



Office of the Director of Public Prosecutions

'To No One Will We Sell, To No One Deny or Delay Right or Justice'
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Editorial



Anusha Rawoah
Ag. Principal State Counsel

Dear Readers,

As the country faces another wave of the COVID-19 pandemic, the ODPP hopes that you stay safe by taking the sanitary precautions all the time, and maintaining social barriers. Nonetheless, as promised, we bring to you our second 'ODPP Podcast', comprising of two parts: the first one, an interview with Mr Mehdi Manrakhan, Senior Assistant DPP, and the second one a review by Ms Deepa Bucktwar, State Counsel. You will also read an interesting article on the legal aspects of the drug scourge, entitled 'Guilty Knowledge', which addresses the notion on 'intention' for drug offences.

Furthermore, to mark the International Women's Day, on the 4th of March 2021, the 'Gender Caucus' of the ODPP organised a workshop at the seat of the Institute for Judicial and Legal Studies, in collaboration with the U.S. Embassy and the Commonwealth Magistrates' Association, for the benefit of the legal profession. A review of same together with that of a radio programme on the 'gender-based violence reform,' and an online Conference organized by the British High Commission Office, is provided in this issue. Readers will also appreciate an article on 'medical negligence' addressing the legal aspects of medical practice.

In the 'Quick Facts' section, as a continuation to our previous issue, we provide you with the second part of offences and penalties under the Food Act. Finally, our usual rubric, Supreme Court judgments summary is included at Page 22.

We wish you a pleasant read and welcome your feedbacks on odppnewsletter@govmu.org.



ODPP PODCAST

LA POUDRIÈRE VOICE



ENTRETIEN AVEC MEHDI MANRAKHAN VICTIMES DE CRIMES - CES ÂMES OUBLIÉES DE NOTRE SYSTÈME PÉNAL



SUIVI DU PODCAST DE DEEPA BUCKTOWAR SUR LE CRIME D'ATTENTAT À LA PUDEUR



RAZIA JANNOO-JAUNBOCUS

MEENAKSHI GAYAN-JAULIMSING

Click on the link below to listen to the Podcast:

<https://youtu.be/PFTf2mE0h4M>



ARTICLES

Guilty Knowledge



Meenakshi Gayan- Jaulimsing
Ag. Assistant Director of Public
Prosecutions

We live in an era where the web of dangerous drugs has slowly permeated all corners of society and touched the realms of all ages. Drug abuse affects not only the individual but also families, businesses, government resources and the society.

A drug is a substance which affects the physical and the psychological functioning of the body when administered. There are legal and illegal drugs. It is an offence punishable by Law to unlawfully indulge in dangerous drugs in Mauritius by virtue of the **Dangerous Drugs Act**. All dangerous drugs are listed in the schedules of the **Act**.

The **Dangerous Drugs Act** gives rise to many offences including unlawful uses of drugs, the offer and sale of drugs, drug dealing and drug trafficking offences. For an offence to subsist under these **sections** of the **Act**, it is incumbent, first and above all, that the offender is in unlawful possession of the dangerous drugs.

The concept of unlawfulness would stem from the fact that an individual has not been authorised to be in such possession. Generally, possession means physical possession. However, we should remember that our jurisprudence has extended the notion of possession, under the **Dangerous Drugs Act**, beyond physical possession. One is deemed to be in possession of dangerous drugs when one has knowledge and control of the existence of the drugs being in one's custody.

Let us take two examples: if X unintentionally comes across Y on the road and Y carries drugs in his bag, X cannot be deemed to be in joint possession of the drugs. If a '*friend*' unknowingly deposits drugs in the bag of a student, the student cannot be deemed to be in possession of the drugs. It can only be inferred that X or the student is in possession of drugs if there is something suggesting that X or the student was involved in the transaction and had knowledge of the other person's acts and doings. For instance, if both X or the student had planned to smoke the drugs in the above scenarios, then the notion of possession comes into existence for X and the student as they had knowledge and control over the drugs. In legal terms, this is called an '*overt act*'. The overt act would be the knowledge that X was walking with Y to smoke the drugs being in physical custody of Y. It would also be the knowledge of the student that his '*friend*' was depositing drugs in his bag for subsequent consumption. The overt act is the connection of the person to the drugs establishing that the person had knowledge and control over the custody of the drugs. Our Mauritian case law (**Nawoor v/s The Queen (1984) MR 104**, **Omarsaib v/s The State (1996) SCJ 30**, **Choramun I VS The State of Mauritius (2014) SCJ 69**) is of useful relevance and reference.

Guilty Knowledge

Drug dealing which involves an element of distribution or sale is gauged from the circumstances of the case. It is generally the quantity of drugs involved, the way in which the drugs are kept, the paraphernalia surrounding the presence of the drugs, the conduct of the offender, that irresistibly suggest that the offender was in possession of the drugs with the intention of dealing with same. When the street value of the drugs exceeds Rs. 1 million, the offender is deemed to be a trafficker.

There is an obligatory custodial sentence penalty in cases where offenders are drug traffickers or in cases of drug dealing where the drugs involved are listed in **Part II of Schedule I** of the **Dangerous Drugs Act**, for example, cannabis resin, cocaine, heroin, opium and synthetic cannabinoids, to name a few. In relation to unlawful use of drugs as a consumer, an inhaler, a purchaser or for simple possession, the penalty is lesser. A Court of Law may order such convicted person to undergo rehabilitation.

However, it is to be remembered that no matter the grading in the involvement of drugs, it remains an offence under our law. Pleading that the drugs was not in one's hands, pockets or bags, would be of no defence if there is knowledge and control connecting the person to the drugs, irrespective of physical custody. ***Guilty is he who has the knowledge!***

Activities of the ODPP Gender Caucus

1. Radio program of Citizen Support Unit on the gender-based violence reform

Gender-Based Violence - "Les avancées dans ce combat"

On December 1, 2020, I attended a radio program organized by the Citizen Support Unit on Kool FM to give greater visibility to the public on the gender-based violence reform. The program dealt in detail with the new strategy of the government, especially sub-strategy No. 2, i.e support services to the victim and rendering the perpetrator accountable. I spoke on the role of the Office of the DPP along with a representative of the Ministry of Gender.

We gave the reasons and history behind the gender-based violence reform. We spoke of the stakeholder consultations which took place before the elaboration of the strategy and action plan. We then gave a brief overview of the strategy and action plan in relation to gender-based violence reform dealing mainly with sub strategy no 2. This concerned support services to the victims and how to render the perpetrator accountable. I spoke principally of the role of the Office of the DPP in the gender-based violence reform. I dealt upon the different measures which our Office proposed to control gender-based violence, namely an online information sharing system among all stakeholders on gender-based violence cases, a timeframe within which enquiry in such cases should be completed, the need to refer cases with serious bodily injury to the Office of the DPP for advice, the setting-up of a specialized unit in each police station to cater for such cases, the elaboration of referral pathways so that not all cases go to court and in appropriate cases, the perpetrators can be enrolled in a rehabilitation course. The public was further informed of the functionality of the new App, "Espwar". I also underlined the role of the Office of the DPP in advising Breach of Protection Order cases and in following up on such cases when there is a withdrawal by the complainant and addressed the incidence of social media in domestic violence cases.

A question and answer session completed the radio program.

2. The Impact of the Covid-19 pandemic on Trafficking in Persons Cases in Mauritius and in the Region

To mark the International Women's Day on the 4th of March 2021, the Gender Caucus organised a workshop at the seat of the Institute for Judicial and Legal Studies, in collaboration with the US Embassy and the Commonwealth Magistrates' Association, for the benefit of the legal profession. The aim of the workshop was to create awareness on the need to combat **Trafficking in Persons** ('TIP'). It is in line with sub-strategy No.3 of the Government which is to identify and redress discriminatory practices that perpetrate gender-based violence.

We had three speakers: Chief Inspector, Mr. Bhojesh Domun of the Mauritius Police Force, Justice Jacqueline Kamau, of the High Court of Kenya and Mrs. Mac Bride, 'TIP' Officer, U.S. Department of State, Washington.



Pareemala Devi Mauree
Principal State Counsel

Activities of the Gender Caucus



Justice Jacqueline Kamau, from the High Court of Kenya

She was the immediate chair of the Chartered Institute of Arbitrators, Kenya (CI Arb-K), is a Chartered Arbitrator, and is an accredited tutor of CI Arb-K and its headquarters in London. She is a member of the Conciliation Panel of the International Centre for Settlement of Investment Disputes (ICSID). Hon. Lady Justice Kamau is a member of the Integrated Court Management Committee and the Mediation Committee. She is currently the President of the Kenya Magistrates and Judges Association and is a member of the Executive Committee and Project and Planning Committee of the Kenya Women's Judges Association.

CI Domun defined 'TIP' as a transnational organised crime, involving several borders and mentioned that 'TIP' can also occur internally. He further added that, Mauritius has signed and ratified the Palermo Convention and enacted the **Combating in Trafficking in Persons Act in 2009**.

According to CI Domun, in Mauritius, 'TIP' can be categorised in the following offences- commercial and sexual exploitation of women and children, exploitation of migrant workers, prostitution, illegal stay of migrant workers in Mauritius.

As regards the impact of the Covid-19 pandemic on 'TIP' in Mauritius, CI Domun was of the view there had been no serious impact. He gave a breakdown of statistics of the 'TIP' cases for the year 2018 which showed that there were a total of 7 cases comprising human trafficking, child trafficking and brothel keeping. For the year 2019, there was a total of 10 cases and, in addition to the above offences, 'causing child to be sexually abused' and 'sexual exploitation' were added to the list. As for 2020, a total of 9 'TIP' cases were registered.

During the Covid-19 pandemic, the closure of the borders halted the flow of migrant workers. There was also no subsequent rise in cases of sexual exploitation of women and children. Reference was made to a case of 'TIP' involving a woman from Madagascar who came on Tourist Visa and overstayed. The female victims have been taken over by the Ministry of Gender and were placed in shelters run by NGOs. Accused parties have been arrested and placed under judicial control.

Justice Jacqueline Kamau from the High Court of Kenya, Civil Division, Nairobi intervened online to give a Kenyan perspective of 'TIP'. According to her, Kenya, especially Northern Kenya, is a hotspot for domestic and transnational human trafficking due to improved infrastructure between Kenya and Ethiopia. There has also been an increase in child sexual exploitation and child sex trafficking cases due to proliferation of online transactions and advent of sex tourism. Corruption also has an incidence on TIP.

The various reasons for trafficking were also addressed: adoption from Western countries being one of them. The kidnapping of children, especially thefts of new born babies from hospitals in organised child trafficking rings to be sold for as little as \$400. Organ-harvesting is also another common underlying cause of human-trafficking in Kenya. Many children have been trafficked for the removal of organs after being adopted by some unscrupulous foreigners. It was shown that the average price of a kidney in Kenya's black market is Kshs 12.57 million (USD 115, 321.1) but the donors get as little as Kshs 200,000 (USD 1834.86).

With respect to the status of trafficking during the Covid-19 period, the 2020 Global Report on 'TIP' released by the UNODC on the 7th February 2021, revealed that about 50,000 people were trafficked to various destinations in the world.

Activities of the Gender Caucus



Mrs. Mac Bride, 'TIP' Officer, U.S. Department of State, Washington

Kerry McBride has ten years of government experience with the State Department working primarily on human trafficking and counter-terrorism issues in East Africa. In 2017, she was a Brookings Legislative Fellow assigned to the Office of Congressman Adam Schiff, Ranking Member of the House Intelligence Committee. She served on the personal staff and worked closely with the Chief of Staff and Staff Director of the Intelligence Committee, advising on foreign affairs and national security issues. She was also the principal organiser for the Freedom of the Press Caucus which seeks to draw attention to the persecution of journalists and the centrality of a thriving marketplace for high quality and responsible journalism to democracy. She holds a BA from the University of Natal, Durban, South Africa, and a MA in International Relations from USIU, Nairobi, Kenya.

The report showed that the most reported victims of trafficking in Kenya were Ethiopians but 15% of Ugandan victims of trafficking said they were destined for Kenya. However, although there is no formal report, it is expected that there was a reduction in cross-border trafficking of persons during the Covid-19 pandemic due to closed borders.

Justice Kamau also portrayed the legal framework in Kenya – the **International Covenant on Civil and Political Rights** prohibits several practices directly linked to trafficking including slavery, the slave trade, servitude and forced labour. **Article 28** of the **Kenyan Constitution** ensures that laws must be enacted to ensure that people live a life with dignity. She dealt extensively on the definition of the offence of trafficking as per **section 3** of the **Counter Trafficking Act**. The penalties for trafficking of persons in Kenya are: trafficking of person attracts an imprisonment of not less than 20 years and not less than Kshs 20 million (USD 183,486.239) or to both and subsequent conviction one is liable to imprisonment for life and secondly, trafficking of children attracts an imprisonment of not less than 30 years and not less than Kshs 20 million or to both and subsequent conviction one is liable to imprisonment for life.

The challenges in the fight against trafficking are the tracing and extraditing of perpetrators due to inadequacy of extradition treaties and agreements, language barriers, fear to report, ignorance of victims that trafficking is an offence. She advocated for safe-houses for victims and whistle blowers; sensitisation campaigns for the offence of trafficking and capacity building of prosecution authorities and inter-state cooperation.

Mrs. Kerry McBride, 'TIP' Officer intervened online from Washington. Mr. Mike Elkin, U.S Embassy Representative and Political and Economic Officer, introduced her. She gave an insight of 'TIP' from the U.S perspective. According to Mrs. McBride, human-trafficking is a crime that involves the exploitation of someone for the purpose of compelled labour or a commercial sex act by force, fraud or coercion. It is qualified as a transnational crime but it can also be committed internally. She emphasised on the need for governments to put in place anti-trafficking measures. Victims of trafficking should be encouraged to report. This will ensure meaningful access to justice. She stressed that prosecutors and law enforcement agencies should not only effectively encourage victims to come forward but also ensure that they are treated with dignity. We should not forget that successful prosecution in cases of trafficking rely heavily on the statement of victims. The protection to the victims are of paramount consideration to protect their testimony. It is considered best practice for authorities and prosecutors to be present during interviews with the victims so as to ensure consistency and provide adequate support. Governments should endeavour to make system adjustments to provide comprehensive victim support.

Activities of the Gender Caucus



Trafficking in Person Workshop held at IJLS.

Mr. Mike Elkin, US Embassy Representative and Political and Economic Officer (Left), Chief Inspector Mr. Bhojesh Domun of the Mauritius Police Force (Middle), Ms. Pareemala Devi Mauree, Principal State Counsel at ODPP (Right)

This should send a strong signal to traffickers that no forms of trafficking will be tolerated. Mrs. McBride advocated for specialised and dedicated units to provide support to victims of 'TIP.' It is essential that victims of trafficking be provided with shelters and protection in order to secure their testimony and successful prosecution. With the Covid-19 lockdown restrictions and economic challenges, curfews and travel restrictions, more children are in vulnerable situations. According to her, most countries around the globe have witnessed a sharp increase in sexual exploitation, for example.

The workshop ended with a question and answer session.

Our warmest thanks to local and international speakers for imparting their valuable knowledge and for their participation, to the U.S Embassy and the Commonwealth Magistrates and Judges Association for their collaboration in setting up this workshop. The speakers' slides will be made available on the IJLS website.

3. Women in Criminal Justice Online Conference – British High Commission

On the occasion of the International Women's Day, Ms. B.Bhagwan, State Counsel and Ms. K.Nathoo, Temporary State Attorney, and I were privileged to attend an online Conference hosted by the British High Commission in Mauritius on March 8th and 9th, 2021. The conference aimed at showcasing the contribution of women in the Sub-Saharan African Region who hold senior positions in the criminal justice system in their respective countries. It covered diverse topics such as the illegal wildlife trade, international cooperation, the role of the regulator in the fight against financial crime, domestic violence and the challenges facing women in responding to threats in curbing financial crimes. I presented a paper on the gender-based violence reform in Mauritius and the role of the prosecutor. I enjoyed the enriching interactions and exchange with the other participants on the conference.

I thank the British High Commission for this initiative and look forward to such future initiatives to showcase the talent and specialised criminal knowledge and experience of women in the African region.

Pareemala Devi Mauree
Principal State Counsel

Medical Negligence/ Malpractice- An Insight into the Breaking of the Hippocratic Oath

"I swear to fulfill, to the best of my ability and judgment, this covenant: I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow..."

Medical practitioners are required to make critical judgment calls under the most stressful situations; they may be constrained by available resources and individual patient choices. As a result, human error is inevitable, however, a line has to be drawn as to what constitutes proper medical practice and what amounts to medical negligence. Simply put, medical negligence is the failure to exercise the ordinary skill of a doctor.

Medical Practice and the Medical Council in Mauritius

In Mauritius, medical practice is regulated by the **Medical Council Act 1999** which provides that "**Professional misconduct or negligence**", in relation to a registered person, includes – (a) a breach of the **Code of Practice**; (b) a failure to exercise due professional skill or care which results in injury to, or loss of life of, a person; (c) a failure to exercise the proper and timely care expected from him; (d) the prescription of a dangerous drug to any person which is in excess of the amount that is properly required for the medical treatment of that person; (e) the prescription of a dangerous drug to any person knowing that such a prescription is not required for the medical treatment of that person; (f) an act of fraud or dishonesty in the exercise of his calling; (g) an improper, a disgraceful, a dishonourable or an unworthy act, or any other act, which brings the medical profession into disrepute. Complaints against medical practitioners with respect to professional misconduct or negligence can be made to the Registrar of the Medical Council which then appoints an Investigating Committee to conduct a preliminary investigation. For disciplinary proceedings, a charge is laid before the Tribunal¹ whereby a hearing is conducted as a civil matter.

Medical Malpractice and the Judiciary

A case of medical negligence can give rise to a civil action as well as a criminal action, to be brought before the Mauritian Courts. When it comes to a civil action, a distinction has to be made as to whether the cause of action is rooted in contract or torts. In the case of a public hospital, the cause of action must be grounded in tort, under **Article 1382** and subsequent sections of the **Code Civil** whereas in the case of a private clinic, the cause of action must be grounded in breach of contract. It is to be noted that the "*règle de non cumul*" prevents a party from claiming a remedy both in contract and in tort.

¹Section 15 of the Medical Council Act 1999

Medical Negligence/ Malpractice- An insight into the breaking of the Hippocratic Oath

For public hospitals, there is no doubt that the State, which is responsible for the health service, as a healthcare provider, has a duty to provide competent professional staff in its hospitals and proper facilities and equipment for the treatment of its patients (vide: **A. Ramcharan & Ors. v The State of Mauritius 2013 SCJ 213**). As such, the State is, by virtue of the provisions of **Article 1384 alinéa 3** of the **Code Civil**, liable as '*commettant*' for the acts and doings of public officers. The alleged imprudence and/or negligence and the causal link between the imprudence and/or negligence and the consequence complained of has to be established by the complainants.²

When it comes to private hospitals or clinics, there is a contract which is known as a "*contrat de soins et d'hospitalisation*", as aptly described in the following extracts: "*In Droit de la Responsabilité et des Contrats, Philippe le Tourneau, 7e édition, note*"4265. *Il est admis qu'un contrat de soins peut se former entre le malade et la clinique ou l'hôpital. La clinique prenant en charge l'intégralité des prestations à assurer. Dans cette hypothèse il n'existe aucune relation contractuelle directe entre le chirurgien et le patient (ou quelque autre membre de l'équipe). Les coéquipiers se trouvent alors réunis, non pas par le patient, ni par l'un de ses membres, mais par la clinique.*" The medical institution and the patient are then bound by the terms and conditions of such contract.

Medical practitioners may also be found guilty of a criminal offence for medical negligence and in this regards, it is worth citing **Section 239(1)** of the **Criminal Code** in relation to involuntary homicide by medical negligence which reads as follows: -"*(1) Quiconque, par maladresse, imprudence, inattention, négligence ou inobservation des règlements aura commis involontairement un homicide, ou en aura involontairement été la cause, sera puni de l'emprisonnement et d'une amende qui n'excèdera pas 50,000 roupies.*"

It was elaborated in **Boodoo A.Y. v The State 2016 SCJ 525** that with regard more specifically to involuntary homicide by medical negligence, at one time, it had been contended that doctors should be immune from criminal responsibility in the exercise of their profession. But it is now settled that doctors may be found guilty of a criminal offence for medical negligence. At the end of the day, it is for the Court to determine the guilt of a medical practitioner for medical negligence. In this respect, French doctrine and case law advocate a need for a "*faute lourde ou grossière*" for a doctor to be found criminally liable. In *Encyclopédie Dalloz, Répertoire de Droit Pénal et de Procédure Pénale, 2ème Ed., Tome III, Homicide*, we read the following at **note 143**: "*Il arrive que l'homicide soit dû à une faute professionnelle grave... Mais les fautes les plus souvent invoquées à l'encontre des médecins et chirurgiens consistent en une négligence...*"

Medical Negligence/ Malpractice- An insight into the breaking of the Hippocratic Oath

Test to be Applied in a Case of Medical Negligence: -

The test to be applied is that aptly stated by the learned author of *Droit de la Responsabilité et des Contrats*, Philippe le Tourneau, 7e édition, at **note 4219**, as follows: "(1) note 4219: L'obligation fondamentale du médecin: donner des soins conformes aux données acquises de la science. La jurisprudence rappelle souvent, dans la lignée de l'arrêt Dr. Nicolas c. Mercier, que le médecin doit prodiguer des soins conformes aux données acquises de la science. Les données acquises à prendre en considération sont évidemment celles de l'époque des soins et non celles qui existent au moment auquel le juge statue."⁴ The same test was applied by the English court and applied in Mauritian cases in the case of **Gopee and Others v. State of Mauritius [2007 SCJ 303]** and in **Boodhoo and Others v. The State of Mauritius [2008 SCJ 167]** where the court applied the test laid down in the case of **Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582**, known as the *Bolam* test.

The *Bolam* test provides that: "In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. 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 a 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 an ordinary competent man exercising that particular art...he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... putting it another way round, a man is not negligent if he is acting in accordance with such practice merely because there is a body of opinion who would take a contrary view."

Furthermore, in **Hunter v Hanley 1955 SLT 213**, it was held that "The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care."

The Doctrine of *Res Ipsa Loquitur* and its Application in Medical Negligence

Res ipsa loquitur, Latin for "the thing speaks for itself," is a legal theory wherein the facts and circumstances surrounding an injury allow the court to presume that negligence has occurred. In an ordinary negligence case, the plaintiff must prove that the defendant owed the plaintiff a duty and that his conduct failed to measure up to that duty. However, under *res ipsa loquitur*, the defendant's negligence may be presumed and thus does not need to be proven. *Res ipsa loquitur* typically arises in cases where the negligent act is so obvious that there is no need for evidence of what happened.

Medical Negligence/ Malpractice- An insight into the breaking of the Hippocratic Oath

Res ipsa loquitur is also applied in medical malpractice cases where something obviously went wrong in surgery, for example, but precisely what went wrong cannot be proven. A foreign object might have ended up in a patient or suturing may have been proven to be ineffective. While it may not be possible to prove precisely what happened during the surgery, possibly because the only people conscious at the time work for the defendant hospital, events occurred that do not ordinarily occur in the absence of negligence. This is sufficient to swing the burden of proof to the defendant hospital so that it will be held liable unless it can prove the chain of events that demonstrates that it was not negligent.

Medical Practice - a life-saving guarantee?

In France, *L'Arrêt Mercier* (Arrêt du 20 Mai 1936)⁵ a decision of the Cour de Cassation laid down the contractual and tortious responsibility of doctors, and is explained in **Mazeaud Leçons de Droit Civil – obligations – Tome II at paragraph 401** as follows:- *«Cet arrêt a précisé que l'obligation contractuelle du médecin était, non l'obligation déterminée de guérir le malade, mais seulement une obligation générale de prudence et diligence, de telle sorte que le client demeure tenu de prouver une imprudence ou une négligence du médecin»*⁶. *“La nature de l'obligation du médecin est généralement, une obligation de moyens”*. A medical treatment by a medical practitioner cannot always guarantee a certain expected result. For instance, in a case of wrong diagnosis, in **H. Hoolash v The Government of Mauritius [1997 SCJ 155]**, the Supreme Court quoted, in relation to the issue of wrong diagnosis, from **Le Tourneau's Responsabilité Civile 3rd Ed.**, at **note 1399**: *“Lorsque le diagnostic a été effectué avec conscience et attention, l'erreur en ce domaine n'est pas fautive ...”* Therefore, a wrong diagnosis does not amount to ‘faute’, unless there is a *“méconnaissance par le médecin”* (vide: **Hoolash v The Government of Mauritius [1997 SCJ 155]**); same reasoning was applied in **A. Ramcharan & Ors. v The State of Mauritius (supra)**.

All in all, to determine whether there has been medical negligence, Courts have to take into consideration, amongst others, the following factors, which can be distilled from the above-cited case law:

- (1) *Has the doctor acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art?*
- (2) *Whether the course the doctor adopted is one which no doctor of ordinary skill would have taken if he had been acting with ordinary care;*
- (3) *At which rung of the career ladder the doctor had reached at the time of the alleged incident; and*
- (4) *The circumstances with which he was faced at the material time.*

Medical Negligence/ Malpractice- An insight into the breaking of the Hippocratic Oath

Truth is, medical negligence/malpractice has become an unfortunate reality in our everyday lives in Mauritius; ranging from people losing lives to ending up being disabled due to mishaps in medical practice. This inevitably triggers the judiciary to look into the technical theories of medicine and the standard of care that is delivered by medical practitioners to patients- not to question the nobility and integrity of the medical practice- but in order to bring a sense of justice to the victims of medical negligence and alleviate the pain of their families. With medical service being free, Mauritius can only aspire to provide the highest attainable standard of health to all its citizens by ascertaining that the Hippocratic Oath taken by medical practitioners is upheld.





QUICK FACTS

DID YOU KNOW?

The Food Act 1998

Penalty under Section 17 for any offence committed under this Act or any regulations

Fine of not less than Rs. 2,000 and imprisonment for a term not exceeding 2 years

Under Section 16(4) of the Act, a food is adulterated where a Government Analyst, a Food Microbiologist or an authorized officer, certifies any of the following:

(a) That it contains or is mixed, diluted or blended with any substance which diminishes its nutritional value or beneficial properties, or alters its natural state when compared to the food in a pure, normal and undeteriorated condition

(b) That any substance or ingredient has been extracted or omitted which causes the nutritive value or other beneficial properties of the food to be less than the food in its normal and undeteriorated condition



Source: 123Test.com



Source: www.expresshealthcare.com.

(c) That it contains or is mixed or diluted or blended with any substance of lower commercial value than the food in its pure, normal and undeteriorated condition

(d) That it contains any substance, the addition of which is not permitted under the Act or any regulations made under the Act

Source: vikaspedia.in



Pure



Adulterated

(e) That it contains a greater proportion of any substance which is permitted in regulations made under this Act

(f) That it is mixed, coloured, powdered, coated, stained, prepared or otherwise treated in a manner whereby damage or inferiority may be concealed

Source: indiatimes.com



PURE



WAX POLISHED



(g) That it is in a sealed package form which is damaged by insects, rodents any other pests

(h) That it is in a sealed package form which is so damaged that it is no longer able to ensure the protection of its contents from contamination and deterioration

(i) That it is in a package and the original contents of the package have been removed, in whole or in part, and other contents placed instead

(l) that, though not unfit, it is prohibited from being imported, or sold for human consumption

(m) That it contains abnormal levels of microorganisms likely to cause food intoxication

(j) That it is exposed to contamination by microorganism, dust, flies, rodents and other pests

Don't buy food if the packaging is badly damaged



Source: slideplayer.com

(k) That it does not comply with the standard or any specification prescribed by any regulations made under this Act



Source: deamstime.com



SUPREME COURT JUDGMENTS SUMMARY

SUMMARY OF SUPREME COURT JUDGMENTS: March 2021

WARREN IAN MAXWELL JENNEPY v THE STATE 2021 SCJ 68

By Hon Judge Mr. N. F. Oh San-Bellepeau and Hon. Judge Mrs. P. D. R. Goordyal-Chitto

Appeal on sentence - Manifestly harsh and excessive - Reduction in Sentence for Imprisonment

The Appellant appealed against the sentence of 18 months' imprisonment and payment of a fine of Rs. 20,000 meted out by the Honourable Magistrate sitting at the Intermediate Court after having found him guilty, under one of the counts on the Information, of the offence of drug dealing, possession of synthetic cannabinoids for the purpose of selling, in breach of **sections 30 (1)(f)(ii) and 47 (5)(a) of the Dangerous Drugs Act** coupled with **GN 242/2013**; for having unlawfully and knowingly possessed dangerous drug for the purpose of selling, to wit; Synthetic Cannabinoids, MDMB-CHMICA, in 0.62g of leaf matter, wrapped in twelve aluminium foils, contained in a while resealable sachet marked "Ministry of Health and Quality of Life Mauritius".

The Appellant's only ground of appeal was that the sentence was manifestly harsh and excessive. While not contesting that the sentence of imprisonment was warranted, the Appellant's Counsel argued for a shorter term of imprisonment (6 months) and a lesser fine (Rs.10,000), submitting that the appellant

(a) was 26 years old at the time of the offence;

(b) had cooperated with the police during the search and enquiry;

(c) had expressed remorse under oath;

(d) had taken steps to address his addiction inasmuch as he was working as a technician drawing a salary and

(e) had a clean record.

Counsel for the Respondent, on the other hand, argued that learned Magistrate had carefully analysed both the mitigating and aggravating factors before sentencing the appellant.

The Supreme Court held, partially allowing the appeal, that a sentence of 12 months' imprisonment and a fine of Rs. 10, 000 would still meet the ends of justice given the mitigating factors in the Appellant's case. The Appellate Court however highlighted that each case is to be dealt with on its own sets of facts and merits and that it was not signalling that offenders in similar drug dealing cases would be dealt with leniency.

THE STATE v RADHA K. 2021 SCJ 67

By Hon. Judge Mr. D.C.N.D. Mootoo

Financing Importation of Dangerous Drugs – Seriousness of Offence – Timely Guilty Plea – Precedent – Mitigating factors

The Accused pleaded guilty to the charge of financing the importation of heroin in breach of **section 30(1)(a)(ii) of the Dangerous Drugs Act** after the averment of trafficking was dropped by the prosecution and was accordingly convicted by the Court.

The Supreme Court, in deciding the appropriate sentence, referred to **section 30(1)(a)(ii) of the Dangerous Drugs Act** which provides as sentence a fine not exceeding one million rupees together

with penal servitude for a term which shall not be less than five years and not more than twenty-five years. A custodial sentence was therefore mandatory and wholly justified owing to the nature of the offence.

The Learned Judge concluded that the guilty plea in the present matter was not a timely one after referring to the authority of **The State v Jeeva 2010 SCJ 367** where the Supreme Court held as follows -

*“Now, it can be seriously doubted whether the accused pleaded guilty at the first available opportunity. Whilst it is true that she changed her plea under **Count 1** when the averment of trafficking was withdrawn, she had maintained her plea of not guilty under **Counts II, III and IV** which did not contain any averment of trafficking. Even for **Count 1**, she never indicated any willingness to plead guilty to a lesser charge in the event of the prosecution dropping the averment of the aggravating circumstance – see the following paragraph from “Reduction in sentence for a Guilty Plea” issued by the UK Sentencing Guidelines Council*

Annex 1 paragraph 3(e) -

(e) Where a defendant is convicted after pleading guilty to an alternative (lesser) charge to that to which he/she had originally pleaded not guilty, the extent of any reduction will be determined by the stage at which the defendant first formally indicated to the court willingness to plead guilty to the lesser charge, and the reason why that lesser charge was proceeded with in preference to the original charge”.

The Court’s second consideration in relation to the length of sentence was precedent and the only decided case for an offence under **s. 30 (1)(a)(ii)** of the **Dangerous Drugs Act** was **The State v. Jeeva 2010 SCJ 367** where a fine of Rs 500,000 and

a term of sixteen years penal servitude was imposed on an accused who was charged with financing the importation of 1,677.6 grams of heroin, sentence which was maintained on appeal.

Furthermore, the Supreme Court considered the character of the accused, the remorse shown by him and his co-operation with the police. It was undeniable that the confessions of the Accused led to the arrest of several other people, including police officers at ADSU who facilitated the importation of dangerous drugs. Thus, an important drug network was detected as a result of information obtained from the Accused.

Nonetheless, the Court could not ignore the seriousness of the offence and taking into account the circumstances of the case, the Accused was sentenced to a fine of Rs 500,000 together with penal servitude for a term of eighteen years.

“Every person is a book, each year a chapter.”

–Mark Twain



**“TO NO ONE WILL WE SELL,
TO NO ONE DENY,
OR DELAY RIGHT OR JUSTICE”**

Chap 4, Magna Carta 1215