EDNA NYASALU v ATTORNEY-GENERAL (1983) Z.R. 105 (H.C.)

HIGH COURT
SAKALA, J.
3RD NOVEMBER, 1983
(1977/HP/700)

Flynote
Tort - Duty of care - Doctor - Patient owed to.
Tort - Negligence - Professional negligence- Proof thereof.

Headnote
The plaintiff claimed damages for injuries sustained as a patient at U.T.H. while under the care and attention of a qualified medical doctor. The claim arose out of the doctor's failure to administer test or enquire orally as to whether the patient was allergic to Procaine Penicillin It was contended that the doctor had been negligent in not performing this standard procedure and thus was in breach of the duty of care owed to the patient.

p106

Held:
(i) A doctor owes a duty of care to a patient which when breached will result in his liability.
(ii) The court will not draw an inference of negligence in cases involving professionals unless there is direct evidential proof thereof, on a balance of probabilities.

Cases cited:
1. Mohammed v Attorney-General (1982) Z.R. 49.
2. Zulu v Avondale Housing Project Ltd. (1982) Z.R. 172.
3. White House v Jordan and Anor [1980] 1 All E.R. 650.

For the plaintiff: M. S. Mwanamwambwa, Lisulo and Co.
For the defendant: A. M. Kasonde, Principal State Advocate.

Judgment
SAKALA, J.: The plaintiff's claim suing by her next friend is for damages for personal injuries arising out of an alleged negligent administration of 3c.c. Procaine Penicillin at the University Teaching Hospital on 27th December, 1974. The particulars of the injuries as per writ are that on 27th December, 1974 3c.c. of procaine penicillin administered to the plaintiff resulted in cardiac arrest and brain damage rendering the plaintiff now abnormal.

Paragraphs 3, 5, 6, 7, 8, 10 and 11 (i) (ii) of the amended statement of claim read:

"3 The said plaintiff was at all material times a patient at the outpatient department of the University Teaching Hospital, suffering from acute tonsillitis as aforesaid. She was attended to by a medical officer namely Dr Mathews as agent or servant of the state who prescribed 3c.c. of procaine penicillin.

5. An injection containing 3c.c. procaine penicillin was administered to her. After said injection she collapsed.
6. On the 27th December, 1974, she was admitted to the University Teaching Hospital in a stage of unconsciousness suffering from cardiac arrest (a condition akin to temporary heart failure).
7. At fifteen hundred hours of the same day the said plaintiff recovered consciousness and further medical treatment was administered at the said University Teaching Hospital.
8. Sometime during the said 1975 she was discharged from the said University Teaching Hospital not having recovered her full mental and physical health brought about by the aforesaid heart failure.
10. The said physical and/or mental abnormalities were caused by the negligence of Dr Mathews and another member of the staff at U.T.H. as servants or agents of the defendant or the state

p107

PARTICULARS OF NEGLIGENCE

(i) Failing to inquire orally whether the patient or plaintiff was allergic to procaine penicillin.

(ii) Failing to do or make test dose so as to ascertain if the patient or plaintiff was allergic to procaine penicillin before administering the same.

11. By reason of the matters aforesaid the plaintiff has suffered pain, injury, loss and damage.

PARTICULARS OF INJURIES

(i) Moderately servers bilateral organic brain damage, more marked on the right hemisphere.

(ii) Substantial loss of speech or voice".

Paragraphs 3, 4, 5, 6, 7 and 8 of the amended defence read as follows:

"3. The defendant has no knowledge of what is alleged in paragraph 3 of the statement of claim and puts the plaintiff to strict proof thereof.

4. The defendant admits paragraphs 4, 5, 6 and 7 of the statement of claim.

5. The defendant has no knowledge of what is alleged in paragraphs 8 and 9 of the statement of claim and puts the plaintiff to strict proof thereof .

6. The defendant denies paragraph 10 of the statement of claim and further more the defendant says that when the plaintiff presented herself at the Filter Clinic of the University Teaching Hospital on 27th December, 1974, she complained of sore throat, headache and fever for the previous days. Following upon examination, Dr Mathews diagnosed acute follicular tonsillitis and prescribed the following:

1. Warm saline gargle.
2. APC 2 tablets to be taken three times a day for five days.
3. Procaine penicillin 3cc im. X 5 days.

7. Further or in the alternative the defendant says that the physical and/or mental

abnormalities alleged in paragraph 10 of the statement of claim were caused or could have been by other unexplained or unknown cause and not by the negligence of Dr Mathews and / or and other member of staff at the University Teaching Hospital as alleged or at all. Each and all particulars of negligence are denied. Whether as alleged or at all.

8. The defendant denies paragraph 11 of the statement of claim and puts the plaintiff to strict proof thereof. Each and all particulars of injuries are denied whether as alleged or at all. Furthermore each and all particulars of special damage are denied whether as alleged or at all."

p108

The plaintiff called two witnesses in support of her claim. On account of mental and physical abnormalities, she did not herself give evidence. For this reason, she had sued by her next friend. PW1, the plaintiff's husband is a building superintendent, with the Lusaka Urban District Council. He testified that he married the plaintiff in 1969. She was then working in the Ministry of Rural Development as a junior clerical officer. In 1975 she was stopped from work by the Medical Board of Zambia on medical grounds. The witness stated that they have two children both boys, one born in February, 1970 and another born January, 1973. The two children attend Thorn Park Primary School. PW1 explained that on 27th December, 1974, he left his home in Chilenje South in the morning going for work together with his wife. When he knocked off in the evening he went home straight. The witness stated that when they woke up the morning, they were all in good health. After knocking off, he waited for his wife at home until 19.00 hours. She still did not arrive home. The witness said he was worried. He went to his parents-in-law but she was not there. He checked at his cousin, she was not there. Finally, company of his cousin who is a doctor, they went to the hospital. Later he learnt from his cousin that his wife was in serious condition in hospital. At 20.00 hours he saw his wife lying in bed with swollen lips and closed mouth. She was speechless. The witness said he read the bedside chart which stated that his wife had been given a penicillin injection and collapsed, the heart beat had stopped and she had become unconscious. The witness further testified that his wife stayed in hospital for 21 days. By then she had lost speech and became paralysed, the condition she is in today. The hands and legs are stiff. She cannot make use of them. According to PW1, the plaintiff can no longer perform the functions of a housewife. The witness also explained that after discharge she was on review, after every month for the whole of 1975. According to PW1, there was no improvement on her speech and physical fitness. The witness further explained that the Medical Board informed him that his wife had brain damage and one of the veins was damaged causing her speechless and paralysis. He stated that at the time the Medical Board recommended her retirement, she used to receive a net salary of K60 a month.

When cross-examined, PW1 stated that he did not attend the University Teaching Hospital with his wife on 27th December, 1974.

PW2, the brother of the plaintiff, told the court that the plaintiff was suing through him because she is unable to speak, a condition she has been in since 27th December, 1974. He explained that he went to the hospital on that day to see his sister. She looked very sick and unable to respond when questioned. This witness also told the court that the plaintiff was born in 1951. She attained Form Four education. In cross-examination, the witness explained that he was not a position to inform the court how his sister was treated at the out-patient.

PW3, Dr Samson Simbalasha Kasuka Mundia, although called to give evidence on behalf of the plaintiff objected to being asked any

p109

medical questions. Thus counsel for the plaintiff closed his case after dispensing with Dr Mundia's evidence.

The defendant called two witnesses both of them doctors. DW1 testified that in 1974 Ednah Nyasulu was admitted into the female medical ward of the UTH from the casualty where she had received treatment for acute tonsillitis. This doctor explained that the first time he came into contact with the patient was on 6th May, 1975, after the patient was discharged but attending speech therapy. The doctor further explained that the patient was admitted after a diagnosis of anaphylactic shock. He stated that this can be caused by a number of things like high blood pressure. According to the doctor, an injection of 3cc procaine penicillin could be one of the causes of anaphylactic shock. The doctor also explained that there are various kinds of medication for tonsillitis; one of them being penicillin. He testified that in case of penicillin there is a theoretical routine of asking patient whether he has received penicillin before or not and whether he had an adverse effect. According to the doctor if the penicillin is in an injection form the patient is supposed to be given a test dose under the skin. The doctor or nurse is supposed to wait for about 30 minutes when it is supposed to show whether the patient does not react adversely. If not, then a full dose is given which according to DW1 varies from doctor to doctor. The doctor explained that there are pitfalls about the oral inquiries in that some patients in our society might not know whether they react to penicillin or not. The doctor also said that even in cases where a patient says he never reacted he might react. The doctor also explained that the pitfall about the test dose is that the test dose can itself kill a patient who reacts to penicillin. The doctor told the court that although the test dose reduces a number of accidents resulting from penicillin it does not eliminate the accidents completely. The doctor also informed the court that whilst it is acceptable to ask a patient to establish whether he reacts or not, it is not hundred per cent protective. According to this witness, the prescription of penicillin was quite in order with the standard of practice of medicine. But he could not comment on what was given to the patient previously.

In cross-examination, the doctor stated that doctors were aware that certain patients were allergic to penicillin earlier than 1971. The doctor stated in cross-examination that it is for this reason that the doctors use the oral questioning and test dose. The doctor stated that these methods are necessary but not every doctor asks patient. The doctor explained that it is standard procedure to give a test close, but one may ask. The doctor also testified in cross-examination that cardiac arrests is a state where the heart stops to pump out enough blood. The doctor also stated that the reactions of procaine penicillin vary.

DW2, another doctor from the University Teaching Hospital, testified that he recalls in 1974 being called to treat patient by the name of Edna Nyasulu. The doctor explained that on 27th December, 1974, at 13.30 hours, he was called at the admission ward to go and see a patient who had been admitted via the filter clinic and reposed unconscious.

p110

According to the doctor, the brief history of the patient was that she had been given an injection of procaine penicillin after she had complained of sore throat. He examined the patient. She was deeply unconscious; she did not resist even to pain, pulse was very weak, the blood pressure was not recordable, she was in a state of shock. The doctor explained that after the examination, he proceeded to treat the patient. On account that she was in a state of shock, she needed fluids as quickly as possible. The doctor stated that he reviewed the patient again at aloud 15.00 hours, she was now conscious, she responded to simple questions. Asked to comment on the prescription, the doctor stated that the prescription was given at the filter clinic but he was not there. He explained that she was given 3cc procaine penicillin to treat tonsillitis. The doctor explained that there are many drugs for treating infections but it is up to the individual doctor to decide the best method of treating a patient. According to the doctor in the present case, penicillin was one of the good antibiotics used in treating tonsillitis. He further explained that penicillin can be administered orally or by injection. In the instant case, the doctor stated that it was given by injection and that it depended on the judgment of the admitting doctor if he thought the infection was very serious. The doctor further told the court that the decision of the method of administering whatever prescription of penicillin depends on the clinical condition of the patient; whether very sick and needing treatment as quickly as possible or not. In the present case, according to the witness, the infection was quite severe that the doctor needed to treat the patient as quickly as possible by injection. He explained that there are many other types of penicillin but procaine, is usually administered as intra-muscular injection. The doctor testified that the standard practice of administering penicillin is that before you prescribe any drug o any medical antibiotics, you ask the patient if he is allergic to it. Usually a small dose of it is given to the patient. If they do not react, then the full dose is given. The doctor stated that at times, particularly in the filter clinic, where doctors are very busy, doctors may forget to ask the particular question but the usual practice is to ask the patient if he is allergic. The doctor also pointed out that it is very well known that in certain cases patients have reacted severely to a test dose. He explained that the test dose is just a precaution but not a full proof method. The doctor after being shown the various documents testified that the treatment prescribed fitted the diagnosis but he could not say that the doctor made the right diagnosis because he did not see the patient himself. The doctor explained that he looked after the patient after she had improved on several occasions. The doctor also stated that a test dose is not conclusive in that sometimes the patient may react to t. He also stated that it is possible that a patient who has not reacted to a test dose may react try a full dose but the chances are less.

In cross-examination, the doctor explained that usually doctors record all the treatment given. He conceded that the carrying out of a test dose before actually administering the penicillin to a patient is a very important step and that the test dose should be recorded. When shown a photo-copy of an out-patient card, the doctor stated that he

did not find where a test dose was recorded. Further in cross-examination, the doctor stated that it was an accepted approved standard and usual practice for doctors to take a best dose before administering penicillin injections but that in a busy out-patient department, this was not possible.

The foregoing was the evidence in these proceedings. Both parties suggested to file written

submissions. At the time of writing my judgment the only written submissions on record were those from the plaintiff's, advocate. The learned principal state advocate was reminded to file his written submissions but this is another case where he did not do so.

I have fully addressed my mind to the pleadings, documents and oral evidence before me as well as the submissions on behalf of the plaintiff. On a consideration of the totality of the evidence, I find the following facts to be common cause and proved. Sometime on 27th December, 1974 the plaintiff suffered acute tonsillitis. On the same day, she was attended to at the out-patient department of the UTH by a medical Officer, namely Dr Mathews, an agent or servant of the state. The doctor prescribed 3cc of procaine penicillin. An injection of 3cc procaine penicillin was administered to the plaintiff. After the injection she collapsed. On the same 27th December, 1974, she was admitted at the UTH in a state of unconsciousness suffering from cardiac arrest (a condition akin to temporary heart failure). The plaintiff recovered consciousness sometime in the afternoon of the same day. The plaintiff was discharged from hospital sometime in 1975 but having not recovered fully. The plaintiff cannot walk normally. She cannot speak normally. She cannot go about her domestic daily duties normally. She cannot now pursue her gainful employment as a clerical officer with the Ministry of Rural Development which job she was compelled to leave sometime in December, 1975, after being declared unfit to work by a Medical Board.

Dr Mathews who prescribed the 3cc procaine penicillin injection or any staff from the out-patient department of the UTH who had anything to do with the plaintiff has not given evidence before me. The plaintiff adduced evidence from her husband and brother both not doctors. The defendant adduced evidence from two doctors from the UTH who treated the plaintiff after her admission. All these witnesses were not at the out-patient department when the plaintiff was being attended to by Dr Mathews and when the 3cc procaine penicillin injection was administered to the plaintiff. Unfortunately the plaintiff herself is not in a position to tell us how she found herself at the out-patient department.

On the foregoing facts which are common ground the case for the plaintiff is that her physical and/or mental abnormalities were caused by the negligence of Dr Mathews and another unknown member of staff at the UTH as servants or agents of the State in that they failed to inquire orally whether the patient or plaintiff eras allergic to procaine penicillin and also by failing to do or make a test dose so as to ascertain if the patient or plaintiff was allergic to procaine penicillin before administering the same. In considering the case for the plaintiff, I am

reminded of the observations made by the Supreme Court in the case of *Khalid Mohamed v The Attorney-General* (1) when Ngulube the D.C.J. said:

> "A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.
> I would not accept a proposition that even if plaintiff's case has collapsed of its own inanition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not need defence."

Also in the case of *Wilson Masauso Zulu v Avondale Housing Project Ltd.* (2) Ngulube D.C.J. said:

> "I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."

The plaintiff has alleged negligence against Dr Mathews and the unknown staff at the out-patient of the U.T.H. The crux of the plaintiff's case as I see it is what really happened at the out-patient department shortly before she collapsed? In the amended statement of claim the plaintiff has pleaded that Dr Mathews and the unknown staff failed to ask her whether she was allergic to procaine penicillin and also failed to carry out a test dose. She adduced no evidence on these issues. But in her favour, I accept DWs 1 and 2's evidence that the usual standard practice before administering a procaine penicillin injection is to ask the patient whether he or she is allergic or/to carry out test dose. The question I ask myself therefore is this: Did Dr Mathews and the unknown staff at the out-patient department fail to carry out the two bests before administering the 3cc procaine penicillin injection to the plaintiff? The plaintiff has not adduced any evidence on the point. But at this juncture, I would like to hasten by sayings that I have no doubt that a donor owes a duty of care to his patients which, when breached, he will be held liable. In his cross-examination of the defendant's witness, counsel for the plaintiff attempted to show that since the medical records do not disclose that the doctor carried out the two tests, the court must infer that he did not and hence he was negligent. For my part, I would not venture to infer negligence in cases involving professionals where there is no direct evidence. Even accepting that the hospital records are silent as to whether the tests were carried out or not, I cannot say they were not for purposes of drawing an inference of negligence on the part of the doctor. In arriving at this conclusion, let it not be thought that I am wanting any sympathy go the plaintiff. She has my greatest sympathies for the state she is in. The case or *Whitehouse v Jordan and another* (3) was a case alleging negligence against a medical practitioner on account of the baby being born with brain damage. The case went as far as the House of Lords. The Plaintiff did not succeed. In the Court of Appeal, Lawton, L.J., at page 659 had this to say on the standard of proof:

p113

> "The standard of proof which the law imposed on the infant plaintiff was that required in civil cases, namely proof on the balance of probabilities, but as Denning, L.J. said in *Hornal v Neuberger Products Ltd.* (1956) 3 All E.R. 970 at 973, (1957) 1 Q.B. 247 at 258. The more serious the allegation the higher the degree of probability that is required. In my opinion allegations of negligence against medical practitioners should be considered as serious. First, the defendant's professional reputation is under attack. A finding of negligence against him may jeopardise his career and cause him substantial financial loss over may years. Secondly, the public interest is put at risk, as Denning, L.J. pointed out in *Roe v Ministry of Health* (1954) 2 All E.R.131 at 139, (1954) 2 Q.B. 66 at 66-87. If courts make findings of negligence on flimsy evidence or regard failure to produce an expected result as strong evidence of negligence, doctors are likely to protect themselves by what has become known as defensive medicine, that is to say, adopting procedures which are not for the benefit of the

> patient but safeguards against the possibility of the patient making a claim for negligence. Medical practice these days consists of the harmonious union of science with skill. Medicine has not yet got to the stage, and maybe it never will, when the adopting of a particular procedures will produce a certain result. "

In the instant case, the facts which are common cause are that the plaintiff was treated for acute tonsillitis. The two doctors who gave evidence on behalf of the defendant agree that the two tests usually carried out before administering penicillin depend on the condition of the patient. If the condition is serious, the tests may not be carried out. Both doctors agree that the tests are not full proof. As already stated I find it very difficult to infer negligence on the part of the doctor. In my humble opinion, it cannot be correct to make a finding of negligence against Dr Mathews and the unknown staff at the out-patient department of the University Teaching Hospital based on a speculation of as to what might have happened at the out-patient department. Thus in my judgment, the plaintiff has not proved negligence against the defendant. I have come to this conclusion with sorrow knowing as I do what anguish the plaintiff has suffered and the grave disabilities the plaintiff will have to bear until death. But I am reminded of the words of Lawton, L.J. in *Whitehouse* (3) case when at pages 661 to 662 he said:

> "As long as liability in this type of case rests on proof of fault judges will have to go on making decisions which they would prefer not to make. The victims of medical mishaps of this kind should, in my opinion, be cared for by the community, not by the hazards of litigation."

For reasons already stated the plaintiff's claim fails and it is accordingly dismissed. On account of the condition the plaintiff is in, I order that each party will bear its own costs.

Claim dismissed
