IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 39/2003
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

B E T W E E N:

DUFF KOPA KOPA
(Suing as next friend and administrator
of the estate of Chuubo Kopa Kopa) APPELLANT

AND

UNIVERSITY TEACHING HOSPITAL
BOARD OF MANAGEMENT RESPONDENT

CORAM: LEWANIKA, DCJ., CHIBESAKUNDA, MUSHABATI, JJS
On 23rd May, 2006 and 22nd February, 2007

For the Appellant: M.M. MUNDASHI and P.K. CHIBUNDI of Mulenga Mundashi & Co.
For the Respondent: I.C. NG'ONGA of Ng'onga & Co.

JUDGMENT

LEWANIKA DCJ delivered the judgment of the Court.

LIST OF AUTHORITIES

1. ATTORNEY-GENERAL VS MARCUS KAMPUMBA ACHIUME 1983, ZR 1
2. JU LUNGU FRED MUTENDA (Suing in person and on behalf of dependants as personal representative or administrator of the estate of Chipola Lungu Matenda, deceased minor) VS ZCCM LTD, APPEAL NO. 37 OF 1998
3. BOLAM VS FRIERN HOSPITAL MANAGEMENT COMMITTEE, 1957, IWLR 582
4. SIDAWAY VS GOVERNORS OF BETHLEHEM ROYAL HOSPITAL, 1985, AC 871
5. MAYNARD VS WEST MIDLANDS REGIONAL HEALTH AUTHORITY, 1984 IWLR.634
6. ROE VS MINISTER OF HEALTH, 1954, ZA.ER.131
7. ROSEMARY BWALYA VS ZAMBIA CONSOLIDATED COPPER MINES LTD, SCZ NO. 1 OF 2005.

This is an appeal against the decision of a judge of the High Court dismissing the Appellant's claim for damages under the Fatal Accidents Act 1846 to 1908 for the death of the deceased and for damages under the Law Reform (Miscellaneous Provisions) Act for the benefit of the estate of the deceased for loss of expectation of life and consequential loss caused to the deceased by the negligent medical attention given by the servants or agents of the Defendant resulting in the death of the deceased on 4th January, 1999.

In this appeal we shall refer to the Appellant as the Plaintiff and the Respondent as the Defendant which is what they were in the court below.

The evidence on record which is not in dispute is that the Plaintiff's son, Chumbo Kopakopa, aged 8 years old swallowed a Coca-Cola bottle top on 25th December, 1998. He was taken to the UTH by his mother for medical attention. At the hospital an X-ray was taken which revealed that the bottle top had lodged at the top of the esophagus. The first doctor who attended to the child was PW 5 who took the child to the theatre and decided to perform an oesophagoscopy. This procedure involved the use of an oesaphagoscope machine which has a tube with a light and the tube is pushed inside to locate the foreign body and then to hook it out through the mouth or push it down towards the stomach. PW 5 was not successful in

removing the bottle top. PW 4 a consultant surgeon conducted the same procedure on 26th December, 1998 and forced the bottle further down the esophagus. PW 4 repeated the same procedure on 28th December but had to abandon it because the child had massive arterial bleeding which necessitated subsequent blood transfusion. The bottle top was eventually removed by PW 6 who conducted a thoracotomy operation which involved the opening of the chest wall and the esophagus. Despite the operation, the child died on 4th January 1999.

The case for the Plaintiff was that the child died as a result of the wrong procedure applied by PW 4 and PW 5 in the attempt to remove the bottle top from the child's throat. It was alleged that as a result of the attempts by PW 4 and PW 5 to push down the bottle top, the sharp edges of the bottle top perforated the esophagus and caused heavy bleeding in the chest area and the mediatenum which led to the chest area becoming infected and inflamed leading to the death of the child. It was alleged that the treatment given to the child by PW 4 and PW 5 in the course of their employment with the Defendant was negligent.

The Defendant denied negligence on the part of its servants or agents and that the correct procedures were carried out on the child.

The learned trial Judge upon a consideration of the evidence adduced before her found that there was no negligence and dismissed the Plaintiff's claim, hence this appeal.

Counsel for the Plaintiff has filed five grounds of appeal namely:-

1. That the learned trial Judge erred in law and in fact by holding that there was no negligence on the part of the Respondent's servants or agents notwithstanding a finding of fact that they had carried out the operation with a poor light source which prevented them from seeing properly;

2. That the learned trial Judge erred in law and in fact by holding that the operation conducted by the Respondent's servants on the deceased was in accordance with the standard procedure but failing to hold that the usage of the standard procedure by the Respondent's servants or agents in the removal of a metal Coca Cola bottle top lodged in the esophagus of a minor without the requisite light source was below the required standard of care for a pediatric surgeon;

3. That the learned trial Judge erred in law and fact by holding that the errors of the Respondent's servants could not be said to have caused or contributed to the death of the child notwithstanding evidence to the effect that the massive bleeding and subsequent death therefrom occurred whilst the deceased was under the care of the Defendant's servants;

4. That the learned trial Judge erred in law and in fact by holding that the procedure applied by the Defendant's servants was correct notwithstanding evidence that the acts of the Defendant's servants were not in conformity or accordance with the practice currently approved as proper by responsible medical opinion which requires that a practitioner first locate the foreign body before pulling or pushing it down;

5. That the learned trial Judge erred in law and in fact by holding that the Defendant's servant Dr. SULTANOV was not negligent because the foreign body could have perforated the walls of the esophagus whether it was first pulled up before it was pushed down not withstanding evidence that it was not approved practice to attempt an oesophascopy without locating the foreign body.

Counsel for the Plaintiff informed us that he would argue grounds 4 and 5 together. Arguing the first ground of appeal Counsel said that at page eleven of the record PW 4 said:-

> ***'He took the child to the theatre where he said he tried to remove the foreign body by an oesophagoscopy method by using an oesophagoscopy machine which has a cable that gives light and this cable is put to the patient under general anaesthesia to examine the mouth and the esophagus. It was Dr. SULTANOV's testimony that he did not see the foreign body using this light. He said he recorded in the report on that day and I quote: 'it was impossible to see any thing there was no good light.' It was Dr. SULTANOV's further evidence that he recorded on the report that and I quote:- 'when there was no light we tried to push the foreign body into the stomach."***

Counsel further said that the evidence of PW 5 at page 13 of the record is that he wrote in his reports on the operation on 25th December, 1998 that:-

> ***"Repeat X-Ray shows – foreign body, in mid chest. Need good light source..."***

He also referred to the evidence of PW 6 the expert witness who said on page 15 of the record:-

'for an oesophagoscope machine to perform an oesophagus operation, good source of light is needed even though such an operation can be performed with poor lighting by an expert but otherwise it may be hazardous."

Counsel submitted that due to the nature of the operation there can be no doubt that in order for oesophagoscopy to be conducted there must be enough light to allow the medical practitioner to see into the oesophagus. He said that from the evidence on record there is no dispute that both PW 4 and PW 5 did not have a good light source but yet proceeded with the operation by way of pushing the foreign body downwards into the stomach.

He further submitted that at page 26 of the record the learned trial Judge finds no evidence of negligence by PW 4 and PW 5 in attending to the deceased. He said that this is despite the finding on page 25 of the record that both doctors *"committed errors when each first pushed down the foreign body without first attempting to pull it up."* He said that this finding was perverse and is one which cannot be supported as reasonably made by a trial court properly evaluating the evidence before it and ought to be overturned in accordance with the decision in **ATTORNEY GENERAL VS MARCUS KAMPUMBA AHICUME (1).**

He said that negligence in relation to a medical practitioner as per the guidelines that we gave in the case of **JU LUNGU FRED MATENDA VS ZCCM** (2) has to be *"ascertained or established in accordance with the*

generally accepted principles and tests for the determination of professional liability with specific reference to alleged medical negligence. In short the Plaintiff would have had to show that what occurred was a result of an error and that such error was one that a reasonably skilled and careful practitioner would not have made."

He submitted that the learned trial Judge had found as a fact that both PW 4 and PW 5 committed errors. That the question that remains is whether those errors are ones that a reasonably skilled and careful medical practitioner would not have made and he submitted that the error of conducting an oesophagoscopy without a good light source is one that a reasonably skilled and careful medical practitioner would not have made.

He said that in determining the level of the standard of skill required by a medical practitioner, we had stated in the **JU LUNGU MATENDA** case that the ***"Bolam test in medical negligence cases has gained wide acceptance as the proper approach in such cases."*** In **BOLAM VS FRIERN HOSPITAL MANAGEMENT COMMITTEE** (3), Mc Nair, J had stated that, ***'but where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the clapham***

Omnibus because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of any ordinary competent man exercising that particular art."

Counsel further submitted that according to the evidence of PW 6 on page 17 of the record, he had said of PW 5 that ***"Dr HAQUE as a junior doctor was not competent to treat this patient"*** and further that he did not have ***the experience of removing a difficult thing like a Coca Cola bottle cap."*** He said that if PW 5 had been a reasonably skilled and careful medical practitioner he would not have made the error of proceeding with an oesophagoscopy in the absence of sufficient light as he lacked the requisite competence and experience and should have referred the patient to a person competent to deal with the patient.

Counsel submitted that a prudent pediatric surgeon with the experience and skill to treat a person with a novel case involving a sharp edged Coca Cola bottle cap lodged in the oesophagus of a minor could not have proceeded with an oesophagoscopy in the absence of a good light source as was done by the two doctors herein who should thus have been

found to be negligent as by so proceeding the two doctors fell below the required standard of care. He further said that on the facts before her and the law on medical negligence, the learned trial Judge should not have found that there was no negligence by the two doctors and that the finding as a fact is perverse and unreasonable, and as a finding in law is incorrect.

As to the second ground of appeal, Counsel said that on page 25 of the record the learned trial Judge stated that, ***"the evidence shows that that the errors in this case were not the method applied since it is the correct procedure for removal of foreign bodies. It only transpired that oesophogoscopy procedure is wrong for removal of coca cola bottle tops with rough edges."***

He said that this holding is wrong in law and ought to be overturned. He referred us to a passage in the 10th Edition of Clerk and Lindsell on tort where the learned authors stated that, ***"in determining whether a Defendant practitioner had fallen below the required standard of care the Bolam test hooks to responsible medical opinion."*** He referred to the testimony of PW 6 who was called as an expert witness who stated on page 14 of the record that when he was called upon to assist, ***"he decided to open the chest in contrast to the usual procedure used in removing foreign bodies because a***

coca cola bottle top has sharp edges and that whichever way you do it either pushing it down or pulling up, it will cut the walls of the esophagus." That PW 6 went on to state at page 15 of the record, that this was a very strange case and that it is the first case in management of foreign bodies in the esophagus where a Coca Cola bottle cap has been swallowed and that this is why he was saying that the procedure conducted by the other doctors was correct but that unfortunately it turned out to be wrong.

Counsel further said that in response to a question of whether in his opinion the two doctors were negligent in using the standard procedure, PW 6 replied that ***"if Dr. HAQUE pushed the Coca Cola cap downwards, he was wrong but that this was how the students are taught"*** on page 16 of the record. And that at page 17 of the record PW 6 went on the state that ***"he was aware that the procedure that Dr. HAQUE did was the same procedure that Dr. SULTANOV attempted to do and that this was why he was called because they had both done something wrong."***

He said that the evidence on record from the responsible medical opinion is that the standard procedure employed by the two doctors was wrong and in this regard the two doctors were negligent in that they fell below the required standard of care by proceeding with the standard

procedure in an extraordinary and novel case. He submitted that if the two doctors had taken reasonable care they would not have proceeded with the standard procedure as they would have judged that the standard procedure for which they were in any case not properly equipped was not suitable to this extraordinary and novel case.

As to the third ground of appeal Counsel said that on page 23 of the record the learned trial Judge found that the errors of Dr. HAQUE, ***"when he attempted to push down the foreign body without first seeing it and without first attempting to pull it up his acts cannot be said to have led or contributed to the death of the child"*** and that at page 17 the learned trial Judge stated that, ***"though Dr. HAQUE may not have had the requisite experience and competence and even though the procedures that he did were wrong and even if he was wrong by failing to refer the matter to a senior doctor, what he did cannot be said to have caused the eventual massive or profuse bleeding of the patient and finally to the child's death."*** Further that on the same page the learned trial Judge finds ***"that the procedures conducted by Dr. HAQUE though erroneous did not lead or cause the death of Chumbo."***

He submitted that these findings are made upon a misapprehension of the facts and are perverse findings going by the evidence before the court and ought to be reversed. He pointed out that at page 13 of the record the learned trial Judge had stated that, "***Dr. HAQUE testified that the X-Ray taken thereafter showed that the foreign body moved to the second part of the esophagus meaning that he did move the foreign body down during the oesophagoscopy procedure,***" He also referred to the testimony of PW 6 on page 24 of the record where he stated, "***that what could have caused the massive or profuse bleeding that led to the death of the patient was either the procedures conducted by the first two doctors or the Coca Cola top itself since it has rough edges.***"

He said that against this evidence the finding of the court below that the procedures conducted by PW 5 though erroneous did not lead or contribute to the death of the child and that though he lacked the requisite experience and competence and was wrong in not referring the matter to a senior doctor, his actions cannot be said to have caused the eventual massive or profuse bleeding of the child and finally to the child's death in the absence of any other cause for the bleeding other than the erroneous procedures of the Defendant's servants is a misapprehension of the facts and

a perverse finding. He said that the only reasonable inference from the facts is that when PW 5 attempted to pull or push the bottle cap it perforated the walls of the esophagus and this commenced the bleeding.

In arguing grounds four and five Counsel said that at page 25 of the record the learned trial Judge made a finding' ***that the procedures applied by both doctors were correct even though both doctors committed errors when each first pushed down the foreign body without first attempting to pull it up."*** That the learned trial Judge also made a finding that, ***"I find that Dr. SULTANOV cannot be said to have been negligent because the foreign body in issue, could have perforated the walls of the esophagus whether it was first pulled up before it was pushed down."***

He said that these findings were made in the face of evidence that an oesophascope machine requires a good light source to look into the patient and locate the foreign body. He referred us to the case of **SIDAWAY VS GOVERNORS OF BETHLEHEM ROYAL HOSPITAL (4)** where it was stated that, "***a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."***

Counsel submitted that in this case, the facts revealed that the accepted practice is that the medical practitioner locates the foreign body and then either pulls it up or pushes it down. That both PW 4 and PW 5 who dealt with the deceased did not see the foreign body due to a poor light source but proceeded to push it down. He said that this practice is not supported by any responsible body of medical opinion. He further said that the case of **MAYNARD VS WEST MIDLANDS REGIONAL HEALTH AUTHORITY** (5) is authority that the test of reasonableness to diagnosis and therapy can be used to determine whether a medical practitioner has failed in his duty and he submitted that it was not a reasonable approach as it is expected that if you push a sharp edged metal bottle cap down an esophagus you will lacerate the tissue and that this should be in the knowledge of any medical practitioner.

He further submitted that it was misapprehension of the facts and a perverse finding by the learned trial Judge to find that the procedures applied by the first two doctors were correct even though both committed errors when their acts are not in accordance with any practice accepted as proper by a responsible body of medical opinion and are unreasonable.

In reply Counsel for the Defendant said that in relation to the first ground of appeal that the poor light source did not contribute to the death of the Plaintiff's child as there was enough light source to carry out the operation and that therefore the learned trial Judge could not have erred in law and in fact. He drew our attention to the evidence of PW 6 at page 186 of the record where PW 6 said that the light was enough when he was called to do the oesophascopy and that the reason why he stopped the operation was the heavy bleeding. He also referred us to the evidence of PW 4 on pages 172 of the record where PW 4 said, ***"there was some light source though poor I managed to go up to the cardiac but still there was no foreign body. It went smoothly without any resistance."*** He also referred us to the evidence of PW 4 on page 173 where he confirmed that he had visual. He submitted that although the vision might have been partially impaired, the doctors had to do their best in the circumstances.

As to the second ground of appeal, Counsel said that the findings of the learned trial Judge were in conformity with obtaining medical practice at the time of the incident. He referred us to the evidence of PW 6 on page 185 of the record where in relation to oesophagascopy PW 6 said, ***"this is how we teach our students. This is the correct procedure."*** On the same page

PW 6 stated that, *'there is nowhere in the medical history where a Coca Cola cap has been swallowed. That is why I am saying the procedure that they did was the correct procedure but unfortunately it turned out to be wrong."* He also referred us to the evidence of PW 6 on the same page where PW 6 said that, *"this is a very strange case. It is the first case in the history of management of a foreign body in the esophagus."* He further referred us to the evidence of PW 6 at page 187 of the record where PW 6 said, *"I think up to now I would say we do not know how to treat this, how to remove the Coca Cola cap from the esophagus because last month we lost yet another child with similar circumstances where a senior doctor was called, now instead of pushing down the way it was done with Chuubo Kopakopa, the consultant tried to move it upwards. The child died from massive bleeding."* He said that PW 6 went on to opine that in these two cases the best treatment is open surgery. Counsel submitted that as the case that was before the learned trial Judge was a strange case, the learned trial Judge was correct in finding that there was no negligence on the part of the Defendant's servants.

As to the third ground of appeal Counsel for the Defendant said that the findings of the learned trial Judge were correct although he conceded

that the deceased died whilst under the care of the Defendant's servants. He drew our attention to the evidence of PW 6 at page 184 of the record where PW 6 had stated that the esophagus had been perforated either by the Coca Cola cap or the procedure. He further said that the expert witness does not attribute the perforation of the esophagus leading to heavy bleeding wholly to the procedure but also to the nature of the foreign object which had sharp edges.

As to the fourth ground of appeal, Counsel said that Dr. HAQUE, PW 5, who was the most junior of the doctors attempted to remove the foreign body without locating it but failed without causing injury to the child. He abandoned the procedure and referred the child to a senior doctor, PW 4. He referred us to the evidence of PW 5 on page 176 of the record where PW 5 stated that, "***No, I could not see the foreign body so I could not push it down.....yes, I directed in the esophagus I did not find. So I could not do anything to the foreign body because I could not see it.***" As for PW 4 he referred us to his evidence at page 172 of the record where he said that, ***"there was some light source though poor. I managed to go up to the cardiac but still there was no foreign body. It went smoothly without any resistance."*** He submitted that based on the evidence of these witnesses

they did what they could have done in the circumstances and that they cannot be said to have been negligent.

As to the fifth ground of appeal, Counsel said that he adopted his arguments in grounds one to four as the grounds are similar.

We are indebted to both Counsel for the submissions which have been of great assistance to us in arriving at our decision in this matter. We have also considered the evidence on record.

As we have stated earlier, it was not in dispute that the Plaintiff's son, Chuubo Kopakopa, aged 8 years old swallowed a Coca-Cola bottle top on 25th December, 1998. He was taken to the UTH by his mother for medical treatment. At the hospital an X ray was taken which revealed that the bottle top had lodged at the top of the esophagus. The first doctor who attended to the child was PW 5 who took the child to the theatre and decided to perform an oesophagoscopy. This procedure involved the use of an oesophagoscope machine which has a tube with a light and the tube is pushed inside the patient's body to look inside to locate the foreign body and then to hook it out through the mouth or push it down towards the stomach. PW 5 was not successful in removing the bottle top.

PW 4, a consultant surgeon, conducted the same procedure on 26th December, 1998 but was likewise not successful in removing the bottle cap. PW 4 repeated the same procedure on 28th December 1998 but had to abandon it because the child had massive arterial bleeding which necessitated subsequent blood transfusion. The bottle top was eventually removed by PW 6 who conducted a thoracotomy operation which involved the opening of the chest wall and the esophagus. Despite the operation, the child died on 4th January 1999.

In the first ground of appeal Counsel for the Plaintiff has argued that the learned trial Judge erred in law and in fact by holding that there was no negligence on the part of the Defendant's servants or agents notwithstanding a finding of fact that they had carried out the operation with a poor light source which prevented them from seeing properly.

The evidence of PW 4 on this point is on page 172 of the record of appeal where he stated that, ***'there was some light source though poor I managed to go up to the cardiac but still there was no foreign body. It went smoothly without any resistance."*** PW 6, Professor MUNKONGE who was called as an expert deposed on page 186 of the record that, ***when I was called to do the oesophagoscope the light was enough for me to see***

but that was not the reason I stopped the operation. The reason was the Coca Cola cap was sharp and removing it either upwards or pushing it downwards would have the same effect."

It has been canvassed by Counsel for the Plaintiff that the finding by the learned trial Judge that there was no evidence of negligence on the part of the Defendant's servants is perverse and ought to be reversed in line with our decision in the case of **ATTORNEY GENERAL VS MARCUS KAMPUMBA ACHIUME** (1). In the light of the evidence of PW 4 and the expert witness PW 6 it cannot be said that the finding of the learned trial judge cannot be supported by the evidence on record. Further as we pointed out in the **JU LUNGU FRED MATENDA** case (2), negligence in relation to a medical practitioner has to be ***"ascertained or established in accordance with the generally accepted principles and tests for the determination of professional liability with specific reference to alleged medical negligence. In short the Plaintiff would have to show that what occurred was as a result of an error and that such error was one that a reasonably skilled and careful practitioner would not have made."*** The learned trial Judge was therefore on firm ground in holding as she did and the first ground of appeal cannot succeed.

The second ground of appeal was that the learned trial Judge erred in law and in fact by holding that the operation conducted by the Defendant's servants on the deceased was in accordance with standard procedure but failing to hold that the usage of the standard procedure by the Defendant's servants or agents in the removal of a metal Coca Cola cap lodged in the esophagus of a minor without the requisite light source was below the required standard of care for a pediatric surgeon.

The evidence of PW 6, the expert witness, at page 185 of the record is that the procedure followed by PW 4 and PW 5 in treating the child was the correct procedure and it is the procedure taught to medical students for the removal of foreign bodies in the esophagus. PW 6 however went on to state that this was a novel and strange case as there was no medical history of a Coca Cola cap being swallowed. PW 6 also gave an example of another child who had also swallowed a Coca Cola cap and in this case the consultant who attended to the child tried to pull the Coca Cola cap upwards but the child still died from massive bleeding. With the benefit of hind sight PW 6 then went on to opine that, ***"I am saying that I think the best way of treating Coca Cola caps is not by pushing downwards or pulling it upwards because in those two methods you still cause injuries to the***

It is common cause that the deceased died whilst he was under the care of the Defendant's servants as a result of massive bleeding following the perforation of the esophagus. The question was put to PW 6 as to what could have caused the perforation of the esophagus and his reply at page 184 of the record was that ***".....that the esophagus had been perforated either by the Coca Cola cap or by the procedure."*** Our understanding of this evidence is that even if the oesphagoscopy procedure had not been attempted the nature of the foreign body that had been swallowed by the child could have perforated the esophagus. In other words the expert witness did not attribute the perforation of the esophagus leading to heavy bleeding wholly to the procedure but also to the nature of the foreign object which had sharp edges. The learned trial Judge was therefore on firm ground in holding as she did and this ground of appeal cannot succeed as well.

The fourth and fifth grounds of appeal which were argued together are in reality an amplification of the first three grounds of appeal. The question that they raise was whether from the evidence on record the Defendant's servants were negligent in the diagnosis and treatment of the deceased.

Both Counsel have referred us to the case **BOLAM VS FRIERN HOSPITAL MANAGEMENT COMMITTEE** (3) and as we have stated

on previous occasions the Bolam test in medical negligence cases has gained wide acceptance as the proper approach in such cases. In this regard we quote from paragraphs 11-12 of Clerk and Lindsell on Torts where the learned authors state as follows:-

> ***"The Bolam test can be divided into two parts:***
>
> 1. ***The test is the standard of the ordinary skilled man excersing and professing to have that special skill. A man need not profess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of a competent man excersing that particular art."***

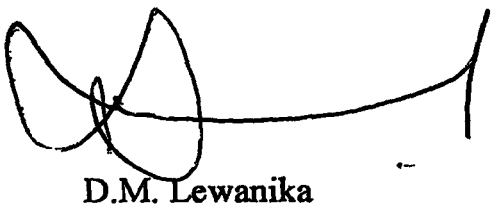
That art is judged in the light of the practitioner's speciality and the post that he holds. Thus ***".....a doctor who professes to exercise a special skill must exercise the normal skill of his specialty."*** A general practitioner is not expected to attain the standard of a consultant obstetrician delivering a baby. But if he elects to practice obstetrics at all he must attain the skill of a general practitioner undertaking obstetric care of his own patients. And in all cases general practitioners and other doctors must exercise care in determining when to refer a patient for a consultant's or other second opinion.

2. ***In determining whether a Defendant practitioner has fallen below the required standard of care, the Bolam test looks to responsible***

medical opinion. A practitioner who acts in conformity with an accepted, approved and current practice is not negligent.....merely because there is a boy of opinion which would take a contrary view.

In this case, "responsible medical opinion" would be the testimony of PW 6 who was called by the Plaintiff as an expert witness. We have already alluded to the testimony of this witness with regard to the propriety of the procedures adopted by PW 4 and PW 5 in the management and treatment of the deceased child. His evidence was that the procedures were the normal accepted and approved current practice and there can therefore be no question of professional negligence.

We sympathise with the parents of the deceased child for we too are parents and grand parents, but the law of professional negligence is clear and from the evidence on record the Plaintiff did not make out such a case. We have no alternative but to dismiss the appeal. However, given the circumstances of this case, we order that each party is to bear its own costs.



D.M. Lewanika
DEPUTY CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE

C.S. Mushabati
SUPREME COURT JUDGE