

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

Claim No. CV 1693 of 2006

BETWEEN:

BEVERLEY LASHLEY

CLAIMANT

AND

QUEEN ELIZABETH HOSPITAL

FIRST DEFENDANT

DR. MCINTYRE

SECOND DEFENDANT

DR. KELLMAN

THIRD DEFENDANT

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2020 January 10

Mr. Arthur E. Holder for the Claimant

Mr. Ivan H. Walters for the Defendants

DECISION

INTRODUCTION

[1] In this matter, the claimant by writ of summons filed on the 21st day of September 2006 is claiming damages for negligence arising out of the complications after a total abdominal hysterectomy and a bilateral salpingo-

oophorectomy were performed. The defendants have accepted liability. The only issue before the court is the assessment of damages.

FACTUAL BACKGROUND

- [2] The first defendant, the Queen Elizabeth Hospital Board is a corporate body established by Act of Parliament which, among other things, provide specialist medical services. The second and third defendants are medical practitioners who at the material times were employed or engaged by the first defendant.
- [3] The evidence in this case was provided mainly by the claimant and consisted of an affidavit filed on 25 July 2017 and a witness statement filed on 5 September 2011 pursuant to an order of the court. The second defendant did provide a witness statement but he did not perform the surgery. In fact there were two operations carried out, the first on 13 October 2003 and the second on 19 November 2019.
- [4] The first surgery was performed by the third defendant and the second (which was undertaken to repair a fistula in the bladder) was carried out by urologist, Dr. Jeevagan.
- [5] The defendants although having filed defences to the claim filed by the claimant did not give any sworn testimony either oral or written.

- [6] It must, therefore, be presumed that the acceptance of liability by the defendants is an acceptance of the evidence presented by the claimant, including the two medical reports in support of the claim submitted by the claimant. It is, therefore, on the basis of the expert reports and the evidence tendered by the claimant that the court will be guided in its assessment of damages.
- [7] At the time of the first surgery, which was performed by the third defendant on 13 October 2003, the claimant was 38 years old. During the surgery the claimant sustained injury to her bladder which resulted in urinary incontinence, among other things.
- [8] The claimant saw Dr. L. Eltora Bennett who, inter alia, noted that the patient appeared not to be adequately counselled with respect to the risk and possible complications of the surgery.
- [9] As a result of the surgery, the claimant had what was described as “a disfiguring midline supra-umbilical scar”. Dr. Bennett suggests that a vertical incision was used at the second surgery and this was questionable.
- [10] Dr. Bennett also mentioned that the patient was discharged from the out-patient clinic prior to the satisfactory resolution of her symptoms.

- [11] The claimant filed a witness statement on 5 September 2011 and an affidavit on 25 July 2017 in which, among other things, she alleged that subsequent to her surgery of 13 October 2003 she started to get “really sick” and would vomit and suffer from diarrhea which both left her physically weak. Additionally, she would involuntarily release bodily fluids and had to sleep with a towel between her legs.
- [12] With the use of antibiotics the claimant appeared to get better and was released from the hospital.
- [13] However, soon after returning home the claimant suffered further urinary incontinence. The situation deteriorated to such an extent that she was required to return to the hospital on 28 October 2003.
- [14] On 29 October 2003 the claimant was given a catheter because she could not control her urine.
- [15] In her witness statement the claimant identified a permanent scar extending from her navel to her vagina.
- [16] She also complained of inability to lift objects and pain in the area of the bladder. As a result, she alleged that she had to receive domestic assistance from her sister.

[17] The claimant says that prior to the incident she worked as a housekeeper for six days per week at the rate of \$50 or \$60 per day. However, for 116 days commencing with her admittance to the hospital, the claimant says she was unable to work because of the surgery and its complications.

[18] Dr. Bennett made the following observations in her medical report:

- “1. *Patient appears not to have been adequately counseled/advised re risk and possible complications of surgery.*
2. *The need for hysterectomy is unclear since the uterus was not reported to be enlarged and there was no uterine pathology.*
3. *She felt she was badly treated on re-admission, prior to being diagnosed with fistula:*
 - *doctor dismissive*
 - *developed a rash and itching (believes it was due to medication or bed linen)*
4. *Patient reports that original gynaecologist did not explain the complication, how it came about or the proposed corrective course of management.*

She is satisfied that the urologist did explain the proposed procedure BUT after surgery he allegedly told her that there had been “a big hole in the bladder”.
5. *Patient saw the consultant gynaecologist (Dr. Garth McIntyre) pre operatively and was made to believe that he was doing the surgery but she discovered*

subsequently that the gynaecological surgery had been done by Dr. Kellman. Post operatively she had minimal contact with Dr. McIntyre.

6. *Why was a midline vertical incision used in second surgery? It is more disfiguring and carries a higher degree of morbidity (greater pain, longer healing time, more prone to adhesion formation).*

7. *At initial surgery both ovaries were removed which could have been plunged patient into immediate menopause.*

She was started on hormonal replacement therapy but she discontinued the medication because it made her feel ill.

She is self-medicating with Evening Primrose Oil and cranberry.

Patient's discharge from the general outpatient department might have been a bit premature with no definite plan in place to monitor her hormonal status and her progress.

(Her current symptoms might be improved with adequate hormone replacement)

8. *When seen now, patient had a disfiguring midline supra-umbilical scar but non-tender and there is no sign of urinary incontinence.*

I am unsure as to the need for supra-umbilical vertical incision.

Her pelvis is somewhat tender on vaginal examination but no masses palpated.

9. *Patient discharged from general outpatient department to polyclinic or private doctor with no definitive plan for continued care or follow up. (e.g. monitor of hormone status post surgical castration).*

She was not made aware of a route back to general outpatient department or gynaecologist in the event that complications developed.

10. *Patient's perception of persisting consequences of complications:*

- i) *She tires easily. Unlikely to be directly related to the surgery at this time. A haemoglobin check was 13.9mg/dl.*

Maybe more likely related to inadequate hormone replacement.

- ii) *Sexual activity is painful – probably due to scarring and adhesions from surgery.*

- iii) *Gets bladder spasms – relieved by cranberry juice.*

Spasms could be result of nerve damage as a result of surgeries but its response to cranberry suggest a psychological component.

Needs counseling re bladder training.

May benefit from medication to decrease spasms/pain.

- iv) *Tends to get a lot of abdominal pain which she attributes to the surgery.*

- v) *She has successfully returned to work and normal general function.”*

[19] The claimant was also seen by Dr. Ermine Belle, Senior Consultant Psychiatrist, on 11 May 2013; 6 July 2013 and 3 August 2013.

[20] Dr. Belle prepared a medical report in which she diagnosed the claimant to be suffering from “Post Traumatic Stress Disorder”.

[21] Some of the problems that the claimant was having subsequent to the surgeries were detailed in the report. Dr. Belle wrote:

“Following the surgical intervention she was hospitalized for a further two months approximately. Her after care was difficult as a part of her incision was slow to heal. She had to return to the hospital on a daily basis for dressings. At that time she was still catheterized and had to walk with an attached urine bag.

Ms. Lashley advised that at this time she started to feel really badly about herself. She found that any problems she had had in her life previously started to resurface.

Ms. Lashley itemized other problems that she has been having as a result of the surgical intervention and its complications.

For some time she was unable to work and had had to access Welfare. This to her was humiliating as she likes to work for herself and up until then had always done so.

Physical examinations by doctors were very painful so she started to avoid going back to the Doctor.

Ms. Lashley has since 2003 had to anticipate when she needs to empty her bladder as there is excruciating pain when her bladder is distended to a certain point.

She is unable to enjoy any sexual encounter because of the pain. She has gone into menopause at what is considered an early stage. She attempted estrogen replacement but there were difficulties with this.

The patient stated that she has difficulty going to the Queen Elizabeth Hospital. She has a fear of the doctor who works at the Queen Elizabeth Hospital. She even experienced fear and apprehension when her sister was hospitalized. She had flashbacks when she attempted to visit her. Ms. Lashley does not attempt to visit other friends and family members. This fear can extend outside of the Hospital. She was even timid and uncertain about coming to this clinic to see me.

Ms. Lashley has difficulty with her body image as well. She experiences feelings of despair and also experiences flashbacks involving her periods of hospitalization. She continues to be upset about the persistent flashbacks. She also advised that she hears her own voice in her head questioning what she has or has not done.

Ms. Lashley was, based on interview and mental status examination, diagnosed as a case of moderate Post Traumatic Stress Disorder.”

- [22] The failure of the defendants to provide any evidence (other than a witness statement of Dr. McIntyre who did not perform any of the surgeries) nor cross-examine the claimant on her evidence has made it difficult for the court in arriving at an assessment of damages.
- [23] In this regard, I must emphasize that submissions of counsel are not a substitute for oral or written evidence.

[24] In making a determination of the assessment of damages, the court has considered that the defendants informed the court that they have accepted liability. Having not provided any substantial evidence the court has come to the conclusion that it must accept the case of the claimant as pleaded and as supported by the evidence provided by the claimant.

[25] Based on the pleadings and evidence it is my view that the claimant is entitled to claim compensation for:

(1) The vesicovaginal fistula that was caused by the surgery of 13 October 2003.

(2) The moderate post traumatic stress disorder identified by Dr. Belle. This was in part due to a failure to properly prepare the claimant for the risks associated with surgery and a failure of both pre-operative and post-operative counselling by the defendants.

[26] Although Dr. Bennett did point to a lack of clarity concerning the need for a hysterectomy, the pleadings indicate that the claimant had agreed to have this surgery.

[27] This decision, therefore, is based on a determination that the injury to the bladder was caused by the negligence of the defendants, though there is

acceptance of the view that previous surgeries would have heightened the possibility that the type of complications that occurred were possible.

[28] I also accept Dr. Belle's assessment that there was psychiatric injury in the form of *'post traumatic stress disorder'*.

[29] Counsel for the claimant referred the court to a number of cases.

[30] Only two of the cases cited, in my opinion, bore reasonable comparison to the instant case. I refer to **George v Tower Hamlets Kemp & Kemp paragraph K10-002** and **Hooper v Young** found at **paragraph K10-005 of Kemp & Kemp**.

[31] In **George v Tower Hamlets**, the claimant underwent a total abdominal hysterectomy. Twelve days subsequent to the operation the claimant became incontinent and a vesicovaginal fistula was confirmed at cystoscopy.

[32] Three weeks after the operation a successful repair surgery was performed but the claimant was left with gross urge and stress incontinence. After further procedures there was still stress and urge incontinence. The final prognosis was that there would be no further improvement in remaining urinary symptoms and she would continue to wear incontinence pads. She would also continue to suffer a drain of energy and would have a poor sleep pattern and repression of sexual functions. The claimant was determined to

have suffered a depressive syndrome. The psychiatric prognosis was that the conclusion of proceedings would assist the claimant's recovery with an improvement of her mental state in the region of 30 percent, but it would take at least two years before she regained an adequate measure of self-confidence to allow a normal range of activities and normal lifestyle.

[33] The claimant was awarded the sum of £30,000.00 for pain and suffering and loss of amenities.

[34] In **Harper v Young Kemp & Kemp** paragraph **K10-005** the facts as recorded were as follows:

“The claimant had a hysterectomy on July 16, 1990. The left ureter was negligently obstructed. For the next nine days she suffered severe pain and distress with severe and constant vomiting. The obstructed ureter was diagnosed on July 24 and a remedial operation, cystoscopy, was carried out. It involved an endoscopic retrograde pyelography and unilateral re-implantation of her left ureter. The wound was closed with a drain and the bladder catheterized. After the remedial operation, she suffered severe depression.”

[35] The claimant was awarded the sum of £17,500.00 for pain and suffering and loss of amenity.

[36] At today's values the amount awarded for pain and suffering would be about Bds\$190,000.00 for **George v Tower Hamlets** and Bds\$115,000.00 for **Harper v Young**.

[37] Another case that I have found useful is the Irish case of **Cynthia Kinsella v Rafferty [2012] IEHC 529** (7 December 2012). In that case the claimant was awarded the equivalent of approximately £80,000.00 for pain and suffering against an obstetrician for negligence in the carrying out of a hysterectomy. At today's values this award would be in the range of Bds\$300,000.00.

The claimant sued consultant obstetrician and gynaecologist, Dr. Rafferty over the operation he carried out on 7 April 2008.

She required the hysterectomy because she suffered from the heavy menstrual bleeding condition, menorrhagia.

Three weeks after the surgery, her bladder began leaking – known medically as a fistula – causing her great distress. In July, she underwent another operation to repair the problem which was carried out by another doctor, assisted by Dr. Rafferty.

Oneill J found that the probable cause of the fistula was a misplaced suture into the bladder by Dr. Rafferty. The judge found that her capacity for work

had been significantly diminished and she would have “absolutely no chance” of getting a new job. A significant element of the award for pain and suffering was “the anxiety disorder” which was a consequence of the fistula and the need for a second surgery to correct this complication.

[38] Counsel for the claimant, Mr. Arthur Holder, is seeking a global award of \$800,000.00 for the claimant’s physical injuries and moderate post traumatic stress disorder.

[39] Mr. Holder referred to the Judicial Studies Board Guidelines for injuries to the female reproductive system. Mr. Walters for the defendants, pointed out that no consideration should be given to the claimant’s reproductive system since the basis of the claimant’s claim was the injury to her bladder and not the initial surgery, where a total abdominal hysterectomy and bilateral salpingo-oophorectomy were performed.

[40] With regard to the substantive injury to the claimant’s bladder, Mr. Holder referred the court to the judicial Studies Board Guidelines for bladder injuries which resulted in serious impairment of control with some pain and incontinence. Mr. Walters noted that according to the Judicial Studies Board Guidelines where there has been almost complete recovery but some fairly long-term interference with the natural functions of the bladder, the quantum

is \$62,300 to \$83,000. He then submitted that an award of \$30,000 would be reasonable.

[41] While the sum of \$800,000.00 seems inordinately high, the sum being offered by Mr. Walters is also too low and not consistent with the authorities and clearly has not taken into account the traumatic stress disorder and the scarring resulting from the surgeries.

[42] In assessing damages for pain and suffering I am mindful of the sage advice found in the words of Lord Carswell who in delivering the judgment for the Privy Council in the **Seepersaud v Persad et al (2004) 64 WIR 378** at 385 said:

“The board entertains some reservation about the usefulness of resort to damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded in modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons can do no more than demonstrate a trend in very rough and general terms”.

[43] Having regard to the fact that the claimant had undergone surgeries in the past, documented in Dr. Bennett’s report: namely, a caesarian section in 1986 and bilateral tubal ligation in 1997, it would have made it more likely

that the complications from the surgery could have occurred. I have also considered the fact that the claimant also was complaining of pelvic pain and painful sexual intercourse prior to the surgery.

[44] Also of significance is that the claimant was able to resume work two years post surgery.

[45] The above factors take the claimant's case outside of the other cases considered.

[46] The court, however, accepts that there are some urinary problems probably caused moreso by stress and anxiety than the second surgery which appeared to be successful at repairing the fistula. The court accepts as well the diagnosis of moderate post traumatic stress disorder, and I have also paid attention to the disfiguring scar.

[47] In all the circumstances, I have formed the view that the sum of Bds\$180,000.00 is a fair sum for the pain and suffering and loss of amenities. This sum recognizes the aggravating factors in the form of scarring and the psychiatric injury of moderate post traumatic stress disorder.

CLAIM FOR PAST LOSS OF EARNINGS

[48] Mr. Holder claims the sum of \$34,000.00 for past loss of earnings on the basis that the claimant did private work at the rate of \$60.00 per day for days per week.

[49] Mr. Holder claims that the claimant was unable to work as a private housekeeper and pursue other domestic working opportunities for a period of approximately two years. Mr. Walters for the defendant submits that the claimant failed to provide evidence of the nature of the work performed, her usual earnings, and that she was granted certified sick leave.

[50] I accept that more than likely the claimant would have worked as a maid or housekeeper sometime in the past but I am dissatisfied with the evidence provided. Past loss of earnings is a head of special damages. Special damages should be pleaded and proved by evidence. In this case there is no pleading nor proof.

[51] The injury in the short term made it impossible for the claimant to work, and going forward, her ability to lift heavy objects and her general enthusiasm and zest would have been diminished. However, having carefully considered this matter and bearing in mind the absence of pleading and

evidence, I have disallowed the claim under this head. For similar reasons I also disallow the claim for travel expenses.

CLAIM FOR PAST LOSS OF FAIMLY LIFE

[52] Mr. Holder claims \$73,193.75 under the head of past loss of family life. He alleges that the claimant's relationship with her longstanding partner ended because sexual intercourse had become painful and unpleasant. Having regard to the fact that prior to the surgeries the claimant was complaining of pelvic pain and painful sexual intercourse, it was necessary for the claimant to show that her complaint was as a result of the bladder injury. No evidence was provided. I agree with counsel for the defendant that the claim under this head should be refused.

CLAIM FOR FUTURE MEDICAL EXPENSES

[53] Mr. Holder makes a claim for future medical expenses of \$30,714.00, but as Mr. Walters observes, the medications relate to the hysterectomy to which she had consented. The claim under this head is, therefore, disallowed.

CLAIM FOR PAST DOMESTIC AND GRATUITOUS ASSISTANCE

[54] Mr. Holder claims the sum of \$19,240.00 under this head. The claimant says that she received help with domestic chores from her son and her sister. The amount is claimed at \$40.00 per day for just over two years. Mr. Walters objects. I agree that more evidence could have been provided. However, given the persistence of the post traumatic stress disorder, the effects of the claimant's injury would have persisted for a considerable time. For this reason, I will allow the sum claimed under this head.

[55] All other heads of claim are disallowed except for Special Damages for which the claim for medical expenses and disbursements of \$5,750.00 is allowed.

DISPOSAL

[56] In summary, I order the defendants to pay the claimant:

General Damages

Pain, suffering and loss of amenities	\$180,000.00
Domestic and Gratuitous Assistance	\$19,240.00

Special Damages

Medical Expenses and Disbursements	\$5,750.00
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[57] Special damages shall bear interest at the rate of 4% per annum from the date of filing the writ until today and both special and general damages shall bear interest at 6% per annum from today until payment.

[58] The claimant shall have her costs assessed if not agreed.

Cecil N McCarthy
Judge of the High Court