REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(SUB REGISTRY, SAN FERNANDO)

Claim No. CV 2010-01958

BETWEEN

LINDA RAJKUMARSINGH

Claimant

AND

GULF VIEW MEDICAL CENTRE LIMITED

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Claimant in person assisted by her relative Mr. J. Gajadharsingh at trial, and Mr. N. Ramnanan at the stage of written submissions

Mr. Andre Rajkumar for the defendant

JUDGMENT

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Background

1. The Claimant alleges negligence against the Defendant arising out of an incident which occurred on the 24th day of May 2006. She claims that a nurse, the employee of the Defendant, mistakenly administered a Drug - Depo-Provera (DP) - (instead of Gynodian Depot - "GD"). She regularly received GD for alleviation of vasomotor symptoms associated with menopause). This alleged mistaken administration of DP caused the Claimant to become ill and suffer adverse effects.

2. The Defendant denies that it was negligent. It contends that administration of DP, via the nurse, was based on the recommendation of its agent Dr. Ali, and was a deliberate and carefully considered substitution, in the absence of GD, because of the ability of DP, like GD, to also ease some vasomotor symptoms. The Defendant further alleges that the Claimant was advised of the proposed substitute before it was administered.

3. It submitted expert medical evidence that:

(a) In the circumstances the use of DP for alleviation of vasomotor menopausal symptoms was reasonable and not negligent.

(b) Further, DP could not account for many of the symptoms that the claimant complained allegedly resulted from DP.

Issues

4. Whether the Claimant was owed a duty of care by the Defendant.

The existence of a duty of care is accepted in this case.

5. Whether the Defendant breached that duty by failing to exercise reasonable care. Incidental to this issue it must be considered whether, as a question of fact, the administration of Depo-Provera instead of GD was deliberate, or a mistake which the defendant's agents attempted to cover up.

6. If so, whether the breach of duty **caused** injury to the Claimant.

It must be considered as a question of fact therefore:

(a) **Whether** the claimant has established that she did sustain **any** injury, loss or damage, and

(b) **If she did** so, whether this was **as a result** of the administration of DP.

Findings of fact

7. I find as follows:

a. That the defendant, via its agent, the nurse, and via Dr. Ali, owed a duty of care to the claimant.

b. On a balance of probabilities that Dr Ali did consciously prescribe administration of Depo-Provera that its administration was not an error, and that he did have a prior telephone conversation with the nurse, who administered it based on his authorization.

c. On a balance of probabilities, that he also had a telephone conversation with the claimant. To find otherwise I would have to reject the evidence of Dr. Ali and the nurse, to find that they perjured themselves on oath, and to find that they conspired to cover up an error, in the administration of Depo-Provera to the claimant instead of GD.

d. Having heard the testimony of each I am satisfied of the veracity of their testimony, and that such inconsistencies in their testimony as might exist are attributable to the lapse of time since the incident in 2006, and not the product of conspiracy.

e. (Based on the testimony of the expert, which I accept), that no symptoms, loss or damage have been proved to be attributable to the administration of Depo-Provera, apart from an initial adverse reaction.

8. As to the initial adverse reaction I find that:-

a. Dr. Ali acted in accordance with the standard to be expected of the ordinary competent specialist gynaecologist in prescribing Depo-Provera.

b. That the side effects experienced by the Claimant with a prescribed drug do not, without more, imply negligence. The attending doctor acted in accordance with the requisite legal standard in prescribing that medication for the patient in the

circumstances of that patient. Attempts to suggest in cross examination that the claimant's peculiar medical history, e.g. inability to vomit following hernia surgery, absence of a uterus, or being past child bearing age, meant that DP should not have been prescribed for her, were rebutted adequately in the cross examination of both Dr Ali and Dr. Narayansingh by the claimant's agent.

c. Further the side effects were dealt with in accordance with that standard, once they ame to Dr. Ali's attention.

Causation

9. On the evidence of the claimant herself, and of Dr Ali, I find that some of the claimant's alleged symptoms e.g. **depression**, **dizziness, nausea, and headache,** - predate administration of Depo-Provera.

10. The claimant accepted in cross examination that she would feel a bit upset, a bit dizzy and get headaches **if she did not get GD**, even before administration of DP. She testified that she would be unable to walk if she did not get GD, but would go on the hormonal patches before this occurred. The medical notes reveal that the claimant experienced **dizziness nausea and headache in 1991**.

11. I accept Dr. Narayansingh's expert evidence that some of those symptoms could be disregarded as being caused by the administration of DP. Of those remaining symptoms that required consideration - **headaches, dizziness**, and inability to sleep, these were subjective, and their causes, if they occurred at all, were multifactorial.

12. In any event, save for alleged inability to sleep, the claimant experienced these symptoms prior to the administration of DP.

Objective existence of continuing symptoms

13. Their **existence** has not been corroborated by any medical evidence whatsoever.

14. Further with respect to all of the continuing symptoms that she complained of, none has been established by medical evidence on the part of the claimant to be **attributable** to the administration of Depo-Provera.

15. Further there is no medical evidence that these symptoms, even if sustained, have been **continuing** since 2006 to trial- 6 years later. The action was filed in 2010, 4 years, (less a few days), after the incident. The claimant claims that she sustained a **bladder infection** after surgery in **1995**. It is clear that this first arose more than 10 years **before** the administration of Depo-Provera. This is one of the symptoms which the claimant continues to complain of. This bladder infection allegedly recurred after administration of Depo-Provera. The claimant states that she did not request payment from Dr Ali for that 1995 incident, nor did she "threaten any legal action". However it is significant that the genesis of the instant claim for compensation seems intertwined with a claim for compensation for treatment of a bladder infection.

> **" para 50 w/s – " I will have to return to the UK to have the infection to my <u>blatter</u> (sic) and legs sorted out….**
> **Para 51 - so that I will have funds to go to the UK so that I will have funds to sort out my <u>bladder</u> and leg problems "**

16. No medical evidence of a causal link between bladder problems, or problems with her legs, and administration of Depo-Provera, has been established. In fact Dr. Narayansingh's evidence has negated any such link.

17. On a balance of probabilities therefore, I cannot accept the evidence of the claimant that her continuing complaints/symptoms were attributable to the administration of Depo-Provera.

Conclusion

18. The claimant has not established that the defendant was in breach of its duty of care to her, and has not in any event established that she sustained any loss, damage, or injury attributable to the alleged incident.

Disposition and orders

19. The claimant's claim is dismissed with costs to be paid by her to the defendant in the sum of $14,000.00

Analysis and Reasoning

Law

20. The claim is in negligence .The claimant needs to establish:-

i. That the Claimant is owed a duty of care by the Defendant.
ii. That the Defendant breached that duty by failing to exercise reasonable care
iii. That the claimant actually sustained injury,
iv. That the breach of duty **caused** the Claimant's injury.

Duty of care

21. It is accepted that Dr. Ali owed a duty of care to the Claimant. As he was the agent of the defendant, implicit in this acceptance is that the defendant owed a duty of care to the claimant. The vicarious liability of the defendant for the alleged acts of both Dr. Ali and the nurse is not in dispute. See also **South West Regional Health Authority v Harrilal Samdaye C.A.CIV.60/2008** at paragraphs 20, 23, and 25.

Breach of Duty:

Law - The Bolam Test

22. This test was applied by the Court of Appeal in the local cases of **Deonarine v Ramlal Civ. App. No. 28/2003** and in **South West Regional Health Authority v Harrilal Samdaye C.A.CIV.60/2008.**

In **Deonarine v Ramlal**, **Civ. App. 28/2003** delivered **7th February, 2007** the Honourable **Mendonça JA**, applying the dictum of **Mc Nair J** in **Bolam v Friern Hospital Management Committee** [1957] 2 All E R 118, stated at paragraph 19-:

"*The principle has been restated over the years but perhaps the most often quoted formulation is the direction of Mc Nair J. to the jury in Bolam v Friern Hospital Management Committee [1957] 2 All E R 118 which is now commonly referred to as the Bolam test. In that case Mc Nair J stated (at p.121-122).*

'How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge that by the conduct of the man on top of the Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on 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. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient that he exercises the ordinary skill of an ordinary competent man exercising that particular art ... 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 ... Putting it the other way around a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view."

23. *It has been said that the Bolam test is applicable to all aspects of a medical practitioner's work. (See* ***Sidaway v The Board of Governors of the Bethlem Royal Hospital*** *[1985] A.C. 871).*

24. *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 from 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 E.R. 635. In* ***Sidaway v The Board of Governors of the Bethlem Royal Hospital****, supra, Lord Scarman put it this way (at 881F):*

> ***"A doctor is 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."***

The Bolitho Exception

25. In the case of **Bolitho v City and Hackney HA [1997] 4All ER 771** the House of Lords recognised a rare exception where medical evidence need not be determinative of the issue **at page 779g** as follows –

"But if, in a rare case, ***it can be demonstrated that the professional opinion is not capable of withstanding logical analysis****, the judge is entitled to hold that the body of opinion is not reasonable or responsible."*

26. **Bolitho** was considered in **Civil Appeal No. 28 of 2003, Dr. Patricia Deonarine v. Rana Ramlal per Mendonca, J.A. (**emphasis added**)**

(39) *As I pointed out earlier in this judgment, it is not sufficient for a plaintiff to succeed to simply show that there was a body of opinion that may not have approved of the practice of the medical practitioner* ***if there also existed a body of equally competent opinion that supported it.*** *But the Court is not bound to hold that a defendant escapes liability for negligence just because he leads evidence from a number of medical experts who support the decision taken by the defendant. This was held to be so* in **Bolitho v City and Hackney Health Authority** *[1997] 4 All E.R. 771. In that case Lord Browne-Wilkinson stated (at p. 778):*

> *… "the Court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. "In Bolam's case … Mc Nair J. stated that the defendant had to have acted in accordance with the practice accepted as proper by '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 have 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 exponents of the body of opinion relied on can demonstrate that such opinion* ***has 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 experts have directed their minds to the question of***

comparative risks and benefits and have reached a defensible conclusion on the matter*."*

(40) *Lord Browne-Wilkinson however expressed the view that it would be an exceptional case where the Court holds that a view held by competent medical experts was unreasonable. He stated:*

"I emphasise that, in my view, it will very seldom be right for a judge to reach 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 would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes 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 the defendant's conduct falls to be assessed.***

27. In **Bolitho** itself at page 779e Lord Browne-Wilkinson stated:-

"These decisions demonstrate that in cases of diagnosis and ***treatment*** *there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that 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 withstanding logical analysis*, the judge is entitled to hold that the body of opinion is not reasonable or responsible.* .

28. It is clear therefore that a court does not have to uncritically adopt the opinion of an expert medical witness in the rare case where such opinion is **not capable of withstanding logical analysis.**

29. The Bolam test has been approved and applied by the House of Lords in relation to **treatment** and diagnosis respectively. It was further applied in the case of **Sidaway** in respect of the requirement to **advise** and warn of possible risks and adverse effects. In that case the House of Lords rejected the North American concept of informed consent and held that the Bolam test equally applied to the duty to advise as to the risk of adverse consequences of treatment.

30. There is no issue in this case that a negligent **diagnosis** had been made as it was common ground that the claimant suffered from menopausal symptoms and that she sought treatment from the defendant for their relief.

Facts and evidence

Breach of Duty of Care - evidence

The sequence of events

31. Dr. Ali's evidence is that *"On the date in question, the nurse on duty **called** to inform me that the facility was out of stock of Gynodian Depot. On learning of this and using my training and experience, **I decided that the drug Depo-Provera would be a suitable alternative for the Gynodian Depot** which was used for the Claimant's monthly injections. In light of this, **I spoke to the Claimant at the said facility** and indicated to her that the Defendant was out of stock of Gynodian Depot and that Depo-Provera could be administered to help treat **some of the vasomotor symptoms of menopause** she was suffering from".*[1]

"I ***gave*** *the Claimant a full and thorough* ***explanation*** *of the drug called Depo-Provera. I explained that the ingredients of Depo-Provera could also alleviate* ***some*** *of the Vasomotor symptoms of menopause which the Claimant was experiencing****.. After advising the Claimant****, she agreed to undergo this form of treatment to have this injection administered to her****. I then***

[1] Para 9 of the witness statement of Dr. Ali dated 6th January 2012

instructed the nurse to proceed with the injection*, after which the Claimant left the said facility. The Claimant was given Depo-Provera on this one occasion."*[2]

Nurse Ragoonanan states *"I put the Claimant in a private room, Room 1, which was the common room, at that time for the administration of medication....*

"I *left the room and returned to the* ***nurses' station****,* ***wherein*** *I searched the* ***medicine cabinet*** *for the Gynodian Depot to administer to the Claimant. However, I observed that the Defendant was out of stock of Gynodian Depot. It is standard procedure during such occasions to call and consult the prescribing physician as to what further steps to take. As such,* ***I called Dr. Ali*** *and informed him that there was no GD following which Dr. Ali gave me verbal orders to administer the drug Depo-Provera instead of GD and then* ***asked to speak to the Claimant****. I then* ***left the nurses station*** *to attend to another patient,* ***I returned to the nurses' station*** *to retrieve the dosage of Depo-Provera for the Claimant.*

".....I retrieved one dosage of Depo-Provera and returned to ***Room 1****. I explained to the Claimant that the injection was Depo-Provera and that Dr. Ali had given me verbal orders to administer it to her. The Claimant agreed and I administered the said dosage of Depo-Provera."*[3]

32. It was submitted that from the Chronology of events set out in both witness statements, Dr. Ali states that he spoke to the nurse, then to the Claimant, and then back to the nurse. The nurse on the other hand states that she spoke to Dr. Ali, and then to the Claimant and then administered the injection.

33. Having had the opportunity to see both witnesses testify I do not consider that anything sinister needs to be read into this discrepancy. The events occurred some years previously and their full significance was not immediately apparent. However it is a discrepancy which I bear in mind in assessing the totality of the evidence.

[2] Para 10 of the witness statement of Dr. Ali dated 6th January 2012
[3] Paragraphs 7, 8 and 9 of the Witness statement of Catherina Ragoonanan filed on the 6th January 2012.

The time

34. It was submitted that there was a time discrepancy in the evidence of the Nurse, She states in her witness statement that the Claimant came for treatment at or about 6:20pm. However she endorsed the time of the administering the medication as 6:35pm[4]. It was submitted that the time gap (representing the difference between the pleaded time and the time endorsed on the prescription) is consistent with the Claimant's version of events i.e When the Claimant came in she was attended to by the nurse and immediately given the wrong drug, there was no phone call and Dr. Ali never spoke to the Claimant on the day in question. The claimant's submission was that this gap was 10 minutes, but this is based on her erroneous submission that the endorsement is 6.30 pm. In fact it is 6.35pm.

35. Further it is difficult to conclude that necessarily inexact time estimates, years after the event – which occurred in May 2006 – (the action being filed in 2010), should lead to an inference that there was a plot and conspiracy involving the nurse and a specialist doctor to cover up an alleged medical mistake.

The prescription

36. I note further that the written prescription[5] was endorsed by the nurse as having administered GD, though when she was confronted in cross examination she explained this was an error. It was contended that the prescription is inconsistent with the Defendant's case. It is **not in dispute** that Depo-Provera was administered. The prescription therefore must be an error, and this is accepted by the nurse**.**

37. The question is was the prescription reflective of what the nurse thought she had administered, or was Depo-Provera consciously administered to the claimant, with the knowledge of the doctor and the patient, and with her informed consent. That is a matter that relies on a lot more than what is recorded in the prescription. Its determination relies on an assessment of the credibility of the claimant, the doctor and the nurse as to what transpired. It also involves an assessment of the evidence of the expert witness as to whether the

[4] Document A1 in Trial Bundle and tendered as T/B "A"
[5] Document A1 in Trial Bundle and tendered as T/B "A"

administration of Depo-Provera in the circumstances of the claimant was indicated and appropriate.

Why was Depo-Provera prescribed on this occasion for the first time?

38. From the evidence elicited at trial it was clear that the drug Depo-Provera was never previously prescribed for the Claimant. When the Claimant could not get GD, she would rely on hormonal patches to ease her symptoms. This raised the issue as to why on this specific occasion was the drug DP administered. Dr. Ali's explanation in this regard was not refuted – (in effect that she would have been producing more oestrogen at an earlier stage when she had more fatty tissue, but that as her level of fatty tissue declined she would be producing less, hence an increase in vaso motor symptoms, necessitating administration of GD, or a suitable substitute – DP).

39. It was contended that though the nurse claimed that she spoke to Dr. Ali, who recommended Depo-Provera instead of GD, this was not documented, nor **details** of the alleged conversation which took place between the Claimant and the Doctor. It would have been desirable that the **fact** of such a recommendation/ prescription be recorded in the patient's notes, though as a practical matter the specific details of the conversation with Dr Ali might not have been. This represents best practice, and would be of great assistance to medical practitioners and institutions when faced, years after the event, with disputes over precisely what happened.

40. It was submitted that the court ought to make the following findings of fact;

i. The nurse negligently administered to the Claimant Depo-Provera instead of GD.
ii. That no phone call was made to Dr. Ali by the nurse.
iii. That Dr. Ali never spoke to the Claimant over the telephone or otherwise and therefore did not advise her of the change of drug and the potential side effects.
iv. The Claimant did not consent to the administration of Depo-Provera nor was her consent sought for same.
v. That the nurse only discovered her error when the Claimant complained of feeling unwell after administration of Depo-Provera and she checked the basket and retrieved the packaging of the drug.

41. The evidence in this regard comes from the nurse herself, Dr. Ali, and the claimant. The nurse testified that the administration of Depo-Provera was a conscious decision arrived at by Dr. Ali after a phone call by her to him, indicating that there was no GD in stock.

42. I have heard the evidence of the nurse and detected no hesitation or duplicity in delivery of her testimony. The evidence was spontaneous and withstood cross examination by the claimant's representative.

43. The same can be said of the evidence of Dr Ali. I note the discrepancies that I have referred to previously, but the evidence taken as a whole does not demonstrate what the claimant avers- namely a sinister conspiracy to cover up the inadvertent, in fact negligent, administration of Depo-Provera instead of GD.

44. The evidence of both Dr. Ali, and, vitally, the evidence of the expert medical witness, is that Depo-Provera was an appropriate substitute for GD in the circumstances of the claimant's condition.

45. The opinion of Dr. Narayansingh, on **the reasonableness of** administering DP to the claimant, does go some way toward assessing which version of events is more likely to be correct. His evidence is that Depo-Provera could have been prescribed for some of the vaso motor symptoms that the claimant complained of.

46. The defendant's claim is that it was an informed decision with informed consent – to administer DP instead of GD, DP being an acceptable substitute for treatment of vasomotor symptoms .The claimant's claim is that the administration of DP was an error, covered up by the doctor to protect the nurse who so administered it. If it were such an error however, it would be an unlikely coincidence that the drug DP, administered in error, should just happen to also be a substitute for GD, and prescribable for the treatment of vasomotor symptoms in a patient like the claimant.

47. Depo-Provera was not a drug that was of such a different kind – in terms of what it could be prescribed for – that its administration, instead of GD, could be said to be an obvious mistake.

It was not as though, for example, an antipsychotic drug had been administered. Then it may have been obvious that a mistake had been made, as claimed by the claimant.

48. It is more difficult to contend that a mistake was made when the drug that was actually administered was confirmed, by expert medical opinion, as being a reasonable substitute for GD, in the circumstances of the claimant's medical condition. This is consistent with the defendant's case rather than the claimant's case.

49. I have heard the evidence of the claimant herself. Her evidence was also spontaneous, and it is clear that she believed that her testimony was truthful. I do not find she was not truthful. I do however find that, while her recollection of events from her perspective was considered by her to be the truth, it is inconsistent with, and diametrically opposed to, that of Dr. Ali, and the nurse.

50. I note that under cross examination the claimant claimed not to recall having seen the expert report of Dr. Narayansingh. He was appointed as a jointly agreed expert, but the claimant subsequently expressed reservations about the use of his report, and concerns about impartiality.

51. However the claimant did have a copy of the report in her possession, which was produced from the custody of her representative, to compare it with the filed report to ascertain whether it was the same as the report she had. It turned out that it was. However the claimant still could not recall having seen it, but accepted that she must have read it. This demonstrated clearly that the claimant's ability to recall was not perfect, even a matter as vital to her case as the existence and content of the only expert report in her claim for medical negligence, which she did not accept.

52. The fact that it was in her custody, and further that she did not accept it, leads to the necessary inference that she must have been aware of its contents. She would hardly be expected to object to it if she were not so aware. Any reasonable objection would have to stem from her awareness of its contents and a non acceptance, and therefore a dispute, as to its conclusions. She admitted as much under further cross examination.

53. I am constrained on a balance of probabilities to accept the defendant's witnesses' evidence as to how Depo-Provera came to be prescribed, namely, that a phone call was made to Dr. Ali by the nurse, that a conscious decision was made by Dr. Ali to prescribe Depo-Provera, and that an explanation of that decision was made to the claimant.

54. I accept the claimant's evidence that she experienced an adverse reaction and that it caused her distress. She also perceived a lack of concern among staff at the nursing home. It may or may not be that this coloured her recollection and perception of what transpired.

55. The claimant's evidence was that she knew Dr. Ali for several years, since childhood, and that he had treated her and performed prior surgery on her – including a hysterectomy. Dr. Ali testified that he never charged the claimant for consultations based on their long standing relationship, having grown up together.

56. The fact is that the claimant was a long standing patient whose condition was known to Dr. Ali. As soon as he was made aware of the adverse reaction being experienced by the claimant he arranged for her admission to the defendant nursing home for observation. The fact that he did not charge for this is consistent with his treatment of the claimant over many years, and I do not regard it as an admission of liability. This context is inconsistent with the existence of the sinister plot and cover up that the claimant seeks to allege.

Conclusion of fact

57. I find, therefore, that there is no evidence to support any such finding that the drug Depo-Provera was administered inadvertently or negligently, or that Dr. Ali was complicit in any cover up of an inadvertent administration of the drug Depo-Provera whether as alleged or at all. I therefore find that the defendant was not in breach of its duty of care to the claimant as alleged.

Causation

58. The medical opinion of Dr. Narayansingh is also relevant to the issue of causation. Dr. Narayansingh confirmed that his evidence was as an independent expert for the assistance of the court. He was questioned extensively by the representative of the claimant, and he was asked

questions by the court. He responded to all questions and the conclusions in his report were unshaken.

59. I therefore have no hesitation in accepting his evidence as that of an independent and objective expert.

60. His conclusions were as follows:-

Gynodian Depot

…… *is used to treat the climacteric symptoms of the female as a result of oestrogen deficiency. The climacteric symptoms are mainly night sweats and hot flushes (vasomotor symptoms), mood disturbances, depressive moods, headaches and irritability.*

Depo Provera…

In Trinidad and Tobago is extensively used and has a very good safety profile. Its major use is a hormonal contraception. The package insert from the manufacturer (Pharmacia) records other indications for its use, they are as follows.

a) The treatment of endometriosis.

b) The treatment of <u>menopausal vasomotor symptoms.</u>

3. Can Depo-Provera be used to treat and/or alleviate the symptoms of oestrogen deficiency that the claimant was being treated for by the administering of Gynodian Depot.

The alleviation of the vasomotor symptoms of hot flushes and night sweats ***can be eased by the administration of Depo-Provera****. The long term effects of oestrogen deficiency such as osteoporosis cannot be treated by the use of Depo-Provera. However* ***the acute symptoms that patients complain of can settle with Depo- Provera as a short term measure****.*

61. In his report Dr. Gordon Narayansingh considered that the symptoms complained of by the Claimant, which can be considered as associated with the use of Depo-Provera, were

difficulty **in sleeping**, **depression**, **headaches and dizziness**. However the said symptoms were "*very subjective and there is no direct clinical test to determine their objective validity…*
They are non specific and their causes are multi-factorial. "

62. Coupled with the evidence that the claimant's complaints of depression, headaches and dizziness long predated the administration of DP in 2006, it is difficult to ascribe a causal relationship between these symptoms and the administration of DP. I therefore find on a balance of probabilities there is none.

63. Dr. Narayansingh further stated that "*The other symptoms which include hot flashes, difficulty concentrating, bladder pains, abdominal cramps, nausea and Vaginal bleeding* ***cannot be implicated as adverse symptoms due to DP****. The latter symptom while it can develop would be rather unusual in women who have had a hysterectomy as in the case of the Claimant".*

64. He testified in cross examination that the symptom of vaginal bleeding is less likely to be experienced by women who have had a hysterectomy since such bleeding would usually be expected to stem from the uterus. He adequately explained a reference in the claimant's medical notes to such bleeding as probably the result of trauma resulting from examination. He concludes that of the many symptoms that the claimant contends arose from the administration of DP, the package insert recognises that DP can cause four - headaches, dizziness, difficulty in sleeping and depression. (In fact the claimant admits to a medical history in which depression was a feature which **predated** the incident. That suggests that that symptom was not caused by the administration of Depo-Provera).

65. Dr. Narayansingh refers to the alleged symptoms of headaches, dizziness, difficulty in sleeping and depression as subjective, and opines that if they exist at all they could have many causes unrelated to the incident.

66. I do accept that as to headaches, difficulty in sleeping and dizziness there is no admissible independent medical evidence corroborating her claim to have suffered these symptoms after, and as a result of the administration of DP.

67. Similarly, therefore, I am constrained by the expert evidence to find no causal relationship between the administration of DP and the symptoms of hot flashes, difficulty concentrating, bladder pains, abdominal cramps, nausea and vaginal bleeding.

68. In fact I find that the claimant has demonstrated no causal relationship between any present symptom, after a **possible** initial adverse reaction, and the administration of DP, and in fact no causal relationship between any symptom in her witness statement and the administration of DP. In fact, apart from paragraph 28, the witness statement is surprisingly vague on what were the symptoms being experienced, and their duration. She provided no admissible medical evidence of the existence of these symptoms or their duration.

69. Further, Dr. Ali testifies that the claimant experienced these - headaches, dizziness, and difficulty in sleeping - before the incident, and he knows this as he had been treating her for many years. Review of the medical notes confirms that he had been treating her for many years- in fact this is not in dispute. Further the medical notes reveal that the claimant did experience dizziness, nausea, and headache in **1991**.

70. Still further, there is no medical evidence that these symptoms, even if sustained, have been **continuing** since 2006 to trial- 6 years later. The action was filed in 2010, 4 years -less a few days - after the incident. The claimant claims that she sustained a **bladder infection** after surgery in **1995**. It is clear that this first arose more than 10 years **before** the administration of Depo-Provera. This is one of the symptoms which the claimant continues to complain of. This bladder infection allegedly recurred after administration of Depo-Provera. The claimant states that she did not request payment from Dr Ali for that 1995 incident, nor did she "threaten any legal action". However it is significant that the genesis of the instant claim for compensation seems intertwined with a claim for compensation for treatment of a bladder infection.

Paragraph 50 of her witness statement – "I will have to return to the UK to have the infection to my <u>blatter</u> (sic) and legs sorted out".
Paragraph 51 – "so that I will have funds to go to the UK so that I will have funds to sort out my <u>bladder</u> and leg problems"

71. No medical evidence of a causal link between bladder problems, or problems with her legs, and administration of Depo-Provera, has been established. In fact Dr. Narayansingh's evidence has negated any such link.

72. On a balance of probabilities therefore, I cannot accept the evidence of the claimant that her continuing complaints/symptoms were attributable to the administration of Depo-Provera.

Application of law to facts

73. The issue therefore arises as to whether the defendant failed to satisfy the Bolam requirements as to standard of care in **treatment** of the claimant.

Application of the Bolam test in relation to standard of care in treatment

74. Dr. Gordon Narayansingh, the expert witness initially agreed to by both parties, provided a medical report. The expert evidence of Dr. Narayansingh is crucial. He confirmed that Depo-Provera can be used to treat and/or alleviate the menopausal vasomotor symptoms of oestrogen deficiency, and it was a suitable substitute for GD for a patient in the circumstances of the claimant for treatment of her vasomotor menopausal symptoms.

75. This was a recognised use of the drug DP, and it could have been legitimately prescribed for the treatment of the claimant's vasomotor symptoms if GD were not available. His evidence confirms that Dr. Ali did not breach the duty of care owed to the Claimant by administering GD, as in so doing he acted in accordance with a practice accepted as proper by a responsible body of competent gynaecologists.

Whether the Bolitho exception applies

76. In this case apart from the fact that there is no opinion contrary to that of Dr. Narayansingh – who was initially appointed as a joint agreed expert, it cannot be demonstrated that his professional opinion is not capable of withstanding logical analysis. Attempts to do so in cross examination were not successful. It is clear that the Bolitho exception does not here apply.

The duty to advise

77. It is not specifically pleaded that the defendant failed to satisfy the Bolam requirements as to standard of care in the d**uty to advise** and warn of possible risks and adverse effects of DP. However it is implicit in the claimant's case that administration of DP was inadvertent and in error, because if, as she alleges, the defendant did not realize she had been injected with DP beforehand, then obviously it would not have advised her of its possible adverse effects. I have found as question of fact that Dr Ali did in fact inform the claimant that he intended to have DP administered in substitution for GD. I have rejected the evidence of the claimant to the contrary.

78. If he had not so advised her the issue would have arisen as to whether a responsible body of competent gynaecologists would have accepted as proper the non disclosure of the possible adverse effects of DP to a person in the specific circumstances of the claimant - with her complicated medical history, including ongoing vasomotor symptoms and their intensity, various surgeries, and prior depression. Evidence was not led on these issues and cross examination was not directed to them, probably because the issue of a duty to advise was not raised frontally in the claimant's statement of case. It arose merely incidentally to the claimant's pleaded case.

79. The state of the evidence in this regard is the same as in **Sidaway**, and the observation in that case is directly applicable. "*So there are eliminated from our consideration* ***matters of clinical judgement*** *of the (Gynaecologist) as to how to conduct a bilateral discussion with the patient* ***in terms best calculated*** *not to scare her off from undergoing an operation* (**treatment** in the instant case*) which in the exercise of the paramount duty of care* ***he owed to her individually*** *to exercise his skill and judgement in endeavouring to heal her ,* ***he is satisfied*** *that it is in her interests to undergo* ***despite such risks*** *as may be entailed."- at 656b-c* - all emphasis added. It is clear from **Sidaway v Bethlem Royal Hospital Governors** and others [1985] 1 All E.R. 643, that not all possible side effects would necessarily have had to be disclosed, and that the level of disclosure depended on inter alia, the chances/risk of adverse effects, the possible severity of such adverse effects ,and the circumstances of the individual patient. See **Sidaway** at 655-j-656a.

80. In the circumstances there is no evidence that Dr. Ali, even if he had not advised the claimant at all of the risk of possible side effects of Depo Provera, despite such non disclosure to

this particular claimant, would have been acting contrary to a practice accepted as proper by a responsible body of competent gynaecologists.

Causation:

81. Even if the Claimant established that the duty of care was breached, the Claimant has to prove that the said breach caused her injury, loss and/or damage. See **South West Regional Health Authority v Samdaye Harrilal CV App No. 60 of 2008 Mendonca JA, Jamadar JA and Bereaux JA delivered 12th May 2011.**

[13] *The question of **liability**, ought, in our judgment, to have been approached from two perspectives, firstly, **whether the hospital was negligent** in its treatment of the respondent during the course of her stay and particularly, during the delivery of her baby and if yes, **whether such negligence was the cause of the stillbirth**. The first issue necessarily involved finding **the existence of a duty of care** to the respondent and considering whether there was a **breach of that duty**. The second issue, being **one of causation turned on the medical evidence**.*

The issue of causation has been addressed in the findings of fact. See paragraphs **58-72** supra.

Damage

82. *It is of course quite clear that a plaintiff must establish that he suffered damage as a result of the defendant's negligence in order to succeed in an action in negligence*- See **Ramlal** supra **at paragraph 50.**

To the extent that she may have suffered an adverse reaction to the administration of Depo-Provera her complaint was responded to and treatment was provided as soon as it came to Dr. Ali's attention when she was admitted to the defendant, treated, and subsequently discharged. I have found that the claimant has not established that she suffered the continuing symptoms that she alleges. See findings of fact at paragraph **68** supra.

Conclusion

83.

i. The claimant was owed a duty of care by the defendant.

ii. The defendant did administer to the claimant Depo-Provera. I find as a question of fact that that administration was a conscious decision by the defendant and that it is more likely than not that the claimant was so informed.

iii. The administration of DP was, in the circumstances of this claimant in accordance with a practice accepted as proper by a responsible body of competent gynaecologists and Dr. Ali did not fall below the standard prescribed in **Bolam** in so prescribing DP. There was nothing in the claimant's medical history which should have prevented a reasonable gynaecologist possessing ordinary skill from prescribing DP in substitution for GD, and I so find on the evidence of the expert.

iv. There is no reason for invoking the **Bolitho** exception and rejecting the evidence of the expert in this case as it has not been demonstrated that it has no basis in logic.

v. In the alternative, with respect to the duty to advise, even if the claimant had not been informed, (though I expressly find as a question of fact that it is more likely than not that the claimant was so informed) the claimant has not established that it would have been the practice accepted as proper by a responsible body of competent gynaecologists to advise a claimant in her specific circumstances and with her particular complaints and medical history , that DP was being administered and its potential side effects.

vi. The Claimant has failed to establish on a balance of probabilities that she sustained or developed the symptoms complained of, or that they continued or persisted as alleged.

vii. The Claimant has failed to establish on a balance of probabilities that the said symptoms and/or loss and/or damages, if they were in fact sustained, were caused by the alleged administration to the claimant of Depo-Provera.

84. The claimant has not established that the defendant was in breach of its duty of care to her, and has not in any event established that she sustained any loss, damage, or injury attributable to the alleged incident.

Disposition and orders

85. The claimant's claim is dismissed with costs to be paid by her to the defendant in the sum of $14,000.00.

Dated this 16th day of October, 2012.

Peter A. Rajkumar

Judge