analgysics until he saw her three days later. By then the swelling had increased and he decided to refer her to the Victoria Hospital for debridgement, which was a surgical procedure to remove the necrotic tissues and cleaning. He also stated that the pain associated with a stone fish sting is considered the worst pain anybody can get and that although morphine and pethadine are injected to the affected area, sometimes that was insufficient to manage the intensity of the pain. He further stated that although a foreign doctor may not have particular knowledge of injuries caused by sea creatures, in tropical waters, yet sufficient information was available in medical textbooks and on the Internet. Dr. Jivan stated that during his practice in Seychelles, he had treated about 6 cases of stone fish stings successfully. With proper treatment, the poison could be denatured and the pain relieved within 48 hours. He stated that during the first few hours, immersion of the injured foot in hot water at 40ºc would have denatured the venom, otherwise the skin tissues would die within seconds. Hence he stated that proper diagnosis and treatment within the first few hours was crucial.

Dr. P. Balagurunathan to whom the 1st plaintiff was referred by Dr. Jivan testified that the necrotic skin was removed surgically on 15th September 2000 and a skin graft was done on 3rd October 2000. Subsequently he examined her two years later and observed a scar which was tender on touch and inflamed. He stated that this pain could be due to the growth of nerves in between the affected area. As regards the localization of any venom, he stated that the anti allergic agent like piriton should be injected to the area. Another drug used in Seychelles in such cases, was xylocaine. He stated that as a local remedy, people applied vinegar to denature the poison. He however stated that he had never heard of the hot water treatment suggested by Dr. Jivan and Dr. Kanasamy to denature the venom.

Dr. David Boulle, holds a Master of Science degree in Marine Science. He also holds a Bachelors degree in science, majoring in micro-biology and Marine biology. He works as a Consultant Fisheries Scientist with the Seychelles Fishing Authority. Testifying regarding the stone fish, he stated that it has 13 venomous spines on the dosal Section. The spines were like sharp needles. Upon being trod on, four types of venom get injected, the myo toxin which affects heart muscles, cyto – toxin which affects the cells, and the neuro-toxin which affects the nerves and causes extreme pain. He stated that when a child is stung by a stone fish, the manifestation of the effect of the poison would be more pronounced than in an adult.

Mrs Mona Benoiton a Clinical Psychologist of the Victoria Hospital testified that she examined the 1st plaintiff for post traumatic stress. She produced a report dated 23rd July 2003 (P2). The 1st plaintiff attended two sessions for desensitization in August 2001 for "*feeling negative about medical consultations, and fearing death, following the skin graft*". Hospitalization had proved traumatic. She was councelled for three months. However she remained "*jerky and traumatized*", as she felt let down by a Medical Officer who she had consulted in good faith and trust.

The Law

This action is based on Article 1382(2) of the Civil Code which defines "*fault*" as "*an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or omission*". Amos and Walton in Introduction to French Law (2nd Edition) Page 218 states –

> *"It also indicates the standard of care required of persons exercising a profession. A prudent man knows he must possess the knowledge and the skill requisite for the exercise of his profession, and that he must confirm at least to normal standards of care expected of persons in that profession".*

In determining the standard of care required of a skilled professional, the Courts in the United Kingdom adopt the "*Bolam Test",* which is based on the Dicta of Mcnair J in his address to the jury in ***Bolam v. Friern Hospital Management Committee (1957) 2 AER 118 At 121***, which is as follows-

> "……but where you get a situation which involves the use of special skill or competence, then the test whether there has been negligence or not is not the test of the man on the Clapham Omnibus, because he has not got this special skill, *the test is the standard of he ordinary skilled man exercising and professing to have that special skill. A man need not possess; the highest expert skill at the risk of being found negligent. It is well established Law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".*

Hence the "*Bolam Test*" concerns itself *with what ought to have been done in the circumstances*.

A further important refinement was added to the "*Bolam Test*" by the house of Lords in the case of ***Bolitho v. City and Hackney Health Authority (1997) 4. AER***. 771. It was held that "*a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct, where it had not been demonstrated to the Judge's satisfaction that the body of opinion relied on was reasonable or responsible".*

The standard of care required of a Medical Practitioner, and the issue of initial non-diagnosis leading to the death of a four year old child was considered in Sri Lanka in the case of ***R.A.F. Arsecularatne v. Professor Priyani Soysa (2000***) Bar Association Law Journal Reports Page 31. The plaintiff, *(Deputy Solicitor General),* consulted the defendant, (*a well known Senior Pediatrician)* in respect of a dragging movement of a leg of his four year old daughter as she walked. This condition had set in suddenly to an otherwise healthy child. The initial diagnosis by the defendant was "*rheumatic chorea*" (R.C). Blood tests were ordered and she was prescribed penicillin, valium and multi vitamins. Subsequently one month later the plaintiff consulted another Senior Pediatrician who obtained a CT scan which revealed that she had a Brainstem Glioma *(B.S.G.).* She was referred to a Neurosurgeon who found the lesion in the middle of the brainstem, and advised that it was inaccessible even for a biopsy and that hence no surgery was possible. However he suggested that the child be taken to the United Kingdom for stereotactic radiotherapy. In the U.K. no surgery was done, and the child was brought back. She was examined once more by an Oncologist, who found that the BSG covered the entire brainstem extending from the mid brain to the medulla and was inaccessible for surgery. The child died the following day, which was exactly two months after consulting the defendant.

The District Court and the Court of Appeal (the 1st Appellate Court), found the defendant liable for negligence in diagnosis and for not ordering at CT scan, and awarded Rs.5 million in damages. On appeal to the Supreme Court, it was held the defendant had held herself as a qualified Pediatrician to whose care and treatment the plaintiff entrusted his daughter, and that hence the defendant owed a duty to the plaintiff to treat the child exercising reasonable care and skill as a Pediatrician, although that duty of care was not a warranty of a perfect result. However the Court held that the ordering of a CT scan upon the manifestations of the symptoms at the initial visit was reasonably required of a specialist Pediatrician to reach a differential diagnosis and that hence, the defendant was negligent. That Court however held hat the mere proof of the fact that the defendant was negligent in not ordering a CT scan, which led to the non diagnosis of BSG initially, did not alone make the plaintiff become entitled to damages, and that it must further be proved that such non-diagnosis caused or materially contributed to the deterioration of the condition and ultimate death. Hence the plaintiff had to prove on a balance of probabilities the existence of a casual connection between the defendant's breach of duty and the damages he suffered. Having reviewed the evidence of several medical specialists who had testified in the case, medical literature and legal jurisprudence on the principle of causation, the Supreme Court allowed the Appeal and dismissed the plaintiffs case for failure to establish causation on a balance of probabilities, and in that respect, it was held that mere possibility, as distinct from probability, was inadequate to establish liability.

The Roman Dutch Law Principles on which that decision was based, are compatible with the principles of delictual liability in French Law. Amos and Walton (supra) states at Page 211 thus-

"French Law requires that there should be a causal connection between the Act

for which the defendant was responsible and the damage. In actions founded under Article 1382, it is not enough to prove that the defendant committed a fault; it must appear in addition that the accident was caused by that fault".

In the present case, the 1st defendant made a speculative diagnosis that the injury may have been caused by a coral. I accept the evidence of the 2nd plaintiff and Mrs Gedeon, the clinic nurse, that they suggested to the doctor that it could be a stone fish sting. Apparently the doctor did not attach any significance to that, and from the medicine prescribed, it is apparent that he was content in controlling the pain and preventing infection of the wound. Had he the knowledge, as an ordinarily skilled Medical Officer, that a stone fish sting if not treated properly and immediately, would have been fatal to the patient, or at least cause necrosis of the affected area, he would have denatured the poison by the "*hot water method"* or by injecting an anti venom. This he failed to do, and hence the localization of the poison caused necrosis of the skin tissue. The surgical interventions and skin grafting would have been unnecessary had the 1st defendant exercised the ordinary skill of an ordinary competent Medical Professional. Even Black's Medical Dictionary (*37th Edition),* under the sub heading "*bites and stings"* deals with the Weever fish, which has similar poisonous spines. It is stated that "*as the poison is destroyed by heat, the affected foot should be repeatedly bathed in water as hot as the victim can tolerate*". An Internet Article identifies the stone fish as of the species "*Synaceja Trachynis, Synaneichthyes Verrucosus*". As regards the venom, it is stated-

"The sting causes excruciating pain and a great deal of swelling rapidly develops *causing death to tissues*. *The severity of the symptoms depends on the depth of penetration and the number of spines penetrated. The symptoms of the venom are muscle weakness,*

temporary paralysis and shock, which may result in death if not treated".

As for treatment, it is stated –

"Do not attempt to restrict the movement of the injected toxin. Bathing or immersing the stung area in hot water may be effective in reducing the pain. Transport the patient to the nearest Medical Center. Hospitalisation for intravenous narcotic analgesia, local anaesthetic infiltration or regional block may be required.

Definitive management consists of administration of stone fish antivenin. Indications for antivenin include severe pain, systemic symptoms or signs of weakness, paralysis and injection of a large amount of venom". _

In the present case, the initial diagnosis, and the treatment given, as recorded in the Medical History Form *(D1)* show that the 1st defendant misdiagnosed the nature of the injury despite the mother of the child and the nurse in attendance suggested that it could be a stone fish sting. As Dr. Jivan stated, the perforation was symptomatic of a stone fish sting. The 1st defendant thought it was "*most likely*" caused by a sea coral. Tindal CJ in the case of ***Lanphier v. Phipos (1838) 8. C&P. 475,*** which was a medical negligence action, summed up to the jury as follows.

"Every person who enters into a Learned Profession undertakes to bring to the exercise of it, a reasonable degree of care and skill. He does not undertake, if he is an Attorney, that in all events you shall gain your case, nor does a Surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of

skill. There may be persons who have higher education and greater advantages than he has, *but he undertakes to bring a fair, reasonable and competent degree of skill ……..”*

In the Sri Lankan case (supra), the deceased child was under the care of the defendant doctor for one month. The CT scan was ordered by another Specialist two days thereafter, and the brain stem glioma *(tumour*) was diagnosed only then. The Supreme Court held that “*ordering a CT scan be taken was something reasonably required by a Specialist Pediatrician to reach a differential diagnosis at that stage. In my view the defendant's conduct fell short of that standard of care and she was therefore negligent*”. However the Court found that there was no causal connection between that negligent omission and the damages caused to the plaintiff, and therefore allowed the appeal filed by the defendant.

In the present case, the omission of the 1st defendant to properly diagnose the nature of the injury had a causal connection to the damage caused to the 1st plaintiff as that was the direct cause of the necrosis and the subsequent complications. Hence he is liable in damages and the 2nd defendant is vicariously liable.

Damages

The 1st plaintiff claims Rs.80,000 for pain and suffering and Rs.90,000 for permanent disability and discomfort. She underwent two operations due to the skin grafting procedure. As Dr. Jivan stated, necrosis of the tissues could have been avoided or at least minimized if the wound was immersed in hot water within the first hour when the 1st defendant examined the child and made a misdiagnosis. According to evidence consequent to the stone fish sting, she suffered excruciating

pain unnecessarily. It was due to the skill of the other doctors who attended on her subsequently that she was able to save her life, or at least prevent amputation of the leg. As I stated in the case of ***Natalie Vidot v. Dr. Joel Nwosu (CS. 12 of 2000),*** *"a tortfeasor cannot get the benefit of an injury caused by him being cured due to the knowledge and skill of a Specialist in the field. The tortfeasor is liable to compensate the injury that he was caused".* In the present case, the negligence of the 1st defendant put the 1st plaintiff in a state which was dangerous to her life and limb.

In the Vidot case (supra), the defendant doctor used a vaginal speculum to examine the genitalia of a 16 years old girl, and in the process, caused a tear of the hymen and caused subsequent bleeding. It was established that he had negligently used an inappropriate speculum, and also that he had not obtained the consent of the parents before commencing an invasive procedure, or even explained to the parents the risks involved. On a consideration of all the circumstances, I awarded a total sum of Rs.75,000.

In the present case, the residual injury is a scar on the heel of the left foot where the skin grafting was done. There is no medical evidence as regards a permanent disability. However on a consideration of the pain, suffering, distress, anxiety and discomfort, and also the disfigurement, I award a global sum of Rs.40,000 to the 1st plaintiff.

As regards the claim of the 2nd plaintiff, there is no evidence that further medical attention was needed in South Africa. The 1st plaintiff testified that subsequent to the skin grafting, she experienced pain on the left foot, and Dr. Balagurunathan suggested further surgery locally to set the nerves. However she

did not agree to anymore surgical operations here, and her mother suggested that they go to South Africa for a second opinion. However in South Africa Dr. Wagenaar, upon examining the 1st plaintiff stated that she needs no further surgery. Blood circulation to the left foot was also found to be normal. Hence the decision to go to South Africa being that of the 1st and 2nd plaintiffs, no award is made in respect of the costs involved. The 2nd plaintiff also claims Rs.20,000 as moral damages. The evidence in the case disclosed that she suffered anxiety, distress and inconvenience as a result of the complications her daughter suffered due to the negligence of the 1st defendant. On a consideration of these factors I award a sum of Rs.5,000 under that head. I also award a further sum of Rs.200 spent on the medical report.

Accordingly, judgment is entered in favour of the 1st plaintiff in a sum of Rs.40,000 and the 2nd plaintiff in a sum of Rs5200, together with interest on each of those amounts, and one set of costs payable by the 1st and 2nd defendants jointly and severally.

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A.R. PERERA

JUDGE

Dated this 3rd day of May 2006