

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 356/2010

[2013] SCSC

STELLA HERTEL

Plaintiff

versus

THE GOVERNMENT OF SEYCHELLES

Defendant

Heard: 15 March 2012, 16 April 2012, 10 May 2012, 26 July 2012

Counsel: Mr. A. Derjacques Attorney at Law for plaintiff

Mr. V. Benjamin Assistant Principal State Counsel for defendant

Delivered: 6 December 2013

JUDGMENT

Burhan J

[1] The Plaintiff filed plaint against the Defendant namely, the Government of Seychelles on the basis of vicarious liability seeking damages in a sum of SR 2, 177, 448.00 for a fault committed by the employees of the Defendant. The fault is alleged to have arisen from the medical negligence of the surgeons and medical staff of the Victoria hospital while they were performing their duties during the scope of their employment with the Defendant.

- [2] The background facts of this case as averred in the plaint are that the Plaintiff had undergone a total Thyroidectomy operation at the Victoria hospital on the 23rd of September 2010. As a result of the operation the vocal chords of the Plaintiff had become permanently immobile resulting in the Plaintiff's speech being impaired. The Plaintiff further avers that it was the acts and omissions of the said surgeons, medical officers and staff at the Victoria hospital that caused the loss and injury to the Plaintiff amounting to a faute in law.
- [3] The Defendant in reply denied that the Rusch Tracheofix was permanent. The Defendant further averred that the Plaintiff was briefed and the risks of the surgery explained to her and the Plaintiff had consented for the surgery. The Defendant avers that proper and reasonable care was taken in the diagnosis and surgical procedures by competent hospital personnel.
- [4] In her evidence the Plaintiff spoke with great difficulty while giving evidence and stated she had been operated on the 23rd day of November 2010 for a hyper thyroid and the doctors had cut her nerve in her larynx and since then she was not able to speak. The medical report given in respect of the disease diagnosed, the surgery performed and the subsequent treatment given was marked as P1. The Plaintiff had subsequently gone to France for further treatment and surgery in an attempt to get back her voice but it had not been successful. The Plaintiff produced the medical certificates issued by the French doctors as Item 1 2 and 3. She stated that as a result of the operation she had lost her job which was earning her an income of SR 4.364.00 per month. The airline ticket purchased by the Plaintiff to go to France was marked as P2. In France the expenses were met by the government as her mother and sisters were resident in France. She further stated that a sum of Euro 20.556.00 was spent by the Government of France for the purchase of her throat piece. She stated that after her operation she had to have a tube in her neck as she was not breathing properly. She had gone through an operation but was not happy with the results. She stated she was going back on the 23rd of March 2012 for another operation.

- [5] Under cross examination she admitted she was diagnosed with Grave's disease and was not responding to medications and therefore removal of both thyroids was recommended and an operation accordingly performed. She identified her signature on the consent form D1 and denied her signature was on the consent form of Dr. Alexander. She admitted that after discharge she was advised to come for follow up treatment but she stated she had not gone as they had already made one mistake. She denied that both doctors had explained the risk of operation to her.
- [6] The other witness the mother of the Plaintiff Veronique Hertel stated that when she heard her daughter was not well and in hospital in the Intensive Care Unit, she had come to Seychelles and asked Dr .Felix what were the chances of her talking and he had replied 50/50. She had decided to take her daughter the Plaintiff to France. As she was a French resident the French government was looking after her daughter. She stated that her daughter the Plaintiff could not work as she could not breathe or speak properly and was depressed. She further stated that her daughter was in fact using a machine which helped remove things from her throat and helped her breathe.
- [7] Dr. Marvin Fanny stated that Dr. Felix Rosabal was no more in the Seychelles and produced his medical report in respect of the Plaintiff Stella Hertel dated 13th December 2010 as P1. Witness explained that a Thyroidectomy was an operation involving the removal of the Thyroid glands in front of the trachea in the region of the neck. He stated according to the report the patient Stella Hertel had been diagnosed having Hyper Thyroidism (Grave's disease) which is a disease where the thyroid produces excess hormones. He further stated that the report indicated that both recurrent laryngeal nerves had been damaged. When the patient presented symptoms, a laryngoscopy was performed and it was determined that the larynx nerve that supplies the vocal chords was damaged resulting in the vocal chords being immobile which resulted in the loss of speech.
- [8] Dr. Fanny further stated that according to the medical books this was a rare complication of thyroid surgery. He stated that diathermy was used in such an operation as it controls bleeding. He affirmed the fact that the report indicated her vocal chords were normal

prior to the operation. The medical report further stated that it is not clear whether the laryngeal nerves were damaged due to complete transection, being caught in ligature or from the effects of diathermy.

[9] He further stated that the medical reports from France too referred to the fact that an operation had been done for Goitre and after the operation it was found that the larynx was immobile. The patient had required a tracheotomy which is the cutting of the trachea to insert a tube. Witness further stated the Plaintiff had to use a nebulizer which breaks down air particles into very small particles in order that it could enter the airway easily and a suction machine which helped to suck up the mucus or secretions within the tracheotomy. He stated the report filed by the defence item I (1a) dated 13th December 2011 indicated the 1st operation done in France was on the 2nd of November 2011 to remove the tracheotomy cannula which is removal of the instrument inserted for her to breathe normally. The report I (4a) dated 30th January 2012 also indicated that the Glottis which was part of the larynx had gone into stenosis which basically was tightening and therefore required the installation of a calibrated endo larynx tube. The report mentioned that the tube had to be left for a couple of months in order to perform suctions of the secretions of the trachea and the bronchioles.

[10] Witness Dr. Fanny further stated under cross examination that the report indicated that the thyroid gland had been highly vascular and adherent or connected to the trachea. He identified the consent forms that had been produced and stated that the patient's consent was always obtained prior to any surgery being performed. He stated that prior to obtaining the signature on a consent form the patient is counselled on what type of surgery is going to be done and the risks and complications of such surgery also explained. If the patient agrees they would sign and it is countersigned by witness. Witness stated that the procedure had been complied with in this case. He stated that the report I (2a) dated 11th January 2011 refers to the fact that one would have to wait for a period of 6 to 9 months before being able to state whether the nerves would recover. He further explained that normally blood vessels are present in glands but the term highly vascular is used when there is a lot of blood being sent to the gland. This would make surgery difficult. He stated that usually in such an operation the nerves to the vocal

chords are transected, tied or diathermised. He stated the nerves are identified and not cut but spared. Arteries he stated may be tied and cut to prevent blood spurting. He further stated that the two nerves are on either side of the neck and require separate procedure. Thereafter the Plaintiff closed her case.

[11] The Defendant called Dr Alexander Bondar who stated that he was a Consultant General Surgeon with 20 years experience. He had been working in the Seychelles since 2004. He further stated he had worked at Yemen and Ukraine. In his evidence he referred to his qualifications and post graduate qualifications and experience. He stated that this particular case was operated by Dr. Felix and he had assisted and was present throughout the surgery performed on the Plaintiff Stella Hertel. His expertise and his experience were not challenged.

[12] Witness stated that the Plaintiff had hyper function of the thyroid gland which was complicated by a disease called Thyrotoxic Goitre. This was not normal and was giving a toxic condition to her whole body. He further stated that the situation could not be controlled by medication and therefore surgery was essential otherwise the toxic hormones produced would kill the patient. He stated the surgeons had to decide in regard to the benefit of saving the life and risks of complications arising during surgery. Basically his evidence was that the operation was a necessity to save the patient's life.

[13] Witness further stated that in doing such operations the possibility of there being complications is always present and in this case the complication of the vocal chords being rendered immobile was a recognised text book complication. Investigations 1 to 2 weeks before surgery revealed already there was a hoarseness of the voice which indicated that the area had been compromised. He stated that there was profuse and abnormally high bleeding during the operation due to the Thyrotoxic Goitre and the presence of extra networks of blood vessels resulting in excess and abnormal bleeding. He said a surgeon would have to cut and ligate as the bleeding has to be somehow stopped and it would be difficult to easily distinguish between nerves, veins and arteries especially when they were deceased. The slight touch to a deceased gland would bring about bleeding.

- [14] He further stated that medicine was given but was not effective and the risk of the heart rate increasing rapidly and finally culminating in cardiac arrest was present. Hyper production of thyroid hormones results in tachycardia fast heart beat. It results in excess sweating, eyes bulging, nonstop diarrhoea and the brain too becomes affected patients cannot sleep and are constantly nervous and stressful.
- [15] Witness Dr. Alexander Bondar stated that due to the complications with the disease of the patient, the nerves would have not been where they should have and he further explained that if a nerve was within the tumour, when the tumour was cut the nerve would be affected and a person would feel numbness in the region. If this procedure had to be done in a life saving operation his evidence was that the surgeon would have no option but to do so. He stated that always in surgery there could be a complication but in this case it was not as a result of negligence. He reiterated the fact that hoarseness of voice was a clear indication that the nerves had already become compromised even prior to the operation.
- [16] Witness further stated that Dr. Felix was a properly qualified specialist from Cuba and each surgeon was allocated a list of cases that could be performed by the General Surgeon. He stated that in his opinion Dr. Felix was competent to handle the case. He stated that a complication was something that occurred that was not normal during the post operative period and gave example of stitches being rejected and infection after operative procedures. He specifically stated there was nothing wrong with the surgery technique of Dr Felix that day and he was not acting negligently.
- [17] Witness Joanna Raoul stated in March 2011 she was working at the Victoria hospital and she had met the Plaintiff who had been admitted for surgery namely Thyroidectomy. She identified her signature and that of Dr. Felix on the consent form D1. She stated that prior to obtaining the signature of the patient she would explain the surgery, whether it would be done under general or local anaesthesia and what they expect from the patient. If the patient agreed to the operation the signature was obtained. At the time of explaining Dr Felix was also present and according to her evidence for this procedure the doctor is always present. She had witnessed the Plaintiff thereafter signing the said document. She

admitted that the doctor had not warned her that she might not speak after the operation and this was more the duty of the ENT surgeon and not Dr. Felix. Thereafter the defence closed its case.

[18] Before one proceeds to further analyse the evidence, it is important to identify and ascertain the law applicable to cases of medical negligence in our jurisprudence. In the case of *Nathalie Vidot v Dr Joel Nwosu Civil Side 12 of 2000* Perera J succinctly set out the law in relation to claims in respect of medical negligence which is set down below and which is based on Article 1382 (2) of the Civil Code of Seychelles. This was followed by Karunakaran J too in the case of *Michel Gabriel v The Government of Seychelles Civil Side 441 of 1999*.

[19] Article 1382 (2) defines fault as follows;

“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”

Standard of Care

On the question of the standard of care and the principles governing medical negligence, the principle enunciated by **Tindal CJ** in the case of **Lanphier V. Phipos (1838) 8. C. & P.475** set out in his summing up to the jury was followed;

“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 event 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 skills. 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, Denning LJ 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 service or not”

[20] 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 ***Bolam v. Friern Hospital Management Committee*** (1957) 2. A. E. R 118, 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**”. The 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.***

[21] When one considers the evidence in this case it could be gathered from the evidence of Dr Alexander Bondar that there was an acute necessity for surgery to be performed on the Plaintiff as had she continued with her condition diagnosed as Hyper Thyroidism or Grave’s disease it would have been fatal for her as she was not responding to

conservative medical treatment and medication. In such a situation having obtained her consent as borne out by the signed consent form, the surgeon proceeded with the operation. Dr Alexander's evidence as an expert was never challenged by any other expert's evidence. His evidence indicated that hyper function of the thyroid gland was complicated by a disease called Thyrotoxic Goitre which produced toxic hormones that would kill the patient. He stated the surgeons had to balance the benefit of saving the life and risks of complications arising during surgery.

[22] Witness Dr. Alexander's evidence clearly indicates that in such operations the possibility of there being complications is always present and in this case the complication of the vocal chords being rendered immobile was a recognised text book complication. This fact too was never challenged by the defence. He stated investigations 1 to 2 weeks before surgery revealed there was a hoarseness in the voice of the Plaintiff which indicated that the area had already been compromised. The evidence indicates that there was profuse and abnormally high bleeding during the operation due to the Thyrotoxic Goitre and the presence of extra networks of blood vessels resulting in excess and abnormal bleeding. He said a surgeon would have to cut and ligate as the bleeding has to be somehow stopped and it would be difficult to easily distinguish between nerves, veins and arteries especially when they are deceased. The slight touch to a deceased gland would bring about bleeding. Further the evidence of Dr. Fanny indicates that the Goitre was adhering to the Trachea which further made the surgery more complex in nature. This evidence too was not challenged in cross examination or by calling any other expert witness.

[23] He stated that due to the complications with the disease of the patient the nerves would have not been where they should have and he further explained that if a nerve was within the tumour when the tumour was cut, the nerve would be affected and a person would feel numbness in the region. If this procedure had to be done in a life saving operation his evidence was that the surgeon would have no option but to do so. He stated that always in surgery there could be a complication but in this case it was not as a result of negligence.

[24] Witness further stated that Dr. Felix Rosabal the surgeon who performed the operation was a properly qualified specialist from Cuba and in his opinion Dr. Felix was competent

to handle the case. He specifically stated there was nothing wrong with the surgery technique of Dr. Felix that day and he was not acting negligently. I find most of the evidence of this witness is supported by the evidence of Dr. Fanny. In regard to surgical procedure I would rely more on the evidence of Dr. Alexander Bondar than Dr. Fanny who admits he was not a surgeon in this field. I find the expert evidence of Dr. Alexander Bondar therefore acceptable to court.

[25] Further in a situation where a textbook complication does arise in an operation and there is independent expert evidence (Dr. Alexander Bondar) to show that the surgeon (Dr. Felix Rosabal) had exercised reasonable care and had a reasonable degree of skill and knowledge at the time he was performing the operation and the expert evidence further indicates that the surgeon was exercising the ordinary skill of an ordinary competent surgeon at the time he was performing the operation, the mere fact that the complication itself has caused injury or even permanent injury to the plaintiff does not suffice to prove negligence on the part of the surgeon. The sword of Damocles must not be seen to hang over a surgeon who uses his scalpel as an ordinary competent surgeon would, to perform life saving but high risk operations with envisaged complications.

[26] When one considers the consent form, the form relevant to the operation done by Dr. Felix has been marked as D1. The Plaintiff admits her signature on this form. The surgeon has confirmed the fact that the nature, purpose and effect of the operation has been explained to the Plaintiff and she has acknowledged same and signed the form. It is the evidence of the nurse Joanna that it would be the ENT doctors who would have explained the risks to the patient. Be that as it may in the Australian case of *Golski v Kirk (1987) 72 A.I.R 443* it was held a doctor's single duty of care owed to a patient can give rise to separate causes of action and failure to give appropriate information to a patient before surgery is a different cause of action from an allegation of negligence in performing the surgery. It appears from the form D1 that the appropriate procedures set out in the consent form itself has been followed by Dr. Felix, prior to the operation.

[27] The Plaintiff in this case marked the medical reports from France as items as the Defendant objected to them being produced as the maker of the document was not

available. Be that as it may even if the documents were to be admitted it reflects what is admitted in the report P1 produced by the Plaintiff. Learned counsel for the Defendant though objecting relied on these documents when he took up the position in his submissions that the medical reports from France disclosed surgery from another source for which the defendant could not be held responsible. The medical reports even if admitted would not in the view of this court establish negligence on the part of the Defendant in this case.

[28] For the aforementioned reasons this court holds that the Plaintiff has failed to prove her case on a balance of probabilities. The plaint stands dismissed. However considering the background facts of this action no order is made in respect of costs against the Plaintiff.

Signed, dated and delivered at Ile du Port on 6 December 2013

M Burhan
Judge of the Supreme Court