

HONG KONG / JUDGMENT

FRANK YU YU KAI v. CHAN CHI KEUNG

COURT

Court of Appeal

DECIDED

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bjbj `*#w cacv 433/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 433 of 2006 (on appeal from HCPI NO. 230 of 2004) BETWEEN FRANK YU YU KAI Plaintiff CHAN CHI KEUNG Defendant Before: Hon Rogers VP, Le Pichon JA and Lunn J in Court Date of Hearing: 27 September 2007 Date of Handing Down Judgment: 24 October 2007 J U D G M E N T Hon Rogers VP: I have had the advantage of reading the judgment in draft of Le Pichon JA. I agree that this appeal should be allowed with the order proposed. However, the decision has caused me no little anxiety. This was primarily due to the fact that the maxim *res ipsa loquitur* had been relied upon. I found difficulty with that because two causes of the plaintiff's condition had been put forward and both had been rejected by the judge. In those circumstances, on the face of the matter, it appeared to me that there was a basis for the judge to come to the conclusion in the light of the medical literature that he did in paragraph 94 where he said:

94. Having regard to the medical literature put before me, in particular those medical literature indicating that while it was previously thought that all perioperative nerve injuries were preventable, but that is no longer the general view today, I am unable to infer negligence, given the facts of this case, on the part of the defendant, even though I was able to come to the finding that the external compression causing the left radial nerve palsy likely took place at the time when the plaintiff was having the operation under anaesthetic. Indeed, having considered the articles that were before the court I consider that absent the findings of fact in paragraphs 82 and 83 of the judgment, to which I refer below, that conclusion was one to which the judge was entitled to come. Although it is clear that injuries to the ulnar nerve are far more common than injuries to the radial nerve, essentially a nerve injury is a nerve injury. In, for example, an article written in 1990 by Dr Kroll and others in the journal *Anesthesiology* entitled *Clinical Investigations: Nerve Injury Associated with Anesthesia* the conclusion is arrived at that: It may be that some of the nerve injuries for which claims were filed occurred spontaneously without any causal relationship to anaesthesia or surgery. The article then goes on to talk specifically about ulnar nerve injuries but I do not see that the statement is other than related to nerve injuries generally. Furthermore in the article in Robert Morell's article in *Current Reviews in Clinical Anesthesia* which is referred to in Le

Pichon's judgment the statement that Evidence is rapidly mounting that indicates that mechanisms of perioperative nerve injury are complex, multifactorial, and incompletely understood. This evidence is often contrary to these prior medicolegal perceptions. is a general statement. Again it is not confined to specific nerves. In short given the complexities of the human body and the comparatively little that is known about its workings, if 2 grounds of complaint are rejected and there is responsible research which concludes that a condition may arise from unknown, and seemingly non-negligent causes, it would seem an inappropriate case to rely on the maxim *res ipsa loquitur* which is founded on the basis that the condition could not have arisen without negligence. On analysis, however, I do not consider that this is a case of *res ipsa loquitur*, certainly not in its full sense. The findings in paragraph 82 and 83 of the judgment that the injury came about due to external compression at the spiral groove at the posterior aspect of the plaintiff's left upper arm and that that had taken place during the time when the plaintiff was under anaesthetic when in the operating theatre are crucial findings. When they are taken in conjunction with the evidence of Kan Wai-han, an enrolled nurse who was on duty in the operating theatre, it would seem that it was the defendant's responsibility to ensure that the position of the plaintiff was correct during the operation. Nurse Kan was called as a witness on behalf of the defendant. In her witness statement, she described how the plaintiff had been brought into the operating theatre and that it was after that, and after the blood pressure cuff had been put on his arm, that the plaintiff was turned on his left side so that an epidural catheter could be inserted. Her evidence then went on in paragraph Nurse Wong and I then assisted Dr Chan in positioning the patient on the operating table. It was Dr. Chan's responsibility to ensure that the body positioning, including the position of both arms, was correct and that the patient was in a comfortable position. Hence it must have been the defendant's responsibility to see that there was no external compression at the spiral groove at the posterior aspect of the plaintiff's left upper arm. That, on the finding of the judge, did not happen. Hence, it was for the defendant to explain how that compression happened without his fault. I consider it is right to reach the further finding concerning the overall responsibility of the anaesthetist for the patient's correct positioning and comfort, in the light of the fact that it was the defendant's case as presented in his evidence. I place less reliance on Professor Holland's evidence. Although he may be a distinguished doctor, parts of his evidence bear some of the hallmarks of partisan advocacy, and some expressions used would be inappropriate for an expert witness. His evidence as to the different responsibilities of those inside the operating theatre can only have been given on a general basis and could not be as to who was present and took responsibility on this particular occasion. Hon Le Pichon JA: This is an appeal from a judgment of Suffiad J dated 8 November 2006 dismissing the plaintiff's claim for damages for personal injuries sustained during an operation. At the conclusion of the appeal hearing judgment was reserved which we now give.

Background

The plaintiff who is himself a surgeon had to undergo a total prostatectomy, a bilateral herniorrhaphy and bladder diverticulectomy operation on 26 May 2001. He was 68 years old at the time. The defendant was the anaesthetist in attendance. For the operation, both the plaintiff's upper limbs were placed in a supine position at about 90° to the plaintiff's body on two armboards, with the palms facing upwards, secured by adhesive strapping at the wrist. The operation began at 1 p.m. and lasted some 6 hours or so. Within 12 hours after coming out of the operating theatre, the plaintiff was unable to move his left hand or fingers. It is common ground that he suffered from left radial nerve palsy. The radial nerve which contains mixed sensory and motor fibres descends from the brachial plexus along the inner side of the humerus, to about its midpoint and then curves obliquely around and behind that bone, occupying a shallow depression known as the muscular-spiral groove. At or shortly below this level the nerve gives off major branches. When those fibres are injured, the result is wrist drop, that is to say an inability to cock the wrist back. This condition is characteristic of radial nerve palsy, the specific lesion being in that part of the nerve which occupies the musculo-spiral groove. The judge's findings in the court below, the plaintiff's case in negligence was based on two scenarios namely, first, that his left arm was allowed to fall off the armboard during the operation and alternatively, that the defendant was negligent using a Non-invasive Blood Pressure (NIBP) cuff on the plaintiff's upper left arm in the operating theatre to monitor the plaintiff's blood pressure. The suggestion was that an arterial cannula should have been used instead or, alternatively, that the cuff had not been properly administered, there being some wrinkle or pleat or kink which might have caused or contributed to compression causing an injury to the spiral groove of the humerus. Alternatively to the 2 positive cases, the plaintiff relied on *res ipsa loquitur* to show negligence. The judge found that at no time did the plaintiff's left arm fall off the arm board during the operation and, further, that the use of the NIBP cuff *per se* was not itself negligent and that the defendant had done all that was reasonably required of them to ensure a proper application of the cuff on the plaintiff. Against those findings there is no appeal. The main dispute below related to the issue of *res ipsa loquitur*. It is common ground that when the plaintiff entered the operating theatre, he had a perfectly normal and functioning left arm and wrist. The judge found that by about 5:30 a.m. the following morning, it was discovered that the plaintiff could not move his left hand or fingers. Dr Vincent Ma who examined the plaintiff two days later, reported that there was local tenderness of left Radial nerve at the spiral groove in the posterior aspect of the mid-shaft of left humerus. His diagnosis was that it was a typical case of left radial nerve palsy (Saturday night palsy). He opined that external compression is usually the cause. Apart from Dr's evidence, Professor Holland's evidence was substantially to the same effect - that radial nerve palsy is commonly caused by [excessive] and prolonged compression of the radial nerve at the spiral groove of the humerus in the upper arm. Because of Dr's finding of local tenderness at the crucially vulnerable spot the spiral groove Professor Holland opined that prolonged and excessive localised external compression of the radial nerve was the only possible cause of the plaintiff's injury. Whilst it was accepted that the plaintiff's condition was left radial nerve palsy, the defendant called medical evidence directed at establishing that the precise mechanism of a

perioperative nerve injury is usually unknown. As is apparent from 82 of his judgment, the judge accepted the evidence of Dr Ma:

82. Given [Dr Vincent Ma's] evidence, and the fact that Dr Vincent Ma's findings was not challenged by the defendant, I find on that evidence that the left radial nerve injury to the plaintiff came about due to external compression at the spiral groove at the posterior aspect of the plaintiff's left upper arm. It must follow that he had rejected the defendant's case that the palsy occurred with no identified cause as is often the case with other perioperative nerve injuries such as ulnar nerve palsy. Having determined that the cause of the injury was external compression, the judge went on to consider whether the injury occurred whilst the plaintiff was in the operating theatre or whether it occurred after he had returned to his hospital room. He found that the external compression took place when the plaintiff was under anaesthetic in the operating theatre. He rejected the defendant's case that it could just as easily have occurred when the plaintiff was in his private hospital room between 7:30 p.m. and 5:30 a.m. the following morning when the palsy was discovered. The judge made this finding on the basis of Professor Holland's evidence that had it not been for the fact that the plaintiff was under anaesthetic, he would likely have moved or changed position even if asleep or half asleep to alleviate the effect of the external compression upon his upper arm at the spiral groove. The judge noted that this aspect of Professor Holland's evidence was not challenged, whether by the defendant or the medical literature produced. An additional factor the judge took into account was the evidence that the nurse on duty had taken the plaintiff's blood pressure at hourly intervals and in so doing had to move his left arm. He considered therefore that it was further unlikely that the plaintiff's left arm would have been subject to prolonged external compression when he was in his hospital room. This appeal The present appeal arises out of the judge's conclusion that he was unable to infer negligence although he was able to find that the external compression causing the left radial nerve palsy likely took place at the time the plaintiff was having the operation under anaesthetic. The reason given by the judge appears in 94:

94. Having regard to the medical literature put before me, in particular those medical literature indicating that while it was previously thought that all perioperative nerve injuries were preventable, but that is no longer the general view today, I am unable to infer negligence Bharwaney, who appeared for the plaintiff, submitted that the judge failed to distinguish between the cause of the injury (which he had already determined to be external compression at the spiral groove) and the cause of the compression. The medical literature the judge appeared to have in mind in 94 harks back to the substance of the medical literature relied on by the defendant to show that the injury could have come about without any identified cause. That evidence is summarised in 75 of the judgment and subparagraph

(1) is effectively reproduced in

94. Nevertheless it would appear that the judge must have implicitly rejected the theory that the injury arose without apparent cause by expressly finding that the injury was caused by external compression at the spiral groove. That finding therefore merits further analysis. No

doubt the finding by Dr Ma of local tenderness at the spiral groove was of considerable significance: it was explicable by and entirely consistent with there having been external compression to the area that was generally considered to be the most vulnerable to radial nerve injury. Put differently, absent the finding of local tenderness, it is unlikely that the judge would have found the cause of the injury to be external compression at the spiral groove. It is also to be noted that Dr Ma considered radial nerve palsy to be equivalent to Saturday night palsy, a description he did not explain or define in his report. The only explanation of that description before the judge is to be found in the evidence of Professor Holland which was summarised in 69 of the judgment:

69. Professor Holland's evidence is quite straightforward, and is simply that radial nerve palsy is commonly caused by extensive and prolonged compression of the radial nerve usually at the spiral groove of the humerus in the upper arm. Because of that and the fact that such injuries very often occur to persons who fall asleep on a sofa or armchair as a result of intoxicating alcoholic drink, and in those circumstances suffer prolonged compression of the radial nerve at the spiral groove because of their arms being extended over the arms of the sofa or armchair, such injury carries the common name of Saturday night palsy. What is plain from the judgment is that the judge found the injury to be a pressure-induced injury at the spiral groove. While it is true that Professor Holland described the external compression as excessive and prolonged whereas Dr Ma simply referred to external compression, I consider that it is a distinction without a difference inasmuch as the injury was caused by there having been sufficient pressure exerted at the vulnerable spot. Clearly to cause the injury, the pressure had to be more than transient: it had to be of a duration and intensity sufficient for the injury to result, and in my view, it is in that sense that the epithet prolonged is to be understood, given that individuals differ in their makeup and the same pressure may impact upon individuals differently. What is critical is that the pressure at the spiral groove was of a duration and intensity sufficient to cause local tenderness at that spot. I now turn to consider the medical literature. As the judge himself noted, the medical literature supported Professor Holland's evidence that Saturday night palsy occurs when a person is either intoxicated by alcohol or drugs, or is under the effect of anaesthetic while undergoing an operation so as to be unable to move or change position to alleviate the effect of external compression at the spiral groove. The medical literature therefore uniformly recommended the avoidance of prolonged or excessive pressure on the lateral aspect of the humerus where it is most vulnerable, in order to prevent radial nerve palsy from occurring. Approaching the matter from a commonsense point of view, it stands to reason that the compression, being external and which gave rise to local tenderness, must be capable of being avoided. As the plaintiff was himself under anaesthetic, he could not be expected to look after himself as if he were awake and to react to alleviate the effect of external compression at the spiral groove. It was the evidence of Professor Holland that the anaesthetist is primarily responsible for preventing injury to the unconscious patient other than that which the surgeon might inflict. Q. If the compressive injury to the radial nerve occurred in the operating theatre, why do you say it was the responsibility of the defendant,

Dr K Chan, which is what you say in the next paragraph? A. Yes, well, during the course of an operation the surgeon and his or her assistants are responsible for the conduct of the procedure and they are preoccupied with what's going on in the operative field. Anything happening outside the operative field, therefore, falls within the province of the anaesthetist as far as protecting that patient is concerned. And the consequences of the unconscious state, of course, are that the patient can't protect himself, so it is the anaesthetist's role to ensure -- to provide that protection and that protection could be protection against untoward pressure, heat injury, for example, from hot objects, postural abnormalities, such as, for example, an arm slipping or something of that nature. And, I mean, there are a number of possibilities, even falling off the operating table, but all of those things which the operatives themselves, the surgeons themselves, couldn't possibly manage. Q. Yes. A. Because of what they are doing, that's where the anaesthetist's responsibilities lie. Of course, to some extent nursing staff also have a role. Q. Yes. A. But it's primarily the anaesthetist's responsibility to keep an eye on all those things. (Transcript, pages 6R-7H) Professor Holland was not challenged in cross-examination on that aspect of his evidence. There is also the witness statement of Kan Wai Han, one of the nurses on duty in the operating theatre when the plaintiff was brought in for his operation, to the effect that it was the anaesthetist's responsibility to ensure that the body positioning, including the position of both arms, was correct and that the patient was in a comfortable position. In my view, on the evidence, the presence of the local tenderness required an explanation and it fell to the defendant anaesthetist whose responsibility it was to protect the anaesthetised patient to provide a plausible explanation for that condition. The judge considered that the medical literature supported the view that radial nerve palsy is not preventable. But it does not follow from the statement that it is no longer the general view today that all perioperative injuries are preventable that radial nerve palsy that is found to be pressure-induced is not preventable. That there is considerable mystery as to the cause of some perioperative peripheral neuropathies particularly ulnar nerve injuries is generally accepted. Thus in Morell's paper in *Current Reviews in Clinical Anesthesia*, it is stated that in over 90% of 113 ulnar nerve injury cases, reviewers were unable to determine the mechanism by which the injury likely occurred. The conclusion that the aetiology of perioperative nerve injury is complex, incompletely understood, and multifactorial may be wholly appropriate in the context of ulnar nerve injuries has no place in the context of a radial nerve palsy injury, the aetiology of which has been found to be external compression at the spiral groove. It might have been different had the judge not been able to determine the actual cause of the radial nerve palsy. Mr Coleman SC relied on *Ratcliffe v Plymouth and Torbay Health Authority* and another, 42 BMLR

64. This was a case where the facts were unusual in that a routine, orthodox and in effect mechanical procedure (the administration of a spinal anaesthetic) produced entirely unexpected damage. As Buxton LJ explained in *Lillywhite & Anor v University College London Hospitals NHS Trust* [2005] EWCA Civ 1466 at 85, in such a case, there are only two possible explanations: either the doctor was physically careless in performing the operation

or there was some underlying condition, unknown to medicine, on which a properly performed operation reacts adversely and for which the doctor plainly is not responsible. A finding that the operation was performed with due care leaves the latter as the only explanation. I do not consider that Ratcliffe can assist Mr Coleman. As explained above, the judge having found that the left radial nerve palsy was caused by external compression at the spiral groove and that the injury occurred during the period when the plaintiff was in the operating theatre, it fell to the defendant to provide a plausible explanation as to why there was local tenderness at the spiral groove when the plaintiff was examined by Dr Ma. In my view, as no explanation was forthcoming from the defendant, much less any plausible explanation, negligence has to be inferred. Moreover, the findings by the judge that the plaintiff's arm had not fallen off the armboard, that the NIBP cuff had been administered properly and the use of the cuff was not negligent per se do not equate to a finding that the possibility of negligence on the part of the defendant in his role as anaesthetist could be ruled out altogether or that he had exercised reasonable care in every respect. For these reasons I would allow the appeal and set aside the judgment below. I would also propose that there be an order nisi of costs in favour of the plaintiff here and below. Hon Lunn J: I have had the advantage of reading the judgments in draft of Rogers VP and Le Pichon JA. I agree that this appeal should be allowed and that there be an order of costs in favour of the plaintiff here and below. I do so for the reasons articulated in the judgment of Le Pichon JA. Hon Rogers VP: Accordingly, this appeal is allowed and there will therefore be an order in terms of paragraph REF _Ref180405092 \r \h above. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (Michael Lunn) Judge of the Court of First Instance Mr Mohan Bharwaney, instructed by Messrs Robertsons, for the Plaintiff/Appellant Mr Russell Coleman SC, instructed by Messrs Jo 1udk M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica 0[1w 0[1w 0[1w Microsoft Word Document MSWordDoc Word.Document.8

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