IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 37 OF 1998

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

JU LUNGU FRED MATENDA (Suing in person And on behalf of Dependants as Personal Representative or Administrator of the Estate of CHIPUKA LUNGU MATENDA – Deceased Minor) APPELLANT

And

ZAMBIA CONSOLIDATED COPPER MINES LTD RESPONDENT

CORAM: NGULUBE, CJ, CHAILA AND MUZYAMBA, JJS.

On 2nd December, 1998 and 9th December, 1999

For Appellant - In Person

For Respondent - Mr. M. Ndulo of Zambia Consolidated Copper Mines Ltd.

J U D G M E N T

Ngulube, CJ, delivered the judgment of the court.

The learned trial Judge accepted the following facts that is to say that on the 18th June, 1992, the deceased infant in the case Chipuka Matenda who was aged two years and four months was playing on his own without being attended by an adult at his parent's house when he injured himself and sustained a laceration on the scrotum. On the same day around 14.30 hours the infant's mother took the child to the hospital to be attended to by a doctor as she feared that the wound might get infected. At the outpatients department a doctor who examined the child recommended that he be admitted in hospital so that the laceration could be sutured in theatre. The doctor also

prescribed an anti tetanus injection to prevent infection. Subsequently, the child was given an injection of diazepham commonly known as valium to counter convulsions which had developed suddenly. A number of clinical tests were carried out on the child to determine what was wrong but all the suspected conditions proved negative. Subsequently, the doctors diagnosed that the child had a space occupying lesion that is cerebral oedema which was consisted with the head injury but upon inquiring of the parents they denied any knowledge of the child having sustained a head injury or any history to that effect. The swelling of the brain did not subside and the doctors did not perform any surgery to relieve the pressure in the brain because they formed the opinion that the child was in too poor a state to undergo surgery. The doctors therefore prescribed a drug known as menatol to reduce the swelling. The child died on the 23rd June, 1992, and according to the death certificate issued the cause of death was subdural haemorrhage due to cerebral oedema. The learned trial Judge doubted whether any postmortem examination was conducted but in fact there was evidence from the plaintiff's own witness that a postmortem had been carried out and that in any event the cause of death stated could not have been ascertained without such a postmortem.

The death of the infant devastated the parents. The plaintiff who is the father and was suing in person and on his own behalf and on behalf of the other dependants of the estate as personal representative commenced proceedings for damages for negligence. It was the plaintiff's contention in the pleadings that the child was taken to the hospital on a fairly minor complaint but instead the child was admitted and given injections one of which was in the absence of the parents. It was the plaintiff's pleading that the professional medical negligence arose out of the fact that the child was admitted into hospital when he was potentially an outpatient case; the fact that

two different allegedly strong injections were administered to an infant within a short space of time; thirdly, the negligence consisted of failing to inquire and determine whether the infant was allergic or not to the type of treatment given; fourthly, an allegation that the infant was overdosed without due care and regard of the effects of dangerous drugs such as tetanus vaccine and valium. The fifth particular given related to the undertaking and conducting of a postmortem which was said to have been maliciously done in the absence of the plaintiff's appointed agents. The defendants of course denied any negligence and averred that the treatment had been normal and usual treatment which had to be attempted in the circumstances of the case.

The learned trial Judge determined that for the plaintiff to succeed in the claim against the defendant, it had to be approved that the medical treatment that was to be administered to the child from the time of admission on 18th June to the time of death on the 23rd June, 1992, was negligent and that the defendant's agents or servants acted in such a way that it was not in accordance with the practice of competent professionals. The learned trial Judge was satisfied on the evidence of the doctors who testified - that is, one on behalf of the plaintiff and another on behalf of the defendant - that there was no negligence in the manner in which the infant was treated. He was satisfied that on the evidence the child might have sustained a head injury on the day on which he injured himself and owing to the fact that it was not attended to by an adult at a time, and its age, it was not able to give a description as to the injury it had sustained so that by the time the doctors had diagnosed what was wrong with the child it was too late for the child's life to be saved. The learned trial Judge applied the tests which was set out in the case of **BOLAM –v- FRIERN**

HOSPITAL MANAGEMENT COMMITTEE (1957) 1 WLR 582; (1957) 2 ALL ER page 118.

The Bolam test in medical negligence cases has gained wide acceptance as the proper approach in such cases. In this regard we quote from paragraph 11-12 of Clerk and Lindsell on Torts 16th edition where the learned authors state as follows:-

"The Bolam test can be divided into two parts:

(1) **"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not profess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of a competent man exercising that particular art."**

That art is judged in the light of the practitioner's speciality and the post that he holds. Thus "... a doctor who professes to exercise a special skill must exercise the normal skill of his speciality." A general practitioner is not expected to attain the standard of a consultant obstetrician delivering a baby. But if he elects to practise obstetrics at all he must attain the skill of a general practitioner undertaking obstetric care of his own patients. And in all cases general practitioners and other doctors must exercise care in determining when to refer a patient for a consultant's or other second opinion.

(2) **In determining whether a defendant practitioner has fallen below the required standard of care, the Bolam test looks to responsible medical opinion. A practitioner who acts in conformity with an accepted, approved and current practice is not negligent "... merely because there is a body of opinion which would take a contrary view."**

It is, of course, for the plaintiff to prove the allegations of negligence in the normal way unless there are any circumstances which would justify invokingly maxim res ipsa loquitur, a situation which was not alleged in this case.

The plaintiff being aggrieved with the outcome of the litigation has launched this appeal and at the outset we apologise for the delay in rendering this decision which was to have been written by our brother Chaila, JS.

One ground of appeal complains that the learned trial Judge failed to consider each and every point in issue. It was argued, based on the case of **WILSON MASAUSO ZULU –v- AVONDALE HOUSING (1982) ZR 172,** that the Judge had a duty to adjudicate upon every aspect of the suit between the parties so as to bring to an end every controversy between them. Thus it was submitted that the Judge failed to deal adequately with the linkage of illness, the treatment given, and the cause of death. The plaintiff submitted that the child only had a scratch between the thigh and scrotum which might have been treated by a disinfectant such as dettol so that it was suspicious for the hospital to have decided to admit the child. It was said that it was equally suspicious that the illness shifted from a scratch on the thigh near the scrotum to suspected head injuries contending that the defendants did not offer any proper explanation for this. It was further argued that the suspicions which were heighten at the postmortem when the representative selected by the plaintiff at the invitation of the defendant was only allowed to identify the body and then excluded from the room where the actual postmortem was being conducted. The appellant further argued that from the report prepared on behalf of the hospital it appeared that no attention of any kind was given to the child on 21st June, 1992, because there are no notes relating to that day. The failure to attend to the child on 21st June, 1992, so the submission went, was itself evidence of negligence. In the premises, it was the plaintiff's submission that the Bolam case was wrongly cited. The plaintiff further complained against the failure by the defendant to call the chief medical officer who had prepared the report before the court on behalf of the hospital. In his oral submissions, the plaintiff (who incidentally is a legal practitioner) emphasized the foregoing and further criticised the learned trial Judge for speculating that the child must have suffered a head injury on

the same day as the injury on the scrotum. The plaintiff points out that even the evidence by the defendant suggested that the child was injured much earlier.

In reply, Mr. Ndulo relied on the heads of arguments which had been lodged on behalf of the respondent. In these written arguments the defendant reiterated that the test is whether the approach to diagnosis and or therapy was or was not reasonable in accordance with the case of **MAYNARD –v- WEST MIDLANDS REGIONAL HEALTH AUTHORITY (1984)** 1 WLR 634 before it could be argued that the defendant's servants, that is the medical practitioners had failed in their duty. It was the defendant's submission that the learned trial Judge applied the correct principles and came to the correct conclusion on the facts of the case. It was pointed out that even the fifth witness called by the plaintiff a doctor at the UTH had confirmed that the treatment given at the time was correct and that it was done in a proper and reasonable manner. It was submitted accordingly that the appeal should not be allowed. The defendants argued that as regard the issues which were allegedly not dealt with or not adequately dealt with the learned trial Judge had in fact addressed his mind to them. Thus on the issue of the linkage of the illness, the treatment, and the cause of death which the postmortem revealed to have been subdural haemorrhage due to cerebral oedema, the defendants argued that though the child was originally admitted for the purpose of suturing the wound on the scrotum the child nonetheless developed convulsions and the doctor diagnosed him as having a space occupying lesion consisted with head injury. It was also submitted that the postmortem was carried out for the purpose only of establishing the cause of death since various investigations had been carried out and finally injury to the head was suspected. It was submitted that since the postmortem merely confirmed what had already been diagnosed earlier there would have been nothing suspicious about this conclusion and

that certainly negligence could not be deduced from the postmortem. The defendants further submitted that on the question of negligence it was not competent to infer such negligence simply because the report did not have a note made on the 21st June, 1992. It was pointed out that according to the evidence the child had received proper attention on all the days. In particular, it was pointed out that the record of appeal before the court (at page 64) showed in the notes obtained from Nchanga North Hospital that some samples were taken from the child on 21st June, 1992. This, the submission went, indicated that he was receiving attention even on that day. It was submitted that there was no negligence during the entire time the child was in hospital. Finally, it was submitted that failure to call all the doctors in attendance and to rely only on the report extracted from hospital file by the chief medical officer was not evidence supportive of the plaintiff's case.

We have given very careful consideration to this appeal, to the grounds, the complaints raised and the submissions and arguments. We have, of course, the greatest sympathy for the plaintiff and his wife who suffered an extremely distressing loss. However, the point at hand is whether or not the plaintiff had proved on a balance that the doctors who attended to the infant had been negligent. In this regard the Bolam test was indeed relevant. It was also important for the learned trial Judge to analyse the evidence in an objective and impartial fashion. Thus, if the plaintiff proposed as indeed he did in the appeal, that the court should regard certain aspects of the events as raising suspicion, it would not be open to the court to adopt such proposes unless on an objective assessment of the evidence and the facts, the circumstances truly raised suspicion and such suspicion tendered to support the allegations of negligence.

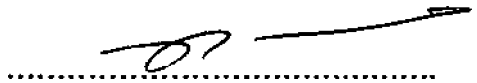
The negligence had to be ascertained or established in accordance with the generally accepted principles and tests for the determination of professional liability with specific reference to alleged medical negligence. In short, the plaintiff would have had to show that what occurred was as a result of an error and that such error was one that a reasonably skilled and careful medical practitioner would have not made. It was therefore crucial for the plaintiff to establish how the tragedy had occurred and in this regard, it is normal and usual to expect that the plaintiff will have expert evidence which supports that any error made was a negligent error. It is therefore of the highest importance in such cases for plaintiff's to assemble competent expert opinion.

The learned trial Judge in this particular case and on the facts established was truly on very firm ground. There was nothing to suggest wrong doing and certainly no evidence supported the particulars of negligence which had been pleaded. For example while it was alleged that strong injections were given one after the other which resulted in a coma the facts on record did not show such a sequence of events nor that the child had reacted adversely to any injection. Instead there were convulsions and progressively the child lapsing into coma from which he appears very regrettably never to have been able to recover.

We sympathise with the parents for their loose for we too are parents but the law of professional negligence is clear and on such law the case was ill-fated from the

beginning. The appeal fails. However, in all the circumstances of the case we feel that each side should bear its own costs.

M.M.S.W. Ngulube
CHIEF JUSTICE.



M.S. Chaila
SUPREME COURT JUDGE.

W.M. Muzyamba
SUPREME COURT JUDGE.