

# **Khomba v Trustees of South End Eastern African Union of the Seventh Day Adventist**

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Mkandawire
<b>Cause Number:</b>	Civil Cause Number: 835/1990 ([1994] MLR 172 (HC))
<b>Date of Judgment:</b>	May 27, 1994
<b>Bar:</b>	Kapanda for the Plaintiff Mwafulirwa for the Defendant

## **Head Notes**

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**Law Of Torts** - Negligence - Medical Profession - Standard of care - Professional practice - Not negligent where professional acts in accordance with a proper and accepted practice.

## **Summary**

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The Plaintiff brought the action against the Defendants, claiming damages for personal injuries sustained and for loss and damages allegedly caused by the Defendant's negligence during and after a tooth extraction. The Plaintiff, having a wisdom tooth

growing inwards, underwent an extraction by the Defendant's dentist, Dr Lacom. Following the procedure, the Plaintiff experienced swelling and pain, leading to a locked jaw. He was eventually admitted to the hospital, where he was operated on by a specialist from South Africa. The Plaintiff contended that the Defendant was negligent in their post-extraction treatment and care, arguing that their actions led to his complications. The Defendant denied liability, asserting that the dentist's actions were in line with accepted professional standards.

The Court was called upon to determine whether the Defendant's dentist was negligent in his treatment of the Plaintiff. The Court's decision hinged on the professional standard of care required in medical and dental practice. In dismissing the action with costs, the Court reasoned that a professional is not negligent if their actions are in accordance with a practice accepted as proper by a reasonable body of their peers as it was in the case herein.

## **Legislation Construed**

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(None)

## **Judgment**

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The plaintiff is claiming damages for personal injuries sustained and for loss and damages suffered as a result of the defendants' alleged negligence in extracting, treating and attending to his tooth. The defendants are denying liability.

The plaintiff told the court that he first went to the Seventh Day Adventist Health Centre in 1987. He could not remember the month. He went there again on 19 July 1989 because he had a problem with a wisdom tooth on the left jaw. It was growing inwards and bending towards the tongue. He was attended to by a dentist, who told him that the only remedy was extraction. The tooth was extracted the same day and after the exercise, he was told to go home. When he got home, the left jaw started swelling and he had a sleepless night due to pain. The next morning he decided to go and see a different dentist, to check if a piece of the tooth had remained. He went to see Dr Girach (PW2). He was referred back to the Adventist Health Centre. When he went back to the hospital, he was given some pain killers. The situation did not improve. His jaws were locked and he could not open his mouth. Then he started to see Dr Kidy, who was his regular doctor. He was given some pain killers, as his jaw was very painful. The pain killers did not improve the situation and so Dr Kidy referred him to the hospital that did the extraction.

On 26 July 1989, he went back to the Adventist Health Centre where he was given some tranquillisers, but that did not help. He was having sleepless nights because of the pain. Finally, he was admitted. He was operated on by a specialist by the name of Dr De Hann from South Africa. The situation improved, but the swelling was still there. As days went by the swelling went down but he could not yawn fully. He was discharged seven days later. It was the plaintiff's evidence that the numbness is still there and he cannot use his left jaw for chewing, because it is dead. A week or two after his discharge he received a letter from the hospital advising him to see a physiotherapist, a Mrs Bell. He had three sessions with the physiotherapist.

The next and last witness was Dr Girach. She is a qualified dental surgeon and runs a dental surgery in Development House. She told the court that the plaintiff visited her on 24 July 1989 for pain due to a swelling on the left jaw following a tooth extraction. She did not conduct an oral examination, as he could not open his mouth. So she just gave him some pain killers to reduce the infection. He saw her again two days later. He had not improved, so she gave him a double dose of antibiotics. Finally, she referred him back to the hospital, because she thought he needed hospital treatment. The doctor told the court that infection may be due to several causes. The main reason could be due to the patient's resistance.

In cross-examination she said the patient could not open his mouth because the jaw was stiff. She said infection was caused by the presence of bacteria, and the mouth is full of bacteria. Asked about what she would do after extracting a tooth, she said she would put a gauze or swab on the socket. If it was a difficult extraction, she would give the patient some antibiotics. She would recommend that the swab be removed if there was bleeding and another one put on. She would also advise the patient to gargle warm salt water. Those, she said, were the procedures for a difficult extraction, and if a doctor did all that, she would not consider him negligent. She said infection is caused by germs and germs cannot be prevented, as the mouth is full of bacteria. Finally, she told the court that in tooth extraction, the dentist depends much on body resistance.

Dr Gary Douglas Lacom is the dentist who extracted the plaintiff's tooth. He qualified in the United States of America in 1978 and he came to Blantyre in 1987. He was in private practice in Oregon, USA, before joining the Adventist Health Centre in October 1987. He first treated the plaintiff on 15 March 1988. He had tooth extraction

elsewhere and he went to the hospital with the problem of a dry socket.

That extraction was not healing properly and so he treated him. The plaintiff went to hospital again on 11 March 1988 with some wisdom teeth which gave him problems. Two were extracted on that day. There remained two more teeth to be extracted and the doctor advised him to go back to the hospital. It was expected that he would go back within a few weeks. But he went back on 19 July 1989, when a problem developed. That means he went back to the hospital after some 16 months. The doctor then proceeded to extract a wisdom tooth on the left jaw. He told the court that it was a successful extraction. He put a cotton pad on the socket for one hour to control bleeding. The cotton pad is sometimes referred to as a gauze or sponge. He applied tetracycline on the socket. He then advised the patient not to smoke and to gargle warm salt water. He also advised him not to spit. He gave him some antibiotics. He told the patient to go back to the hospital after one week. The plaintiff did go back with a dry socket. Later he was admitted for an abscess in the mouth. One cause of this could be bacteria which was always present in the mouth. The plaintiff was given oral medication with more antibiotics. The admission form was tendered as Exh D1. It was the doctor's evidence that everything was done properly. Antibiotics were given to control infection. The doctor's notes were tendered as Exh D2. A detailed summary was put in as Exh D3 and the nursing progress notes as Exh D4. The court was told that if a tooth was compacted, then extraction became difficult. Had the plaintiff gone back to the hospital earlier as recommended, there should have been no compaction.

In cross-examination, the doctor said he did not know who prepared the summary, Exh D3, and he did not know when it was prepared. The summary is flowery and it is clear that it was prepared specifically for these proceedings. I disregard it.

Paragraph 7 of the amended statement of claim gives details of the alleged negligence. This paragraph has six sub-paragraphs and none of them attacks the manner in which the extraction itself was done. Indeed, it is the treatment after extraction that is being attacked. Sub-paragraph (a) reads:

“failed to diagnose or suspect that the plaintiff was developing a swelling on the place from which the tooth had been extracted and failed to give or procure any treatment for the same or any investigation which would have discovered the same.”

The extraction itself is not being faulted and there is evidence to show that this was successful. After the extraction, what did Dr Lacom do? He put a cotton pad on the socket. This was to control bleeding. He applied tetracycline antibiotic in the socket to control infection. The doctor gave the plaintiff some instructions on how to take care of it. The plaintiff was told not to smoke, to gurgle warm salt water. He was also advised against spitting. The plaintiff was told to go back to the hospital after one week. The doctor was dealing with a compacted tooth which made extraction difficult. The compaction itself was entirely the fault of the plaintiff.

Some 16 months earlier he had been advised to go for extraction. He did not follow that expert advice. He only went back to the hospital when a complication developed. It was the doctor’s evidence that had the plaintiff reported for extraction in good time as advised, there might have been less complications. Despite the application of antibiotics, the plaintiff developed an abscess in the mouth. The infection was caused by bacteria which is always present in the mouth.

Now, in doing what he did, was Dr Lacom negligent? The test is that of an ordinary medical man; in this particular case, an ordinary reasonable dentist. On the evidence before me, can it be said that what Dr Lacom did was not in accordance with the standards of a reasonably competent dentist? It is recognised that in dealing with a medical or dental problem, there may be one or more perfectly proper standards and if a doctor conformed with one of those proper standards, then he would not be negligent. In the case of *Bolan v Friern Hospital Management Committee* [1957] 1 WLR 582 Mc Nair J, at page 587, put the standard of medical men in the following way:

“I myself would prefer to put it this way, that he is not guilty of negligence if he had acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular act.”

The plaintiff called Dr Girach. She is a dental surgeon and she runs her own dental surgery. In cross-examination, she said that after an extraction, she would put a gauze or swab, which is the same thing as a cotton pad. She would apply antibiotics if it was a difficult extraction. She would then advise the patient to gargle warm salt water. The procedure she outlined is exactly what Dr Lacom followed. Perhaps Dr Lacom went even further, in that he advised the plaintiff not to smoke and not to spit. It is clear, therefore, that the procedure Dr Lacom followed is in conformity with the proper practice in dental surgery. Dr Girach went on to say that it is not easy to prevent infection, in that the mouth is full of bacteria. The dentist then has to rely much on the patient's body resistance. On the evidence before me, I fail to see how Dr Lacom can be said to have been negligent.

The plaintiff attended the hospital as an out-patient on 21, 24, 25 and 27 July. On most of those dates he was attended to by other dentists. The fact that he was not attended

to by Dr Lacom is no evidence of negligence on the doctor or the hospital. The doctor's notes show that the site was irrigated, washed and packed with tetracycline and gauze was irrigated, washed and packed with tetracycline and gauze was replaced. The plaintiff was given antibiotics and pain killers. There is no evidence to show that on any of those dates the hospital staff was negligent.

He was admitted on 28 July 1989. The nursing progress notes have not been challenged and there is no evidence to suggest that as an in-patient, he did not have adequate attention. On the evidence before me, there is nothing to suggest that any of the hospital staff was negligent.

In the result, I find that the plaintiff has not succeeded in proving negligence against the defendant. The action is, therefore, dismissed, with costs.