IN THE SUPREME COURT OF ZAMBIA HOLDEN AT LUSAKA (CIVIL JURISDICTION) **APPEAL NO 203/2014**

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
25 AUG 2017
SUPREME COURT REGISTRY 1
P. O. BOX 50067, LUSAKA

BETWEEN:

THE ATTORNEY GENERAL **APPELLANT**

AND

GEORGE MWANZA
(in his capacity as Personal Representative of the late Monica Mwanza) **1ST RESPONDENT**

WHITESON MWANZA
(in his capacity as Personal Representative of the late Grace Mwanza) **2ND RESPONDENT**

CORAM: **MAMBILIMA CJ, KAOMA AND KAJIMANGA JJS; on 11th July, 2017 and 22nd August 2017**

For the Appellant : **Non-appearance**
For the Respondents : **Ms. A. Theotis, of Theotis, Mataka and Sampa Legal Practitioners**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **ROSEMARY BWALYA V ZAMBIA CONSOLIDATED COPPER MINES LIMITED (MUFULIRA DIVISION), MALCOLM WATSON HOSPITAL AND DR. Y. C. MALIK (2005) ZR 1**
2. **BOLAM V FRIERN HOSPITAL MANAGEMENT COMMITTEE (1957) 2 ALL ER 118.**

3. BOLITHO (ADMINISTRATRIX OF THE ESTATE OF BOLITHO (DECEASED) V CITY AND HACKNEY HEALTH AUTHORITY [1997] 4 ALL ER 781.
4. ROE V MINISTRY OF HEALTH AND OTHERS [1954] 2 All ER 131
5. WHITEHOUSE V JORDAN AND ANOTHER [1980] 1 ALL ER 650
6. WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172.
7. RE AN ARBITRATION BETWEEN POLEMIS AND BOYAZIDES AND FURNESS, WITHY AND COMPANY LIMITED [1921] 3 KB 560
8. FAWAZ AND CHELELWA V THE PEOPLE (1995-1997) ZR 3
9. KNIGHTLEY V JOHNS AND ANOTHER [1982] 1 ALL ER 851
10. ORMAN CORRIGAN (SUING BY NEXT FRIEND ALBERT JOHN CORRIGAN) V TIGER LIMITED AND ABDI JUMALE (1981) ZR 60
11. SMITH V LEECH BRAIN & CO. LTD AND ANOTHER (1961) 3 ALL ER 1159
12. OVERSEAS TANKSHIP (UK) LTD V MORTS DOCK & ENGINEERING CO LTD (1961) 1 ALL ER 404 at page 413
13. ELIJAH BOB LITANA V BERNARD CHIMBA AND THE ATTORNEY GENERAL (1987) ZR 26
14. KONKOLA COPPER MINES PLC AND ANOTHER V KAPAYA (2004) ZR 233

LEGISLATION REFERRED TO

a. STATE PROCEEDINGS ACT, CHAPTER 71 OF THE LAWS OF ZAMBIA
b. LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, CHAPTER 74 OF THE LAWS OF ZAMBIA

WORKS REFERRED TO:

i. HALSBURY'S LAWS OF ENGLAND VOLUME 74 FIFTH EDITION Paragraph 62
ii. CHARLESWORTH AND PERCY ON NEGLIGENCE 9TH EDITION R.A. PERCY AND C.T WALTON page 388
iii. MEDICINE, PATIENTS AND THE LAW BY BRAZIER AND CAVE, 4TH EDITION Page 156
iv. HALSBURY'S LAWS OF ENGLAND VOLUME 34 4TH EDITION paragraph 30

This is an appeal against the Judgment of the High Court, delivered on 26th January, 2014, which found the Appellant liable for damages in medical negligence.

Facts leading to this litigation are substantially not in dispute. The deceased, Monica Mwanza and Grace Mwanza (not related) approached Petauke General Hospital for permanent contraception known as bilateral tubal ligation (BTL). The operations were conducted on the same day on 31st March 2005, under general anaesthesia by Dr. Mbinga Mbinga, a medical practitioner.

When the two women regained consciousness they were wheeled from the theatre to the recovery ward. The nurse on duty in the ward, a Mrs. Beatrice Tembo Msoni, administered doses of injections allegedly prescribed by the doctor and almost immediately, both women stopped breathing. The doctor's efforts to resuscitate them failed and minutes later, the two women were pronounced dead.

Post-mortem results and the forensic pathologist's report indicated the cause of death as chemical poisoning. An analysis of the specimens, comprising urine, blood and stomach contents

collected from the bodies of the deceased women detected an organo-chlorine pesticide identified as endosulfan.

The 1st and 2nd Respondents as personal representatives of the estates of the deceased sued Dr. Mbinga, Mrs. Msoni and the Appellant, on behalf of Petauke General Hospital, pursuant to Section 12(1) of the **STATE PROCEEDINGS ACT,**[a] and sought the following reliefs:

i. **Compensation for loss of life to the tune of ZMK K1,800,000,000.00**
ii. **Damages for professional negligence**
iii. **Breach of statutory duty**
iv. **Aggravated damages for unethical conduct**
v. **Further or other relief the Court may deem fit**
vi. **Interest at the current bank lending rate**
vii. **Costs.**

The particulars of negligence that were pleaded were:-

a. **Failing to prescribe the appropriate medication**
b. **Failing to comply with manufacturer's instructions**
c. **Failing to verify drug and dosage**
d. **Failing to administer the correct drug**
e. **Administering a pesticide to a human being**
f. **Failing to ascertain the use and potential side effects of the drug**
g. **Failing to obtain adequate information to determine whether or not the particular drug administered to the deceased was meant for the purpose for which it was used.**

The Respondents called five witnesses. The evidence of PW1, Charity Mwanza, was that her sister Monica returned from theatre breathing badly and later stabilised but immediately the nurse administered an injection, her sister breathed once and stopped. The testimony of PW3 Patson Mwanza was much the same. He told the trial Court that his wife, Grace started talking 15 minutes after returning from theatre but the moment the nurse administered an injection, she stopped talking and did not respond to his touch. Efforts to resuscitate her were to no avail. The next thing he saw was his wife's body being wrapped in a cloth and taken to the mortuary. It was his evidence that the deceased last ate at 18.00 hours the previous day, having been advised not to eat any food on the day of the operation.

The Appellant's defence was a complete denial of negligence or breach of duty on its part or on the part of its servants or agents. According to the Appellant, the operations and injections were carried out and administered in a professional manner in accordance with medical ethics and standard procedure. That the drug that was administered was cristapen, an antibiotic commonly

used to prevent and treat infections that may result from operation wounds.

The Appellant further contended that the presence of endosulfan in the deceased's specimen was an indication that the pesticide was ingested or absorbed through the skin, and not injected into the blood stream as alleged by the Respondents. That in any case, pesticides were not part of the stock of drugs dispensed by the health institution.

The Appellant relied on the evidence of Mrs. Msoni (DW2), Dr. Mbinga (DW4) and Dr. Faston Mathew Goma, a medical expert (DW3). According to DW2, the deceased returned from theatre with very weak vital signs. That she called the doctor in the theatre who instructed her to give the patients drugs he had prescribed on the drug chart. That the doctor prescribed cristapen, gentamicin and croxacilin but she only found the first two which she administered. She testified that when the doctor came he administered hydrocortisone to resuscitate the patients but failed and a few minutes later the deceased were certified dead.

DW4's version was that the deceased went through normal BTL procedure. That they were assessed before the operation and in theatre, and both were certified fit. That the operations proceeded first with Grace and then with Monica and that after the operation, the patients were placed in a waiting room in the corridor of the theatre for further monitoring. That he sent the deceased to the ward after satisfying himself that both had responded to stimuli and the blood pressure, pulse and respiration rate were normal. Further, that he gave orders to administer axpain, gentamicin and fluids.

DW4 told the Court that he was in the theatre when DW2 called to tell him that something was wrong with the deceased. He went to the ward and found that the patients were not breathing. He then commenced resuscitation measures. After half an hour, there was no response and at that point, he confirmed that the patients were dead. He had no idea why the deceased's health deteriorated at the same rate. He told the Court that he had conducted four similar operations the day before with full recovery. During cross-examination, DW4 testified that in the course of trying

to resuscitate the patients, he administered adrenaline. He also prescribed some drugs which were administered intravenously by the nurse.

On the finding of endosulfan in the blood and stomach contents obtained from the bodies of the deceased, DW 3, Dr. Goma, was of the opinion that the pesticide could have been swallowed into the stomach and at the time of death, the contents had not been pushed into the duodenum. According to him, it was highly unlikely that the chemical was injected in the blood stream because the body mechanism was such that it was much easier for substances to move from the stomach to the blood stream than the other way round.

Upon consideration of the evidence that was before her, the learned trial Judge concluded that the Appellant and its servants owed a duty of care to the two patients when conducting the BTL operation and administering the post-operation treatment. That what was in dispute was whether the Appellant had breached this duty and whether the said breach caused injury or harm to the deceased. The Court found as a fact, that the cause of death of the

two women was chemical poisoning by a pesticide known as endosulfan. What was in dispute was how the chemical found its way into the bodies of the deceased women, that is, whether it was injected or ingested. On the evidence that was before her, the learned Judge agreed with the Respondents that the pesticide could only have been injected into the deceased at the Appellant's hospital, given the status of the patients before and after the operation.

The learned Judge's view was that the conventional Bolam test of relying on expert evidence to determine medical negligence, which was approved by this Court in the case of **ROSEMARY BWALYA V ZAMBIA CONSOLIDATED COPPER MINES LIMITED (MUFULIRA DIVISION), MALCOLM WATSON HOSPITAL AND DR. Y. C. MALIK**[1] had limited or no application to the facts before her. In that case we held as follows-

> "**(1) the standard of care demanded of medical practitioners is the standard of the ordinary skilled man exercising and professing to have that special skill.**
>
> **(2) A medical practitioner need not profess the highest expert skill. It is sufficient if he exercises the ordinary skill of a competent person exercising that particular art. The art is judged in the light of the practitioner's specialty.**

(3) In determining whether a defendant practitioner has fallen below the required standard of care, the law looks to responsible medical opinion. A practitioner who acts in conformity with an accepted, approved and current practice is not negligent.

The learned Judge held that this test, which has its origin in the English case of **BOLAM V FRIERN HOSPITAL MANAGEMENT COMMITTEE**[2], was not immutable. That there was a new Bolam approach, which rejects the less interventionist approach and requires Courts to take a hard look at the professional practice and the expert evidence, and decide whether it puts the patient unnecessarily at risk. That hence, in a later case of **BOLITHO (ADMINISTRATRIX OF THE ESTATE OF BOLITHO (DECEASED) V CITY AND HACKNEY HEALTH AUTHORITY**[3] the House of Lords held as follows-

"These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence... because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied on is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis,

the judge is entitled to hold that the body of opinion is not reasonable or responsible."

On the basis of this authority, the learned Judge discounted the evidence of the expert witness, DW3, for failing to demonstrate to the Court's satisfaction that the body of opinion relied on was reasonable or responsible. The learned Judge found that this was a rare case where professional opinion, that the pesticide was swallowed, was incapable of withstanding logical analysis, given the overwhelming evidence that the patients were incapable of eating any food prior to the operation, having been strictly instructed not to eat from midnight before the day of operation. That after the operation, both patients were sent to the recovery ward where they did not eat anything. The Judge alluded to the concession by Dr. Goma, that if death occurs within minutes of injection, it could be linked to the injection, depending on the drug administered.

On the totality of the evidence, the Court found that there was negligence in monitoring or verifying the post BTL operation treatment and in administering drugs to the deceased. The Judge stated on page 44 of the record of appeal that:-

> ***"I am reasonably satisfied to conclude that there was failure to monitor or verify the treatment administered to the two deceased women by the nurse. I have made this inference because it is clear that while DW 2 claims to have been instructed to administer the drugs, DW 4 denies having instructed the nurse to give drugs at that point."***

Consequently, the Judge found that it was the nurse, Beatrice Tembo Msoni who was negligent. She stated on pages 47 to 48 of the record of appeal that:-

> ***"Accordingly, guided by the evidence and the various authorities referred to in this case, the appropriate inference I make, under the circumstances of this case, is that only DW 2, Beatrice Tembo Msoni had been negligent in monitoring and verifying the post BTL-operation treatment or drugs administered to the two deceased women Grace Mwanza and Monica Mwanza"***

Having found that the Respondents had proved their case against the Appellant on the preponderance of probabilities, she awarded them all the claims save for interest. She ordered that all the claims for damages should be assessed by the Registrar.

This is the Judgment that the Appellant has appealed against to this Court, advancing only one ground of appeal, namely that-

> **The learned trial Judge erred in law and fact when she concluded that the Plaintiffs (now Respondents) had proved their case on the preponderance of probabilities against the Defendants (now Appellant) and granted the Plaintiffs substantially all the reliefs they were claiming as against the Defendants.**

At the hearing of the appeal, Counsel for the Appellant was not in attendance, having been allowed to attend a workshop for State

Advocates. However, we proceeded with the matter after noting that Counsel had filed elaborate and detailed heads of argument on 22nd December, 2014.

In launching his assault on the judgment of the Court below, the Appellant referred us to a portion of the judgment of the lower court appearing on page 29 of the record of appeal, in which the learned trial Judge stated:-

> ***"As I see it, the crux of the whole case is first, whether or not the Defendant breached the duty of care in conducting the BTL operation and continuing the treatment of the deceased after the operation; and secondly, whether or not the Defendant's breach of duty, if any, caused the deaths of the two deceased."***

He submitted that as stated by the trial Judge, it was well-settled law that to maintain a legal claim for compensation against hospitals, doctors and other servants, a Plaintiff must establish the elements of negligence; that is:-

a) that a duty of care was owed to him or her;
b) that the duty was breached; and, that
c) he or she suffered injury or harm caused by the breach

Counsel argued that in addition to these elements, the concept of foreseeability plays a part in actions for negligence.

To support this argument, Counsel referred us to among others, the opinion of Lord DENNING in the case of **ROE V MINISTRY OF HEALTH AND OTHERS**[4] where he stated that-

> **"The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to person when you could not reasonably foresee that he might be injured by your conduct... The second question is whether the neglect of duty was a "cause" of the injury in the proper sense of the term and causation, as well as duty, often depends on what you should foresee. The chain of causation is broken when there is an intervening action which you could not reasonably be expected to foresee."**

Counsel submitted that in this case, the Appellant's servants could not reasonably foresee that the deceased would die from prescribing and administering drugs, given that DW4 had carried out the same operation the previous day, prescribed the same drugs and all the patients had recovered. Further, that it was also not reasonably foreseeable that the deceased would die from chemical poisoning since the Appellant's servants were not in control of the endosulfan and that pesticides were not stocked at the hospital, thereby breaking the chain of causation.

Counsel went on to argue that while the Appellant's servants owed the deceased a duty to perform the BTL operation and

administer the prescribed drugs with reasonable care and skill, the standard of care required of them was that of an ordinary skilled doctor professing to have that skill as espoused in the case of the **ROSEMARY BWALYA V ZAMBIA CONSOLIDATED COPPER MINES LIMITED (MUFULIRA DIVISION), MALCOLM WATSON HOSPITAL AND DR. Y. C. MALIK**[1].

He submitted that the Appellant's servants did not breach their duty of care and neither did they fall short of the required standard. That it was confirmed by the expert witness' testimony that the Appellant's servants acted in conformity with accepted, approved and current practice. Submitting on what he coined as ***'the ingested or injected thesis,"*** Counsel stated that the Court below ought to have attached significant weight to the evidence of the expert witness because he demonstrated that the Respondents' claim that endosulfan was injected into the blood stream was without merit and that the Respondents failed to call expert witnesses to counter his evidence. He contended that even if it was accepted that there was a breach of duty, the Court ought to have considered whether the Respondents proved that such breach

caused the injury. In his view, there was no breach of duty since the Appellant could not reasonably be expected to have foreseen that prescribing and administering the medication in issue, could have led to the death of the deceased women. According to Counsel, the chain of causation was broken when there was an intervening action which could not reasonably be expected to have been foreseen.

Counsel contended also, that the Respondents failed to provide evidence to support the particulars of negligence in the statement of claim. It was Counsel's submission that the demise of the two women, though regrettable, was not sufficient to establish negligence. He cited the cases of **WHITEHOUSE V JORDAN AND ANOTHER**[5] and **ROE V MINISTRY OF HEALTH,**[5] arguing that the danger of imposing liability on hospitals and doctors whenever something went wrong or on flimsy evidence, was that medical practitioners would resort to defensive medicine to avoid claims in negligence. In the case of **WHITEHOUSE V JORDAN**[5] Counsel referred us to a portion of the judgment by Lawton L.J. in which he said the following:

"In my opinion allegations of negligence against medical practitioners should be considered as serious. First, the Defendants' reputation is under attack. A finding of negligence against him may jeopardise his career and cause him substantial financial loss over many years. Secondly, the public interest is at risk, as Denning L.J pointed out in ROE V MINISTRY OF HEALTH (1954) Z ALL ER 13... If courts make findings of negligence on flimsy evidence or regard failure to produce an expected result as strong evidence of negligence, doctors are likely to protect themselves by practising defensive medicine, that is to say, adopting procedures that are not for the benefit of the patient but safeguards against the possibility of a patient making a claim for negligence Medical practice these days consists of the harmonious union of science and skill...

And in the case of **ROE V MINISTRY OF HEALTH**[4], Lord Denning, L.J., observed that we would be doing a disservice to the community at large, if we were to impose liability on hospitals and doctors for everything that happens to go wrong. That doctors would be led to think more of their own safety than of the good of their patients. Counsel concluded by urging us to find that the Respondents had failed to prove their claim of negligence in line with our decision in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**[6] where we held that it is for the one who alleges to prove the allegations.

In response, the learned Counsel for the Respondent relied on her written heads of argument filed on 30th June, 2017. She confined her arguments to DW2 who was found to have been

negligent by the Court below. Counsel submitted that the Court below was on firm ground when it held that DW2, Beatrice Tembo Msoni had been negligent in monitoring the post BTL operation and administering drugs to the two deceased women. That the Judge was also on firm ground to state that the crux of the case was whether the Appellant had breached its duty of care when conducting the BTL operation and administering treatment after the operation. She referred among others, to the works of **BRAZIER AND CAVE**[iii] in their book, Medicine, Patients and the Law, where they said:-

> **"A patient claiming against his doctor, or hospital generally has little difficulty in establishing that the Defendant owes him a duty of care. A general practitioner accepting a patient on to her list undertakes a duty to him. A hospital and its entire staff owe a duty to patients admitted for treatment."**

On the Appellant's argument that its servants could not have reasonably foreseen that death would result from prescribing and administering medicines, Counsel observed that since the lower Court attributed negligence to the nurse, and not the doctor, the Appellant had misapprehended the nature of the duty that DW2 owed to the deceased. Counsel argued that the deceased were owed

a duty of care to be administered with the correct drug, and not a pesticide, and to be attended to by medical personnel who had adequate information to determine whether or not the particular drug administered was meant for the purpose for which it was used.

Counsel submitted further, that the Court below made the following findings of fact:-

1. **that it was more likely than not, that the treatment given through the injection dose contained a chemical, endosulfan which caused the death of the two women.**

1. **that DW2 did not use diligence, care, knowledge, skill and caution in administering treatment.**

2. **that the two deceased women were fit prior to anaesthesia and if what was injected in their bodies was merely procedural and common antibiotics, their health could not, have deteriorated suddenly after the injection leading to their death.**

Based on these findings, the Court below concluded that the deceased were injected with endosulfan. Counsel submitted that the Appellant had not advanced any cogent arguments to give this Court sufficient reason to interfere with the findings of fact, based on the principles set out in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**[6] that an appellate Court will only upset findings of fact if they are found to be

perverse, or made in the absence of any relevant evidence or upon a misapprehension of the facts.

Counsel submitted that the Appellant could still be found liable in negligence, even if the harm occasioned to the two women was to be considered not to be reasonably foreseeable, because the death of the women was a direct consequence of DW2's negligent act. For this proposition, we were invited to look at the case of **RE AN ARBITRATION BETWEEN POLEMIS AND BOYAZIDES AND FURNESS, WITHY AND COMPANY LIMITED.**[7] In that case a falling plank, caused a spark igniting a fire that completely burnt down the ship. The Court of Appeal in England held that since the falling of the plank was the result of the negligence of the charterers' servants, the charterers were liable for all the direct consequences of the negligent act, even though those consequences could not reasonably have been anticipated.

On the argument that the chain of causation was broken, the Respondents' Counsel contended otherwise, that the chain of causation was not broken as there was no intervening action which DW2 could not reasonably be expected to foresee. She stated that

the two women died within minutes of the injection being administered to them and the negligence was the immediate or precipitating cause of death of the deceased women.

Reacting to the Appellant's argument that the Court below ought to have attached significant weight to the evidence of the expert witness, Counsel for the Respondents submitted that the lower Court was entitled to discount the evidence of the expert witness and make its own conclusion that the pesticide was injected, and not ingested. To support her contention, she cited the case of **FAWAZ AND CHELELWA V THE PEOPLE**[8] where this Court gave guidelines on how to deal with expert evidence. We stated that:-

> ***"When dealing with the evidence of an expert witness, a Court should always bear in mind that the opinion of an expert is his own opinion only and it is the duty of the court to come to its own conclusion based on the findings of the expert witness."***

Counsel submitted that the learned trial Judge was entitled, after considering the evidence of the expert witness, to hold that the endosulfan was injected and not ingested.

Coming to the argument that the Respondents did not adduce evidence to support particulars of negligence, Counsel submitted that the record was replete with evidence, both in the pleadings and testimony of the Respondents' witnesses, proving negligence. She echoed her earlier submissions that DW 2 owed the deceased women a duty of care, which duty was breached, causing the death of the deceased.

We have carefully considered the evidence on record, the submissions of Counsel and the judgment appealed against. That the Appellant and its servants owed a duty of care to the two deceased patients is not in dispute. As we see it, the main issue for our determination is whether the Appellant's servants breached that duty when conducting the BTL operation and post operation treatment, thereby causing the death of the deceased; or, if indeed there was a reasonably unforeseeable intervening action that broke the chain of causation so as not to impute liability in negligence on the Appellant and its servants.

Counsel for the Appellant argued that it was not reasonably foreseeable that prescribing and administering drugs would result

in the death of the deceased and that the chain of causation was broken because of an intervening action. Counsel for the Respondents ,on the other hand, contended that the deceased were owed a duty of care to be administered with the correct drugs, not a pesticide, and, therefore, the issue of foresee-ability did not arise. That since DW2's breach of duty was the intermediate or precipitating cause of death of the two women, there was no break in the chain of causation.

It is trite that a medical practitioner, a nurse or a hospital owe a duty of care to patients who submit themselves to their treatment and care. If this duty is breached and a patient suffers injury or death, the medical practitioner, nurse or indeed the hospital could be found liable in negligence.

As has been correctly stated by both Counsel, the position of the law in an action for the tort of negligence is that in order to determine whether an act is negligent, a claimant should not only prove that he/she is owed a duty of care; he/she must also prove that duty was breached resulting in damage. It is relevant to determine whether any reasonable person would foresee that the

act would cause damage. The case of **ROE V MINISTRY OF HEALTH**[4], cited to us by Counsel for the Appellant aptly summarises the position when it states:-

> **"The first question is whether there was duty of care owed to the plaintiff, and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you cannot reasonably foresee that he might be injured by your conduct. The second question is whether the neglect of duty was a "cause" of the injury in the proper sense of that term...the chain of causation is broken when there is an intervening action which you could not reasonably be expected to see."**

The determination of forseeability is essentially a question of fact to be decided on the circumstances of each case. In the case of **KNIGHTLEY V JOHNS AND ANOTHER**[9] it was stated that:-

> **"The question to be asked is accordingly whether that whole sequence of events is a natural and probable consequence of Mr John's negligence and a reasonably foreseeable result of it...The answer to this difficult question must be dictated by common sense rather than logic on the facts and circumstances of each case. In this case it must be answered in the light of the true view to be taken of the events leading up to Inspector Sommerville's acts, or rather his act and omission, and the plaintiff's, and Pc Easthope's, acts"** (emphasis ours).

Coming to the case at hand, the Court below made a finding of fact that the two deceased patients were certified fit for the BTL operation. DW1, Maureen Munyenyembe, the theatre nurse, told the lower Court that the vital signs of the two patients were normal before the operation. That after the operation, the two women had

recovered. Their vital signs were normal and both had responded to stimuli by the time they were moved to the recovery ward. This was confirmed by DW4, Dr. Mbinga Mbinga, who carried out the operation. He sent them to the ward with orders to continue monitoring the vital signs and prescribed the antibiotic medication to be administered. Only DW2 had indicated that the vital signs were weak. There was undisputed evidence that after the injections were administered by DW2, both women stopped breathing and within a short time, they were pronounced dead. The learned Judge found that DW4's evidence was more credible than that of DW2 and drew an inference, which she was entitled to, that whatever happened to the deceased, occurred in the recovery room at the hands of DW2.

It would appear, on the evidence, that the whole sequence of events points to a rapid deterioration of the patients' conditions as a consequence of DW2's act. The lower Court inferred that the death of the deceased was as a result of DW2's negligence, an act for which the Appellant can rightly be held vicariously liable.

It is not in dispute that samples from both patients were found to contain a pesticide. The Court made a finding of fact that this pesticide was injected into the patients. This finding was based on the evidence that the deceased women had been told not to eat anything after midnight, before the operation and that their vital signs were alright before they were operated on. They both died within minutes of receiving an injection. The evidence on record is that it is DW2 who injected the patients in the recovery ward. We do not find that the findings by the Court below in this regard, can be said to have been perverse or made in the absence of relevant evidence or indeed, that they were made upon a misapprehension of the facts.

The learned Counsel for the Appellant has spiritedly argued that the harm suffered by the deceased was not reasonably foreseeable. To counter this argument, the Respondents have relied on the case of **RE POLEMIS**[7] **.** In that case, the negligent party was held to be liable for all the direct consequences of the negligent act even though the consequences could not have been reasonably anticipated.

The case of **RE POLEMIS**[7] was decided in 1921. Later decisions show that the case has been a subject of much debate. In 1954, Lord Denning had occasion to discuss the principle laid down in **RE POLEMIS** in the case of **ROE V MINISTRY OF HEALTH**[4]. According to him, that decision was of very limited application. He agreed that there is no duty of care owed to a person if you cannot reasonably foresee that he could be injured by your action. His view was that forseeability can be disregarded when negligence is the immediate or precipitating cause of the damage.

There were two other decisions in 1961, which discussed the principle laid down in **RE POLEMIS**[7]. The first one was **OVERSEAS TANKSHIP (U.K.) LTD V MORTS DOCK AND ENGINEERING CO. LTD**[12] decided by the Privy Council in January 1961. Commenting on the principle, Viscount Simonds had this to say:-

> **"Enough has been said to show that the authority of Polemis has been severely shaken, though lip-service has from time to time been paid to it. In their Lordship's opinion, it should no longer be regarded as good law....For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however**

> **unforeseeable and however grave, so long as they can be said to be direct."**

The second case of **SMITH V LEECH BRAIN & CO. LTD AND ANOTHER**[13] was decided in November 1961. A defendant was found to be liable in negligence for burns suffered by a galvaniser whose hip got burnt by molten metal at his place of work. The burns later developed into cancer which later claimed his life. Lord Parker, C.J. had occasion to discuss the principle laid down in **RE POLEMIS** and the decision by the Privy Council in the case of **OVERSEAS TANKSHIP**[12]. According to him:-

> ***"The test is not whether these Defendants could reasonably have foreseen that a burn would cause cancer and that Mr. Smith would die. The question is whether these Defendants would reasonably foresee the type of injury suffered, namely, the burn."***

He went on to find that the damages which the plaintiff was claiming were damages for which the Defendants were liable.

It is not in dispute that in this case, death occurred within minutes of the deceased being injected. The learned trial Judge found that the injection contained a pesticide which caused the death of the two women. The cause of death was chemical poisoning.

Looking at the facts of this case, the sequence of events show that the time between the administering of the injection of the drugs and the deceased being pronounced dead was very short. It was a matter of minutes. Clearly, there was no intervening act to break the chain of causation. The only plausible conclusion that can be drawn from these circumstances is that the dose of injections administered by DW2 must have contained the chemical poison which caused the death of the two women. The action of DW2 was the immediate and precipitating cause of death. Going by the reasoning of Lord Denning in **ROE V MINISTRY OF HEALTH,**[4] foreseeability in such circumstances can be disregarded. We fully agree with this reasoning.

In this respect, we find the arguments that the pesticide was not in the control of the Appellant's servants unsustainable especially in view of DW4's evidence, which was not controverted, that the drugs prescribed and syringes used were not analysed. The fact that there was no evidence of the drugs and syringes being tested entitled the trial Court to conclude that had that evidence been adduced, it would have been favourable to the Respondents.

This position was espoused by the learned authors of **HALSBURY'S LAWS OF ENGLAND VOLUME 74TH EDITION**[i] who wrote that-

> **"Where the evidence relating to negligence is particularly within the control of the Defendant, little affirmative evidence may be required from the Claimant to establish a prima facie case, which it will be for the Defendant to rebut."**

Thus while the legal burden of proving negligence rested on the Respondents, there was an evidential burden to rebut the assumption that had the drugs and the syringe, which were in the possession and control of the Appellant's servants been tested, the evidence adduced would have been in favour of the Respondents. The learned authors of **CHARLESWORTH AND PERCY ON NEGLIGENCE**[ii] at paragraph 5-02 page 388 make it clear that-

> **"It is not necessary for the Plaintiff to eliminate every possibility of how the accident may have happened without the fault on the part of the Defendant but what is adduced in evidence, on behalf of the Plaintiff, must go further than pure guesswork and reach the field of legal inference."**

The evidence adduced by the Respondents needed only to show or enable the Court to draw an inference that the negligent act was a probable consequence of the Appellant's servants' act or omission.

On the argument that the Court below ought to have attached weight to the expert evidence and that the Respondents should

have brought their own expert witness, we echo what we said in the case of **FAWAZ AND CHELELWA V THE PEOPLE**[7] that:-

> **"When dealing with the evidence of an expert witness a court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the court to come to its own conclusion based on the findings of the expert witness. As we said in Chuba v The People (1), the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be used as a guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it. The same thing applies to the opinion of other expert witnesses."**

The purpose of expert evidence in establishing negligence in the realm of diagnosis and treatment is not necessarily to pit one professional opinion against another, but to guide the Court. At the end of the day, the Court still has to make its own conclusion based on all the evidence before it.

When considering the evidence, the Court is entitled to draw inferences based on the facts and circumstances surrounding the case. In this case, the events leading to the death of the two women were cardinal. The Court below was faced with a situation where two women, from totally different backgrounds, both certified fit to undergo a BTL operation for permanent contraception, underwent the operation on the same day and within a short space of time

thereafter, their health deteriorated drastically and both of them died at the exact same time.

The Judge relied on the case of **BOLITHO (DECEASED) V CITY AND HACKNEY HEALTH AUTHORITY**[2], in which the House of Lords held that where the professional analysis is not capable of withstanding logical analysis, the Judge is entitled to hold the body of opinion as not reasonable or responsible.

It is not surprising that in dismissing the expert witness' evidence, the learned Judge, at page 47 of the record of appeal, made the following observation-

> **"In my view, if what was injected into their bodies was merely the procedural and common antibiotics, cristapen and gentamicin, I strongly and reasonably believe that the two women's health could not after such an injection have suddenly deteriorated and died at the same time; only a lethal chemical could be attributed to such sudden post-bilateral ligation operation death during general anaesthesia."**

From the foregoing, we find no basis to disturb the lower Court's finding that DW2 was negligent. We are satisfied that the Respondents proved their claim on a balance of probabilities in the Court below. The appeal on liability therefore fails.

We glean from the ground of appeal that another aspect of the judgment that the Appellant is contending with is the order of the Court granting the Respondents all the reliefs that they prayed for. Although no specific arguments were raised in the heads of argument on the reliefs granted by the Court below, we feel compelled to consider the award made by the lower Court in view of what we said in the case of **ORMAN CORRIGAN (suing by next friend Albert John Corrigan) V TIGER LIMITED AND ABDI JUMALE**[9] that:-

> **"Before an appeal court can properly interfere with damages, it must be satisfied either that the Judge in assessing the damages applied the wrong principle of law or if he did not err in law then that the amount awarded was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

In the court below, the Respondents, as representatives of the estates of the deceased, were claiming:

1. **compensation for loss of life to the tune of ZMK K1, 800,000,000.00;**
2. **damages for professional negligence;**
3. **breach of statutory duty,**
4. **aggravated damages for unethical conduct and,**
5. **further or other relief the Court may deem fit,**
6. **interest at the current bank lending rate and costs.**

The learned trial Judge awarded the Respondents all these claims except interest and referred the damages to the Registrar for assessment.

The claim for compensation for loss of life under 1 is really a claim for loss of expectation of life. It is a head of damage to compensate for shortening a life. The general rule for the award of damages for loss of expectation of life is aptly stated by the learned authors of **HALSBURY'S LAWS OF ENGLAND**[IV] that:-

> **"Damages for loss of expectation of life are in all cases represented by a small conventional sum, taking some but not much account of the prospect of a healthy and happy life as opposed to an unhappy one, some account of the age of the sufferer, and account of the degree of the shortening of life."**

We have held, in several cases, that damages for loss of expectation of life should be moderate, taking into account the value of the Kwacha and inflationary trends. In the case of **ELIJAH BOB LITANA V BERNARD CHIMBA AND THE ATTORNEY GENERAL**[13], we held that awards for loss of expectation of life under the **LAW REFORM (MISCELLANEOUS PROVISIONS) ACT**[b] should be moderate and fixed regardless of age. In our later decision in the case of **KONKOLA COPPER MINES PLC**

AND ANOTHER V KAPAYA[14], we affirmed the principle that damages for loss of expectation of life must be moderate and heeded our guideline that the award to each claimant must be fixed regardless of age. In that case, we awarded an amount of K5,000,000 (unrebased). We went further to hold that awards for loss of dependency must be given to each specific dependant according to the degree of dependency. However, there is no claim for loss of dependency in this case.

Arising from what we have stated above, we find that the amount awarded to the Respondents of K1,800,000,000.00 (K1,800,000 rebased) representing individual claims of K900,000,000.00 (K900,000.00 rebased) for each estate was not only wrong in principle but also inordinately high. We accordingly set it aside.

The case of **KONKOLA COPPER MINES PLC V KAPAYA** was decided in 2004, almost thirteen years ago. There is no doubt that due to passage of time and taking into account inflationary trends, the award now would be much higher.

The Respondents also claimed and were awarded damages for professional negligence, breach of statutory duty, and, aggravated

damages for unethical conduct. Statutory damages are provided by statute as opposed to damages claimed under the common law. There is no pleading which alleges that liability in this case arose under a breach of any statutory duty. Also having claimed general damages for professional negligence, the Respondents cannot also claim damages for unethical conduct. The alleged improper conduct by the Appellant's servant is within the parameters of professional negligence.

Arising from what we have stated above, the Respondents are only entitled to damages for loss of expectation of life and for professional negligence. We order that assessment of these damages be referred to the Registrar.

Since the claim is against the Attorney-General, we award interest on the sums to be assessed at 6% per annum from the date of writ to the date of payment.

On the whole, this appeal has failed on merit, but is successful only to the extent of the guidance given on the damages.

Costs in this Court and in the Court below shall be for the Respondents.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE