

IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL JURISDICTION

CIVIL ACTION NO.: 58 OF 2001



BETWEEN:

SHAMIMA BANO f/n Rustam Shah

PLAINTIFF

AND:

1. **DR LAISENIA TALENAWESI**
2. **ATTORNEY-GENERAL OF FIJI**

DEFENDANTS

Mr. Sarju Prasad - **Counsel for the Plaintiff**
Ms M. Rakuita with
Mr. A. Tuilevuka - **Counsels for the Defendants**

JUDGMENT

On 19th January 2001, the plaintiff showed signs of an incomplete abortion and was admitted to Labasa Hospital for evacuation of the uterus or what is commonly called a DNC operation. In cases of DNC a patient is normally discharged the next day. This was not to be in this case. During the course of DNC, a perforation was caused to the uterus and a portion of small intestine had been pulled through the uterus down through cervix into the vagina. An exploratory operation (Laparotomy) was conducted and the uterus was sutured, 8 inches of the bowel excised and ends of the intestine stitched.

The defendants admit liability for the perforation of the uterus and excision of 8 inches of the small intestine. However the plaintiff alleged that as a result of the initial negligence she suffered following consequential problems: firstly, she has developed dyspareunia which is a pain suffered during sexual intercourse resulting in her failing to provide conjugal rights to her husband; secondly, that she has developed chronic constipation after the operation as a result of shortening of the intestine and thirdly, that she had to undergo tubal ligation as a result of weakening of her uterus due to perforation. This last item was not pleaded but there is reference to tubal ligation in the minutes of pre-trial conference. The defendants deny causation and say that the injury to the uterus and its subsequent suturing **or** excision of the 8 inches of the bowel could not have resulted in dyspareunia, constipation or called for tubal ligation.

CAUSATION:

I shall look at the issue of causation first. Regarding this, evidence was given by the plaintiff and PW3 Doctor Bhartiya Devi Ram and plaintiffs husband PW4 Mohammed Intaz. The plaintiff told the court that after the operation she had difficulty going to the toilet and she felt anxious and uncomfortable and that sex with her husband caused her great pain something from which she did not suffer before the operation. She said she visited hospital regarding the constipation and she was given tablets, enema was administered which was painful experience and she was advised to eat high fibre foods. She also told the court that she wanted more children but she was advised by the doctors that in view of the damage to her uterus, there was risk to her life or to that of the baby if she gave birth. She was advised to have what she called a **"baby operation"**. She says the baby operation was the result of the first operation.

Her evidence is supported by that of her husband PW4 Mohammed Intaz **who** said his wife had difficulty passing toilet and that she feels severe pain during sex and that on advice of doctors tubal ligation was done even though they wanted more children.

The plaintiff also called Doctor Bhartiya Devi Ram, a medical practitioner who prepared a report dated 17th November 2004 being plaintiffs exhibit 2. She had examined the plaintiff on 17th November 2004. She conducted a vaginal, pelvic and rectal examination of the plaintiff. She had gone through the medical folder of the plaintiff. She said that the plaintiff was depressed and could not handle her daily affairs. She said that pelvic inflammatory disease could have been caused by spillage of bacteria into the pelvis through the perforation in the uterus. She concluded that deep pelvic pain was due to possible scar tissue adhesions from previous operation and constipation was due to damage to bowel. She considered that dyspareunia was the result of the operation. Doctor Bhartiya Ram is a general practitioner and not a gynaecologist or a surgeon.

The defendants called three witnesses. The first was PW1 Doctor Esala Nainoca a consultant in Obstetrics and Gynaecology for past 10 years. His first contact with the plaintiff was soon after the DNC procedure went wrong. He had with the first defendant sutured the perforation of the uterus. He said the size of the hole in the uterus would not have posed any risk to future pregnancy as the hole was one to two centimetres when compared to ten to twelve centimeters incisions on wall of uterus in Caesarean sections. He disagreed with Doctor Ram that pelvic pain could be caused by this operation as there was no cutting in the pelvic area but above it. He said surgery on the bowel should not cause pain in the cervix. He considered that such operation should not result in dyspareunia.

The next witness was DW2 Doctor Bhusan Ogale who had practiced medicine in India and was also an associate Professor of Surgery. He saw the folder of the plaintiff and knew that 8 inches of the plaintiffs intestine had been excised. He said if intestine is cut and ends joined, then it is possible for joint to get narrowed and it can give pain and give rise to constipation if digested and undigested food cannot effectively pass through the narrowed joint.

He examined the plaintiff and found no evidence of incisional hernia due to the operation. He found tenderness on left side of abdomen. He found the

rectum empty which he said was unusual in case of a patient who complained of constipation. He further conducted a barium test. He brought with him to court radiological films. Based on this test, he found no stricture at the point of surgery. Based on the barium test and radiological films he concluded that the barium had passed through the small intestine to the large intestine within 2 hours and 30 minutes. He further said that if constipation had lasted four years after surgery, the plaintiff would be in very serious condition and suffer serious weight loss.

Thirdly, the defendants called Doctor Jayanti Regi who qualified with MBBS in 1972 and who is a consultant in Gynaecology & Obstetrics at Labasa Hospital. She examined the plaintiff on 20th July 2004. She found that the plaintiff suffered from tenderness of the cervix and lateral side of abdomen. She diagnosed it as pelvic inflammatory disease (PID) which is a disease not associated with pregnancy or inside abdomen operation. In 99 percent of the cases it is an ascending infection from vagina upwards. PID she said could give pain during sex. She said adhesions after operations should not last more than 4 to 6 weeks after operation. She said one can have pregnancy despite perforation of uterus.

The plaintiff alleged in her evidence that she had to go through tubal ligation as a result of the first operation and on advice of doctors. There is no mention of tubal ligation in the statement of claim. A party is bound by his/her pleadings which define the parameters of the claim. She cannot at trial without seeking amendment attempt to expand or add to her claim. This portion of claim appears to be an afterthought. However, I shall deal with the matter. The tubal ligation was done in August 2001. I do not believe the plaintiff that she went through tubal ligation as a result of advice of doctors at Labasa Hospital. Her own witness Doctor Bhartiya Devi Ram is silent on this aspect whether the perforation on uterus would result in her inability to have children. Doctor Nainoca who is a consultant gynaecologist and who had seen the size of the perforation concluded that it would not have posed absolute risk to a future baby. He compared the size of this perforation to substantively larger perforations in Caesarean operations and there advice of risks is given after three such deliveries. Doctor Regi another consultant gynaecologist supported conclusions of Dr Nainoca. Doctor Nainoca

was a frank witness who had no hesitation in admitting that the initial operation had gone wrong and the plaintiff faced difficult post operation recovery. He had assisted in repairing the damaged uterus. He had first hand knowledge of what had gone wrong and size of perforation. He is highly qualified in gynaecological matters compared to PW3 Dr Bhartiya Ram.

I conclude that the doctors at Labasa Hospital had no reason to suggest to plaintiff to go through tubal ligation nor did they.

The next issue is of dyspareunia. Doctor Bhartiya Devi Ram put plaintiffs difficulty in having sex to scar tissue and that PID could have been caused by spillage. Doctor Nainoca had ruled out deep pelvic pain alluded to in Doctor Bhartiya Ram's report as there was no cutting in the pelvic region itself. The area operated upon is removed from the pelvic region. Dr. Ogale said the plaintiff suffered from no incisional hernia as he found the scar on her abdomen healthy. He had examined plaintiffs abdomen. Hence he ruled out possibility of any pain due to incisional hernia or post-operative complication. Doctor Jayant Regi who is quite an experienced doctor in the field of gynaecology was more direct. She diagnosed the plaintiffs problem to PID which is an infection of upper genital gland which cannot be due to any inside abdomen operation. She said PID can give pain during sex and the plaintiff had severe PID. She commented that Assessment in Doctor Bhartiya Ram's report is flawed because she had not ruled out PID and she also said that post operation adhesions would not last more than 4 to 6 weeks. I prefer the evidence tendered on behalf of the defendants by two gynaecologists who are both consultants to that of the plaintiff. Doctor Bhartiya Ram's logic was simply because problem arose after the operation, it was due to it is untenable in light of reasoned explanation by Doctors Nainoca and Regi.

The last issue is one of spastic colon or chronic constipation. The medical folder does reveal that the plaintiff had been in hospital for complaints of constipation. The issue is whether it was due to the operation or some other factors. Doctor Bhartiya Ram PW3 in her report concluded **"damage to bowel**

resulting in slower transit time of residue thus constipation with difficulty in passing stools".

She did not tell what is the normal transit time of stool. Doctor Ogale said that food should pass from stomach to small intestine in six hours. Once it comes to small intestine, it has a variable time to reach large intestine. The variable time is from minutes to a day. Doctor Ram's conclusions are based on history related by plaintiff, abdomen examination and examination of rectum. Doctor Ogale gave factors which can cause constipation like generic factor, stress, food intake, work style. He concluded if the plaintiff had suffered constipation for such a length of time of roughly five years, she would suffer severe weight loss. However, when one looks at Dr Bhartiya Ram's report it says "***slightly overweight for height***". Dr Ogale also said that in case of constipated patients, the rectum would be loaded with stool. The plaintiff's rectum was empty of stool. Plaintiff's own doctor also found "***rectum empty of stool***".

Doctor Bhartiya Ram's conclusion was effectively buried by the barium tests which is done under fluoroscopic vision and conducted by Doctor Ogale. The transit time according to Dr Ogale was two and half hours. Therefore within two and half hours food both digested and residue would go past the point where the intestine had been cut and joined. I found Doctor Ogale's evidence to be credible and convincing. He was obviously a person in command of his area of expertise. Given the nature of evidence, I very much doubt that the plaintiff is suffering from constipation. I conclude that the operation on the small intestine did not cause constipation as alleged.

My impression of the plaintiff was that she did suffer some pain at the initial stages but she tried to exaggerate her claim by suggesting continued complications.

Accordingly I find that there were no long-term adverse effect on the plaintiff from the initial negligence of the first defendant. However, I also find that what was routine DNC operation and which would have meant hospitalization for

7

a day or two resulted in plaintiff being in hospital for twenty two days from 19th January to 9th February. It resulted in an exploratory operation, sutures to rectify the perforation of the uterus and excising and subsequent stitching of the intestine. She must have gone through some very anxious moments and suffered great pain. The pain and anxiety and discomfort would not have ended the day she was discharged but continued for some months to come, at least for five to six months. She did attend a number of follow up clinical reviews as shown in agreed facts. She was a married woman who had two young children aged 12 and 13 years and naturally she would be concerned about them and missed them. She also told the court that she played volleyball. Given the nature of the surgical operations done on her, I consider that she would be handicapped in going about her usual duties and conducting her daily affairs for a period of six months. With these observations in mind, I now proceed to deal with the issue of damages. I have noted sums suggested by the plaintiff in her submissions.

SPECIAL DAMAGES:

Travel - The plaintiff has claimed hospital expenses and travelling charges. She had to stay twenty extra days in hospital. This would have resulted in her family coming to see her. She says taxi fare was \$5.00 each way that is \$10.00 return. I am quite familiar with Labasa and I find this a reasonable fare. She says at times his family came to visit her three times in a day. I consider \$300.00 which she claimed as reasonable for travelling.

Loss of Wages - The plaintiff says and I believe her that she worked as a housegiri for Krishna Prakash (PW2) for \$40.00 per week. Krishna Prakash supports her version. He is an independent witness. I have already said the unnecessary surgical operations would have handicapped her for six months so I allow her loss of wages for 6 months that is 26 x \$40.00 or \$1040.00. At the same time she said she had to engage a housegiri herself and pay her \$30.00 per week. Zubeda Khatoon (PW5) confirmed she worked as housegiri and got paid \$30.00 per week. She said she still works as a housegiri for the plaintiffs family. However in view of my earlier remarks I allow expenses for housegiri for 6 months or 26 weeks that is 26 x 30 or \$780.00.

Damages for pain suffering and loss of amenities - Generally an award under this head is not capable of being calculated with mathematical accuracy or by some fixed daily rate. The purpose of the award is to compensate the plaintiff not to punish the defendants. Exemplary damages have not been claimed. Previous awards are looked at for the purpose of maintaining consistency in awards but at the end of the day compensation is awarded on the basis of the particular claimant and the particular circumstances of the individual case before the court. A fair and reasonable award must be made for the peculiar circumstances before the court - Attorney-General of Fiji v. Vimal Govind v. Aliana Kotoiwasawasa & Another - FCA 47 of 2003.

Nivnesh Neil Singh v. Attorney-General - HBC 26 of 1995 involved a child aged 13 years. The doctors had failed to correctly diagnose and treat the plaintiff for acute appendicitis resulting in the plaintiff suffering from infection in the form of septicemia and pneumonia which required further surgery in New Zealand and hospitalization for 89 days. Justice Byrne awarded \$60,000.00 for pain and suffering.

In Amina Shah v. Nalini Naravan & the Attorney-General - HBC 98 of 1994 (Lautoka) Justice Gates awarded \$40,000.00 for pain and suffering where a needle had been abandoned in the plaintiff's body after an operation and she suffered for roughly 15 years.

Considering the circumstances of this case I am of the view that a sum of \$25,000 for pain and suffering as fair and just.

Interest - Interest was also pleaded. The plaintiff is entitled to interest. I award interest at the rate of 6% per annum from the date of filing of the writ (04/10/01) to present.