SPS. ALFREDO BONTILAO AND SHERLINA BONTILAO, PETITIONERS, VS. DR. CARLOS GERONA, RESPONDENT.

G.R. No. 176675. September 15, 2010

Ponente: VILLARAMA, JR., J.

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VILLARAMA, JR., J.:

Before us is a petition for review on certiorari[1] under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing the June 28, 2006 Decision[2] and January 19, 2007 Resolution[3] of the Court of Appeals (CA) in CA-G.R. CV No, 00201. The CA had reversed the March 23, 2004 Decision[4] of the Regional Trial Court (RTC) of Cebu City, Branch 6 and dismissed petitioners' complaint in Civil Case No. CEB-17822.

The facts are as follows:

On December 28, 1991, respondent Dr. Carlos Gerona, an orthopedic surgeon at the Vicente Gullas Memorial Hospital, treated petitioners' son, eight (8)-year-old Allen Key Bontilao (Allen), for a fractured right wrist. Respondent administered a "U-splint" and immobilized Allen's wrist with a cast, then sent Allen home. On June 4, 1992, Allen re-fractured the same wrist and was brought back to the hospital. The x-ray examination showed a complete fracture and displacement of the bone, with the fragments overlapping each other. Respondent performed a closed reduction procedure, with Dr. Vicente Jabagat (Dr. Jabagat) as the anesthesiologist. Then he placed Allen's arm in a plaster cast to immobilize it. He allowed Allen to go home after the post reduction x-ray showed that the bones were properly aligned, but advised Allen's mother, petitioner Sherlina Bontilao (Sherlina), to bring Allen back for re-tightening of the cast not later than June 15, 1992.

Allen, however, was brought back to the hospital only on June 1992. By then, because the cast had not been re-tightened, a rotational deformity had developed in Allen's arm. The x-ray examination showed that the deformity was caused by a re-displacement of the bone fragments, so it was agreed that an open reduction surgery will be conducted on June 24, 1992 by respondent, again with Dr. Jabagat as the anesthesiologist.

On the said date, Sherlina was allowed to observe the operation behind a glass panel. Dr. Jabagat failed to intubate the patient after five (5) attempts so anesthesia was administered through a gas mask. Respondent asked Dr. Jabagat if the operation should be postponed given the failure to intubate, but Dr. Jabagat said that it was alright to proceed. Respondent verified that Allen was breathing properly before proceeding with the surgery.[5] As respondent was about to finish the suturing, Sherlina decided to go out of the operating

room to make a telephone call and wait for her son. Later, she was informed that her son had died on the operating table. The cause of death was "asphyxia due to congestion and edema of the epiglottis."[6]

Aside from criminal and administrative cases, petitioners filed a complaint for damages against both respondent and Dr. Jabagat in the RTC of Cebu City alleging negligence and incompetence on the part of the doctors. The documentary evidence and testimonies of several witnesses presented in the criminal proceedings were offered and admitted in evidence at the RTC.

On March 23, 2004, the RTC decided in favor of the petitioners. It held that the doctrine of res ipsa loquitur was applicable in establishing respondent's liability. According to the RTC, asphyxia or cardiac arrest does not normally occur in an operation on a fractured bone in the absence of negligence in the administration of anesthesia and the use of an endotracheal tube. Also, the instruments used in the administration of anesthesia were all under the exclusive control of respondent and Dr. Jabagat, and neither Allen nor his mother could be said to be guilty of contributory negligence. Thus, the trial court held that respondent and Dr. Jabagat were solidarity liable for they failed to prove that they were not negligent. The trial court likewise said that respondent cannot shift the blame solely to Dr. Jabagat as the fault of the latter is also the fault of the former, respondent being the attending physician and being equally in care, custody and control of Allen.[7]

Aggrieved, respondent appealed the trial court's decision to the CA. Dr. Jabagat, for his part, no longer appealed the decision.

On June 28, 2006, the CA reversed the RTC's ruling. It held that the doctrine of res ipsa loquitur does not apply for it must be satisfactorily shown that (1) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the plaintiff was not guilty of contributory conduct; and (3) the instrumentality which caused the accident was within the control of the defendant.

The CA held that while it may be true that an Open Reduction and Internal Fixation or ORIF could not possibly lead to a patient's death unless somebody was negligent, still what was involved in this case was a surgical procedure with all risks attendant, including death. As explained by the expert testimony, unexplained death and mal-occurrence is a possibility in surgical procedures especially those involving the administration of general anesthesia. It had also been established in both the criminal and administrative cases against respondent that Allen's death was the result of the anesthesiologist's negligence and not his.[8]

The CA added that the trial court erred in applying the "captain of the ship" doctrine to make respondent liable even though he was the lead surgeon. The CA noted that unlike in Ramos v. Court of Appeals,[9] relied upon by the trial court, the anesthesiologist was chosen by petitioners and no specific act of negligence was attributable to respondent. The alleged failure to perform a skin test and a tracheotomy does not constitute negligence. Tracheotomy is an emergency procedure, and its performance is a judgment call of the attending physician as it is another surgical procedure done during instances of failure of intubation. On the other hand, a skin test for a patient's possible adverse reaction to the anesthesia to be administered is the anesthesiologist's decision. The CA also noted that the same anesthesia was previously administered to Allen and he did not manifest any allergic reaction to it. Finally, unlike in the Ramos case, respondent arrived only a few minutes late for the surgery and he was able to complete the procedure within the estimated time frame of less than an hour.

Petitioners filed the present petition on the following grounds:

> [1] THE COURT OF APPEALS ERRED IN REVERSING THE DECISION OF THE REGIONAL TRIAL COURT BY DISMISSING THE COMPLAINT IN SO FAR AS THE
>
> SURGEON, DR. CARLOS GERONA IS CONCERNED [AFTER] CONCLUDING THAT HE IS NOT SOLIDARILY LIABLE WITH HIS CO-DEFENDANT, DR. VICENTE JABAGAT, THE ANESTHESIOLOGIST, IN THE ABSENCE OF ANY NEGLIGENT ACT ON HIS PART.
>
> [2] THE COURT OF APPEALS ERRED WHEN IT MISAPPRECIATED ESSENTIAL FACTS OF THE CASE THAT LED TO ITS FINDINGS THAT DOCTRINE OF RES IPSA LOQUITfUJR AS APPLIED IN THE RAMOS CASE IS NOT APPLICABLE IN THE INSTANT CASE.[10]

Essentially, the issue before us is whether respondent is liable for damages for Allen's death.

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Petitioners argued that the doctrine of res ipsa loquitur applies to the present case because Allen was healthy, fully conscious, coherent, and ambulant when he went to the hospital to correct a deformed arm. Yet, he did not survive the operation, which was not even an emergency surgery but a corrective one. They contend that respondent, being the lead surgeon, should be held liable for the negligence of the physicians and nurses working with him during the operation.

On the other hand, respondent posited that he should not be held solidarity liable with Dr. Jabagat as they were employed independently from each other and their services were divided as their best judgment dictated. He insisted that the captain-of-the-ship doctrine had long been abandoned especially in this age of specialization. An anesthesiologist and a surgeon are specialists in their own field and neither one (1) could dictate upon the other. The CA was correct in finding that the Ramos case does not apply to respondent. Dr. Jabagat was contracted separately from respondent and was chosen by petitioner Sherlina. Respondent was only a few minutes late from the operation and he waited for the signal of the anesthesiologist to start the procedure. He also determined the condition of Allen before and after the operation.

We affirm the assailed CA decision.

The trial court erred in applying the doctrine of res ipsa loquitur to pin liability on respondent for Allen's death. Res ipsa loquitur is a rebuttable presumption or inference that the defendant was negligent. The presumption only arises upon proof that the instrumentality causing injury was in the defendant's exclusive control, and that the accident was one (1) which ordinarily does not happen in the absence of negligence. It is a rule of evidence whereby negligence of the alleged wrongdoer may be inferred from the mere fact that the accident happened, provided that the character of the accident and circumstances attending it lead reasonably to the belief that in the absence of negligence it would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrongdoer.[11]

Under this doctrine, the happening of an injury permits an inference of negligence where the plaintiff produces substantial evidence that the injury was caused by an agency or instrumentality under the exclusive control and management of the defendant, and that the injury was such that in the ordinary course of things would not happen if reasonable care had been used.[12]

However, res ipsa loquitur is not a rigid or ordinary doctrine to be perfunctorily used but a rule to be cautiously applied, depending upon the circumstances of each case.[13] In malpractice cases, the doctrine is generally restricted to situations where a layman is able to say, as a matter of common knowledge and observation, that the consequences of professional care were not as such as would ordinarily have followed if due care had been exercised. In other words, as held in Ramos v. Court of Appeals,[14]the real question is whether or not in the process of the operation, any extraordinary incident or unusual event outside of the routine performance occurred which is beyond the regular scope of professional activity in such operations, and which, if unexplained, would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence.

Here, we find that the CA correctly found that petitioners failed to present substantial evidence of any specific act of negligence on respondent's part or of the surrounding facts and circumstances which would lead to the reasonable inference that the untoward consequence was caused by respondent's negligence. In fact, under the established facts, respondent appears to have observed the proper amount of care required under the circumstances. Having seen that Dr. Jabagat failed in the intubation, respondent inquired from the latter, who was the expert on the matter of administering anesthesia, whether the surgery should be postponed considering the failure to intubate. Respondent testified,

WITNESS:

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A -

Actually sir, if I may cut short, I'm sorry. I don't know what is the term of this sir. But what actually, what we had was that Dr. Jabagat failed in the intubation. He was not able to insert the tube.

ATTY. PADILLA:

Q -

And you noticed that he failed?

A -

Yes, sir.

x x x x

ATTY. PADILLA:

Q -

And you noticed that he failed and still you continued the surgery, Dr. Gerona?

A -

Yes, I continued the surgery.

x x x x

COURT:

Q -

Did not Dr. Jabagat advise you not to proceed with the operation because the tube cannot be inserted?

A -

No, sir. In fact, I was the one who asked him, sir, the tube is not inserted, shall we postpone this for another date? He said, it's alright.[15]

Respondent further verified that Allen was still breathing by looking at his chest to check that there was excursion before proceeding with the surgery.[16] That respondent decided to continue with the surgery even though there was a failure to intubate also does not tend to establish liability, contrary to the trial court's ruling. Petitioners failed to present substantial proof that intubation was an indispensable prerequisite for the operation and that it would be grave error for any surgeon to continue with the operation under such circumstances. In fact, the testimony of the expert witness presented by the prosecution in the criminal proceedings and admitted into evidence at the RTC, was even to the effect that the anesthesia could be administered by alternative means such as a mask and that the operation could proceed even without intubation.[17]

There was also no indication in the records that respondent saw or should have seen that something was wrong as to prompt him to act differently than he did in this case. The anesthesia used in the operation was the same anesthesia used in the previous closed reduction procedure, and Allen did not register any adverse reaction to it. In fact, respondent knows the anesthesia Ketalar to be safe for children. Dr. Jabagat was also a specialist and more competent than respondent to determine whether the patient has been properly anesthetized for the operation, all things considered. Lastly, it appears that Allen started experiencing difficulty in breathing only after the operation, when respondent was already about to jot down his post-operation notes in the adjacent room. Respondent was

called back to the operating room after Dr. Jabagat failed to appreciate a heartbeat on the patient.[18] He acted promptly and called for other doctors to assist and revive Allen, but to no avail.

Moreover, we note that in the instant case, the instrument which caused the damage or injury was not even within respondent's exclusive management and control as Dr. Jabagat was exclusively in control and management of the anesthesia and the endotracheal tube. The doctrine of res ipsa loquitur allows the mere existence of an injury to justify a presumption of negligence on the part of the person who controls the instrument causing the injury, provided that the following requisites concur:

1. The accident is of a kind which ordinarily does not occur in the absence of someone's negligence:

2. It is caused by an instrumentality within the exclusive control of the defendant or defendants; and

3. The possibility of contributing conduct which would make the plaintiff responsible is eliminated.[19]

Here, the respondent could only supervise Dr. Jabagat to make sure that he was performing his duties. But respondent could not dictate upon Dr. Jabagat the particular anesthesia to administer, the dosage thereof, or that it be administered in any particular way not deemed appropriate by Dr. Jabagat. Respondent's specialization not being in the field of anesthesiology, it would be dangerous for him to substitute his judgment for Dr. Jabagat's decisions in matters that fall appropriately within the scope of Dr. Jabagat's expertise.

Under the above circumstances, although the Court commiserates with the petitioners on their infinitely sorrowful loss, the Court cannot properly declare that respondent failed to exercise the required standard of care as lead surgeon as to hold him liable for damages for Allen's death.

In civil cases, the burden of proof to be established by preponderance of evidence is on the plaintiff who is asserting the affirmative of an issue.20 Unless the party asserting the affirmative of an issue sustains the burden of proof, his or her cause will not succeed.

WHEREFORE, the petition is DENIED. The Decision dated June 28, 2006 and Resolution dated January 19, 2007 of the Court of Appeals in CA-G.R. CV No. 00201 are AFFIRMED.

No pronouncement as to costs.

SO ORDERED.

Carpio Morales, (Chairperson), Peralta,[*] Bersamin, and Sereno, JJ., concur.

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[*] Designated additional member per Special Order No. 885 dated September 1, 2010.

[1] Rollo, pp. 46-69.

[2] Id. at 7-21. Penned by Associate Justice Isaias P. Dicdican and concurred in by Associate Justices Apolinario D. Bruselas, Jr. and Agustin S. Dizon. The dispositive portion of the Decision reads as follows:

> WHEREFORE, in view of the foregoing premises, judgment is hereby rendered by us GRANTING the appeal filed in this case. The complaint in Civil Case No. CEB-17822 as to the defendant-appellant is hereby DISMISSED for lack of merit.
>
> SO ORDERED.

[3] Id. at 40-41.

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[4] Records, Vol. II, pp. 1038-1048. Penned by Judge Anacteto L. Caminade. The dispositive portion of the Decision reads as follows:

> WHEREFORE, this Court hereby orders the defendants to pay plaintiffs, jointly and severally, as follows: (a) P50,000.00 for the life of Allen, (b) PI0,000.00 for the burial expenses, (c) P750,000.00 as moral damages, (d) P250,000.00 as exemplary damages, (e) attorney's fees equivalent to 25% of the total of the foregoing amounts, and (f) P50,000.00 as litigation expenses. Costs against defendants.
>
> It is so ordered.

[5] TSN, December 4, 2002, p. 29. TSN, December 4, 2002, p. 29.

[6] Records, Vol. II, pp. 1039-1040.

[7] Id. at 1044-1047.

[8] rollo, pp. 14-16.

[9] G.R. No. 124354, December 29, 1999, 321 SCRA 584.

[10] Rollo, p. 55.

[11] Batiquin v. Court of Appeals, G.R. No. 118231, July 5, 1996, 258 SCRA 334, 344-345.

[12] Id. at 345.

[13] Reyes v. Sisters of Mercy Hospital, G.R. No. 130547, October 3, 2000, 341 SCRA 760, 772.

[14] Supra note 9, at 603.

[15] TSN, December 4, 2002, pp. 27-30.

[16] Id. at 29.

[17] Records, Vol. II, pp. 724-725.

[18] Rollo, p. 78; TSN, August 29, 2002, pp. 33-34.

[19] Cantre v. Go, G.R.No. 160889, April 27, 2007, 522 SCRA 547, 556.

[20] Alonso v. Cebu Country Club, Inc., G.R. No. 130876, December 5, 2003, 417 SCRA 115, 123.

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