91454

1967/13

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 Appellant

-- and --

GOVERNMENT OF THE FEDERATION OF MALAYSIA AND DOCTOR JOSEPH LOGANATHAN DEVADASON Respondents

---

CASE FOR THE RESPONDENTS

Record

1. This is an Appeal 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 trial judge (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.

2. The Appellant's claim as stated in her Statement of Claim can be summarised thus :- pp.3-6

(1) The action was brought under the Civil Law Ordinance Act 1956 Part III for the benefit of the Appellant, the mother of the deceased and one dependant, a son of the deceased.

(2) At all material times the deceased was employed by the First Respondents as a female attendant at a Social Hygiene Clinic managed by them at Sultan Street, Kuala Lampur, and operated by the Second Respondent, the medical officer in charge.

Record

(3) 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 he instructed a nurse to administer an injection of procaine penicillin to the deceased.

(4) Procaine penicillin was accordingly injected but the deceased died shortly afterwards.

(5) The Respondents were negligent in administering the penicillin into the deceased's buttock, which was not the safest area for an injection and/or failing to ascertain whether or not the deceased was allergic to penicillin and/or in failing to watch for and properly treat reactions.

3. By their joint Defence both Respondents pleaded that the action not having been
pp.7-8 commenced within 12 months from the negligent act it was barred by section 2 (a) of the Public Authorities Protection Ordinance 1948 and section 38 of the Government Proceedings Ordinance 1956; they admitted the various matters referred to in sub-paragraphs (1) to (4) inclusive of the preceding paragraph hereof but they denied that they were negligent in any of the respects alleged.

4. The action came on for hearing before Mr. Justice Ong on the 9th day of June 1964. The first witness was the Appellant who after giving evidence of her financial circumstances and those of the deceased stated that on hearing of the death she had gone to the hospital and was told by the staff nurse Madam Chan that her daughter had died because of an injection of penicillin, that no doctor was present at the time and no oxygen was administered. The Appellant told Madam Chan that her daughter had been allergic to penicillin and in 1958 had been given an Out-Patient Clinic Card to that effect. Four years before her death the deceased had been given a penicillin injection and had suffered reactions with swelling of face and body and

itching all over. After seeing the doctor at that time the deceased said that she had been warned not to use penicillin in future. In cross-examination the Appellant said that she knew her daughter was allergic to penicillin and her daughter knew this herself. Record

5. The second witness for the Appellant was Madam Chan Tet Chin who was the staff nurse at the Clinic and who had been working there since August 1955. She said that at first the Second Respondent had instructed her to give the deceased sulphatetrad tablets. As she and the deceased were leaving the doctor's office the deceased enquired what the doctor had prescribed to which she replied "tablets". Thereupon the deceased said "Why not give me an injection instead of tablets?" Madam Chan then took the deceased back to the doctor's office and told him she preferred penicillin whereupon he said "Give her 2 c.c. procaine penicillin." Madam Chan gave the penicillin injection and after washing her hands she saw that the deceased was slightly blue about the lips. The deceased said she felt a bit funny. Madam Chan put her to bed and called for the Hospital Assistant and Medical Officer who both arrived in about 2-3 minutes. Whilst Madam Chan was preparing a hot water bag and blankets the doctor was testing the deceased's heart with a stethoscope. Within a period of about 15 minutes the deceased had 3 injections, one adrenalin and 2 coramine. Madam Chan said that she gave the deceased the penicillin injection on the buttock and that she had given the deceased procaine penicillin on the instructions of Dr. Poulier in September 1955 but she had not told the Second Respondent about this. Madam Chan said "She had told me that some people were allergic to penicillin, but she had spoken in general terms and did not mention herself. I took no particular notice of her remarks. We have no oxygen apparatus in the Clinic." pp. 12-15

6. In cross-examination Madam Chan repeated that the deceased had asked for an injection and mentioned penicillin. Madam Chan went on "She p.14

Record

did not say a word about her allergy. She never told me of her allergy. When Dr. Poulier prescribed penicillin for her I found no reaction. The buttock is the proper place for an injection." Madam Chan stated that the Doctor had tried artificial respiration and she also said "On average I give 50-60 injections of penicillin every day. I never gave any test to any patient before injection of penicillin. This was the only mishap in all these years - since I was there in this Clinic".

7. In re-examination Madam Chan said that the Medical Officer did prescribe a choice of
p.15 sulphatetrad tablets or penicillin injection and the deceased had asked for the injection as they were leaving the doctor's room.

8. The Appellant's third witness was Dr. Tan Chee Koon who had been in private practice as a medical practitioner for almost 13 years and had given a large number of penicillin
pp.15-16 injections. He said he would not allow a patient to dictate to him what he wants but when penicillin is indicated he would take a careful history and submit the patient to a careful interrogation. If a patient had had penicillin before without reactions he would still conduct penicillin sensitivity tests. Where, though tests had shown a green light, there was sensitivity to penicillin he would prescribe adrenalin, anti-histamine, coramine, cortico-steriod. He went on "... above all one must have oxygen available at all times. In emergency cases it would be necessary to make the injections intravenous. Mr. McGladdery wrote on penicillin poisoning in December 1960. Endo-tracheal tubes are useful. If a patient is slipping, one would make an intra-cardiac injection. When all else fails, one could make a cardiac massage."

9. In cross-examination he said "No test is infallible. What I had spoken of are revival requirements. Buttock, in my opinion, is not
p.17 L.1 the best place for an injection."

10. The Appellant's fourth witness was Dr. S. G. Rajahram a private medical practitioner and President of the Medical Association of Malaya. He said that on the 22nd December 1960 he wrote to Dr. Claxton, Assistant Secretary B.M.A. on penicillin sensitivity and he received a reply on the 18th January 1961. Copies of the two letters were exhibits A (iv) and B.

Record

p.17

pp.69-70

This closed the case for the Appellant.

11. The Second Respondent then gave evidence that he had been in Government Service as a Medical Officer for 25 years. On the 7th April 1960 at about 10.30 a.m. the staff nurse had brought the deceased to see him. She had an ulcer in her right ankle and swollen glands on the thigh and he had prescribed sulphatetrad tablets or penicillin injection. They went away but shortly after the nurse came back saying the deceased preferred a penicillin injection. The nurse had told him previously that she had given the deceased penicillin years ago so he told her she could give penicillin. Shortly afterwards he was sent for and found that the deceased had collapsed and was lying on the couch. He asked the Hospital Assistant to give an injection of adrenalin, then of coramine and a little later coramine again. The breathing of the deceased became shallower and the staff nurse and he performed artificial respiration but to no effect. He said that the Clinic was for venereal disease essentially and the average number of penicillin injections was 100 a day. He had never had a previous mishap. It was not then hospital routine to make tests but this was now done. At that time there were divided opinions about the value of tests. He said that they never had tests in Government Hospitals and he did not know of her allergy.

12. In cross-examination he said that he did not make any investigation into the deceased's history. He knew of a person developing hypersensitivity to penicillin after having had penicillin before and that there was a remote possibility of danger but he carried on because he had had no mishap

p.19 L.7

Record

before. He said that he did not as a rule give choice of treatment to a patient and he now realised, after the event, that it was dangerous to have given the injection without a test.

13. The Respondents next and final witness was Dr. R.P. Pillay a Consultant Physician in the
p.19 L.28 General Hospital, Kuala Lumpur. He said "Re penicillian tests - opinions sharply divided - tests not very valuable. Of 12 fatal cases in Taiwan 6 tests were negative - 6 others had no tests. Tests only show skin reaction. In 1964, I would carry out tests rather than dispense with tests. Dr. Devadason did his best within his limited means in the circumstances. History of the patient should have been taken before injection."

p.20 14. (i) At the close of the evidence and speeches on the 11th day of June 1964 the learned Judge said that he found for the Appellant. On the 2nd day of July 1964 he gave the grounds of his judgment. After reciting the facts leading up to the examination of the deceased by the Second Respondent he said
p.21 L.29 "What took place hereafter rested entirely on the evidence of the doctor and staff nurse. The only person who could testify against them was dead. Hence I thought that, where these two persons were seeking to throw the blame entirely on the deceased, it was salutary to remember the words of Brett M.R. in In re Garnett L.R. 31 Ch. D. 1, 9". The learned Judge then quoted from the judgment of Brett M.R. and also referred to a similar note of caution being voiced by Issacs J. in the Australian case of Plunkett v. Bull (19) C.L.R. 544, 548-9.

(ii) After analysing the evidence the learned
p.24 L.16 Judge went on :-

> "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.

Record

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 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 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.

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 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."

Record

p.25 (iii) The learned judge after referring to the cases of Roe v. Minister of Health 1954 2 W.L.R. 915 and the judgment of Denning L.J. as he then was at p.926 and to the case of Bolam v. Friern Hospital Management Committee

p.26 L.30 1957 1 W.L.R. 583 and the judgment of McNair J. at p.586 said "Although the discovery of penicillin by Sir Alexander Fleming was made thirty five 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 has had fatal consequences. The defendant doctor in this case could not have been unaware of this possibility."

(iv) A little later in his judgment the learned judge said "What the defence appeared to

p.27 L.30 have been unable to appreciate was that I was not in the least concerned with the doctor's failure to carry out the sensitivity tests. The negligence did not lie in the omission to carry out such tests on the patient for individual idiosyncrasy. 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 injection. 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.

Record

By way of gilding the lily, perhaps, it is not out of place to point out that one doctor at least in the Government service - which in practice was said never to have carried out sensitivity tests before 1960 - took enough precautions in April 1958 on the very same patient which enabled him to discover her allergy as he noted it on her Out-Patient Card. He exercised the standard of case which he must have thought necessary. Dr. Devadason did not, and his failure unquestionably was negligence."

15. From this judgment the Respondents appealed to the Federal Court upon the grounds set forth in the Memorandum of Appeal dated the 31st day of August 1964. The Appeal was heard by the Federal Court (Thomson Lord President, Syed Sheh Barakbah C.J. and Tan Ah Tah J.) on the 10th and 11th days of November 1964. The grounds of appeal, which were somewhat lengthy, were conveniently summarised by the learned C.J. in the course of his judgment as hereinafter appears.

p.31

pp.33-45

16. (i) On the 2nd March 1965 Thomson Lord President delivered judgment allowing the appeal with which judgment Syed C.J. and Tan J. concurred. The learned Lord President said that in sum what the grounds of appeal amount to is that the judge's finding of negligence was not supported by the evidence. He said that except on one point not of very great importance there was no question of credibility involved at the trial and the case accordingly fell to be considered in the light of the case of Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 and the speech of Viscount Simonds quoting with approval the words of Lord Cave L.C. in Mersey Docks and Harbour Board v. Proctor 1923 A.C. 255,

pp.46-60

(ii) The learned Lord President said that he disagreed with the trial judge in his criticisms of the second Respondent and Madam Chan, their evidence indicating that there was no collaboration between them and the confusion in the details of their evidence being due to the fact that they were searching their memories as to something that happened four years previously.

p.50

Record

In any event he said whatever the truth of their story it was not very material except that it seemed to have led to the feeling in the case that something was being hushed up.

(iii) After analysing the evidence and after referring to that part of the judgment of the trial Judge quoted in sub-paragraph (iv)
p.57 L.27 of Paragraph 14 hereof the learned Lord President said 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 in relation to the effect of penicillin whereas what was relevant was the general state of knowledge on the subject among members of the medical profession in Malaya in 1960. He pointed out 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 early 1960 and not at the time they were speaking. He then went on :

p.58 "On the other hand on 22nd December, 1960, that is some months after the fatality with which we are concerned here, Doctor Rajahram, the President of the Malayan Medical Association was writing on behalf of his Association the letter which has already been quoted which at the very lowest suggests there was doubts in the minds of the medical profession as to the desirability of ascertaining any history of previous penicillin injections. Why ask the question if the answer was as certain and well known as it apparently was four years later? Unfortunately, however, the significance of this letter would appear not to have been appreciated at the trial for neither counsel took the trouble even to ask the writer why he wrote it and it was not urged upon the Judge's notice at the end of the trial. It is accordingly perhaps not surprising that it was overlooked.

In all the circumstances and particularly the light of Doctor Rajahram's letter it is

Record

very difficult to avoid the conclusion that in the early part of 1960 the potential dangers from penicillin injections was not very widely appreciated by the 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. Presunably 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."

The learned Lord President then referred to the cases of Marshall v. Lindsey County Council (1935) 1 K.B. 516 and Roe v. Minister of Health (supra). p.59-60

17. The Respondents' appeal was accordingly allowed with costs. p.61

18. On the 21st day of April 1966 His Majesty The Yang di-Pertuam Agong pursuant to a Report

Record

p.62-63 dated the 8th day of February 1966 granted the Appellant Leave to Appeal in forma pauperis.

19. The Respondents respectfully adopt in its entirety the reasoning of the learned Lord President and will contend that he was right in allowing their appeal for the reasons stated in his judgment.

20. Without derogating from the contention contained in the last paragraph, the Respondents further respectfully submit :-

(1) In stating that relevant evidence would have been that it was accepted practice among Government doctors throughout the country that
pp.27-28 the patient's history was never probed before prescribing a penicillin injection and in doubting that any doctor in Government service could be found to testify to that effect the learned trial Judge appeared wrongly to be indicating that the burden of disproof of negligence was upon the Respondents; alternatively if the burden of disproof of negligence was upon the Respondents it was not in law necessary for them to show that it was accepted practice for patients' history never to be probed before prescribing a penicillin injection.

(2) The learned trial Judge was wrong in inferring that because a doctor had in April 1958 discovered that the deceased was allergic to penicillin this indicated that the Second
p.28 Respondent was negligent in not discovering this allergy.

(3) It does not follow that had the Second Respondent taken the precaution of asking a few questions he would necessarily or probably have discovered that the deceased was allergic to penicillin.

21. The Respondent will therefore submit that this Appeal should be dismissed for the following (among other)

R E A S O N S

(1) The learned trial Judge was wrong in

Record

regarding Madam Chan Tet Chin and the Second Respondent as untruthful witnesses.

(2) The learned trial Judge's finding that the deceased never asked specifically for penicillin was contrary to the evidence, and in finding as aforesaid he failed to take any or any sufficient account of the fact that the deceased had been employed for 5 years at the Clinic and was familiar with penicillin treatment.

(3) The learned trial Judge was wrong in placing any reliance on his own knowledge of penicillin or the possible consequences of its use.

(4) The Second Respondent could only have been negligent if he had failed to exercise the ordinary skill of an ordinary competent medical practitioner according to the standards existing on the 7th April 1960 and there was no evidence that he had failed to exercise such skill according to the standards then existing.

(5) There was no evidence that in April 1960 it was the generally accepted practice among medical practitioners for a doctor before injecting penicillin to make the enquiries which the learned trial Judge held that the Second Respondent ought to have made.

(6) The learned trial Judge did not give any or any sufficient weight to the evidence of the Second Respondent relating to the practice in his own Clinic and Government Hospitals generally.

(7) The learned trial Judge did not appear to attach any, or sufficient weight, to the letter sent by Dr. Rajahram on the 23rd December 1960 to the British Medical Association which letter indicated that at that date there were doubts in the minds of the medical profession in Malaysia as to the desirability of ascertaining any history of previous penicillin injections.

(8) The learned trial Judge appeared to

Record

indicate in his judgment that the burden of disproving negligence was upon the Respondents.

(9) Even if the burden of disproof of negligence was upon the Respondents it was not necessary for them to show that it was accepted practice for patients history never to be probed before prescribing a penicillin injection.

(10) The learned trial Judge was wrong in inferring that because a doctor had in April 1958 discovered that the deceased was allergic to penicillin this indicated that the Second Respondent was negligent in not discovering this allergy.

(11) It does not follow that had the Second Respondent taken the precaution of asking a few questions he would necessarily or probably have discovered that the deceased was allergic to penicillin.

(12) For the reasons contained in the judgment of the Federal Court.

BERNARD FINLAY

11 OF 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

CHIN KEOW Appellant

--- and ---

GOVERNMENT OF THE FEDERATION OF MALAYSIA AND DOCTOR JOSEPH LOGANATHAN DEVADASON Respondents

---

CASE FOR THE RESPONDENTS

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
Cheapside, E.C.2.
Respondents' Solicitors.