1967/13

No.11 of 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

CHIN KEOW (Plaintiff) — Appellant

-and -

GOVERNMENT OF MALAYSIA and DOCTOR JOSEPH LOGANATHAN DEVADASON (Defendants) — Respondents

CASE FOR THE APPELLANT

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1. This is an appeal by special leave from a judgment of the Federal Court of Malaysia (Thomson, Lord President, Syed Sheh Barakbah C.J. and Tan Ah Tah J.) dated the 2nd day of March, 1965, allowing an appeal by the Respondents from a judgment of the High Court at Kuala Lumpur (Ong J.) dated the 2nd day of July, 1964, whereby the Appellant was awarded damages in the sum of 10,250 dollars in respect of her claim following a fatal accident which occurred to one Chu Wai Lian, the daughter of the Appellant, on the 7th day of April, 1960, at a Social Hygiene Clinic which was managed by the First Respondents and in the charge of the Second Respondent. p.46 p.21

2. These proceedings were commenced by Writ of Summons issued by the Appellant on the 19th day of May, 1962, and were brought under the Civil Law Ordinance, 1956, Part III, which provides for compensation to the family of a person for loss occasioned by his death and for the survival of

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certain causes of action for the benefit of his estate. Sub-sections (1) and (2) of Section 7 of that Ordinance provide that:-

> "(1) Whenever the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.
>
> (2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any of the persons whose death has been so caused and shall be brought by and in the name of the executor of the person deceased."

3. The Appellant brought the claim for the benefit of herself and one Ng Kit Kheong, the son of the deceased, and on behalf of the estate of the deceased. The matters averred in her Statement of Claim which are material to this Appeal were as follows:- pp.3-6

> (1) At all material times the deceased was a female attendant employed by the First Respondents at the Social Hygiene Clinic managed and controlled by them at Sultan Street, Kuala Lumpur, and operated by their servant the Second Respondent, the medical p.3 1-28

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officer in charge thereof.

(2) On the 7th April, 1960, the deceased consulted the Second Respondent about an ulcer in her right ankle and glands in her right thigh, whereupon the Second Respondent instructed a nurse, one Madam Chan Teik Chin, to administer an injection of procaine penicillin to the deceased. p.4 l.2

(3) Madam Chan then administered an injection of procaine penicillin to the deceased, whereupon the deceased immediately complained of feeling strange and became unconscious. p.4 l.9

(4) Injections of adrenoline and coramine were then administered but the deceased died shortly thereafter. p.4 l.16

(5) The Respondents were negligent in failing to enquire of the deceased whether or not she was allergic to penicillin and/or in failing to take any proper measures to ensure that an injection of penicillin could be safely administered to the deceased. p.4 l.32

4. By their joint Defence the Respondents:- pp.7-8

(i) pleaded that the action, not having been commenced within twelve months next after the act, neglect or default complained of was barred by Section 2 (a) of the Public Authorities Protection Ordinance, 1948, and Section 38 of the Government Proceedings Ordinance, 1956; p.7 l.4

(ii) admitted the matters set out in p.7 l.13

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sub-paragraphs (1) to (4) in the preceding paragraph hereof; and

(iii) denied that the death of the deceased was caused by any negligence on their part. p.7 l.15

5. The principal questions raised by this Appeal are -

(i) whether the Federal Court of Malaysia was justified in rejecting the view formed by the learned trial Judge of the credibility of certain witnesses and in substituting therefor certain inferences of fact unfavourable to the Appellant; and

(ii) the effect and meaning of the evidence given at the trial.

No question arises in respect of the measure of damages.

6. The action was heard by Mr. Justice Ong on the 9th and 11th days of June, 1964. In her evidence in chief the Appellant stated that she knew of the deceased's allergy because:- pp.11-12 p.12 l.7

"four years before her death, after an injection of penicillin, she suffered reactions, swelling of face and body and itching all over. I asked her to go back to see the doctor. She came back and told me she had been warned not to use penicillin in future. She had had that injection at Out-Patient Clinic in General Hospital".

The Appellant then produced the deceased's Out-Patient Card (Exhibit P.1), upon which appeared p.12 l.18

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the words, "Allergic to Penicillin". In cross-examination the Appellant reaffirmed that the deceased well knew that she, the deceased, was allergic to penicillin. p.12 l.22

7. The second witness for the Appellant was Madam Chan Tet Chin, a staff nurse at the Social Hygiene Clinic. She stated that the Second Respondent instructed her to give the deceased an injection: p.12 l.36

> "At first the Doctor (the Second Respondent) asked me to give her sulphatelrad tablets. Then, when we were coming out of the Doctor's office, she asked me what did Doctor prescribe for me. I told her 'tablets' - not mentioning the name. Then she asked, 'Why not give me injection instead of tablets?' So I took her in again to Medical Officer's office and told him she preferred injection. Then Doctor said 'Give her 2 c.c. procaine penicillin'. So I gave her the injection. That was all the Doctor said and all he did."

After describing the collapse of the deceased and the remedial treatment attempted, Madam Chan stated that she had in September, 1955, given the deceased a penicillin injection upon the instructions of a Dr. Poulier. She had not, however, told the Second Respondent of this. p.13 l.40

8. In cross-examination Madam Chan stated that when the deceased said she wanted an injection the deceased specified penicillin and p.14 l.11

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that she (Madam Chan) then said to the Second Respondent, "She does not want tablets. She prefers penicillin injection". In re-examination, after being reminded of her evidence at the inquest (Exhibit A (vi)), Madam Chan altered the account given in her evidence in chief by stating that the Second Respondent prescribed a choice of either sulphatertrad tablets or a penicillin injection and the deceased asked for the injection as they were leaving the Second Respondent's room. In reply to questions by the learned Judge, Madam Chan stated that the deceased could understand what the Second Respondent said but nevertheless asked Madam Chan, in Chinese, "Did Doctor prescribe tablets or injection?"

p.15 l.6

p.75

p.15 l.13

9. The third witness for the Appellant was Dr. Tan Chee Koon. He stated that he had been in private practice for almost 13 years and had given a large number of penicillin injections. He would not allow a patient to dictate to him what he wants. He continued:-

p.15 l.31

> "When penicillin is indicated, I would take a careful history - ask patient if he had had penicillin before. Next I would ask about itchiness of skin or difficulty in breathing or fainting after injection, then I would ask about asthma, if he had it before or other urticarial manifestations or other symptoms of allergy. Finally I would ask if any doctor in past had advised against use of penicillin ..... These enquiries are necessary because penicillin has proved

p.15 l.37

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fatal in quite a number of cases."

Dr. Tan stated that he considered Exhibit P.1 very revealing in showing the care then taken to exclude penicillin. p.16 l.27

10. The fourth and last witness for the Appellant was Dr. S. G. Rajahram, the President of the Medical Association of Malaya. He stated that on 22nd December, 1960, he wrote a letter concerning penicillin sensitivity to Dr. Claxton, Assistant Secretary B.M.A. and received a reply thereto on 18th January, 1961. Copies of these letters were exhibited as Exhibits A(iv) and A(v). p.17 l.16 pp.69-72

11. A copy of the report of the post-mortem examination was admitted by agreement (Exhibit A(i)). The cause of death was therein stated to have been, "Anaphylactic shock". pp.65-66

12. In the course of his evidence the Second Respondent said:-

"On 7th April, 1960 about 10.30 a.m. P.W.2 (Madam Chan) brought deceased to me. She had an ulcer in right ankle and swollen glands on thigh. I examined her. I prescribed sulphatatrad tablets or, as an alternative, penicillin injection. They both went away, and staff nurse came back soon afterwards and told me that the amah preferred an injection of penicillin. The staff nurse had already told me previously that she had already given the amah penicillin some years ago, so p.18 l.1

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I told the staff nurse she could give penicillin. The Hospital Assistant gave the injection".

In cross-examination the Second Respondent said:-

"I prescribed dressing for sore leg. I did not do anything else. I had made no investigations into her history ..... Not as a rule do I give choice of treatment to the patient." p.19 l.7

13. The only other witness for the Respondents was Dr. R. P. Pillay, a Consultant Physician at the General Hospital, Kuala Lumpur. In the course of his brief evidence he said:

"Dr. Devadason did his best within his limited means in the circumstances. History of the patient should have been taken before injection." p.19 l.38

14. At the conclusion of the evidence and after hearing Counsel for the Respondents, the learned Judge found for the Appellant and assessed and apportioned damages. p.20 l.26

15. As appears from the Grounds of Judgment delivered on the 2nd day of July, 1964, the learned Judge based his decision upon the following main grounds:- pp.21-28

(i) He did not believe either Madam Chan's or the Second Respondents's evidence to the effect that sulphatetrad tablets were prescribed by the Second Respondent or that the deceased either p.24 l.35 et seq.

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prescribed for herself or specifically asked for penicillin.

(ii) The Second Respondent was negligent in failing to make proper enquiry of the deceased before prescribing the injection. p.25 l.5 et seq.

(iii) Had proper enquiry been made, the death would not have occurred. p.27 l.38

(iv) Injury to the deceased was a reasonably foreseeable consequence of the negligence referred to in (ii) above. p.27 l.2

16. (1) In establishing the ground set out in subparagraph (i) of Paragraph 15 hereof, the learned Judge, after quoting from the judgment of Brett M.R. in In re Garnett L.R. 31 Ch.D. 1 at p.9, and rehearsing passages from the evidence of Madam Chan, said:- p.21 l.37

"Now, the deceased, according to the staff nurse, could understand English, but could not speak it. I thought that her evidence in cross-examination was inconsistent with her earlier evidence. Further, I thought it odd that the deceased herself should have specified penicillin, for five reasons. First, she was not English-speaking; secondly, if she had expressed her preference for "injections instead of tablets", simpliciter, as the staff-nurse said in the first place, it is plain that she could not have asked specifically for p.23 l.11 et seq.

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penicillin; thirdly, it is inconceivable that she could have remained in ignorance of her allergy discovered in 1958, and that she should, in the face of such warning, have asked for penicillin; fourthly, it seemed incredible that the deceased, holding a menial post, should have even known what to prescribe for herself and, all the more so, that she should have had the presumption to instruct the doctor on his own job; fifthly, I was not a little surprised that he allowed a patient to dictate to him, as it were, what she thought best for herself".

(2) After rehearsing the Second Respondent's evidence on this issue, the learned Judge continued:- p.24 l.6 et seq.

"I found it in the highest degree odd that the doctor should have 'prescribed sulphatetrad tablets or as an alternative, penicillin injection.' I could not understand any necessity for prescribing these alternatives. He had penicillin available, and he must have had sulphatetrad also. Nothing was said about the tablets being in short supply. Why, then, a prescription in this extraordinary manner? Surely the decision must be his, not the patient's, nor one left to the choice of his nurse or assistant consulting their own convenience. The explanation was too fantastic for me to give it any credence. Of course there was no other way to pass p.24 l.16 et seq.

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the blame on to the deceased except to allege that the prescription was in the alternative and that the unfortunate woman herself made the choice. Were there no alternative, as alleged, the prescription of Penicillin must be the inevitable conclusion. The nurse contradicted herself, and she and the doctor contradicted each other. As witness I believed neither of them.

I was satisfied, and I found as a fact, that sulphatetrad tablets were never prescribed by the doctor, that he prescribed a penicillin injection - and a penicillin injection only - as a routine treatment for the deceased, and that he did so prescribe without asking one single perfunctory question to attempt to discover whether she was sensitive to the drug. To leave no room for ambiguity, I am bound to say that I was also satisfied, and I found as a fact, that the deceased never prescribed for herself, or asked specifically for penicillin."

17. (1) In establishing the ground set out in subparagraph (ii) of Paragraph 15 hereof, the learned Judge said:

"The only issue in this case was a very simple one, and that was why I had no hesitation in giving judgment for the plaintiff forthwith at the close of the

p.25 l.2 et seq.

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trial. Was the doctor negligent when he failed to ask even one, or at most three, questions of his patient before he prescribed the injection? The first and most obvious question should have been: "Have you ever had penicillin before?" Other questions should logically follow according as the answer was in the affirmative or negative."

(2) After referring to the cases of Roe v. Minister of Health (1954) 2 W.L.R. 915, p.25 l.16
and Bolam v. Friern Hospital Management p.25 l.35
Committee (1957) 1 W.L.R. 583, the learned Judge continued:-

"Although the discovery of penicillin by p.26 l.30
Sir Alexander Fleming was made thirty-five et seq.
years ago, its general use in this country has now gone on for nearly 20 years, and it is, I think, true to say that many an ordinary layman is aware that certain individuals are allergic and sensitive to this particular antibiotic, and that in certain cases its use had had fatal consequences. The defendant doctor in this case could not have been unaware of this possibility. Even granted that fatalities are comparatively rare, the consequences nevertheless were foreseeable, which distinguishes the instant case from the unfortunate mishap that caused spastic paraplegia to the two men in Roe v. Minister of Health. In my

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view the test of foreseeability was satisfied in the instant case, on the doctor's own admission."

(3) After rehearsing a passage from the Second Respondent's evidence, the learned Judge said: p.27 l.6

"What the defence appeared to have been unable to appreciate was that I was not in the least concerned with the doctor's failure to carry out sensitivity tests. The negligence did not lie in the omission to carry out such tests on the patient for individual idosyncracy. The essence of the negligence here was the failure to take the simple, elementary precaution of asking a few questions. Had he done so, the mishap would not have happened. I should have thought that some probing at least into every patient's history was the very first thing any doctor would start with on seeing a patient. The doctor here was guilty of negligence by his omission to do so. It is quite irrelevant that up to 1960 doctors in government and municipal hospitals habitually gave injections without tests. What could have been relevant was evidence that it was accepted practice among Government doctors throughout the country that the patients' history was never probed before prescribing a penicillin in- p.27 l.30 et seq.

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jection. I doubt that any doctor in Government service can be found to testify in court to this effect. In this respect there was no question of viewing this 1960 case through 1964 spectacles."

18 The passages set out in the preceding Paragraph hereof also contain the learned Judge's establishment of the grounds set out in subparagraphs (iii) and (iv) of Paragraph 15 hereof.

19. The Respondents, by Notice of Appeal dated the 6th day of July, 1964, appealed against Mr. Justice Ong's decision to the Federal Court of Malaysia. p.30

20. By a judgment delivered on the 2nd day of March, 1965, by Thomson, Lord President, in which Barakbah C.J. and Tan J. concurred, the Federal Court of Malaysia allowed the appeal and awarded the Respondents the costs of the appeal and of the action in the Court below. pp.46-60

21. The judgment of the Federal Court of Malaysia was based upon the following grounds:-

(i) Except on one point, not of very great importance, there was no question of credibility involved at the trial. p.47 l.33

(ii) The learned trial Judge was wrong in disbelieving the evidence of Madam Chan and the Second Respondent to the effect that the deceased herself expressed a preference for penicillin rather than sulphatetrad tablets. p.50 l.44

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(iii) In the early part of 1960 the potential dangers from penicillin injections were not very widely appreciated in Malaya and it was not the generally accepted practice among doctors at that time to make enquiries as to a patient's history in relation to penicillin. p.59 1.4

(iv) The Second Respondent had given thousands of penicillin injections without any ensuing trouble and had no reason to suspect that he was doing anything potentially dangerous. p.59 1.15

(v) The Second Respondent had not failed to take any precaution which was at the relevant time considered necessary. p.59 1.35

(vi) The Second Respondent was not, therefore, in any way negligent. p.59 1.33

22. In establishing the ground set out in sub-paragraph (ii) of Paragraph 21 hereof, the learned Lord President, after referring to the case of p.47 1.37 Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 and quoting from the speech of Lord Cave, L.C., in Mersey Docks and Harbour Board v. Procter (1923) A. C. 253, said:-

"The trial judge was very critical of the p.50 1.16 evidence of these two witnesses. He took the view that their evidence as to the deceased woman expressing a preference for penicillin rather than sulphatetrad tablets was a concoction because: 'there was no other way to pass the blame on the deceased except to allege that the

prescription was in the alternative and that the unfortunate woman herself made the choice'. In the event he believed neither of them. The Judge's views were based on the fact that both witnesses apparently gave their evidence in a somewhat confused way and that in any event he considered there was a strong element of inherent improbability in what they said. That may well be. It is, however, abundantly clear that at the very lowest there was no collusion between them because clearly the nurse, who in any event was the plaintiff's witness, if she had been concerned to concoct a false story in collaboration with Doctor Devadason to shield herself would almost certainly have adopted Doctor Devadason's evidence that it was the hospital assistant and not herself who actually administered the injection. And if there was no collaboration between the two witnesses it is inconceivable that independently and without consultation they should both have invented the story about the sulphatetrad tablets. The only reasonable explanation, then, of their telling that story is that it is true, and the confusion in the details of their evidence was due to the fact that they were searching their memories as to something that happened four years previously. In any event, however, whatever the truth of that story be it is not really very material

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except that the confusion regarding it may to some extent have accounted for the feeling that something was being hushed up which seems to have found its way into the case."

23. (1) In establishing the grounds set out in subparagraphs (iii) to (vi) of Paragraph 21 hereof, the learned Lord President summarised the conclusions of the maker of the report of the post-mortem examination (Exhibit A (i)) as being - "I found nothing wrong with the woman except that she was dead; she had had penicillin immediately before she died and therefore I am compelled to conclude that the penicillin was the cause of death". This, the learned Lord President said, suggested that the doctor who in April, 1960, made that report may not have been familiar with the behaviour of the human body when injected with penicillin, a fact which bore upon the contemporary general state of knowledge among medical men. p.52 l.45

(2) The learned Lord President then expressed regret that there was not called at the trial a greater volume of expert, professional evidence and that no adequate references was made to any medical works of authority. p.53 l.16 et seq.

(3) Of Doctor Rajahram's letter (Exhibit A(iv) the learned Lord President said - "(it) is to my mind of the greatest p.55 l.2

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importance as illuminating the state of knowledge of medical practitioners in Malaya at the time when it was written for it is difficult to think of any reason for its being written if the answers to the questions which it raised were known".

(4) The learned Lord President then quoted from the passage from the judgment of the learned trial Judge which is set out under subparagraph (3) of Paragraph 17 hereof and said with reference thereto that he did not see how the learned Judge could have arrived at these conclusions without importing into the case a great deal of personal knowledge, whereas what was important was the general state of knowledge on the subject among members of the medical profession in Malaya in 1960. The learned Lord President observed that the witnesses were all speaking in the middle of 1964 and there was nothing to show that their attention was directed to conditions as they were in the early part of 1960. p.57 l.15 p.58 l.14

(5) After again referring to the significance of Doctor Rajahram's letter (Exhibit A(iv)), the learned Lord President concluded:- p.58 l.27

"In all the circumstances and particularly in the light of Doctor Rajahram's letter it is very difficult to avoid the conclusion that in the early part of 1960 the potential dangers from penicillin injections were not very widely appreciated by the p.59 l.1 et seq.

medical profession in this country and that it was not the generally accepted practice among doctors at that time to make enquiries as to a patient's history in relation to penicillin.

It is in the light of this that the present case must be considered. Doctor Devadason was engaged in a line of professional business where he was giving literally thousands of penicillin injections a year. Presumably he had far more experience of giving such injections than Doctor Tan and Doctor Pillay put together. He had had no trouble before. The woman whom he treated was not a stranger. She had been living in the atmosphere, so to speak, of penicillin injections for years and it may well be that the fact that she herself had suffered some discomfort from having such an injection some years previously had not shaken her belief in the efficacy of the drug. In the circumstances there seems nothing very surprising in her asking for an injection of it or in Doctor Devadason giving her such an injection. And if he did not know at the time he was doing something potentially dangerous there can be no question of negligence by reason of not taking precautions which at the time were not by reason of any potential danger considered necessary."

24. On the 21st day of April, 1966, His

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Majesty the Yang di-Pertuan Agong, having taken into consideration a Report dated the 8th day of February, 1966, granted the Appellant special leave to prosecute this appeal in forma pauperis. p.62

25 (1) It is respectfully submitted that the Federal Court of Malaysia erred in rejecting the view expressed by the learned Judge in respect of the credibility of Madam Chan and the Second Respondent and thereby departed from the principle enunciated by Lord Cave L.C. in the case of Mersey Docks and Harbour Board v. Procter (supra) when he said:-

"I have found, on the other hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness ....."

It is submitted that it is implicit in the passages from the judgment of the learned trial Judge set out under Paragraph 16 hereof and from the questions put to Madam Chan by the learned trial Judge himself, that the learned trial Judge formed from the bearing of Madam Chan and the Second Respondent a firm and unfavourable view of their credibility on the issue of the suggested prescription in the alternative and of the deceased's subsequent selection. p.15 l.13 et seq.

(2) It is further submitted that the five reasons stated by the learned trial Judge in support of his rejection of the suggestion

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that the deceased herself specified penicillin were fair and logical inferences drawn from the evidence before him; whereas the inference, namely that there had been no collusion betweem Madam Chan and the Second Respondent, upon which the Federal Court of Malaysia founded its view to the contrary, does not arise compellingly from the evidence. p.50 l.31 et seq.

26. (1) It is further respectfully submitted that the Federal Court of Malaysia was not justified in drawing the inference and concluding that at the time of the deceased's death the potential dangers of penicillin sensitivity were not widely known in Malaya. None of the independent medical expert witnesses gave any evidence to this effect. On the contrary:- p.59 l.1 et seq.

(i) The post-mortem report (Exhibit A (i)) stated the cause of death to be "Anaphylactic shock", a term which was in 1960 well recognised and current in the medical profession and which means the immediate reaction which takes place in the smooth muscle of the body after the injection of a protein to which that body is supersensitive. It seems clear, therefore, that the doctor who carried out the post-mortem examination readily connected the death of the deceased with the recent injection of

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penicillin.

(ii) The deceased's Out-Patient Card (Exhibit P.1.) shows that in 1958 a member of the staff of the General Hospital in Kuala Lumpur was well aware that injections of penicillin might have injurious effects upon certain patients.

(iii) Doctor Tan stated in evidence that penicillin had proved fatal in quite a number of cases. He was not cross-examined upon this. p.16 l.10

(iv) The Second Respondent himself said in cross-examination that he knew of the possibility of a person developing hypersensitivity to penicillin after having penicillin before and that in such cases there was a remote possibility of danger. That he was speaking of the period before the death of the deceased appears plainly from his next words:- "Knowing that, I carried on because I had had no mishaps before." p.19 l.10

(v) Doctor Pillay, the Respondents' witness, referred to 12 fatal cases in Taiwan and concluded his evidence by stating that the history of the deceased should have been taken. p.19 l.35

(2) It is respectfully submitted that the Federal Court of Malaysia erred in concluding that it was difficult to think of any reason for the writing of Doctor Rajahram's letter Exhibit A (iv)) if the answers to the questions which it raised were known in p.55 l.1 pp.69-70

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Malaya. Doctor Rajahram in evidence p.17
gave no reason for writing the letter.
It is submitted that it is at the least
consistent with the probabilities that he,
being the President of the Medical Asso-
ciation of Malaya, in fact wrote after the
present claim was under consideration and
in an attempt to obtain evidence from an
impeccable source upon the matters raised
in his letter.

(3) The Federal Court of Malaysia dis- p.58 l.14
counted the evidence set out under (iii) et seq.
and (v) of subparagraph (1) of Paragraph 26
hereof on the grounds that the witnesses
(Doctors Tan and Pillay) were speaking in
the middle of 1964 and there was nothing
to show that their attention was directed
to conditions as they were in the early
part of 1960. Had not this evidence (part
of which was led by the Respondents and
given by their expert in chief) related
to 1960 it would have borne little
relevance to the case. It is respectfully
submitted that it ought to be presumed that
such evidence, admitted as it was without
query by either Counsel or the learned trial
Judge, was relevant and directed to the
issues before the Court.

27. (1) It is further respectfully submitted
that the Federal Court of Malaysia erred p.59 l.35
in concluding that the Second Respondent
had not failed to take any precaution which

was at the relevant time considered necessary. The unchallenged expert evidence called by the Appellant and the expert evidence led by the Respondents themselves was to the contrary. Thus:-

(i) Doctor Tan stated:

"When penicillin is indicated I would take a careful history - ask patient if he had had penicillin before ... etc." p.15 l.37 et seq.

(ii) Doctor Pillay stated:

"History of the patient should have been taken before the injection". p.19 l.40

(2) In view of the experts' unanimity on this issue and also on the issue of the potential hazards of penicillin injections (vide subparagraph (1) of Paragraph 26 hereof), it would have been superfluous to have called at the trial a greater volume of expert evidence or to have made reference to medical works of authority. It is respectfully submitted that the criticisms of the Federal Court of Malaysia on this score were unjustified. p.53 l.16 et seq.

28. It is therefore respectfully submitted that the evidence established that -

(i) the Second Respondent was negligent in failing to make proper enquiry of the deceased before prescribing the injection;

(ii) had proper enquiry been made the death would not have occurred; and

(iii) injury to the deceased was a

reasonably foreseeable consequence of the negligence referred to above,

and that the learned trial Judge was right in so finding and in giving judgment for the Appellant accordingly.

29. The Appellant therefore humbly submits that this appeal should be allowed for the following among other

REASONS

1. BECAUSE the learned trial Judge was right in disbelieving Madam Chan Tet Chin's and the Second Respondent's evidence in respect of prescription in the alternative and the deceased's selection of penicillin.

2. BECAUSE the Federal Court of Malaysia was wrong in rejecting the learned trial Judge's view of the credibility of Madam Chan Tet Chin and the Second Respondent.

3. BECAUSE the Federal Court of Malaysia was wrong in concluding that in the early part of 1960 the potential dangers from penicillin injections were not very widely appreciated in Malaya and it was not the generally accepted practice to make enquiries as to a patient's history in relation to penicillin.

4. BECAUSE the Federal Court of Malaysia was wrong in regarding Doctor Rajahram's letter of 23rd December, 1960, as a principal ground justifying the conclusion set out in the

immediately preceding Reason hereof.

5. BECAUSE the Federal Court of Malaysia was wrong in holding that the Second Respondent had not failed to take any precaution which was at the relevant time considered necessary.

6. BECAUSE the Federal Court of Malaysia was wrong in finding that the Second Respondent was not in any way negligent.

7. BECAUSE the Federal Court of Malaysia was wrong in finding that the learned trial Judge could not have arrived at his decision without importing into the case a great deal of personal knowledge.

8. BECAUSE the Federal Court of Malaysia was wrong in finding that the report of the post-mortem examination suggested that the doctor who made that report may not have been very familiar with the behaviour of the human body when injected with penicillin.

9. BECAUSE the Federal Court of Malaysia was wrong in discounting the evidence of Doctors Tan and Pillay on the ground that there was nothing to show that these doctors were directing their attention to conditions as they were in the early part of 1960.

10. BECAUSE the judgment of the learned trial Judge was right and ought to be restored for the reasons given therein.

11. BECAUSE the judgment of the Federal Court of Malaysia was wrong.

James Mitchell

No. 11 of 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

CHIN KEOW

v.

GOVERNMENT OF MALAYSIA and DOCTOR JOSEPH LOGANATHAM DEVADASON

CASE FOR THE APPELLANT

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