THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Mohun and Another v Phillips N O obo Shearer and Another (1219/2021) [2022] ZASCA 186 (22 December 2022)

The Supreme Court of Appeal (SCA) dismissed, with costs, an appeal of the first appellant, Dr Sudhir Mohun, and upheld, with costs, an appeal of the second appellant, Doctors G Sanpersad, R Maharaj & Associates, against the judgment of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court).

The central issue in the appeal was whether the appellants were liable for the brain injury sustained by Mr David Robin Shearer, who was admitted as a patient in the emergency unit of Life Westville Hospital (the hospital) on 27 December 2014.

Mr Shearer, who was 43 years old at the time, was brought to the hospital's emergency unit by his wife, the second respondent, Mrs Justine Shearer, after he reportedly consumed an unknown quantity of tablets in combination with alcohol. Shortly after his arrival, the first appellant examined him. It was common cause that during the course of that evening, Mr Shearer became hypoxic and suffered from cardiac arrest, which led to permanent brain damage. The first appellant was a specialist physician who was, on the evening in question, engaged as a *locum tenens* by the second appellant, a medical practice which provided clinical care in the emergency unit in terms of a memorandum of agreement with the hospital.

In regard to the liability of the first appellant, the SCA found the following. The evidence of Professor André Retief Coetzee, the first respondent's expert witness, was cogent, clear and founded on logical reasoning. Most importantly, it was undisputed in material respects. The first appellant agreed with a number of statements and conclusions made by Prof Coetzee. Notably, the first appellant, inter alia, conceded that if the hypoxia was reacted upon timeously, the arrest would probably not have occurred and Mr Shearer would not have suffered brain damage. He agreed with the proposition put to him in cross-examination that if he had gone to check on Mr Shearer after 21h35 and up until 22h00, he would have been able to save him from suffering brain damage.

The SCA found further that Mr Shearer's history of overdose of alcohol with drugs should have caused a reasonable medical practitioner in the first appellant's position to expect a gradual change in Mr Shearer's breathing and oxygenation. In this regard, the SCA found that, on his own evidence, the first appellant was negligent by leaving the patient in the care of the nursing staff without adequately instructing them. The first appellant conceded that he should have given clear instructions to the nursing staff, in particular Sister Phillips, to constantly remain with Mr Shearer, as well as to what precisely to monitor him for, given that the ingestion of drugs and alcohol could affect his respiratory rate and lead to possible airway obstruction.

The SCA, therefore, held that the evidence of negligence and causation was overwhelmingly against the first appellant. There was, accordingly, no reason to interfere with the high court's decision in relation to him.

In regard to the liability of the second appellant, the SCA found as follows. The only question in relation to the liability of the second appellant before the SCA was whether in law it was liable for the negligence of the first appellant. The high court had found that the first appellant was an independent contractor in relation to the second appellant. That finding was not challenged before the SCA. Our law is clear that the principal is not liable for the civil wrongs of an independent contractor, except where the principal was personally at fault.

The SCA found further that the first respondent disavowed any intention to attempt to persuade the SCA to develop the law of vicarious liability. It followed that there was simply no legal basis upon which the second appellant could attract vicarious liability for the conduct of the first appellant. Thus, the SCA held that, on the evidence before it, no case had been made out for a finding that the second appellant was vicariously liable for the delicts of the first appellant.

Turning to the alternative argument that the SCA should develop the common law by reconsidering the principle of non-delegable duty of care in circumstances where the victim was especially vulnerable, particularly in places like hospitals and schools – whereby a higher standard of care was argued for – the SCA found that the first respondent presented before the Court none of the factors necessary for a court to consider before developing the common law.

Consequentially, the SCA held that both arguments in relation to the liability of the second appellant failed. This meant that the high court's order concerning the second appellant could not stand.

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