[2012 JMSC Civ 192

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 01122

BETWEEN:	ANNISSIA MARSHALL	CLAIMANT
AND:	NORTH EAST REGIONAL HEALTH AUTHORITY (ST. ANN'S BAY HOSPITAL)	1ST DEFENDANT
AND:	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. Norman Samuels and Mr. Raymond Samuels instructed by Samuels and Samuels for the Claimant

Mr. Nigel Gayle and Ms. Latoya Bernard instructed by the Director of State Proceedings for the first and second Defendants

March 5, 6 & 7, 2012

FRASER J

ORAL JUDGMENT

Ruling on No Case Submission

[1] By way of the amended Claim Form the claimant Annissia Marshall sought damages against the1st and 2nd Defendants for negligence and medical malpractice in that they by themselves or by their servants or agents performed surgery on her without her consent.

[2] This case turns on the question of whether or not the claimant consented to the surgery performed on her on the 15th July 2004. The issue arises in two ways:

i. Firstly, the claimant alleges that she did not sign the general authorisation form; and

ii. Secondly, that even if the court were to find that she signed the form, that was not consent specific to the surgery performed, as the claimant should have been specifically told in terms such as the following that: “You are going to surgery and we are going to investigate your colon to see if that is where the problem is. In doing that we might have to take off a portion of your large bowel and in that circumstance a colostomy bag would have to be attached.”

[3] The claim is one in negligence and in her witness statement, received in evidence as her evidence in chief, the claimant summarised the particulars of negligence she was alleging as follows:

i. The surgical operation of the 15th day of July 2004 when the relevant Ultra Sound Report did not indicate any condition referable to the need for the surgical operation.

ii. Performing a surgical operation which in my opinion was a serious one without my consent.

iii. Performing a surgical operation which in my opinion and on which I was informed and verily believed carried with it a serious risk of a complication by damage to the colon without informing me of the various complications of the said risk.

iv. Performing such a surgical operation which Defendants knew or ought to have known carried with it the risk of my wearing a Colostomy Bag without advising me as to the risk of me wearing a Colostomy Bag and the likely period which that condition would last.

[4] For the claimant to succeed there must be established a duty of care, breach of that duty of care and damage resulting from that breach.

i. If the surgery was found to have been undertaken without her consent express or implied that would be evidence of negligence as the hospital owes a duty of care to the patient to give proper advice and obtain consent before proceeding to treat the patient, including the performance of surgery. Not having obtained such consent would be evidence of breach of that duty. The damage that would result is not however very clear as the claimant has expressly stated through counsel that no issue is being taken with either the surgical procedures or the post operative care (save the complaint emanating from the claimant, that the hospital was being dilatory in reversing the colostomy). However, at least the damage would be in relation to the loss of the opportunity to seek a second opinion.

ii. Secondly, If the court finds there was a signed consent form, then for negligence to be proven, there would have to be a duty of care established to warn the claimant of a known risk or one that ought to have been known, breach of that duty and thirdly that she suffered damage in that had she been warned of the risk she would not have undergone the surgery.

[5] The defendants have been put to their election and have decided to make a no case submission. Therefore if it fails they would not be entitled to call evidence. In ruling on this no case submission I have to consider whether the claimant's case has been established on the evidence on the balance of probabilities.

[6] Firstly, on the issue of whether or not the claimant signed the consent form dated 05.07.04., the claimant's evidence in her witness statement is that on the 15th July 2004, without her consent, she underwent an operation at the St. Ann's Bay Hospital. In her viva voce evidence she maintained that she did not consent and that she did not sign the form dated 05.07.04. She said that on the previous consent form that she admitted signing on the 29.06.04 and on the one signed subsequently on the 29.12.04 the endorsement "no blood transfusion" was seen.

This endorsement she said was written on at her instruction by a nurse on the 29.06.04 and in her own hand on the form dated 29.12.04, but was absent on the form dated 05.07.04.

[7] She indicated the reason for that notification was due to her Jehovah's Witness religious beliefs which she had inherited from her grandparents. She put this reason forward as supporting her contention that she did not in fact sign the form dated 05.07.04.

[8] The findings of the expert Superintendent William Smiley however contradict the claimant. Based on a comparison of specimen signatures, which the claimant acknowledged she provided to the office of Superintendent Smiley, and the questioned signature on the original consent form dated 05.07.04, his conclusive finding was that they were made by one and the same person. Hence, a finding that Miss Marshall was the one who signed the consent form dated the 5/7/2004.

[9] When the court asked her whether or not she could explain the discrepancy between the finding of the expert and her contention that she did not and had not signed the consent form she responded that *"Despite the finding of the handwriting expert, my reason for saying I did not sign is that, that is not my handwriting and the time I was brought in I was in severe pain and I think it was my husband who registered me at A & E."*

[10] There is also the evidence elicited from the claimant in cross examination that she was conscious between the 5th and 15th days of July 2004. That during that period she had consented to and undergone several tests, that she was conscious when she was taken to the operating theatre and prepared for surgery. She indicated that she did not object nor did she indicate that she want to leave the hospital. That sequence of events and the claimant's course of conduct – the defendants maintain – support both the fact of the claimant having signed the form (i.e. actual consent) as well as implied consent from her actions.

[11] significantly, in cross-examination the claimant had earlier stated that if the court were to find that she signed the form dated 05.07.04 that would have been consent to the second surgery. That second surgery being a reference to the surgery on the 15th July 2004 which is the surgery in question.

[12] I have carefully considered all the evidence adduced on the case of the claimant. The strongest thing in favour of the claimant saying she did not sign the consent form of the 05.07.04 is the absence of the words “no blood transfusion” on that consent form. That factor however has to be considered against the finding of the handwriting expert whose analysis was requested by the claimant. The handwriting expert has confirmed that Miss Marshall signed the form.

[12] The evidence of the complainant is that at the time of admission she was in great pain. The court will however not speculate as to why the claimant would not have ensured that the words no blood transfusion was recorded on the form dated 05.07.04., if in fact she signed it.

[13] On the totality of the evidence adduced on the claimant’s case the court finds and accepts that the claimant signed the form dated 05.07.04. The court accepts the finding of the expert that the claimant signed the form. The court also finds that the experts’ conclusion is consistent with the evidence of the claimant’s non-objection to the surgery at the time she was being prepared for this surgery. This is significant; especially as the evidence is that the claimant had undergone surgery at the same hospital a mere 14 days before when she had an oopherectomy to remove a haemorrhagic ovarian cyst. She would therefore have been all too familiar with the procedures leading up to surgery and would have been expected, as any reasonable person would be expected to, to object or at least query what was happening, had she not consented to the surgery.

[14] As I have already indicated however, counsel for the claimant had another arrow in his quiver. The claimant he said is a lay person and that her opinion as to what would amount to consent could not change the law. Counsel therefore submitted that even if the court finds, as the court has just done, that the claimant signed the consent form, that general consent would not suffice for the specific operation the claimant underwent.

[15] That general authorization reads.

> General authorization for treatment.
>
> I Annissia Marshall recognise the need for hospital care and hereby consent to services at the St. Ann's Bay Hospital as ordered by the attending physician including, anaesthesia, laboratory procedures, medical or surgical treatment, x-ray examination, or other hospital services rendered under the general and specific instructions of the physician." (Dated the 5/7/2004 signed Annissia Marshall and witnessed).

[16] I should also point out that on that same form there is a section for release from responsibility for discharge and or refusal of treatment which reads.

> The undersigned on leaving the hospital and/or have refused medical treatment against medical advice. I acknowledge that I have been informed that risk is involved and hereby release the medical authorities and the hospital from all responsibility for any ill effects which may result from my action.

[17] There is a third section to that form which deals with permission to leave hospital and which reads:

> I, *name of the patient*, do hereby request permission to leave hospital from a particular time to another time and further I release the St. Ann's Bay hospital from all responsibility for any ill effects which may result from my action.

[18] I have outlined these two latter parts to indicate that there was and is on the form sections which indicate that a patient can sign indicating that they do not wish to be treated or that they wish to leave the hospital. In this case, none of those sections were completed. All that was completed was the general authorisation for treatment.

[19] Now as earlier indicated counsel for the claimant submitted that the claimant should have been told of the possibility of the removal of a part of her colon which would have necessitated the carrying out of a Hartman procedure, with the result that she would have had to temporarily wear a colostomy bag after the surgery. Before going into the evidence on this point it is important to outline the law concerning the assessment of medical negligence.

[20] Counsel for the defendant in his submission firstly relied on the authority of ***Whitehouse v Jordan*** [1980] 1 ALL ER 650 and cited a passage from page 659 at paragraphs b-e which reads as follows:

> The standard of proof which law imposed on the infant plaintiff was that required in civil cases, namely proof on the balance of probabilities, but as Denning LJ said in ***Hornal v Neuberger Products Ltd***[1]**:** "The more serious the allegation the higher the degree of probability that is required." In my opinion allegations of negligence against medical practitioners should be considered as serious. First, the defendant's professional reputation is under attack. A finding of negligence against him may jeopardise his career and cause him substantial financial loss over many years. Secondly, the public interest is put at risk, as Denning LJ pointed out in ***Roe v Ministry of Health*****.**[2] If courts make findings of negligence on flimsy evidence or regard failure to produce an expected result as strong evidence of negligence, doctors are likely to protect themselves by what

[1] [1956] 3 All ER 970 at 973, [1957] 1QB 247 at 258
[2] [1954] 2 All ER 131 at 139, [1954] 2 QB 66 at 86-87

has become known as defensive medicine, that is to say, adopting procedures which are not for the benefit of the patient but safeguards against the possibility of the patient making a claim in negligence. Medical practice these days consists of the harmonious union of science with skill. Medicine has not yet got to the stage, and maybe it never will, when the adoption of a particular procedure will produce a certain result. As Denning LJ said in ***Roe v Ministry of Health***[3]***:***

> It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical Science has conferred great benefits on mankind, but these benefits are attended by considerable risks... We cannot take the benefits without taking the risks.

[21] Counsel for the defendants also relied on the case of ***Bolam v Friern Hospital Management Committee*** [1957] 2 ALL ER 118. The case of ***Bolam*** has become the gold standard of the test of negligence in respect of medical matters. At page 121 letter e it reads:

> 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 at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.

[3] [1954] 2 All ER 131 at 137, [1954] 2 QB 66 at 83

> Counsel for the plaintiff was also right, in my judgment, in saying the mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds.

[22] So I accept that those two cases, ***Whitehouse*** and ***Bolam,*** outline the standards and principles to be applied in the judgment of medical negligence cases.

[23] Counsel for the claimant first cited the case of ***Cassidy v Ministry of Health*** [1951] 1 ALL ER 574 to support the submission that "The claimant was admitted in the hospital and the authorities there were under a duty of care to her to see that neither an omission nor a commission was done by any member of their staff which resulted in damage to her and for which she could claim damages." The case of ***Cassidy*** was one in which it was held that the evidence showing a prima facie case of negligence on the part of the persons in whose care the plaintiff was, had not been rebutted and hence the negligence was established.

[24] However as noted earlier in this ruling, it was later clarified by counsel for the claimant that there was no challenge to the treatment or post operative care in respect of the claimant. It was indicated that the issue was consent. In ***Cassidy*** the prima facie evidence of negligence on the part of the person in whose care the plaintiff had been, was not rebutted. ***Cassidy*** is therefore not relevant to the determination of the issues in this case, there being no challenge to the quality of care — surgical or post operative — to which the claimant was subject.

[25] Counsel instead relied on the submission that there had been a breach of the duty to inform the claimant of the risk attendant on the surgery, with resultant damage. He cited the cases of ***Sidaway v Board of Governors of the Bethlehem Royal Hospital and Others*** [1985] AC 871, ***Pearce and Another v United Bristol Healthcare NHS Trust*** 48 BMLR 118**;** ***Chatterton v Gerson & Another*** [1981] QB 432 as well as the case of ***Chester v Afshar*** [2005] 1 AC 134. Before turning to the evidence it is significant to note that in each of the

cases cited by counsel for the claimant, the risk of the damage suffered and complained of was known and the issue was whether the doctor disclosed or sufficiently disclosed that risk to the claimant, to allow the claimant in each case to make a decision based on adequate facts.

[26] In the case at bar however, that was not the factual situation. On the evidence before the court the contention of the defence is that the risk of the wearing of the colostomy bag was not known prior to the surgery as it was only on the surgeon's seeing the internal condition during surgery that the decision was made to perform a Hartman's procedure which necessitated the use of the colostomy bag.

[27] The surgical exploration had become necessary because of the obstruction to her intestines and the lack of improvement by the other methods of treatment. The claimant has produced no medical evidence that would be able to establish, suggest or substantiate the position that the doctors knew or ought to have known about the possibility, whether slight or significant, of the need for a Hartman procedure with the resultant need for colostomy bag, prior to the surgery being conducted.

[28] On that basis alone the claimant has failed to establish a prima facie case of negligence on the basis of a failure to inform in light of the ***Bolam*** standard. Based on that standard, the claimant could only succeed if it was shown that in accepted medical practice it would have been expected that the doctors who performed surgery on Miss Marshall at least ought to have known of the risk and hence should have specifically disclosed that risk to her.

[29] However the position does not end there. Based on the case of ***Chatterton v Gerson*** which was relied on by the claimant, even if it had been established that the doctors knew or ought to have known that a Hartman procedure with the resultant need for the wearing of a colostomy bag was likely, the claimant would

have to prove not only the breach of the duty to inform, but that had the duty not been breached she would not have chosen to have the operation.

[30] In the claimant's evidence she has maintained that she would have desired the opportunity to seek another opinion. However in the absence of any evidence as to what the likely second opinion would have been, there is no evidence before the court to establish the view that she would not have chosen to have the operation. Even if I am wrong on that point, the primary point is that there is no medical evidence challenging the defence position that the doctors did not know prior to the surgery that a Hartman procedure with resultant need for a colostomy bag was likely and neither is there medical evidence to suggest that the doctors ought to have known of that possibility or likelihood.

[31] Before I conclude my ruling, counsel for the claimant in submissions indicated that the quality of post operative care was not being challenged. However there was some evidence from the claimant of her dissatisfaction with the length of time it was taking for the colostomy to be reversed, with the result that she eventually had the procedure done in New York.

[32] The evidence is that after the claimant woke up from surgery and discovered the colostomy bag she was advised that she would be wearing it for 3 to 6 months. The further evidence from the claimant is that she returned to the hospital in October and was told that the operating theatre was undergoing repairs and was not available.

[33] In any event, depending on the time she went to the hospital in October, it would have been either just before or just around the time of the expiration of 3 months after the surgery. On the 29th December 2004 she went back to the hospital for the colostomy reversal procedure but took ill while there and had to be admitted at the Accident and Emergency Department.

[34] She admitted in evidence that having taken ill she was not in a condition for the procedure to be performed then. Her evidence was that she didn't get any further date from the doctor and she felt she was being given the "run around" and hence she took the decision not to return to the hospital for any further treatment in relation to the colostomy after December 2004.

[35] December 2004 would have been within the 3-6 months time frame for reversal of the procedure that she had been advised of at the time her surgery was done. Therefore that period had not yet expired on the two occasions that she presented for the operation to be done. The reason for the procedure not having being done being on either of those occasions was firstly the unavailability of the operating theatre and secondly, her own illness. In those circumstances it could not be successfully maintained that in respect of post operative care concerning the removal of the bag, the hospital was in anyway negligent.

[36] At this point I should reiterate that the claimant has not sought to challenge the conduct of the surgery. While there is an attempt in the witness statement to challenge the basis on which the surgery was undertaken based on the ultra sound report, this court cannot take cognisance of a lay person's interpretation of medical reports. Hence this court will not accept any suggestion based on that interpretation that there was no medical or no proper medical basis for the surgery to have been conducted.

[37] The surgical procedure itself was not challenged by any suggestion that any lack of due care and skill was applied. During surgery there was a mass removed from the claimant which subsequent testing found indicated endometriosis, a condition which left untreated would have resulted in her death.

[38] On the totality of the evidence therefore, I find that the claimant's case has not been established on the balance of probabilities and accordingly the no case

submission succeeds. Judgment for the defendants with costs to the defendants to be agreed or taxed.