

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS133/2008

[2016] SCSC560

ANDREW FRANKY LAURETTE

Plaintiff

versus

THE GOVERNMENT OF SEYCHELLES

Defendant

Heard: 2 June 2010, 21 October 2011

Counsel: Mr. A. Derjacques for plaintiff

Mr. C. Jayaraj for defendant

Delivered: 29 July 2016

JUDGMENT

Karunakaran J

[1] The plaintiff has brought this action against the defendant, the Government of Seychelles, which inter alia, provides medical services to the public through its employees working at the Ministry of Health. The plaintiff claims compensation in the sum of R669, 000, 600/- from the defendant for loss and damage, which he suffered as a result of a “fault” allegedly committed by the said employees of the defendant. Herein the employer is being sued in delict for the fault of its servants based on vicarious liability. The fault

alleged emanated from the act of medical negligence of the doctors/surgeons employed by the defendant at the Victoria Central Hospital. Particularly, the medical team lead by the Ophthalmologist and Surgeons allegedly committed an act of medical negligence, while they diagnosed, operated and treated the plaintiff for an injury, which the plaintiff had sustained on his right eye, while he was cutting some trees.

[2] The facts

The facts transpired from the evidence on record, are these:

The plaintiff is a young man, aged 34 and a resident of Point Larue, Mahé. He is self-employed as a casual labourer. He is living in a family of five, his wife and four children. On 9th December 2007 he was working as a casual labourer in a site-clearance work at Mont Plaisir, Anse Royale. He was cutting a cinnamon tree using a chainsaw standing on a branch of it. He suddenly slipped off the branch and fell to the ground. His face hit against a dried branch lying on the ground and he sustained injuries on his face. A piece of cinnamon wood from that branch - a twig -about 3 cm long and 1 cm in diameter- vide exhibit P1- pierced and made a hole on the eyelid and went into his right eye. Blood started oozing out from the injured eye. The plaintiff felt severe pain. He immediately rushed to Anse Royale Hospital, where he was seen by a doctor. Having observed the nature, extent and location of the injury, obviously, as there were no specialised facilities at the Anse Royale Hospital, the doctor immediately transported the patient in an ambulance to the Central Hospital in Victoria for necessary treatment. The plaintiff was taken to the emergency section at the Victoria Hospital, and the duty-doctor therein examined the injury and took the history. The plaintiff felt severe pain in his injured eye and told the doctor that he felt that there was something staying inside his eye. The doctor referred him for an X-ray of his injured eye. The X-ray was taken but it did not show any foreign body hidden in the injured eye. However, the plaintiff continued to complain that he had a severe pain inside and could not role his eyeball and still reiterated that something he felt staying inside his eye. However, the doctor told that he felt so because of the impact on his eye. Then, the duty-doctor referred him to eye-department at the hospital for necessary treatment by specialist. The Ophthalmologist, in the eye department Dr. Nidi Verma - PW2 – saw him. According to Dr. Verma when she first

saw the plaintiff, he did not tell her the history of the trauma that a twig had entered into his eye, but he simply told her that while he was cutting some branches of a tree, a twig hit his eye. Upon examination, Dr. Verma found that there was no light perception in his injured eye. UV scan of right eye was done, but there was no abnormality seen. The plaintiff also told her that he felt severe pain in his injured eye and that something had gone and stayed inside his eye. He also complained that his eyelid had a hole as wood had pierced through. The ophthalmologist told him that his eye was normal and the injury seen on his eyelid was simply a laceration/scratch. She told the plaintiff that there was nothing wrong with the eyeball, though he complained that he was not able to rotate. She examined his injured eye with ophthalmoscope, slit-lamp and confirmed again that everything was normal in the injured eye and the pain, the feeling of some foreign body inside his eye, and the impaired vision etc. were all due to the impact on the eye but all those symptoms will subside later. She then gave him some eye drop/lotion, analgesics, (pain-killer), antibiotics etc. and told him to go home and continue the medication. Plaintiff applied the drops and started taking all the medications. However, the pain did not subside, rather intensified. The pain became unendurable, the next day he returned to the same ophthalmologist. The plaintiff again repeated the same complaint to her and stated that he felt sever pain and the presence of some foreign body inside his eyes. The ophthalmologist carried out ultrasound examination. According to her, she did that test because she mainly wanted to rule out a regular detachment or a vitreous haemorrhage for the loss of vision. However, the ultrasound examination showed a normal study. She did not find anything inside. She told him to go home. Again the plaintiff continued the medication without any improvement. Pain intensified and his eyes became swollen. Again he went back to see the same ophthalmologist and complained again that he felt increased pain and the presence of some foreign body inside his eyes. The third day of his visit, the ophthalmologist finally suspected that there could have been some foreign body inside the injured eye of the plaintiff. The ophthalmologist in this respect testified that the first day, when she examined the plaintiff's she did not suspect the presence of any foreign body in the eye as the plaintiff himself did not give the history of the trauma and if he had mentioned in the history, perhaps she would have done the necessary. However, on the third day, she suspected and then referred the plaintiff for a CT scan being taken on his injured eye. In fact, the CT scan showed the presence of a foreign body - a wooden

piece -a twig about 3 cm long and 1 cm in diameter- vide exhibit P1- inside his eye. The plaintiff was immediately admitted in hospital for the required surgery to remove the twig. With the assistance of surgeon Dr. Telemaque and the neuro surgeon Dr. Charma, the ophthalmologist carried out the operation and removed the twig from the right eye orbit -ocular muscle area - close to the right eyeball. The injured tissues inside had developed abscess and pus had to be drained from the affected region. However, on the first day of the surgery they could not completely remove the foreign body and the next day they had to repeat the surgery to remove the residual pieces of wood in it. The surgery was successful to the extent that the surgeons could remove the twig from the injured right-eye. However, the plaintiff could not regain vision. He became totally blind in his right eye. He is now one eyed man and whenever he works in sun light he is still getting pain in his right eye. According to the ophthalmologist, since the plaintiff's optic nerves were damaged due to the impact and injury (trauma) he lost vision in his right eye.

[3] In the circumstances, the plaintiff, being dissatisfied with the said surgical interventions and treatments, felt that those treatments did not bring the desired result because of the *fault* of the doctor, especially the ophthalmologist, who treated him for the wound on his right eye. According to the plaintiff, the said surgical operations were wrongly and negligently performed and diagnosed and treated by the employees of the defendant. Hence, by a plaint dated 15th May 2008, the plaintiff filed the instant suit against the defendants for loss and damages. In the plaint, he claimed compensation for loss and damage, which he suffered due to a "*fault*" allegedly committed by the employees of the defendant. The alleged fault that gave rise to the cause of action in the instant suit emanated from medical negligence on the part of the employees of the defendant in that, the defendant:

- (i) Failed to effect proper care and attention and observation to plaintiff between the 9th of December 2007 to the 14th of December 2007.
- (ii) Failed to diagnose in due time and sufficient time that plaintiff had a foreign object lodged in the right eye orbit.
- (ii) Failed to utilize the Ct-Scan unit on the 9th, 10th, and 11th of December 2007.

- (iii) Failed to provide a sufficiently competent and professional surgery and medical staff for the surgery of the 13th of December 2007, led by Dr Nidhi Verma.
- (iv) Failed to provide a sufficiently competent and professional surgery and medical staff for the second surgery of the 15th of December 2007, led by Dr Henry Telemaque.
- (v) Failed to act when realising that Plaintiff had to have surgery overseas, and the medical staff and services and equipment was inadequate in the Seychelles.
- (vii) Failed to protect Plaintiff from blindness.
- (Viii)Blinding Plaintiff and reducing Plaintiff to having zero light perception in his right eye.
- (ix) Failed to provide, generally, a minimum and adequate medical service.

[4] It is the case of the plaintiff that as a result of the said fault committed by the defendant he suffered loss and damages as follows: -

a) Total blindness in the right eye	Rs	250, 000.00
b) Extreme pain and suffering, continuing up to date and lack of coordination	Rs	100,000.00
c) Economic loss from December 2007 to June 2008 @R2800/ - per month for 7 months	Rs	19,600.00
d) Future economic loss	Rs	200,000.00
e) Restorative surgery, overseas (India)	Rs	100,000.00

TOTAL Rs669, 600.00

Therefore, the plaintiff now claims that the defendant is liable to compensate him for the consequential loss and damage hereinbefore particularized.

[5] The defence case

On the other side, the defendant did not adduce any evidence. However, it has averred in the statement of defence that although the plaintiff was medically treated by the employees of the defendant at the Victoria Hospital, none of the employees for that matter committed any act of medical negligence in treating the plaintiff for the injury. They did not commit or omit anything that amounts to a “*faute*” in law. Moreover, the essence of the pleading in the statement of defence is that the loss of vision in the injured eye occurred not because of any fault of medical negligence on the part of the doctors or surgeons, who treated or operated the plaintiff but because of the nature and extent of the injury the plaintiff sustained due to the accident. Therefore, the defendants deny medical negligence, liability and so dispute the claim of the plaintiff for consequential loss and damages.

[6] 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. Although it seems repetitious, I would like to restate herein what I have stated in earlier cases of this nature in the past. 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”

[7] 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 Vs. The Government of Seychelles*** - Civil Side No: 407 of 1998 – Judgment delivered on 28th October 2002, and followed in ***Gabriel V Government of Seychelles*** (2006) SLR 169 endorsing the formula, which **Perera, J.** applied in ***Nathaline Vidot Vs Dr. Joel Nwosu***- Civil Side No: 12 of 2000.

TindalCJ while summing up to a jury in ***LanphierV. 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 vs. Ministry of Health (1951) 2. KB348 at 359***, **DenningLJ** 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”.

[8] 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.*** in his address to the jury in ***Bolamv. 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**

[9] 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.**

[10] 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 ophthalmologist Dr. Verma, when first examined the plaintiff failed to detect in time, whether there had been a foreign body inside in the injured eye of the plaintiff.*

ii) *The surgery was done by surgeons, who were incompetent or non-qualified in the field of ophthalmology, who committed act or acts of medical negligence resulting in a total loss of vision in the right eye of the plaintiff.*

[11] First of all, there is no evidence on record to show that the defendant performed any surgery on the alleged date negligently on the plaintiff. The evidence of Dr. Verma reveal that the plaintiff had already sustained damage to his optic nerves due to the impact and injury (trauma) and so he lost or got impaired vision in his right eye.

[12] Obviously, there was not any act of medical negligence on the on the part of the surgeons in performing the surgery on the plaintiff. In any event, there is not even one iota of evidence on record to conclude on a preponderance of probabilities that there was an act or acts of medical negligence on the part of any doctor or surgeon or any employee of the defendant in conducting the surgery for the removal of the foreign body, the twig from the injured eye of the plaintiff. However, applying the “*Bolam test*”(vide supra)on evidence I find that the ophthalmologist Dr. Verma when first time examined the plaintiff, she failed to do what she ought to have done as any skilled professional in that profession would have done in the given circumstances of the case history. She failed to conform at least to the normal standards of care expected of persons in that profession in view of the following facts and circumstances:

1. She complained in her testimony that the plaintiff was at fault in that he did not tell her the history as to how the accidental injury occurred and the twig pierced into his eyes. Undoubtedly, it is her professional duty as a medical professional to ask the patient about the history. A doctor cannot blame the patient that he did not voluntarily tell the history of the trauma. In any event, the plaintiff has given the history of the trauma to the duty-doctor, who was in charge of the emergency unit and saw him first. At least, Dr. Verma should have asked that duty doctor, who referred the patient to her to forward the case-notes as well, so that she would be able to know the history of the trauma. She failed to do that either.

2. Given the nature of the injury, having seen the hole in the eye lid and after having heard the patient repeatedly complaining that there was something causing pain inside his injured eye-orbit as a skilled professional, she should have done further examination and should have immediately referred the patient for CT scan to rule out that there had been no twig inside. However, she did not act as *expected of persons in that profession.*

- [13] It is common knowledge X-rays can detect only radio-opaque foreign bodies such as glass and metal. That is why the twig was not seen in the X-ray imaging. When wooden piece had involved in the trauma and is suspected following the history, she should have immediately send the plaintiff for a CT, which she miserably failed to do.
- [14] It is true that following any traumatic breach of the skin, X-rays can be used to identify and locate residual foreign bodies. Materials which are radio-opaque such as glass or metal are usually seen easily. Other less dense substances such as wood are not readily detected with X-rays.
- [15] Had she done CT on the first day, although the vision could not have been regained, at least the plaintiff need not have gone through the pain for three days.
- [16] In this respect, I find that the allegation of medical negligence levelled against Dr. Verma is well founded; however, there is no evidence on record or testimony by any competent witness to substantiate the allegation medical negligence or incompetency on the part of the surgeons, who operated the plaintiff to remove the twig from his right eye. The plaintiff has wrongly believed and acted on his own medical opinion, when he had no specialised knowledge, qualification or competence in that field. Unfortunately, the suit is based on his guesswork on medical negligence on the issue of surgery. Hence, I find that the plaintiff has miserably failed to establish any act of medical negligence on the part of the surgeons.
- [17] Obviously, there is not even one iota of evidence on record to show that the surgeons either Dr. Verma or Dr. Telemaque, who performed the operations or incision for removing the twig or treating the plaintiff for the injury. I accept the evidence of the expert witness, the Ophthalmologist 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 they had to repeatedly operate to remove the twig and residual piece.
- [18] It is also pertinent to note that loss of vision was inevitable due to damage to the optic nerves. 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 England 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.

[19] 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 vs. Jordan (1980) AllER 650*. I find the evidence of Dr. Vermais 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 presence of foreign body and its residual pieces necessitated the revision of surgeries to remove it completely, it happened 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 operated 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, still there is no causal link between the "total blindness in the right eye" and the "medical negligence" in surgery. Indeed, total blindness occurred from the outcome of the plaintiff's injury, its nature, location and his physiological constitution, not from 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.

[20] In the final analysis, I find that the plaintiff has failed to show on a preponderance of probabilities that either the defendant or any of the employees of the defendant namely, surgeons, doctors, and staff of the Victoria Central Hospital, who operated the plaintiff for the injury, committed any negligent act or omission in the course of surgical treatment given to the plaintiff during the relevant period, which resulted in blindness. However,

the defendant is liable to compensate the plaintiff for the pain and suffering he underwent for three days, due to Dr. Varma's failure to detect the foreign body - the twig -using CT scan at the earliest opportunity and time. Therefore, I partly allow the plaintiff's claim and award the sum of Rs 100,000/- to the plaintiff for pain and suffering and inconvenience. I enter judgment for the plaintiff accordingly, with costs of this action.

Signed, dated and delivered at Ile du Port on 29 July 2016

D Karunakaran
Judge of the Supreme Court