Professor Dr Hj Mohammed Feizal bin Abdullah @ Balakrishnan a/l Krishnan & Anor v Harvender Jeet Kaur a/p Kaka Singh & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–123 OF 2001
HARMINDAR SINGH JC
31 JULY 2009

Tort — False imprisonment — Whether first defendant wrongfully detained in second plaintiff's premises

Tort — Negligence — Professional negligence — Claim against medical practitioner and hospital run by him — Causation — Whether first defendant proven on balance of probabilities that it was first plaintiff's negligence rather than some other factor which caused death of her newborn baby — Res ipsa loquitur — Whether res ipsa loquitur must be pleaded before first defendant could rely on it in this trial — Whether conditions for res ipsa loquitur to apply had been satisfied — Whether newborn baby was in sole management and control of plaintiffs

The first plaintiff was a consultant surgeon in a private hospital run by the second plaintiff, in which the first defendant had delivered a healthy baby boy on 7 February 1996. Just after midnight on the same day when the newborn baby developed breathing difficulties, the first defendant had asked for a doctor. However there was no doctor or nurse present at the hospital at that time to render assistance. The only person present was one Abdul Azeez ('Azeez') who was not called upon as a witness, who performed some sort of suction on the baby. After attending to the baby Azeez had left at about 3.30am to look for the first plaintiff. In the meantime the first defendant frantically looked for assistance by going downstairs where she found that she had been locked in the premises with no one around. She then called her sister-in-law for help and while waiting managed to break the lock open. While she was unsuccessfully trying to push the baby through the grills of the door, Azeez returned followed by the first plaintiff a little later at 5.20am. Despite attempts at resuscitation the baby died at 6am of respiratory distress syndrome. The events that transpired were reported prominently in all the major newspapers but more so in the newspapers published by the second defendant. The plaintiffs then commenced the present suit against the defendants for defamation and to this the first defendant filed a defence and

counterclaim for defamation, false imprisonment and negligence. The plaintiffs' claim was however struck off leaving only the first defendant's counterclaim to be decided by the court. The claim for defamation was abandoned by the first defendant at the outset of the trial. Thus the issues before the court were whether the first defendant was wrongfully detained in the second plaintiff's premises as she claimed, whether the negligence of the first plaintiff caused the death of the first defendant's baby and whether the first defendant could rely on res ipsa loquitur to prove negligence on the part of the plaintiffs.

Held, dismissing the first defendant's counterclaim with no order as to costs:

(1) According to the first plaintiff, whose evidence was confirmed by a nurse with the second plaintiff, although the front door grill was locked, there were keys hung at the side of the front door. There were also emergency exits that could be easily identified as they carried the exit sign. As such, it was more likely that the first defendant who had just had her baby and was in agony at the deteriorating condition of the newborn that she failed to notice the exit doors or the keys to the front door. Under these circumstances, the court must adopt a pragmatic approach and hold that the first defendant was not wrongfully detained as she claimed (see paras 7–10).

(2) Although the evidence adduced clearly showed that inadequate arrangements were made to monitor the first defendant and her baby after the birth, the first defendant had the burden to prove on a balance of probabilities that it was the first plaintiff's negligence rather than some other factor which caused the death of the baby. In this regard it was necessary to consider whether the maxim res ipsa loquitur must be pleaded before the first defendant could rely on it in this trial and whether the conditions for res ipsa loquitur to apply had been satisfied. As a case of res ipsa loquitur merely shifts the burden of introducing evidence and since pleadings only require a disclosure of material facts not evidence, a failure to plead the maxim in this case did not preclude the first defendant from raising the same at the end of the trial. However, in order for the maxim to apply the baby must be in the sole management and control of the plaintiffs. In the instant case there was undisputed evidence that the baby was handed over to the first defendant's mother-in-law at her insistence and therefore the baby was not in the exclusive care, control and management of the plaintiffs. As such, the cause of death was not within the peculiar knowledge of the plaintiffs and an inference of negligence through res ipsa loquitur did not apply. As such, the burden to prove breach of duty, injury and

causation on a balance of probabilities remained with the first defendant (see paras 11, 12, 14, 15, 17 & 18).

(3) The issue of causation is critical in cases involving negligence on the part of a medical practitioner. Thus in the instant case, it was vital to call in medical evidence to prove how delay in attending to the baby could have led to the baby's death. Since this evidence was not provided, the first defendant had failed on a balance of probabilities to prove negligence on the part of the plaintiffs and the first defendant's claim in negligence must fail (see paras 18 & 21).

[Bahasa Malaysia summary

Plaintif pertama adalah doktor bedah perunding di sebuah hospital swasta yang dijalankan oleh plaintif kedua, di mana defendan pertama melahirkan bayi lelaki yang sihat pada 7 Februari 1996. Sebaik sahaja tengah malam pada hari sama apabila bayi yang baru dilahirkan itu mengalami kesukaran bernafas, defendan pertama telah meminta pertolongan seorang doktor. Walau bagaimanapun tidak ada doktor atau jururawat yang berada di hospital pada masa itu untuk memberikan bantuan. Satu-satunya orang yang hadir adalah seorang bernama Abdul Azeez ('Azeez') yang tidak dipanggil sebagai seorang saksi, yang telah melakukan sejenis sedutan ke atas bayi itu. Selepas membantu bayi itu Azeez telah meninggalkan hospital pada kira-kira jam 3.30 pagi untuk mencari plaintif pertama. Sementara itu defendan pertama dengan cemasnya mencari bantuan dengan pergi ke bawah di mana dia mendapati bahawa dia telah dikunci dalam premis tersebut tanpa seorang pun yang tinggal. Dia kemudiannya memanggil kakak iparnya untuk pertolongan dan sementara menunggu berjaya untuk memecahkan kunci tersebut. Sementara dia sedang mencuba untuk menolak bayi melalui gril pintu itu, Azeez kembali diikuti oleh plaintif pertama selepas itu pada jam 5.20 pagi. Walaupun percubaan-percubaan untuk memulihkan dibuat bayi itu mati pada jam 6 pagi kerana 'respiratory distress syndrome'. Peristiwa yang telah berlaku itu dilaporkan dengan ketaranya dalam semua akhbar-akhbar utama tetapi lebih ketara dalam akhbar yang dicetak oleh defendan kedua. Plaintif kemudiannya memulakan guaman ini terhadap defendan-defendan untuk fitnah dan terhadap itu defendan pertama memfailkan satu pembelaan dan tuntutan balas untuk fitnah, penahanan salah dan kecuaian. Tuntutan plaintif walau bagaimanapun dibatalkan dan yang hanya tinggal tuntutan balas defendan pertama untuk diputuskan oleh mahkamah. Tuntutan untuk fitnah telah ditinggalkan oleh defendan pertama pada permulaan perbicaraan tersebut. Oleh itu isu-isu di hadapan mahkamah adalah sama ada defendan pertama adalah dengan salahnya ditahan dalam premis plaintif kedua sepertimana yang didakwa olehnya, sama ada kecuaian plaintif pertama itu menyebabkan kematian bayi defendan pertama dan sama

ada defendan pertama boleh bergantung pada res ipsa loquitur bagi membuktikan kecuaian oleh plaintif. A

Diputuskan, menolak tuntutan balas defendan pertama anpa perintah untuk kos: B

(1) Menurut plaintif pertama, di mana keterangannya telah disahkan oleh seorang jururawat yang bekerja dengan plaintif kedua, walaupun gril pintu depan telah dikunci, terdapat kunci-kunci yang digantung di tepi pintu depan. Terdapat juga pintu-pintu keluar kecemasan yang boleh dikenalpasti dengan mudah kerana mereka mempunyai tanda keluar. Oleh itu, ianya lebih berkemungkinan bahawa defendan pertama yang baru saja melahirkan bayinya dan sedang menderita akibat keadaan merosot bayi baru lahir itu sehingga dia gagal untuk memerhatikan pintu-pintu keluar atau kunci-kunci untuk pintu depan. Di bawah keadaan-keadaan ini, mahkamah mesti menerima satu pendekatan pragmatik dan memutuskan yang defendan pertama tidak dengan salahnya ditahan seperti yang didakwanya (lihat perenggan 7–10). C D

(2) Walaupun bukti yang dikemukakan menunjukkan dengan jelas bahawa persiapan yang tidak memadai telah dibuat untuk memerhati defendan pertama dan bayinya selepas kelahiran, defendan pertama mempunyai beban bagi membuktikan atas satu imbangan kebarangkalian bahawa ia adalah kecuaian plaintif pertama dan bukannya faktor-faktor lain yang menyebabkan kematian bayi tersebut. Sehubungan ini ianya adalah mustahak untuk menimbangkan sama ada maxim res ipsa loquitur mesti diplidkan sebelum defendan pertama boleh bergantung padanya dalam perbicaraan ini dan sama ada syarat-syarat untuk penggunaan res ipsa loquitur telah dipenuhi. Oleh kerana satu kes res ipsa loquitur hanya mengalihkan beban untuk mengemukakan bukti dan memandangkan pliding hanya menghendaki satu pendedahan fakta-fakta yang material dan bukan bukti, suatu kegagalan untuk memplidkan maxim tersebut dalam kes ini tidak menghalang defendan pertama daripada menimbulkannya di akhir perbicaraan. Walau bagaimanapun, untuk maxim itu digunapakai bayi tersebut mesti berada di dalam pengurusan dan kawalan khusus plaintif. Dalam kes ini terdapat bukti yang tidak dapat dipertikaikan bahawa bayi tersebut telah diserahkan kepada ibu mertua defendan pertama atas desakannya dan oleh itu bayi tersebut bukan berada dalam penjagaan, kawalan dan pengurusan eksklusif plaintif. Oleh itu, punca kematian bukanlah dalam pengetahuan khusus plaintif dan satu inferens kecuaian melalui res ipsa loquitur adalah tidak terpakai. Oleh itu, beban bagi membuktikan pelanggaran kewajipan, kecederaan dan penyebaban atas E F G H I

satu imbangan kebarangkalian kekal dengan defendan pertama (lihat perenggan 11, 12, 14, 15, 17 & 18).

(3) Isu penyebaban adalah kritikal dalam kes-kes yang melibatkan kecuaian oleh seorang pengamal perubatan. Oleh itu dalam kes sekarang ini, ianya adalah amat penting untuk meminta bantuan keterangan perubatan bagi membuktikan bagaimana kelewatan dalam membantu bayi tersebut boleh menyebabkan kematian bayi tersebut. Oleh kerana bukti ini tidak diberikan, defendan pertama telah gagal atas satu imbangan kebarangkalian bagi membuktikan kecuaian oleh plaintif dan tuntutan defendan pertama bagi kecuaian mesti gagal (lihat perenggan 18 & 21).]

Notes

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1133–1206.

For cases on whether first defendant wrongfully detained in second plaintiff's premises, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 636–654.

Cases referred to

Barnett v Chelsea & Kensington Hospital Management Committee [1968] 3 All ER 1068, QBD (refd)

Bennett v Chemical Construction (GB) Ltd [1971] 1 WLR 1571, CA (refd)

MA Clyde v Wong Ah Mei [1970] 2 MLJ 183; [1970] 1 LNS 73, FC (refd)

Scott v London and St Katherine's Docks Co (1865) 3 H & C 596 (refd)

Teoh Guat Lai v Ng Hong Guan [1998] 4 MLJ 525; [1998] 4 AMR 3815, CA (refd)

Wilsher v Essex Area Health Authority [1988] 1 All ER 871, HL (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103

M Manoharan (M Manoharan & Co) for the plaintiffs.
David Gurupatham (David Gurupatham & Koay) for the first defendants.

Harmindar Singh JC:

[1] On 7 February 1996 at about 5.30pm, the first defendant gave birth to a healthy baby boy later named Babypal Singh ('the baby'). The baby was delivered in the premises of the second plaintiff which was a private hospital run by the first plaintiff who was a consultant surgeon. This joyous occasion was however short-lived as what unfolded next is a tragic story, the events of which appeared extensively in the newspaper managed by the second defendant. The story is as follows.

[2] Just after midnight on 7 February 1996, the baby developed breathing difficulties. When the first defendant asked for a doctor, she was told that he was not around. There was also no nurse at that time although the plaintiffs dispute this. There was one person who was around. The first defendant says that he was just a dispenser. This person as could be gathered from the evidence was one Abdul Azeez. He performed some sort of suction on the baby. He was not called to give evidence. Although the first plaintiff asserted that this Abdul Azeez was qualified, no evidence of his qualifications was given.

[3] It then transpired that this Abdul Azeez had called the first plaintiff around 3.30am. Abdul Azeez then leaved the premises and arrived at the first defendant's house at about 5am. The first plaintiff then arrived at the hospital at 5.20am. Despite attempts at resuscitation, the baby died at 6am. The cause of death was listed as 'respiratory distress syndrome'. But that is not the whole story.

[4] Prior to this, after Abdul Azeez had attended to the baby and then left to look for the first plaintiff, the baby's condition was getting worse. In a frantic state, the first defendant took the baby downstairs to find assistance. She found no one and to compound her predicament, she found the premises locked. She managed to break open the lock on a phone and called her sister-in-law who arrived 15 minutes later. In what must have been a moment of sheer desperation, the first defendant tried to push the baby through the grill but was unsuccessful. Soon after, Abdul Azeez returned followed by the first plaintiff a little later. As it turned out, all the efforts were in vain. The events that transpired were reported prominently in all the major newspapers but more so in the *New Straits Times* and the *Malay Mail*.

[5] The plaintiffs then commenced this suit against the defendants for defamation. In return, the first defendant filed a defence and counterclaim for defamation, false imprisonment and negligence. The claim of the plaintiffs was however struck out on 18 September 2008. An application for reinstatement of the plaintiffs' claim was dismissed on 3 April 2009. The plaintiffs have filed an appeal to the Court of Appeal which appeal is pending.

[6] In the circumstances, only the counterclaim by the first defendant was left to be decided by this court. However, the claim for defamation was abandoned at the outset of the trial. The remaining claims of wrongful detention and negligence were considered as follows.

CLAIM FOR WRONGFUL DETENTION

[7] The first defendant claimed that she was wrongfully detained in the

plaintiffs' premises for a period of about 5 1/2 hours. Her evidence was that she saw only three doors and they were all locked. On the other hand, the first plaintiff testified that although the front door grill was locked, there are always keys hung at the side. This was confirmed by SP2, a nurse with the second plaintiff, who said there was a key at the side of the front door. Apart from this, there were emergency exits that could be easily identified as they carried the 'exit' sign.

[8] Considering these circumstances, I am unable to see how the first defendant could have claimed that she was wrongfully detained. The exit doors could be opened from the inside though not from the outside. I think it was more than likely that as the first defendant had just given birth and as she was in agony at the deteriorating condition of her newborn, she failed to notice the exit doors or the keys to the front door.

[9] In this kind of situation, the court must adopt a pragmatic approach. Whether there was wrongful detention or not must depend on the specific circumstances of each case, the situation of the individual and the context in which the individual finds himself or herself.

[10] Considering all the circumstances and the facts involved in this case, the first defendant's claim for wrongful detention cannot succeed.

CLAIM FOR NEGLIGENCE

[11] In this case, the evidence adduced clearly shows that inadequate arrangements were made to monitor the first defendant and her baby after the birth. The fact that there was only Abdul Azeez whose qualifications are unknown is quite unacceptable. The first plaintiff knowing this when he was contacted at 3.30am should have come immediately instead of at 5.20am as he eventually did.

[12] In the normal case, before any consideration as to damages can arise, it is necessary to prove that the breach of duty was the cause of the injury complained of and that the injury in question was foreseeable. The burden rests on the claimant to show that he or she would not have suffered the injury or damage if the medical practitioner had not been negligent. In other words, the claimant must prove on balance of probabilities that it was the negligence of the medical practitioner rather than some other factor which caused the injury.

[13] However, there may be cases where an inference of negligence may arise from the injury itself and its surrounding circumstances by recourse to maxim known as res ipsa loquitur. In the case of *Scott v London and St*

Katherine's Docks Co (1865) 3 H & C 596 where this rule probably emanates, the plaintiff, a customs officer, was injured by some sugar bags falling on him in the defendant's warehouse. In a classic exposition of the maxim, Erle CJ affirmed as follows:

> There must be some reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

[14] Now, two questions arise as to whether the maxim can be relied upon in the instant case. The first question is whether the maxim res ipsa loquitur must be pleaded and the second, whether the baby was under the exclusive care of the plaintiffs.

[15] With regards to the first question, it should be observed that the principle of res ipsa loquitur is essentially a rule of evidence regarding onus of proof. In any trial, although the burden of proof remains throughout on the plaintiff, it is not uncommon for the burden of introducing evidence, or sometimes referred to as the onus of proof, to shift from one side to the other depending upon the evidence that is introduced (ss 101, 102 and 103 of the Evidence Act 1950). In a similar way, a case of res ipsa loquitur merely shifts the burden of introducing evidence to explain how the impugned incident occurred without negligence on the part of the party upon whom negligence is alleged. Furthermore, it is also trite that pleadings require only a disclosure of material facts not evidence. For these reasons, I am more inclined to hold that a failure to plead the maxim in this case does not preclude the first defendant from raising the same at the end of the trial (see also *Bennett v Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 and *Teoh Guat Lai v Ng Hong Guan* [1998] 4 MLJ 525; [1998] 4 AMR 3815).

[16] On the second question, the case of *Scott v London and St Katherine Docks*, suggests that three conditions must be satisfied before res ipsa loquitur applies. These were summarised in *Clerk and Lindsell on Torts* (18th Ed) at p 410 as follows:

(a) the occurrence is such that it would not have happened without negligence; and

(b) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control;

A (c) there is no evidence as to why or how the occurrence took place; if there is such evidence, then appeal to res ipsa loquitur is inappropriate for the question of the defendant's negligence must be determined on such evidence.

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[17] In the present case, the baby was by all accounts born healthy and without incident. In the ordinary course of things, a healthy baby does not some hours later cease to live. There was also no explanation as to what caused the baby to develop breathing difficulties and its subsequent demise. C The issue of concern is whether the baby was in the sole management and control of the plaintiffs. This question is of considerable importance because if it was the case that the baby was in the sole control of the plaintiffs, then the cause of the damage or injury or death as in this case, may peculiarly be within their knowledge (see *MA Clyde v Wong Ah Mei* [1970] 2 MLJ 183; D [1970] 1 LNS 73). In such a case, it would be patently unfair for the person suffering the injury to have to provide the explanation for the damage, injury or death. However, in the instant case, there was undisputed evidence that the baby was handed over to the first defendant's mother-in-law at her insistence. It seems therefore that the baby was not in the exclusive care, control and E management of the plaintiffs. As such, it cannot be said that the cause of death was within the peculiar knowledge of the plaintiffs. For this reason, an inference of negligence through res ipsa loquitur does not bite in this case.

F **[18]** That being the case, the burden remained on the first defendant to prove breach of duty, injury and causation on a balance of probabilities. Although we have a case here where there were obviously inadequate arrangements to monitor the baby resulting in delay in attending to the baby when he had breathing difficulties, this by itself is insufficient. There must G also be evidence that it was this failure that caused the death of the baby. This issue of causation is therefore critical. It may be tempting to suggest and even accept that the facts as proved raise an inference of negligence on the part of the plaintiffs. I say tempting because it may appear plausible at first blush that the baby could have been saved if medical assistance had come sooner. H However, our system of justice requires proof and not conjecture. Although it may on occasions appear that the hurdle of causation is set too high in medical cases, it can sometimes be the case that injury or death could be due to several potential causes and it would be unfair to impose liability on a medical practitioner if the cause of injury or death is not attributable to him I or her. In *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, the infant plaintiff who was born prematurely was given excess oxygen. The infant developed retrolental fibroplasia which resulted in blindness. This retinal condition could have been caused by excess oxygen but it also occurred in premature babies. On appeal it was held by the House of Lords as follows:

Where a plaintiff's injury was attributable to a number of causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation.

[19] Another example is where the injury or death would have occurred in any event. In *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 3 All ER 1068, three night watchmen went to the casualty department of the defendant's hospital. They complained of vomiting after drinking some tea. The doctor at the casualty department told them to go home without examining them. They went away but some hours later, one of them died from what was found to be arsenical poisoning. There was evidence that since arsenical poisoning was rare, even if the deceased had been examined and admitted to hospital and treated, there was little or no chance that the only effective antidote would have been administered to him before the time at which he died.

[20] It was held that although the hospital casualty doctor was negligent in failing to see and examine the deceased, it was not proven on a balance of probabilities that it was the defendants' negligence which caused the patient's death and the claim was dismissed.

[21] What these cases illustrate is that since the onus to prove causation was on the plaintiff (the first defendant in our case), it was vital to call in medical evidence to prove the same. In the instant case, medical evidence should have been adduced to show how such a death could have occurred, and crucially, if any delay in attending to a baby in such a case would have led to the baby's demise. Since this was not provided, the first defendant has failed on a balance of probabilities to prove negligence on the part of the plaintiffs. The first defendant's claim in this regard must therefore fail.

[22] In the result and with much regret, the first defendant's counterclaim is dismissed. In view of the circumstances of this case, I do not propose to make any order as to costs. Finally, although this may be of little consolation to the first defendant, my sympathies are with her. The profound joy of a

A newborn followed almost instantly by the dreadful proceedings which led to the sudden inexplicable demise are events which I imagine will stay long in her mind.

First defendant's counterclaim dismissed with no order as to costs.

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Reported by Kohila Nesan

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