

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS 17/2015**

**[2016] SCSC 941**

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Francois Octobre

Plaintiff

versus

The Government of Seychelles

Defendant

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Heard: 19<sup>th</sup> May 2004, 16<sup>th</sup> June 2016

Counsel: Mr. Anthony Derjacques for the plaintiff

Mr. David Esparon for the defendant

Delivered: 25<sup>th</sup> November 2016

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**JUDGMENT**

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**M. TWOMEY, CJ**

[1] I would like to begin by tendering an unreserved apology to the Plaintiff who has waited nearly fifteen years for the resolution of this matter. That a litigant has to wait that long for a simple claim in the courts of Seychelles is a woeful indictment of the justice system we strive to serve. Let this case be the last one of its kind.

[2] This matter was heard by Karunakaran J and on his unavailability to deliver a decision, the parties unanimously elected for the transcript of evidence to be adopted by this court and for a decision to be delivered. Mrs. Lepathy, Deputy Registrar, formally produced the transcript of proceedings in this case.

- [3] I now turn to the facts of this case. In May of 1999, while working as a soldier with the Seychelles Defence Forces (SPDF), the Plaintiff fell and injured his right knee.
- [4] After the injury the Plaintiff went to ‘the clinic’, the name of which is not in the transcript of proceedings but in creole parlance refers to Victoria Clinic, where – by his own testimony and the testimony of Dr. Chetty – he was treated with pain killers and analgesic.
- [5] In August of 1999, the Plaintiff obtained arthroscopy surgery to investigate the continued discomfort in his knee. This procedure is also referred to as key-hole surgery. After this examination the Plaintiff continued to experience difficulty in his right knee. He came into the clinic for a check-up in November of 1999. Dr. Chetty testified that this check-up determined that while there was full range of motion in the Plaintiff’s knee he was suffering from ligament damage. This resulted in instability in the ankle joint and possible nerve damage. The Plaintiff was referred for physiotherapy.
- [6] In May of 2000 the Plaintiff underwent open surgery in order to rectify the issues with the ligament in his knee which had caused him to walk with crutches. When the surgery began, the doctors found that there was a torn ligament present. This injury existed prior to the surgery. They sutured the ligament and completed the operation. However, they did not work on his nerve damage in his ankle because, as described by Dr. Chetty, “the nerve injury w[ould] recover” over time. I note that this is perhaps conjecture as Dr. Chetty was at pains to state that notes were missing or illegible and this fact was not contained in the notes available.
- [7] The Plaintiff was discharged on 2 June, 2000 in good condition and was given a knee brace. By July he was re-examined and the doctors found that there was a positive test for ligament damage. Later, in September, the medical notes show that his knee’s flexion was only at 90 degrees and he no longer had a full range of movement.
- [8] The discomfort continued for the Plaintiff and despite being referred for physiotherapy, Dr. Chetty testified that during a routine administration of a steroid injection to assist with rehabilitation, the Plaintiff’s knee was stable but his quadriceps were weak,

indicating in his opinion that he had not been going to his physical therapy appointments. Again there is no medical notes of this fact. The Plaintiff however stated that he went to English River Clinic for physiotherapy. His right leg according to Dr. Chetty was now effectively paralysed.

[9] The notes as I have stated are paltry, incomplete and lack detail. They give no indication whether the paralysis to the Plaintiff's leg was a result of a damaged nerve. The following is an excerpt of Dr. Chetty's evidence as he explains the notes in the file of the Plaintiff:

*“Q (from the Court): But did they do the nerve problem. Was there any treatment or surgery for nerves?”*

*A: ...a nerve injury takes much longer than expected...*

*Q: But did you treat for nerve injury?*

*A: There was nothing documented...*

*Q (from Mr. Derjacques) I want to see if there are any notes on the nerve in the file. Look if you can find anything there.*

*A: No. because I cannot read this ...The notes are missing, no there is nothing.”*

[10] In regards to his injuries, the Plaintiff has made the following complaints against the Defendant's servants, employees or agents:

1. Incompetent or inefficient medical treatment
2. Incompetent or inefficient surgery
3. Incompetent or inefficient post operation treatment
4. Wrong diagnosis
5. Error in medication or treatment afforded.

[11] He has averred that this amounted to a *faute* on their part resulting in the deterioration and injury to his knee for which he claims the sum of SR1, 400,000.

[12] In Seychelles, delictual liability is governed by Article 1382 of the Civil Code of Seychelles which is verbatim the equivalent article of the French Civil Code. It provides in relevant part:

*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...*

[13] In terms of vicarious liability Article 1384 states in relevant part:

*1. A person is liable 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.*

...

*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. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.*

[14] In *Emmanuel v. Joubert*, [1996] SCCA 49, 5, Ayoola JA stated:

*The three elements which therefore make a claim arise in respect of a delictual act are fault, injury or damage and the causal link. The claim arises at the earliest time when these three co-exist and it is from that time that it is open to the aggrieved person to bring an action to enforce the claim that has thus arisen...A claim in respect of an act or omission arises when facts on which liability can be founded exists.*

[15] In respect to medical liability, it is Article 1382 (2) of the Code that has the most relevance. Since Seychellois civil law is based on French law, it is the law of delict that

applies in negligence cases, including those of medical negligence (see *Omath v Charles* (2008) SLR 269). Cases such as *Laurette v The Government of Seychelles* [2016] SCSC 560 are therefore decided per incuriam. As reiterated in *Nanon & Anor v Ministry of Health Services & Ors* [2015] SCCA 47, the use of English medical negligence cases such as *Bolam v Friern Hospital Management Committee* (1957)<sup>1</sup> WLR 582 by the courts to found medical liability cases are an aberration and must be disregarded.

[16] The test for medical liability in a delictual claim by a patient against a doctor in Seychelles, is the demonstration by evidence 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” (See *Nanon supra*).

[17] Essentially, in regards to cases involving medical liability, the reasonable person standard (adopted from *Bolam supra*) is the wrong test. Instead, this court will look to -

*“...the standard of ordinary skilled persons exercising and professing to have that skill. ... In a practical sense, this means proving one of two things:*

*(1) the doctor did not include the correct diagnosis on the differential diagnosis list, and a reasonably skilled and competent doctor under similar circumstances would have; or*

*(2) 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.” [Nanon Para 19-21]*

[18] In order to satisfy this test, the courts in Seychelles have determined that it is necessary for the plaintiff to utilise expert witnesses to adduce evidence of these medical accidents since the plaintiff will be otherwise unqualified to testify on his own behalf as to the actions of medical professionals.

[19] In the present suit, grave difficulties were encountered even in getting the hospital to release the Plaintiff’s file or to have a medical officer from the hospital testify in order to explain the medical notes kept on the Plaintiff.

[20] The Plaintiff's difficulties in this regard are not unique. Seychelles is a small jurisdiction with only one secondary care facility, Seychelles Hospital. Patients often do not have a choice to be treated in a different hospital or a private clinic. Moreover, consultants are not easily found for expert evidence in court cases. It is also a small community and foreign healthcare professionals are closely regulated by the Ministry of Health and this contributes to their reticence to testify against that ministry.

[21] In *Desaubin v United Concrete Products (Seychelles) Ltd* (1977) S.L.R. 164, Sauzier J stated that Article 1382 of the Civil Code of Seychelles does not contain an exhaustive definition of fault. I am of the opinion that it has become necessary to clearly state the definition of fault in relation to medical practitioner's law and cases of medical liability.

[22] In situations where the treatment of a patient is concerned, the authority of the *arrêt Bianchi* (Conseil D'Etat Assemblée 9 avril 1993) is in this regard extremely helpful and one that I would find especially applicable to Seychelles given the heavy burden of proof on the patient to show the occurrence of a medical accident. In *Bianchi* the Conseil d'Etat found that:

*When a medical act, necessary for the diagnosis or for the treatment of the patient, presents a risk, the existence of which is known but the occurrence of which is exceptional, and there is no evidence to suggest that the patient is particularly exposed to such risk, the public hospital services are deemed responsible if the execution of the act is the direct cause of harm unrelated to the initial state of the patient as with the foreseeable evolution of that state, presenting characteristics of extreme gravity (translation into English the Court's).*

[23] *Bianchi* was confirmed by the decision of the *Hôpital Joseph Imbert d'Arles*. (Conseil d'Etat du 3 novembre 1997). The Cour de Cassation in the *Arrêt Bonicci du 21 mai 1996* went a step further when it decided that a clinic:

*“est présumée responsable d'une infection (nosocomiale) contractée dans une salle d'opération (...) à moins de prouver l'absence de faute de sa part.”*

Thus, the French Cour de Cassation was willing to exact a heavy burden on medical practitioners and institutions in cases of hospital acquired infections and impose a regime of strict liability in such cases.

[24] In respect of Seychelles and the tortious regime applicable in medical accidents, it could be said that a simple reading of Article 1382 charges doctors and hospitals with solely an *obligation de moyens* (that is, the obligation of deploying the best efforts and skills to attain an objective without guaranteeing it) burdening the Plaintiff with the duty to prove negligence, imprudence, inattention or lack of care on the part of the legal practitioner which resulted into the injury. This remains the basic principle in the law of medical liability in Seychelles.

[25] However, given the special circumstances of Seychelles as outlined above, that is, a small community with few consultants and no access to alternative secondary medical care within the small jurisdiction, it is proper to read into the provisions of Article 1382 an *obligation de resultat* (the obligation to attain a result) or to be more precise *une obligation de sécurité de resultat* (strict safety liability) in certain circumstances not explored by the French authorities.

[26] A consequence of this strict safety liability is the creation of the right to bodily integrity (see G. Viney, Introduction à la responsabilité, Paris, L.G.D.J., 1995, p.57).

[27] Medical liability in those special circumstances described is established by the patient bringing prima facie evidence of the medical intervention that caused the harm and damage to him. The burden then shifts onto the medical practitioner to explain that the intervention did not result in the harm alleged.

[28] The relationship between the physician and his patient results in an *obligation de sécurité de résultat* (strict safety liability) where the worsening of the patient's condition is not connected to or caused by the existence of any previous condition. Further, the medical practitioner could exonerate himself if he is able to prove that the worsening of a condition or its recurrence could occur through normal wear and tear.

- [29] I emphasise that the reverse burden of proof is limited to cases where those special circumstances exist. Such special circumstances are clearly evident in the present case.
- [30] The Plaintiff brought evidence showing that he subjected himself to the only surgery facility in Seychelles to have a ligament in his leg repaired and came out with further damage to his ligament and paralysis of his leg. The transcript of proceedings clearly indicate that the Plaintiff's leg was worse after the operation. This fact is confirmed by Doctor Chetty.
- [31] Here was a simple intervention to repair a torn ligament. The result was paralysis of the limb. No such risk had been evident or foreseen. In such circumstances a presumption of fault on the part of the doctor is established. The burden of proof shifts to the Defendant to show that the damage was not as a result of the acts of its employee, servants or agents (see Article 1384 of the Civil Code)
- [32] The challenge to the Plaintiff's evidence seems to relate only to his credibility. Mr. Esparon for the Defendant has submitted that there is a discrepancy in the evidence tendered by the Plaintiff in relation to his injury. I find the relevance of the source of the Plaintiff's injuries to be minor and not particularly relevant. The question in this case relates directly to the Plaintiff's treatment at the hospital and subsequent injuries and is not based in the origins of the initial injury.
- [33] Moving to the particulars raised in the plaint, all five of the Plaintiff's issues can be summarized under the second prong of the *Nanon* test but also under *Bianchi*. Essentially, the Plaintiff is claiming that the treatment given by the doctors, specifically the surgery conducted in May of 2000, was inappropriate and the management of his injury caused more harm than good.
- [34] The following exchange in relation to the examination of the condition of the Plaintiff's knee before and after surgery supports the contention by the Plaintiff:

*Q (by Mr. Hoareau, then Counsel for the Defendant): It seems that the only difference is that before the operation you could bend your knee and now after the operation you cannot bend your knee.*



A: yes.

(Testimony on cross examination 19/5/2004 at 23).

- [35] This testimony shows that the Plaintiff's leg was less mobile and more uncomfortable after the operation than before and this would tend to evidence negligence or that the reduced mobility and paralysis was an outcome of the surgery.
- [36] It is therefore my conclusion that the Plaintiff has satisfied his burden of showing that his condition worsened after the surgical intervention. The onus then shifted to the Defendant to bring explanations of why this occurred. The Defendant was not very forthcoming with its explanations of what took place. Its agents or servants lost some of the Plaintiff's notes. They were unable to account for the reasons the Plaintiff's leg became paralysed after the operation. Their defence seems to be that they had no knowledge of what happened. They failed to come to court on many occasions to produce the Plaintiff's notes until almost fifteen years after he filed his suit (see extract of transcript of proceedings above).
- [37] If they, as medical experts were unable to explain the worsening of the Plaintiff's condition after the surgery, how can we expect the Plaintiff – who did not have access to his case file from the time of his injury until Doctor Chetty testified in June 2016 – to satisfy the Courts? I am not satisfied with any of the excuses that they provided for why the Plaintiff's condition became worse under their care and not better.
- [38] As far as medical practitioners and their relationship with patients are concerned there should be considerable emphasis on the protection of life, bodily integrity and health. They are under a duty to act with these factors in mind. They have failed to acquit themselves of that duty in this case.
- [39] Having established that they are liable for the Plaintiff's injury I now turn to the question of quantum.
- [40] Little evidence was adduced by the Plaintiff in relation to this issue. He was 31 when he had the operation, in the prime of his life. After the operation he could not walk and he

continues to mobilise with difficulty even with the aid of crutches. There is no doubt that his injury was serious and permanent and no doubt affected his quality of life. There was a denial of the damage claimed by the Defendant.

[41] He has claimed a global sum of SR1, 400, 000 which includes damages for injury to his right knee and ankle, permanent disability, moral damage and economic loss. He has waited fifteen years for the payment of damages. He has undoubtedly suffered pain, injury, distress, discomfort, and anxiety. He has sued *in forma pauperis*.

[42] A considerable amount of time has passed since he was injured and it is difficult to make a proper assessment of damages. However, in both *Cable and Wireless v Michel* (1966) SLR 253 and *Fanchette v Attorney-General* (1968) SLR111, the court stated that although it might be difficult to assess damages due, this should not be a bar to making an award.

[43] In respect of delicts, damages are compensatory and not punitive. Hence the Plaintiff should not make a profit but at the same time not suffer any loss (See *Mambe v Pomeroy* (1970) SLR 54, *Bristol v Sodepak* (2005) SLR123, *Jacques v Property Management Corporation* (2011) SLR 7). The aim is to make the Plaintiff whole again from a monetary perspective.

[44] The case of *Rosalie and anor v Duane and anor* (1987) SLR 121 is instructive on the award of moral damages.

[45] In *Ventigadoo v Government of Seychelles* (2007) SLR 242, Karunakaran J conducted an overview of other awards for personal injury cases and reiterated the view held by Perera J in *Larame vs. Coco D'Or (Pty) Ltd* SC 172 /1998 that when the claim is for a loss of an organ or a limb, the substantial award should be made for such loss and that on the other hand, in claims for fractured legs or arms from which a claimant recovers completely, the substantial award should be made for pain and suffering.

[46] I accept the logic in *Larame* but neither alternative applies to the present matter. Here, the plaintiff has a paralysed limb from which there will be no recovery. His pain and suffering continues. It is my view therefore that he should receive substantial damages for

both the physical and moral damage. Awards are arbitrary but should be consistent. In *Seychelles Breweries v Sabadin* SCA 21/2004, the Court of Appeal stated that in determining the quantum of damages, a court needs to have regard to comparable cases.

[47] With all these qualifications in mind, I have looked at recent awards to come to a fair decision on this issue. In *Fanchette v Dream Yachts Charters* CS 153/2008 (decided in 2015) an award of only SR140, 000 was made. In *Tucker and anor v La Digue Lodge* SC 343/2005 SR190, 000 was awarded. In *Bristol v UCPS* SC 225/2005 for a similar injury Renaud J awarded the sum of SR 211,456. In *Farabeau v Casamar Seychelles Ltd* (2012) SLR 170, SR 350, 000 was awarded. The award must be pegged however to the present cost of living.

[48] No evidence was brought in relation to his loss of earnings. I would have been capable of making such an award if evidence of his salary as a soldier at the time of the incident had been made available to me. I would have been able to compute a figure based on his earnings then and the number of years he would have formally have expected to remain working. Unfortunately Counsel failed to make available this evidence and his client has been poorly served. That is a terrible shame. The Court has been consistent in its statement that it cannot make the case for the Plaintiff nor conjure figures from the ether.

[49] In the circumstances and on the limited evidence available I award the Plaintiff the global sum of SR550, 000 made up as follows: SR250, 000 for injury to his knee and ankle, SR100, 000 for permanent disability, SR100, 000 for moral damages and SR100, 000, for the loss of his quality of life.

[50] I also award him legal interests on this award to be calculated from the time he filed his suit in 2002.

[51] Finally, I direct the Registrar to serve a copy of this judgment on the Minister of Health. It is unacceptable that patients who are injured as a result of the acts of the Ministry's employees have to wait for so long to have doctors produce notes and evidence on a patient's treatment. It is also unacceptable that medical practitioners keep either partial or no contemporaneous notes relevant to a patient's treatment. This has to stop. It is hoped

that the emphasis on the patient's right to protection of life, bodily integrity and health might awaken some action on the part of the Ministry. That right is also constitutional and for that reason ought to be vindicated.

Signed, dated and delivered at Ile du Port on 25<sup>th</sup> November 2016.

**M. TWOMEY**  
Chief Justice