IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , S. Domah (J.A) , M. Twomey (J.A) **]**

Civil Appeal SCA 05/2013

(Appeal from Supreme Court Decision CS 79/2010)

Dorothy Nanon
Dyson Alcindor — Appellants

Versus

The Health Services Agency
Ministry of Health
Government of Seychelles — Respondents

Heard: 10 December 2015
Counsel: Ms Lucy Pool for the Appellants
Mr. Hermanth Kumar for the Respondents
Delivered: 17 December 2015

JUDGMENT

F. MacGregor (PCA)

[1] This is an appeal against the judgment of Judge Dodin, delivered on 6th February, 2013 in a civil claim between the parties.

[2] The background of this matter was that in the early hours of 19th September, 2009, the 1st appellant was in labour. She was taken to the Seychelles Hospital by her co-habitee, the 2nd Appellant. She was admitted to labour. At 0706 hours, she delivered a baby who died moments later.

[3] On 20th September, 2009, the appellants were issued with a birth notification of a 'live female infant'.

[4] The same day, the 1st appellant was discharged from the Hospital. Her discharge summary noted that she had given birth to a baby, who had suffered neonatal death.

[5] On 24th September, 2009, the Hospital issued the bereaved parents with another birth notification for "stillborn female infant".

[6] Appellants were dissatisfied with the turn of events and considered that the servants of the Ministry of Health Services responsible for their care, had been negligent in handling the 1st appellant during her delivery and issuing varied administrative paperwork thereafter. They approached the Supreme Court and alleged negligence on the part of the respondents in handling the 1st appellant. They further claimed damages in lieu of the said negligence. Moral damages for the loss of the baby R 800,000 and special damages of R 4, 215. A total of R 804, 215. The Supreme Court after hearing both parties however dismissed the claim of negligence and consequently the claim for damages failed.

[7] They approached this Court to appeal the whole decision of the Court a quo. Based on the grounds of appeal, the appellants set out their arguments on five points, namely;

i. The action was brought under the Principles of "faute" under Articles 1382 and 1383 of the Civil Code of Seychelles. The learned Judge erred in applying English law and principles to determine the outcome of the case.

ii. The learned Judge was wrong to hold that the Plaintiffs did not call expert evidence to support their claim, that the defendants or any one of them, knowing that no such experts at Victoria Hospital were at the disposal of the Plaintiffs. The learned Judge had previously refused an application for the Defendants to make the 1st Plaintiff's medical file available to the Plaintiffs Counsel.

iii. The learned Judge erred in applying the doctrine of *Res ipsa loquitor* when it was not raised or pleaded by the Plaintiffs. *Res ipsa loquitor* is an English law doctrine which raises a rebuttable presumption of negligence not applicable under the Civil Code of Seychelles.

iv. The learned Judge failed to comprehensively assess all the evidence in the case and as a result due consideration was not given to the relevant factors.

v. The learned Judge erred in relying on an obscure publication from the US Library of Medicine and Kim Colangelo which are not authorities to support his finding in the case.

[8] Ground i and iii were argued together. Points a-k in ground 4 were withdrawn, and so was ground 5.

[9] We shall consider the first ground of appeal, which effectively covers all the other grounds of appeal. It reads;

> *The action was brought under the principle of "faute" under Articles 1382 and 1383 of the Civil Code of Seychelles. The learned Judge erred in applying English law and principles to determine the outcome of the case.*
>
> The relevant Articles here state that;
> *Article 1382*
>
> *1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
> *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 an omission.*
> *3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.*

4. *A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.*
5. *Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.*

Article 1383

1. *Every person is liable for the damage it has caused not merely by his act, but also by his negligent or imprudence.*
2. *The driver of a motor vehicle which, by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall accordingly be liable unless he can prove that the damage was solely due to the negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God.*
3. *The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English law.*

[10] The events unfolded as follows.

The 1st appellant was expectant in the early months of 2009. She had a completely uneventful pregnancy, except for a mild iron deficiency, for which appropriate drugs were prescribed. She carried her pregnancy to maturity. In the early hours of 19th September, 2009, the 1st appellant was in labour. She arrived at the Victoria Hospital accompanied by her partner, the 2nd appellant. She was examined by the midwife on duty and was admitted to labour ward at around 4.30 am. After examination, she was considered to be in 'early labour', and it was estimated she could take upto 10 hours before delivery. A CTG machine was placed on her to monitor the status of the foetus.

[11] Her partner, the 2nd appellant, left her to go and catch some sleep.

[12] The 1st appellant called for help shortly after being left in the ward. Further examination was done, and the midwife concluded it was a false alarm. She was left alone once more.

[13] Around 7am, she called for help again, and on examination, the midwife realised that she was ready to deliver. She was assisted to deliver. At 0706hrs, she delivered what the midwife explained to the court as a 'flat baby'. The baby was taken away immediately for urgent attention.

[14] Efforts were made by the midwife, and two doctors, a paediatrician and an anesthetist to resuscitate the baby in vain. The baby was declared dead at 7.30am, of that day.

[15] On the 20th September, the 1st appellant was discharged from hospital, and a discharge summary issued to that effect.

[16] We shall separate and consider the different scenarios here. The 1st appellant as a patient in labour, the baby being offered medical attention and the hospital giving two different notifications, one for live birth and one for "stillbirth". We shall consider each scenario separately.

The Mother in Labour;

[17] The appellants sued for damages, claiming that as a result of wrongful diagnosis, and /or error of judgment as to the 1st appellant's condition, the defendants failed to provide her with proper standard of care and attention, as a result of which she lost her baby.

[18] The burden of proof in civil cases rests with the plaintiff. Under the Civil Code of Seychelles, he who avers must prove (see Article 1315 thereof). Three elements must be proved, fault, injury or damage and the causal link. This was affirmed in the case of *Emmanuel v Joubert SCA 49/1996, LC 117*

[19] As is evident in the provisions of Article 1382-1383(supra), in a delictual claim by a patient against a doctor, the patient has to show that the doctor did not act as a prudent person in the special circumstances in which the damage was caused. The patient must show that the doctor or the medical practitioner caused damage or harm by either an act, negligence or imprudence.

[20] In cases of skilled professional such as a doctor or a medical practitioner, the reasonable person test should not be used but rather the test is the standard of ordinary skilled person exercising and professing to have that special skill.

[21] In a medical malpractice case based on diagnostic error, the patient must prove that a doctor in the special circumstances, that is, in a similar specialty, under similar

circumstances, would not have misdiagnosed the patient's illness or condition. In a practical sense, this means proving one of two things:

- The doctor did not include the correct diagnosis on the differential diagnosis list, and a reasonably skilful and competent doctor under similar circumstances would have.
- The doctor included the correct diagnosis on the differential diagnosis list, but failed to perform appropriate tests or seek opinions from specialists in order to investigate the viability of the diagnosis.

[22] The test of negligence applied by the Supreme Court of Seychelles in a series of cases in which it has relied on the *Bolam v Friern Hospital Management Committee (1957)1 WLR 582*, is an aberration and must cease. Bolam is an English tort law case. Seychelles' civil law is based on the French law and it is the law of delict that applies in negligence cases, including those of medical negligence. (see Omath v Charles (2008) SLR 269)

[23] The issue that remains to be decided is whether the 1st Appellant's condition was wrongly diagnosed, or not diagnosed at all? There was no doctor attending the 1st Appellant, at the time of, and immediately after delivery. She was dealt with by the midwives on duty.

[24] The mid-wife explained that when the 1st appellant was admitted at the labour room, a CTG machine was placed on her, to check the heartbeat of the foetus, and measure contraction. The monitoring of the heart beat rate would establish the condition of the foetus and assist the attending personnel to make the correct decision regarding the delivery method to be employed. Was the heart rate of the baby normal at that point? We shall assume it was because if it wasn't, then action would have been taken at that point. If it was, at what point did the heart rate of the unborn baby start to decline?

[25] The CTG must be continuously applied before and during delivery because it is the most critical period when the labour contractions are at their highest intensity. The mid-wife explained to the court that when the baby was delivered, her heartbeat was below hundred. What determined the rate of heart beat at the time of birth? Was it the machine or the mid wife's personal faculties?

[26] While we have not had the advantage of separate medical explanation, we believe that the fact that the 1st appellant had two previous deliveries gave her some experience on delivery. The fact that she continued to complain after the first examination, in our view would suggest that she considered her situation to be dire. Was she ignored?

[27] When she was finally examined, she was fully dilated and ready to deliver. Within 6 minutes, she delivered. The question we are left to baffle with is, was it that she delivered very fast, or she was assisted to deliver too late? Was there negligence on the part of the mid-wife, and her team in realizing the situation of the 1st appellant was evolving fast?

[28] Expert opinions are often a crucial feature of a patient's case. A qualified expert is usually required at trial. We would have benefitted from an independent expert view point but the

plaintiffs did not bring in any. Nor did we have the opportunity to view the medical notes of the 1st appellant.

[29] From the evidence available, we should conclude that had the CTG machine been observed keenly, it would have been possible to notice any drastic change in the heartbeat of the foetus.

[30] It is not difficult to see that had the midwife paid more attention to the complaining 1st Appellant, she would have given her more assistance in her delivery, better than the 6 minutes that were afforded to her.

[31] We find the evidence of Dr Rizvi unconvincing, insensitive and reckless. His answer to the last question on cross examination summed his attitude towards the case before the court. *"..this happens everywhere and it is going to happen again and I am guaranteeing you that.."* We are not sure a patient facing failed delivery should be made to understand that she fits in the statistics of stillbirths, or whether she should be made to understand that, it was a regrettable misfortune, that the Doctor-in-charge will endeavour to ensure it

doesn't happen again. A prospective parent in the court room would be scared by that chilling warning that stillbirths are guaranteed to happen again at the Victoria hospital.

[32] It is not contested that the defendant's employees had a duty of care to accord the 1st plaintiff and obstetric and paediatric care with the reasonable skill and diligence prevailing in the medical profession in order to ensure the safe delivery of the baby.

[33] The Learned Judge in the court below (at para 26) considered that the defendants had maintained that the plaintiff had shown no sign that there was anything wrong with her pregnancy, or that she suffered any condition that could require special care. We consider it a wrong conclusion. The hospital did not show the CTG machine was monitored throughout the delivery. The point of the pregnancy that was at issue was delivery stage, and there was no specialist gynaecologist on call that night for emergencies. To conclude that there was no need for specialized attention would be to excuse the hospital for not having had specialized personnel on call and not monitoring the patient keenly.

[34] The evidence on the examination of the placenta was that of the midwives. No medical doctor examined the Placenta, and no credible efforts were made to find out from the appellants the probable reasons for the observations on the said placenta. We should consider that the observations made, and maybe adopted by the hospital, to be self-serving, self-comforting and some kind of belated excuse as to the emerging reality that the 1st appellant had lost her baby. We leave it to the conscience of the concerned personnel, more particular the mid-wives and the then Consultant in Charge of the Department of Obstetrics and Gynaecology at the Seychelles Hospital, Dr Zia Rizvi.

[35] Be that as it may, the question shall be, whether the appellants proved negligence on a balance of probability.

[36] This is no doubt a sad case. The appellants who appear to be ordinary people gave evidence which had to be contrasted by that of trained, experienced and sophisticated

medical personnel of the Respondents. The appellants offered no expert evidence to counter the evidence of the respondents. The Court must guard not to be the 'expert'. It must remain impartial and decide the case without any influence of emotion. We borrow the words of Marais JA *in* the matter of **Broude v McIntosh and Others 1998 (3) SA 60 SCA** that –

> *"When a patient has suffered greatly because of something that has occurred during an operation a court must guard against its understandable sympathy for the blameless patient tempting it to infer negligence more readily than the evidence objectively justifies, and more readily than it would have done in a case not involving personal injury. Any such approach to the matter would be subversive of the undoubted incidence of the onus of proof of negligence in our law in an action such as this."*

[37] There is no direct evidence that the respondents or its servants were negligent in diagnosing the condition of the 1st appellant, and that such negligence caused her to give still birth. The appellants relied on their own understanding of the situation as it unfolded and traditional experience of birth especially that of the mother of the 2nd appellant. Certainly, that was not enough. The Court cannot make a conclusion of negligence based on traditional knowledge of child birth, as contrasted by modern medical care offered at the hospital, whether the story is concocted or not.

[38] We must conclude that on a balance of probability, the appellants were unable to prove the faute of the respondents in treating the 1st appellant.

The Child being resuscitated

[39] Immediately the baby was born, the mid wife ran off with her to give emergency medical attention. An Anaesthetist and a Paediatrician on call were summoned in urgency to join in. Their efforts with varying methods to save the life of the baby failed, and the baby was declared dead at 0730hours, of that day. The Discharge indicated the possibility of undiagnosed *Abruptic placentae* and made a conclusion of *neonatal death*. A **neonatal**

death is **defined** as a **death** during the first 28 days of life (0-27 days).

[40] A post-mortem was conducted on the 23rd September, 2009. Post mortem results showed death was caused by Acute Respiratory Distress Syndrome, a life-threatening lung condition that prevents enough oxygen from getting to the lungs and into the blood.

[41] It noted the age of the body to be "stillborn". **Stillbirth** refers to the death of a baby after 24 weeks of pregnancy but before **birth**. The medical profession describes **stillbirth** as either 'intra-uterine' or 'intra-partum'.

> An **intra-uterine** stillbirth means that the baby has died in the womb.
> **Intra-partum** stillbirth means death occurring during labour or delivery.

[42] The appellants alleged that as a result of wrongful diagnosis/error of judgment as to the 1st appellant's condition, the respondents failed to provide her with the proper standard of care and attention as is expected.

[43] We have already looked at the negligence or lack of evidence in relation to it in the paragraphs preceding. The paediatrician on call was not a specialized paediatrician. It is up to the hospital and by extension, the Ministry of Health Services, to decide who it appoints to what positions and what educational qualifications and practical experience they would need to possess. Both doctors as well as the midwives who were called to give evidence for the defence offered detailed accounts on how their efforts did not bear fruit.

[44] In the absence of contradictory measures that should have been taken, and which measures would have resulted in different results, we have no way of contradicting their efforts. Negligence in attending to the new born baby has not been proved.

The records

[45] At birth, the midwife noted that the baby was born alive. The heartbeat was far below the normal, but still it was noted. Efforts to improve the situation of the baby were not successful and therefore the baby was pronounced dead, 24 minutes after birth.

[46] On 20th September, 2009, the Midwife issued a birth notification of a 'live female infant'. Later on the same day, the 1st appellant was discharged from the Hospital. Her discharge summary noted that she had given birth to a baby, who had suffered neonatal death. Using the Birth notification, the appellants approached the Civil Status officer on 21st September, 2009 and recorded the birth of a child, and obtained a Birth Certificate to that effect.

[47] A postmortem was performed on the baby on 23rd September, 2009 and a report on the same was issued the same day. The report considered the body to have been stillborn. With that, the Hospital issued a Birth Notification on 24th September, 2009 of 'stillborn female infant'. A Burial Permit as well as a Death Certificate were then issued on 25th September, 2009.

[48] Did the documents cause confusion? Did they amount to fault? Did they cause distress?

[49] Both the parents of the baby were aware that they had lost the baby by 10am on 19th September, 2009. All records following that state of affairs could not change the fact. However, in a very sensitive and painful time for the appellants, who had just suffered the distress of losing their baby, we find the issue of the varied notifications, as exhibited in the pleadings and the evidence produced in court to have been negligent on the part of the respondents. This justifies award of moral damages for distress they went through, particularly the bewildering declarations of "live birth" and "still birth" referring to the same time and date of birth.

[50] We accordingly award SR75,000 damages to the 1st appellant and SR25,000 to the 2nd appellant with costs to the appellants.

F. MacGregor (PCA)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015