# IN THE SUPREME COURT OF SEYCHELLES

## Civil Side: CS355/2004

[2016] SCSC 969

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**MAGGIE DUBEL**
Plaintiff

versus

**MINISTRY OF HEALTH**
Defendant

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Heard:

Counsel: Mr. Gabriel for plaintiff

Mr. Chinnasamy for defendant

Delivered: 2 December 2016

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**JUDGMENT**

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**Renaud J**

**Background**

[1] The Plaintiff filed a case before the Supreme Court claiming the sum of SR 100,400.00 as compensation from the Defendant, namely the Attorney General representing the medical personnel who oversaw the delivery of her child.

[2] The child was born on the 22nd May, 2004 and died on the 10th June, 2004.

[3] The issue, according to the Plaintiff, is whether the Defendant could have avoided the premature death of her child if she had been advised to give birth through the caesarean method rather than first attempting vaginal birth.

**Plaintiff's Evidence**

[4] In favour of her contention that the staff at the Victoria Hospital committed a *faute*, the Plaintiff discussed her difficult pregnancy. She testified that she went for check-ups once a month for the first six months of her pregnancy and twice a month for the remainder. Each time she arrived at the Hospital she was admitted for observation lasting approximately 3 nights. When describing her standard ultrasounds, the Plaintiff complained that a Dr. Fock-Tave was a bad communicator and would not share information with her unless she asked him very specifically. When the Plaintiff did ask him questions he explained that the baby was fine. The Plaintiff was also informed of a 10cm fibroid in her uterus but claims that the Doctors never explained that it could cause complications.

[5] On 22nd May, 2004 the Plaintiff was admitted to the Victoria Hospital with a "fractured membrane." She testified that the Hospital staff did not explain this to her and that she did not understand what it meant.

[6] The Plaintiff's recollection of the timing of the birth and the arrival of her mother was not very clear but through the totality of the evidence this Court accepts that the Respondent's mother arrived around 12:30pm and the Plaintiff went into advanced labour after 2:30pm. In view the traumatic situation she was in at the time, she could not recall sufficiently to inform the Court of the amount of time that passed between the beginning of her labour and the decision to conduct a caesarean section.

[7] The Plaintiff testified that - *"if [Dr. Fock-Tave] has taken good care of me my baby would be alive with me today."* She stated that Dr. Jivan told her during an ultrasound that she needed to deliver her baby. The Plaintiff then returned to Dr. Fock-Tave but did not speak to him about her conversation with Dr. Jivan since she thought that *"when Dr. Fock-Tave would pass [her] in the ultrasound he would have seen the same thing that Dr.*

*Jivan have seen."*

[8] The Plaintiff also averred that she should have undergone a caesarean section at 7 months but that Dr. Fock-Tave refused to permit the procedure due to safety concerns. Regarding this testimony, the attorney for the Defendant asked her the following:

Q: you are telling the court that you have preferred seven months' birth as compared to eight months because seven is better, is that your evidence?
A: Yes that is my evidence.

Q: why do you say so?
A: when my baby was in the nursery, I compared a seven months child whilst my child was eight months; I noticed that the seven months child was livelier than the eight months child.

Q: you did not see the foetus in your womb at seven months for you to compare it to the baby at eight months.
A: I saw what was in my belly at seven, I went to Dr. Jivan and he told me that my baby was very much alive.

[9] Unfortunately, Dr. Jivan did not adduce any evidence that could have corroborated her testimony hence that testimony is not supported by professional medical backing.

[10] The Plaintiff did testify that Dr. Seth explained to her that her child's brain had been damaged due to lack of oxygen and that he could be handicapped. So did Dr. Athanasius. She was also informed during her pregnancy that the fibroid could cause her to lose her baby and as a result she would be placed under close observation. This can be shown through the evidence presented by the Plaintiff that she was observed up to twice per month up to the date of her delivery and because her final ultrasound was on the 20th or 21st April, 2004 when Dr. Fock-Tave informed her that everything was normal.

[11] At the end of the Plaintiff's testimony-in-chief she stated that the Doctors gave her no special treatment and instead cared for her *"like any ordinary pregnant woman."*

[12] On cross-examination the Plaintiff testified that during her pregnancy she was suffering from gestational diabetes, high blood pressure, weight-gain, and a large fibroid. She

refused to accept that delivering a baby 2 months early involved risks to the child because, she claimed, her brother was born prematurely and he has suffered no health consequences. The rest of her testimony proffered little value to the determination of this Court unless it could be supported by medical background.

[13] The only other witness in favour of the Plaintiff was the Plaintiff's mother who essentially corroborated the testimony of the Plaintiff. In addition to recounting the history of the pregnancy from her own point of view, she gave testimony as a lay witness regarding hospital procedure on the basis of the fact that she is a mother of six. This opinion testimony from a lay witness unfortunately has no evidential value in terms of deciding this case in a Court of law.

**Defendant's Evidence**

[14] The presence of fibroid in the uterus of the Defendant was diagnosed not to be a hindrance to the natural birth of her child. The medical condition of the Plaintiff prior to giving birth was such that it was diagnosed that she could properly give birth without resorting to a caesarean section. That operation had to be carried out on the Plaintiff despite the Defendant taking reasonable care and exercising all available skills and diligence in the diagnostic of and treatment of the Plaintiff and that at any rate the caesarean section was carried out as a result of unforeseen complications which could not have been detected prior to the delivery stage. The Defendant did not either vicariously or personally commit any *faute* whatsoever. At any rate, the quantum of damage is manifestly exaggerated.

[16] The Plaintiff is not an expert in the field of Gynaecology and Obstetrics to depose on the medical aspects of child birth, whether caesarean operation could have been carried out instead of normal delivery, and whether time chosen by the medical team to conduct caesarean was right or wrong.

[17] **Dr. Zia-Ul-Hasan Rizvi** had drawn up a Medical Report **(Exhibit D1)** based on the records in the medical file of the Plaintiff which file is kept by the Defendant.

[18] Dr. Rizvi testified that the Plaintiff was booked for ANC at Seychelles Hospital on 16th June, 2013 about 13 weeks of gestation. She was found to be having gestational blood sugar. She had several visits for ANC. She had 3 ultrasound examinations during her pregnancy and a fibroid of about 10cms in the upper part of the uterus. On 20th May, 2004 she reported complaints of vaginal discharge for one week before that day. An ultrasound on that day showed some amount of amniotic fluid and foetus weighing 2.9kg. On 22nd May, 2004, she was found to be in advanced labour and the foetal heart tracing was normal. A decision was taken to review her in 3 hours.

[19] At 3pm it was decided to deliver the baby by caesarean procedure and the child, a male baby weighing 3.1kg was delivered at 3.12pm. The baby was handed over to the Paediatrician and the child was admitted to ICU for observation. The Plaintiff was also left in ICU for observation and transferred to Maternity Ward next morning. She was discharged from hospital care on 26th May, 2004 but the child was kept under observation. Dr. Rizvi also testified that autopsy showed pulmonary dysplasia and cyanosis and edema of the brain.

[20] Dr. Rizvi denied that under the conditions in which the Plaintiff was found, the operation to have the child delivered should not be carried out. He stated that caesarean was the only way out under such conditions and it was necessitated in view of the fact that there was no progress of natural labour pain. He also confirmed that the Plaintiff was explained on all aspects of her condition. The Plaintiff was fine when the delivery took place. The presence of fibroids has nothing to do with the delivery process.

[21] Dr. Rizvi testified that during labour the baby's heart condition was observed. He categorically denied that the Defendant was shifting blame. He also explained the causes of pulmonary dysplasia and also on the issue of relative obesity causing pulmonary pressure. He stated that basic indicators were present for caesarean.

[22] **Dr. Erna Athanasius,** Consultant Paediatrician stated that she prepared her Medical Report **(Exhibit D2)** in collaboration with other medical and paramedical persons and

based on medical records kept in the medical file of the Plaintiff kept by the Defendant. Her testimony was based on that report.

[23] She testified that the baby was delivered by an emergency caesarean section for "cephalo-pelvic disproportion" and failure to progress on 22nd May, 2004 at 1515hrs. After its delivery the baby was handed over to the Paediatrician and upon observation for vital signs by AGPAR score was seen. The baby was limp, blue and not crying.

[24] Dr. Athanasius testified that after seeing the condition of the baby after delivery, vigorous resuscitation including endotracheal intubation was done. After AGPAR indicators, the child was handed over to Neonatal ICU and was put on wide spectrum antibiotics and oxygen was provided to maintain normal pulse values but nil by mouth, however, intravenous fluid was administered. Physical examination revealed mild dyspmorphism, hypotonia, webbing of the neck and wide spaced nipples, otherwise the baby was within normal limits for a newborn. The baby was kept at the Victoria Hospital and given the required post natal care. On 9th June, 18 days after birth, the baby and mother was discharged. On 10th June at 7.35am the baby was hurriedly returned to the Neonatal ICU, was cyanosed, bradycardic and gasping. The baby was resuscitated for about 10 minutes after which the baby died.

[25] The Pathologist **Dr. Maria Slakovic** carried out a post-mortem on the baby on 10th June, 2004 and produced her report **(Exhibit D3)**. She found the cause of death to be due to pulmonary dysplasia and cyanosis and edema of the brain. She added that birth asphyxia could be a problem with lungs and also explained that due to lack of oxygen the brain will become small.

**The Law**

[26] Delictual and quasi delictual liability is governed by Article 1382(1) and (2) of the Civil Code of Seychelles (CCSey) worded follows:

**Article 1382 (1)** of the CCSey states that-
*"Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it."*

**Article 1382 (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 omission."*

[27] The Seychelles Court of Appeal in the case of ***Nanon & or v Ministry of Health Services &Ors*, [2015] SCCA 47, 6** discussed the interpretation and application of this provision of law in cases of medical delict.

[28] The three necessary elements when making a claim of delict, are -*"fault, injury or damage and the causal link."* ***(See the case of Emmanuel v. Joubert, [1996] SCCA 49, 5).***

[29] In general, faute 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.

[30] However, the existence of injury to a Plaintiff does not automatically render someone to be at fault. *Faute* is defined in Article 1382(2) of CCSey as reproduced above.

[31] In a case concerning fault in medical practice, the prudent person standard is transformed into the standard of one who –

*"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."* (***Laurette v The Government of Seychelles*, [2016] SCSC 560, para. 6**).

**Findings and conclusion**

[32] I would like to state that Doctors and Nurses involved in the instant case are professionals in their own right and were the employees of the Defendant and were performing their duties as such, at the material times.

[33] In this case it is undeniable that there has been injury to the Plaintiff through the loss of

her child. This was an unimaginable tragedy and the Court sympathizes with the Plaintiff's grief.

[34] In the submissions made on behalf of the Plaintiff the only evidence of *faute* proffered by the Plaintiff was that - *"the Doctors who were assigned to the mother prior to giving birth did hesitate to carry out the caesarean procedures when the Plaintiff started to feel abdominal pain and was experiencing certain drainage of amniotic fluid. This was the critical moment when a quick decision could have been taken to save the baby, especially as the mother was overweight and diabetic."*

[35] The Plaintiff case is anchored on the delay by the Defendant's employees in deciding to deliver her baby by caesarean section and that led to the eventual death of her baby. In her layman's view the death of her child could have been avoided if the decision to do the caesarean was made earlier than when it was performed. The Plaintiff testified that she was in labour for about 6 hours before the decision was taken to do a caesarean section to remove the baby and that was what led the eventual death of her baby due to asphyxiation.

[36] Although the Plaintiff is not an expert witness she can however testify as to the truth of what she went through which led her to believe that the Defendant was at fault. The Plaintiff adduced the evidence of her mother who, though not an expert witness, had experienced the giving birth of many children in her lifetime and she corroborated the layman's evidence of the Plaintiff. The Plaintiff having adduced evidence, albeit layman's, in support of her allegation, it was incumbent on the Defendant to adduce counter evidence in that respect. (see paragraph 24 of the case of ***Government of Seychelles v Heirs Philibert Julienne SCA 07/12***).

[37] It is practically almost impossible for a person of the status of the Plaintiff to adduce the evidence of an independent expert witness to support her contention. Moreover, she did not have access to the full contents of her personal medical file in the first instance as such file is kept by the Defendant.

[38] Article 28 of our Constitution recognizes the right of access of every person to information relating to that person and held by a public authority which is performing a government function and the right to have the information rectified or otherwise amended, if inaccurate. This appears not to have been a right enjoyed by the Plaintiff!

[39] The medical file of a patient falls within the ambit of that Constitutional provision. At least a photocopy of ALL the contents of the medical file of a patient ought to be made available to that patient at her request and at her cost. If the Defendant intends to rely on documents contained in such file these must be fully disclosed to the Plaintiff before the hearing otherwise any report summarized from the contents of the file and tendered in evidence, by a witness who did not personally attend to the Plaintiff, would remain unsubstantiated and of no evidential value.

[40] The Defendant who employed such experts can easily do so. However, in the circumstances such witnesses are not deemed to be independent expert witnesses. They are simply witnesses of the Defendant and in the process of defending their own interest in such case. Therefore they are obviously tainted with biasness. Their evidence must be assessed as such.

[41] It is only through cross-examination of the witnesses of the Defendant that the Plaintiff can get further assistance in whatever limited extent possible in proving her case on a balance of probability. That also is only possible if those Defendant's witnesses are candid. If the witnesses of the Defendant do not produced documentary evidence from the medical file of the Plaintiff kept by them, it is almost impossible for meaningful evidence to be elicited from such witnesses. By not producing in evidence the medical records of the Plaintiff from her file is, in my opinion, a tactical approach in the defence of alleged medical negligence cases in Seychelles and indeed in this instant one.

[42] Dr. Rizvi who testified for the Defendant was not the Doctor who attended to the Plaintiff. In fact it was Doctor Fock Tave who did. Dr. Rizvi gave evidence base on a report (**Exhibit D1**) dated 11th December, 2012 made presumably by extracting the stated information from the medical file of the Plaintiff kept by the Defendant. However, the

medical file of the Plaintiff was not produced in Court to support the report. Dr. Rizvi *inter alia* stated that the Plaintiff was informed that she had gestational diabetes but there is no record that such information was given to the Plaintiff as Dr. Rizvi himself did not do that personally. The mother of the Plaintiff confirmed that she accompanied her daughter to all her ANC and she never heard anybody mentioned diabetes and what precaution the Plaintiff should take during her pregnancy and what effect this could have on her and her baby. The Defendant did not adduce the evidence of any witness to confirm that such information was indeed given to the Plaintiff. Gestational diabetes caused the foetus to grow bigger than that of a non-diabetic mother thus possibly easing natural birth.

[43] Failing to give proper and relevant information to a patient is an omission which can constitute *faute*.

[44] Likewise Dr. Athanasius produced a report (**Exhibit D2**) dated 15th November, 2004 which she apparently compiled from the medical file of the Plaintiff and there again such file was not adduced in evidence in support of the contents of her report. Dr. Athanasius had firsthand knowledge of only what she did in connection with the baby only after its birth by caesarean. The evidential value of her testimony in refuting the allegation of the Plaintiff is minimal and negligible in the circumstances.

[45] It is true that the Plaintiff not being an expert cannot testify as to what should have been the best time to carry out the caesarean section to deliver her baby but what is not required to be stated by any expert is that it is obvious that the baby could not be delivered by vaginal delivery and had to be delivered by caesarean. Dr. Zlakovic in her evidence and her Postmortem Report **(Exhibit D3)** confirmed that the baby died due to pulmonary dysplasia and cyanosis and edema of the brain.

[46] What the Plaintiff is saying is therefore confirmed by the fact of what actually happened and based only on common sense and logical deduction that if the caesarean section was done earlier the baby would have had oxygen thus avoiding its death.

[47] The Plaintiff having reached that apparent factual layman's conclusion it is then for the Defendant to explain why there was the delay in removing the baby as it did by caesarean. The Doctor who did the caesarean section did not testify hence no reasonable explanation has been given by him to denounce the averment of the Plaintiff that the caesarean could have been done earlier.

[48] No evidence was adduced coming from the medical personnel who personally attended to the Plaintiff, firstly, during her pre-natal consultation and to state what advice and information was given to the Plaintiff regarding gestational diabetes and other possible risk factors; secondly, during the period of labour to state why she was made to wait allegedly unattended until the critical moment leading to the removal of the baby; thirdly, the attempt to have a natural delivery only to find that the passageway was too narrow; fourthly, was there any prior assessment made to determine whether the size of the baby was such that it could come out through the passage of the Plaintiff; fifthly, about the removal of the baby that was able to be done in a matter of 12 minutes after it was found that the baby was stuck head down in the vaginal passage of the Plaintiff.

[49] Plaintiff testified and it was corroborated by her mother who was with her in the labour room that she was left unattended for long period without the presence of any professional assistance. There is no evidence emanating from any of the witnesses Defendant who were present, to counter this allegation.

[50] The name of a certain Doctor came up in evidence during the hearing and certain allegations were made by the Plaintiff. The Defendant at its risk and peril chose not to adduce the evidence of that particular Doctor to rebut any such allegation thus leaving it open to the Court to give credence to what the Plaintiff testified in regard to him.

[51] In the appeal case of ***Government of Seychelles v Heirs Philibert Julienne SCA 07/12*** delivered on 14th August, 2014 the Seychelles Court of Appeal, when the Appellant did not at the hearing produced the medical file of the Respondent, observed at paragraph 12 that –

*"The relevant Ministry was summoned to produce the case file of the patient from which the material facts could be ascertained for determination. They did not do that. They chose to rest content with just delegating a doctor who had no knowledge of the case at all to produce a report of Dr. ... The report would have had its weight in gold if what it contained had been backed up by the patient's file. In the absence of the patient's file, there should have been an objection to the admissibility of this report. But there was none, probably in anticipation of the fact that the full case file would be forthcoming in support of what the report contained. In the light of the fact that the hospital file was never produced, the report even if admissible, remained hearsay, in the circumstances, and could not be acted upon by the learned Judge."*

[52] At paragraph 13 of the same judgment the Court observed that –

*"Nor could Exhibit 1 (medical report) be regarded as expert evidence. It lacked the objective reliable facts from which a logical conclusion could be drawn. Whatever material facts it alluded to lacked independent support from reliable record. It contained a number of factual information which was obviously in dispute and had been made a live issue in examination in chief, in cross-examination as well as in re-examination."* ....."

[53] The Plaintiff at paragraphs 3, 4 and 5 of her Plaint averred that – "... prior to the birth, the presence of fibroids were detected on the Plaintiff's uterus by the Defendant." Thus "... the Defendant is aware that this medical condition makes natural birth difficult and complicated." Also, "Despite the presence of the above-mentioned medical condition, the Plaintiff avers that the Defendant made her undergo labour to give birth in the natural way."

[54] At paragraph 6 of the Statement of Defence the Defendant inter alia stated that – "... and that at any rate the caesarean section was carried out as of result of the unforeseen complications which could not have been detected prior to the delivery stage." It noted here that the 'unforeseen complications' is not particularised in the pleadings of the Defendant. Furthermore, at the hearing neither the Doctor nor the Nurses who attended the Plaintiff testified thus leaving this Court with no evidence to counter the averments of the Plaintiff. The two Reports exhibited were not drawn up by the Midwives and/or the Doctor who personally attended to the Plaintiff and likewise those personnel did not testify in Court.

[55] This Court is taking a similar approach in the instant case as that stated by the Seychelles Court of Appeal in the above quotations in the case of ***Government of Seychelles v Heirs Philibert Julienne SCA 07/12.***

[56] I find that the averments of the Plaintiff have not been sufficiently addressed by the Defendant to enable this Court to decide in its favour. I therefore conclude that prior to the birth of the baby, the presence of fibroids were detected on the Plaintiff's uterus by the Defendant. Thus the Defendant was aware that the medical condition of the Plaintiff which could make the process of natural birth difficult and possibly complicated. Therefore, despite the presence of the stated medical condition, the Defendant made the Plaintiff to undergo labour to give birth in the natural way before carrying out the caesarean section at the very last minute which eventually led the baby to suffer pulmonary dysplasia, cyanosis and edema of the brain and eventually death.

[57] For reasons stated above I find that the Plaintiff has proven her case against the Defendant on a balance of probabilities. It only suffices that the fault of the *preposee* is deduced from the material facts of the case.

[58] I therefore conclude that the Defendant is vicariously liable in law to the Plaintiff for her loss and damage.

**Damages**

[59] In cases like the instant suit the provision of Article 1384 of CCSey comes into play. The relevant parts of Article 1384 read as follows:

> *"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. .....*
> *3. Masters and employers shall be liable on their part for damage caused by their servants and employees acing within the scope of their employment."*

[60] Under Article 1384(3), all the Plaintiffs have to do is to establish the material facts from

which the fault of the Master or Employer may be deducted. In this respect, this regime is different from the regime of Article 1382. As Encyclopedie Dalloz Responsabilite du fait d'autui, at para 364, puts it:

*"La responsibilite des commettants pour les dommages cause par leurs preposes est profondement different de la responsibilite du droit common prevue par l'article 1382 du code civil. Nous savons, en effect, que non seulement la faute du commettant n'a pas a etre prouvee par la victim main encore que le commettant ne peut echapper a sa responsabilite en prouvant son absence de faute dans le choix ou la surveillance du prepose."*

[61] In terms of quantum, I note that the Plaintiff is claiming a total of SR100,400.00 when she entered her claim in December, 2004. The Defendant contended that the amount claimed is manifestly exaggerated. I do not believe that the amount claimed is not manifestly exaggerated. Compared to the award made in the case of ***Nanon*** in circumstances almost similar to the instant case, I believe that it is fair and reasonable that the Plaintiff is awarded the sum of **SR75,400.00**.

[62] Judgment is accordingly entered in favour of the Plaintiff as against the Defendant in the sum of **SR75,400.00** with interests and costs.

Signed, dated and delivered at Ile du Port on 2 December 2016

B Renaud
**Judge of the Supreme Court**