REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2007-01036

BETWEEN

ANNIE KELLMAN

Claimant

AND

DR. ROBERT DOWNES

First Defendant

AND

NORTH CENTRAL REGIONAL HEALTH AUTHORITY

Second Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:
Mr. Mervyn Mitchell for the Claimant

Mr. Duncan Byam for the First Defendant
Mr. Ravindra Nanga for the Second Defendant

J U D G M E N T

THE CLAIM

1. This action was commenced on the 29th March 2007 by the filing of a Claim Form and Statement of Case. On the 10th July 2007, the Claimant filed an Amended Claim Form and Statement of Case.

2. The essence of the Claimant's claim is a claim for damages for personal injuries and financial losses suffered as a direct result of professional negligence of the First and Second Defendants.

THE FACTS

3. The facts as pleaded by the Claimant in her Statement of Case are as follows:

   (a) On the 7th April 2003 she underwent surgery at the Mount Hope General Hospital to remove an ovary cyst. The first Defendant, Dr. Downes performed the surgery;

   (b) After the operation, when the Claimant regained consciousness, she experienced excruciating pain;

   (c) On the following day, the Claimant began to suffer from various symptoms such as vomiting, swelling of her face and stomach and excretion of blood from her bowel. She continued to experience severe pains;

   (d) After examination by Drs. Brian and Ganta, the Claimant was sent for an X-ray;

   (e) After the X-ray, the Claimant was referred to the Casualty Department of the Port of Spain General Hospital for emergency surgery on the 10th April 2003;

   (f) The Claimant received a medical report which was annexed to her Amended Statement of Case and marked "AK 1". According to this report dated 9th October 2003 and signed by Dr. Albert Lander, House Officer, Prof. Naraynsingh's Unit, the Claimant was referred to the Port of Spain General Hospital on the 9th April 2003 by the Mt. Hope Women's Hospital for abdominal pains. She was admitted to Ward 22 where a diagnosis of perforated bowel was made. Emergency surgery was performed on the 10th April 2003 and the following was found:

(i) Faeces in abdomen;
(ii) Half litre of blood in pelvis;
(iii) Rectosigmoid colon completely transected;
(iv) Vicryl suture on mucosa of distal end of bowel.

At surgery the bowel was anastomosed, a fefunctionary colostomy was left in place and a chest tube drain was left to drain her pelvis. The Claimant was sent home on the 17th April 2003 and followed up on the Ward and Clinic.

4. On the 27th June 2006, the Claimant's Attorney sent a letter of claim to the Defendants claiming damages and threatening to institute legal proceedings if compensation was not paid within 28 days. Compensation was not paid by the Defendant as a consequence whereof these proceedings were instituted.

5. The Claimant alleged that she suffered financial loss, injuries, pain and suffering and untold hardship by reason of the negligence of the First-named Defendant, the servant and/or agent of the Second Defendant. The particulars of negligence set out at paragraph 22 of the Amended Statement of Case are as follows:

"*1. Failure to perform/handle the said surgery/operation professionally.*
2. The Claimant will further rely on the principle of res ipsa loquitur"

6. In compliance with the Order of Best J. dated 28th November 2008, the Claimant filed only one witness statement, a witness statement in her name on the 16th December 2008.

7. At a case management conference held on the 19th October 2009, the Claimant's Attorney intimated to the Court that he intended to rely on the Claimant's witness statement only. On the same day, certain hearsay statements made by the Claimant in her witness statement were struck out.
8. On the 21st October 2009, the Claimant's Attorney applied to this Court for relief from sanctions in order to permit the Claimant to file an additional witness statement of Dr. Deo Maharaj. However, having regard to the length of time that had elapsed between the Order of Best J. and the date of this application, the Claimant withdrew this application on the 24th February 2010. The trial was then fixed for the 10th June 2010.

EVIDENCE AT TRIAL

9. At the trial, the Claimant was the only witness called in support of her claim. The Claimant did not issue a witness summons to Dr. Deo Maharaj or any other medical practitioner to give evidence in support of her allegation that the First Defendant failed to perform/handle the said surgery/operation professionally. In fact, the Claimant did not even annex to her witness statement the medical report annexed to her Statement of Case and did not serve a Notice to admit that Report in evidence.

10. Accordingly, the only evidence that this Court had before it was the evidence contained in the Claimant's witness statement and her evidence under cross-examination by the First and Second Defendants' Attorneys-at-Law.

11. The First Defendant filed a witness Statement on the 8th May 2009 and he was cross-examined thereon.

THE ISSUES

12. According to the Claimant's Statement of Issues filed on the 15th December 2008, the following issues were in dispute in this action:

> *"1 Whether or not the Defendants and their servants and/or agents negligently ruptured/slashed the Claimant's colon when they performed surgery upon her for the removal of an ovarian cyst on the 7th April 2003 at the Women's Hospital, Mount Hope.*
>
> *2. Whether or not the injury inflicted upon the Claimant by the Defendants their servants and/or agents in the course of the performance of surgery to remove an ovarian cyst is/was a risk of that kind of surgery and occur without negligence.*
>
> *3. Whether or not the Defendants their servants and/or agents were negligent when after the performance of the aforesaid surgery, mindful of the alleged risk of the rupture/slashing of the colon, closed the wound without confirming that the colon was not ruptured/slashed.*

13. The First Defendant did not file a Statement of Issues.

14. The Second Defendant's Statement of Issues filed on the 27th February 2009 identified the following issues:

> *"1. Whether the first-named Defendant was the servant and/or agent of the second-named Defendant?*
> *2. Whether the second-named Defendant is liable for the acts of the first-named Defendant?*
> *3. Whether the injury complained of by the Claimant was caused by the negligence of the Defendants or either of them?*

4. *Whether the injury complained of by the Claimant is an associated risk and/or recognized complication and/or consequent complication of the surgery that the Claimant underwent?*
5. *Whether the Claimant had a complicated medical history?*
6. *Whether the second-named Defendant used all reasonable care and proper skill in the treatment of the Claimant?*
7. *Whether the Claimant is entitled to damages?"*

THE CLAIMANT'S EVIDENCE

15. I have carefully considered the evidence adduced by the Claimant as set out in her witness statement and under cross-examination by the Defendants' Attorneys and make the following observations in respect thereof:

    (a) The Claimant failed to give any evidence that her colon or bowel was slashed or ruptured in the operation performed by the First Defendant;

    (b) The Claimant did not give and did not call any evidence concerning what may have caused her vomiting, swollen face, severe pain and passing of blood after the operation. The only reference to an injury to her bowel is contained in paragraph 13 where she stated that on the 10th April 2003 "*Dr. Downes then told me that my bowel was ruptured when I did the operation in Guyana. I then asked him, 'if that's the case how come I wasn't dead yet.'* "

    (c) The Claimant did not give and did not call any evidence concerning the findings and observations of the doctors who operated on her at the Port of Spain General Hospital on the 10th April 2003. In particular, the Claimant failed to put into evidence the medical report referred to in her Amended Statement of Case.

(d) The Claimant did not give any evidence of any mistake or error of judgment committed by the First Defendant in the performance of the operation to remove the ovarian cyst.

(e) The Claimant did not give or call any independent evidence to establish that the First Defendant failed to perform the surgery upon her in a professional manner.

16. It is apparent, therefore, that the Claimant's Attorney, by his failure to call any medical testimony, was relying solely on the doctrine of *res ipsa loquitur.*

Res ipsa Loquitur

17. It is clear from the authorities that the burden of proving negligence lay at all times upon the Claimant. In certain circumstances, a Claimant who has sustained injuries in circumstances where such injuries would not have happened if the defendant had taken due care, the Claimant may discharge that burden by inviting the court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care. ***Ng Chun Pui v. Lee Chuen Tat [1988] RTR 298 (P.C.)*** However, the Claimant must adduce evidence to establish a prima facie case and then, if the defendant does not adduce any evidence, there will not be any evidence to rebut the inference of negligence and the court will be entitled to conclude that the claimant has proved his/her case. Where, however, a defendant adduces evidence, the court must then assess that evidence to determine whether it is still reasonable to draw the inference of negligence.

18. In ***Ng Chun Pui v. Lee Chuen Tat*** (ibid), the Privy Council adopted two passages from the decided cases as a clear exposition of the true meaning and effect of the so-called doctrine of res ipsa loquitur.

19. In ***Henderson v. Henry E. Jenkins & Sons [1970] RTR 70***, Lord Pearson said at pp. 81I-82A:

> *"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants. I have some doubts whether it is strictly correct to use the expression 'burden of proof' with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage."*

20. In ***Lloyde v. West Midlands Gas Board [1971] 1 WLR 749, 755*** Megaw LJ said:

> *"I doubt whether it is right to describe res ipsa loquitur as a "doctrine". I think it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances, It means that a plaintiff prima facie*

establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. I have used the words "evidence as it stands at the relevant time." I think that this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, res ipsa loquitur. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."

ESTABLISHING NEGLIGENCE

21. In ***Whitehouse v. Jordan [1981] 1 WLR 246***, Lord Edmund-Davies in the House of Lords (at p. 258A) made it clear that doctors and surgeons do not fall into any special legal category in deciding whether they are to be held liable in negligence:

"Doctors and surgeon fall into no special legal category, and, to avoid any future disputation of a similar kind, I would have it accepted that the true doctrine was enunciated—and by no means for the first time—by Mc Nair J. in ***Bolam v. Friern Hospital Management Committee [1957]*** *1 WLR 582, 586 in the following words, which were applied by the Privy Council in* ***Chin Keow v. Government of Malaysia [1967]*** *1 WLR 813:*

> *"…. where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been 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."*

If a surgeon fails to measure up to that standard in any respect ("clinical judgment" or otherwise), he has been negligent and should be so adjudged."

22. In ***Deonarine v. Ramlal, Civil Appeal No. 28 of 2003***, Mendonca J.A., after citing with approval from the judgment of Mc Nair J. in the **Bolam** case, stated as follows at paragraph 21:

> *"In accordance with the Bolam test, for a plaintiff to succeed he must show that the medical practitioner failed to exercise a reasonable degree of skill and care. The medical practitioner can therefore be held liable if he failed to act in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. However, as is evident from the passage quoted in the Bolam case, it is not sufficient for the plaintiff to adduce evidence to show that there is a body of medical opinion that considers the practice adopted by the medical practitioner to*

be wrong if there also existed a body of equally competent opinion that considered it acceptable. (see Maynard v. West Midlands Regional Health Authority [1985] 1 All ER 635.) In ***Sidaway v. The Board of Governors of the Bethlem Royal Hospital****, supra, Lord Scarman put it this way (at 881F):*

> *"A doctor in not negligent if he acts in accordance with the practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."*

CONCLUSIONS

23. In the light of my observations with regard to the deficiencies in the Claimant's evidence, I have come to the following conclusions:

    (i) Insofar as the Claimant has relied upon res ipsa loquitur, the Claimant, in her testimony, failed to adduce evidence that raised a prima facie inference of negligence on the part of the First Defendant.

    (ii) The Claimant failed to call any medical testimony to establish that the First Defendant failed to measure up to the standard of the ordinary skilled surgeon exercising and professing to have that special skill;

    (iii) Having considered the evidence of the First Defendant in chief and under cross-examination, I am satisfied that even if I considered that the evidence of the Claimant raised a prima facie inference of negligence against the First Defendant, that inference would have been rebutted by the First Defendant. Having regard to the risk of complications caused by adhesions as a result of previous operations performed upon the Claimant in 1989 and 1992, this operation was likely to be dangerous and I am

satisfied on a balance of probabilities that the First Defendant exercised reasonable care and proper skill before, during and after the operation and that he was not negligent in the performance of the operation upon the Claimant or in his care of her thereafter.

(iv) The Claimant failed to adduce any evidence to establish that the First Defendant was the servant and/or agent of the Second Defendant when he performed the operation.

(v) Accordingly, the Claimant's claim against both Defendants is dismissed.

24. I take this opportunity to put on record my disappointment with the manner in which the Claimant's case was conducted. Given the allegation made by the Claimant in the Amended Statement of Case of a failure by the First Defendant to perform the operation professionally, it was imperative, in my opinion, for the Claimant to adduce medical testimony to establish that the First Defendant failed to measure up to the standard of the ordinary skilled surgeon exercising and professing to have that special skill. Even if the Claimant had not been able to obtain that evidence in time to file a witness statement in compliance with the Order of Best J, the option still existed for a witness summons to be issued to compel the attendance of such a witness but this was not done. Further, the medical report referred to in the Claimant's Statement of Case was not put into evidence either by serving a notice to admit or by summoning the doctor who prepared the Report. Further, notwithstanding an extension of time given by this Court on the 19th October 2009 to the parties to file propositions of law with supporting authorities on or before the 30th November 2009, the Claimant's Attorney did not file any propositions of law prior to the trial. Even more startling was the fact that at the conclusion of the trial, the Claimant's Attorney could not assist this Court with any references to

authorities upon which he relied. Even when he was invited to respond to the authorities cited by the Defendants, the Claimant's Attorney declined that invitation. It may very well be that at the end of the day the outcome of this case may have been the same but the Claimant deserved a higher standard of professionalism from her Attorney than she received.

25. In the light of these remarks, I wish to notify the Claimant and her Attorney that pursuant to Part 66.8 of the Civil Proceedings Rules I am minded to make a wasted costs order herein to direct the Claimant's Attorney to pay the Defendants' costs and the Claimant's Attorney may, if he so wishes, attend before me on the 28th July 2010 at 10.00am in POS 17 to show cause why such an order should not be made against him.

Dated this 05th day of July 2010.

André des Vignes
Judge