

VEL v BENJEE

(2012) SLR 194

Frank Ally for the plaintiff
D Esparon for the defendants

Judgment delivered on 25 July 2012 by

KARUNAKARAN J:

The plaintiff in this action claims the total sum of R300,000 from both defendants jointly and severally for loss and damage which the plaintiff suffered as a result of a fault, allegedly committed by the first defendant, a medical doctor, who had been employed as surgeon by the second defendant, the Government of Seychelles, at the Victoria Central Hospital.

The fault alleged emanates from medical negligence on the part of the surgeon in that he failed to properly diagnose and treat the plaintiff with the required standard of professional care, particularly when the surgeon treated and performed surgery on the plaintiff, a Legamentoplasty for an injury the plaintiff had sustained to the anterior cruciate ligament (ACL) of his left knee.

The second defendant is being sued herein on vicarious liability since the first defendant has allegedly committed the fault in the course of his employment with the second defendant. It is the case of the plaintiff that due to the first defendant's fault - rather medical negligence - he lost ligament in his left knee. This resulted in partial and permanent disability to the plaintiff. Consequently, the plaintiff claims that he sustained extensive loss and damage and suffered in all walks of his life. Hence, the plaintiff seeks compensation in the total sum of R300,000 from the defendants for his loss and damage as detailed below:

(i)	Permanent disability and aesthetic loss	R75,000
(ii)	Loss of amenities of life	R75,000
(iii)	For pain, suffering, discomfort, inconvenience and anxiety	R75,000
(iv)	Moral damage	R75,000
	Total	<u>R300,000</u>

The defendant denied liability. It is not in dispute that in August 2002 the medical officers of the second defendant treated the plaintiff for an injury to his left knee. However, it is the case of the defendants that they never committed any fault or any act of medical negligence in treating the plaintiff or in performing the surgery. They did make a correct diagnosis and gave correct medical treatment to the plaintiff in a professional, diligent and efficient manner and gave the necessary and appropriate treatment to the plaintiff.

The plaintiff in this matter is a young man, aged 25. He is presently employed as a generator-operator at Coetivy Island. In 2002, he was 20, young and energetic. He was then working in Mahé. He was a good basketball player. He had also been qualified as a cadet to represent a basketball team at the national level. He had a big dream of becoming a world renowned basketball player. In August 2002, he used to play and practice basketball almost every day. On a particular day in August 2002, while he was playing basketball and jumping to catch the ball, he landed on the floor on a crooked angle. As a result he sustained some internal injury to his left knee. It was swollen and painful. He put some ice on the injured spot and went to the Emergency Department at the Victoria Hospital. A Cuban doctor, who was in charge, took x-rays and told the plaintiff that everything was alright. The doctor also gave him some tablets for relief from pain. The pain, however, did not subside. After a couple of days, the plaintiff went to see Dr Sherwyn, a specialist doctor for sportsmen. This doctor, having seen the plaintiff, told him that there was an interior ligament damage and advised the plaintiff to see the specialist doctor - Dr Benjee - who was a visiting surgeon from Reunion. The plaintiff subsequently saw Dr Benjee, who on the following day performed an operation. The same night the plaintiff had fever, which persisted for 20 days. Puss started coming out of the wound. The plaintiff stayed in hospital for about 6 months. His knee was not getting better after the operation. It got worse. Subsequently, he was sent to Reunion for further treatment. Dr Benjee performed another operation on the same knee and fixed a plastic knee and put two small screws inside the knee. Although the wound is healed and the plaintiff can walk, he cannot completely bend his knee. If he forces it to bend completely it is painful. In cold weather it is painful. Now the plaintiff cannot do all the jobs which he could do before. However, he stated that he could swim and run but not as fast he used to before. According to the plaintiff, he can now do only light duties at his place of work. The Court also observed two linear scars, each about 6 inches long, on the plaintiffs left knee. Also the Court observed the plaintiff could bend his knee 90 degrees backwards.

The plaintiff testified all this happened due to medical negligence on the part of the defendants. In cross-examination, the plaintiff admitted that all his medical expenses were borne by the Government of Seychelles. Further the plaintiff admitted that the doctor, although explained the risks involved in the operation, he preferred the operation to the other alternative of rest for 9 months, since he thought it was a minor operation.

PW2, Mr Alex Jimmy, Sports Officer from National Sports Council testified that he knew the plaintiff as a good basketball player, a very talented and disciplined potential player. He had a bright future as basketball player but because of his present knee condition, he lost his future in the field of sports. PW3, the father of the plaintiff also corroborated the testimony of the plaintiff as to how he sustained the injury, his sufferings, the nature of the treatment given to him for the injury and post- operative complications.

In view of all the above, Mr Ally, counsel for the plaintiff submitted that because of the fault, the medical negligence on the part of the doctors who treated the plaintiff, the latter suffered loss and damage in the sum of R300,000 for which the defendants are

jointly and severally liable in law to make good. Hence, he urged the Court to enter judgment accordingly for the plaintiff.

On the defence side, no evidence was called. However, Mr Esparon, counsel for the defendants submitted that the plaintiff has not adduced positive evidence to prove on a balance of probabilities that the defendants committed any fault or acted negligently in giving medical treatment or performing surgery on the plaintiff. The plaintiff as a lay person cannot give expert opinion as to any medical negligence in the given nature of the case. In the circumstances, Mr Esparon sought dismissal of the case.

I carefully perused the pleadings, the evidence on record and the submissions made by counsel in this matter.

Obviously, in cases of this nature negligence by doctors has to be determined by judges who are not trained in medical science. They rely on experts' opinions and decide on the basis of basic principles of reasonableness and prudence. This brings a lot of subjectivity into the decision and the effort is to reduce it and have certain objective criteria. This may sound simple but is tremendously difficult as the medical profession evolves and experimentation helps in its evolution. Thus, there is a constant tussle between the established procedures and the ever changing innovative methods in the medical field including the surgical side. But, innovation simply for the sake of being different, without any reason, is not acceptable. For instance, in the case on hand, the professional expertise in the innovative field of "Legamentoplasty" is being challenged by the plaintiff on the ground of medical negligence. And, these issues involving medical speciality make it extremely challenging to decide on negligence by doctors. The concept of negligence in the medical profession based on the idea of the 'reasonable man' is somewhat complex. Be that as it may.

Negligence

It is very difficult to define negligence; however, the concept has been accepted in our jurisprudence under fault in terms of article 1382 of the Civil Code. Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affair would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his or her person or property. The definition involves three constituents of negligence:

- (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty;
- (2) Breach of the said duty; and
- (3) Consequential damage.

As rightly submitted by Mr Esparon, cause of action for negligence arises only when damage occurs, for damage is a necessary ingredient of this tort. Thus, the essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

In the case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, it was held that:

In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. Thus, the understanding of negligence hinges on the 'reasonable man'. Let us try to understand who this 'reasonable man' is.

The Reasonable Man

It has been held by the courts that the test of reasonableness is that of the 'ordinary man', also called the 'reasonable man'. In the *Bolam* case, it was discussed that:

In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the Clapham omnibus. He is the ordinary man.

Why the mention of 'Clapham omnibus'? The *Bolam* judgment was pronounced in 1957 and Clapham, at that time, was a nondescript south London suburb. It represented "ordinary" London. Omnibuses were used at that time for the public transport. Thus, "the man on the Clapham omnibus" was a hypothetical person, who was reasonably educated and intelligent but was a non-specialist.

The courts used to judge the conduct of any defendant by comparing it with that of the hypothetical ordinary man. In the case of a professional, he is a person doing or practising something as a full-time occupation or for payment or to make a living, and that person knows the special conventions, forms of politeness, skills etc associated with a certain profession. Professional is contrasted with amateur – a person who does something for pleasure and not for payment.

Negligence by professionals

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons. In light of all the above, in the instant case the evidential burden lies on the plaintiff to establish that the doctors who were treating him at the material time for the injury failed or omitted or neglected in the performance of their duty as a skilled person in the medical profession. Having carefully examined the evidence on record, I find that the plaintiff has not adduced even one iota of evidence to establish any act of medical negligence on the part of the doctors who treated him for the his knee injury or while they performed operations for the said injury. There is no evidence on record to show

any actionable negligence that consists in the neglect of the use of ordinary care or skill towards the plaintiff to whom the defendants owed the duty of observing ordinary care and skill. Besides, there is no evidence to show that by the said neglect the plaintiff has suffered injury to his person. Indeed, there is no medical evidence or any expert opinion at all on the alleged medical negligence. For these reasons, I conclude that the plaintiff has failed to prove his claim on a preponderance of probabilities in this matter. The suit is accordingly dismissed. I make no orders as to costs.