[2014]JMSC Civ.159

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. R D18 OF 2001

BETWEEN	**JULIET ROBINSON**	**CLAIMANT**
AND	**HOSPITAL (SPANISH TOWN REGION) MANAGEMENT BOARD (SPANISH TOWN HOSPITAL)**	**1ST DEFENDANT**
AND	**MINISTRY OF HEALTH**	**2ND DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**3RD DEFENDANT**
AND	**DR. KNIGHT**	**4TH DEFENDANT**
AND	**DR. WATSON**	**5TH DEFENDANT**
AND	**DR. BENNETT**	**6TH DEFENDANT**

Surgery on patient – Caesarean Section – Sterilization -Duty of doctor/surgeon to inform patient of risks before and after medical procedure - to obtain patient's consent - to record treatment of patient – test of standard of care of medical practitioner – breach of duty of care – expert medical testimony - cross-examination by video link – R. 32 (1) (2) (3) of CPR 2002 – Sexual and Reproductive health and rights of women – The 1994 Cairo Declaration on Population and Development – Measure of Damages.

Miss Dundeen Ferguson and Ronald Koates instructed by D.N. Ferguson and Associates for the Claimant

Harrington McDermott instructed by Director of the State Proceedings for 1st, 2nd, 3rd, 5th and 6th Defendant

Heard January 7,8,16, 2013, 25th September, 2014

Daye, J.

[1] The claimant, Mrs. Juliet Robinson is a Jamaican residing in Brooklyn, New York, U.S.A. with her husband and family. She sued doctors of the Spanish Town Hospital, the hospital and the Attorney General, representing the Government on the 7th February, 2001. She claimed they breached their duty of care towards her while she was a patient at the hospital in February 1995.

She gave birth to a healthy baby girl in the month of September 2009 in the United States. This was her fifth child. This baby was conceived by in vitro fertilization. Her other four children were conceived naturally, that is she was able to get pregnant by normal means.

[2] Though the claimant is happy for the birth of her fifth child who is health, she is dissatisfied that she did not conceive the child naturally like all her previous pregnancies. She tried hard with her husband to get pregnant for their 5th child. She experienced pain, anxiety and stress and increased costs during her effort to have this child. Also, she incurred high medical bills and costs due to the specialist treatment she received in order to get pregnant with this child.

[3] Something happened to her when she gave birth to her fourth child on the 8th February 1995 at the Spanish Town Hospital in Jamaica. The doctors cut both of her tubes and did not tell her. She was admitted there a few days before the 8th February due to the medical condition of

hypertension and pre-eclampsia in the late term of her pregnancy. She was then 28 years old. The doctors at the hospital treating her decided and did induce labour. The doctors performed a lower segment Caesarean section operation (C-section) to deliver this healthy baby girl. This operation was done under general anaesthesia.

[4] After the C-section operation, the doctors went on to cut her tubes. This was a second operation. This other medical procedure is known as bilateral partial salpingectomy. As a consequence of this operation, the claimant/patient would become in fertile. That is, she would not be able to naturally become pregnant and have other children.

[5] The tubes of a woman can be tied instead of cut and this also would prevent future pregnancies. This is another method of controlling a woman's fertility called tubal ligation. There was some difference on the medical evidence whether both medical procedure are one and the same. It appears the effects are one and the same, though the first procedure is very difficult to reverse in comparison to the second. The hospital offers this service and therefore the state as a method of family planning or birth control. However, it is a matter of choice for the patient/woman and her consent must be obtained for such a procedure. The claimant asserts that while she eventually agreed to the Caesarean section operation for the delivery of her fourth child, she refused repeatedly any offer of tubal ligation. (She had delivered her other three children naturally).

[6] Further she did not know that any such operation was done on her until in 1999 in the U.S.A. It was a gynaecologist to whom she was referred told her the results of a medical test he requested on her, that she realised that she had a bilateral partial salpingectomy (i.e. both of her tubes were cut).

Pleadings – Claim of Negligence

[7] The claimant in her statement of claim filed on the 4th July, 2001 indicated that the doctors at the Spanish Town Hospital were negligent in treating her by:

(i) Performing tubal ligation on (her) without her consent or knowledge

(ii) Removing portion of (her) tubes without her consent or knowledge

(iii) Administering medical treatment to (her) without informing her of the risks and the likely result thereof

(iv) Failing to take any proper or effective measures whether by way of examination, tests or otherwise to ensure that the surgical procedure would not have resulted in tubal ligation

[8] Counsel Mr. Harrington McDermott for the defendants – doctors of the hospital, the hospital and the state submitted these complaints are concerned with an action for trespass to the person i.e. assault and/or battery rather than breach of any duty of care giving rise to any action for negligence in the treatment of the claimant/patient.

[9] Dr. Danielle Clair, the expert witness for the claimant opined that in the United States it would be assault and battery for a surgeon/doctor to perform an operation on a patient such as cutting the patient's tube without

the patient's consent. The witness did give an opinion that this conduct of the doctors did amount to failure to exercise due care and skill in the operations on the claimant. In other words, the expert doctor's opinion is that the treatment fell below the standard of care. This ultimately is a matter for the court.

[10] However the claim for negligence as pleaded is also connected to the claim for trespass to the person as they arise on the same set of facts. That is the operation performed on the claimant on the 8th February, 1995.

[11] Nevertheless, the Director of State Proceedings, the Attorney for the doctors at the hospital and the Government filed a Defence in February 2002. They raised the defence that the surgical procedure to cut the claimant's tube was an emergency procedure to save the claimant's life. They allege that after the baby was delivered the claimant/patient developed excessive bleeding around the vessels of the uterus. They also allege the medical procedure was done to stop the bleeding and save the patient's life. They claim the patient could not give consent for this as she was under general anaesthesia. Further, that none of the doctors had asked the patient during the operation if she wanted to tie her tubes and she told them no.

Issues

[12] The issues therefore joined between the claimant and the defendant is:

(a) Did the doctors attending the claimant at the Caesarean delivery of her fourth child ask if she wanted a tubal ligation?

(b) Did the claimant/patient consent to any tubal ligation of the Caesarean operation?

(c) Did the said doctors have a duty to inform and or advise the claimant/patient, before the Caesarean operation, of any material risk involved?

(d) If yes, did the doctors fail to inform the claimant/patient that a risk of tubal ligation may arise?

(e) Did excessive bleeding develop around the vessels of the uterus during the Caesarean delivery, so that the doctors had to perform an emergency bilateral partial salpingectomy?

(f) Did the doctors fail to exercise due care and skill in treating the claimant during her Caesarean delivery?

(g) Did the doctors have a duty to inform the claimant/patient after her Caesarean delivery that they performed an emergency tubal ligation on her that involved cutting both of her tubes?

The Law – Duty of care of doctors to patient

[13] The test of a standard of care required for a doctor or any person professing some skill or competence was established in the case of **Bolam v Friern Hospital Management Committee** [1957] 1 W. L. R. 582. Mc Nair J. Formulated the test in a direction he gave the jury on the issue of liability of negligence. It is as follows (p. 586-587).

> "But when you get to a situation which involves the use of some special skill or competence, then the test is to whether there is negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising particular art. I myself would prefer

> to it this way, that (a doctor) is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way around, a man is not negligent, if he is acting in accordance with such practice, namely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get more today saying 'I do not believe in anaesthetics. I am going to do my surgery in the way it was done in the eighteenth century'. That clearly would be wrong".

[14] The facts in **Bolam's** case were: the plaintiff who was suffering from mental illness was advised by a consultant of the defendant's hospital to undergo electro convulsive therapy. He was not warned of the small risk of fracture. He was also not given relaxant drugs nor was he restrained. The plaintiff sustained a fractured hip during the treatment. At the time, medical opinion on the desirability of warning patients of the risk of fracture and the use of relaxant drugs and physical restraint varied.
Under the **Bolam** test professional persons such as doctors were held to the standard of their ordinary peers who were trained and skilled in their field rather than the standard of or the ordinary reasonable man in the test of negligence.

[15] This test of standard of care required by doctors when treating their patients was modified by the **House of Lords in Bolitho v. City and Hackney Health** [1997] 4 All ER 771. In that case a two-year old boy had severe brain damage after admission into hospital for respiratory problems. He subsequently died. The paediatrician had failed to incubate him. Incubation was the only procedure that would have prevented respiratory failure but was not without risk. The expert witness on each side gave

diametrically opposed views about whether the failure to incubate was reasonable. Lord Browne-Wilkinson who delivered the judgment of the court pointed to the circumstances in which a court would decide that there was negligence in spite of expert evidence agreeing with the defendant's course of action. This is what he said (at para. 777-778).

> ".....in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment on diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In Bolam's case, McNair J. Stated that the defendant had to have acted in accordance with the practice accepted as proper b y a 'responsible body of medical men'. Later he referred to 'a standard of practice recognised as proper by a competent reasonable body of opinion'. Again, in the passage which I cited from Maynard's case, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives – responsible, reasonable and respectable all show that the court has to be satisfied that the exponent of the body of opinion relied on how to demonstrate that such opinion had a logical basis. In particular, in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the expert have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter..... In the vast majority of cases, the facts that distinguish experts in the field of a particular opinion will demonstrate a reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of understanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible. I emphasise that in my view, it will very seldom be right for a judge to risk the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgement which a judge will not normally be able to make without expert evidence. As the question of Lord Scarman makes it clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only

where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which defendant's conduct falls to be assessed."

[16] This modification of **Bolam's** test places an added burden on the medical doctor or professional to show also that the body of opinion he or she relies on is logical. It is a higher test for the standard of care of a doctor. The court would be required to analyse the scientific principle upon which the medical technique or medical procedure rests to determine if the body of medical opinion is logical.

The **Bolam** test and the **Bolitho** modification has been applied in Jamaica and other Caribbean courts. Wolfe, J. (and he then was) applied the Bolam test in **Joyce Hind v Dr. Walter Craig and the University Hospital Board of Management** [1982] 19J.R.C. 81. In that case the plaintiff who suffered from hypertension was admitted to the University Hospital of the West Indies (U.H.W.I.) to have an angiogram operation. The operation was performed by the doctor on the same day and the plaintiff recuperated and was discharged the following day. Three (3) months later, she developed, while in the U.S.A. symptoms of pain. She was admitted for surgery in the United States and hospitalised for sixty (60) days. She claimed that the pre-surgical and post-operational treatment received in the USA differed from what she received at the U.H.W.I.

[17] She sued the doctor and the hospital in Jamaica to recover damages for negligence claiming as against the first defendant that the medical equipment was not sterilised, failure to use gloves and/or masks and failure to take or to advise her on post-operational precautions and that the hospital engaged an unskilled doctor. The court did not find in her favour based on the Bolam test.

[18] Anderson, J. decided two (2) cases in the Supreme Court in 2006 and 2009, applying the Bolam test as modified by Bolitho. They were **Howard Genas v the Attorney General and the Black River Board of Management** and Dr. K.D. Mshana S.C.C. A. 1996 60-105 and **Leroy Williams v Kenneth Enyi,** S.C.C. A. 2006 HCV – 1560.

[19] In the Genas case, the claimant, a farmer fell from his motor cycle in a rural district in St. Elizabeth. He was taken to Black River Hospital where he was admitted. He sustained a depressed fracture of the right tibit and experienced problem with the blood circulation of this leg. He was last at the hospital for eight (8) days before being transferred to the Orthopaedic Department at the Kingston Public Hospital. His right leg had developed gangrene and the doctors amputated it above the right knee. He later sued the doctor of the Black River Hospital for breach of their respective duty of care towards.

[20] Anderson J accepted the evidence of the consultant orthopaedic surgeon called for the claimant that the doctor treating the claimant had a duty of care to transfer him to a specialist medical facility that could treat the claimant's injury. He also found that it was the doctor's duty or failure to transfer the claimant caused his leg to develop gangrene that resulted in it being amputated. He therefore found the doctor breached his duty of care to the claimant applying the **Bolam/Bolitho** test. The claimant was awarded a $5,000,000.00 for general damages for general damages $50,000.00 as normal damages $4 million for loss of future earnings and handicap on the labour market and special damages.

Duty to Disclose – Informed Consent

[21] Anderson J addressed specifically the issue of the duty of a doctor to inform or advise to disclose to the patient of any material risk involved in a course of treatment. This duty he showed was related to the doctrine of informed consent. The doctrine is based on the principle that a patient has the right to learn about the risk and benefits of a medical procedure before making a decision to undergo the treatment. The corollary of the right is the duty of a physician to disclose certain information to the patient. Anderson J. showed that the early authority from this principle was the California Supreme Court case of **Cobbs v Grant** (1972) 8 Cal. 3d. 229.

[22] There the learned judge referred to a 2002 article in the British Medical Journal by Professor Skene who discussed the High Court of Australia decision of **Bergens v Whitaker** [1992] 175 CLR 479 as applying the olam test as modified. In that case, an ophthalmologist failed to mention the possibility of sympathetic ophthalmia, a near but serious complication of eye surgery, despite the patient asking about the possible effect to the non-operable "good" eye. The complication happened and the patient became blind. The High Court unanimously found ophthalmologist liable. The court held it was part of the doctor's duty of care to disclose "material" risk. The High Court cited with approval the dissent judgment of Lord Scarman in **Sidaway v Governors of Bethlem Royal Hospital** [1985] AC 871. He refused to apply the **Bolam** principle to cases involving the provision of advice or information. Lord Scarman's view was that "the duty to warn" arises for the patient's right to know of material risk, a right which in turn arises for the patient's right to decide for himself, and whether or not to submit to the medical treatment proposed. The claimant in sideway sustained some pain in her neck, right shoulder and arms. Her neuro-surgeon took her consent for cervical cord decompression, but did not

include in his explanation the fact that was less than one (1%) percent of the cases, the said decompression caused paraplegia. She developed paraplegia after the spinal operation. The court by a majority rejected the claimant's claim for damages and held applying the olam principle that consent did not require an elaborate explanation of remote side effect.

[23] In **Smith v Tunbridge Wills Authority** [1994] MLR 334 (HL) the court applying a modified **Bolam** test held it was "neither reasonable nor responsible" for a surgeon not to mention the risk of importance from rectal surgery, even if some doctors do not mention that risk.

[24] In **Pearce and Anor v United Bristol Healthcare NHS Trust**, dat. May 20, 1998, the English Court of Appeal denied a claim for negligence against a consultant. There the pregnant claimant had visited the doctor on a day when she was already fourteen days beyond term on November 27, 1991 and sought advice about whether induction or a Caesarean section would be advisable. The doctor advised that it would be best to wait and have a normal delivery.

In the result that the claimant went into hospital on December 4, 1991 where it was found that the baby was not viable. She was induced and gave birth to a still born baby girl, the baby having died in utero between the 2nd and 3rd December. She claimed she was not advised of the risk of waiting to effect a normal delivery and the doctor was in breach of his duty to give information of the risk of still birth in that case. The court held that the decision of the doctor not to advise the claimant of the statistically insignificant risk was not a breach of duty. The claimant would not have acted differently if told of the risk. The court found that the treatment did not fall short of the Bolam test.

[25] In **Janet Birch v University College London Hospital NHS Foundation** [2008] EWHC 2237, the claimant suffered a stroke caused by a cerebral catheter angiogram at the defendant's hospital. The court found no negligence by the defendant to perform catheter angiography rather than the alternative imaging method, (MRI) but the failure to discuss with the claimant of the comparative risk resulted in the defendant being liable to the claimant for breach of duty of care.

[26] In **Genus'** case, Anderson, J found the senior medical doctor did not inform or advise the claimant of the risk of remaining at the Black River Hospital with the fracture to his right foot and the circulatory problem in comparison to travelling to Kingston Public Hospital in an ambulance in that condition. He found the doctor/hospital breached his duty of care to the claimant in this respect even though it was not a case where the doctor performed surgery.

[27] Anderson, J found also that the doctor breached his duty of care to the claimant/patient in **Leroy Williams'** case in 2009 as he also found in **Genus'** case. In **Leroy Williams'** case the claimant went to a private doctor in the town of Falmouth, Trelawny for pain he was having to his left ear and neck. The doctor diagnosed his condition as spasmodic torticollis ("crick neck"). He administered voltarin injection intra muscular to the claimant's left buttocks. The patient complained immediately that he felt numbness to his left leg foot. His condition worsened. He went to the Falmouth Hospital and was given a referral letter to the Cornwall Regional Hospital. He went there and saw a consultant orthopaedic surgeon. He was referred to a consultant neurologist. They both gave medical reports which form the medical evidence for the claimant.

The neurological report is that injury to the buttocks can cause neuropathy. In this case, there was injury to the claimant's sciatica nerve.
The court found it was the misplaced intra muscular injection to the claimant's buttocks that caused damage to the claimant's sciatica nerve and the injury to his left lower leg. The claimant had a left foot drop gait and loss of sensation to the left foot. The doctor fell short of his duty of care to the claimant under the **Bolam** principle. The court awarded the claimant $500,000.00 general damages for pain and suffering, damages for loss of future earnings and handicap on the labour market plus proved special damages.

[28] In **Holness v University College Hospital Board of Management JM** 2007 S.C. 72 dat. June 29, 2009, Jones, J. applying the **Bolam/Bolitho** test did not find the defendant liable in negligence. The facts in summary of this case were that the mother of a son who was a haemophiliac sued the hospital for negligently causing her son's death. The son was admitted to the hospital and was treated by blood transfusion. He died. Results of test on blood given to him during blood transfusion revealed that the blood contained HIV and hepatitis C. She allege the hospital did not exercise due care in the collection, testing and storing of blood given by donors. She claimed it is the contaminated blood which caused her son's death.
Jones, J. felt the mother failed to prove it was the contaminated blood as opposed to the haemophilia condition that caused her son's death. Further, he found that the hospital acted in accordance with the practice which was proper and reasonable at the time for collecting and testing and storage. He rejected the belated claim by the mother that the hospital failed to inform or advise her of the risk in treating her son by blood transfusion. The learned judge reasoned that this allegation was not pleaded, no amendment was

granted to the pleading. He found the claimant did not provide the necessary medical evidence to prove her case.

[29] Morrison JA sitting in the Belize Court of Appeal in **Mike Williams v Atanascio COB, Universal Health Service Co**. C.A. 9 of 2004, delivered in 2005, approved the **Bolam** principle which was followed by the trial judge in that case.

[30] The state of the authorities in own jurisdiction show that the **Bolam/Bolitho** test of the standard of care of a medical doctor is applicable. Also, it shows the court accept that the Bolam test is reconcilable with the duty that a medical doctor has a prior duty to inform, advise and/or warn a patient of any material risk involved in any surgical problem or better treatment administered to him or her.

[31] If the rationale for the duty of a doctor to inform or advise the patient rest on the right of a patient to know of any risk that may affect him so as to make a decision whether to accept the treatment then in my view the duty to inform the patient must extend to disclosure to the patient of a risk or emergency treatment undertaken after such treatment.
I therefore find that doctors at the Spanish Town Hospital and the Attorney General owed a duty of care to the claimant: to inform, advise and warn the clamant before surgery of any material risk with the Caesarean section operation, and to inform, advise or warn the claim after a Caesarean section operation of any complications or risk or treatment administered during the surgery.

Breach/Evidence

[32] The next consideration is whether the defendant b reached any of the duty care that may impose on each of them.

The International Conference on Population and Development of Cairo Declaration.

Under Chapter VII of the Programme Action adopted by a Declaration of Governments of the Cairo Conference in 1994 to which Jamaica was a participant, there is a comprehensive definition of reproductive health and related right. It is provided at:

> 7.2 "…. reproductive health therefore implies that people ….. have the capability to reproduce and the freedom to decide if, and when and how often to do so. Implicit in this last condition and the right of men and women to be informed and to have access to safe, effective and affordable methods of family planning of their choice as well as other methods of their choice for regulation of fertility which are not against the law ….."
>
> 7.3 " …. reproductive right embraces certain human rights that documents and other consensus documents. These rights rest on the recognition of a basic right of all couples and individuals to decide freely and responsibly, the number, spacing and timing of their children and to have the information and means to do so ….. ." It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents."

[33] This international instrument accepts that there is a duty of the state to inform every person about their reproductive care and health and about their fertility. It incorporates a person's decision on their reproductive health is a human right. Although this claim is one in private law i.e. the tort of negligence or trespass to the person (assault or battery) it does

relate to public law i.e. allege breach of the state of an individual's fundamental and human rights.

The Privy Council's decision in **The Minister of Home Affairs v Fisher** (1979) 44 W. I. R. 107, [1980] A.C. 319, 328 which has been followed in some cases in the Caribbean, held that a court ought to take into consideration obligations and rights accepted in international instrument when looking at domestic laws. The court can determine whether a right exist, ought to exist or the extent of any right by reference to international instrument.

[34] In my view it appears that acceptable international health practice are standard and consider it is proper that doctors and health providers have a duty to inform patients of all manner of their reproductive health care before and after treatment. This duty and right ought then to be part of our common law.

Breach/Evidence/Analysis

[35] The claimant's evidence in chief i.e. her witness statement is that she gave no consent for her for any form of tubal ligation at the time the doctors attending her was about to perform the Caesarean section operation on the 8th February, 1995. Further, she says that she was alert at the time and she refused the offer of such treatment by the doctors attending her. She says this was so as the anaesthetist did not administer full strength anaesthesia on her. (para. 4 -7).

Dr. Bennett, the senior doctor attending her, denied that the claimant could refuse any offer to consent to tubal ligation as the Caesarean section operation was done under general anaesthesia and the patient would be unconscious. She cannot say if the claimant was informed after the

Caesarean section delivery of her baby that a tubal ligation was done on her. Though she said this was the accepted practice of the hospital.

[36] The medical records available disclosed there was a nurse's note which read: "agree to have C/S with persuasion".
There is no further record that consent was given to by the claimant to any form of tubal ligation. Counsel Mr. Harrington McDermott submitted for the doctors that there was an emergency after the Caesarean section delivery and the signed authorization form of the claimant gave implied consent. He relied on the authority of **F v West Berkshire Health Authority** [1989] 2 ALL ER 548 at 548J.
Lord Bridge stated that:

> "it would be intolerable for members of the medical, nursing and other professions devoted to the care of the sick that, in caring for those lacking capacity to consent to treatment, they should be put in a dilemma that, if they administer the treatment which they believe is in the best interest, acting with due skill and care, they run the risk of being held guilty of trespass to the person, but if they withhold that treatment they could be in breach of a duty of care owed to the patient."

On this authority, Counsel is contending the unconstitutionality of the state of the claimant along with the authorization form gave rise to implied consent. It was an emergency and the doctors exercised due care and skill.

[37] The nurse's note supported the claimant's that she did not consent to any tubal ligation. The notes also support the evidence that she was not informed about any material risk of this Caesarean section operation. Her unchallenged evidence that the anaesthetist did not give her the full strength anaesthesia medicine means she should at least be conscious before the operation commenced and alert enough to refuse any offer to tie

or cut her tubes. I accept she was not informed about the tubal ligation. Dr. Bennett did not and could not rebut this evidence of the complainant. All she was able to do was to refer to the general practise to inform patients after surgery if any procedure was done as a result of complication. Dr. Bennett's evidence on essential matters of fact was in the realm of generalization of what is normal practice. To that extent, where there is any conflict between her evidence and claimant, I accept and prefer the claimant's evidence. So I hold that she did not inform the claimant post operatively of the tubal ligation performed on her. There was a breach of the duty of care to the claimant to inform her before and to inform her after, about any material risk attendant on the Caesarean section operation.

[38] The very defence of necessity arising from an emergency is indicative that the claimant did not consent and was not informed of any material risk of Caesarean section operation.

Was there an emergency?

[39] The relevant aspect of Dr. Bennett's evidence as to the necessity of tubal ligation is in para. 5 and 6 of her witness statement:

> 5. "During the claimant's Caesarean operation, there was excessive bleeding coming from the vessels and not from the local area where the baby was delivered ..... It could not be foreseen that the claimant would have bled to the extent that she did."
>
> 6. "After the baby was delivered, in an effort to the excessive bleeding and to prevent the patient from bleeding to death, the vessels surrounding the claimant's uterus was clamped. The result of clamping the vessels that was there to stop the bleeding would stop the blood flow to the fallopian tubes, which would otherwise eventually die and cause a lot of pain to the patient. It was therefore necessary to do the bilateral partial salpingectomy,

as this was the acceptable course to adopt in these circumstances."

Dr. Claire, a board certified obstetrician/gynaecologist whose medical report dated 11th March, 2011 was approved by the court as expert testimony, explained on medical records regarding this operation was sparse. When the doctor was cross-examined pursuant to on order of the court by video link, she did not describe any emergency. There was no record ofany haemorrhage or excessive bleeding or bleeding in the region of the fallopian tube any bruised ligament. Neither was it clear if there was any excessive blood loss.

[40] The type of record she expected to see of a surgey in the U.S.A. and Jamaica which she says has the same standard and practice would be:

(i) time dated notes
(ii) name of physical surgery
(iii) the anaesthesiologist
(v) the diagnosis
(vi) the procedure
(vii) the blood test
(viii) the details as to consent obtained
(ix) the details on the actual surgery
(x) patient's post operative condition
(xi) instruments used

Exhibit 5 which was patient's medical file did not disclose any emergency. There was a record of the blood loss of 500 cc, but in her opinion a blood loss of 500 cc to 1,000 cc was normal in a Caesarean section operation.

[41] Dr. Bennett admitted under cross-examination that the record below were her notes of the operation of the 8th February 1995:

"Operation - LSCS
Surgeon – G. Bennett and C. Watson (Assistant)
Anaesthetist – A. Curtis
Findings of Procedure: Pfoninstail incision; uterus term tubes ovaries. No apparent defect (N.A.D.) routine LSCS- live female – Apgar g. Routine closure uterus in 2 layers. Pelvis peritonoes closed. Bilateral salpingectomy done. Abdomen closed in layers EBL 400 cc."

The notes suggest that the C-Section operation was routine and there was no emergency. Dr. Claire's opinion would be soundly based. Dr. Bennett in cross-examination explained "NAP" means she saw no apparent defect of the fallopian tubes. Returning to Dr. Claire's evidence she says absent from her notes is any record of clamping of the uterine vessel or any "apparent" hamodynamic instability or orthostatic episodes to suggest anaemia or excessive blood loss.

[42] Dr. Claire agreed in cross-examination that the uterus could be injured during a C-Section operation and bleeding may result. However, the injury would not be to the extent that would necessitate the cutting of both tubes of the patient.
Further, she says the locale of the operation of the C-section is different from the locale of the uterus and fallopian tube.
The anatomical difference also meant that major blood vessel supplying the uterus was different to those supplying the fallopian tube. Again, Dr. Claire's opinion that there was no emergency that warrants a tubal ligation of the patient would be soundly based. The claimant would have discharged her duty to prove on a balance probability that the defendants did not act in accordance with the proper medical practice in treating her. The defendant failed also to adduce evidence that there was bleeding around the vessel to the uterus. I am unable to accept or rely on Dr. Bennett's explanation that

the fact that her record showed that a bilateral partial salpingectomy was performed meant there must be bleeding around the vessels of the tubes and uterus. Dr. Claire's evidence contradicted this. Dr. Bennett's explanation appears theoretical especially as she was the person who performed this procedure. Neither do I accept the defendant's explanation that inadequate medical records were kept of this operation due to being short staffed in Jamaica and the heavy work load of doctors. The medical notes need not be so elaborate but ought to report the vital medical facts.

[43] Without going into details of the technical description of tubal ligation versus bilateral partial salpingectomy, I accept Dr. Claire's opinion that the latter is a form of tubal ligation and the effect is to render the patient infertile. Similarly, I do not agree with Counsel Mr. Harrington McDermott's written submission that Dr. Claire's medical report is based on false or mis-appreciation of the difference between two medical procedure. Also, I do not agree with Dr. Bennett's opinion about the duty to keep records of treatment is based on the standard of that in the U.S.A. and not of that in Jamaica. Dr. Bennett's treatment of the claimant and vicariously the Spanish Town Hospital fell short of the standard of practice of a responsible body of medical opinion skill in the specialty of a gynaecologist and surgeon and health care provision. The treatment was not reasonable and rational. The complications of bleeding around the uterus could have been foreseen. Dr. Claire's evidence to this is possible. I do not infer this was not foreseen.

Damages – General Damages

[44] The principle to be applied to an award of monetary compensation to a claimant for injuries caused by a defendant for breach of duty of care i.e. the test of negligence is that the sum of money awarded should put the claimant as best as possible, in the position he or she would have been had it not

been for this injury. In other words, the victim should be placed in her status quo ante. This is contrasted with an award of damages in contract where the claimant is awarded a sum of money to compensate her for the loss she reasonably expected to have or anticipated. In other words, the claimant should be put in the position of her status quo past. The principle of damages in negligence was applied in the medical negligence case of **Tanya Clarke v Dr. Soe Win, Dr. Bennett, the Attorney General** suit C.L. 2000/C164, del. August 26, 2002, (per Campbell, J. page 8 para.3-4.) Counsel Ms. Dundeen Ferguson relied on this authority as basis of her claim for a quantum of general damages of $12, 699, 175.

[45] Mr. Harrington McDermott submitted the update general damages award of $9,191,246.00 in **Josina Jackson v Andre Rance** (Cl. Cd. 2000 J. 027 delt. Sept. 2, 2002 should be discounted to $2,750,000.00 as the proper damages for the claimant.

A claimant is entitled to damages for:

(a) all actual and prospective pain and suffering caused by the injury

(b) any mental illness arising from the injury

(c) medical treatment necessary for the injury and also;

(d) mental anguish

(See **Tanya Clarke**, supra., p. 8,9)

[46] The claimant's statement of claim dated 4th July, 2001 set out the particulars hereunder:

Particulars of Injury

1. scarring, resulting from the removal of potions of both tubes and blocking of tubes

2. inability to conceive children

Particulars of Special Damages

1. Costs of doctor's visit	US$8,000.00
2. Costs of x-ray	US$ 500.00
3. Costs of minor surgery	US$8,000.00
4. Costs of specialist	(to be supplied)
5. Costs of medication	(to be supplied)
6. Costs of hospital fees	(to be supplied)

[47] The particulars of damages were amended at trial on 7th January, 2013 to add cost of medical report US$1,092.50 and a round sum of US$15,825.10 for cost of treatment, doctors visits/surgical procedure.

[48] Then in the Counsel for the claimant's written closing submission of 1st March, 2013, she requested that the court enter judgment for the claimant for:

1. special damages in the sum of US$14,862.60 with interest at six percent (6%) per annum from 22nd February, 1995 to date of judgment
2. general damages in the sum of $12,669, 175.91 with interest of six percent (6%) per annum from 1st November, 2012 to the date of judgment
3. Future medical expense US$30,000.00 and
4. Costs

[49] The claimant's evidence is that she suffered pain when she had to do medical investigative test, particularly the dye test (i.e. in 1999), to find out why she could not get pregnant. She and her husband also experienced frustration and anxiety when they underwent fertility treatment when she was trying to get pregnant in 1995 (para.11-14 W.S.)
She had to consult a specialist in 1999 that performed the following procedure: a laparoscopy, a hysteroscopy as well as a hystero-salpingeram. This cost her US$3,000.00. After these procedures, she was advised that both her tubes were cut in a bilateral partial salpingectomy which was performed on her. She found out that this caused her to be infertile. This caused her mental anguish.

[50] She then started treatment for in vitro fertilization in 2001. She stopped and then recommenced in August 2008 to January 2009. She had to make several doctor's visit for this treatment. The treatment was painful and she and her husband continued to have anxiety.
During all her medical treatment and efforts to become pregnant from 1999 to 2009, her marital relationship with her husband was strained and she experienced emotional trauma. Her tubes were scarred also as a result of the tubal ligation.

[51] In my view, this claimant would be entitled to general damages covering her physical, emotional pain and suffering commencing from 1998, expenses incurred from for fertility treatment, for expenses for in vitro fertilization treatment, cost of test done, doctor's visit and medical procedure (special damages must be recovered). She is also entitled for loss of amenity where the enjoyment of life which she and her husband experienced was diminished due to the tubal ligation. She would be entitled

to damages also for the scarring of the tubes and infertility. The medical report was that her fertility was zero percent.

[52] In **Tanya Clarke's** case (supra Campbell, J.) awarded the claimant general damages of $4,125,000.00. The doctor/surgeon at the Spanish Town Hospital had performed surgery and removed her ovaries. He did this on the grounds that she had ovarian cysts. She was 19 years at the time and subsequently married her fiancé to whom she was engaged. She later migrated to Brooklyn, New York, U.S.A. She was left infertile from this operation. Her marital relationship with her husband suffered considerably. She developed psychological and psychiatric illnesses. She was experienced pre-mature ageing.

[53] The claimant in the instant case did not suffer the mental condition as **Tanya Clarke** but the loss of amenity was not so great. Her injuries were less severe. So the sum awarded in **Tanya Clarke's** case ought to be discounted in my view by thirty-three and one-third percent (33 1/3%).

[54] In **Josina Jackson's** case, the claimant who was involved in one accident suffered the following injuries:

(1) Severe abdominal injury, resulting in pain and perforation of her intestine leading to the possibility of life threatening peritonitis,

(2) Emergency laparotomy and incidental appendectomy

(3) Damages to the fallopian tubes

(4) Low chance of the plaintiff conceiving spontaneously

(5) Likelihood of the plaintiff becoming pregnant through intro vitro fertilization

(6) Unlikelihood that her fallopian tubes would function normally and it may require surgery to remove the fallopian tubes

(7) Increased risk of ectopic pregnancy

(8) Likelihood of suffering recurring bouts of disability abdominal pains

(9) Medical laparotomy scar

[55] These injuries are more serious than that of the instant claimant. However it does not arise that a seventy-five percent (75%) discount of this awards ($9,191,246 .00) of general damages would fairly reflect the claimant's award to the instant claimant's case. In my view **Tanya Clarke's** case is a better guide for general damages and discount of thirty-three and a third percent (33 1/3%) resulting in $8,000,000.00 is fair and reasonable for the claimant.

Special Damages

[56] Special damages is out of pocket expenses incurred by the claimant as a result of the defendant's wrong. The authorities is settled that the claimant has the duty to prove specifically the damages alleged.
The award of special damages that the claimant is entitled to in my view are:

(1) Expenses for fertility

(2) Expenses for in vitro fertilization treatment

(3) Pre-natal ante-natal expense

(4) Costs of diagnostic tests

(5) Costs of doctors' visits

(6) Costs of medical procedure underwent i.e. surgery

[57] The question of damages charged on proof by receipts and or payments on invoice. Once again I do not agree that the court should discount the claimant's cost for pre-natal care as submitted Counsel Mr. Harrington McDermott. This is a medical cost that arises particularly as a result of the nature of the injury the claimant sustained.

[58] Counsel submitted that the claimant has only proved US$6,967.50 in special damages. The sums representing receipts for payment or doctors' visits after the claimant got payment for in vitro fertilization are permissible (i.e. Ex. 1C. 1E. IF and 1G). This totalled US$622.30. To this must be added the US$3,000.00 for the laparoscopy.

[59] I accept the claimant has proved her claim for special damages: (1) US$13,670.10 for cost of medical treatment, doctors' visit and surgical care procedure and (2) US$1,197.50. In my view the fact she made co-payment under insurance policy do not affect the proof of special damages. This benefit of an insurance should go to the claimant who bears the cost of such insurance.

Future Medical Expense

[60] The claimant testified that she and her husband would like to have another child. She has not passed child bearing age. The experience of having her fifth child showed that she has a relative chance of having another.

The cost of future expenses that the claimant may incur can only be an estimate based on the expenses she has proved cost her to conceive and give birth to the fifth child. This means that if her medical condition is confirmed, it would not be necessary for her to incur cost in fertility test treatment and cost for surgery to diagnose her. These costs would

necessarily have to be deducted from future costs to have another child bearing in mind her present age is US$10,000.00 and not US$30,000.00 as the claimant pleaded. She did testify in evidence–in-chief that the doctors' advised her in 1999 that it would cost her US$10,000.00 to attempt to reverse the tubal ligation. In any event, the cost of the invitro fertilization was US$8,000,00 in 2009. So an adjustment to US$10,000.00 in 2013 would be reasonable.

I believe that this award for future medical expenses in line with the reasoning of Cooke JA when **Tanya Clarke's case** went on appeal in the **Attorney General v Tanya Clarke**, SSCA Nos. 109 2002 del. December 20, 2004.

[61] It is my view also that a patient's right to be informed before and after treatment of any material risk related to that treatment cannot be effectively exercised without those responsible for such treatment providing and maintaining an adequate record of such treatment. In other words, there is a duty on the hospital and the medical staff it engages to keep and maintain an adequate record of patient care.

[62] In the circumstances judgment for the claimant against the 1st, 2nd, 3rd, 5th and 6th Defendants.

[63] The Award of Damages is as follows:

(1)	General Damages	J$8,000,000.00
	Pain and suffering/Loss of amenities Interest at three percent (3%) for the 22nd November, 2002 to date of judgment	
	Special Damages	US$ 14,862.60
	Interest at three percent (3%) from	

8th February, 1995 to date of judgment

Costs to the claimant to be agreed or taxed