

**Gabriel v The Government Of Seychelles
(2006) SLR 169**

Frank ALLY for the Plaintiff
Fiona LAPORTE for the Defendant

Judgment delivered on 20 September 2006 by:

KARUNAKARAN J: The Plaintiff has brought this action against the Defendant namely, the Government of Seychelles - based on vicarious liability - claiming compensation in the sum of R490,000 for loss and damage, which the Plaintiff suffered as a result of a "fault" allegedly committed by the employees of the Defendant through its Ministry of Health. The fault alleged emanated from medical negligence of the doctors/surgeons employed by the Defendant at the Victoria Central Hospital, when they medically diagnosed, operated and treated the Plaintiff for a cut injury to his left wrist.

The facts

The Plaintiff, aged 50, is a resident of Pointe Larue. He is a mason by profession. He is a right handed person. He lives with his wife and has fathered five children. All the children are now adults save the youngest. In the middle of 1990s, the Plaintiff was a self-employed mason. He was then earning around R5,000 to R6,000 per month. Admittedly, on 1 January 1997, the Plaintiff sustained a cut injury on his left wrist. According to the medical history/report - vide exhibit P2 - the Plaintiff received that injury following an assault by a known person with a piece of metal whilst fighting. However, the Plaintiff testified in Court that he received that injury while he accidentally fell down on a corrugated iron sheet at his mother's place. Be that as it may. He immediately went to the hospital at Anse Royale for medical assistance. The medical officer therein sutured the wound and advised the Plaintiff to go home and return next day for the follow-ups. The Plaintiff accordingly, went home and returned to the hospital next morning. There was another doctor on duty by name Dr Tensing. This doctor examined and told the Plaintiff that the wound was in the process of healing. He therefore, advised him to go home. The Plaintiff went home. As the night fell, the Plaintiff gradually, developed severe pain in his left hand.

The next morning that was on 3 January 1997, the Plaintiff again went to Anse Aux Pins Clinic. He was seen by another medical officer by name Dr Jivan. This doctor examined the wound. He found something wrong in the healing process of the wound and so referred the Plaintiff to the Central Hospital in Victoria, for specialized treatment. At the Central Hospital, the Plaintiff was seen by Orthopaedic Surgeon Dr A. Korytnicov. On examination, the surgeon noticed a traverse laceration of 4 cm in the left wrist of the Plaintiff with numbness in the 2nd and 3rd fingers of the left hand. The left median nerve and the tendon of the muscular flexor digitorum longus had also been damaged by the cut injury. On the same day that is, on 3 January 1997, the surgeon immediately carried

out an operation to repair the damaged median *nerve* and the *tendon*. During the postoperative period there was tenderness over the scar on the left wrist. There were restricted movements of the 2nd, 3rd, and 4th fingers. Despite the surgical operation and physiotherapy, the Plaintiff's symptoms did not show any improvement. Again on 24 March 1997, Surgeon Korytnicov carried out a second operation for the exploration of the median nerve and the tendon. The Plaintiff again developed pain and scar hypersensitivity with reduced grasping power and sensation, to the first, second and third fingers. He had also developed "neurinoma" of the median nerve, which means a benign growth found on the sheath of the nerve due to trauma. Hence, on 7 July 1997, Surgeon Korytnicov had to carry out a third operation for the excision of the "neurinoma". He also did grafting to the median nerve using a part of the nerve taken from Plaintiff's left leg. Despite the third operation, the Plaintiff was not completely healed of the posttraumatic symptoms. The Plaintiff was unhappy over the results of the surgical treatments. He was rather abusive to Dr Korytnicov and threatened him with legal action for damages. The Plaintiff also refused to accept further treatments from him. Therefore, the surgeon had no other option but to refer the Plaintiff to another surgeon - Dr Browne - who subsequently, took over the case and continued the treatment.

Following the revision of the said three consecutive operations to compress the damaged left median nerve and the grafting exercise, the Plaintiff experienced relief of symptoms only for about ten months. Again, he developed recurrence of "neurinoma" and pain. He also suffered loss of grasping power and sensation to the first and second fingers in his left hand. These symptoms showed no improvement despite adequate physical and occupational therapy.

In the circumstances, the Plaintiff, being dissatisfied with the said three surgical interventions and nerve-grafting treatments, felt that those treatments did not bring the desired result because of the fault of the doctors, who treated him. Hence, by a plaint dated 19 December 1997, the Plaintiff filed a suit in Civil Side No. 432 of 1997 - hereinafter called the "first suit" - against the Defendant for damages. In that suit, he claimed compensation for loss and damage, which he suffered due to a "fault" allegedly committed by the employees of the Defendant. The fault that gave rise to the cause of action in the "first suit" allegedly emanated from medical negligence on the part of the employees of the Defendant, who failed to provide the Plaintiff with required standard of care and attention. The doctors/surgeons committed a "*fault*" in their medical diagnosis, operation and treatment given to the Plaintiff for the injury. In the "first suit", paragraph 4 of the plaint - vide exhibit D1 - reads thus:

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 the 3rd January, 24th March and 7th July 1997, such failure amounting to a fault in law.

Moreover, the particulars of the injury, loss and damage, which the Plaintiff claimed in the first suit, under paragraph 7 and 8 of the plaint therein - vide exhibit D1 - read thus:

Particulars of injury

- i) *Loss of sensation and median nerve in left hand*
- ii) *Restricted movement in the left hand*
- iii) *Pain in left leg*
- iv) *Scars on both sides of left ankle*

Particulars of loss and damage

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|---|---------------------|
| • <i>Partial loss of use left hand</i> | <i>R50, 000. 00</i> |
| • <i>Scars on left ankle</i> | <i>R5, 000. 00</i> |
| • <i>Pain and suffering, anxiety, distress and discomfort</i> | <i>R20, 000. 00</i> |
| • <i>Moral damages</i> | <i>R20, 000. 00</i> |

Total R95,000. 00

The Court adjudicated the “first suit” and awarded damages in favour of the Plaintiff.

The second suit

Nearly two years after filing the “first suit” and obtaining a judgment, the Plaintiff has now come before this Court with the present suit - hereinafter called the “second suit” - in which he claims again damages from the Defendant for medical negligence of its employees in respect of the same injury. In the second suit, the case of the Plaintiff is that following the first three operations, the Plaintiff developed pain and hypersensitivity with reduced grasping power and sensation to his first and second fingers. When the first suit was pending in Court, the surgeons of the Defendant again carried out two more operations on the injured hand. One on 29 April 1999, in which the surgeons partially removed the Plaintiff’s medial nerve. The other operation was carried out on 20 May 1999, in which they totally removed the Plaintiff’s median nerve. According to the Plaintiff, despite the last two operations, namely the 4th and 5th in the series of operations the surgeons carried out on the Plaintiff, there was no improvement. Since then, the condition of the injury has deteriorated. The last two operations have only resulted in permanent total disability of his left hand. The Plaintiff claims that such disability was caused due to the fault on the part of the surgeons, who treated the injury, in that they failed to make a proper diagnosis and give proper treatment to the Plaintiff as well as failed to provide the required standard of medical care. According to the pleadings in the second suit, the cause of action arose as and when the surgeons carried out the 4th and the 5th operations on the Plaintiff for the same injury but without success.

The Plaintiff has also averred in the plaint of the present suit that as a result of the medical negligence of the Defendant’s employees, he sustained a permanent total

disability of his left hand. Hence, he claims compensation in the sum of R490,000 from the Defendant towards loss and damage as particularized below:

(i) Permanent total loss of use of left hand	R 250, 000.00
(ii) Loss of amenities of life	R 50, 000.00
(iii) Aesthetic loss	R 10, 000.00
(iv) Pain, suffering, discomfort, Inconvenience, anxiety	R 50, 000.00
(v) Moral damages	R100,000.00
(vi) Loss of earnings from the date of Operation to the date of plaint (Rs 5,000 x 6 mths)	R 30,000.00
Total	<u>R490,000.00</u>

In the present suit, the Plaintiff testified in essence that following the first three unsuccessful operations, he again in 1998 underwent another operation by surgeon Dr Jerome. This surgeon told the Plaintiff that he had fixed the main nerve but the thinner nerves could not be attached since the equipment necessary for that treatment were not available in Seychelles. He also informed the Plaintiff that one Dr Lee, a visiting orthopaedic consultant-surgeon from Singapore would see him during his visit to Seychelles. After a couple of months, Dr Lee on his visit examined the Plaintiff's hand and advised him that he should undergo another operation. The Plaintiff retorted saying that according to Dr Jerome there was no need for him to go for another operation. But, Dr Lee insisted that if the Plaintiff really wanted to get relief from the pain, he should undergo another operation.

Dr Lee accordingly, advised the surgeon in charge of the Victoria Hospital namely, Dr Kosmider to perform the operations to the Plaintiff in furtherance of his expert opinion and consultancy. Dr Kosmider, after taking the opinion from the visiting consultant, performed the last two operations. from which the cause of action allegedly arose for the second suit. It is evident from the medical report - exhibit P3 - dated 5 August 1999, prepared by Dr Kosmider that he performed the said two operations - hereinbefore referred to as the 4th and the 5th operations - only for the purpose removing the neurinoma that had developed on the median nerve, in line with the opinion of the consultant-surgeon. The Plaintiff further testified that despite all those treatments, his hand is still bad and painful until today. At present, he is not able to use his left hand at all. He does not work as he cannot and so sitting at home. As a result, he suffered loss of earnings, pain, discomfort, inconvenience and anxiety besides, loss of amenities of life and aesthetics. Although he approached some of the doctors in Seychelles for effective medical treatment, they were not able to do anything to improve the condition. Now he is physically disabled and getting a monthly sum of R850/- from Means Testing Scheme. According to the Plaintiff, all the loss and damage he sustained simply because of the "fault" of the Defendant's medical staff and their professional negligence. In the circumstances, the Plaintiff has averred in his plaint - vide paragraph 8 - that the

said medical employees of the Defendant, whilst treating him for the injury omitted to do the following, which constitute a “fault” in law namely:

(a) Failed to make proper diagnosis and give proper treatment to the Plaintiff;
and

(b) Failed to take proper medical care and attention to the required standard.

Therefore, the Plaintiff now claims that the Defendant is liable to compensate him for the consequential loss and damage hereinbefore particularised.

The defence case

On the other side, the Defendant has raised a plea in limine litis on a point of law stating that the present suit namely, the second suit is barred by res judicata in view of the judgment given in the previous suit that is, in the “first suit” Civil Side No. 432 of 1997, between the same parties on the same cause of action. On the merits, the Defendant has averred in the statement of defence that although the Plaintiff was medically treated by the employees of the Defendant at the Victoria Hospital, they never committed any act of medical negligence in treating him for the injury. They did not commit or omit anything that amounts to a “faute” in law. Therefore, the Defendant denies medical negligence, liability and so disputes the claim of the Plaintiff for consequential loss and damages.

Dr Salomon Gonalro - DW1 - an Orthopaedic Surgeon with 21 years of experience in his specialised field, having studied all the medical reports, gave his expert opinion on the nature of the Plaintiff’s injury and as to the correctness of the medical decisions taken and the accuracy of the surgical treatments given by the Defendant’s employees. He also expressed his opinion on the alleged medical negligence or otherwise of the Defendant’s employees in diagnosing and treating the Plaintiff for the injury. According to this expert, when a median nerve is damaged it is not medically possible to get complete recovery or cure by a single surgery. Especially when neuroma develops it inevitably requires a revision of operations performed repeatedly to improve the syndrome that affects the function of the hand. Moreover, the development or condition of neuroma is inherent to the injury. The surgical intervention or the treatment has nothing to do with such developments, nor can this be attributed to any medical negligence on the part of the surgeons. Since “nerve grafting” is the common and the only option medically available to elongate the affected nerve, the surgeons in this case, have done what they are required and what they could reasonably do to improve the function of the hand in the given circumstances. Even in nerve grafting techniques, the degree of recovery depends upon the type of the nerve involved and the physiology of the patient. Full recovery to normalcy is not possible; it will only be partial as has happened in the case of the Plaintiff. There has been no negligence on the part of the surgeons Dr Jerome or Dr Kosmider in treating the Plaintiff for the injury. Their diagnostic procedure and decisions were correct even though the result was not satisfactory. Each individual has different physiological response, certain people can

recover fast and some will take a long time. In the circumstances, Dr Salomon Gonalro opined that there had been no medical negligence on the part of the Defendant's employees in respect of the surgical diagnosis and treatment given to Plaintiff. For these reasons, the Defendant urged the Court to dismiss the instant suit.

Res judicata

Before I proceed to examine the merits of the case, I believe, it is important to determine the preliminary issue namely, the plea of *res judicata* raised by the Defendant in this matter. The general rule is that a Plaintiff who has prosecuted one action against a Defendant and obtained a valid final judgment is barred by *res judicata* from prosecuting another action against the same Defendant where (a) the claim in the second action is one which is based on the same factual transaction that was at issue in the first; (b) the Plaintiff seeks a remedy additional or alternative to the one sought earlier; and (c) the claim is of such a nature as could have been joined in the first action. Underlying this standard is the need to strike a delicate balance between the interests of the Defendant and of the Courts in bringing litigation to a close and the interest of the Plaintiff in the vindication of a just claim.

For the plea of *res judicata* to be upheld, although it is trite, I have to restate that there must be the threefold identity of (i) subject matter, (ii) cause and (iii) parties in both cases namely, the first and the second one. In this respect, I carefully examined the pleadings in the complaints filed in both suits, with particular focus on the nature of the alleged injury, cause of action and the damages claimed in each case. First of all, as I see it, the "subject matter" at issue in the previous suit was nothing but a posttraumatic disability/dysfunction of the Plaintiff's left hand, despite surgical treatments by the Defendant's employees. Obviously, the "subject matter" at issue in the second case is also based on the same factual transaction, which had been at issue in the first suit. Hence, I find the "subject matter" in both suits, are identical in pith and substance to wit: disability/dysfunction of the Plaintiff's left hand. Secondly, as regards the identity of cause, the question to be determined here is whether the disability/dysfunction of the Plaintiff's left hand, has deteriorated resulting in new loss or damage since the previous judgment was given in the first suit so as to give rise to a "new cause of action" for the Plaintiff to institute the second suit. Indeed, the pleadings in both cases and the evidence on record clearly show that the Plaintiff's left hand has been dysfunctional because of the injury to the median nerve and neuroma. This has been the case ever since the institution of the first suit - See, paragraph 7 and 8 of the complaint filed in the first suit in exhibit D1. Although the pleading in the second suit describes the injury as a "total permanent loss of use of the left hand", the medical evidence reveals no such loss. In fact, the medical report dated 22 February 1999, which forms the basis for the second suit, does not disclose any material fact anew, to show that the Plaintiff's condition has deteriorated since the previous judgment was given in the first suit. In fact, medical report of 1999 rather indicates that there has been some improvement in the condition, since 1997. This is evident from the fact that the medical report of 1997 which formed the basis for the first suit stated that there was restricted movements of 2nd, 3rd, and 4th fingers of the Plaintiff, whereas medical report of 1999 states that only two fingers the 1st and the 2nd one have lost simply grasping power and sensation. In the

circumstances, I find the disability/dysfunction of the Plaintiff's left hand, has not deteriorated resulting in any loss or damage anew since the previous judgment was given in the first suit so as to give rise to a "new cause of action" for the Plaintiff to institute the second suit. Therefore, the causes of action in both suits are one and the same. Needless to say, the parties are also the same. Hence, in my judgment the present suit is barred by res judicata in this matter. Hence, I uphold the plea of res judicata and rule that the instant suit is not tenable in law and liable to be dismissed. Although the finding on the issue of res judicata substantially disposes of the suit, considering the aspect of appeal, it seems necessary that this Court should also proceed to examine and determine the case on the merits.

Medical negligence

Before one proceeds to analyse the evidence, it is important to identify and ascertain the law applicable to cases of medical negligence as it stands in our jurisprudence. Obviously, 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." In this respect, Amos and Walton in *Introduction to French Law* states:

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

Standard of Care

On the question of the standard of care and the principles governing medical negligence, I would like to restate what I have enunciated in *Charles Ventigadoo v Government of Seychelles* Civil Side No: 407 of 1998 (Judgment delivered on 28 October 2002), endorsing the formula, which Perera J applied in *Nathaline Vidot v Dr Joel Nwosu* Civil Side No: 12 of 2000.

Tindal CJ while summing up to a jury in *Lanphier v Phipos*_(1838) 8 C&P 475, in a medical negligence action, formulated the following principle:

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 at 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 and you will say whether, in this case, the injury was occasioned by the want of such skill in the Defendant.

In *Cassidy v Ministry of Health* [1951] 2 KB 348 at 359, Denning LJ stated thus:

If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment on him; and that is so whether the doctor is paid for his services or not.

The accepted test currently applied in English Law to determine the standard of care of a skilled professional, commonly referred to as the “*Bolam*” test, is based on the dicta of McNair, J in his address to the jury in *Bolam v Friem Hospital Management Committee* [1957] 2 All ER 118 at 121. He stated:

... 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 the 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” This test is a departure from the previous test of the hypothetical “reasonable skilled professional”, which placed emphasis on the standards adopted by the profession. The “*Bolam* test” concerns itself with what ought to have been done in the circumstances.

The principles thus enunciated in these authorities have one thing in common with the French Law of delict. That is, the relevant test is that of the reasonable or prudent man in his own class or profession, as distinct from the ordinary man in the street or Clapham. This is the test, which in my view, ought to be applied to the case on hand. It is on this basis that the Defendant’s liability has to be determined in this action.

Now, I will proceed to examine the merits of the case applying the above principles to the facts of the case on hand. Firstly, the case of the Plaintiff herein, is that the following two material facts constitute medical negligence on the part of the Defendant and which amounts to a “fault” in law. They are:

- i) The employees of the Defendant failed to make proper diagnosis and give proper treatment to the Plaintiff; and
- ii) they also failed to take proper medical care and attention to the required standard.

As regards the allegation of “improper or wrong diagnosis”, obviously, there is not even one iota of evidence on record to show that the surgeons either Dr Jerome or Dr Kosmider, who performed the last two operations, made any wrong diagnosis at any point in time in their surgical procedure or medical treatment given to the Plaintiff. I accept the evidence of the expert witness, the Orthopaedic Surgeon, Dr Salomon Gonalro - DW1 - in that there has been no professional negligence on the part of the

surgeons in treating the Plaintiff for the injury. Their diagnostic procedure and decisions were correct even though the result was not satisfactory. As he rightly pointed out that each individual has different body, certain people can recover fast and some will take a long time. In the absence of any other evidence to the contrary, I accept the expert opinion of Dr Salomon Gonalro and so find that there had been no medical negligence in respect of the surgical treatment the Plaintiff received from the Defendant for the injury. It is also pertinent to note that development or condition of neurinoma is inherent to the injury and inevitable. Nothing could have prevented its development. The surgical intervention or the surgeon has nothing to do with it nor can this be attributed to any medical negligence on the part of the surgeon. In *Hotson v East Berkshire Health Authority* [1987] 2 All ER 909 the claimant suffered an injury and was referred to hospital where a doctor negligently failed to diagnose his condition. The House of Lords rejected the claimant's claim because the vascular necrosis which developed was found to have been inevitable and there was nothing that could have been done even had the Defendant made a correct diagnosis.

Having said that I note that an allegation of negligence against medical personnel should be regarded as serious and that the standard of proof should therefore, be of a high degree of probability per *White House v Jordan* [1980] All ER 650. I find the evidence of Dr Salomon Gonalro is uncontroverted, strong and credible in every aspect of the case for the defence. In my judgment, the surgeons, doctors and other medical personnel who operated and medically treated the Plaintiff for the injury did exercise reasonable care and the necessary skills required of them in their treatment on the Plaintiff. As I see it, the development of neuroma that necessitated the revision of surgeries was occasioned not through medical negligence of the employees of the Defendant at the Victoria Hospital or by the want of any skill in the surgeon who treated the Plaintiff for the injury. In fact, as a consequence of *Hotson* (supra), in many medical negligence actions the dispute between the parties is whether the Defendant's negligence has, on a balance of probabilities, had a material effect on the outcome of the claimant's injury/disease or not. In the present case, even if one assumes, for the sake of argument that the Defendant had been negligent in providing surgical treatment and medical care, still there is no causal link between the "development of neuroma" and the "medical negligence". Indeed, neuroma is the outcome of the Plaintiff's injury and his physiological constitution, not that of any medical negligence on the part of the surgeons or any other employee of the Defendant, who treated the Plaintiff for the injury in question and so I conclude.

In the final analysis, I find that the Plaintiff has failed to show on a preponderance of probabilities that any of the employees of the Defendant namely, surgeons, doctors, and staff of the Victoria Central Hospital, who treated the Plaintiff for the injury, committed any negligent act or omission in the course of medical or surgical treatment given to the Plaintiff during the relevant period. Therefore, the suit is dismissed. I make no order as to costs.

Record: Civil Side No 441 of 1999