IN THE SUPREME COURT OF SEYCHELLES

1. **Roch Labonte of Greenwich, Mahe**

Olivette Labonte of Greenwich, Mahe

2. **Sonny Labonte of La Louise, Mahé**

3. **Roger Labonte of Petit Paris, Mahe**

Denis Labonte of St. Louis, Mahe

4. **Philippe Labonte of Anse Aux Pins, Mahé**

5. **Elvis Labonte of Greenwich, Mahe**

Ahtee Labonte of London England

6. **Hansel Labonte of Greenwich, Mahe**
Plaintiffs

Vs

The Government of Seychelles
Represented by the Attorney General
of National House, Victoria **Defendant**

Civil Side No: 46 of 2005

Mr. B. Georges for the Plaintiffs
Ms. D. Esparon for the Defendant

D. Karunakaran, J. **JUDGMENT**

The plaintiffs have brought this action against the defendant namely, the Government of Seychelles based on vicarious liability. In this action, they claim moral damages in the sum of R550, 000/- for pain, suffering and loss, which the plaintiff sustained because of a "fault" allegedly committed by the employees of the defendant through its Ministry of Health. The alleged fault emanated from an act of negligence of the workers employed by the defendant at the Victoria Central Hospital, in that, they allowed through negligence, a psychiatric inpatient (now deceased) to jump out of a window that resulted in his death. Indeed, the plaintiffs claim damages in this matter in their own capacity as well as heirs, legal representatives and ayants droit of the deceased.

The facts

The 1st and the 2nd plaintiffs are the father and mother, whereas the 3rd to 9th plaintiffs are brothers of one Alex Labonte (now deceased), hereinafter called the deceased, who was born on 13th July 1981. In 2004, the deceased was a young man and was 23. Since birth, he had been living with his parents and brothers in a joint family. He was very close and affectionate to his parents and brothers, with some special affinity particularly towards one of his

brother Hansel Labonte (PW2). However, all members of his family loved him very much. The deceased was sometime working for Laxmanbai, a construction company and used to share his earnings with his parents.

In early 2002, he developed some psychiatric disorder; presumably due to substance abuse, vide medical report dated 30th September 2004 in exhibit P2. In the middle of 2002, he had disturbed sleep, showed odd behaviour, at times became abusive, aggressive, and even turned violent. This caused concern to all members of his family. On the 24th June 2002, he was first taken to Victoria Hospital for medical examination and treatment. His mental status examination revealed that he was having flight of ideas, delusion of grandiosity, increased psychomotor activity. He was admitted to Psychiatric Ward and given medical treatment. However, he was not completely cured of his mental illness. He exhibited the same problem from time to time. He had been intermittently on treatment since 24th June 2002 for the recurrence of similar problems. On 26th May 2004, he was hospitalised and kept in the Psychiatric Ward. In fact, he was admitted that day with a history of having odd behaviour, was abusive, and tried to kill a dog that morning. He was very disturbed and unpredictable. He managed to escape from hospital on 28th May 2004. However, he was brought back to hospital by his father on 31st May 2004. He was subsequently discharged from hospital as the father informed them that the deceased was manageable at home. Again, at one stage, he had been admitted to Les Cannelles mental hospital for safe custody and treatment. The parents and brothers used to make regular visits to see

the deceased in the Psychiatric Unit at the Victoria Hospital as well as at the Les Cannelles Hospital. Subsequently, he was discharged but continued treatment as an outpatient while he was staying with his parents and brothers at home.

Again, on the 14th May 2004 the deceased showed the recurrence of the same disorder, as he was not taking the treatment. He had disturbed sleep, became abusive and more so disturbed others. He was immediately taken to hospital. On that day, whilst the nurse was talking to him, the deceased managed to escape from her custody and was never brought back to hospital by anyone. Therefore, the hospital authorities treated the said “escape” as discharged vide exhibit P2.

Again, on 7th of June 2004, the police arrested the deceased for disturbing others, abusing cannabis and for exhibiting abnormal and aggressive behaviour. The police obtained a court order for medical examination and confinement. Consequently, the deceased was admitted to the Psychiatric Unit of the Victoria Hospital for care, custody and treatment. The deceased was again having flight of ideas, delusion of grandiosity, increased psychomotor activity, disoriented to time, place and person. He showed elated mood and unpredictable behaviour. He was given treatment and kept in confinement because of his escaping tendency. He was still excited, agitated, violent, over talkative, banging the door on and off, uncooperative and throwing water on himself. Hence, he was kept in confinement on the 8th and 9th of June 2004.

On 10th of June 2004, an unfortunate event happened. The

deceased was kept as usual in the confinement room under lock and key. This special room was meant only to keep the patients, who are very aggressive and uncontrollable. This is situated in the psychiatric ward on the ground floor. It is a small square room with four walls, a side window, a ceiling and with only a mattress on the floor. In the normal circumstances, the patient who is kept in that room is given water every fifteen minutes and checked. On the door, there is a square - open area - like a small window, which one can open and close in order to look at the patient inside and check his condition. The deceased was placed in that room for his own safety and security and for the safety of the staff because he was threatening them.

At 12.30 pm that day, the deceased suddenly became aggressive; started shouting, swearing at the staff and banging the door. Later on he settled for a while. But again, he became aggressive, started shouting and was banging the door. The duty nurse Ms. Florence Baccari (DW2) was supposed to give an injection to the deceased for sedation that night. As the deceased was aggressive and had already shown a propensity to escape, she had to get the assistance from police and other security guards to prevent him from escaping while opening the room for giving injection. Ms. Amy Thelermont (DW1), the chief nursing officer in charge that night had also advised her to get police assistance accordingly, before she attempts to give any injection to the deceased. Hence, DW2 called the police for assistance. It was around 9. 30 pm. Two police officers and an armed army officer came to assist the nurse. Already there were three security guards at the hospital for assistance. In all there were six strong men to assist the nurse, so that they could open the confinement room, physically immobilise the deceased and then the nurse would be able to give the sedative injection.

Did this materialise? The evidence given by the nurse, Ms. Florence Baccari (DW2) is crucial in this respect, which shows thus:

> “the door of the confinement room is about two and a half feet wide. Its hinges are on the left. The handle on the right and there is a bolt on the top. The security guard was opening the door, so was on the right. And I was behind him with the syringe in my pocket. There were two police officers one on my left another on my right side. The army officer was to the right of the security officer. As the door would open, the first person to see inside was the army officer because he was where the door would open. As the door was opened I told the deceased” Alex, it is time for your injection”. He refused and said that he was not going to take any injection. Then he tried to come out of the room and the security guard tried to push him back inside. The police officers tried to grab him. However, Alex managed to break free. All the officers were running after him. I was bit disappointed that they had allowed Alex to run away. ..And went to the corridor. The security, police officers and the army officer all were running after him. He ran to the other block of the hospital building.”

According to eyewitness DW1, the deceased ran into the maternity ward, which is on the 2nd floor. He went into one of the cubicle where there was a lady with a baby. She screamed. He opened the window, broke the window open and went outside on a small concrete and stood there. They tried to sweet-talk him to come down but he walked to the edge of that piece of concrete. The chief nurse (DW1) called the fire brigade. They arrived at the scene about eight men and with a ladder. DW1 got the security guard to bring mattresses and put them down at the bottom, where the deceased was standing at the top. They brought about eight mattresses. At the same time, they were trying to talk to him; but he did not answer. He asked for water. One of the staff gave him water. He was standing on the edge. DW1, went down got the telephone number of his father and told what was happening and asked him to come down to hospital. But, his father told that even if he

talked to Alex, he would not listen. Hence, he declined to come down to hospital.

The evidence of the chief nursing officer in charge (DW1) in this respect reads thus:

> "So we tried whatever we could. Alex did not come down. He just lay down on that piece of concrete. It was a very narrow piece of concrete. He was there for some time. Then I think at some point he fell asleep and then he fell down from there. He fell half on the mattresses and half on the rough ground. He hit all his left side. People came with a stretcher to take him to casualty. When we took him to casualty he was not conscious. We ran with him to ICU. I phoned his father again and told him Alex had fallen down and is in ICU. He did not answer. We did everything we could for Alex."

Despite, intensive medical treatments at the Victoria Hospital, the deceased did not regain consciousness. After a month, on the 9th July 2004, he was transferred to North East Point Hospital. At that time, he was unconscious responding to only painful stimuli - as per medical report exhibit P2 - with the following diagnosis:

- Fracture in right frontal sinus wall
- Fracture of the left maxillary sinus wall

Fracture of the humerus of the left arm
Fracture of the pelvis left side

At the North East Point Hospital, he was receiving palliative care, physiotherapy treatment and occupational therapy attention. However, on the 20th August 2004, his general condition continued worsening and he died due to complications of the Immobility Syndrome.

In view of the above, the plaintiffs contend that the omission of the employees of

the defendant in allowing the deceased, who was in their care and custody, to evade them or their omission to prevent his evasion, or both, constitute a "fault" for which the defendant is vicariously liable to them. By reason of the death of the said deceased the plaintiffs have been caused pain, suffering and loss, which they estimate at Rs550, 000/- made up of as follows:-

- *Rs100,000/- for each of the first and second plaintiffs for the loss of a child*
- *Rs50,000/- for each of the 3rd to 9th plaintiff for the loss of brother*

Hence, the plaintiffs claim that the defendant is liable in damages in the total sum of Rs 550,000/- for their pain, suffering and loss.

The defence case

On the other side, the defendant denies liability. The contention of the defendant is in essence, that the deceased died because of his own acts and doings. The deceased, evaded the authorities of his own doings and the defendant took all reasonable precautions as a reasonable prudent person in a similar situation would have taken to prevent his escape. Hence, the defendant avers that it is not liable to pay any damages to the plaintiffs. However, the defendant does not dispute the fact that it owns and manages the Victoria Hospital and employs all staff working therein. It also does not dispute the fact that the deceased had been admitted to the Psychiatric Ward of the Hospital and escaped whilst he was in their care and custody. Its only contention is that it did not commit any fault in law, as it took all reasonable precautions as a reasonable prudent person in a similar situation would have taken to prevent his escape. To establish this defence the defendant called two witnesses, DW1 and DW2 to testify as to the circumstances, which led to the escape, fall and to the death of the deceased. In any

event, according to the submission of the State Counsel, having regard to all the circumstances of the case the quantum of damages claimed by the plaintiffs is excessive.

***Does it involve any m*edical negligence or any other professional negligence?**

Before one proceeds to analyse the evidence, it is important to identify and ascertain the law applicable to the case on hand. It is settled in case law that the heirs of a deceased person died as a result of the negligence of the defendant, are entitled to claim in that capacity, damages for the prejudice, material or moral, suffered by the deceased before and until his death and resulting from a tortuous act before his death, provided he had not renounced his claim. However, when the death is concomitant with the injuries resulting from the tortuous act, heirs cannot claim in that capacity, and may only claim in their own capacity. *Vide De Sylva Vs D'Offay (SLR 1970); Pon Waye Vs Chetty (1971); Hardie Vs Costain Civil Engineering Ltd. (1972); Dubois and Ors Vs Albert and another (1988).* Be that as it may. Although the incident, which gave rise to the cause of action in this matter, occurred in the hospital premises apparently involving medical staff like nurses of the hospital, this case admittedly, does not attract medical negligence. In any event, it is also not pleaded as such in the plaint. As I see it, the police officers, the army officer and the security guards involved in the entire episode, had one thing in common. They were all *security personnel* engaged by the defendant for a specific service of safely securing the corpus and effectively arresting the movement of the patient (the deceased) so that the nurse on duty would be able to give the necessary injection to him at the material time and place. Although the security personnel of these categories are employed by

different specialized agencies, like the Police Force, National Guard, Private Security Companies, SPDF and the like, they are all indeed, service providers. They obviously, provide professional security services to the public or to other government agencies, ministries, departments, private people, or companies either by virtue of their contract of employment or by virtue of some statutory obligation or by any other private contract with their clients. Whatever may be the case, whoever they may serve, whether for a fee or not, as long as they expressly or impliedly agree to provide their professional services on security related matters, they are under an obligation to provide that service to the required standard using their special skill and competence. Needless to say, any professional service for that matter requires and *involves the use of special skill, knowledge and competence.* Obviously, the member of the police force and other disciplinary forces are trained only to acquire that special skill and competence before they are employed for that job. The service provided by the **security guard** or **security officer**, also similarly involves the use of such special skill and competence. In the circumstances, I find on a point of law, the standard of care required of the security personnel engaged in the task of preventing the escape of the deceased from the confinement room must conform at least to the normal standards of care expected of persons in that particular profession. Hence, I hold that the test required to be applied to determine the standard of care in this matter, is that of a skilled professional, not that of *the man on the Clapham omnibus.* In other words, the relevant test is not that of the ordinary man in the street or Clapham or that of a prudent man, as submitted by the learned State Counsel but that of a skilled professional.

Admittedly, this action is based on “fault”. Article **1382(2)** of the Civil Code

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

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 ***Mc Nair, J.*** i*n* his address to the jury in ***Bolam v. Friem Hospital Management Committee (1957) 2. All. E. R 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 I have formulated supra, in respect of the security personal and their standard of care, which they ought to exercise in the performance of their professional duty or service. AS I see it, this is the test, which 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, herein the case of the plaintiffs is that the following two material facts constitute "negligence" on the part of the defendant and which amounts to a "*fault*" in law. They are:

i) *The employees of the defendant allowed the deceased, a psychiatric patient to evade and go out of their care, custody and control and to jump out of a window that resulted in his death; and/or.*

The security personnel, as the employees of the defendant omitted or

failed to take the necessary duty of care and attention to the required standard to prevent the deceased from evasion.

As regards the first limb of the allegation as to the act of *"allowing the deceased to evade",* obviously, there is not even one iota of evidence on record to show that the defendant employees deliberately allowed the deceased to escape from the confinement room. However, the second limb of the allegation needs a careful consideration in the light of the entire circumstances of the case. In fact, the police officers, the armed army officer and the security guards, in all six strong security personnel, are in my view, ***"skilled professionals"***. They constituted the security team that was engaged by the defendant for a specific service of safely securing the corpus and effectively arresting the movement of the patient (the deceased) so that the nurse on duty would be able to give the necessary injection to him at the material time and place. When they provide such service, they are legitimately expected to *use their special skill and competence to the standard of a* ***"skilled professional"*****.** Obviously, if six of those strong men had properly positioned themselves and had acted with due diligence with the required standard of their professional skill and competence as security personnel the deceased could not have escaped from the small room, where he had been confined. Viewing the evidence hereinbefore rehearsed, and in the light of all the circumstances - narrated supra - I find that the said security personnel were the employees or agents of the defendant at the material time. They obviously, omitted to take or exercise - the necessary - duty of care and attention to the required standard of any skilled professional of their class; when they were engaged to provide a specialised service at the material time and place. As a result, they failed to prevent the deceased from evasion. In my view, the failure on the part of the security personnel in this respect constitutes a "fault" in

terms of Article 1382 of the Civil Code. The defendant is therefore, vicariously liable to compensate the defendants for the consequential damages. In passing, I should mention here that it is reasonably foreseeable that a patient by reason of his mental or emotional illness may attempt to injure himself or even attempt to commit suicide, those in charge of his care owe a duty to safeguard him from his self-damaging potential. This duty contemplates the reasonably foreseeable occurrence of self-inflicted injury regardless of whether it is the product of the patient's volitional or even negligent act. The degree of care, the competency and foreseeablilty of skilled professionals in this respect is required to be higher than that of a prudent man, who commits an act in the special circumstances, in which the damage was caused.

Moving on to the assessment of quantum in this case, I find that the death was not concomitant and the deceased died about 70 days after sustaining the serious bodily injuries. During that period, he had been unconscious but responding to only painful stimuli vide exhibit P2. In the circumstances, the deceased obviously must have suffered considerable pain and suffering throughout that period. I am satisfied that the deceased formed part of a very close household and that the parents and brothers must have suffered much grief and shock at his sudden and untimely death. Needless to say, the 1st and 2nd plaintiffs being parents of the deceased must have gone through a lot of pain because of the unexpected death of their young son and irreparable loss of their loved one. Likewise, the brothers of the deceased should also have gone through the same.

In my final analysis, I take into account that

(i) the plaintiffs in their capacity as the heirs of the deceased are entitled to their respective share from damages payable to the deceased for the pain and prejudice

suffered by the deceased himself before his death; and

the plaintiffs are entitled to moral damages in their own right resulting from the death of the deceased.

Having regard to all the circumstances of the case, I award the following covering both aspects of their entitlement to moral damages:

- Rs50, 000/- for each of the first and second plaintiffs namely, the parents for the loss of their son; and

Rs20,000/- for each of the 3rd to 9th plaintiff namely, the siblings for the loss of their brother

In the final analysis, therefore, I enter judgment for the plaintiffs and against the defendant in the total sum of Rs 240,000/ and with costs.

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D. KARUNAKARAN

JUDGE

Dated this 9th day of July 2007

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