

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. C.L 2000/C164

BETWEEN	TANYA CLARKE (nee TYRELL)	PLAINTIFF
AND	DR. SOE WIN	1 ST DEFENDANT
AND	DR. BENNET	2 ND DEFENDANT
AND	THE ATTORNEY GENERAL	3 RD DEFENDANT

Dennis Goffe, Q.C., instructed by Myers, Fletcher & Gordon for the plaintiff.

Mrs. Monique Harrison-Beckford, instructed by Director of State Proceedings for the defendant.

Heard on: 20th, 21st September; 5th October 2001 and 26th August 2002

Assessment of Damages.

Campbell J

On the 1st June, 1995 the plaintiff, then aged 19 years, attended on Dr. Mary Sloper, Family Practitioner. She complained of having experienced severe abdominal pains for the "last four days". On examination Dr. Sloper reported that, "she had a large smooth tender mass in the left lower abdomen extending tip almost to the umbilicus." Sloper testified that she suspected a large ovarian cyst and referred her to a private gynaecologist. The health arrangements with Courts (JA) Ltd., where the plaintiff was employed, would not facilitate her treatment by a

private practitioner. She was sent to University Hospital of the West Indies. She was unable to gain admittance there and was sent to the Spanish Town Hospital where she was admitted. She was x-rayed, and Dr. Sloper's diagnosis of ovarian cyst was confirmed. She underwent a laparotomy. The plaintiff testified that she was told that both her ovaries had been removed, as she had been found to have cancer of the ovaries.

On July 24th 1995 Dr. Sloper was advised by Mr. Leighton Knight, the then Senior Medical Officer at Spanish Town Hospital, that the biopsy report of the plaintiff, was to the effect that the plaintiff had dermatofribromata of the ovaries. This is not a malignant condition.

The operation on the plaintiff had been performed by a surgeon, not a gynaecologist, as it should have been. It appears that there was no gynaecologist resident available at the hospital that night. There was no consultation with a senior doctor by the operating surgeon prior to performing the laparotomy. Neither was there a biopsy done to confirm the doctor's erroneous clinical impression that the cysts were cancerous. The plaintiff remained for one week in the hospital after her surgery. She testified that she was given her ovaries in a babies' formula bottle, marked "infamil" for the necessary tests to be done at Department of Pathology University of West Indies.

Before attendance on Dr. Sloper on the 1st June 1995, she was engaged to be married. Her fiancé resided in the United States. Their wedding was scheduled for 24th June, 1995. She testified that the loss of her ovaries had "an effect on my feelings about getting married". She said that the 2nd Defendant had told her that she would not be able to conceive, and that she would be going through menopause. The plaintiff testified that her fiancé had discussed having children, and had indicated that he wanted two kids. They had already chosen the names of the children, the daughter would be Tanielle and the boy, Andre, Jr. She was reluctant in the circumstances to get married, but was persuaded to do so because the plans were so far gone. She joined her husband in Brooklyn, New York, the year following their marriage.

The marriage faced considerable difficulties as a result of the plaintiff's condition. She says her sex life was not good, before the operation she enjoyed having sex with her fiancé. The premature menopausal state brought on by the removal of her ovaries caused vaginal dryness during sexual intercourse with the result that sex was painful and uncomfortable. She had to use a vaginal lubricant. She suffered from decreased libido, and her husband had to negotiate with her in order for them to have sexual intercourse. She testified that she did not want to have sex. Because of these reasons sexual relations with her husband were infrequent. During her testimony on the 20th September 2001, she stated that she

last had sex on the 4th July 2001. She suffered from hot flashes, as a result the air in her bedroom was conditioned at a temperature of 70°F, "it cost a lot of money and it is cold, and would get much colder at nights." She testified that the temperature "creates difficulty with my husband, he has to sleep with his relatives or at a motel, that happens twice per month."

The plaintiff complains that her enjoyment of life has been severely impaired not only in respect to sexual relationships with her husband and health but generally. She feels sick and tired frequently and suffers from abdominal pains and vaginal bleeding. She has no menstrual period; the bleeding she experiences is a side effect of medication. Any physical activity causes spotting, that is a small amount of bleeding from her vagina. This limits her ability to participate in ordinary household chores. Her husband, "does most of the housework", this situation is exacerbated by the fact that her husband gets home from work at 7.00pm and sometimes works on weekends. Her husband becomes upset if she spots, claiming she deliberately brought it on by physical labour in order to avoid sex. The heat generated from ironing clothing affects her adversely. She says in exchange for ironing her clothing, her husband wants sex. She suffers from cramps in both legs, about four times per month since surgery.

The plaintiff's testimony was punctuated by pauses to allow her to compose herself. She wept quite openly throughout her testimony. She testified that she

had not been to a psychiatrist before her visit to Dr. Knight on the 18th September 2001. She had seen "nine or more" doctors because she felt that the staff of these institutions was discussing her case, which caused her great embarrassment. She recounts instances when doctors, on being told that her ovaries were removed, "looked at her as if she was crazy". She had made about nine visits to the doctor for each of the year, 1996, 1997, 1999, 2000 and five visits in 1998. She was admonished by her husband for dressing-up teddy bears in pampers, and placing it on the bed as one would a child. When her mother says that she needs grandchildren, she does not explain her inability to conceive naturally because of shame.

Dr. Frank Knight saw the plaintiff for the first time on the 18th September 2001. He noted her apparent obsession with the idea "getting an egg". She believed "if she could get a fertilised egg into her uterus, everything would be thereafter fine." Dr. Knight regarded this as an element of psychotic thinking, which places her in danger of a psychotic paranoid disorder. Dr. Knight, opined that Mrs. Clarke has an adjustment disorder with depressed mood on the background of an unresolved grief reaction. In Dr. Knight's opinion, the disorder is a direct result of the surgical removal of both the plaintiff's ovaries, leading to menopause. A person so affected is likely to have delusional ideas or disturbance of the thought process. Knight further opined that, the plaintiff's putting diapers

on the teddy bears is consistent with his findings, and represents fantasy behaviour as seen in children. He characterised the removal of the ovaries as the female castration, paralleled in the male with the removal of the testicles. He opined that the giving of the plaintiff of her ovaries in a babies' formula-bottle could lead to traumatic stress disorder.

Dr. Mary Sloper, had diagnosed the plaintiff with large ovarian cysts and had made a referral to the University Hospital on the 1st June 1995. When she next saw the plaintiff on the 31st July 1995, she was severely depressed. Dr. Sloper noted that the plaintiff frequently cried when reminded of any incident that reminded her of the removal of her ovaries, e.g. visits to the doctor. She suffered from poor appetite, "lack of enjoyment of those things she formerly took pleasure in reading and a total lack of interest in sex. She complained of irritability, and morbid thoughts. The plaintiff scored 78 on Zung self-rating depression scale. She was at increased risk for premature aging, heart disease, stroke, and osteoporosis, deep vein thrombosis, cancer of the lung. Changes would result in her hair texture, thinning. Hair growth on her face, vaginal dryness, loss of teeth with possible effect on gums.

General Damages

The plaintiff's injuries are particularised in the Statement of Claim, paragraph 14:

As a result of the said acts of negligence and trespass the Plaintiff has suffered and continues to suffer bodily injury and pain, emotional trauma, and permanent disabilities, and has incurred and will continue to incur significant expense until the end of her life.....

Particulars of Injuries

Loss of both ovaries with, inter alia, the following consequences: -

- a. inability to conceive*
- b. premature presentation of all the symptoms of menopause including hot flushes, nausea, night sweats and restlessness*
- c. frequent bleeding per vaginal*
- d. severe abdominal pain from time to time, which is linked to the bleeding*
- e. inability to enjoy sexual intercourse*
- f. complete lack of estrogen*
- g. the need to take hormone replacement drugs daily until age 65 with the attendant increased risks, including uterine and breast cancer*

- h. severe reactive depression*
- i. severe psychological trauma*
- j. chronic anxiety state*
- k. significantly reduced prospects of a happy marriage, due to the above.*

The hallowed principle to be applied for the measure of damages is restitution in integrum. Subsidiary rules can only be applied if they give effect to that rule.

Lord Blackburn stated it thus in Livingstone vs Rawyards Coal Co. (1880) 5

App. Cases 25 at page 39

"Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or as suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. Compensation, in a case such as this is a notional or theoretical compensation to take the place of that which is not possible, namely actual compensation (see Rushton v National Coal Board (1953) 1Q.B. 495 at 502."

In *Medical Negligence* by Michael A. Jones (Sweet and Maxwell 1996) at page 480-9-051, the learned authors state.

"The plaintiff is entitled to damages for actual and prospective pain and suffering caused by the injury, by a neurosis resulting from the injury, or attributable to any

necessary medical treatment for the injury. This includes any discomfort, humiliation, or disfigurement suffered by the plaintiff. A person who suffers mental anguish because he is aware that his life expectancy has been reduced can recover for that anguish. Similarly, a person who is physically or mentally incapacitated by his injuries and is capable of appreciating the condition to which he has been reduced is entitled to be compensated for the anguish that this creates."

(a) **Pain and Suffering and Loss of Amenities**

The plaintiff injury, described by Dr. Sloper as a female castration, is without precedent in this jurisdiction. The plaintiff lost both ovaries a few weeks before her marriage. She has entered premature menopause at age 19 years, whilst still childless. The plaintiff has been exposed to increased risks of several life threatening diseases. The injuries are unique. In J.P.S Co. Ltd. v Barr, et al Wright JA., at page 344, recognising the difficulties posed in such a case, said;

"It is well recognised that the award of damages for non-pecuniary loss is never free from problem let alone in a case such as the instant which is appropriately classified as unique."

The Court was referred to the English case of Butters v Grimsby and Scunthorpe Health Authority (January 12, 1998), where the plaintiff had her uterus punctured twice, her cervix injured, and some of her endometrium wrongly removed in an operation performed by an inexperienced surgeon. The plaintiff developed secondary amenorrhea, had two miscarriages and finally a

hysterectomy. A sum of £50,000 was awarded for general damages. The Judge awarded damages under three heads (a) infertility (b) physical pain and suffering from the hysterectomy, the laparotomy, two hysteroscopies, the laparoscopy, the division intrauterine adhesions and lower abdominal pain (c) scarring. The defendant appealed on the grounds that the plaintiff had not been left childless and had suffered no significant psychiatric complications. The plaintiff who had intended to have a large family cross-appealed. In dismissing the defendants' appeal, the Court of Appeal was of the view that the damages were correctly assessed, having considered the pain and suffering and that the plaintiff should not be penalised for not having succumbed to the pain and anxiety. The deterioration of her marriage and the fact that she would have to undergo further investigative surgery moved the Court to make a further award of £5,000 to the plaintiff.

In Biles v North East Thames Regional Health Authority (Oct.1987), the plaintiff, age 19 was sterilised. She was married some four years later in 1977. The sterilisation was unnecessary. She tried unsuccessfully to conceive, including four invitro-fertilization attempts. General damages were assessed on the basis she would be permanently infertile, at £45,000 for pain and suffering and loss of amenities.

The injury the plaintiff has suffered is happily, extremely rare. The efforts of Counsel have failed to unearth any such injury in this jurisdiction or within the Caribbean. The awards of £55,000 in January 1998 and £45,000 in October 1987 are represented by the updated sums in local currency of \$4,033,391.69 and \$5,115,216.54 respectively. In J.P.S.Co. Ltd. v Barr et al, Wright J. noted at page 345 that;

"There is no formula for achieving equiparation between any West Indian currency and the English pound so far as to relieve a trial judge of the difficulty attendant upon the use of awards in English cases as guides in making assessments within our region."

The injuries to the instant plaintiff are more severe than in either of the cases cited. In *Butters*, there was no evidence before the Court of psychiatric complications, and she was not childless. Both these were factors in this case.

Dr. Knight's testimony that the plaintiff has an adjustment disorder with depressed mood. Both Drs. Knight and Sloper are of the view that she was in need of psychiatric intervention; and that such treatment would be of assistance to her. It is beyond dispute that the plaintiff was desirous of having children. Her chances of conceiving were described by Dr. Sloper, by way of using invitro-fertilization "would be difficult but not impossible."

The report of the case of *Biles* carries no evidence of loss of amenities, occasioned by the deterioration of the plaintiff's marriage due to her inability to

have enjoyable sexual intercourse, as in the instant case. Cognisance must be taken of the fact alluded to by Dr. Knight that culturally, Jamaicans tend to view inability to conceive in an unpleasant light, 'the infertile female is a mule'. The unchallenged evidence is that the plaintiff is at increased risks of premature death, aging, and is exposed to the devastating side effects of the medications which she must take. The plaintiff has been catapulted into a menopausal life some thirty-five years before nature would have prepared her for that event. Her husband similarly unprepared has been called upon to start his married life not with his young bride but with a tearful, depressed wife who does not enjoy sex and cannot do ordinary household chores without vaginal bleeding. This has substantially reduced the plaintiff's enjoyment of life. I would therefore upgrade the *Biles* award to reflect the greater loss of amenities in this case. The sum of \$5,500,000.00 is therefore a reasonable starting point. Bearing in mind the difference in the English and Jamaican economies, I would scale that figure down by 25% (see *J.P.S. Co. Ltd. v Barr*. Per Wright J.A. page 346 letter f). The figure thus produced is \$4,125,000.00. This sum should normally be reduced by an amount to represent capitalisation or immediacy of payment. However, no such reduction will be made in recognition of the psychiatric complications the plaintiff has suffered.

(b) **Future medical expenses**

The starting point is the historical evidence of cost of care of the plaintiff, from July 1995 to September 2001 (i.e 6 1/4 years). The U.S cost commences as of June 1996. These constitute recurrent expenditure visited on the plaintiff because of the negligence of the defendants. The total sum claimed for expenditure incurred in United States currency for that period in respect of doctors' visits; medication, tampons minus loss of earnings amount to US\$62,334.36.

(1) **Doctors' visit** - The plaintiff's evidence is that her insurance covered two visits per year. In addition to those two visits she would attend on her doctors approximately ~~nine times~~ per year. Of the two visits covered by the insurers, the insurance company would pay 80% of the cost. In respect of the other nine visits, the expenses were entirely from the account of the plaintiff. She paid a sum of US\$375 for each visit. It is noteworthy that these visits are unsupported by any documentary evidence. Of the nine doctors that she should have seen, not only were there no supporting evidence, but we were only given the names of two of those doctors. Crown Counsel vigorously attacked the lack of specificity, and rehearsed before the Court the admonitions of Hercules J.A. in Murphy v Lawson 14 J.L.R. 119 that "it is not enough for a plaintiff" to write down particulars, and so

to speak, throw them at the head of the Court, saying; "This is what I have lost; I ask you to give me these damages. They have to prove it."

This is moreso, when the plaintiff is seeking to prove damages incurred in a highly developed jurisdiction with a well-known history of personal injuries litigation. Proof should not be hard to come by. The plaintiff was unable to achieve any greater precision in relation to the number of her visits than to say "approximately" and "or about". The plaintiff is awarded damages for six visits to the gynaecologist (inclusive of visits paid substantially by the insurers) per year, except in 1998 when her evidence is she made "about five visits". A total of twenty nine (29) visits at \$375 per visit, to produce the sum of US\$10,875.

(II) **Ultra Sound** - The plaintiff states she would have "about five times per year", at US\$116 per test, a total of US\$2,900.00 for the five year period.

(III) **Pap Smear** - The plaintiff testifies that the pap smear would be 5 or 6 times in the first year, "tests less than first year in 3rd and 4th year" at a cost of \$116 per test. She is allowed five tests for the first year and two for each succeeding year for the period, a total of 13 tests for a sum of US\$1,508.00. The total expenditure on doctors' visits, (\$10,875.00 + \$2,900.00 + \$1,508.00), is \$14,383.00.

(IV) **Medications** - The claim is US\$10,020.00, the plaintiff has tendered receipts dated 21st February 2001 and 18th July 2001, in respect of the drug

prempo, the total payment was \$50.25 and \$54.35 respectively. Each supply would be expected to last for two months. The plaintiff also had in evidence a statement of reimbursement made by the insurance company for the year 1998, on behalf of the plaintiff, which totalled \$692.75. An award of \$10,020.00 is made.

(V) **Tampons** - Crown Counsel has argued that if the plaintiff were a "normal" woman she would need tampons, twelve weeks out of each year, therefore the claim should be discounted accordingly. A period of one year's cost will be taken from the total of US\$2,514 to produce a sum of \$2,011.

(VI) **Psychiatric and Counselling sessions** - The plaintiff evidence is "that she was told that the sessions cost \$600". Dr. Frank Knight's testimony is that "an hour long session would cost \$100-\$200". He would recommend two visits per week for two months, thereafter once per week for a year. Counsel claims \$150 per session, for a total of \$10,200. The total sums to be computed for the head of future medical expenses are as follows:

(a) Doctors' visits \$10,875 (b) Ultra sound \$2,900 (c) Pap Smear \$1,508

(d) Medication \$10,020 (e) Tampons \$2,011 (f) Counseling \$10,020. Total \$37,334. The evidence is that the plaintiff enjoyed the benefits of discounted payments under a policy of health insurance held by her husband. I make no distinction between payments made by the insurers and those made by the

plaintiff for the purposes of calculating special damages and future medical expenses.

In Frank Coleman v Donald MC.Donald & Carol Smith (1979) 16 J.L.R. 490 per Carberry J.A. at page 498;

“As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the tortfeasor.”

From the sum of US\$37,334 in order to determine the annual cost this sum should be divided by five. The annual expenditure is US\$7,466.80 to this must applied the multiplier of sixteen. No objection was raised to this multiplier by Crown Counsel, who appeared on behalf of the Third Defendant. In *Barrs* case, the plaintiff was 24, and a multiplier of sixteen was applied. The amount to which the plaintiff is entitled to as future medical expenses, is the sum of US\$7,466.80 multiplied by sixteen, i.e. US\$119,469

(VII) **In Vitro-Fertilisation** - In vitro-fertilisation, the plaintiff's evidence is that the cost of the procedure, i.e. "getting an egg", as she puts it, would be US\$20,000. Mr. Goffe has said that she should be allowed four attempts. That he says were the number of attempts granted the plaintiff in the case of *Biles*. There is clear

evidence from both doctors who testified that there is a possibility of success of the plaintiff conceiving. Crown Counsel has argued that the Court did not have the benefit of hearing from a gynaecologist as to the cost of this procedure and the likelihood of success in respect of this particular plaintiff. The equivalent of J\$3.4M is being claimed for this procedure yet, other than the plaintiff's bald assertion, there is nothing to support the efficacy of the sum claimed. Dr. Knight in answer to Crown Counsel concedes that having a child may not improve her state. The spectre of the plaintiff not accepting the child as being hers is raised on the evidence of Dr. Sloper. The patient has testified that she has made some forty-one (41) visits to the gynaecologist's office, yet not one word is forthcoming from any of the doctors seen as to whether the plaintiff is a likely candidate and what are the risks attendant on this procedure. The sum of US\$20,000 for attempt at invitro-fertilisation is awarded. An award of US\$139,469 is made for future medical expenses.

The award for General Damages.....J\$4,125,000.00

For future medical expenses.....US\$139,469.00

Special damages

Medical reports J\$20,000.00

Medication and treatment J\$23,760.00

Anti-depressant	<u>J\$20,343.00</u>
Total	<u>J\$64,103.00</u>
Visits to doctor	US\$15,283.00
Medication	US\$10,020.00
Tampons	US\$ 2,011.00
Lost Earnings	<u>US\$ 1,100.00</u>
Total	<u>US\$28,414.00</u>

Interest on Special Damages at 6% from the 1st June 1995.

Interest on General Damages at 3% from the 6th September 2000.

Cost to the plaintiff to be agreed or taxed.