IN THE SUPREMECOURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal in terms of Article 127 of the Constitution read with Section 5(c)(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 152/2011

SC (HC) CA LA No. 152/2011

WP/ HCCA/ Kaluthara No.13/2007(F)

DC Panadura No.1842/M

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara (being a minor, through her next friend, her father; the 2nd Defendant)

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara (the next friend of the above mentioned Plaintiff minor)

   Both of 295/15, Sri Somananda Mawatha,

   Arukgoda, Alubomulla.

PLAINTIFFS

-Vs-

1. E. Chandrani alias Chandrani Epitawala,
   Dias Memorial Hospital (Kethumathi),
   Panadura.

2. Western Provincial Council,
   Western Provincial Council
   Office,
   Colombo.

3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

And others

DEFENDANTS

And then

1. E. Chandrani alias Chandrani
   Epitawala,
   Dias Memorial Hospital
   (Kethumathi),
   Panadura.

2. Western Provincial Council,
   Western Provincial Council
   Office,
   Colombo.

3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

DEFENDANT- APPELLANTS

-Vs-

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara

Both of 295/15, Sri Somananda Mawatha,

Arukgoda, Alubomulla.

PLAINTIFF- RESPONDENTS

And Now Between

1. E. Chandrani alias Chandrani Epitawala,
Dias Memorial Hospital (Kethumathi),
Panadura.

2. Western Provincial Council,
Western Provincial Council Office,
Colombo.

1ST AND 2ND DEFENDANT-APPELLANT- PETITIONERS

-Vs-

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara

   Both of 295/15, Sri Somananda Mawatha,

   Arukgoda, Alubomulla.

PLAINTIFF- RESPONDENT-RESPONDENTS

3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

3RD DEFENDANT-APPELLANT- RESPONDENT

And now between

1. E. Chandrani alias Chandrani Epitawala,
   Dias Memorial Hospital (Kethumathi),
   Panadura.

2. Western Provincial Council,
   Western Provincial Council Office,
   Colombo.

1ST AND 2ND DEFENDANT-PETITIONER - APPELLANTS

1. Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara

2. Kothmale Gajanayake Mudiyanselage Priyantha Bandara

Both of 295/15, Sri Somananda Mawatha,

Arukgoda, Alubomulla.

1ST & 2ND PLAINTIFF – RESPONDENT – RESPONDENTS

3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

3RD DEFENDANT – APPELLANT – RESPONDENT

Before: Priyasath Dep, PC, CJ

Buwaneka Aluwihare, PC, J

Priyantha Jayawardena, PC, J

Counsel: Viraj Dayaratne DSG with Ashen Fernando for the Appellants

Mahinda Nanayakkara for the Respondents

Argued on: 20th of November, 2014

Decided on: 11th of October, 2018

Priyantha Jayawardena PC, J

Facts of the case

This is an appeal filed against the Judgment dated 24th of March, 2011 delivered by the Provincial High Court of the Western Province Holden in Kaluthara, affirming the Judgement of the District Court of Panadura dated 14th of February, 2007.

The 1st Plaintiff - Respondent – Respondent, being a minor, instituted an action in the District Court of Panadura, through her next friend, the 2nd Plaintiff - Respondent - Respondent (hereinafter referred to as the 1st Respondent and 2nd Respondent respectively) seeking damages from the 1st and 2nd Defendant - Petitioner – Appellants, the 3rd Defendant-Appellant-Respondent (hereinafter referred to as the 1st Appellant, 2nd Appellant and the 3rd Respondent respectively), the Director of Health Services and the Chief Minister of the Western Province.

The 1st and 2nd Respondent pleaded *inter alia* that, the 1st Respondent was admitted to the Kethumathi Hospital of Panadura on or about the 24th of April, 1999 and was in the said hospital until she was transferred to the National Hospital of Colombo on the 1st of May, 1999.

Further, while she was in the care of the Kethumathi Hospital, the 1st Appellant inserted a cannula to the left arm of the 1st Respondent on or about the 29th of April, 1999. During the process of cannulation, an artery of the 1st Respondent was pierced and that resulted in the amputation of her left arm.

Further, it was averred that the 2nd Appellant and the 3rd Respondent are vicariously liable for the negligence of the 1st Appellant.

Accordingly, a sum of Rupees 4 Million was claimed as special damages and a further sum of Rupees 1 Million was claimed as general damages.

The Appellants filed a common answer denying the said allegations and stated *inter alia*;

(i) whilst the 1st Plaintiff – Respondent was at Kethumathi Hospital, she was not in the exclusive care of the 1st Appellant,

(ii) due diligence and care was exercised when the cannula was inserted to the 1st Respondent, and the 1st Appellant is not responsible for the alleged wrongful conduct, and

(iii) therefore, the 2nd Appellant and 3rd Respondent are not vicariously liable for the alleged negligence of the 1st Appellant.

The Director of Health Services and the Chief Minister of the Western Province had moved to be discharged from the case, as a cause of action had not been disclosed against them in the Plaint.

After the trial, the learned District Judge, delivered the judgement in favour of the 1st and 2nd Respondents and held that the 1st Appellant was negligent in cannulating the 1st Respondent which resulted in the amputation of her left arm. Further, it was held that the Appellants and the 3rd Respondent are liable for the damages caused to the 1st Respondent. Accordingly, the learned District Judge awarded a sum of Rupees 3.5 Million as special damages and a further sum of Rs. 500,000/- as general damages for the pain and suffering that the 1st Respondent endured for a period of 3 months at the Kethumathi Hospital as well as at the National Hospital of Colombo.

However, the learned District Judge discharged the Director of Health Services and the Chief Minister of the Western Province, who were the 4th and 5th Defendants, from the case as no cause of action was disclosed against them.

Being aggrieved by the said judgement of the District Court, the 1st Appellant preferred an appeal to the Provincial High Court of the Western Province Holden in Kaluthara and stated *inter alia* that;

"(i) It was not established on a balance of probability that it is the single injury on the artery of the left hand of the 1st Plaintiff, that caused the prevention of circulation of blood to the relevant area of the said hand;

(ii) It was not established on a balance of probability that the alleged insertion of the said cannula caused the said injury;

(iii) It was not established on a balance of probability that the alleged injury was caused by the attempt made by the 1st Defendant at about 8.00 p.m. on 29 – 04 – 1999 to insert the said cannula on the hand of the 1st Respondent, and

(iv) Subject to the above that it was not established on a balance of probability that the 1st Defendant was negligent in inserting the said cannula."

The 2nd Appellant and the 3rd Respondent filing a separate appeal in the Provincial High Court stated *inter alia* that, the judgement of the District Court was contrary to law and against the evidence led at the trial and sought to have the said judgement set aside.

Both the appeals were consolidated and taken up for hearing. The Provincial High Court delivered the judgement and held that only the 2nd Appellant was vicariously liable for the conduct of the 1st Appellant and discharged the 3rd Respondent. Subject to the above, the said appeals were dismissed.

Being aggrieved by the judgement of the Provincial High Court, the Appellants sought leave to appeal from this court and leave was granted on the following questions of law;

"(i) The Provincial High Court erred in law in holding that the 1st Petitioner's (1st Appellant's) act of negligence resulted in the amputation of the hand of the 1st Plaintiff – Respondent, and

(ii) The Provincial High Court erred in law when it failed to appreciate that the said judgement (of the District Court) is contrary to law and against the evidence presented in the case."

Submissions by the Appellants

The Appellants submitted that the 1st Appellant had exercised due care and diligence when the cannula was inserted to the left arm of the 1st Respondent and denied that the arterial injury was caused by her negligence. Therefore, it was submitted that the 1st Appellant is not liable for the damages claimed by the Respondents. In the circumstances, it was submitted that the 2nd Appellant is not vicariously liable for the alleged negligence of the 1st Appellant.

In support of their contention, the Appellants cited the case of *Wasserman v. Union Government* 1934 AD 228 at 231 which stated;

> "A person must take precautions against harm happening to another if the likelihood of such harm would be realized by the reasonably prudent person. He is not however bound beyond that. He need not take precautions against a mere possibility of harm not amounting to such likelihood as would be realized by the reasonably prudent person."

Furthermore, the Appellants contended that the High Court and the District Court had failed to appreciate the difference between medical negligence and medical misadventure. Therefore, it was submitted that the learned District Judge arrived at a conclusion which is against the evidence led before the District Court and the applicable legal principles.

The Appellants stated that the amputation of the forearm of the 1st Respondent child had evoked tremendous sympathy and drew the attention of court to the words of Dheeraratne J in the case of *Prof. Priyani Soysa v. Rienzie Arsecularatne* (2002) 2 SLR 293;

> "Sympathy is not the valid basis for determination of the important issues in this case, and as judges it is our responsibility to do justice between the parties accordance to law."

Submissions by the 1st and 2nd Respondents

The 1st and 2nd Respondents submitted that, the 1st Respondent who was three weeks old at the time, was suffering from high fever and fits and was admitted to Kethumathi Hospital in Panadura on the 24th of April, 1999. The 1st Respondent was diagnosed with Meningitis and drugs were administered to her by way of intravenous cannulation. On the 29th of April, 1999 the 1st Appellant had made several attempts for a span of 30 minutes, to insert the cannula to the left arm of the 1st Respondent.

On the 30th of April, 1999, the mother of the 1st Respondent observed a paleness in the area around the infusion of the left arm of the 1st Respondent, and notified the 1st Appellant. However, the 1st Appellant had disregarded her complaint.

It was further submitted that according to the medical records the paleness of the 1st Respondent's arm was observed on the morning of the 01st of May, 1999 by Sister Leelarathne and the cannula was removed. Moreover, Dr. Kalyani Guruge, Consultant Paediatrician who was attached to the said unit, suspected that the left arm of the 1st Respondent was forming blood clots and provided treatment to arrest the situation. However, the treatment given to the 1st Respondent failed to produce positive results. Therefore, the 1st Respondent was transferred to the National Hospital of Colombo on the evening of the 01st of May, 1999.

Professor Abdul Sheriffdeen, a vascular surgeon at the National Hospital, had diagnosed that the paleness of the left arm of the 1st Respondent was due to the formation of blood clots and performed a surgery on the 1st Respondent to remove the said clots on the 01st of May 1999.

However, by the 06th of June, 1999, the fingers of the 1st Respondent had blackened due to a development of gangrene, as a result of the blood clotting. Therefore, the said arm was amputated from the forearm by Professor Sheriffdeen, in order to prevent the spreading of the continued development of gangrene.

It was submitted that the formation of blood clots in the 1st Respondent's arm was a result of a damage caused to an artery by the negligence of the 1st Appellant whilst attempting to insert the cannula on the 29th of April, 1999.

The 1st and 2nd Respondents further submitted that as a result of the said injury to the artery the blood circulation to the left arm of the 1st Respondent had been affected, causing gangrening in the area which eventually led to the amputation of the forearm of the 1st Respondent.

Moreover, it was submitted that the 1st Appellant failed to exercise due care and diligence expected from a nurse. Further, had the 1st Appellant acted with due care and diligence when inserting the cannula, and monitored the 1st Respondent, the damage caused to the 1st Respondent could have been avoided.

The Counsel further submitted that, Professor Sheriffdeen who testified on behalf of the 1st and 2nd Respondents, had stated in evidence that the artery would have been pierced as a result of medical negligence of the staff of the Kethumathi Hospital. Further, the damage could have been avoided if the staff in the unit in question, were more diligent.

The 1st and 2nd Respondents cited the case of *Bolitho v. City & Hackney HA* (1997) 4 All ER 771 in support, which held that;

> "A doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct, where it has not been demonstrated to the Judge's satisfaction that the body of opinion relied on was reasonable or responsible."

Did the 1st Respondent suffer the alleged arterial damage whilst taking treatment at the Kethumathi Hospital?

The 1st Respondent had been admitted to the Special Baby Care Unit of the Kethumathi Hospital of Panadura on or about the 24th of April, 1999 and was in the said unit, till she was transferred to the National Hospital of Colombo on the 01st of May, 1999.

The care provided at this unit was for children under one month, with medical emergencies. The unit had eight nurses and 24 hour care was provided for the patients. Further, Dr. Guruge, Consultant Paediatrician who was attached to the said unit had stated that the nurses of this unit have undergone special training to diagnose changes in the children at an early stage and to inform a doctor. They have also been trained to insert cannulas. The unit is well-lit on a 24 hour basis, so that the nurses could see each child from a distance.

The bed head tickets, nurses' notes and other documents maintained at Kethumathi Hospital were marked at the trial. According to the evidence given by Dr. Guruge, the 1st Respondent who was 21 days old at the time, was admitted to the Kethumathi Hospital on the 24th of April, 1999 with a history of high fever and fits. At the time of admission to the hospital the 1st Respondent had no injuries on her left arm, but exhibited tremors in the fingers of her left hand.

Further, the 1st Respondent was given medication by using a cannula on the date of admission, due to the recurring fits. The 1st Respondent had been administered with medication every 12 hours through the cannula until the 26th of April, 1999. However, on the 27th of April, 1999 medication was administered every 6 hours. Dr. Guruge had stated that according to the medical records the fever of the 1st Respondent had increased on the 28th of April, 1999 and returned to normal by the 29th of April, 1999.

Moreover, according to medical records, the 1st Respondent did not suffer from fits or fever on the 29th of April, 1999. Further, she was breast fed by the mother. On the evening of the 29th of April, 1999 the 1st Appellant along with another nurse had inserted a cannula to the 1st Respondent.

According to the testimony of the 1st Appellant, she had taken about 30 minutes to insert the cannula as the veins of the 1st Respondent were not visible and had caused difficulties to insert the cannula. Further, the 1st Appellant admitted that she had not requested for the assistance of a senior staff member or the doctor of the ward. She had further stated that the 1st Respondent was in normal condition on the 30th of April, 1999.

On the morning of the 01st of May, 1999, the cannula had been removed after noticing that the left arm of the 1st Respondent was pale and cold. Upon doctor's instructions, the arm was massaged and medication was administered through a new cannula that was inserted to a vein in a different limb. Dr. Guruge had stated that the colour of the arm had slightly returned to normal after giving medication. However, as the arm did not completely return to its normal condition, the 1st Respondent was transferred to the National Hospital of Colombo on the same day.

Professor Sherifdeen who operated on the 1st Respondent stated that the initial effects of an arterial damage could take place within a period of six hours from the injury. Further, there is no connection between the meningitis condition for which the 1st Respondent was admitted to the hospital and the amputation of her arm.

The staff of the hospital was under an obligation to exercise due care and diligence in respect of all the patients under their care at all times. In addition to the said collective duty, each member of the medical and para medical staff which include nursing staff are personally responsible for their conduct while they treat patients.

Considering that there were no injuries to the arm of the 1st Respondent at the time of being admitted to the Kethumathi Hospital, and the fact that the arterial injury was not related to the illness of the 1st Respondent as stated by Professor Sherifdeen, I am of the opinion that the 1st Respondent suffered an injury to an artery whilst she was being treated at the Kethumathi Hospital which led to the amputation of her arm. Further, the said damage was not related to her illness.

In view of the above finding I shall now consider whether Kethumathi hospital had a duty of care towards the 1st Respondent.

Did Kethumathi Hospital owe a Duty of Care?

A duty of care arises when one owes a duty to another. Further, the duty of care may arise under the common law or as a result of a contract between the parties. It may be breached by commission or omission of a duty.

In the case of *Attorney – General v Smith* 8 NLR 229 at 239 it was held that;

> "The Plaintiff's action is undoubtedly and admittedly founded on contract, and I think that the admission of a person into the General Hospital for treatment involves an implied undertaking on the part of the Government that due and reasonable skill will be exercised by the staff of the hospital, *i.e.*, by the servants of the Government, in the treatment, nursing, and care of the person so admitted into the hospital."

National Guidelines for New Born Care by the Ministry of Health 2014, Volume I, page 52 stipulates the following guidelines in respect of the process of monitoring of babies receiving IV fluids;

"(i) Inspect the infusion site <u>every hour</u>.

(ii) Look for redness and swelling around the insertion site of the cannula, which indicates that the cannula is not in the vein and fluid is leaking into the subcutaneous tissues.

(iii) If redness or swelling is seen at any time, stop the infusion, remove the cannula, and establish a new IV line in a different vein…." [Emphasis added]

Thus, the Special Baby Care Unit of the Kethumathi Hospital, was required to follow the above guidelines. According to the evidence of Dr. Guruge who worked in the said unit, the nurses of the unit are trained for emergencies, and should have been more attentive to the 1st Respondent.

As such, the nurses of the unit should have monitored the 1st Respondent on a regular basis. Had they complied with the stipulated guidelines they would have noticed the changes that were taking place and would have taken immediate steps to prevent the 1st Respondent's condition from being aggravated.

In the circumstances, I am of the opinion that when a patient is admitted to a hospital a contract is formed between the patient and the hospital, not only to treat the patient but also to exercise due care for the said patient. Accordingly, necessary treatment and care should be provided by the hospital through its medical staff and para medical staff. Therefore, the hospitals owe a duty of care to the patients whilst they are in the hospital.

Thus, I hold that Kethumathi Hospital owed a duty of care to the 1st Respondent when she was admitted to the said hospital.

Was the arterial damage a medical misadventure or negligence on the part of the 1st Appellant?

The Appellants submitted that the amputation of the arm of the 1st Respondent was not due to the medical negligence of the staff at Kethumathi hospital but due to a medical misadventure. Hence, this court has to determine whether the said injury to an artery had been caused due to the negligence of the 1st Appellant or if it was a medical misadventure.

Medical misadventure is considered as personal injury resulting from medical error or medical mishap, or an unintended outcome of an intended action.

The term negligence denotes the absence of due care where there is a duty to exercise due care and the failure to exercise such care. The conduct could be wrongful or carelessness arising from an omission or commission of an act.

The mother of the 1st Respondent, in her testimony, stated that the 1st Respondent was admitted to the Kethumathi hospital on the 24th of April, 1999 and received treatments at the Special

Baby Care Unit. She further stated that on the 29th of April, 1999, the 1st Appellant with another nurse inserted a cannula to the left arm of the 1st Respondent. She stated that she noticed the 1st Appellant attempting to insert the said cannula to several places and it took about 30 minutes for her to succeed.

Professor Abdul Haleem Sheriffdeen, Consultant Vascular Surgeon of the National Hospital, Colombo, stated that injuries to arteries and external pressure on an artery are among the most probable causes for blood clotting. He stated that an arterial injury could be caused in three circumstances;

1. When cannulating a patient who is unconscious when admitting to the hospital due to the collapsed blood vessels,
2. while cannulating at any time after being admitted to the hospital, and
3. when a cannula is mistakenly inserted into an artery.

According to the evidence of the Proffessor, during the first surgery performed on the 1st Respondent, he observed an injury to an artery in the affected area and identified it as the root cause for the 1st Respondent's condition. He was of the opinion that the anti-biotics given to the 1st Respondent for meningitis had entered into the blood stream through the said injury which caused the blood clotting.

Three medical officers and seven members of the nursing staff including the 1st Appellant gave evidence on behalf of the 1st Appellant.

All the members of the nursing staff who had testified in court admitted that the cannula removed from the 1st Respondent's arm after noticing the paleness on the 1st of May, 1999 was inserted on the 29th of April, 1999 by the 1st Appellant.

The 1st Appellant in her testimony, admitted that she inserted the cannula to the 1st Respondent on the 29th of April, 1999 and that it took about 30 minutes to insert the cannula. She had further stated that she was aware of the sedative drug that has been administered to the 1st Respondent which made it difficult to locate the veins. She admitted that she did not seek the assistance of the medical officer on-call when she found it difficult to locate a vein.

The 1st Appellant had stated that she did not injure an artery in her attempt to insert the cannula into the 1st Respondent. The 1st Appellant stated that an arterial injury could be caused in four different instances, i.e. when taking blood for testing, while cannulation, while giving saline and while injecting the drugs.

Dr. Kalyani Guruge, stated that after noticing the paleness in the 1st Respondent's hand on the 1st of May, 1999 she consulted the doctors at the National Hospital, Colombo to obtain the necessary instructions and treated the patient accordingly. As the condition of the 1st Respondent was deteriorating, she was transferred to the National Hospital on the same day.

According to Professor Sheriffdeen, the 1st Respondent's left forearm had to be amputated due to the gangrene that developed in the affected area as a result of the blood clotting in the affected area. His conclusion was that the effect of the antibiotics given for meningitis which had entered into the blood stream via the arterial injury had caused the blood clotting. He was of the opinion that the negligence of the staff who cared for the 1st Respondent in cannulating and monitoring led to the amputation of the left arm of the 1st Respondent.

Furthermore, the 1st Appellant had failed to request for assistance in cannulating the 1st Respondent, when it became apparent that it was difficult to insert the cannula. This was followed by the failure to monitor the arm of the 1st Respondent after the cannula was inserted. In the circumstances, I am of the opinion that the 1st and 2nd Respondents have established the negligence on a balance of probability.

Taking into consideration the evidence led at the trial, I hold that the amputation of the arm was not due to a medical misadventure but due to negligence. In this regard I wish to mention, had the staff of the Kethumathi hospital monitored the 1st Respondent they could have avoided the amputation of the arm.

Was the 1st Appellant Negligent?

According to R. G. McKerron in 'The Law of Delict' at page 26;

> "Considered as an objective fact, negligence may be defined as conduct which involves an unreasonable risk of harm to others. It is the failure in given circumstances to exercise that degree of care which the circumstances demand. It is a relative, not an absolute, conception, and may consist either in omitting to do something which a prudent and reasonable man would do in the circumstances or in doing something which a prudent and reasonable man would not do in the circumstances."

Charlesworth & Percy on Negligence (9th Edition) at page 16 refers to three essential components that needs to establish negligence;

"a. The existence of a duty to take care, which is owed by the defendant to the complainant;

b. The failure to attain that standard of care, thereby committing a breach of such duty; and

c. Damage which is both casually connected with such breach, has been suffered by the complainant."

(a) Was a duty of care owed by the 1st Appellant to the 1st Respondent?

In order to establish negligence, there has to be a duty of care owed by the 1st Appellant to the 1st Respondent. A duty arises when the law recognizes a relationship between two people where one owes a duty of care to the other. Charlesworth & Percy on Negligence page 19 (9th Edition) states that the word 'duty' indicates a relationship between one person and another, imposing an obligation on one person, for the benefit of the other, in order to take reasonable care in all the circumstances.

The 1st Appellant was a nurse by profession, working at the Special Baby Care Unit at the Kethumathi Hospital. It was common ground that the 1st Appellant, inserted a cannula to the 1st Respondent on the evening of the 29th of April, 1999.

It was held as follows in *Rex v. Bateman* (1925) 19 Cr App R8 at 12;

> "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that service be rendered for reward…… The law requires a fair and reasonable standard of care and competence……."

It was held in *Achutrao Haribhau Khodwa v State of Maharashtra* AIR [1996] SC 2377 at 2383,

> "A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge, which he is to exercise a

> reasonable degree of care. This is the least which a patient expects from a doctor."

I am of the opinion that the degree of care set out in the above cases are not only applicable to the doctors but also to all para medical personnel which includes nurses. The 1st Appellant was on duty from the 29th of April, 1999 to the 30th of April, 1999 and thus owed a duty of care towards the 1st Respondent who was a patient entrusted in her care.

Further, the 1st Appellant had a duty of care towards the 1st Respondent when she inserted the cannula and to monitor her thereafter. Particularly given the fact that the 1st Respondent was only 15 days old, the veins were not visible and it had taken about 30 minutes to insert the cannula. The 1st Appellant had a duty to comply with the said guidelines and she should have monitored the 1st Respondent on an hourly basis.

(b) Did the 1st Appellant breach the duty of care owed to the 1st Respondent?

A duty of care may be breached by failing to exercise reasonable care in fulfilling a duty. Breach of a duty of care is decided on facts and circumstances of each case.

It was held in *Poonam Verma v Aswin Patel* AIR (1996) SC 2111 at 2116,

> "The breach of duty may be occasioned either by not doing something which a reasonable man, under a given set of circumstances would do, or, by doing some acts which a reasonable and prudent man would not do"

Thus, to succeed in a case of negligence, the Plaintiff must prove that the Defendant was in breach of his duty of care. The standard of care and what constitutes a breach of that standard ought to be determined based on the facts of each case.

In *Lanphier v Phipos* [1838] 8 C & P 419 at 420, it was held;

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantage than he has, but he undertakes to bring a fair, reasonable and competent degree of skill ……"

The standard of care can be assessed in an objective manner according to the task undertaken by the professional, irrespective of his qualification and job title. The standard of care has to be judged as to what ought to have been done and the requirement to have foresight is to be assessed as to what ought to have been foreseen in the particular circumstances. Hence, the standard of care of the 1st Appellant owed to the 1st Respondent who was an infant of three weeks is of a higher degree than to a normal patient.

In *Glasgow Corporation v Muir* [1943] 2 All ER 44 at 48 referring to the standard of care it was held;

> "The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life."

It was alleged by the Respondents that the 1st Appellant acted in breach of her duty of care while inserting the cannula to the 1st Respondent on the 29th of April, 1999.

Professor Sheriffdeen had stated that while performing the surgery to remove the blood clot, he noticed an injury to an artery where the blood clotting had taken place. Professor Sheriffdeen was of the opinion that the said injury had happened when the cannula was inserted into the artery while the 1st Respondent was treated at the Kethumathi hospital. He specifically denied the possibility of an artery being injured by a cannula during a state of fits suffered by the 1st Respondent because a cannula cannot pierce through substances as it is made of plastic.

Professor Sheriffdeen, in his testimony further stated that the effects of an arterial injury on a patient stabilizes within twenty-four hours from its causation.

The last time a cannula was inserted into the 1st Respondent was at around 7.00 pm on the 29th of April, 1999 while she was at the Kethumathi hospital which was inserted by the 1st Appellant. Therefore, it is reasonable to assume that the said arterial injury was caused during the said cannulation.

The 1st Appellant while giving evidence, admitted that she inserted a cannula into the 1st Respondent's arm at around 8.00 pm on the 29th of April, 1999. Further, the witnesses from the nursing staff attached to the Special Baby Care Unit of the hospital who testified on behalf of

the 1st Appellant admitted that the said cannula inserted by the 1st Appellant was the same cannula which was removed on the 1st of May 1999, after noticing the change of colour around the infusion site of the affected arm of the 1st Respondent.

The 1st Appellant further admitted that she took about 30 minutes to insert the cannula as it was difficult to locate a vein. She also admitted that she was aware of effects of the sedative drug named Phenobarbital administered to the baby, which makes it difficult to locate the veins.

The 1st Appellant stated that she inserted the cannula only once and she took a long time for cannulation because she was being extra attentive and diligent. However, she admitted that she found it difficult to locate a suitable vein to insert the cannula and that she did not call the medical officer on duty for assistance.

In the circumstances, I am of the opinion that after realizing the difficulty in locating the veins of the 1st Respondent who was an infant of three-weeks administered with sedative drugs along with other drugs, the 1st Appellant ought to have sought the assistance of the senior nurse or the doctor who were at the ward at the time the cannula was inserted to the 1st Respondent.

The test is whether a reasonable man would not do, and not doing something a reasonable man would do. I am of the view that a reasonable person would have sought the assistance of a doctor when it was not possible to insert a cannula for about 30 minutes specially when the baby was only 21 days old. Further, was it not too much to expect from a reasonable person to monitor the hand of a baby after a cannula was inserted after a struggle of 30 minutes.

Thus, taking into consideration the age, the medical condition of the 1st Respondent and particularly the long span of time that the 1st Appellant took to insert the cannula and the fact that the hand got disfigured only after the cannula was inserted by the 1st Appellant on the 29th of April, 1999, I hold that an artery had got damaged whilst inserting the cannula by the 1st Appellant.

Further, the 1st Respondent had failed to monitor the 1st Respondent after the cannula was inserted. This conduct cannot be accepted from a reasonable person. Especially from a trained nurse.

In the circumstances, I am of the opinion that the 1st Appellant has breached the duty of care owed to the 1st Respondent when the danger was clearly foreseeable and obvious. It cannot be considered as an accident or a medical misadventure, but negligence.

Did the 1st Respondent suffer damages as a result of the negligence of the 1st Appellant?

The damage caused to the 1st Respondent should be a proximate cause of the breach of duty of care and the 1st and 2nd Respondents should prove it on a balance of probability.

Hence, the nexus between the damage and the alleged negligence must not be remote. Further, the Respondents must prove that the injury was not a result of the cause of the disease or an accepted and inevitable complication of treatment given with skill and care. Further, the injury or damage should have been foreseeable.

The 1st Appellant was a nurse attached to the Special Baby Care Unit of the Kethumathi Hospital and she has had 26 years of experience. She was the second most senior at the said ward and was trained to handle emergency situations. The care offered in this ward is for infants below 30 days of age and the nurses are specially trained to provide special care for such babies.

According to the testimony of the 1st Appellant, on the evening of the 29th of April, 1999 she had taken about 30 minutes to insert the cannula to the 1st Respondent's arm. She had stated that a long time was taken as the veins of the 1st Respondent were not visible and the skin had to be cleaned to insert the cannula. However, she admitted that she did not request the assistance from a senior nurse or the doctor even though they were present at the ward. Further, she failed to monitor the arm of the 1st Respondent after the cannula was inserted.

According to the evidence led at the trial, at the time the 1st Respondent was admitted to the hospital on the 24th of April, 1999, the 1st Respondent was only suffering from fever and fits which was later diagnosed as meningitis.

According to Professor Sheriffdeen, the left arm of the 1st Respondent had to be amputated because of the gangrene that developed in the arm, due to the interrupted blood circulation. The said interruption was caused by the blood clotting that had taken place in the artery which supplied blood to her left arm.

As discussed above, the left arm of the 1st Respondent was amputated due to a damage caused to an artery whilst she was in the said hospital. Taking into consideration the long span of time the 1st Appellant took to insert the cannula and the failure to seek the assistance of the senior nurse or the doctor who were available in the ward and the failure to monitor the 1st Respondent after the cannula was inserted, I hold that the 1st Appellant failed in the duty of care that she owed to the 1st Respondent. As discussed above, I am of the view that the 1st Appellant was negligent in her duty and as a result the left arm of the 1st Respondent was amputated below

the left forearm. As stated above the said amputation was due to medical negligence that took place whilst the 1st Respondent was in Kethumathi Hospital.

As discussed, the 1st Appellant has failed to exercise due care at the time she inserted the cannula and to monitor the 1st Respondent. Thus, I hold that she was negligent when she treated the 1st Respondent and thus, she suffered damages as a result of the said negligence.

Vicarious liability of the 2nd Appellant

Vicarious Liability as defined in 'The law of delict in Ceylon' by E. R. Wickramanayake at page 30 states as follows;

> "The general rule of the Roman Dutch Law is that a person is liable only for his own negligence. Under that law therefore a husband is not liable for his wife's torts any more than she is liable for his. This general rule is however subject to one exception, namely, that a master is liable for the acts of his servant operating within the sphere of the duty or service entrusted to him.
>
> Two conditions must be satisfied before one man can be held liable for the delict of another. i.e.
>
> (i) The latter must be his servant and not an independent contractor.
> (ii) The delict must be committed in the course of the master's employment."

According to the letter of appointment issued by the Western Provincial Council, marked as 'V1', the 1st Appellant worked within the scope of the 2nd Appellant as a nurse in the Kethumathi Hospital of Panadura at the time of the incident. The 1st and 2nd Respondents proved that the 1st Respondent suffered the arterial damage whilst being a patient at the special baby care unit of the Kethumathi Hospital. Therefore, the 2nd Appellant is vicariously liable for the actions of the 1st Appellant.

In any event the 1st and 2nd Respondents proved that the 1st Respondent suffered a damage to an artery which led to the amputation of the left arm below the forearm, whilst she was at Kethumathi Hospital due to the negligence of the staff. As discussed in the case of *Attorney – General v Smith* (supra) the admission of a person into the hospital for treatment involves an implied undertaking on the part of the hospital that due and reasonable skill will be exercised

by the staff of the hospital. Hence, I am of the view that it is not necessary to prove which member of the staff was negligent.

Is the Judgement of the District Court perverse?

The learned District Court Judge had the advantage of seeing and hearing the witnesses who gave evidence in the case. He has given cogent reasons for his findings of fact.

I am of the opinion that the learned District Judge had adequately considered and evaluated the evidence led at the trial. Evaluation of the facts is a matter for the trial court. Any reasonable person with a trained legal mind would have arrived at the same conclusions that he arrived at, in the instant appeal. The judgement of the District Court is not perverse. An appellate court will not interfere with the finding of facts and substitute with a preferred version unless the judgement of the District Court is perverse.

As discussed above, I am also of the opinion that the 1st and 2nd Respondents have proved their case on a balance of probability. Further, the judgement of the District Court is not perverse and thus, the question of setting aside will not arise.

Conclusion

I hold that the 1st Appellant had a duty to take care when she inserted the cannula to the 1st Respondent and she breached the said duty of care. As a result of the said breach the 1st Respondent suffered damages. Thus, the 1st Appellant and her employer who is the 2nd Appellant are liable for the damages suffered by the 1st Respondent.

Accordingly, the following questions of law are answered as follows;

i. The Provincial High Court erred in law in holding that the 1st Petitioner's (1st Appellant's) act of negligence resulted in the amputation of the hand of the 1st Plaintiff – Respondent? No

ii. The Provincial High Court erred in law when it failed to appreciate that the said judgement (of the District Court) is contrary to law and against the evidence presented in the case? No

In view of the aforementioned findings I dismiss the appeal with costs fixed at Rs.50,000/-. Accordingly, The Appellants should pay the said sum of Rs. 50,000/- to the 1st and 2nd Respondents in addition to the costs ordered by the lower courts.

Judge of the Supreme Court

Priyasath Dep, PC, CJ

I agree **Chief Justice**

Buwaneka Aluwihare, PC, J

I agree **Judge of the Supreme Court**