

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS29/2009

[2016] SCSC 981

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DAVID MICHEL  
Plaintiff

versus

THE GOVERNMENT OF SEYCHELLES  
Defendant

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Heard:

Counsel: Mr. Elizabeth for plaintiff

Mr. Chinnasamy for defendant

Delivered: 5 December 2016

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JUDGMENT

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Renaud J

**Plaintiff's claim**

[1] The Plaintiff by his amended Plaint is suing the Defendant claiming damages in the total sum of SR983,900.00 for vicarious liability for alleged *faute* committed by the Defendant's employees employed at its Ministry of Health in allegedly failing to give him the necessary health care thus eventually leading to the loss of use of his right arm.

### **The Plaintiff**

- [2] The Plaintiff was a 46 year old Security Officer with Isles Security Agency earning SR2,925.00 monthly, at the material time. On or around 6<sup>th</sup> August, 2008 he fell down and dislocated his right shoulder whilst installing a CCTV camera at his house. He went to the Anse Royal Hospital on the same day where he was referred to Victoria Hospital for X-ray which revealed that he had dislocated his right shoulder. The Doctor applied bandage and put a 45 degree sling to hold his shoulder in position. Two days later the pain became so unbearable that he went back to the Doctor when the bandage was replaced by another type of bandage.
- [3] The Plaintiff alleged that he continued to suffer great pain and on 13<sup>th</sup> August, 2008 he was operated upon. During that operation the Surgeon inserted a metal pin in his right clavicle but did not apply any plaster of paris casing as the Plaintiff believes this to be the usual medical procedure.
- [4] At around midnight on the 5<sup>th</sup> September, 2008 the Plaintiff the pins inside his clavicle snapped. Because of the excruciating pain that followed he called for the Ambulance which transported him to Anse Royale Hospital. There, a Cuban Doctor employed by the Defendant refused to examine him but only prescribed painkiller tablets and told him that as he is not a Specialist the Plaintiff had to go to Victoria Hospital later that day.
- [5] The Plaintiff had to spend the rest of the night on a bench at the Anse Royale Hospital suffering unbearable pain throughout the rest of the night until he took public transport early in the morning to go to Victoria Hospital. He was there examined by a Chinese Doctor who simply changed the bandage on the wound and again applied a sling to his arm. That Doctor, employed by the Defendant, refused to carry out an X-ray of his shoulder even though the Plaintiff informed him that the metal pin had snapped in his shoulder the night before.
- [6] Three weeks thereafter after trying and failing to get an appointment to see a Specialist, the Plaintiff allegedly asked to see the person in charge and he was duly referred to Doctor Reginald.

- [7] On 17<sup>th</sup> November, 2008 he finally underwent two further operations where rotten flesh was removed from his shoulder and part of his collar bone was sawn off and removed by the Surgeon. The Plaintiff averred that although he never consented to the said operation yet it was carried out by a Cuban Doctor who thereafter applied a plaster of paris casing on his upper body from 18<sup>th</sup> November, 2008 to 15<sup>th</sup> January, 2009.
- [8] The Plaintiff never recovered and is now permanently disabled as he cannot now use his right arm.
- [9] The Plaintiff was 41 years old at the time of the accident. He was admitted in hospital from 13<sup>th</sup> August 2008 to 17<sup>th</sup> August 2008. He was re-admitted in Hospital on 17<sup>th</sup> November 2008 and discharged on 24<sup>th</sup> November, 2008. He was summarily dismissed from his employment because of the extended sick leave. The Plaintiff is presently unemployable on the labour market. The Plaintiff has three minor dependants and lives alone.
- [10] The Plaintiff alleged that the acts and/or omissions of the Doctors mentioned constitute a "faute" for which the Defendant is vicariously liable to make good.

#### **Defence**

- [11] The Defendant averred that on 7<sup>th</sup> August, 2008 the Plaintiff upon advice of the Doctor refused surgical treatment therefore a close reduction and immobilization with plaster (velpeau bandage) was applied. The next day 8<sup>th</sup> August 2008 the Plaintiff reported back to Casualty Dept without immobilization, claiming allergic reaction to the plaster. Bandage with gauge was then applied.
- [12] The Defendant averred that the Plaintiff came back to SOPD (orthopaedic clinic) on the 12<sup>th</sup> August, 2008 with more complaints and stating his willingness to have surgical treatment. The Defendant averred that the Plaintiff was discharged after his operation on the 18<sup>th</sup> August, 2008 without pain or adverse symptoms. The Plaintiff allegedly missed 2 SOPD appointments on the 17<sup>th</sup> and 24<sup>th</sup> September, 2008.

- [13] The Plaintiff was next seen on 30<sup>th</sup> September with the pin missing and X-ray confirmed that it was broken. The Plaintiff was allegedly advised of the necessity to remove the pin and was also referred for physiotherapy. Only one operation for removal of pin and internal fixation of the acromio-clavicular joint was performed. The Plaintiff consented to the operation.
- [14] The Defendant contended that the Doctor has not been medically negligent to the Plaintiff in any way whatsoever. Any further injury or aggravation of the injury of the Plaintiff was caused through Plaintiff's own fault or negligence or psychotic behaviour in respect to the treatment administered.
- [15] The Defendant contended that it is not liable in any way to the Plaintiff and prayed the Court to dismiss the Plaintiff with costs.

#### **The Hearing**

- [16] At the hearing the Plaintiff testified on his own behalf and introduced 27 items as documentary evidence. The Defendant adduced the evidence of 6 Doctors as well as that of a Physiotherapist and also introduced a further 6 items as documentary evidence.

#### **Plaintiff's Evidence**

- [17] The evidence of the Plaintiff revealed that he lived at Takamaka and was physically fit and working as a Security Officer at the material times. **Exhibit P1** shows that Plaintiff was earning SR2,925.00 per month.
- [18] On **6<sup>th</sup> August 2008** at about 11.30pm he fell from a ladder from a height of 1.7m onto rocks on his right side and stomach. Ambulance from Anse Yoyale Clinic was called but it never turned up. Very early next morning the Plaintiff made his own way to Anse Royale Hospital where a Doctor examined him and referred him to Victoria Hospital. On **7<sup>th</sup> August 2008** he was transported there by Ambulance at 12.30pm. He was referred for X-Ray by Dr. Ribail who later confirmed that there was a dislocation of the right shoulder which was not serious. Dr. Ribail bandaged his right shoulder in plaster and held it in position by a sling and he was sent home.
- [19] The Plaintiff turned out to be allergic to the kind of plaster that was applied, so two days

later, on **9<sup>th</sup> August, 2008**, he returned to Anse Royale Hospital where after being examined by a Doctor who referred him back to Victoria Hospital where the previous type of plaster was removed and he was bandaged by a different kind of bandage and thereafter sent home. The Plaintiff was in constant pain and had to go back to the Doctor again.

[20] On **13<sup>th</sup> August, 2008** he went back to Victoria Hospital and Dr. Ribail put his right arm in a different kind of sling (**Exhibit P2**) and was advised to return back at a later date for fixing of a pin to hold his bone in place. The Plaintiff returned again 2 or 3 days later when Dr. Ribail operated on him for about 4 hours. He thereafter spent 3 or 4 days at Victoria Hospital and then discharged with his right arm still in the sling.

[21] At around midnight on **5<sup>th</sup> September, 2008** he saw blood all over his bed and pillow and his shoulder was numb and painful. He was later taken by Ambulance to Anse Royale Hospital. The Hospital was closed and all lights were off and it was cold and raining. Later Cuban Dr. Hector came and he told Dr. Hector, in the presence of Nursing Assistant Assary, that he suspected that the pin in his shoulder had broken. He asked Dr. Hector to refer him immediately to Victoria Hospital but Dr. Hector refused and instead sent him home and asked him to go to Victoria Hospital the next day. It was raining at the time and he was bleeding and in pain. There was no transport to go home as it was night time. He had to sit on a bench in the cold until next morning when he made his way to Victoria Hospital by his own.

[22] On **6<sup>th</sup> September, 2008** he arrived very early in the morning at the Casualty Department of the Victoria Hospital where he saw one Dr. Sun and the Plaintiff told him of his suspicion about the broken pin. Dr. Sun only applied a dressing to his wound and sent him home at 1.30pm.

[23] The Plaintiff continued with his dressings at his District Clinic. Infection eventually developed and had to go back to Victoria Hospital. His medical file could not be found and he was told to wait for an appointment.

[24] On **30<sup>th</sup> September, 2008** he had an appointment with Dr. Ribail who removed the sling

and the plaster. Dr. Ribail then removed the exterior piece of the pin and ordered for dry dressings to be applied. The Plaintiff asked Dr. Ribail what was going to happen to the piece of the pin inside his shoulder. Dr. Ribail told him that it does not matter. However, whenever the Plaintiff moved his hand he felt piercing pain in his shoulder so he requested for an X-ray. Instead Dr. Ribail sent him for physiotherapy. He could not do the physiotherapy because his arm and shoulder was swollen and painful with pus coming out from his shoulder.

- [25] The Plaintiff had another operation to insert a screw in his shoulder whilst the piece of the pin was still inside his shoulder. He went back to see Dr. Ribail between 18<sup>th</sup> November 2008 and 15<sup>th</sup> January, 2009 about the continuing pain but Dr. Ribail refused to see him again because the Plaintiff had previously made written complaints to the Minister and the President about the piece of broken pin in his shoulder. Dr. Ribail seemed to be angry with him.
- [26] His health was deteriorating and was in constant pain and could not sleep despite taking pain killers. He later saw an Indian looking Doctor at Anse Royale who said there the Plaintiff must have another operation in order to resolve the situation. He was referred to Victoria Hospital where he was seen by Dr. Alexander who told him that he would have to cut his shoulder bone in order to do what was necessary. The Plaintiff fearing for the worst initially refused.
- [27] The Plaintiff later went to complain to the Chief Surgeon Dr. Reginald who gave him a note in which he requested Dr. Ribail to operate and remove the piece of the pin in his shoulder. Dr. Ribail showed his anger towards him and asked him to come another time for the operation. He returned back and was admitted then discharged again because on the scheduled date for the surgery there was not electricity. The Plaintiff returned the next day and consented to the removal of the pin but not to have any bone to be cut. He had a 6 hour surgical operation and thereafter taken to the Ward and was bleeding.
- [28] Three days after the operation Dr. Ribail came to see him and looked at his X-ray. He cut the X-ray film in two pieces and threw away one piece. The Plaintiff collected that

piece of the cut X-ray film which is now **Exhibit P5**. Dr. Ribail sarcastically told the Plaintiff –“*now you will stop complaining*”. Dr. Ribail did not visit him again.

- [29] After 8 days Dr. Ribail came to discharge him after putting the upper part of his body in plaster of paris cast. Every month, for 3 months, he came to the Hospital to have the cast removed and replaced. The cast was finally removed on **14<sup>th</sup> February, 2009**. He was thereafter sent for physiotherapy. However, at that time his hand was locked, swollen and painful and he could not make any movement with his right arm. He went to see the Doctor several times after that since he could not use his right arm.
- [30] The screw (**Exhibit P6**) as shown on the X-ray which was inserted by Dr. Ribail was removed by Surgeon Dr. Danny Louange on **17<sup>th</sup> September, 2009** by surgery. That screw was not holding anything as it was put through his bone marrow and was loose.
- [31] The Plaintiff applied for and received a Medical Report dated 15<sup>th</sup> April, 2009 (**Exhibit P7**) compiled by Dr. Kishnan Rao. He received a Medical Report dated 6<sup>th</sup> April, 2009 from Dr. Malulu (**Exhibit P8**). He received a Medical Report dated by Dr. Ribail dated 14<sup>th</sup> February, 2009 (**Exhibit P9**). He applied for and received a two-page list (**Exhibit P10**) of the dates on which he had consultation at the Hospital drawn up by Dr. Kishnan Kumar Saha dated 7<sup>th</sup> September, 2009. On 8<sup>th</sup> February, 2010 he received another Medical Report drawn up by Dr. Ribail dated 8<sup>th</sup> February, 2010 (**Exhibit P11**). A Medical Report drawn up by Dr. Murthy Chetty dated 21<sup>st</sup> January, 2010 was admitted as **Exhibit P12**. He received a second Medical Report from Dr. Murthy Chetty dated 19<sup>th</sup> January, 2011 (**Exhibit P13**). Physiotherapist Mr. Bala Traore issued him a Medical Report dated 20<sup>th</sup> January, 2011 (**Exhibit P14**). Yet another Medical Report was issued by Dr. Murthy Chetty on 4<sup>th</sup> February, 2011 (**Exhibit P15**). The Plaintiff did an MRI examination of his right shoulder on 28<sup>th</sup> August, 2011 and Dr. Murthy Chetty issued a report based on that MRI dated 25<sup>th</sup> May, 2012 (**Exhibit P16**).
- [32] The Plaintiff paid his own fees for an MRI examination (**Exhibit P17**). He received a CD of an MRI from a visiting Specialist Orthopaedic from Chennai Hospital showing how his operation should have been performed, is now exhibited as **Exhibit P18**.

- [33] Finally on 21<sup>st</sup> June, 2012 the Physiotherapist Mr. Bala Traore issued him a report of his progress which now **Exhibit P19**.
- [34] The Plaintiff produced in evidence 3 photos (Exhibits 20, 21 and 22) of his right shoulder. **Exhibit 20** shows his right shoulder before the surgery. **Exhibit 21** shows 2 holes that were made on the back of his shoulder. **Exhibit 22** shows where part of his shoulder where there is a cut of about 35cm.
- [35] **Exhibit P23** is a letter dated 12<sup>th</sup> February, 2009 from Social Security awarding the Plaintiff invalidity benefit for 6 months. The period of such invalidity benefit was extended for further periods by **Exhibits 24; 25; 26**. **Exhibit 27** is a letter dated 9<sup>th</sup> December, 2010 from Social Security concerning the award of permanent disability pension fund. He received a total of SR2,500.00 and SR1,500.00 for housing per month.

#### **Evidence on behalf of the Defendant**

- [36] **Dr. Venkatakishan Rao Boyanapalli** is employed the Defendant since 2006 as a general Doctor and not a specialist. He, assisted by a Nurse who also acted as a translator, saw the Plaintiff at Anse Royale Clinic on **7<sup>th</sup> August 2008** at around 4am with certain minor abrasions and an apparent deformity which restricted movement of his right shoulder due either to a suspected dislocation or a fracture. The Nurse immobilised his arm in a sling and he was sent for X-Ray and review by Orthopaedic Surgeon at Victoria Hospital. Dr. Boyanapalli wrote a Report which is **Exhibit P7**. He did not see the X-Ray result of the Plaintiff.
- [37] The witness did not produce any contemporaneous notes of what he actually saw and did on that day. The dispute as to the time the Plaintiff was seen cannot therefore be resolved by the records. I believed the recollection of the Plaintiff to be the correct version since he would have recalled his situation better compared to the Doctor who sees many patients.
- [38] **Dr. Sundaram Natarajan** is a Doctor employed by the Defendant. He never saw the patient and did not issue any certificate in his regards. His evidence is of no assistance to



the Court.

- [39] **Dr. Ribail Barbie Reyes** a Doctor for over 17 years and has been working in Seychelles on and off since 2008 with the Defendant at the Victoria Hospital. He compiled the Report **Exhibit P11** on 8<sup>th</sup> February, 2010 and his testimony was on the basis of what he wrote in exhibit P11.
- [40] Dr. Reyes examined the Plaintiff on **7<sup>th</sup> August, 2008** and found that his right anterior clavicle joint was deformed, swollen, painful and unstable. He ordered for an X-ray to be done and the result showed that there was an anterior clavicle dislocation. Close reduction and immobilisation with plaster was done. The Plaintiff returned on **12<sup>th</sup> August, 2008** with the same problem and accepted the surgical treatment previously proposed by the Doctor.
- [41] On **14<sup>th</sup> August, 2008** the Plaintiff was admitted and operated upon the next day. Dr. Ribail made a close reduction and fixation with pin and the Plaintiff was discharged on **18<sup>th</sup> August, 2008**.
- [42] Dr. Ribail next saw the Plaintiff on **30<sup>th</sup> September, 2008** with the exterior part of the pin missing. An X-ray was done on **2<sup>nd</sup> October, 2008** which confirmed that the pin was broken. He advised the Plaintiff that it was necessary to have the remaining part of the pin removed. He also referred the Plaintiff for physiotherapy.
- [43] The Plaintiff next attended the Orthopaedic Clinic in **October 2008** complaining of pain in right shoulder which the Plaintiff felt was caused by the piece of the broken pin which was still inside his shoulder. Dr. Ribail decided to remove the piece of the broken pin from his shoulder of the and did a "SternoClavicular joint arthrodesis", that is, fixing a silver screw in the Plaintiff's shoulder on **18<sup>th</sup> November, 2009**. (should read 2008). The screw was put from the acromyon to the clavicle.
- [44] The Plaintiff was discharged to be followed up in the Orthopaedic Clinic in SOPD. The immobilisation was removed 6 weeks after and rehabilitation treatment followed.

- [45] The witness however neither produced the medical file of the Plaintiff neither the contemporaneous notes he made at the material times in support of the contents of his Report. The witness admitted that he could not recall every details since this case happened a long time ago.
- [46] In cross-examination the witness answered that when there is a dislocation it also resulted in the tear of the muscles and ligaments as well. The Plaintiff had a scapular and humerus dislocation as revealed by the X-ray. On 7<sup>th</sup> August 2008 Dr. Ribail manipulated the shoulder bones to put it back into place and held the shoulder in place with plaster and gauge bandage. Dr. Ribail admitted that the sling is not a treatment for acromio clavicle dislocation which the Plaintiff suffered from.
- [47] **Dr. Daniella Malulu** a Psychiatrist employed by the Defendant and working at the Victoria Hospital for the past 10 years. She drew up a Report **Exhibit P8**. The Plaintiff was first referred in **May 2006** and was found to be suffering of acute stress reaction. This state could be the result of his having problems within his family and his employer.
- [48] The Report **Exhibit P8** was compiled by Dr. Malulu who attended to the Plaintiff for about one year in **2009**. Neither the medical record of the Plaintiff and nor any contemporaneous notes made in support of the contents of the Report were produced in Court by the witness.
- [49] **Dr. J. Manoo** is a Doctor employed by the Defendant for over 10 years in the Orthopaedic Department. He was presenting a Report (**Exhibit 16**) dated 25<sup>th</sup> May, 2012 compiled by a colleague Dr. Murthy Chetty who was on overseas training at the time. No supporting documents are attached in support of the contents of the Report. Both Dr. Manoo and Dr. Chetty are not specialist. Exhibit 16 has very limited evidential value in the circumstances. The evidence is more or less hearsay.
- [50] **Dr Christian Anasie** is a Doctor employed by the Defendant for over 14 years in its Orthopaedic Department. Dr Anasie vaguely recalled having seen the Plaintiff only once but he however wrote a full Report (**Exhibit P10**) dated 7<sup>th</sup> September, 2009 concerning

the treatment the Plaintiff received. Dr Anasie testified that he went through the medical notes of the Plaintiff and from which he wrote the Report. He, however, did neither attached copy of those notes to the Report nor produced any in Court. In the circumstances I find that Exhibit 10 has very limited evidential value. The evidence is more or less hearsay.

[51] **Mrs. Wahida Payet** is a fully qualified Physiotherapy working at the Victoria Hospital. She has over 25 years experience in that filed. She attended Court as a witness to present a Report drawn up by one Mr. Bala Traore who had since left the employment of the Defendant. The Report is dated 20<sup>th</sup> January, 2011 (**Exhibit P14**). The witness did not personally have anything to do directly with the Plaintiff. No supporting documents are attached in support of the contents of the Report. I find that Exhibit P14 has very limited evidential value in the circumstances. The evidence is again more or less hearsay.

#### **The Law**

[52] 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.”*

[53] 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.

[54] 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)

[55] 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.

[56] 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.

[57] 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 acting within the scope of their employment.”*

[58] 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 responsabilite des commettants pour les dommages cause par leurs preposes est profondement different de la responsabilite 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.”*

[59] 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).

[60] Legal burden always rested on the Plaintiffs to prove the case against the Defendant for fault by making the material averments and supporting them by the deposition of its

witnesses. It, thereafter, fell upon the Defendant to rebut the evidential burden which shifted upon them.

[61] It only suffices that the fault of the *preposee* is deduced from the material facts of the case. (*Quoted from Heirs Julienne v Government of Seychelles SCA 07/12*)

[62] For avoidance of doubt I find that all the Doctors and Physiotherapist involved in this case are professionals in their own right and all were the employees of the Defendant and were performing their duties as such, at the material times.

### **Findings**

[63] On 6 August, 2008 the Plaintiff fell while installing CCTV cameras around his hooue. The fall resulted in a dislocation of his right shoulder, the treatment of which is the basis for his Plaint. After the fall, the Plaintiff attempted to call an ambulance but the ambulance never arrived. He made his own way to Anse Royale Clinic where he was referred to the Casualty Department at the Victoria Hospital.

[64] The next day at Victoria Hospital an X-ray revealed a dislocated right shoulder. The initial diagnosis of a dislocated shoulder was confirmed as being correct. It was then determined by the Doctor that it was not a serious matter and only close reduction and immobilization with plaster was called for and accordingly performed by the Doctor and the Plaintiff sent home.

[65] Two days later the Plaintiff returned because of allergy to the plaster. The plaster was changed and the Plaintiff sent home. The Plaintiff continued to suffer and had to return back to hospital and this time a pin was inserted to hold the shoulder bone in place. The Plaintiff was thereafter sent home.

[66] On 12 August, 2008 the Plaintiff went to the Orthopaedic Clinic and decided to accept surgical treatment for his shoulder as suggested by the Doctor. On 14<sup>th</sup> August, 2008, the Plaintiff returned to the Victoria Hospital where a metal pin was inserted into his right clavicle. He was discharged on 18<sup>th</sup> August, 2008.

[67] On 12<sup>th</sup> September, 2008 the Plaintiff went to Anse Royale Hospital and explained to the

Doctor what had happened and stated that he suspected that the pin in his shoulder was broken. The Doctor not being a Specialist declined to perform any procedure on the Plaintiff and instead told him to go to Victoria Hospital. The Plaintiff spent the night on a bench at the Anse Royale Hospital where he was bleeding and in pain. His visit the next day to Casualty Department was documented in **Exhibit P10**.

- [68] Early morning on 13<sup>th</sup> September, 2008 the Plaintiff followed the Doctor's advice and made his way to Victoria Hospital. There he again explained that he suspected that the pin in his shoulder had broken. Dr. Sun and Nurses cleaned and bandaged his wound. However, the Plaintiff was unable to understand Dr. Sun and does not know why no X-ray was conducted and the pin was not removed at that time. This complaint again appears to fall into prong two of the test for *faute* in that the Plaintiff feels that the Doctor, having been informed of the Plaintiff's medical condition, should have X-rayed his shoulder and removed the pin at the time that he bandaged the Plaintiff's arm.
- [69] It is possible to conclude that a Doctor encountering a patient in pain and in the middle of the night could have ordered for the Plaintiff to be immediately taken by Ambulance to Victoria Hospital for an X-ray to be done in order to assess the extent of the injury or taken some steps towards confirming the patient's self-diagnosis. This complaint again appears to fall into prong two of the test for *faute* in that the Plaintiff feels that the Doctor, having been informed of the Plaintiff's medical condition, should have X-rayed his shoulder and removed the pin at the time that he bandaged the Plaintiff's arm.
- [70] The Plaintiff returned on 30<sup>th</sup> September, 2008 when an X-ray was performed which confirmed that the pin was indeed broken. The Doctor removed the part of the pin that was protruding on the outside by using forceps and told the Plaintiff that it would be necessary to remove the remaining part of the pin located inside his body.
- [71] As a result of the ongoing pain in October of 2008, caused by the broken pin, the Plaintiff went back to Hospital and the Doctor decided to remove the pin and do Sterno Clavicular joint arthrodesis with screw on 18 November, 2008. The surgery proceeded normally and the Plaintiff was discharged and told to follow up in Orthopaedics Clinic.

- [72] This Court cannot comprehend why it took so long for that other part of the pin to be removed from the shoulder of the Plaintiff who was in pain?
- [73] The Plaintiff continued to suffer until the Chief Surgeon Dr. Reginald had to intervene and ordered that the Plaintiff be operated upon on 18 November, 2008. A 4 hour surgery was done to remove the pin and other consequential treatment but the result was negative. The Plaintiff claims that he agreed to pin removal but not to having his bones cut. The Doctor inserted a screw to hold his shoulder bone in place.
- [74] At a point in time a screw was inserted in the shoulder of the Plaintiff. However it was later found by Dr. Louange an Orthopaedic that the screw was effectively serving no purpose as it was located in the bone marrow and not in the hard part of the bone. Dr. Louange removed that screw.
- [75] Despite this treatment the Plaintiff cannot now make use of his right arm and is unemployable due to his injuries and had to rely on Social Security invalidity benefit.
- [76] Part of satisfactory care is ensuring that people understand the Doctor's statements relating to their injury and treatment plans. It is certainly not appropriate for a patient to leave the care of the hospital and remain unaware of the reasoning behind his treatment or the subsequent actions to be taken. Effective communication of information regarding treatment must be properly and effectively communicated by the treating Doctor to the patient.
- [77] In order to make such a determination, it is vital that claims be proven through the use of medical documents or medical experts. Without such evidence, it is impossible for the Court to take judicial notice of medical facts or procedures on the basis of a lay person's testimony as they do not have the requisite expertise. In such circumstances, the Court can only make deductions from the evidence of the professional witnesses tendered by the Defendant including medical notes contained in the Plaintiff's file held by the Defendant.

[78] To a lay person, it was his expectation to have an X-ray of his shoulder or for a Doctor to remove the broken pin, but no explanation was given by the Doctor as to why nothing was done to alleviate his pain as well as his concern regarding the metal pain in his shoulder. It was incumbent on the Doctor to have at least put the mind of the Plaintiff at rest by giving him proper information, which the Doctor failed to do.

**Conclusion**

[79] Having analysed what transpired with regard to the Plaintiff in relation to the loss of use of his right arm, it is my considered judgment that the medical reports and other testimonies presented as evidence in this case do not in the least impress me that the treatments afforded to the Plaintiff by the employees of the Defendant in the course of their employment, were sufficient or applied correctly taking into consideration all the circumstances that the Plaintiff went through.

[80] No other evidence of an impartial expert in the medical field was presented and the reports submitted before this Court confirmed that the Plaintiff's account of the events are not exaggerated or embellished.

[81] From my analysis and comparison of the evidence of the professional witnesses of the Defendant, I could easily find evidence that can be interpreted in support of the Plaintiff's claim. The Plaintiff indeed suffered inconveniences, pain and anxiety especially now that he cannot make use of his right arm following treatment given to him by the employees of the Defendant. That in itself is sufficient to lead this Court to conclude that there was fault committed by the Defendant when giving treatment to the Plaintiff.

[82] An ordinary citizen fell from a ladder and suspected that he had dislocated his right shoulder. He did the obvious by immediately making his way to the nearest hospital at Anse Royale. The appropriate treatment being not available there, he continued to make his way to Victoria Hospital where dislocation was confirmed. He was bandaged and sent home. The unfortunate saga that transpired after that is not one that is expected of the Defendant in providing appropriate medical care. How can a simple dislocation ended three months later into the total loss of use of the right arm especially when the victim was in the hand of professionals throughout that time.



[83] I believe that I have sufficiently set out my analysis and findings hereinbefore that now support my conclusion, that on a balance of probabilities, the Defendant was at fault and is therefore vicariously liable to the Plaintiff in law for damages. I accordingly enter judgment in favour of the Plaintiff as against the Defendant.

[84] The damages the Plaintiff is claiming are particularized as follows:

- |   |               |
|---|---------------|
| a. Moral damage for pain and suffering, anxiety, stress, inconvenience, mental anguish and trauma | SR 100,000.00 |
| b. Loss of earnings at SR 2,925 per month from November 2008 to date and continuing               | SR 11,700.00  |
| c. Future loss of earnings from 2009 to 2031 when Plaintiff reaches pensionable age               | SR 772,200.00 |
| d. Loss of amenities  | SR 100,000.00 |

[85] The claim of the Plaintiff for moral damage for pain and suffering, anxiety, stress, inconvenience, mental anguish and trauma, need not be proven by actual evidence. This Court is in a position to assess this claim taking into consideration the evidence before the Court. I do not believe that the sum claimed is excessive. I award the Plaintiff the sum of **SR100,000.00** under this head.

[86] The Plaintiff is claiming a total of SR772,200.00 for loss of earnings. At the time of the fall, the Plaintiff was earning a wage which is less than the present prescribed invalidity pension at SR5,050.00 per month. Since the Plaintiff is permanently incapacitated he will obviously draw such pension for the rest of his life. However, it is obvious that if the Plaintiff could make full use of his right arm he would surely earn more than the prescribed pension. Moreover, the loss of a right arm, even the Plaintiff is right-handed, does not preclude him from doing other economic activity to earn some extra money to supplement his pension. In the circumstances I believe that under this head of claim this Court in all fairness ought to only supplement the earning of the Plaintiff by awarding a sum that would enable him to launch in an alternative economic activity in the future. It is my considered judgment that a monthly supplement of a further 20% of his pension,

say SR1010.00 per month paid up front now, from the age when he was injured when he was 46 years old, up to retirement age of 63 years, a period of 17 years, is fair and reasonable in the circumstances. On that basis I award the Plaintiff the total sum of **SR206,000.00** to cover his claim for loss of earnings from the time of his accident and future loss of earnings until his retirement age.

[87] The Plaintiff claims SR100,000.00 as loss of amenities. It is not clear what this head of claim is meant to cover. I take it that he would need to engage the assistance of someone as he cannot make full use of his right arm. This Court takes judicial notice that it is an embedded arrangement that the State provides free carers to persons in such circumstances. I would therefore award the Plaintiff a nominal sum of **SR44,000.00** under this head of claim.

[88] I award the Plaintiff the total sum of **SR350,000.00** as damages against the Defendant for vicarious liability.

[89] I award interest and costs to the Plaintiff.

Signed, dated and delivered at Ile du Port on 5 December 2016



B Renaud

**Judge of the Supreme Court**