Privy Council Appeal No. 11 of 1966

Chin Keow – – – – – – – – – – *Appellant*

v.

Government of Malaysia and Doctor Joseph Loganathan Devadason – – – – – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH APRIL 1967

Present at the Hearing:
VISCOUNT DILHORNE
LORD HODSON
LORD GUEST
LORD UPJOHN
SIR HUGH WOODING
[*Delivered by* SIR HUGH WOODING]

On the morning of 7th April 1960 Madam Chu Wai Lian, an amah employed in the Social Hygiene Clinic at Sultain Street, Kuala Lumpur, spoke to the staff nurse about an ulcer on her right ankle and swollen glands in her thigh. The nurse, Madam Chan Tet Chin, took her to the respondent Dr. Devadason who was then the medical officer in charge of the clinic. After he had examined her, she was given an injection of procaine penicillin from which she died within an hour. Alleging that her death was due to the negligence of the doctor, her mother, the appellant Madam Chin Keow, claimed damages under s. 7 of the Civil Law Ordinance of Malaya on behalf of herself and the infant son of the deceased. She also claimed for loss of expectation of the life of the deceased, but in the events which have happened this claim is not now pursued. The two respondents were named as defendants in the action the doctor having been employed by the Federal Government of Malaysia to run the clinic on its behalf.

The action came on before Ong J. who found for the appellant. He awarded damages and compensation in the sum of $10,250, including $750 for funeral expenses, and he apportioned the balance by awarding $8,000 as compensation to the infant son and $1,500 to the appellant personally. Also, he ordered the respondents to pay the costs of the action. On an appeal by the respondents, the Federal Court of Malaysia rejected Ong J.'s finding of negligence and accordingly allowed the appeal, dismissing the action with costs both in that court and in the court below. The appellant then obtained special leave to appeal to this Board in *forma pauperis*.

The only issue arising upon this appeal is whether the Federal Court was right in rejecting Ong J.'s finding that the doctor was negligent. The negligence alleged may be summed up under three heads as follows: (1) that before prescribing the injection the doctor failed (*a*) to inquire or (*b*) to carry out any tests, as he ought properly to have done, so as to ascertain whether the deceased was allergic to penicillin; (2) that he caused the staff nurse to administer, or alternatively failed to instruct her

not to administer, the injection in the buttock which was an unsafe place for that purpose; and (3) that he failed to take proper, timely and effective measures to remedy the effect on the deceased of the penicillin injection. No evidence was led, however, which could in any way support the second or third allegation. As to the first, it became clear that medical opinion was at that time divided as to the value of sensitivity tests, so Ong J. was not troubled by the omission to carry them out. On his assessment of the evidence, the essential issue was whether the admitted failure to make any inquiry into the history of the patient was a negligent omission on the part of the doctor.

Their Lordships agree with the Federal Court, but for entirely different reasons, that no question of credibility was involved at the trial. It matters not at all whether, as the respondents alleged, the doctor prescribed sulphatetrad tablets or alternatively a penicillin injection and that the deceased elected to have the latter. It was he who was consulted and it was he who prescribed. It was his responsibility therefore to take such precautions as might be appropriate to avoid any harmful result. And if it should be that due inquiry should have shown that injecting the patient with penicillin was likely to be dangerous, it was his duty not to direct or cause it to be given whatever her own preference may have been if, as it appears in this case, an alternative method of treatment was available. Their Lordships make particular reference to this because such contradictions as Ong J. found in and between the evidence of the nurse and the doctor are in their opinion quite immaterial and may well be explained by an unclear recollection of the details of events which occurred more than four years before the hearing of the action.

It was not in dispute that before prescribing or authorising the injection to be given Dr. Devadason did not inquire into the deceased's medical history. On the contrary, he frankly admitted this himself. So the sole question which Ong J. had to determine was whether any duty lay on the doctor to make such inquiry. For this purpose he adopted the test, in their Lordships' opinion quite rightly, which was propounded by McNair J. in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, at p. 586, as follows:

> "where you get a situation which involves the use of some special skill or competence, . . . the test . . . is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

What, then, was the evidence in that regard? Dr. Tan, a witness for the appellant, stated that when penicillin is indicated he would take a careful history. He described what his interrogation would be—an interrogation which he said would not exceed five minutes—and he added that all his staff had been trained to ask those questions. Finally, he explained that all these inquiries were necessary because penicillin has proved fatal in quite a number of cases. Not only was he not cross-examined on any of this evidence, but Dr. Pillay who testified for the respondents stated explicitly that the history of the patient should have been taken before the injection. And Dr. Devadason himself admitted that he knew of the possibility of a person developing hypersensitivity to penicillin after having had penicillin before, that he had been told by the nurse that the deceased had had a penicillin injection some years previously, that in such cases there was a remote possibility of danger and that, knowing this, he nevertheless carried on because he had had no mishaps before. In other words, he followed his routine practice of never pausing to make the appropriate inquiry. It may be that he had fallen into this routine because in his clinic, which was essentially for venereal disease, he did an average of one hundred injections each day, but in the view of their Lordships that cannot suffice to exempt him from the duty of care which a doctor owes to every patient he treats.

The Federal Court seems however to have thought that evidence should have been forthcoming from medical witnesses of the highest professional standing or that such evidence as there was should have been supported by references to the writings of distinguished medical men. Their Lordships do not agree. The test is the standard of the ordinary competent practitioner exercising ordinary professional skill, and on this the evidence was all one way. Further, from a detailed analysis of the written record the Federal Court concluded that in speaking of the obligation to make due inquiry the medical witnesses were speaking from hindsight and not of what they considered to have been the reasonable requirement at the material time—in April 1960. But Ong J. made it abundantly clear that he did not view "this 1960 case through 1964 spectacles". He saw and heard the witnesses. His notes were not a verbatim reproduction of the *viva voce* proceedings but his own recorded account of the evidence. He was nonetheless aware of the questions asked and in a position of advantage to assess the answers given. He had thus impressed upon him the scope and nature of the evidence in a way denied to any appellate tribunal. No such tribunal could therefore have the same vivid appreciation of what the witnesses said and what they meant by what they deposed.

Their Lordships are accordingly of opinion that the Federal Court was wrong in rejecting the finding of Ong J. and in substituting conclusions of its own. In their view, it is plain that Dr. Devadason failed in his duty to make appropriate inquiry before causing the penicillin injection to be given which, it was admitted on the pleadings, was the cause of the death of the deceased. Had any inquiry been made, he would undoubtedly have been made aware that in 1958, three years after the giving of the injection of which the nurse made mention, the deceased had been given another from which she suffered adverse reactions which led to an endorsement on her out-patient card of the warning "Allergic to Penicillin". In such circumstances, the fatal injection should never have been given.

Accordingly, their Lordships will advise the Head of Malaysia that the judgment of the Federal Court be reversed and that of Ong J. be restored, that the respondents should be ordered to pay the appellant's costs of the appeal before the Federal Court and of this appeal but, as she was given leave to prosecute her appeal in *forma pauperis* before this Board, the latter will be taxed on the pauper scale.

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In the Privy Council

CHIN KEOW

v.

GOVERNMENT OF MALAYSIA AND DOCTOR JOSEPH LOGANATHAN DEVADASON

DELIVERED BY
SIR HUGH WOODING

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