# IN THE SUPREME COURT OF SEYCHELLES

## Civil Side: CS167/2010

[2016] SCSC928

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**JEAN-PAUL FRANCOIS ACTING IN HIS CAPACITYAS FATHER, NEXT OF KIN AND ADMINISTRATOR OF THE DECEASED BABY DENZEL FIRMINO**

**JEAN-PAUL FRANCOIS**

**SUZANNE THERESE FIRMINO**

**RIHANNA FIRMINO**

**RASHID RON MARIUS ALBEST**

Plaintiffs

versus

**GOVERNMENT OF SEYCHELLES**

**HEALTH SERVICES AGENCY**

Defendants

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Heard:

Counsel: A. Derjacques for plaintiffs

C. Jayaraj for defendants

Delivered: 22 November 2016

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**JUDGMENT**

**Dodin J**

[1] This is claim for loss and damage in respect to the death of baby Denzel Firmino, who died at Victoria Hospital after delivery on the 6th of January 2010. The Plaintiffs' claim is that the death of baby Denzel Firmino were as a result of medical negligence by the employees of the 2nd Defendant for which the 1st Defendant is ultimately responsible. On that latter point of responsibility, there is no contest.

[2] The Plaintiffs' claim has been set out as follows:

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| i. | 1st Plaintiff in his capacity as administrator and next of kin(pain and suffering of the deceased and distress from knowledge of impending death) | Rs 60,000.00 |
| ii. | 2nd Plaintiff in his personal capacity (moral damage for distress, shock, depression) | Rs 130,000.00 |
| iii. | 3rd Plaintiff in her personal capacity (moral damage) | Rs 130,000.00 |
| iv. | 4th Plaintiff in her personal capacity (moral damage) | Rs 130,000.00 |
| v. | 5th Plaintiff in his personal capacity (moral damage) | Rs 130,000.00 |
| vi. | Special damage for funeral, flowers, transport, advertisements, the wake and tomb | Rs 25,000.00 |
| | Total | Rs 605,000.00 |

[3] The Defendants denied liability for the death of baby Denzel Firmino maintaining that all possible medical care and treatment was given to the deceased baby and hence the Defendants are not liable to any loss or damage suffered by any of the Plaintiffs.

[4] The brief facts that are not in dispute are that the 3rd Plaintiff, Suzanne Firmino, was carrying twins fathered by the 2nd Plaintiff, Jean-Paul Francois, the 4th Rihanna Firmino and 5th Plaintiff Raschid Ronmains Albest are the sister and brother of the deceased baby. On the 6th of January, 2010, at around 3.30am Suzanne Firmino was admitted to the maternity ward of the Seychelles Hospital. She was 36/37 weeks pregnant and getting contractions. The first twin was born without any problem but the second twin, the

deceased, was only delivered after considerable interventions by the midwife and Doctor Anna Rose. As soon as the second twin was born he was taken to the Intensive Care Unit. On the 7th January, 2010, the medical team decided to remove the life support system and the baby died at 1920 hours on the same day. The cause of death is recorded as "D i c" due to haemorrhage of the lungs.

[5] Suzanne Firmino testified that during the course of her pregnancy, she followed regular reviews at the English River Health Centre. She knew she was carrying twins and in December 2009, Dr Michel told her that the babies are positioned one head down and one head up and if the position remains the same one would be born normally but the other would require caesarean intervention.

[6] On the 6th January when she was admitted to maternity, she told the midwife, Mrs Simeon, in the presence of Dr Anna Rose but she was informed that Dr Michel had not written anything in her file. She was not given an ultra sound to determine the positions of the babies. The first baby was born normally and is still alive. After some 20 to 25 minutes when the second baby did not come out and she was not having contractions, Dr Anna Rose attempted to bring the baby out by inserting her hand into her vagina to turn the baby but to no avail. She believed forceps were used to bring out the baby.

[7] After some time she heard Dr. Anna Rose say "shit" and it seems that something had come out and she believed it was the placenta and the baby came out after that but it was not showing signs of life and the baby was immediately taken away. Mrs Simeon later returned to clean her up and informed her that the child was ok but not breathing normally so he was taken to I.C.U. to be revived.

[8] Around 4 pm on the same day, she went to see the baby and noticed the baby had tubes in the mouth, nose, belly button and penis and other things attached to the body. The baby was blue with dots on the body. The next day, she went to see the baby again and the situation was the same. A doctor later briefed her on the situation, telling her that the baby had taken too long to respond and had fits. His brain has been affected due to lack of oxygen. The baby was not responding to treatment and at about 7 pm when she went to see the baby, the tubes had been disconnected and baby died in her presence.

[9] Jean-Paul Francois testified that on the 6th January, 2010, he was in Singapore when he was informed by Suzanne Firmino that she had given birth but that only the girl is with her and that the boy is still in the I.C.U. and she was not sure what was happening. He arrived in Seychelles on the 7th January and went straight to the Seychelles Hospital and saw the baby in an incubator at the ICU, near the maternity ward with several tubes and other connections to his body. A lady doctor told him that the baby was not responding, was suffering from fits and his organs had started to fail. The tubes were removed and the baby died at about 7pm.

[10] Dr Philip Govinden testified that he did not personally attend to the delivery but that from the records left by Dr Anna Rose who was no longer in Seychelles, the baby was the second of twins who was delivered by forceps and suffered from fits and seizures and was placed on ventilator in the child ICU. At birth the baby had an AFGAR score of 0 and did not improve with treatment.

[11] Dr Rizvi testified that as consultant in charge he prepared a report based on the notes in the file of Ms Suzanne Firmino. He maintained that according to his expertise, when twins are in the positions as reported in this case, only if it is the mother's 1st delivery would caesarean be recommended but as the mother had delivered before, the positions of the twins did not matter. He believed that the placenta did not come out and that all Dr Anna Rose did was to hold and stabilise the baby for delivery and not repositioning him. He agreed that the baby died of suffocation due to lack of oxygen and that was evidenced by haemorrhage of the lungs. He did not agree that caesarean section would have saved the baby at that stage because it takes at least 25 minutes to prepare for the operation and the 2nd twin had to be delivered within 20 minutes.

[12] The Defence did not call any witness but made submissions denying liability in the case. Learned counsel for the Defendant submitted that the medical staff under the employment of the Defendant did not commit any faute and therefore has no liability to pay any damages. Learned counsel submitted that it is not disputed that Ms. Suzanne Therese Firmino, the mother of the deceased child was admitted into Victoria Hospital for delivery and the child was deliver by forceps on 6th January 2010 at 0649 hours and the

baby died on 7th January 2014 at 1920 hours. It was submitted by the Defendants that the cause of the death was hemodynamic condition and every protocol was put in place to deliver and save the baby.

[13] Learned counsel submitted further that such cause of action arise only when damage has occurred and that the Plaintiff will have to show that they suffered due to the negligence of the Hospital Authorities at the material time of their treatment. The evidence in this case has to be weighed against the standards set in decided cases. In the case, the Defendants submitted that the evidential burden of the Plaintiff has not been discharged. There is no evidence pointing to the failure of the duty to care or any action or omission on the part of the doctors that caused any damage to the Plaintiffs.

[14] Learned counsel submitted that the Plaintiffs' two witnesses, the mother and father of the deceased are lay persons whose evidence has not shown any indication of fault by the doctors. Particularly the evidence of the mother is only a perception of a lay person and not competent to assess whether the medical staff had discharged their skills and care to the required level in treating the child. Learned counsel maintained that on the other hand the doctors though summoned by the Plaintiffs testified that all necessary protocols and procedures were followed in treating the baby. The reports by Dr. Rizvi and Dr. Govinden recorded the medical condition of the baby and the situation that had led to the demise of the baby. Their testimonies were not shaken by the Plaintiffs. Dr. Anna Rose who was present during delivery and who used forceps was not called by the Plaintiffs.

[15] Learned counsel submitted that according to Dr Rizvi, forceps is used in millions of deliveries even today, and that in the present case, from the medical notes forceps delivery was more appropriate instead of caesarean.

[16] Learned counsel form the Defendant hence moved the Court to find that the Plaintiffs have failed to prove any negligence or damage on the part of the Defendants medical staff and therefore dismiss the suit with costs.

[17] Learned counsel for the Plaintiffs submitted that the Plaintiffs have discharged the burden of proof, on a balance of probabilities. Learned counsel submitted that the staff,

especially Dr. Anna Rose, was negligent in the medical services afforded to Suzanne and baby Firmino. Had the ultra sound check been conducted, baby Firmino might have been alive today. Had a caesarean been done to deliver baby Firmino, she would have been alive. Had Dr. Michel's recommendations been followed or had it been on file and had Dr. Anna Rose been more humane, prone to listen, prone to take advice, baby Firmino would have been alive today.

[18] Learned counsel made a review of the evidence highlighting these particular aspects of the case as follows:

a. *The 3rd Plaintiff Ms. Suzanne Firmino was 36 weeks pregnant.*

b. *She was at her sister's place, and at 3 am was feverish, and dehydrated.*

c. *She was supposed to go to hospital on the next day but decided to go at 3.30 am. The babies were coming.*

d. *Nurse Simeon denied that the babies were coming. Suzanne informed her that an ultra sound check was necessary, as Dr. Michel had already informed her, a few days prior during the medical checks.*

e. *Suzanne again informed the midwife that the consulting Dr. Michel had told her an ultra sound check was necessary because of twins and whether both babies had 'turned for delivery".*

f. *The recommendation was not on file. Perhaps Dr. Michel had forgotten. Dr. Anna Rose said that an ultra sound was not necessary. She refused an ultra sound check and therefore could not know of the placement of the twins, in the womb. Dr. Anna Rose came and left several times. She seemed indecisive.*

g. *She delivered the 1st baby quickly. She asked about a caesarean for the 2nd baby. Dr. Anna Rose refused a caesarean. She started to press and manipulate her stomach to no attempt to turn the baby. They said it would take 45 minutes to set up a caesarean table, and it was too late. But they manipulated her stomach for a long time, so they could have, if they had wished, done a caesarean to deliver the baby.*

h. *Dr. Anna Rose got her hand inside the vagina to manipulate and turn the baby. Out came the placenta. She said "shit", she took forceps to manoeuvre or extract the baby. The baby came out. It was not responding. The umbilical cord was then cut. The baby was taken to ICU, it was not breathing. The cause of death was haemorrhage in the lungs.*

i. *When the artificial respiratory was turned off, to kill the baby, she was not consulted. The father, Jean Paul, arrived 30 minutes after the tube was removed for the baby to die. He also was not consulted.*

j. *Jean Paul Francois, deponed on the surrounding facts, but was not present at the delivery. He confirmed Dr. Michel had advised, previously that an ultra sound check was necessary, as it were twins, and their positions at delivery was important.*

[19] Learned counsel for the Plaintiffs submitted that the leading authorities on medical negligence are *Government of Seychelles vs Charles Ventigatoo, SCA No 20 (a) of 2006*, dated 26.4.2007; *Bolam vs Frien Hospital Management Committee 1957, 2 AER 118.* It was held as a good law, "where you get a situation which involves the use of special skills or competence, then the test whether there has been negligence or not is not the test of a man (in the street) because he has not got the special skill. The test is the standard of the ordinary skilled man exercising and professing to have that skill. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

[20] Learned counsel moved the Court to find that the medical team that took care of the 3rd Plaintiff has failed to meet the required standard of care in the circumstances and as a result baby Firmino lost his life and therefore the Court should find the Defendant liable and award damages as prayed.

[21] I take note that the defence in addition to not calling any witness also did not bring any evidence with regard to the quantum of damages pleaded.

[22] I also note that Dr Anna Rose did not testify as she had already left the jurisdiction at the expiration of her contract.

[23] Dr Govinden is and Dr Rhizvi's testimonies did not contribute much to the proceedings and particularly Dr Rhizvi came forth as rather evasive and non-committal in his answers which is not surprising considering that they are employees of the Defendant called upon to testify for the Plaintiffs.

[24] The concept of negligence is now well established as set out by Lord Justice McNair in the case of *Bolam v Friern Hospital Management Committee [1957] 2 All ER 118*:

> *" In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a 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 skill at the risk of being found negligent ...[I]t is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent ... "*

[25] Medical negligence is an act or omission by a medical professional that deviates from the accepted medical standard of care. Doctors and other medical professionals have a duty to their patients to provide treatment that is in line with the medical standard of care, which is usually defined as the level and type of care that a reasonably competent and skilled health care professional, with a similar background and in the same medical community, would have provided under similar circumstances.

[26] Medical negligence occurs when a doctor, dentist, nurse, surgeon or any other medical professional performs their job in a way that deviates from this accepted medical standard of care. Hence if a medical professional provides treatment that is sub-standard in terms of accepted medical norms under the circumstances, then that medical professional would have failed to perform his or her duty, and is said to be negligent.

[27] In the case of *Dorothy Nanon and Dyson Alcindor v Health Services Agency, the Ministry of Health and Government of Seychelles Civil Side No.: 79 of 2010*, the Court set out certain elements that the Plaintiff must establish in order to establish negligence, namely:

a. Duty of Care: that is that the Defendant owed a duty to the Plaintiffs to take care of their wellbeing.

b. Breach of that duty of care by showing that the Defendant was at fault.

c. Causation: It is necessary to establish that the failure by the Defendant actually caused the injuries or loss complained of. (That the loss claimed was not too remote); and

d. That the injury can be set right or compensated by the Defendant paying damages to the plaintiff.

[28] Moreover, errors of judgement do not automatically amount to breaches of duty. They only do so in circumstances where the doctor or medical professional has not acted with a level of care that would be expected from a reasonably competent professional. Claims for medical negligence most frequently fail due to an inability to establish causation as there are often a variety of possible explanations for the outcome. However, if it can be shown that the breach materially contributed to the damage or it is more likely that the damage was due to negligence than another cause that is usually sufficient. Furthermore, in the absence of any other reasonable explanation for a phenomenon, the principle of *'res ipsa loquitur'* (the thing speaks for itself') may apply.

[29] In this case elements a, c and d as set out in paragraph 27 above are not in contention in that it is trite law that the Defendant had a duty of care to the Plaintiffs in the delivery of the deceased baby; that the loss of the baby was directly related and hence not too remote to the process of delivery although what actually caused the loss remains in issue; and the loss can be compensated by the Defendant paying damages to the plaintiffs if it is found that there was indeed a breach of the duty of care by the Defendant. The outstanding issue that is contested is b, that the defendant did not breach any duty of care and therefore not liable to the Plaintiffs.

[30] Learned counsel for the Defendant maintained in his submission that the evidence in this case has to be weighed against the standards set in decided cases. In this case, the

Defendants submitted that the evidential burden of the Plaintiff has not been discharged. There is no evidence pointing to the failure of the duty to care or any action or omission on the part of the doctors that caused any damage to the Plaintiffs. That the evidence of the mother is only a perception of a lay person and not competent to assess whether the medical staff had discharged their skills and care to the required level in treating the child. On the other hand the doctors though summoned by the Plaintiffs testified that all necessary protocols and procedures were followed in treating the baby.

[31] Whilst it is quite proper for learned counsel to advance such interpretation of the evidence, one must also keep in mind that the context of Seychelles makes it virtually impossible to have expert witnesses in the field of medicine who are totally independent of the Seychelles Health Services Agency. In deed Dr Rizvi was quite evasive in answering questions that could shed greater light on the accepted norm in the delivery of twins in similar circumstance to the present case. The Court understand his position in the circumstances but without more and clear explanation of what really went wrong, the Court is left with a strong notion that something went wrong which was not the fault of the 3rd Plaintiff but more a mistake on the part of the 2nd Defendant's employees.

[32] First I note that even according to Dr Rizvi, the second twin had to be born within 20 minutes of the first for the baby to survive but the evidence showed that Dr Anna Rose continued the attempt manoeuvre the baby into position up to 25 minutes after the 1st twin was born. Secondly, it is clear that if the 3rd Plaintiff had gone straight for a caesarean operation as she requested there would have been less complication. Thirdly, had an ultra sound or other means of determining whether both twins were in proper position for birth would certainly had aided the medical term in determining which course to take to ensure the safe births. All these taken together showed that something went wrong in the process and cost baby Denzel Firmino his life.

[33] I am therefore satisfied on the balance of probabilities that the duty of care owed the Plaintiffs has been breached by the employees of the employees of the 2nd Defendant for which the 1st Defendant is also liable, and I so find.

[34] None of the parties brought evidence on the issue of quantum of damages. Apart from the pleadings, learned counsel for the Plaintiff submitted that the amount of damages prayed for is fair and reasonable whilst learned counsel for the Defendants did not venture any opinion thereon. A brief *tour d'horizon* of cases decided in other jurisdiction indicates that quite generous amount of compensation are paid for such cases although not as high as for medical negligence resulting in the death of an adult.

[35] In the United Kingdom, damages generally range as follows:

For death between £12,500 and £300,000

Pain and suffering even for surviving family members between £1,000 and £200,000

Funeral costs between £3,000 and £10,000.

[36] It is also worth noting that a 2010/11 report on Australia's medical indemnity claims by the Australian Institute of Health and Welfare found that: 53% of medical negligence payouts were less than $10,000, 25% where between $10,000 and $100,000, 16% where between $100,000-$500,000 and 6% where for $500,000 or more.

[37] In the case of *Government Of Seychelles V Rose SCA N0:14 of 2011* the Court of Appeal upheld an award of R940,000 as reasonable in the justice of the case of an adult person dying in police custody as a result of police negligence. However in the case of *Dorothy Nanon and Dyson Alcindor v Ministry of Health and Ors SCA 05/2012* a case partially similar to the present one involving the loss of a child at birth, the Court of Appeal awarded SR75,000 damages to the 1st appellant and SR25,000 to the 2nd appellant.

[38] Considering all the above I consider the following awards to the Plaintiffs to be fair and justiceable:

i. 1st Plaintiff in his capacity as administrator and next of kin (pain and suffering of the deceased and distress from knowledge of impending death) Rs 60,000.00

ii. 2nd Plaintiff in his personal capacity (moral damage for distress, shock, depression) Rs 100,000.00

iii. 3rd Plaintiff in her personal capacity (moral damage and her close proximity and being directly and personally affected) Rs 120,000.00

iv. 4th Plaintiff in her personal capacity (moral damage) Rs 100,000.00

v. 5th Plaintiff in his personal capacity (moral damage) Rs 100,000.00

vi. Special damage for funeral, flowers, transport, advertisements, the wake and tomb Rs 25,000.00

Total Rs 505,000.00

[39] I award costs to the Plaintiffs.

Signed, dated and delivered at Ile du Port on 22 November 2016

G Dodin
**Judge of the Supreme Court**