Mrs L. Mtileni v Registered Trustees of Blantyre Adventist Hospital

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Potani
Cause Number:	Civil Cause Number: 1831/2001 ([2006] MLR 309 (HC))
Date of Judgment:	April 25, 2006
Bar:	Plaintiff unrepresented Mr Nkhono for the Defendants

This is a case of alleged medical negligence. The plaintiff, Grace Mtileni, brought this action against the defendants, the Registered Trustees of Blantyre Adventist Hospital, on behalf of the estate of her deceased child and on her own behalf. The plaintiff claims damages for loss of expectation of life with regard to the death of her child and damages for pain and suffering and loss of amenities and conjugal rights in relation to personal injuries she suffered allegedly due to the negligence of defendants' servants.

The brief undisputed background to the plaintiff's action is that in the year 2000, the plaintiff was in her family way. When she was due for delivery, she went to the defendants' hospital for the usual assistance and that was on 13 August. On the very same day, she was blessed with a baby girl. On recommendation by the attending doctor, it became necessary to administer some glucose on the newly born baby girl. This recommendation was made on 14 August. It so happened on some occasion that a nurse on duty erroneously administered saline (salt) solution instead. It was on 17 August, when it was discovered by the attending doctor that a wrong substance had been administered and that was only after the plaintiff had asked that the drip used to administer the substance be shifted from the right arm to the left arm upon noticing that the right arm was getting swollen on the spot the drip was placed. On the next day, the child died and the plaintiff was discharged from the hospital. However, not long after being discharged, the plaintiff noticed something amiss in a form of some unpleasant smelling discharge from her reproductive organs prompting her to go to the defendant's hospital for examination which revealed that she had a condition known as puerperal sepsis. It is the plaintiff's assertion both in her statement of claim and evidence that the death of her child was due to the negligence of the hospital staff by wrongly administering saline solution instead of glucose and that her infection was also due to negligence in that the defendants' servants failed to give her proper or adequate post natal care in particular failing to perform some D and C procedure after forced delivery hence the present action.

In her evidence, the plaintiff also gave a long narration of what she called abusive and uncooperative treatment the nurses at the defendants' hospital displayed towards her from the time she went to the hospital for delivery up to the death of her baby prompting her to lodge a written complaint to the hospital

authorities who responded with an apology. She also gave an account of the physical and psychological pain the puerperal sepsis infection has brought on her life as a result of which she has had to seek frequent medical attention which in some cases necessitated her to be operated on and that she could not have sexual intercourse with her husband resulting in a separation.

The Court has had the benefit of being presented with written submissions by the parties. Perhaps at this juncture it should be recalled that the plaintiff was legally represented only up to the time she gave her testimony, otherwise she conducted the rest of the case on her own. However, she was able to come up with well prepared written submissions. The issues that stand out for determination in the parties pleadings, evidence and submissions are firstly whether the defendants are liable in negligence for the death of the plaintiff's child/baby and secondly whether the defendants are liable in negligence for the infection the plaintiff suffered.

It would serve a useful point of departure to bear in mind the prerequisites to be satisfied before liability in negligence can be attached to a defendant. The authorities on the subject starting from the well known case of Donoghue v Stevenson (1932) AC 652 cited by counsel for the defendants reiterated three major components of the tort of negligence. Firstly, there must be a duty of care owed to the plaintiff by the defendant. Secondly, there must be breach of that duty by the defendant. Thirdly, the plaintiff must have suffered damage as a result of the defendants' breach of duty. Attendant to the element of duty of care is the issue of the standard of care. As a general rule, the standard of care is measured on the threshold of that expected of a reasonable man and Blyth v

Birmingham Waterworks Company (1856) 11 Ex Ch 781 cited by the plaintiff is a case in point. However, in cases of specialised skills, that is, where a person holds out himself or herself to possess special skill or knowledge, the law imposes a duty of care commensurate with such a skill or knowledge. Thus the duty of care a doctor and indeed a nurse owes to a patient is of a standard which must accord with the skill they profess to possess.

The first issue that is to be considered is on the alleged negligence by the defendants resulting in the death of the plaintiff's child. There can be no doubt whatsoever that the defendants owed a duty of care to the deceased child. The evidence shows that the deceased child was under the care of Associate Professor Micheal Mvundula, a specialist paediatrician. There were nurses who would also attend to the child but under the general superintendence of professor Mvundula. In the case of Kalea v the Attorney General, 1993 16(1) MLR 152 Mkandawire, J. rightly held that a specialist, as in this case, has a higher duty of care than an ordinary or general practitioner. The learned Judge went on to allude to Bever on Negligence, 4th Edition paragraph 1355 which sets out the standard of care as follows–

The duty of a specialist is referable to a higher test than that of an ordinary practitioner. Special profession involves higher duty and the standard to be attained is that of the Specialist amongst medical men and not that of the General Practitioner and includes proper instructions to nurses and to the patient for their conduct in intervals of the doctor's attendance.

In the case at hand, the alleged breach of duty is the administering of saline solution on the deceased child instead of glucose. The evidence shows that Professor Mvundula had prescribed the provision of glucose to the child on account of her prematurity. The evidence also shows that it was not at all necessary to administer saline solution on the child. However, as it turned out, the nurse on duty at one of the occasions wrongly administered saline solution on the child. Since saline solution was not part of the treatment the child required, it would follow that it was an error to administer it and in the view of the court it was such an error a reasonably skilled and careful practitioner would not have succumbed to. The court would therefore hold that the required proof of negligence counsel for the defendant in his submission cited from Clark and Lindsell on Torts, 16th Ed, Sweet and Maxwell, London 1989 page 638 has been satisfied. Indeed the learned authors also recognised that the plaintiff may in certain circumstances rely on the doctrine or maxim of res ipsa loquitor, that is, an inference of negligence may arise when an accident or error occurs which in the ordinary course of things does not happen if the medical practitioner exercises reasonable care and skill. The case before the court is one in which a substance was administered which in the ordinary course of events should not have been administered if there was reasonable care and skill expected of medical practitioners. The doctrine of res ipsa loquitor would therefore aptly apply in this case more so as there is no explanation or evidence from the defendants as to how the error occurred. Indeed as rightly observed by the plaintiff in her submission, the defendants conveniently and without explanation chose not to parade the culprit nurse as a witness. What the evidence reveals is that either due to gross incompetence on the part of the culprit nurse or lack of proper instructions and supervision by Professor Mvundula, the culprit nurse committed the error. As rightly observed by the plaintiff in her submission, due to the vulnerability of the deceased child, there was need for Professor Mvundula to

exercise close and meticulous supervision on the child. In short therefore the court finds that the defendants were in breach of the duty of care owed to the deceased.

The critical question, however, still remains and that is whether or not the death of the plaintiff's child came about due to the breach of duty by the defendants, that is, the negligent administering of saline solution instead of glucose. Counsel for the defendants on this aspect raised the very important question of burden of proof. He cautioned that the approach suggested in Mc Ghee v National Coal Board (1973) 1 WLR that once breach of duty has been established, the burden of proof on the cause of the injury (causation) shifts to the defendant is erroneous and cited the House of Lords' decision in Wilsher v Essex AHA (1988) 1 All ER 871 as clearly overruling or disapproving such an approach and emphasising that the burden of proving causation rests on the plaintiff. To underscore the point, counsel submitted that it is not open to the court to make an inference of causation from breach of duty. There must be actual proof of causation. The court would largely agree with counsel that the burden of proving causation rests on the plaintiff since the general rule is that who asserts must prove.

However, it is not entirely correct to say that there can be no proof of causation through inference. Depending on the facts of the case, there could be instances in which inference of causation can perfectly be made on proof of breach of duty. Such would be the case where the facts are such that there can be no other inference drawn from an established breach of duty other than causation. That is not the position in the case at hand as there are two possible causes of the

child's death, that is, the wrongly administered saline solution, on the one hand, and the extreme prematurity of the child and the attendance inherent low survival level, on the other hand. It would obviously be erroneous in such a case to make an inference of causation and this is supported by the case of Kay v Ayrshire Arran Health Board (1987) 2 All ER 417 referred to by Mr Nkhono for the defendants in his submission.

Thus the duty this court has is really to weigh the two competing causes of the death of the plaintiff's child in the light of the available evidence and decide whether on a balance of probabilities it can be said that the death was caused by the defendants' breach of duty or other causes. It should be observed at this point in time that in her submission, the plaintiff argued that the defendants' evidence through Professor Mvundula that the child did not die due to the administered saline solution but extreme prematurity and an infection called sepsis which arose from the umbilicus should not be allowed to stand since it relates to facts not pleaded in the defence. In support of this proposition, the plaintiff cited several cases the gist of which is that parties should be restricted to adduce evidence only on facts or matters that are pleaded. Among the cases cited are Phillips v Phillips 4 QBD at 133; Zgambo v Kasungu Flue Cured Tobacco Authority 12 MLR 311 at 317 and Likaku v Mponda 11 MLR 411 at 414-415.

According to the plaintiff, she could not have objected to the admissibility of such evidence during the trial as required by the case of Sumana v Hara and Another 16(2) MLR 848 as she was not legally represented and alluded to the holding by Bolt J. in Gunde v Msiska (1961-63) ALR Mal 465. It is correct and the point is conceded by counsel for the defendants that pleadings bind the parties and

define the parameters within which the case is to be confined. The extent to which evidence at trial is to be confined to matters pleaded was well illustrated in the Zgambo case cited by the plaintiff as follows:

“Where the evidence at the trial established facts different from those pleaded...which are not just a variation, notification or development of what been alleged but which constitute a radical departure from the case pleaded, those facts is inadmissible.”

As can be seen from the above dictum, the rule that evidence adduced at trial must be restricted to matters pleaded should not be construed pedantically. Evidence though not direct to the matters pleaded would still be admissible if it is merely a variation, modification or development of what has been pleaded or alleged. It is only in cases where the evidence is a radical or fundamental departure from matters pleaded that it becomes inadmissible. Reverting to the present case, it is to be observed that in paragraphs 3 of the amended defence, the defendants attribute the death of the plaintiff’s child to extreme prematurity and goes on to give the particulars of the prematurity namely that the baby was born at 24 weeks gestation with a weight of only 800 grammes. The evidence of Professor Mvundula which the plaintiff seeks to be excluded essentially goes to develop the assertion on the alleged extreme prematurity by explaining the likely infections or consequences an extremely premature child would suffer and in particular those suffered by the child in this case leading to her death. It is therefore evidence that does not constitute a radical departure from what was pleaded in the defence. The position would have certainly been different if the evidence was on a very different aspect and not infections related to extreme prematurity. There is therefore no legally justifiable basis on which Professor

Mvundula’s evidence on the cause of the death should be struck out.

The plaintiff also vehemently attacked Professor Mvundula’s assertions on the cause of the death for lack of reasons. The plaintiff argued that the evidence being opinions of an expert, he should have given the basis or reasons for his opinions. This contention by the plaintiff is misconceived. Professor Mvundula gave very illuminating evidence. He testified that he has been a Paediatrician for 28 years and his experience in those years has been that the survival chances of children born with a weight of below 1000 grammes is very minimal and that as a matter of fact, in his entire career, only one such child has survived. He explained that such children are prone to sudden deterioration mainly as a result of infection. There is therefore ample evidence from Professor Mvundula on the basis for his opinion that the death was due to extreme prematurity. Indeed, he even went further to give reasons for his opinion discounting the saline solution as the cause of the death stating that such a solution is not harmful to the baby as to cause death. He added that the saline solution was counter-balanced by the milk the child was being breast fed and therefore could not have been a health risk at all. In conclusion, on the evidence before the court, the balance of probabilities tends to show that the death of the plaintiff’s child cannot be attributed to the negligence of the defendants. It was a death that came about due to the inevitable risk to infection extreme premature children are prone to.

Moving on to the claim relating to injuries the plaintiff suffered allegedly due to the defendants negligence, it is centred on the averments that the defendants failed to take any or adequate care or proper attention to the plaintiff’s post natal trauma and also failing to administer D and C procedure after forced

delivery. An examination of the plaintiff's evidence and submissions reveals that the plaintiff's case is essentially one of saying that because of the defendants negligence, she developed puerperal sepsis also known as child birth fever which in turn led to another infection called Pelvic Inflammatory Disease (PID).

It cannot be denied that the defendants owed a duty of care to the plaintiff when she went to the defendant's hospital for delivery. Were the defendants in breach of that duty? The alleged breach of duty is that the defendants failed to administer D and C procedure after forced delivery. The defendants admit in very clear terms that no such procedure was conducted. It was the evidence of Rachel Salinga, one of the nurses who actively attended to the plaintiff, that it was not necessary to administer D and C on the plaintiff since her delivery was normal and the placenta was complete although it had to be held with forceps. She categorically denied to have used any unconventional tools or to have asked the plaintiff's mother to help to deliver the placenta or to clean up the plaintiff. She went on to explain that she could not have asked an untrained person to help in the delivery process and that had she needed any help, she could have asked her colleagues for assistance. It is worth noting at this juncture that the plaintiff's claim on the injury she allegedly suffered due to negligence of the defendants centres on what hap pened during her delivery. As the evidence shows, nothing unusual happened to the plaintiff during the delivery. Perhaps the only unusual thing was that the baby that was born was extremely premature. The Court therefore is at great pains to see any breach of duty on the part of the defendants during and after the plaintiff's delivery. Indeed the Court is also at pains to see any link between the way the plaintiff was handled during and after her delivery and the infections she later developed. It was argued by the plaintiff that the Court should reject the defendants' defence that the plaintiff developed

the infection she attributes to the defendants' negligence before 2000 as the evidence of Dr Conopio which the defendants sought to rely on this aspect was all hearsay. The quick observation to be made on this aspect is that no where in the defence do the defendants raise such a defence. It is not part of the defendants' pleading so much so that in so far as the pleadings stand, the evidence of Dr Conopio is outside the pleadings and therefore of no consequence. In any case, it is not up to the defendants to disapprove causation. The burden lies on the plaintiff to prove breach of duty, in the first place, and then that as a result of such breach of duty the plaintiff suffered injury. As observed earlier, the plaintiff has failed to establish breach of duty and therefore the question of causation does not even begin to arise.

A brief comment has to be made on the letter of apology the defendants wrote to the plaintiff following the death of her child. The plaintiff in her evidence created the impression that the letter was an admission of liability by the defendants. However, the evidence of Mrs Kumlenga, the author of the letter, puts into proper perspective the context in which the letter was written. She explained that since the plaintiff had lodged a written complaint to the hospital, she was obliged to write an apology in order to preserve the good reputation of the hospital.

It is in the light of the foregoing that the plaintiff's action fails in its entirety with costs to the defendants.

For the plaintiff:

Plaintiff, present in person