JOSEPH ANTHONY

v.

DR MUHAMAD ARIF MOHAMAD RASAT & ORS

Court of Appeal, Putrajaya
Collin Lawrence Sequerah, Faizah Jamaludin, Evrol Mariette Peters JJCA
[Civil Appeal No: W-01(NCvC)(W)-365-07-2023]
14 September 2026

Tort: *Negligence — Appeal against dismissal of claim for damages for negligence in conduct of post-mortem examination and police investigation into sudden death, and for misfeasance in public office — Whether claim brought by appellant in personal capacity as deceased's father or solely as administrator of deceased's estate — Whether appellant could rely on ss 7 and 8 Civil Law Act 1956 — Whether medical officer, who was not a pathologist, suitable to conduct post-mortem — Whether medical officer owed duty of care to deceased and to deceased's father — Whether investigating officer owed duty of care to deceased and to deceased's father — Whether tort of misfeasance in public office made out against medical officer and investigating officer — Whether Government vicariously liable under ss 5 and 6 Government Proceedings Act 1956 — Whether claim time-barred*

On 17 November 2010, the deceased, a medical doctor on duty at the Klinik Kesihatan Kuah, Langkawi, was found dead in his quarters. The 4th respondent was assigned to conduct police investigations into the death, and on 18 November 2010 the 1st respondent, a medical officer at Hospital Langkawi, conducted a post-mortem examination on the deceased's body ("the first post-mortem"). The 1st respondent's post-mortem report dated 8 March 2011 recorded the cause of death as 'unascertained', after which the deceased was buried. On 24 November 2014, the 2nd plaintiff in the High Court, who later discontinued the action, applied for an order to exhume the deceased's remains for a second post-mortem. The High Court allowed the application, and the body was exhumed on 23 February 2015. On 17 March 2015, Prof Dr Kasinathan Nadesan and Dr Richard Byron Collins conducted a second post-mortem examination, and thereafter, Dr Richard Byron Collins prepared a post-mortem report dated 29 February 2016, and Prof Dr Kasinathan Nadesan prepared a report dated 13 March 2017. On 11 May 2018, the appellant, the deceased's father and the administrator of his estate, sued the 1st respondent, the 2nd respondent (the Director of Hospital Langkawi), the 3rd respondent (the Director of the Kedah State Health Department), the 4th respondent, the 5th respondent (the Inspector-General of Police) and the 6th respondent (the Government of Malaysia). The appellant sought damages for negligence in the conduct of the first post-mortem and of the police investigation into the death, and for misfeasance in public office, and he alleged that the 2nd, 3rd, 5th and 6th respondents were vicariously liable. The appellant asserted that

the claim was brought both in his capacity as administrator for the deceased's estate pursuant to s 8 of the Civil Law Act 1956 and in his personal capacity as the father of the deceased. After a full trial, the High Court dismissed the appellant's claim with costs of RM5,000.00, and the appellant appealed. The issues before the court were: (i) whether the appellant had sued in his personal capacity as the deceased's father or solely as administrator of the deceased's estate; (ii) whether the 1st respondent was a suitable person to conduct the post-mortem; (iii) whether the 1st respondent owed a duty of care to the deceased and to the appellant; (iv) whether the action was time-barred under s 2(a) of the Public Authorities Protection Act 1948; (v) whether the tort of misfeasance in public office was made out against the 1st and 4th respondents; and (vi) whether the 2nd, 3rd, 5th and 6th respondents were vicariously liable under ss 5 and 6 of the Government Proceedings Act 1956.

Held (dismissing the appellant's appeal):

(1) It was evident that the appellant had brought the action as administrator of the deceased's estate and not in his personal capacity. Based on the pleadings, the admissions made during the trial and the factual matrix of the case, no cause of action had vested in the deceased before he died, and neither was the death of the deceased caused by any act or omission of the respondents. In the premises, the appellant, suing as the administrator of the estate of the deceased, was unable to place reliance on ss 7 and 8 of the Civil Law Act 1956. The High Court therefore had not erred in concluding that the appellant had brought the action in his capacity as the administrator of the deceased's estate. (paras 46-62)

(2) Sections 330 and 331 of the Criminal Procedure Code ("CPC") were reasonably clear that there was no requirement under the law for a post-mortem to be conducted by a pathologist or an expert in pathology. Article 11(a) of the General Order, Chapter F (Medical) bound the 1st respondent and in fact imposed upon him an obligation to conduct a post-mortem when required to do so. In the premises, the 1st respondent was the proper and suitable person to conduct the post-mortem. (paras 63-67)

(3) Applying the test in *Caparo Industries Plc v. Dickman and Others* ("*Caparo* test") as adopted in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor*, the 1st respondent owed no duty towards the deceased, who was never a patient of the 1st respondent. As regards the appellant, applying the *Caparo* test, and based on the circumstances, it was not reasonably foreseeable that the 1st respondent's act or omission when performing the autopsy would cause the appellant to suffer loss. There was no voluntary assumption of responsibility by the 1st respondent and no reasonable reliance by the appellant in the performance of the post-mortem, and the autopsy was also not conducted at the appellant's request. The legal duty that the 1st respondent owed was to the state and not to any individual. Hence, there was no legal proximity between the appellant and the 1st respondent for a duty of care to arise. There

were compelling policy considerations against imposing a duty of care on persons similarly circumstanced as the 1st respondent, since any imposition of liability in such circumstances would undoubtedly open the floodgates of litigation. (paras 71, 72, 73, 74, 82, 83, 84, 85 & 86)

(4) The first post-mortem was performed on 18 November 2010, which could be taken as the point from which time began to run. As regards the 4th respondent, no specific dates were pleaded in respect of any act, neglect or default complained of, or any continuance of injury or damage, with regard to the investigation. As the appellant's claim was only filed on 11 May 2018, the action was by all accounts time-barred under s 2(a) of the Public Authorities Protection Act 1948. (paras 87-90)

(5) On the facts, there was no relationship between the deceased or the appellant and the 4th respondent that gave rise to a duty of care under the law of negligence. Nor was there evidence of any injury or damage suffered by the deceased or the appellant that was caused by the 4th respondent's acts. The 4th respondent was mandated by s 329 of the CPC to investigate the death of any person upon receiving information. Nothing was submitted by way of any law, direction or guideline indicating the standard action to be taken when investigating sudden death cases. There was nothing set in stone as to the manner in which such investigations ought to be conducted. The investigation disclosed no indication of foul play, and the concerns and suspicions raised by the deceased's younger brother, PW2, did not constitute any foundation for an investigation based on foul play. (paras 95-104)

(6) On the facts, neither the 1st nor the 4th respondent had the malice or intent to harm the appellant, or the knowledge that their acts were unlawful and would probably injure the appellant. There was no evidence, and nothing in their conduct, from which it could be inferred that they had acted with bad faith or malice or were indifferent to the effect of an abuse of power on the appellant. Both the 1st and 4th respondents had only discharged their functions according to what the law required of them. In respect of the 4th respondent, the elements of the tort of misfeasance in public office were also not sufficiently pleaded. In the premises, the 1st and 4th respondents were not liable for the tort of misfeasance in public office. (paras 106-111)

(7) Under ss 5 and 6 of the Government Proceedings Act 1956, liability could only attach to the Government if the public officer concerned had been found liable. As the 1st and 4th respondents had been found not liable, no vicarious liability could attach to the Government. (paras 112-114)

Case(s) referred to:

Alexandrou v. Oxford [1993] 4 All ER 328 (refd)

Caparo Industries Plc v. Dickman and Others [1990] 2 AC 605 (folld)

Donoghue v. Stevenson [1932] AC 562 (refd)

Kaliamah Rajan & Ors v. Supritendan Wooi Kooi Cheang Ketua Polis Daerah Tampin Negeri Sembilan & Ors [2023] 1 MLRH 733 (refd)

Lawyer v. Kernodle United States Court of Appeals for the Eighth Circuit September 12, 1983, Submitted; November 16, 1983, Decided No. 83-1301 (folld)

LeJeune v. Causey Court of Appeal of Louisiana, First Circuit March 11, 1994, Rendered No. 93 CA 0455 (folld)

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 5 MLRA 152 (folld)

Noor Zela Sa'im v. Putra Specialist Hospital (Melaka) Sdn Bhd & Ors [2022] MLRHU 2144 (refd)

Roshasliana Mohd Rani & Yang Lain lwn. Wong Chong Kuey & Satu Lagi [2021] MLRHU 1665 (refd)

Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan [1982] 1 MLRA 143 (refd)

Three Rivers DC v. Bank of England (No. 3) [2003] 2 AC 1 (folld)

Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2019] 6 MLRA 432 (refd)

Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors [2013] 7 MLRA 655 (refd)

Legislation referred to:

Civil Law Act 1956, ss 7, 8

Criminal Procedure Code, ss 329, 330, 331

Government Proceedings Act 1956, ss 5, 6

Public Authorities Protection Act 1948, s 2(a)

Counsel:

For the appellant: M Visvanathan (V Sanjay Nathan & Pushan Qin Nathan with him); M/s Saibullah MV Nathan & Co

For the respondents: Zetty Zurina Kamaruddin (Shazreen Nadia Zulkipli with her); AG's Chambers

[For the High Court judgment, please refer to *Joseph Anthony & Anor v. Dr Muhamad Arif Mohamad Rasat & Ors* [2023] 6 MLRH 599]

JUDGMENT

Collin Lawrence Sequerah JCA:

A) Introduction

[1] The Appellant brought an action for damages against the Respondents for negligence in conducting a postmortem on Sebastian A/L Joseph (the deceased) in 2010. The Appellant also pleaded misfeasance in public office as a cause of action against the Respondents.

[2] After a full trial, the learned Judicial Commissioner of the High Court, at the time, dismissed the Appellant's claim with costs of RM5,000.00.

[3] Aggrieved by the decision of the High Court, the Appellant has filed the appeal to this court.

B) Pertinent Facts

[4] The salient and pertinent facts reveal that on 17 November 2010, Sebastian a/l Joseph ("Deceased") who was a medical doctor and who had been on duty at the Klinik Kesihatan Kuah in Langkawi, was found dead in his quarters at No. 4072, Kuarters Baru Klinik Padang Matsirat, 07100 Langkawi, Kedah Darul Aman.

[5] At the material time, the 4th Respondent was assigned to conduct police investigations on the Deceased's death.

[6] On 18 November 2010, the 1st Respondent conducted a postmortem examination on the Deceased's body ("1st postmortem").

[7] The 1st Respondent prepared a postmortem report dated 8 March 2011 in respect of the 1st postmortem where the Deceased's cause of death was recorded as "unascertained", after which the Deceased was buried.

[8] On 24 November 2014, the 2nd Plaintiff at the High Court (who later discontinued the action) filed an application for a court order to exhume the Deceased's remains from the grave for the purposes of a second postmortem. The application was allowed by the High Court on 7 January 2015 as a result of which on 23 February 2015, the Deceased's body was exhumed from the grave.

[9] On 17 March 2015, Prof Dr Kasinathan Nadesan together with Dr. Richard Byron Collins conducted a second postmortem examination on the Deceased's body ("2nd postmortem").

[10] Dr. Richard Byron Collins prepared a postmortem report dated 29 February 2016 and Prof Dr Kasinathan Nadesan prepared a postmortem report dated 13 March 2017 in respect of the 2nd postmortem which eventually resulted in the Appellant filing the claim on 11 May 2018.

C) Submissions Of Parties

Appellant

[11] The Appellant asserted that his claim had been initiated both in his capacity as an administrator for the estate pursuant to s 8 of the Civil Law Act 1956 and in his personal capacity as the father of the deceased.

[12] Learned counsel for the Appellant submitted that the 1st Respondent had not been suitably qualified at the material time to conduct the postmortem

on the deceased's remains as this was merely 2 to 3 months after he began his career as a medical officer in Hospital Langkawi.

[13] As a result, contended the Appellant, the 1st Respondent would not have possessed the necessary experience and nuance to conduct a postmortem examination on the deceased.

[14] The Appellant further submitted that the 1st Respondent had just finished a 24-hour shift prior to conducting the postmortem. This, it was contended, resulted in the situation where it was more probable than not that the 1st Respondent had been sleep-deprived and tired at the time of conducting the 1st postmortem.

[15] It was also the contention of the Appellant that the 1st Respondent was never issued any orders from his superiors nor the police to conduct the 1st postmortem nor could he prove otherwise, and so had gone on a frolic of his own.

[16] The Appellant submitted that the 1st Respondent had known the deceased personally as the deceased served as a medical doctor at the Klinik Kesihatan Kuah, Langkawi together with the 1st Respondent's wife. This, submitted by the Appellant, gave rise to a conflict of interest as it would diminish the 1st Respondent's objectivity in conducting the postmortem.

[17] In support of this argument, the Good Medical Practice 2019 was cited, which contained a stipulation that a doctor, whenever possible, must avoid providing medical care for anyone with whom he has a close personal relationship, particularly family members.

[18] In respect of the 2nd postmortem, the Appellant submitted that based on the testimony of Dr. Richard Byron Collins (PW3), the 1st Respondent had failed to collect alternative samples from the deceased's remains which could have helped in determining the deceased's cause of death, which was negligence on the part of the 1st Respondent.

[19] The Appellant said that according to Dr. Richard Byron Collins, the reason the deceased's cause of death has been classified as "unascertained" or "undetermined" was attributable solely to the inadequacies of the 1st postmortem.

[20] Dr Kasinathan, it was submitted, was of the view that with the exception of making a few incisions, no actual postmortem was conducted. It was submitted that Dr Kasinathan had attributed the death of the deceased to be "Coronary artery disease" and that Dr Kasinathan had made that finding after making the necessary incisions at the deceased's heart, which ought to have been something routinely done during the 1st postmortem. The 1st Respondent, however, had completely failed and/or omitted to carry out any such examination on the heart during the 1st postmortem with the result that he was negligent and/or had committed misfeasance in public office.

[21] The Appellant therefore submitted that under the circumstances, the 2nd and 3rd Respondents (D2 and D3 at the High Court) ought to be made vicariously responsible for the actions of the 1st Respondent as the 2nd and 3rd Respondents had failed to ensure that a properly qualified forensic pathologist carried out the 1st postmortem.

[22] As far as the 4th Respondent was concerned, the Appellant submitted that the learned Judicial Commissioner ("JC") erred in holding that, as the investigating officer, he did not owe a duty of care to the Appellant to investigate all the facts and circumstances of the Deceased's death.

[23] The Appellant further submitted that the 4th Respondent had only taken three (3) pictures of the entire case of the deceased's case at the material time and did not even take pictures of the deceased's remains during the 1st postmortem.

[24] The Appellant submitted still further that the 4th Respondent also failed to investigate the cause of the allegedly faulty rear doorknob of the deceased's quarters, which, according to his own account, "tidak boleh dibuka dari luar dan dalam rumah" and not only failed to take pictures of the so-called faulty doorknob but also failed to record this crucial fact in his investigation diary.

[25] It was submitted that the 4th Respondent further failed to investigate the last phone calls on the deceased's personal phone even though the said mobile phone had been in the house with the deceased at the material time.

[26] The 4th Respondent was also taken to task for failing to interview the deceased's parents, neighbours and his colleagues for any clue and/or insight into the deceased's death to affirmatively rule out any possibility of criminal elements.

[27] The 4th Respondent had also failed to investigate the number of people which could have been said to have access to the deceased's quarters, as this would have been crucial information to the investigations, bearing in mind the unusual circumstances of this case.

[28] The litany of complaints against the 4th Respondent continued with the Appellant alleging that he failed to apprise the deceased's family once every three months with updates on the investigations as promised in his letter to the deceased's younger brother (PW2) dated 6 November 2014.

[29] The 4th Respondent had further failed to take reasonable steps to ensure that an inquest into the death of the deceased was registered and conducted, which coupled with all of the other complaints against him, was sufficient to make out the tort of misfeasance.

[30] The Appellant submitted that the JC had erred in holding that his claim against the 1st Respondent for the negligent autopsy was time-barred under

s 2(a) of the Public Authorities Protection Act 1948 (PAPA), contending that the action was filed within 36 months' time frame.

Respondents

[31] The Respondents submitted that on 16 March 2023, the 2nd Plaintiff withdrew the action against all the Respondents and, with that, the position was settled that the action of the Appellant was as a "Pentadbir Estet"/"Estate Administrator" of the deceased. In addition, there was also no breach of statutory duty pleaded by the Appellant.

[32] The Respondents submitted that the Appellant's claim under ss 7 and 8 of the Civil Law Act 1956 as the administrator of the deceased's estate cannot stand as there was no cause of action vested in the deceased before he died and the death of the deceased was not caused by any action or omission of the Respondents.

[33] Accordingly, the Respondents submitted that the Appellant as Administrator of the Estate of the Deceased cannot rely on ss 7 and 8 of the Civil Law Act 1956.

[34] The Respondents submitted that the obligation to conduct a postmortem is provided for under ss 330 and 331 of the Criminal Procedure Code ("CPC"), which provide that a Government Medical Officer must perform the procedure to determine the cause of death. This is also provided for in art 11(a) of the General Order, Chapter F (Medical).

[35] The 1st Respondent submitted that accordingly, there was no requirement under the law for a postmortem to be conducted by a pathologist or an expert in pathology as contended for.

[36] It was also submitted that by virtue of s 330, s 331 CPC and art 11(a) of the General Order, Chapter F (Medical), the 1st Respondent did not owe a private duty to the deceased and to the Appellant.

[37] The Respondents submitted that based upon the test used to determine whether a duty of care arose in negligence, namely the *Caparo* test (*Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605), no duty of care arose under the circumstances.

[38] It was further submitted that the 1st Respondent's relationship with the deceased (if any), the surrounding circumstances of the deceased's death and his state of mind did not operate as a bar to the 1st Respondent conducting the postmortem.

[39] It was also submitted that there was no requirement or provision under any law or code or administration directive that prevented the 1st Respondent from performing an autopsy on his colleague.

[40] As far as the 4th Respondent was concerned, it was submitted that the High Court had correctly determined that the 4th Respondent did not owe a duty of care to the Appellant for the death of the deceased.

[41] It was submitted that by virtue of s 329 CPC, the 4th Respondent was charged with the responsibility of investigating the death of the deceased in certain prescribed circumstances.

[42] It was therefore contended that there was no duty of care in negligence owed by the 4th Respondent and that no cause of action in negligence can be founded upon a police investigation in the case of sudden death report.

[43] Any form of vicarious liability was also denied.

D) Our Analysis

[44] Based upon the submissions of parties and the issues raised, we find that the following issues fall to be addressed;

a) In what capacity was the Appellant suing?

b) Whether the 1st Respondent was the suitable person to conduct the postmortem?

c) Did the 1st Respondent owe a duty of care to the deceased and to his father, the Appellant?

d) Was the action by the Appellant brought within time?

e) Was a tort of misfeasance against the 1st Respondent and the 4th Respondent made out?

f) Were the 2nd, 3rd, 5th and 6th Respondents vicariously liable?

[45] These will be addressed in turn.

a) In What Capacity Was The Appellant Suing?

[46] During the course of the trial, the Appellant made certain significant admissions on this point. For instance, the Appellant admitted that in the Statement of Claim, the action was initiated by him as administrator of his son's (the deceased) estate.

[47] The Appellant further, during trial, admitted that he is the legal administrator of his late son's estate and referred to the Grant of Letters of Administration given on 15 April 2015.

[48] In addition, the Appellant agreed there was no evidence tendered in respect of any trauma or mental illness suffered by him.

[49] The Appellant, in his submission, stated that the claim was brought by him pursuant to s 8 of the Civil Law Act 1956.

[50] The issue to be resolved therefore is whether a cause of action vested in the deceased before he died and whether the death of the deceased was caused by any act or omission of the Respondents.

[51] It is apposite to set out in full ss 7 and 8 of the Civil Law Act 1956.

[52] Section 7 reads as follows:

> "7. Compensation to persons entitled for loss occasioned by death
>
> (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].
>
> (2) Every such action shall be for the benefit of the wife, husband, parent, child and any person with disabilities under the care, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.
>
> (3) ...."

[53] Section 8 provides as follows:

> "8. Effect of death on certain causes of action
>
> (1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate: Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person."

[54] The operation and mechanics of s 7 and s 8 of the Civil Law Act 1956 ("CLA") were elucidated in the case of *Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] 1 MLRA 143, helpfully cited by learned counsel for the Respondents, as follows:

> "**At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore, no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children**. Lord Ellenborough

C.J. in *Baker v. Bolton* (1808) 1 Camp 493 ruled that "in a civil court the death of a human being could not be complained of as an injury. (1808) 1 Camp 493."

The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: "*actio personalis moritur cum persona*". The first principle which regarded death as not giving rise to any cause of action was rectified by s 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in ss 7 and 8 of our Civil Law Act, 1956.

Had it not been for ss 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular s 7, his case must stand and fall on the basis of these sections. We set out below s 7 of the Act as follows:-.....

It is clear from these wordings that the **respondent must satisfy at least two conditions before he could succeed in maintaining the suit. The first is that he has to prove that the death of the deceased was caused by "wrongful act, neglect or default" of the appellants**. In view of the decision of the learned judge in giving judgment for the respondent and further in the absence of counsel's argument on the matter, it must be taken that the first condition is fulfilled — i.e. death was caused by wrongful act, neglect or default of the appellants.

... The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. **The second is that the default is such 'as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof**."

[Emphasis Added]

[55] The position of the common law prior to the enactment of ss 7 and 8 of the CLA did not recognise any cause of action for the death of a person which could be made or claimed by the family of the Deceased against any tortious perpetrator. This principle is based on the maxim "*actio personalis moritur cum persona*" which means "a personal action does not survive and dies upon the death of the injured party".

[56] The position has now been legally reformed with amendments to the Fatal Accidents Act 1846 (known as Lord Campbell's Act) and the Law Reform (Miscellaneous Provisions) Act 1934. The legal principles in the Fatal Accidents Act 1846 have now been incorporated into the Civil Law Act 1956.

[57] The difference between ss 7 and 8 of the CLA was explained in *Noor Zela Sa'im v. Putra Specialist Hospital (Melaka) Sdn Bhd & Ors* [2022] MLRHU 2144, as follows:

> "[29] This difference was vividly explained by the Federal Court in *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2017] 6 MLRA 635 [TAB 10 DB0A] in the following manner: **[89] An action under s 7 is brought by the specified dependants and the estate of the deceased person in their own right, [90] An action brought under s 7 must be distinguished from an action brought under s 8 of the CLA. Section 8 deals with certain causes of action which were already vested in the deceased person prior to his death and which he would have been able to pursue, but for his death**. Those causes of action are not limited to causes of action arising from the wrongful act, neglect or default which resulted in his death, those causes of action survive for the benefit of the deceased person's estate."
>
> [Emphasis Added]

[58] The difference and intent between the two sections can also be discerned from the Hansard dated 18 July 1984 as follows:

> "Seksyen 7 Akta Undang-Undang Sivil 1956 di antara lain membenarkan sesiapa yang terkilan oleh kematian seseorang yang disebabkan oleh perbuatan kecuaian dan kengkaran, salah oleh orang lain di mana jika kematian tidak berlaku akan membolehkan orang yang terkilan itu menuntut ganti rugi dari pihak yang menyebabkan perbuatan, kecuaian dan kengkaran salah tersebut menuntuk kerugian untuk kematian itu...."
>
> "Seksyen 8 Akta Undang-Undang Sivil 1956 pula memperuntukkan bahawa kesemua tindakan tuntutan yang sedia ada terhadap atau bagi orang yang telah meninggal hendaklah terus berjalan terhadap atau untuk faedah estet si mati."

[59] See also *Kaliamah Rajan & Ors v. Supritendan Wooi Kooi Cheang Ketua Polis Daerah Tampin Negeri Sembilan & Ors* [2023] 1 MLRH 733 and *Roshasliana Mohd Rani & Yang Lain lwn. Wong Chong Kuey & Satu Lagi* [2021] MLRHU 1665.

[60] Based upon the pleadings, admissions made during the trial and as will be evident later on, based upon the factual matrix of this case, it was clear that no cause of action vested in the deceased before he died and neither was the death of the deceased caused by any act or omission of the Respondents.

[61] In the premises, the Appellant, suing as the administrator of the estate of the deceased, is unable to place reliance on ss 7 and 8 of the CLA.

[62] It was evident that he brought this action as administrator of the estate and not in his personal capacity. We therefore find that the learned High Court Judge ("HCJ") had not erred when he concluded that the Appellant had brought the action in his capacity as the administrator of the deceased's estate.

b) Whether The 1st Respondent Was The Suitable Person To Conduct The Postmortem?

[63] The requirement to conduct a postmortem is provided under s 330 and s 331 of the CPC respectively as follows:

Section 330 reads as follows:

> "Duty of officer to arrange for postmortem examination in certain cases.
>
> Every officer making an investigation under s 329 shall if there appears to him any reason to suspect that the deceased came by his death in a sudden or unnatural manner or by violence or that his death resulted in any way from or was accelerated by any unlawful act or omission on the part of any other person, at once inform the nearest Government Medical Officer and, unless it appears to him that the body should be viewed by a Magistrate *in situ*, shall take or send the body to the nearest Government hospital or other convenient place for the holding of a postmortem examination of the body by a Government Medical Officer:
>
> > Provided that if that officer is satisfied as to the cause of death and that the deceased came by his death by accident, he may order the body to be buried immediately."

Section 331 reads:

> (1) Upon receiving the information referred to in s 330 a Government Medical Officer shall, as soon as practicable, make a postmortem examination of the body of the deceased.

[64] These provisions are reasonably clear that there is no requirement under the law for a postmortem to be conducted by a pathologist or an expert in pathology.

[65] In addition to that, art 11(a) of the General Order, Chapter F (Medical) stipulates the following:

> "Pemeriksaan Mayat.
>
> 11. (a) Pegawai-pegawai perubatan adalah dikehendaki menjalankan pemeriksaan-pemeriksaan mayat apabila: (i) diperintahkan secara bertulis oleh seseorang Majistret; atau, (ii) dipohon secara bertulis oleh seseorang pegawai Polis, yang berpangkat tidak rendah daripada Inspektor. Dimana boleh, semua mayat-mayat hendaklah dibawa ke rumah mayat untuk pemeriksaan tersebut.
>
> (18). (b) Pemeriksaan-pemeriksaan mayat dalam kes-kes lain hendaklah dengan persetujuan waris si mati."

[66] This provision clearly binds the 1st Respondent and in fact imposes upon him an obligation to conduct a postmortem when required to do so under those circumstances.

[67] In the premises, the 1st Respondent was the proper and suitable person to conduct the postmortem.

c) Did The 1st Respondent Owe A Duty Of Care To The Deceased And To His Father, The Appellant?

[68] The law on negligence has evolved since the seminal case of *Donoghue v. Stevenson* [1932] AC 562.

[69] It is perhaps best to quote verbatim the now famous words of Lord Atkin in that case as follows:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, ...
>
> Who is my neighbour ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[70] Lord Atkin must have no doubt extrapolated that principle from the story or parable of the "Good Samaritan" as indeed was astutely observed by the Learned High Court Judge ("HCJ").

[71] More recently however, the test has been refined following the case of *Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605. It is now the prevailing test in Malaysia in determining negligence.

[72] The *Caparo* test (as it is commonly referred to), requires the court to ask three basic questions:

(a) Whether the damage is reasonably foreseeable?

(b) Whether there is a relationship of proximity between the claimant plaintiff and the defendant?

(c) Whether it is just, fair and reasonable to impose a duty in such a situation?

[73] The test has been adopted as part of our jurisprudence as evident in the Federal Court case of *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 5 MLRA 152 where the following was stated:

> "[44] To put it in a nutshell **the preferred test is the threefold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The threefold test has been recognised by the House of Lords in *Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605, as the elements giving rise to a duty of care**. In the judgment of Lord Bridge in *Caparo* at pp 617-618, His Lordship said that:
>
> > What emerges is that, **in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one**

> **in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other**.
>
> [45] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered. As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss. **As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues**."
>
> [Emphasis Added]

[74] Applying the principles to the case at hand, it is crystal clear that as the deceased was never a patient of the 1st Respondent, there was no duty owed towards the deceased.

[75] It has been seen earlier that the requirement to conduct a postmortem is provided for under s 330 and s 331 of the CPC, which imposes a duty upon the 1st Respondent to conduct the postmortem.

[76] The only other issue to be determined now is whether the 1st Respondent owed a duty of care to the Appellant as the father of the deceased in the conduct of the postmortem.

[77] There are apparently no reported Malaysian cases that can assist us on the matter and so it is to the foreign jurisdictions that we must turn to. The High Court Judge in fact alluded to two cases in the United States of America.

[78] In the first case, *LeJeune v. Causey, Court of Appeal of Louisiana*, First Circuit March 11, 1994, Rendered No. 93 CA 0455, the parents sued the coroner for negligence in failing to investigate their daughter's death or perform an autopsy and the trial court there sustained the coroner's defence that he owes no duty of care to the parents.

[79] On appeal, the Court of Appeal of Louisiana agreed that the coroner did not owe a duty to the parents. The court explained that, although the statutes governing the coroner's office did require the coroner to investigate accidents and perform an autopsy in cases where a crime is suspected, any duty the office owed was a duty to the state, not the private individuals, for the welfare of society and in the interest of public justice.

[80] In the second case, *Lawyer v. Kernodle United States Court of Appeals for the Eighth Circuit* September 12, 1983, Submitted; November 16, 1983, Decided No. 83-1301, on similar facts, the United States Court of Appeals for the Eighth Circuit dismissed a negligence suit filed by the husband of the deceased wife on the ground that no duty of care was owed.

[81] In the absence of local case law on the matter, these two cases serve as persuasive authority in our jurisdiction.

[82] Applying the *Caparo* test to the factual matrix, we find firstly, based upon all the circumstances of the case, it was not reasonably foreseeable that the 1st Respondent's act or omission when performing the autopsy would cause the Appellant to suffer loss.

[83] There was no voluntary assumption of responsibility by the 1st Respondent and no reasonable reliance by the Appellant in the performance of the postmortem. The provisions of the CPC governing the autopsy procedure require a medical officer to perform an autopsy on a deceased in cases where a crime is suspected. The autopsy also was not conducted by the 1st Respondent at the request of the Appellant. The legal duty that the 1st Respondent owed was to the state and not to any individual.

[84] Hence, there was no legal proximity between the Appellant and the 1st Respondent for a duty of care to arise.

[85] There are also compelling policy considerations against the imposition of a duty of care upon persons similarly circumstanced as the 1st Respondent towards the Appellant. As has been seen, the 1st Respondent was under a legal obligation to perform the postmortem. Any imposition of liability in circumstances such as these would undoubtedly open the floodgates of litigation to seemingly aggrieved persons.

[86] In the premises, we are constrained to conclude that there arose no duty of care upon the 1st Respondent towards the Appellant in performing the postmortem.

d) Was The Action By The Appellant Brought Within Time?

[87] The facts reveal that the first postmortem was performed on 18 November 2010, which can be taken as the starting date and point of computation in respect of when time began to run.

[88] As far as the 4th Respondent is concerned, there are no specific dates that were pleaded in respect of any "act, neglect or default complained of" or the "continuance of injury or damage" with regard to the investigation.

[89] Section 2(a) of the PAPA reads as follows:

> "2. Protection of persons acting in execution of statutory or other public duty
>
> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof."

[90] As the Appellant's claim was only filed on 11 May 2018, by all accounts, the Appellant's action was time barred pursuant to the provisions of s 2(a) of the Public Authorities Protection Act 1948.

e) Was A Tort Of Misfeasance Against The 1st Respondent And The 4th Respondent Made Out?

[91] As can be seen above, the 1st Respondent was obligated to conduct the postmortem pursuant to s 330 and s 331 of the CPC. He was not performing that function pursuant to a private arrangement and there was accordingly no voluntary assumption of responsibility in such circumstances. The 1st Respondent was therefore under all the circumstances, not liable for the tort of misfeasance.

[92] As far as the 4th Respondent was concerned, the existence and extent of a police officer's duty at common law was considered in the English case of *Alexandrou v. Oxford* [1993] 4 All ER 328.

[93] The facts of that case revealed that the plaintiff's shop was burgled, activating the burglar alarms. The police officers promptly attended the scene, but they failed to inspect the rear of the shop where the burglars forced entry. The goods were removed from the shop. The plaintiff successfully sued the chief constable for the value of the goods stolen.

[94] The Court of Appeal, Civil Division, allowing the chief constable's appeal, held that a plaintiff alleging that a defendant owed a duty to take reasonable care to prevent loss to him caused by the activities of another person had to prove not merely that it was foreseeable that loss would result if the defendant did not exercise reasonable care, but also that he stood in a special relationship to the defendant from which the duty of care would arise. In the instant case, there was no such relationship between the plaintiff and the police. Also, it would not be in the public interest to impose such a duty of care on the police.

[95] Returning to the facts in the instant appeal, there is no existence of a "relationship" between the deceased or the Appellant and the 4th Respondent that gives rise to duty of care under the law of negligence and neither was there evidence of any injury or damages suffered by the deceased or the Appellant caused by the act of the 4th Respondent.

[96] Section 329 of the CPC stipulates:

"329. Duty of police officer to investigate death

(1) Every officer in charge of a police station on receiving information:

(a) that a person has committed suicide;

(b) that a person has been killed by another, or by an animal, or by machinery, or by an accident;

(c) that a person has died under circumstances raising a reasonable suspicion that some other person has committed an offence;

(d) that the body of a dead person has been found, and it is not known how he came by his death; or

(e) that a person has died a sudden death, shall with the least practical delay transmit such information to the officer in charge of the police district.

(2) On receipt of the information the officer in charge of the police district or some other police officer acting under his directions and being either the officer in charge of a police station or a police officer not below the rank of sergeant shall immediately proceed to the place where the body of the deceased person is and there shall make an investigation and draw up report of the apparent cause of death, describing the wounds, fractures, bruises and other marks of injury as may be found on the body, and such marks, objects and circumstances as, in his opinion, may relate to the cause of death or the person, if any, who caused the death, and stating in what manner or by what weapon or instrument, if any, the marks appear to have been inflicted.

(3) Every police officer making an investigation under this section into the cause of any death, may exercise any or all of the special powers in relation to police investigations in seizable cases conferred on the police officer by Chapter XIII and ss 112, 113 and 114 shall apply to statements made by persons examined in the course of the investigation.

(4) The report shall be signed by the police officer by whom it was drawn up, and where the report was not drawn up by the officer in charge of the police district it shall immediately be forwarded to him.

(5) The officer in charge of the police district shall immediately forward that report to the Magistrate within the local limits of whose jurisdiction the body of the deceased was found.

(6) When the information given under subsection (1) is of such a nature that, though it affords reasonable ground for believing that a death has occurred, it is unlikely that the body of such deceased person can be found owing to its destruction by fire or otherwise or to the fact that the body is lying in a place from which it cannot be recovered, the officer referred to in subsection (2) shall nevertheless make an investigation and draw up a report, and forward the report to the nearest Magistrate who shall proceed in reference to the report as in the case of a report forwarded under subsection (5)".

[97] It is clear that the 4th Respondent is mandated by law to conduct an investigation as to the death of any person upon receiving information.

[98] It was alleged by the Appellant that the 4th Respondent's investigation was shoddy and incompetent. Amongst the specific allegations were that the 4th Respondent ought to have investigated the deceased's mobile phone to ascertain who the deceased might have been in communication with prior to the death, failure to interview the neighbour and the persons who had access to the key to the deceased's house.

[99] However, there was nothing submitted by way of any law, direction or guideline indicating what the standard action that ought to have been taken in the investigation of sudden death cases such as this.

[100] There is nothing set in stone as to the manner in which such investigations ought to be conducted.

[101] In the case of *Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2013] 7 MLRA 655, the Court of Appeal held as follows:

"[49] **In our view police investigation into any complaint or reported crime is entirely within the discretion of the police as to methodology or time taken**. There are various factors to be considered such as the seriousness and complexity of the alleged crime, the availability of witnesses to be interviewed and statements to be recorded and the location, accessibility etc of the crime scene. **So it is the police that has to decide how and what investigation to be carried out and whether arrest and detention of suspect is required to assist the investigation**. Of course, the investigation, particularly in respect of arrest and detention of the suspect, must be done in accordance with law. In this instant appeal there is evidence to show that DW4 had obtained the order of the magistrate to further detain or remand the 1st appellant until 26 September 2010 for further investigation. The 1st appellant did not challenge that order by the magistrate. Notwithstanding that the IO in this case, armed with the magistrate's order, could have detained the 1st appellant until 26 September 2010, the 1st appellant was released on 25 September 2010 i.e. one day earlier albeit late at 6pm after the IO had more or less completed her investigation. In our opinion therefore, there is no merit in the complaint

by the 1st appellant that he was detained or remanded unnecessarily by the defendants for investigation or that his detention was unlawful."

[Emphasis Added]

[102] The Appellant's pleaded case was that the deceased was found dead after PW2 failed to contact the deceased and then went to the deceased's quarters and found a bad smell, the door locked, the air conditioning still on and the deceased's car still parked in the parking area.

[103] After that, the 4th Respondent went to the quarters and commenced an investigation, after which the deceased was sent for a postmortem. PW2's statement was recorded, and there was no indication of foul play based on the investigation.

[104] Further, there were no suspicious events or people related to the deceased reported to the police. Quite simply put, the concerns and suspicions raised by PW2 did not constitute any foundation for investigation based upon foul play.

[105] The essential elements or ingredients of misfeasance were set out in the House of Lords decision in *Three Rivers DC v. Bank of England (No. 3)* [2003] 2 AC 1 to be as follows:

a. The defendant must be a public officer;

b. The loss to the plaintiff must have been caused by the exercise of power by the defendant as a public officer; and

c. The act of the public officer must fall either in the targeted malice limb of misfeasance where he acts with intent to harm the plaintiff or the illegality limb of misfeasance where he knows that the act is unlawful and that it will probably injure the plaintiff.

[106] It is quite apparent, on the facts of the case, that neither the 1st nor the 4th Respondent had the malice or intent to harm the Appellant or possessed the knowledge that they knew their acts were unlawful and that it would probably injure the Appellant.

[107] In *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2019] 6 MLRA 432, the Federal Court had occasion to examine the nature and ingredients of the tort and said as follows:

"The Law Relating To The Tort Of Misfeasance In Public Office

[182] The tort relates to deliberate dishonest conduct and abuse of power by a public officer. **As stated in *Three Rivers* (above) (per Lord Steyn) the rationale underlying the tort is that "in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes**..."

[183] The quintessence of the rule of law is that no man is above the law and that all men are equal before the law. **This tort therefore serves to protect citizens against abuse of power by public officials**. To that extent, it is distinctive in that it combines both public and private law elements, unlike other torts which are wholly private in nature.

[184] **The key ingredients of the tort are**:

(i) an abuse of public power or authority;

(ii) by a public officer;

(iii) who either (a) knew that he was abusing his public power or authority, or (b) was recklessly indifferent as to the limits of their public power or authority; and

(iv) who acted or omitted to act either with (a) the intention of harming the plaintiff (targeted malice); or with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.

[185] **It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, ie the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tort hard to plead and to prove as it is only in rare circumstances that such facts subsist as would allow the plea to remain on the record**. In many instances, the plea is struck out as it is simply insufficient. This is because, it is not every act or omission on the part of a public officer which lends itself to the bringing of an action premised on this tort. **It requires outrageous conduct with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated**."

[Emphasis Added]

[108] There was no evidence, nor was there anything in the conduct of the 1st and the 4th Respondents that would enable any inference to be made that would lead to the conclusion that they acted with bad faith or malice or were indifferent to the effect of the abuse of power on the Appellant.

[109] It was plain that both of them had only discharged the functions according to what the law had required of them.

[110] In respect of the 4th Respondent, the elements of the tort of misfeasance in public office were also not sufficiently pleaded.

[111] In the premises, the 1st and the 4th Respondents were not liable for the tort of misfeasance.

f) Were The 2nd, 3rd, 5th And 6th Respondents Vicariously Liable?

[112] Sections 5 and 6 of the Government Proceedings Act 1956 (Act 359) read as follows:

> "5. Liability of the Government in tort
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government."
>
> "6. Limits of liability of the Government
>
> (1) No proceedings shall lie against the Government by virtue of s 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally."

[113] It is apparent from these two sections that liability can only be attached to the Government if there is a finding of liability of the public officer concerned.

[114] As the 1st and the 4th Respondents have been found to be not liable, no vicarious liability can be attached to the Government.

E) Decision

[115] In all the circumstances of the case and for the reasons given above, we find no cause for appellate intervention.

[116] In the premises, we dismiss this appeal with no order as to costs, bearing in mind the circumstances of this case.