

**JULIENNE v GOVERNMENT OF SEYCHELLES**

**(2012) SLR 23**

Frank Elizabeth for the plaintiffs  
D Esparon for the defendant

**Judgment delivered on 30 January 2012 by**

**RENAUD J:**

This suit was entered on 27 October 2005 whereby the plaintiffs claim the following as loss and damages, against the defendant for reasons pleaded:

(a) Moral damages for pain, suffering, bereavement and loss of father at R 25,000 per child	R 175,000
R 50,000 for the wife	<u>R 50,000</u>
	R 225,000
(b) Pain and suffering of deceased before death	<u>R 50,000</u>
Total	R 275,000

**Plaintiffs' case**

The plaintiffs are the children of the late Philibert Julienne (hereinafter referred to as "the deceased"), who passed away on 28 April 2005. They brought this action in their own capacity as well as in their capacity as heirs to the estate of their late father.

The plaintiffs averred that at the time of the admittance of the late Philibert Julienne to the Victoria Hospital for medical treatment on Friday 6 April 2005, the deceased was married and had the following 7 children:

- (1) Margaret Daphne Theoda Julienne, born on 28 January 1968;
- (2) Marinette Francoise Julienne, born on 25 June 1971;
- (3) Jude Andrew France Julienne, born on 15 July 1974;
- (4) Marie-Antoinette Julienne, born on 15 May 1975;
- (5) Josette Merna Julienne, born on 6 January 1977;
- (6) Sindy Anette Julienne, born on 2 August 1978; and
- (7) Tony Riley Julienne, born on 16 December 1979.

The deceased was diabetic at the time of his admittance to the hospital.

The plaintiffs averred that the deceased was given inappropriate and inadequate medical treatment for his illness during his stay in the hospital.

The plaintiffs also averred that the defendant's action or omission in treating the deceased amount to a 'faute' in law for which the defendant is liable to the plaintiffs in law.

The plaintiff further averred that the defendant, their employees, servants, agents or préposés action or omission caused or contributed to the death of the deceased in that:

- (a) The defendant gave the wrong information to the plaintiffs in respect of the defendant's ability to treat and care for the deceased.
- (b) Advised the plaintiffs that amputation of the deceased's leg would not be necessary when the defendant knew or ought to have known that amputation was necessary to save the deceased's life.
- (c) The defendant administered the wrong, inappropriate or inadequate medical treatment to the deceased thereby causing or contributing to his death.
- (d) The defendant assured the plaintiffs that the deceased had no fever when the deceased did suffer from fever and the same had reached over forty degrees Celsius and the deceased was shivering and sweating profusely from the effect of the fever.
- (e) The defendant failed to provide reasonably good and adequate medical treatment to the deceased as would generally be expected from a good, competent, skilled and qualified medical practitioner.
- (f) The defendant was incompetent, reckless and negligent in all the circumstances of the case.

For reasons stated above, the plaintiffs claimed to have suffered loss and damages as stated above.

### **Defendant's case**

In its statement of defence, the defendant denied the averment of the plaintiffs that the deceased was given inappropriate and inadequate medical treatment for his illness during his stay in the hospital.

The defendant also denied that its action or omission in treating the deceased amounted to a 'faute' in law for which it is liable to the plaintiffs in law.

The defendant further denied that it, its employees, servants, agents or préposés action or omission caused or contributed to the death of the deceased, as pleaded at paragraphs (a) to (f) of the plaint.

By way of further answer the defendant stated that:

- (i) The defendant's employees, servants or préposé attended to the deceased in April, 2005, in a professional, diligent and efficient manner and gave the deceased the necessary and appropriate treatment;

- (ii) The defendant's employees, servants or medical officers made the appropriate and correct diagnosis;
- (iii) That correct information was imparted to the plaintiffs and the deceased at all material times relating to his treatment by the medical officers.
- (iv) That the plaintiffs and deceased were properly advised by the medical officers in their professional capacity as good, skilled, competent and qualified medical practitioners.

The defendant averred that the alleged loss or damages are not directly or indirectly derived from the defendant's or its employee, préposé, or servants act or omission.

### **Facts not in dispute**

The plaintiffs are the children of the late Philibert Julienne (the "deceased"), who passed away on Saturday 28 April 2005.

The deceased was married to Marie-France Lafortune on 19 June 1973. The marriage certificate is marked as Exhibit P4.

Out of the marriage seven children were born. They are Daphne Margaret Theoda Julienne. Her birth certificate is admitted as Exhibit P5. Marinette Francoise Julienne, her birth certificate is Exhibit P6. Jude Andrew France Julienne, his birth certificate is Exhibit P7. Marie Antoinette Julienne, her birth certificate is Exhibit P8. Josette Merna Julienne, her birth certificate is Exhibit P9. Cindy Anette Julienne, her birth certificate is Exhibit P10. Tony Riley Julienne, his birth certificate is Exhibit P11. They are all alive and have brought this action in their own capacity as heirs to the estate of their late father.

The deceased was diabetic at the time of his admittance to the hospital.

### **The issues**

The issues that this Court is required to determine are:

Firstly, was the deceased given inappropriate and inadequate medical treatment for his illness during his stay in the hospital?

Secondly, whether the defendant's actions or omissions in treating the deceased amount to a 'faute' in law for which the defendant is liable to the plaintiff in law.

Thirdly, whether the defendant's, its employees', servants', agents' or préposés' actions or omissions caused or contributed to the death of the deceased.

To establish or otherwise the third issue, this Court has to consider whether the particulars in support of that averment as pleaded have been established by evidence. These are:

- (a) Whether the defendant gave the wrong information to the plaintiffs in respect of the defendant's ability to treat and care for the deceased.
- (b) Whether the plaintiffs were advised that the amputation of the deceased's leg would not be necessary and whether the defendant knew or ought to have known that amputation was necessary to save the deceased's life.
- (c) Whether the defendant administered the wrong, inappropriate or inadequate medical treatment to the deceased thereby causing or contributing to his death.
- (d) Whether the defendant assured the plaintiffs that the deceased has no fever when the deceased did suffer from fever and the same had reached over forty degrees Celsius and the deceased was shivering and sweating profusely from the effect of the fever.
- (e) Whether the defendant failed to provide reasonably good and adequate medical treatment to the deceased as would generally be expected from a good, competent, skilled and qualified medical practitioner.
- (f) Whether the defendant was incompetent, reckless and negligent in all the circumstances of the case.

## **The law**

The pertinent applicable legislative provisions are articles 1382 -1384 of the Seychelles Civil Code. Article 1382 states that:

1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.
2. Fault is 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 an omission.
3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.
4. A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.
5. Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.

Article 1383 provides that:

1. Every person is liable for the damage he has caused not merely by his act, but also by his negligence or imprudence.  
.....

Article 1384 provides that:

1. A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.
2. The father and mother ...
3. Masters and employers shall be liable on their part for damages caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.
4. Teachers and craftsmen ...

To shed some light as to how the Seychelles Court of Appeal has interpreted and applied the above-quoted legal provisions, I will refer to and cite the case of *Attorney-General v Roch Labonte & Ors* SCA 24/2007, where that Court held that:

1. A professional is required to exercise a higher standard of care than the prudent man (bon pere de famille; l'homme moyen; the man on the Clapham bus).
2. To be a professional, one needs to belong to a self-regulating organization. The mere fact that someone specialize in a particular area does not make them a professional.
3. For those who are not professionals, the standard of care that is applicable is that of the prudent man.
4. Fault under articles 1382-1384 of the Civil Code depends on what precautions were taken to foresee the occurrence of an event and adopt measures to prevent the consequences.
5. There can be no fault where there is diligence in dealing with predictable or unpredictable events.
6. For the Government to be vicariously liable for the actions of its employees fault must be attributable to the State.
7. For the Government to be vicariously liable for the actions of its employees, it must be shown that the employees in exercising their official functions were acting in bad faith, abused their power, or were grossly negligent.
8. For there to be gross negligence the act must be one that no person of ordinary intelligence would commit.
9. Once fault is found, the act of the victim will generally not exonerate the author of the fault. However, the fault of the victim may be such that it completely negates the responsibility of the other party.
10. "Actes de puissance publique" are not justiciable.
11. Government "actes de gestion en vue des services publiques" are justiciable.

### **Evidence of plaintiffs' witnesses**

Evidence in support of the plaintiffs' case was adduced by two witnesses, Ms Marinette Julienne and Mrs Cindy Pothin nee Julienne who are both the daughters of the deceased.

Marinette Julienne was a medical social worker at the material time and at the time of testifying she was a student at the National Institute of Health and Social Studies doing a Diploma in Social Work.

Cindy Pothin born Julienne was and is a nurse by profession and now specializes in mental health nursing. She was trained at the National Institute of Social Studies from 1997 to 1999. She now holds a Diploma in Mental Health. She has been working for the Ministry of Health as a nurse for almost twelve years now.

The evidence on behalf of the plaintiffs no doubt reveals matters of serious concern to them as they observed during the time that the deceased was being treated by the defendant. The two witnesses related to the Court all the material events that went on during that period of his hospitalisation. All of what they have testified may be truthful and cogent but what is of most concern to this Court are only what are considered to be relevant to the matter in issue. On that basis this Court has summarized its findings of facts which follow.

### **The facts**

In 1995 the blood sugar level of the deceased was out of control as a diabetic and there was complication that led to the amputation of the lower part of his right leg. He had been on tablets since after his amputation in 1995 to 1999 and he was doing well and still in employment. His blood sugar level was stabilized and every Saturday he was going for his physiotherapy treatment. The deceased continued to be diabetic and was also hypertensive.

In April 2005 it appeared to the relatives that he was developing the same complication that occurred in 1995.

On Friday 6 April 2005, the deceased was at home and was complaining of pains in his left leg on which there were blisters. The next day, Saturday 7 April 2005 the wound was turning bluish and his relatives took him to Dr Kumaran, a doctor in private practice at English River. Dr Kumaran immediately caused him to be admitted to the D'Offay Ward at the Seychelles Hospital where he was seen by doctors including Dr S Sanyal and Dr Ronaldo.

Amongst the other treatment to be administered the doctors also ordered that his leg be soaked every day before it is dressed.

When the deceased was admitted the doctors also scheduled him for a wound debridement the next day, Saturday 7 April 2005. He was accordingly starved from midnight and the next day he was taken to the operating theatre at 12 noon. However the debridement was not carried out and he was brought back and was told that he would be attended to later.

The deceased went to theatre more than once on that day and each time he was told that he would be attended to later, but without any further explanation or reason given to him or his relatives. The deceased waited up to 4 pm on that day and still he was not admitted to theatre for the debridement. By then the deceased who was feeling faint, and thirsty, drank three packets of juice. He accordingly informed the nurses of that. The doctor eventually agreed to do the wound debridement the next day, Sunday 8 April 2005.

On Monday 9 April 2005 the health condition of the deceased deteriorated, and he had fever on and off. He was administered panadol, amoxicillin and treatment for high blood pressure and diabetes. The treatment was either oral or by intra-venous method.

One of his daughters discussed the health condition of the deceased with the nurse who was only a student nurse working without supervision, administering panadol syrup to the deceased. Upon enquiry by the witness as to why panadol syrup was being administered to an adult, the student nurse told her that she would discuss this with the doctor and let her know afterwards.

During the day, the deceased continued having fever and when that was taken up by the relative with Dr Ronaldo, he said that he could not prescribe other medication without discussing with Dr Telemaque who was in charge of the ward.

As from Monday 9 April 2005 a relative stayed with the deceased during the day. On Tuesday 10 April 2005 the condition of the deceased was worsening and he was beginning to be delirious and he was weak and he could not lift his arm to scratch himself.

Dr Telemaque came the next day Tuesday 10 April 2005 to see the deceased in the presence of the relatives.

On that day Tuesday 10 April 2005 when Dr Telemaque examined the leg of the deceased he enquired from the nurse whether the leg of the deceased had been soaked as ordered. The nurse replied in the negative and stated that it had been soaked only on Saturday 7 April 2005. Dr Telemaque expressed his surprise and asked why the deceased's leg had not been soaked as it was his instruction that it was to be soaked every day. Dr Telemaque then remarked that dressing was being applied on a dirty wound. In the presence of the relatives Dr Telemaque again told the nurse that the wound must be soaked every day before it is dressed.

In the night of Tuesday 10 April 2005 the health condition of the deceased worsened and he was becoming delirious. The nurse told the relatives that that morning when her assistant groomed the deceased, the deceased informed them of his being delirious. By 8 pm that day (Tuesday) the deceased was behaving strangely and was throwing things from his bed. The nurse asked one of his relatives to come and stay the night with him and his wife went.

The next morning Wednesday 11 April 2005 the deceased's leg had flesh coming out and a nurse was putting a "square white pack" on it. The nurse could not confirm to the relatives whether applying that pack was correct as she said that the Hospital had just received it and it was only then that she was testing it.

By 4 pm on Wednesday 11 April 2005 when the "pack" was removed from the deceased's leg, the leg appeared as if the flesh had been cooked and his veins could be seen. The veins were dry, looking as if when one fries something dry. The condition of the deceased's leg appeared to have worsened when the pack was removed.

The nurses referred to by the witnesses up to that point in time, never introduced themselves to the relatives and carried no name badge and they are therefore only known by face. One of them was however known and that was the nurse in charge, Ms Morel.

The deceased's condition worsened, his high blood pressure rose and fell on and off as his hypertension was volatile and at that point the doctor informed the relatives that the deceased was developing a heart condition and that he would have to be put on treatment to remove the excess water from his body and also his heart had to be tested.

At that time it was one Nurse Ah-Tion who was doing the heart test on the deceased and according to the witness Nurse Ah-Tion was complaining nonstop that she was tired of working with patients with diabetes, patients that had dirty wounds. Nurse Ah-Tion continued complaining until she finished the procedure. The procedure was a sort of machine that they use to test the heart. The deceased did not get better after that.

The system of treatment that was used to remove excess water required the monitoring of the deceased's intake and outtake of liquid, his urine, things that he was eating or drinking. The relative staying with the deceased was not properly educated on how to measure and collect that information. The nurse would just come, say at 12 noon, give him lunch and then entered it on the record as if the deceased had eaten that lunch without her asking if he had really eaten or not. The records were not being kept properly.

Dr Telemaque informed the deceased that definitely he would have to amputate his left leg. The deceased signed his consent paper himself for the amputation. Dr Telemaque explained to the deceased that his leg had to be amputated because of the burns on his leg that were shown to the relatives. The temperature level of the deceased continued to rise and fall on and off with fever, the blood sugar level was also rising and falling on and off with diabetes and so also high blood pressure level. The doctor tried to stabilize him because they were going to proceed with the amputation the following Thursday 12 April 2005.

On Thursday 12 April 2005 the relatives came very early in the morning. At that time the deceased was doing blood transfusion and a student nurse was using the "canula", unsupervised, and she was having difficulty removing it. At the same time that student



nurse was testing the blood pressure when she received a phone call. She just left and went away, leaving the BP apparatus there for a long time.

The deceased went to the operating theatre early afternoon of Thursday 12 April 2005 and three of his children waited for him in the lobby outside the theatre. They noticed that he took a long time inside, so they asked the nurse why. The nurse told them that she did not know why. By 4 pm the relatives saw all the doctors leaving the theatre and everyone was taking their bags to go home. The relatives asked again and no one knew.

The relatives saw the doctors who were supposed to be treating the deceased, Dr Ronaldo and Dr Sergio coming out of the operating theatre. The relatives ran after them to ask them what was happening because they had not seen the patient coming out. The doctors told the relatives that they should enquire with Dr Telemaque. The relatives asked to see Dr Telemaque and no one knew where he was. The relatives insisted that they see him and they were told that he had left. The relatives then saw the deceased coming out of the theatre lying on a stretcher heading for the ICU. The relatives "ran" around the hospital like mad people asking what was happening. The relatives were told that they could see the deceased later as he had to be admitted to ICU because of his condition.

The next day, Friday 13 April 2005 early in the morning the relatives came and asked to see the deceased and were allowed to see him in the ICU. All the beds in the ICU were full. One of the relatives saw the deceased struggling to remove the mask from his face and the mouth of the deceased appeared as if it had been pulled or fallen on the left side of his face. The relative informed the nurse and asked her why his mouth was like that. The nurse said that they had not noticed it but that they would inform the doctor. By 10 am the relative was informed that the deceased was being discharged from the ICU. That was not even 24 hours after he was admitted. The relative was told that if she wanted to know why she had to enquire with Dr Telemaque whom the relative had not seen up to then. The deceased was placed again on D'Offay Ward and he was just there like a vegetable.

On Monday 16 April 2005 when Dr Telemaque observed the deceased's medication chart, Dr Telemaque surprisingly asked the nurse in the presence of the relatives why the deceased was not on a specific kind of drug; he said that the deceased was supposed to be on that medication since the day he was admitted. The nurse just shrugged her shoulders to indicate that she did not know why.

On Saturday 21 April 2005 at around 2 pm a relative went to the hospital to see the deceased, when she came she saw that the deceased was not responding at all. He was sleeping and his breathing was strange, he was breathing as if the respiration was coming from his stomach. According to the nurses that state was called comatose. The relative informed the nurse that it seemed that the condition of the deceased was not alright and the nurse told her that he was in a deep sleep.

At around 6 pm of that Saturday 21 April 2005 the relative insisted again that the nurse come and see the deceased because since she got there the deceased had not woken up and had not responded and the breathing sound was very strange. At around 5 to 6 pm, the relative had called all her sisters and her mother to come. The nurse came and told her that the deceased was in a deep coma and that she will inform the doctor but no doctor came to see him. The nurse decided to put the deceased in a side room where they usually keep patients who are critically ill. The deceased was there but again the doctor never came and the relatives were told to wait. They waited for a long time and then the doctor came at around 7 to 8 pm. It was Dr Sergio who came but he could barely speak English. The relatives had difficulty understanding him and he also had difficulty understanding them. Dr Sergio is a Cuban. One of the relatives asked him about the deceased's condition and he simply replied - 'no good', 'no good', 'the condition no good', that was all that he could speak. The relatives wanted to know more than 'no good' but Dr Sergio just kept saying 'no good'. When asked again he said - 'the scan no good, no good', so, the relatives asked the nurse who was on duty for a second opinion on the deceased's situation. The nurse told them that the doctor had already talked to them and there was no other doctor and no other opinion that could be given to them. The relatives told the nurse that they did not have enough details because the doctor had only told them - 'no good, no good'. The nurse again told the relatives that the doctor had already talked to them.

At that time one of daughters of the deceased, Mrs Cindy Pothin (born Julienne), who is a nurse was there. She told the relatives that it was only a matter of accepting it. However, Cindy insisted with the nurse to call the doctor because the relatives wanted the doctor to examine the deceased. The nurse, Ms Ah-Tion, ignored them. One of the relatives informed Ms Ah-Tion that she is a medical social worker and that Cindy is a nurse and that if she does not call the doctor, one of them would call. One of the relatives told Nurse Ah-Tion that she would go round the hospital to look for the doctor. Out of desperation the relatives preferred to get a Seychellois doctor who could better understand their situation. The relative saw Dr Mickey Noel who was working at the ICU and she asked him for his help only to come and see the deceased and to tell the relatives what was happening. Dr Mickey Noel told them that he would not be able to come and assess the deceased because he was not the doctor in charge of the ward and that he had to have the permission from the doctor who was in charge of the ward for him to do that. Dr Mickey Noel said that the only thing that he could come and do was to look at the deceased's medical case notes.

Dr Mickey Noel came and looked at the deceased's file and he informed the relatives that the condition of the deceased was such that it was advisable that they insist with the nurse that the doctor in charge of the ward comes and see the deceased.

It was Dr Telemaque who was the doctor in charge and Dr Sanyal was the doctor who was on call. Nurse Ah-Tion insisted that the doctor had already talked to the relatives and that it was a matter that they should accept and the second nurse who was there, Nurse Onezime, also took the opportunity to speak to the wife of the deceased and told

her to tell the relatives to stop because the doctor had already talked to them and there was nothing that could be done.

The relatives insisted and eventually after a lot of persuasion, Ms Ah-Tion called Dr Sanyal, Dr Ronaldo, Dr Sergio and Dr Noel. That was almost midnight of Saturday 21 April 2005.

When the doctors came the first thing that Dr Sanyal very loudly said was that his patient's condition was not like that when he left him. He said to the nurses, Ms Ah-Tion and Ms Onezime that – 'I told you that if the patient's condition changes you have to call me'. Dr Sanyal then told the relatives that nobody had informed him that the deceased's condition had changed drastically for the worst. At that time the deceased's skin was moist, he was sweating and he was breathing from his stomach and Dr Sanyal told the relatives that the deceased would have to go back to ICU because his condition was very critical. Around 2.30 am on Saturday 22 April 2005 the deceased was transferred back to the ICU.

A few days after that the relatives met with the Health Minister Mr Vincent Meriton and they put their concerns forward because they by then had perceived that there was negligence, lack of supervision, they were concerned regarding the treatments being given to the deceased, among other matters. Dr Valentin was also present at that meeting. They had the chance to negotiate the issue of the deceased receiving 10ml of panadol syrup. The deceased was not supposed to be on syrup, but on pills. Dr Valentin, surprisingly said - 'what !! panadol syrup?'. Dr Valentin added that if the deceased was on panadol syrup it would have to be more than 10ml, maybe it should have been about two bottles. When the relatives voiced their concern regarding the syrup they were told that no panadol syrup had been prescribed. Minister Meriton told the relatives that he would investigate and then inform them of the outcome. All along the relatives were in contact with Minister Meriton and he told the relatives that he was working on it until he left the position of Minister for Health and the relatives never received any feedback from him.

The deceased was kept in ICU. On Monday 23 April 2005 in the morning Dr Punda, who was a doctor in the ICU introduced herself as one of the doctors who assisted during the deceased's operation. Dr Punda said to the relatives that all the doctors inside the theatre had asked Dr Telemaque if he had informed Mr Julienne's family of his condition because Dr Punda said that she had noticed that on the bench outside the theatre there were many of the relatives and she said that she recognized from their faces that they were the relatives. Dr Punda said that Dr Telemaque confirmed that he had already spoken to them. In fact Dr Telemaque had not spoken to any of them. Dr Punda said if Dr Telemaque had not talked to the family it could be because according to Dr Punda the deceased was critically ill at the time and his condition was 50- 50.

When the deceased was in the ICU the following Saturday 21 April 2005 the relatives got a phone call to come to the hospital on emergency. When a daughter and the wife

came Dr Telemaque told them that he was going to do another wound debridement because the wound was septic. The relatives consented.

When his daughter came back the next Monday 23 April 2005 again Dr Punda asked her if Dr Telemaque had explained to her what he went to do with her father in the theatre. She told Dr Punda that Dr Telemaque made them sign a paper for wound debridement. Dr Punda told the daughter that it was not a wound debridement that they signed for, but for another amputation. Dr Telemaque amputated her father's leg further up.

The relatives believe that they had the right to be informed that the doctors did not do a debridement but an amputation further up.

Unluckily the deceased died on Saturday 28 April 2005 whilst he was still in the ICU where he was taken after the second supposed debridement.

The death certificate of the deceased was admitted and marked as Exhibit P1.

The relatives had been to the Ministry of Health several times to get copies of the medical report of the deceased, and were informed that the file had mysteriously disappeared and could not be found. The relatives then instructed a lawyer on 8 August 2005 to write to Minister Meriton asking for the medical file of the deceased.

The letter dated 8 August 2005 from counsel to Ministry of Health is marked as Exhibit P2.

The relatives received a letter on 22 August 2005 from Mr Maurice Lousteau Lalanne, the Principal Secretary in the Ministry of Health refusing to give copies of the deceased's medical report.

The letter dated 22 August 2005 from the Ministry of Health in reply to the previous letter is admitted and marked as Exhibit P3.

During the time that the relatives visited the deceased in the hospital, they formed the opinion that the deceased's doctors and medical practitioners were not totally providing him care, with professionalism, diligence, in an efficient manner and also were not giving him the necessary and appropriate treatment for his disease which was diabetes.

The averment of the defendant, the Government of Seychelles is denied by the relatives, when it stated that there was a correct diagnosis made of the deceased and that at all times the relatives were being given correct information about his treatment by the medical officers. The relatives had to be after them all the time to seek for information about the deceased and most of the time the information was not detailed. The family was obviously not satisfied with the information they were being provided and that was why they kept insisting all along. Until today, the relatives have been

asking the Ministry of Health to provide information regarding the deceased and they have been informed that his file has disappeared, and that there was no information.

The relatives denied the averment of the defendant that the deceased and the family were being advised properly by the medical officers in a professional capacity as good, skilled, competent and qualified medical practitioners, and/or that they were imparting information to them about the deceased throughout his stay at the hospital. The relatives had to deal with doctors who could not speak English clearly, and most of the time when the relatives asked the nurses to assist and explain to them, they said that the relatives had to ask the doctor.

The relatives believe that there was medical negligence in the way that the care and treatment was applied to the deceased.

The wife of the deceased was unemployed and totally depended on the deceased financially. Before the deceased passed away he worked with the Customs Division and he retired on medical grounds in October 2004 when he was about 59 to 60 years old and was admitted in hospital on 6 April 2005 where he died on 28 April 2005. The deceased was receiving an invalidity benefit at that time.

The relatives instructed the lawyer to again write another letter to the Ministry of Health in answer the latter's letter of 22 August 2005 to insist that the medical file be given to her as these are the records of the deceased's medical condition. The letter dated 31 August 2005 from counsel to the Ministry of Health is Exhibit P12. Still the Ministry of Health refused to give copies of the medical records of the deceased to his relatives.

The relatives claimed that they are not only aggrieved about the death of the deceased but also because they were not given enough and not given proper information about the state of the deceased all along.

### **Evidence of defendant's witness**

Dr Bhubendi Sherma was the only witness who testified on behalf of the defendant.

Dr Bhupendi Sherma is a surgeon who graduated from the SMS Medical College, Nepal, India more than 20 years ago. He obtained a Master Degree of Surgery. He was a surgeon in Seychelles from 2006 – 2009. He has had prior medical experience as a surgeon when he was working in the Medical College in India.

Prior to his testifying, Dr Bhubendi Sherma made it clear to the Court that he was not in Seychelles and that he was not at all involved with the management and treatment of the deceased at the material time. He had only been asked by his immediate employer, the Ministry of Health, to come to Court to present a "medical report" dated 11 July 2005, drawn up by one of the doctors who attended the deceased at the material time, Dr S Sanyal who has since left Seychelles for good.

Dr Sherma testified that despite all his efforts to obtain the medical case file of the deceased from his employer, the Ministry of Health, he was unsuccessful. He was before Court armed only with the medical report written by Dr Sanyal but with no supporting documents attached. Documents such as results of tests carried out, remarks or observations made by the doctors or nurses who were ministering to the deceased, sequence of events during the period the deceased was under treatment, surgeries carried out etc.

Dr Sherma did not know Dr Sanyal personally but had seen medical reports in many files signed by Dr Sanyal. He therefore knew Dr Sanyal's signature, having come across it many times.

He showed the Court where Dr Sanyal had signed on the medical report pertaining to Phillibert Julienne dated 11 July 2005 (Exhibit D1).

The medical report was drawn up by Dr S Sanyal, Consultant Surgeon, Department of Surgery, Victoria Hospital, Ministry of Health, dated 11 July 2005 on Mr Philibert Julienne of Pointe Larue, born 11 January 1946, which is now Exhibit D1.

Dr Sherma could only assist the Court with general information based on his personal opinion but such information was not evidence relating to the specific situation of the deceased or evidence in the matter in issue, in support of the defendant's case.

### **Findings and conclusions**

This Court will first consider the evidence of Dr Bhubendi Sherma.

The evidence of Dr Sherma amounts to hearsay evidence when it relates to the actual situation of the deceased. As he stated himself, he was not present at the material times and moreover he had not had the benefit of seeing the medical case file of the patient to verify the facts contained in the medical report drawn up by Dr Sanyal, Exhibit D1. As a matter of evidence Exhibit D1 carries no weight as the author who actually drew up that exhibit was not subjected to any cross-examination. The medical report is furthermore not supported by results of any tests or actual case notes as these were not made available to the witness who testified.

This Court also takes note of Exhibit P3 which is a curt reply from the Principal Secretary of the Ministry of Health in response to a request by the lawyer of the plaintiffs to obtain the medical records of Mr Philibert Julienne. If the Ministry of Health was not minded to provide to the heirs any medical record pertaining to the deceased, this Court believes that that should not have been the case with regards to the witness who was testifying in favour of the defendant.

When testifying in Court, Dr Sherma who was the only witness of the defendant stated that despite his endeavours to obtain the medical case file of Mr Philibert Julienne for his verification prior to his coming to Court to testify, the case file was not made

available to him. In the circumstances Dr Sherma could not assist the Court to establish the veracity of the contents of Exhibit D1.

This Court also takes note that it may be that Dr Sanyal had left the country for good, but this excuse is not available to the other doctors or nurses who had personal knowledge of the matter and who are still in the country. They could have been of assistance to the Court and the defendant in this matter, especially when the witnesses of the plaintiffs have cited names when they were testifying on material aspects.

The evidence now available for this Court to base its findings upon in order to reach its conclusion is, in the main, only the evidence of the witnesses of the plaintiffs which stand "uncontroverted".

Upon an analysis of the evidence adduced by the witnesses for the plaintiffs, this Court makes the following findings upon which this Court has accordingly based its conclusions.

There are two main issues which this Court has to first determine before considering the other particulars pleaded.

Firstly, it has to establish whether the deceased was given inappropriate and inadequate medical treatment for his illness during his stay in the Seychelles Hospital.

Secondly it also has to determine whether the action or omission of the defendant's employees, servants, agents or préposés in the manner that they treated the deceased amounted to a 'faute' in law to render the defendant liable to the plaintiffs in law.

The deceased was referred to the defendant for treatment because of his situation that required immediate, specific and particular treatment. There was no doubt an element of urgency. The deceased was diabetic and had hypertension at the time of his admittance to the Seychelles Hospital. About 15 years prior to that he had had one leg amputated.

Failure by the defendant's employees, servants, agents or préposés to properly soak the leg of the deceased every day before dressing, administration of panadol syrup to a diabetic patient, failing to call the doctors when the health condition of the deceased showed a declination, among other omissions in my judgment sufficiently put into question the defendant's ability to have properly, professionally, adequately and sufficiently treated and cared for the deceased in the circumstances.

The defendant's employees, servants, agents or préposés at all material times knew or ought to have known that amputation was necessary to save the deceased's life yet they advised the plaintiffs that amputation of the deceased's leg would not be necessary.

It is the findings and conclusions of this Court that the defendant's employees, servants, agents or préposés:

- (a) Administered wrong, inappropriate or inadequate medical treatment to the deceased thereby causing or contributing to his death.
- (b) Assured the plaintiffs that the deceased has no fever when the deceased did suffer from fever which had reached over forty degrees Celsius and the deceased was shivering and sweating profusely from the effect of the fever.
- (c) Failed to provide reasonably good and adequate medical treatment to the deceased as would generally be expected from good, competent, skilled and qualified medical practitioners.
- (d) In the particular circumstances of this case, showed incompetence, recklessness and negligence.

It is also the findings of this Court that the defendant's employees, servants, agents or préposés, at all material times when the deceased was under their medical care did not give sufficient or did not give correct information to the plaintiffs. The evidence of the witnesses of the plaintiffs abounds with such instances. This caused mental anguish to the plaintiffs.

In light of its finding of facts enumerated above, and applying the law to the facts as found, it is the considered judgment of this Court that the plaintiffs have satisfied this Court and proven their claim on a balance of probabilities that the defendant vicariously committed a "faute" in law by the actions and/or omissions of its employees, servants, agents or préposés and that the plaintiffs are therefore entitled to judgment in their favour.

The plaintiffs claimed to have suffered loss and damages for which the defendant is liable to make good to the plaintiffs. In the circumstances it is the judgment of this Court that the defendant ought to make good the loss and damages suffered by the plaintiffs.

This Court takes note that the incident giving rise to this claim arose in April 2005 and that the plaintiffs entered this suit in October 2005. The purchasing power of the Seychelles Rupee had considerably eroded during the intervening period in that R 5.00 could purchase a US Dollar in 2005 and R 13.75 is now required to purchase that same US Dollar. This Court finds that the plaintiffs' claim for loss and damages are not speculative and excessive and assesses the damage as follows:

(a) Moral damages for pain, suffering, bereavement and loss of father	
at R 25,000 per child	R 175,000
R 50,000 for the wife	<u>R 50,000</u>
	R 225,000



(b) Pain and suffering of deceased before death	<u>R 50,000</u>
Total	R 275,000

Judgment is accordingly entered in favour of the plaintiffs as against the defendant in the total sum of R 275,000 with interest and costs.