

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Action No. HBC 274 of 2014**

**BETWEEN**

**JAI NARAYAN** of Lot 36 Omkar Road, Nasinu, Unemployed.

**FIRST PLAINTIFF**

**AND**

**NIRMALA WATI** of Lot 36 Omkar Road, Nasinu, Domestic Duties.

**SECOND PLAINTIFF**

**AND**

**THE MEDICAL SUPERINTENDENT, COLONIAL WAR MEMORIAL**  
**HOSPITAL** of Waimanu Road, Suva, Fiji.

**FIRST DEFENDANT**

AND

**THE PERMANENT SECRETARY, MINISTRY OF HEALTH,**

Dinem House, 88 Amy Street, Toorak, Suva, Fiji.

**SECOND DEFENDANT**

AND

**THE ATTORNEY GENERAL OF FIJI** Suvavou House, Victoria Parade,

Suva, Fiji.

**THIRD DEFENDANT**

<b>Counsel</b>	:	Ms. L. Gounder for the Plaintiffs Ms. M. Lee with Mr. V. Chauhan for the Defendants
<b>Dates of Hearing</b>	:	07 <sup>th</sup> and 8 <sup>th</sup> November, 2017
<b>Date of Judgment</b>	:	29 <sup>th</sup> January, 2018

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## JUDGMENT

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- [1] The plaintiffs instituted these proceedings claiming damages for pain and suffering and for loss of amenities suffered by them due to the negligence of the staff of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
- [2] The 3<sup>rd</sup> defendant has been joined pursuant to the State Proceedings Act 1951.
- [3] It is averred in the statement of claim that the 1<sup>st</sup> plaintiff was admitted to the CWM hospital on 19<sup>th</sup> March 2013 with a testicular swelling and associated fever. He was diagnosed with epididymo-orchitis and he was administered with Penicillin to which he reacted and collapsed.
- [4] The doctors have then advised the 2<sup>nd</sup> plaintiff that the 1<sup>st</sup> plaintiff was dead and he would be taken to the morgue. When he was about to be taken to the morgue the 1<sup>st</sup> plaintiff had seen his eyebrow and forehead slightly moving and the doctors have examined the 1<sup>st</sup> plaintiff and had declared that he was alive.
- [5] The defendants in their statement of defence averred that on 19<sup>th</sup> March, 2013 the plaintiff (1<sup>st</sup> plaintiff) was to CWM Hospital with complaint of increasing right testicular swelling of five days and associated fever and was diagnosed with having epididymo-orchitis. Before that on 17<sup>th</sup> March, 2013 after being referred from Makoi Health Centre for the same problem, the 1<sup>st</sup> plaintiff had been given amoxicillin, flagyl and paracetamol. He had not been admitted to CWM hospital since he refused admission.
- [6] The defendants also averred that on 19<sup>th</sup> March, 2013 the 1<sup>st</sup> plaintiff was given intravenous cloxacillin at the Emergency Department and the 1<sup>st</sup> plaintiff reacted with itchiness and he felt uncomfortable and later collapsed. The defendants have also stated in the statement of claim how the doctors treated him.
- [7] The defendant have denied the allegation that the doctors who treated the 1<sup>st</sup> plaintiff pronounced him dead and state further that there is no record to say that he was pronounced dead and that this allegation is a fabrication.

[8] At the pre-trial conference the following facts have been admitted by the parties:

1. The 1<sup>st</sup> defendant is a medical officer in-charge of the Public Hospital namely CWM Hospital duly constituted under Public Hospitals and Dispensaries Act 1955.
2. The 2<sup>nd</sup> defendant is a body duly constituted to administer the 1<sup>st</sup> defendant and CWM Hospital pursuant to Public Hospitals and Dispensaries Act 1955.
3. The 3<sup>rd</sup> defendant is joined pursuant to State Proceedings Act 1951.
4. On or about 19<sup>th</sup> March 2013 the plaintiff was admitted at the CWM Hospital due to having right testicular swelling and associated fever, He was assessed to have epididymo-orchitis.
5. The plaintiff was admitted to CWM Hospital on 19<sup>th</sup> March, 2013.
6. During the admission the plaintiff was reviewed by the surgeons for his presenting problems whereby intravenous cloxacillin was administered at the Emergency Department and the plaintiff had reacted with itchiness and he felt uncomfortable and later collapsed.

[9] 1<sup>st</sup> plaintiff's evidence is that he was taken to the CWM Hospital in an ambulance and his wife the 2<sup>nd</sup> plaintiff also accompanied him and at the hospital when he told Dr. Mafa that he was allergic to Penicillin he was asked to shut up and injected Penicillin. The witness also said that after regaining consciousness he was handicapped. The 1<sup>st</sup> plaintiff had been discharged from hospital after 3 of 4 days. It is his evidence that thereafter he felt weak and dizzy at times.

[10] Nirmala Wati, the 2<sup>nd</sup> plaintiff who is the wife of the 1<sup>st</sup> plaintiff testified that she took her husband to the CWM Hospital around midnight on 19<sup>th</sup> October, 2013 and the hospital staff put him on a bed and asked her to stay outside. The 1<sup>st</sup> plaintiff, according to the witness, was attended to by a doctor at 5.05 in the morning. The witness identified the doctor who attended to her husband a Dr Mafa. She testified further that she took her husband to the same hospital three days ago and he already had a medical



folder. This time the doctor had made a new folder and when she told the doctor that her husband was allergic to Penicillin the doctor has told her that she was the doctor.

- [11] It is also her evidence that the moment the medicine was given intravenous her husband's tongue came out and it became black in colour. The attending doctor had thereafter called some other doctors who gave the 1<sup>st</sup> plaintiff oxygen and they also have given him a cardiac massage. It is also her evidence that after about half an hour the doctor and others who attended to the patient left and Dr Mafa opened the eyes of the patient and told her, "no response" and went away. She had come back again, examined the patient and had told the witness that he was no more. According to this witness when the doctor pronounced her husband dead someone had brought a white sheet to cover him but she had not allowed them to cover him. After sometime she had seen the 1<sup>st</sup> plaintiff's eyebrows moving and when she told the doctor about it she had come and given oxygen to the patient and after about two hours the patient had opened his eyes.
- [12] After he was discharged from the hospital the 2<sup>nd</sup> plaintiff had taken the 1<sup>st</sup> plaintiff to Dr. Yogendra Prasad who testified at the trial and also issued a report on the patient which was tendered in evidence marked as "P2". In cross-examination the 2<sup>nd</sup> plaintiff said that on two occasions Dr Mafa said that her husband was no more. She also said that he was there like that for about 1 ½ hours and Dr Mafa came and checked on him. Once the 1<sup>st</sup> plaintiff was pronounced dead he had not been given oxygen.
- [13] Amitesh Avikash Narayan is a son of the plaintiffs. He testified that his father was taken to the hospital on 19<sup>th</sup> March, 2013 and in the morning he got a call from the mother and told him that his father had passed away. He said that he called their tenant Mohamed Faiyaz and his cousin Ajay Narayan and with them went to the hospital. The witness testified further that when he went to the hospital father was lying in bed, his tongue was out and the eyes were closed. There were no doctors or nurses around and a doctor came checked the patient and said he was no more and asked them to stay out. After about 15 - 20 minutes his mother had come out and told him that the father was alive.

- [14] Witness Mohamed Faiyaz testified that on 19<sup>th</sup> March, 2013 after his morning prayers he heard Mr. Narayan's son shouting him to open the door and when he opened the door he said that his father had passed away and they rushed to the hospital with one of his cousins. When they went to the hospital Mr. Narayan was lying in bed, his eyes were closed and the tongue was out. He also said that a doctor was pressing Mr. Narayan's chest. Later, the doctor has told them that Mr. Narayan was no more. The witness had then gone back home and while making preparations for the funeral he had got a phone call that Mr. Narayan was alive.
- [15] Ajay Narayan who went to the hospital with Amitesh Narayan and Mohamed Faiyaz corroborated the evidence of the other two witnesses who went to the hospital with him and said that while they were making preparations to put up a shed Amitesh called and said that the father was alive.
- [16] Dr Yogendra Prasad has made a report on Jai Narayan's allergy to Penicillin. In his report (P2) he says that Jai Narayan was seen at his clinic on three occasions and he is allergic to Penicillin. In his report he has stated the treatment given to Jai Narayan and in the last paragraph he says that he was admitted to CWM Hospital of 19<sup>th</sup> March, 2013 and was there till 25<sup>th</sup> March, 2013 as he suffered anaphylactic shock due to Penicillin given at CWM Hospital. It is his opinion that the doctors should have asked the patient whether he was allergic to Penicillin or should have performed the skin test before administering Penicillin to him.
- [17] In cross-examination the witness was confronted with paragraph 3 of the report prepared by Dr William May on 11<sup>th</sup> July, 2014 (P3) where it is stated that in 2004 Mr. Narayan had been given cloxacillin intravenous. The response of the witness was that there is a possibility that a patient can develop an allergy over the time. The witness also said that if a patient shows flucloxacillin and tells that he took that medicine it is sufficient for the doctor to conclude that he is not allergic to Penicillin.
- [18] Dr Mafa Lokega testified that Jai Narayan came to the hospital around 5.00 o'clock with a history of scrotal pain and swelling. He was accompanied by his wife. The patient was diagnosed with right sided scrotal inflammation and was given ampicillin, Cloxacillin and gentamycin I.V. She testified



further that the wife of Jai Narayan showed her the medication he was on and penicillin was one of them. However, when the medicine was given he collapsed. The witness then explained the treatment given to the patient. The witness stated that at no point of time Mr. Jai Narayan was pronounced dead. The witness was referred to page 51 of the medical folder (D1) where there is no indication that the patient is allergic to any drug and he had been earlier given amoxicillin and flucloxacillin.

- [19] The main issue for determination here is whether the doctor who treated the plaintiff was negligent in administering cloxacillin without ascertaining whether the patient is allergic to penicillin based drugs. The evidence in this respect is contrary to each other. The plaintiff's version is that they told the doctor that the 1<sup>st</sup> plaintiff was allergic to penicillin and the doctor says that they did not tell her but the 2<sup>nd</sup> plaintiff showed the medicine the 1<sup>st</sup> plaintiff had been given earlier and one of them was penicillin.
- [20] The learned counsel for the defendants submitted after hearing the evidence and demeanour of witnesses, the question before the court is who to believe and to the weight to be given to the evidence. The plaintiffs' version is that Dr Mafa administered penicillin despite being told about four times that he was allergic to it and Dr Mafa's position is that she had ruled out any allergy to penicillin after the wife had shown her the amoxicillin tablets. It is the submission of the learned counsel that Dr Mafa's version of events is more reasonable and is not a result of fabrication or unreasonable imagination.
- [21] Both plaintiffs testified that they told Dr Mafa that the 1<sup>st</sup> plaintiff was allergic to penicillin and against this evidence only Dr Mafa said that the 2<sup>nd</sup> plaintiff showed amoxicillin tablets as the medicine used by the 1<sup>st</sup> plaintiff. For the mere reason that the 1<sup>st</sup> defendant is a doctor the court cannot disregard or disbelieve the evidence of the plaintiffs'. Even in cross-examination the plaintiffs reiterated that they did not show the doctor the medicine the 1<sup>st</sup> plaintiff was using.
- [22] The issue here is whether the doctor should have done the skin test before administering penicillin intravenous. It is common knowledge that medicine administered intravenous acts very much faster than the orally administered medicine, in the body, so, side effects, allergic reactions, and other effects can occur faster when medicine is administered intravenous.

[23] Dr Mafa testified in cross-examination the earlier medical folder in which there was an entry to the effect that the 1<sup>st</sup> plaintiff had developed an allergy to penicillin, was not available for her to refer to at the time she attended to the patient. The doctor did not explain why she did not look for the medical folder and there is no evidence that the plaintiff's situation was so serious that she could not wait for few minutes to get the medical folder before administering penicillin intravenous. The defendants relied on page 51 of 'D1' to show court that there is no indication that the 1<sup>st</sup> plaintiff was allergic any drug. Making an entry in the medical folder which is in the custody and control of the 2<sup>nd</sup> defendant is the responsibility of the doctors. The defendants tendered 'D1' to show that the 1<sup>st</sup> plaintiff had previously been prescribed penicillin based drugs. If Dr Mafa carefully examined this folder before she administered cloxacillin intravenous she could have seen the following entry made in May 2009;

T/C anaphylactic Shock ... to Penicillin.

[24] The learned counsel for the defendants submitted the question for the court to determine is whether Dr Mafa had taken reasonable steps ascertain whether the 1<sup>st</sup> plaintiff was allergic to penicillin.

[25] In **Kumar v Permanent Secretary for Health** [2006] FJHC 130; Civil Action 45.2004 (20 July 2006) it was held that in proving negligence the plaintiff must establish the following;

(a) The hospital doctors, surgeons and/or their support staff all or anyone of them involved in the management, treatment of the plaintiff owed a duty of care;

(b) That duty of care has been breached by the defendants in not discharging the standard of care required; and

(c) That the breach has caused the injury to the plaintiff.

[26] In **Bolam v Friern Hospital Committee** [1957] 1 WLR 582 McNair J directed the jury:

'Where some special skill is exercised, the test for negligence is not the test of the man on the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising or professing to have that special skill. It is the duty of a



professional man to exercise reasonable skill and care in the light of his actual knowledge and whether he exercised reasonable care cannot be answered by reference to a lesser degree of knowledge than he had, on the grounds that the ordinary competent practitioner would only have had that lesser degree of knowledge. This is not a gloss upon the test of negligence as applied to a professional man. That test is only to be applied where the professional man causes damage because he lacks some knowledge or awareness. The test establishes the degree of knowledge or awareness which he ought to have in that context. Where, however, a professional man has knowledge, and acts or fails to act in way which, having that knowledge he ought reasonably to foresee would cause damage, then, if the other aspects of duty are present, he would be liable in negligence by virtue of the direct application of Lord Atkins' original test in *Donoghue v Stevenson*. 'it is not enough to show that another expert would have given a different answer . . . the issue is . . . whether [the defendant] has acted in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession' and 'How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. But where you get a situation which involves some special skill or competence, then the test of whether there has been negligence or not is not the test of the man on the top of the 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.'

- [27] From the evidence as considered above the court is of the view that Dr Mafa has not discharged the duty of care expected of a doctor. Unlike in any other profession, the degree of responsibility of a doctor towards his or her patient is very much higher. Dr Mafa has failed to discharge that duty to the satisfaction of all concerned. After the 2<sup>nd</sup> plaintiff informed the doctor even she had not thought it advisable to see the folder and ascertain whether the 1<sup>st</sup> plaintiff was allergic to penicillin based drugs. For these reasons I hold that Dr Mafa had not exercise reasonable skill and care towards the 1<sup>st</sup> plaintiff.

- [28] The plaintiffs also complain that the doctors pronounced that the 1<sup>st</sup> plaintiff dead and was trying to take him to the morgue. However, the evidence of Dr Mafa is that after the 1<sup>st</sup> plaintiff went into an anaphylactic shock she and the others tried to support his respiratory system and the patient started breathing. If the patient was pronounced dead by the doctors they would not have done all these things including cardiac massage. Mohamed Faiyaz, a witness for the plaintiff said in cross-examination that he saw a doctor pressing the chest of the patient. This evidence shows that after the 1<sup>st</sup> plaintiff going into a anaphylactic shock the doctors have not abandoned the 1<sup>st</sup> plaintiff as alleged by the plaintiffs.
- [29] In the circumstances the 1<sup>st</sup> plaintiff is entitled to some damages for what he had to go through due to the negligence of the doctors. However, the plaintiffs have failed to adduce medical evidence to show that he is experiencing dizziness at times and he feels weak. The court must have evidence that these difficulties are due to the anaphylactic shock he suffered and if so, for how long these weaknesses will last. The plaintiffs have failed to adduce any such evidence.
- [30] The 2<sup>nd</sup> plaintiff in this matter is not entitled to claim damages. It was the 1<sup>st</sup> plaintiff who suffered damages due to the negligence of the hospital. The law does not provide for damages for the wife's inability to sleep, nightmares, for constant recalling the time at CWM hospital. Damages cannot be awarded for mental pain. The 2<sup>nd</sup> plaintiff does not have a cause of action to sue the defendants for damages. The 1<sup>st</sup> plaintiff has claimed \$457.50 as special damages for medical and transport expenses, medical report from CWM Hospital and for medicines. Special damages must be pleaded and proved. There is no iota of evidence on record to say that the 1<sup>st</sup> plaintiff has in fact, spent the amount claimed. The court does not expect the plaintiff to adduce documentary evidence to prove the claims of this nature however, there must at least be a bare statement of the plaintiff that he spent this amount for medicine and transport. Hence, the claim of the 1<sup>st</sup> plaintiff for special damages must fail.
- [31] The 1<sup>st</sup> plaintiff also claims damages for pain and suffering and for loss of amenities. On the question loss of amenities, in the case of **H. West and Son Ltd v Shephard** [1964] AC 326 at page 341 Lord Reid said:

There are two views about the true basis of this kind of compensation. One is that the man is simply being compensated for the loss for his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunities to full and normal life which are now denied to him by his physical condition – for multitude of deprivation and even petty annoyances which he must tolerate.

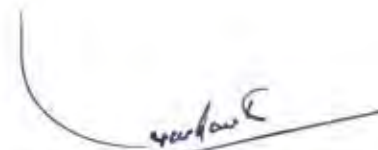
[32] There is no evidence of loss of amenities. The facts of this case do not fit in to any of the categories of loss of amenities of life enunciated in the decision cited above. Therefore the 1<sup>st</sup> plaintiff is only entitled to damages for pain and suffering. There is also no evidence that the plaintiff the pain suffered by the plaintiff continued after he gained consciousness.

[33] There is no formula to measure damages for pain and suffering. The court has to award an amount arbitrarily but it must be reasonable. Taking all the evidence and the circumstances of this case into consideration I conclude that it is reasonable to award \$10000.00 as damages for pain and suffering.

[34] For the reasons aforementioned the court makes the following orders;

1. The defendants are ordered to pay the 1<sup>st</sup> plaintiff \$10000.00 as damages.
2. Claim of the 2<sup>nd</sup> plaintiff is dismissed.
3. The defendants are also ordered to pay the plaintiff \$2500.00 as costs (summarily assessed).



  
Lyone Seneviratne

**JUDGE**

29<sup>th</sup> January, 2018