IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 22 of 2011

BETWEEN : VIMLA WATI of Tuatua, Labasa.

PLAINTIFF

AND : THE PERMANENT SECRETARY OF HEALTH of Suva

FIRST DEFENDANT

AND : ATTORNEY GENERAL OF FIJI

SECOND DEFENDANT

BEFORE : Justice G. Deepthi Amaratunga
COUNSEL : Mr. A. Sen for the Plaintiff
Mr. J. Mainavolau for the Defendants

Date of Hearing : 16th September, 2013
Date of Judgment : 25th October, 2013

CATCH WORDS -
Medical Negligence - open Cholecystectomy- severing of common bile duct (CBD) - inherent risks involved in open cholecystectomy - negligence during the surgery - failure to observe injury during a surgery – wrong diagnose of the symptoms of injury to CBD during the post operation observation.

JUDGMENT

A. INTRODUCTION

1. The plaintiff underwent an operation for the removal of the gallbladder. The removal was done through open Cholecystectomy. There is an inherent risk associated with this type

of surgery, where injury to hepatic duct/CBD may occur, but in this case the injury was severe and the common bile duct was severed and two ends were sutured blocking bile secretion. There is no evidence to suggest that the surgery was a complicated one. The expert medical evidence stated that injury to CBD in this type of surgery is less than 1% and this he attributed to mainly complicated cases where the identification of ducts and veins is difficult due to anatomical variations, but there is no evidence of such difficulty in regard to the Plaintiff. The doctor who performed the 2nd surgery said that there were no such anatomical variations. Not only during the surgery, but also the post operation observation failed to diagnose the defects of the operation, though the patient had shown symptoms of bile duct obstruction. Negligence of the hospital staff including the doctor who performed the operation is evident. The 2nd surgery was successful, and no proof of causation to the disabilities to negligent surgery, that Plaintiff presently experiencing. No proper impairment assessment report was produced, and damages confined to past pain and suffering due to defective surgery.

B. AGREED FACT

Following facts are agreed between the parties at the pre-trial conference.

1. *At all material times the 1st Defendant owned, managed and administered Labasa Hospital and provided medical, specialist and other health services.*

2. *The 2nd Defendant is the representative of Government of the Republic of Fiji under these proceedings pursuant to the Crown Proceedings Act.*

3. *The Plaintiff was born on 11th October, 1949 and was a patient at Labasa Hospital on 4th May, 2010.*

4. *On or around 4th May, 2010 the Plaintiff underwent open Cholecystectomy under general anesthesia which was performed by Doctor Maloni who at the material time was employed by the 1st Defendant as a Surgeon at Labasa Hospital.*

5. *Said Dr. Maloni owed the Plaintiff a duty of care, while the patient at Labasa Hospital.*

6. *Following the said operation on 4th May, 2010 the Plaintiff suffered severe back and loin pain of which she complained to the hospital authorities.*

7. *The Plaintiff was discharged on 11th May, 2010 from the Labasa Hospital.*

8. *The Plaintiff was readmitted to the hospital on 20th May, 2010 following her visit to clinical ward for review and before that a scan and some tests were conducted.*

9. *On 23rd May, 2010 second operation was conducted by Dr. Abhay Chaudhary, a Consultant Surgeon.*

10. *After the second operation the patient was admitted to ICU for 8 days and shifted to Women's Surgical Unit and remained there till 29th June, 2010 before transferring to CWM Hospital at Suva and she was admitted there until 30th July, 2011.*

C. ANALYSIS

2. The Plaintiff underwent an open Cholecystectomy operation at Labasa Hospital on 4th May, 2010 and after being admitted to the same hospital in the surgical ward, the Plaintiff was discharged on 11th May, 2010. After the surgery, the Plaintiff had pain in her abdomen and also absence of bile in her stools and diarrhea continued till discharge from hospital. At the time of discharge the Plaintiff was advised to come for review at clinical ward in seven days. According to the Plaintiff she had visited the outpatient ward due to severe pain in 4 days, and was advised to take here medication given at the point of discharge, but there is no record of such a visit, in her medical folder produced by the Plaintiff. After 9 days from the discharge the Plaintiff had reported to clinical ward and had complained of severe pain and her blood and urine samples were tested and an Ultra Sound scan was also obtained and she was re-admitted to the hospital. The results of these tests indicate that there was a high concentration of bile/proteins in her blood and urine and the scan was symptomatic of an accumulation of a fluid in her abdomen.

3. The said accumulated fluid was tested and it was confirmed that it was bile. This could happen only when the Common Bile Duct was injured, which happens in less than 1% of such open Cholecystectomy operations. The condition of the Patient was life-threatening at the time of diagnosis and an immediate surgery was performed.

4. It was revealed at the said corrective surgery that the CBD was severed and sutures were administered at two opened/severed ends of CBD. In a Cholecystectomy CBD is not required to be severed and only severing of the Cystic duct which opens to common Hepatic Duct is required.

5. Once the Cystic Duct opened to the Common Hepatic Duct the CBD is formed and the severing of the Cystic duct was needed, in order to remove gallbladder, before it opened to the Common Hepatic Duct. So, the removal of the gallbladder and cystic duct will not sever Common Hepatic Duct or CBD, but in this operation the CBD were severed and sutured the two open ends separately without connecting them. The suturing of two ducts or openings instead of one would ring alarm bells to a surgeon with reasonable care. If reasonable care was administered in the operation this fact would have realized and would have corrected the mistake immediately. This fact did not caught to the scrutiny by Dr. Maloni and no explanation for such a glaring error or mistake was produced at the trial. This cannot be considered as inherent risk involved in this type of surgery.

6. Though the injury to the CBD is possible due to proximity of the Cystic Duct, and Common Hepatic Duct and CBD in open Cholecystectomy operation, such incidence is less than 1% according to the medical evidence .The reason for such injury is also due to the anatomical variations of people and mainly due to difficulty in identification of the Cystic Duct from CBD. The Plaintiff was operated for the second time by Dr Abhay Chaudhary, who gave evidence at the trial, and confirmed the absence of such anatomical variations and there were no such factors to make it difficult to identify the relevant organs or ducts and veins. In the circumstances the severing of CBD and also suturing the two ends, so as to obstruct the bile from reaching the intestine for digestion and other metabolic reactions, is a clear dereliction of duty of care expected from a surgeon.

7. When Dr. Abhay Chaudhary gave evidence he said that Cholecystectomy is relatively straight forward operation if not complicated and also indicated that there were no notes of the doctor who performed the operation, to indicate that the patient's operation was a complicated one. He who conducted the second surgery also confirmed the absence of

factors to make the surgery complicated one confirming the negligence on the part of Dr. Maloni.

8. Dr. Abhay Chaudhary, who was the person in charge of surgical ward of the Labasa Hospital also stated that even when he carried out the second surgical operation it was not a complicated one and also stated when a person is operated for the second time it usually becomes more difficult than the first operation, but even in the second operation it was not difficult to make identifications of organs, ducts etc. indicating the first operation was not a complicated one. He also indicated what factors would make an open Cholecystectomy a complicated operation. He also stated that generally, before the operation it may not be possible to diagnose whether it will be complicated one, but once the body is dissected it can be identified. He also said if it is complicated, some additional assistance will be called for by obtaining assistance from another surgeon. In this surgery there was no such assistance requested. This supports that the surgery was not a complicated one.

9. Dr. Abhay Chaudhary said he had carried out more than 400 Cholecystectomy operations himself and from the evidence that he had gathered at the subsequent, corrective surgery and also from the notes of the doctor who performed the first operation, the patient's operation could not have been a complicated one.

10. In contrary to being complicated the notes of Dr. Maloni who conducted the Cholecystectomy clearly indicated that the relevant organs and ducts and blood supply were identified. The Operation an Anesthetic Report of the Plaintiff dated 4th May, 2010 which is contained in the Plaintiff's Medical Folder Marked as P1, was separately marked for the defence in the cross examination marked as D3 and this record clearly indicate that Cystic Duct was separated and ligated. If so there was no need to sever the CBD. Both parties rely on these notes contained in the 'Operation and Anesthetic Record'. There was no reason to sever CBD and the only conclusion is the lack of duty of care to the patient.

11. It is admitted that the Cholecystectomy was done by the Dr. Maloni and the Assistant Surgeon was Dr. Rachana of Labasa Hospital according to D3. The consultant surgeon who was in charge of the surgical ward at that time, who gave evidence read the notes of the said Dr. Maloni and indicated that the respective ducts and the blood vessels were identified, indicating that the operation, was not a complicated one. The absence of such factors that make the operation a complicated one when the same consultant operated for the second time also proves that the operation carried out by Dr. Maloni assisted by Dr. Rachana was not complicated one. The blood supply to the Cote's Triangle (area in which the operation was carried out) and various ducts being properly identified reimburse the fact that the first operation was not a complicated one. On preponderance of evidence the surgery cannot be included in 1% category where injury to CBD may occur.

12. Cote's triangle is the area where the surgery was administered commonly known, and several important organs are located, hence presence of good blood supply to the region. In a complicated case there is a less than 1% possibility of injury to the CBD during the operation. In order to fall in to the category of less than 1%, there should be presence of anatomical variations and other factors which make it difficult to identify the organs and ducts and blood supply in the region (Cote's triangle). There are no factors to support a complicated Cholecystectomy in this case.

13. Even in a complicated Cholecystectomy only an injury to CBD is possible, but in contrary the Plaintiff's CBD was severed and also sutured the open ends separately, indicating negligence on the part of Dr. Maloni. This act of negligence cannot be considered as common risk associated in injury to CBD in complicated Cholecystectomy for two reasons. First there is no evidence to prove that it was complicated Cholecystectomy, and secondly even in such complicated surgery only an injury to CBD is possible not severing and then suturing of CB and leaving it, as in this case.

14. In Dr. Abhay Chaudhary's evidence he stated that in Labasa Hospital at least a two Cholecystectomy operations are conducted per day and this is the most common type of surgery and a Doctor with reasonable skills and experience in surgery could conduct such

operation. He also said that this is not a highly skilled type of surgery though there may be incidences of injury to the CBD due to complications. The witness did not mention the text or literature he relied on, when the risk of injury was mentioned, but considering the skills and qualification and being the consultant surgeon who was in charge of the surgical ward for a considerable time, and now a lecturer at Fiji National University, his evidence can be accepted as an expert in this area. This evidence was not challenged, but as I have analyzed in this judgment, the error or defect inherent in the open Cholecystectomy has no application to this case. The conduct by Dr. Maloni assisted by Dr. Rachana of Labasa Hospital, cannot be categorized to fall into this category for reasons I have stated in this judgment. There are risks associated due to anatomical variations and factors unforeseen before the operation but this risk cannot be used as a scapegoat for a surgery conducted negligently.

15. If the Cholecystectomy was a complex one there is possibility of injury to CBD. Whether the Cholecystectomy was complicated or not is fully within the knowledge of the surgeon who performed the Cholecystectomy and if so he should have made notes of that fact and also should make additional precautionary measures to monitor the patient so that an early detection of any accidental injury to CBD could have identified at earliest opportunity, but this never happened to Plaintiff. So, even if the operation was complicate Cholecystectomy (there is ample evidence that it was not so) there is gross negligence on the part of medical staff of the Labasa Hospital, when the Plaintiff's post operation recovery review was not done with reasonable care.

16. The Plaintiff had taken more than the usual recovery time for uncomplicated open Cholecystectomy operation and also indicated abnormal blood, urine reports and diarrhea with white coloured stools. These symptoms were not properly analysed by the medical staff and that resulted the Plaintiff to life-threatening situation where the secretion of bile was obstructed by suture and secreted bile from the sutured end due to pressure, accumulated in the abdomen. This resulted the Plaintiff having 'burning sensation' an extremely severe pain in the whole body. This pain was due to the negligence of doctor who performed the operation as well as other medical staff who were unable to diagnose

the defect, though the Plaintiff complained of severe pain and other signs of bile obstruction in the body. More investigations or even the proper analysis of the said complains of the patient, would have mitigated the pain and suffering due to defective surgery, but this did not happen and the Plaintiff was discharged and even when she returned after 4 days from the discharge, with a severe pain she was advised to continue with same medication given at the time of discharge without further investigation in to the cause of the symptoms. The further investigations were carried out only on 20th May, 2010 when she again reported to surgical ward. Dr. Abhay Chaudhary said her condition at that time was severe and could even be life-threatening, indicating a high degree of negligence on the part of the medical staff of the hospital.

17. The Plaintiff in her evidence stated that she had complained of her pain and other medical conditions to the authorities. These were evidenced from her medical folder and in the cross examination the counsel for the Defence marked these specific folders. Though some actions were taken it is clear that no correct analysis of her symptoms was conducted hence absence of proper treatment. A high concentration of bile in the urine and lack of bile in stools would have immediately rung a bell that bile was not secreted to the intestine. The white coloured stools indicated absence of bile and concentrated bile in urine are contradictory findings and would need further analysis before discharging the patient with such condition. Since there was general risk of injury to CBD, the post surgery review and observation would have been more vigilant. So, the negligence of the Medical Staff of the Labasa Hospital is evident.

18. Dr. Abhay Chaudhary in his evidence stated that conditions of injury to CBD could have been identified as symptoms of secretion of bile would be present on the next day of the surgery. If so why it was not identified was not explained, but the notes in the patient folder indicate otherwise. So, the only possible conclusion that I can arrive at is, that those notes were also not properly maintained or recorded. The Defence tried to rely on the said notes, but the fact remained that the operation of Dr. Maloni was done without proper care and skill.

19. The counsel for the Defendants relied on excerpts of the text 'Clinical Negligence (4th Edi) by Dr. Mihael J. Powers,Mr Nigel H . Harris and Dr. Anthony Barton. Under General surgery (Chapter40) – Specific Operations states as follows

> *'40.32 During the course of a surgical procedure, surrounding structures that are not usually part of the field of that particular operation may be injured. For example, operating on the stomach of a patient who has had a pervious abdominal operation, in whom, for other reasons, there are adhesions present, may necessitate dividing adhesions to neighbouring loops of bowel. In the course of this dissection, it may not be possible to avoid damaging the bowel. This in itself does not constitute negligence, but failure to recognize a hole in the bowel following such mobilization, clearly is. The hole must be repaired by anastomosis. Removal of spleen at the time of upper abdominal surgery is sometimes necessary. This may be due to damage inflicted on the spleen during the surgical procedure, and such damage again usually due to adhesions, may be unavoidable. Recognizing damage to the spleen and taking the appropriate action of repair or excision of the organ is not negligent. Failure to recognize the injury may then result in severe post – operative bleeding when the hematoma ruptures. In a correctly observed patient, the sighs of shock will be detected early, laparotomy undertaken and splenectomy performed. Failure to observe the patient in the post – operative period may result in these early complications being missed, and this is negligent.'*

20. The above passage which I quoted form the 'Clinical Negligence' text (supra) that the Defendant relied is a case in point. I fully endorse the said paragraph contained in the text. Applying the said proposition even if the damage to CBD was unavoidable, the suturing the CBD is negligent. By the same token, failure to observe the obstruction of bile when the colour of the stools turned pale also indicate negligence. According to the notes of Dr. Maloni, the gallbladder was attached to liver by some adhesions. If removal of such adhesions resulted injury or severing of CBD, the injury would have been corrected immediately by connecting the severed parts together. Non observance of such injury is a negligent act. The severing of CBD and suturing the opened ends separately, without connecting them proves negligence on preponderance of evidence. Once the negligence is established the court needs to assess the damages.

D. SPECIAL DAMAGES

21. The Plaintiff claims following special damages

Transportation	500.00
Medication	300.00
Stay of the Plaintiff's spouse in Suva for 6 weeks at $50 per day	2 100.00
Having Housekeeper $80 per week from the date of operation until the date of the filing of the writ (80X58)	4,640.00
Total	7,540.00

22. The Plaintiff gave evidence and did not mark any document except the Medical Folder of the Plaintiff maintained by the Labasa Hospital which the Defence also relied in their cross examination of the expert evidence of Dr. Abhay Chaudhary. The medical folder cannot support the proof of special damages. The Plaintiff stated that after she was discharged from the first operation she came to the out patient ward to complain the severe pain she encountered after discharge from hospital. She explained the pain as 'burning sensation' and said it was unbearable, and had to come back to hospital after about 4 days from the discharge on 11th May, 2010. She had used a taxi for this visit and also used a taxi after the second operation when she was transferred to the CWM hospital to return to Labasa. The Plaintiff was unable to produce any documentary proof of that. She was admitted to CWM hospital to obtain a CT scan of the corrective surgery, but she remained in the CWM hospital for nearly one month.

23. Considering that she returned by air and she was accompanied by husband, I shall allow a special damage for transportation including air fare a sum of $400. The patient was given medication by the hospital and there was no evidence that she was asked to obtain medicine from outside. The Plaintiff stated that she is presently taking some medicine for the pain, but this pain according to the Plaintiff's medical evidence is due to her advanced age and no causation to injury of CBC is proved. On preponderance of evidence there is no proof of impairment from negligent surgery.

24. The Plaintiff was unable to link the causation of her present difficulties to the defective operation. There was no impairment assessment report in terms of AMA Guide Lines (6th Edition) which is the generally accepted method of assessing impairment for legal actions in Fiji. The Plaintiff did not produce any evidence to support impairment due to negligence of the 1st operation. In contrary the medical evidence produce by the Plaintiff failed to explain any permanent or temporary impairment of the Plaintiff after the second corrective surgery. Even the Plaintiff was not asked to come for clinical observations after the 2nd operation, indicating complete recovery at CWM hospital. If not either at the same hospital or at Labasa Hospital, the Plaintiff would be required to attend clinic for observation of the recovery of the impairment or disability.

25. So, the Plaintiff's existing pains and difficulties have no link or the causation to the negligence or the medical mishap that was subsequently corrected through a surgery that connected the severed CBD. Hence no special damage can be granted for her present or future medication. The surgeon who performed that operation said he connected the severed CBD directly. He said that was possible in this surgery since the direct connecting of two severed parts created no tension to CBD.

26. The Plaintiff had claimed $50 per day for six weeks she spent at a relative's place for expenses and claimed $2,100. Again there is no evidence to support this claim, but there is evidence that she was transferred to the CWM hospital at Suva from Labasa Hospital and she remained there for nearly one month. The Plaintiff stated that her husband accompanied her, but she did not tell that her husband visited her daily or there was such a need for one person to attend to her needs. She stated that once discharged her husband accompanied her home and they travelled together. Considering the evidence I will grant $600 for incidental expenses including expenses at staying in a relative's place in Suva for the period of one month.

27. The Plaintiff had claimed for expenses for a housekeeper. The present housekeeper's expenditure again could not be linked to the causation of the negligent surgery. The 2nd surgery was successful and the damage has to be confined to the pain and suffering of the

patient due to the negligent operation. There is no medical evidence to support impairment due to the severing of CBD which had an effect on her health. In any event the Plaintiff in her evidence stated that house keeper is engaged only once a week at a rate of $12 per day. So, housemaid's expenditure should be restricted from 11th May, 2010 to 20th May, 2011 when she was readmitted for the 2nd surgery to the hospital. I have already granted a gross sum for the period that Plaintiff remained in Suva, hence that period cannot be included for housekeeper's expense. The Plaintiff and her husband were in Suva during that period. So the expenditure for housegirl is for 9 days at $12 is $108.

28. The total amount granted for special expense is $(400+600+108=1108) $1008. I also award an interest of 3% p.a for said sum from the date of alleged negligence (i.e. 4th May, 2010) to the date of judgment and 6% p.a thereafter until the final settlement of the sum.

29. The Plaintiff is seeking general damages for the pain and suffering due to the negligence. The Plaintiff had to undergo a second or corrective surgery due to the fact that first operation was defective. Due to defects in the first surgery the CBD was severed and the bile from the liver secreted from the suture due to the pressure accumulated due to obstruction of bile, to the abdomen from 4th May, 2010 to 20th May, 2010 till the corrective surgery was carried out. The Plaintiff explained the severe pain she had encountered and said it was a 'burning sensation' inside her body, though exaggeration of pain and suffering is common the medical evidence confirmed that pain due to accumulation of bile in the abdomen, was severe. So the Plaintiff went through severe pain due to the negligence of the Medical staff of the Labasa Hospital including Dr. Maloni till the corrective surgery was administered and readmitted to the same hospital on 20th May, 2011. If the first operation was successful the recovery would have been in less than a week according to Dr. Chaudhary. Due to the conduct of the medical staff of 1st Defendant this recovery of the operation became longer and the Plaintiff was transferred to CWM hospital and he also stayed there for nearly one month. The award for the severe pain is confined only till corrective surgery was conducted and the time period was from 4th May to 20th of May 2010.

30. When awarding general damages for pain and suffering the court cannot arithmetically assess it. At the same time when the court is awarding damages for pain and suffering there should be uniformity as to awards. The only case of similar medical negligence that exposed a plaintiff to a pain and suffering for nearly two months was in 1996 and the Magistrate's Court had awarded a sum of $14,000 at that time. Though the Plaintiff's counsel extolled the virtues of the Resident Magistrate's said decision and said that he would submit a copy of the said decision, he refrained from doing so, but the Defence submitted a copy of the said decision. It should be noted that duration of pain and suffering in that case was four times (2 months) of the case before me (16 days). The type of pain and duration of it are relevant factors to taking into account, in assessment of damages.

31. The principles governing the amount of such awards and the function of this court in relation thereto are set out by Lord Diplock in his speech in ***Wright v British Rlys Board*** [1983] 2 All ER 698 at 699–700,

> *'My Lords, claims for damages in respect of personal injuries constitute a high proportion of civil actions that are started in the courts in this country. If all of them proceeded to trial the administration of civil justice would break down; what prevents this is that a high proportion of them are settled before they reach the expensive and time-consuming stage of trial, and an even higher proportion of claims, particularly the less serious ones, are settled before the stage is reached of issuing and serving a writ.* ***This is only possible if there is some reasonable degree of predictability about the sum of money that would be likely to be recovered if the action proceeded to trial and the plaintiff succeeded in establishing liability****. The principal characteristic of actions for personal injuries that militate against predictability as to the sum recoverable are, first, that the English legal system requires that any judgment for tort damages, not being a continuing tort, shall be for one lump sum to compensate for all loss sustained by the plaintiff in consequence of the defendant's tortious act whether such loss be economic or non-economic, and whether it has been sustained during the period prior to the judgment or is expected to be sustained thereafter.* ***The second characteristic is that non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or***

judge, the figure must be "basically a conventional figure derived from experience and from awards in comparable cases" …**(emphasis added)**

32. I have referred to cases cited by the counsel for the Plaintiff. These cases were not comparable with the case before me. In the absence of any High Court decision regarding similar circumstances I award a damage of $15,000 as general damages for past pain and suffering. The Plaintiff is granted an interest of 6% p.a from the date of writ to the final settlement of the full sum.

33. I also award a cost in favour of the Plaintiff assessed summarily at $5,000.

E. FINAL ORDERS

a. The Plaintiff is granted a Special Damages of $1008 and an interest of 3% p.a from 4th May, 2010 to the date of judgment and 6% p.a thereafter until final settlement against the Defendants jointly and or severally.

b. The Plaintiff is also granted a general damages of $15,000 against the Defendants jointly and or severally and also interest to said sum at 6% p.a from 11th June, 2011 to final settlement of the full sum.

c. The Plaintiff is also granted cost of $5,000 assessed summarily.

Dated at **Suva** this **25th** day of **October, 2013**.

…….

Justice Deepthi Amaratunga

High Court, Suva