

**THE HIGH COURT OF FIJI AT LABASA**  
**CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 33 of 2014

**BETWEEN** : PARMILA DEVI RAJ of Bocalevu, Labasa.

**Plaintiff**

**AND** : PERMANENT SECRETARY OF HEALTH

**1<sup>st</sup> Defendant**

**AND** : ATTORNEY GENERAL OF FIJI

**2<sup>nd</sup> Defendant**

COUNSEL : Mr. A. Sen for Plaintiff  
Mr. J. Mainavolau for Defendants

Date of Hearing : 08<sup>th</sup> March, 2016

Date of Judgment : 29<sup>th</sup> April, 2016

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**JUDGMENT**

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[1] The plaintiff instituted these proceedings against the defendants claiming special damages in the sum of \$ 5,040.00, general damages and costs.

- [2] The plaintiff was admitted to the Labasa Hospital on 6<sup>th</sup> June 2013 with the history of vaginal bleeding. On 8<sup>th</sup> June 2013 she had a scan of the pelvis which showed retained products of conception. The plaintiff requested for bilateral tubal ligation surgery.
- [3] Dr. Tuggi while performing the surgery damaged the bladder of the plaintiff. The plaintiff's case is that the injury caused to the bladder was due to the negligence of Dr. Tuggi.
- [4] In the statement of defence the defendants while denying the allegation of negligence on the part of the doctor who performed the surgery averred that the defendants have exercised reasonable degree of care at all times in the execution of their functions.
- [5] The main issue for determination is whether it was due to the negligence of Dr. Tuggi the injury to the plaintiff's bladder was caused.
- [6] At the trial both the plaintiff and the defendant proposed to call Dr. Viliame Nasila to testify. The parties came to an understanding and allowed the plaintiff to call the doctor as her witness. In his evidence Dr. Viliame Nasila who is the gynecologist of Labasa hospital testified that the plaintiff was admitted to the hospital on 6<sup>th</sup> June 2013 and was diagnosed with a miscarriage complication which was an incomplete miscarriage. The plaintiff was scanned twice and the tubal ligation surgery was done on 10<sup>th</sup> June 2013 by Dr. Tuggi with an abdominal incision. Dr. Tuggi in the process of getting into the abdominal cavity caused a 3 cm long cut injury on the bladder. The plaintiff who could have been released from the hospital on the following day had to be kept for 14 days and the patient had been given antibiotics to avoid any infection and the catheter inserted had been there, according to the plaintiff's evidence, even on the 1<sup>st</sup> July 2013 when she was reviewed by the doctors.

[7] On behalf of the defendants the learned counsel called a doctor who had no knowledge of the incident which is the subject matter of this action. She testified that the plaintiff came to the Out Patients' Department of Labasa Hospital complaining of an abdominal pain. Then the learned counsel sought permission of the court to have a document of which she was not the author, read by the witness without tendering it in evidence and also without serving it on the opposite party. Once a document is read in evidence it becomes part of the record and the opposite party is entitled to peruse it and cross-examine the witness on the contents of the document. Therefore, the court disallowed the application of the defendant's counsel to read this document in evidence without tendering it to court.

[8] It is the submission of the learned counsel for the defendants that complications are not unusual in surgical operations. The learned counsel in this regard cited the following paragraphs from the book titled **CLINICAL NEGLIGENCE**, 4<sup>th</sup> Edition by Dr. Micheal J Powers, Mr. Nigel Harris and Dr. Anthony Barton;

Complications following general surgery can be divided into two groups: those specifically related to the operation itself, and those related to any operation itself.....sometimes, following a surgical procedure, there is a recognized associated condition which may occur in all patients, or may occur selectively.....these changes can be temporary or permanent, giving rise to minimal symptoms but, on occasions, quite severe and disabling complications. Although these problems are not negligent the patient who has received proper consent or understands tolerates this outcome better.

In any individual operation, certain anatomical structures are known to be at risk. The basic principle is that all anatomical structures should be preserved, or if damaged, then repaired, unless the decease process necessitates their removal. ...Operating in the abdomen may involve

operating common bile duct, which again, should be preserved unless there is a good indication for removing it.

During the course of surgical procedure, surrounding structures that are not usually part of the field of the particular operation may be injured. For example, operating on the stomach of a patient who has had a previous abdominal operation, or in whom, for other reasons there are adhesions present, may necessitate dividing adhesions to neighboring loop 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, or the damaged segment resected and continuity of the bowel is restored by anastomosis.

- [9] It is the submission of the learned counsel for the defendants that the above principle clearly shows that in general surgery the law is quite clear on complications and adhesions that occur and the procedures undertaken to remedy the complications.
- [10] I have to disagree with these submissions for the reason that these principles can apply to a situations where the surgical misadventures occur after the doctor who performed the surgery had taken all the precautionary measures.
- [11] It was the evidence of Dr. Viliame Nasila that it is a prerequisite that the bladder has to be emptied before tubal ligature surgery is performed. Even in cross-examination the doctor stated that this injury would not have happened, if the bladder was emptied prior to the surgery by Dr. Tuggi.
- [12] The learned counsel for the defendants also submitted that the injury to the bladder was inflicted by hand which in my view is impossible. Dr. Viliame Nasila in cross-examination said that this injury could have been caused by the

hand but it is his evidence that it needs a considerable force to inflict an injury of this nature. It is not a disputed fact that the injury was a cut. In my view it is not possible for a doctor who performs a surgery wearing surgical gloves to inflict a 3 cm cut injury by hand.

- [13] The doctor who performed the surgery owed a duty of care to the plaintiff. There is no evidence that Dr. Tuggi did his personal best to avoid this injury being caused to the bladder in the course of the surgery. In **TORT LAW by Nicholas J McBride and Roderick Bagshaw**, 4<sup>th</sup> Edition (2012) at page 246 it says that the fact that a defendant did his or her personal best avoid something happening will not necessarily mean that he or she did not breach a duty of care owed to the claimant. The standard of care that a defendant is expected to exercise in the interest of a claimant is objective.
- [14] If Dr. Tuggi was careful enough to follow usual procedure which the doctors are required to follow as stated by Dr. Viliame Nasila the injury caused to the plaintiff's bladder could easily have been avoided. It cannot therefore, be said that Dr. Tuggi has exercised the standard of care expected of a doctor in performing the surgery on the plaintiff.
- [15] The learned counsel for the plaintiff submitted that the maxim *res ipsa loquitur* could be applied to the facts of this case.
- [16] The rule is that the burden of proving the negligence on the part of the defendant is on the plaintiff who alleges negligence. The burden shifts to the defendant in a case where the maxim '*res ipsa loquitur*' (the thing speaks for itself) applies. If what has happened to the claimant will count as evidence that the defendant has breached his duty of care, the burden of proof will then fall on the defendant to show that, in fact, he did not breach his duty of care and that what happened to the claimant has some other explanation.

[17] The plaintiff who underwent the surgery is not in a position to say what happened in the course of the surgery. It is Dr. Tuggi who knows exactly what how the bladder was injured during the surgery but he sought not to testify at the trial and to explain the manner in which this injury was caused. Dr. Viliame Nasila took over the patient after the injury was caused. He was not an eye witness to the incident. He could only testify as to what happened thereafter and of course his opinion as an expert.

[18] In the case of **Barkway v South Wales Transport Co Ltd** [1950] 1 All E R 392 at page 394 it was observed;

The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speaks for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not.

[19] The evidence available on record is sufficient to shift the burden to the defendants to explain cause of the injury and since there is no explanation offered by the defendant the court has no alternative but to infer negligence on the part of the doctor who performed the surgery on the plaintiff which is also supported by the evidence of Dr. Viliame Nasila.

[20] By way of special damages the plaintiff claimed \$5040 (Transportation - \$500, Medication - \$300 and for the house keeper at the rate of \$80 per week for 53 weeks - \$4240).

[21] To prove that she spent \$500 as taxi fare to come to the hospital on various occasions after the injury was caused to her bladder the plaintiff called the taxi driver who took her to the hospital. The witness testified that since there was

no bus service to the place where they lived he used to provide transport to the plaintiff and the plaintiff spent \$500 as taxi fare. In cross examination the learned counsel for the defendants asked the witness whether he issued receipts to the plaintiff and he answered in the negative. Explaining it further the witness said that he works for the taxi company and there was no policy that they had to issue receipts. He testified further that receipts were issued only upon request. The credibility of this witness was not challenged by the learned counsel for the defendants. Therefore, there is no reason for the court not to act upon the evidence of this witness.

[22] Witness Michael Ranesh Chand is a cousin of the plaintiff who testified that during her illness he worked in their farm and also attended to domestic work for a period of one year. According to him he had been paid \$80 per week for the work done. The plaintiff in her evidence said that she spent \$300 for medicine. This claim was also not challenged by the defendant.

[23] The plaintiff testified at the trial that after the operation catheter on her for 16 days which was very painful and urine was leaking from it. It is also her evidence that she travelled to the hospital with the catheter and even after it was removed she could not attend to her day to day domestic matters and she could not stand for long. She testified further that she and her husband were farmers and she cannot assist the husband after the injury. However, there is no evidence as to the extent to which the family of the plaintiff lost income from the farm due to the injury caused to her bladder. If the farm was closed the injury sustained by the plaintiff could not have been the sole reason for that. There is no doubt that due to the negligence of Dr. Tuggi the plaintiff had undergone lot of pain and she had been uncomfortable until the catheter was removed. The Plaintiff also complained that after the operation she put on lot of weight and she was not feeling normal after discharging from the hospital.

[24] In calculating the damage for pain and suffering the court cannot ignore the fact that apart from the injury caused to the bladder she also underwent a tubal ligation surgery. For the plaintiff to become entitled to damages for the continued pain there must be evidence that it was due to the injury caused to the bladder and not due to the tubal ligation surgery but there is no such evidence available on record except for the evidence of Dr. Viliame Nasila that it was possible that the injury would last long.

[25] The learned counsel for the defendant called his own mother to testify at the trial. In her evidence the witness stated that she had undergone three cesarean surgeries but she was able to wash clothes and sweep the floor. She testified further that she does not feel the pain and she also can drive. It is to be noted that position of the plaintiff who sustained a cut injury on the bladder is quite different to that of a person who had a cesarean surgery. Pain suffered by the plaintiff cannot in anyway be compared with the mother of the plaintiff who testified in court after many decades of her cesarean surgery.

[26] The evidence adduced by the plaintiff regarding the pain she was in after the surgery is sufficient for her to be entitled to damages for pain and suffering. There is no mathematical formula to calculate the quantum of damages to be awarded for pain and suffering. Since there is no relationship between pain and money the court must award some amount arbitrary but reasonable after taking into consideration the facts and circumstances of each case.

[27] In assessing the quantum damage for pain and suffering I will also take into consideration the following decisions where the court has assessed damages under various circumstances.

In **Anderson v Salaitoga** [1994] FJHC 42; Hbc0353j.89s (4 May 1994), the plaintiff in an accident suffered severe head injuries and the court awarded \$85000 as damages for pain, suffering and loss of amenities



In **Kotoiwasawasa & Another v Govind & the Attorney General** [2003] FJHC 270; HBC0192j.2000s (13 February 2003), the plaintiff was awarded \$95000 for pain and suffering. In that case the plaintiff sustained injuries in a motor vehicle accident and as a result her leg below the knee was amputated.

In **Attorney-General v Waqabaca** [1998] FJCA 43; Abu0018u.98s (13 November 1998) is a case where the plaintiff suffered irreversible brain damage due to the negligence of the doctors and the court awarded \$85000 as damages for pain and suffering.

In **Flour Mills Fiji Limited v Raj** [2001] FJCA 35; ABU0056.1999S (24 May 2001), the plaintiff was unconscious for three days after being taken to hospital, where he remained until 1 October. The right arm was amputated and he was in plaster for a month and on medication for constant pain, undergoing frequent trips to the theatre for surgical attention to both arms. Movement in the left arm and hand is very limited and the prognosis is uncertain, but it was said in the hospital report that he might benefit from extensive rehabilitative therapy, and that he will probably benefit from prosthesis for his right arm. The Judge noted that he had been a keen sportsman and is now largely inactive and dependent upon his wife for the simplest tasks; that his sexual relations with her have deteriorated and that he is embarrassed to go out. He continues to suffer pain. The court awarded \$85000 which was upheld by the Court of Appeal.

In **Maka v Broadbridge** [2003] FJCA 31; ABU0063.2001S (30 May 2003), the plaintiff sustained fractures in the forearm and in the hip joint. The hip replacement caused restrictions in the movement. Due to the misdiagnosis of the injuries by the doctors his right leg was shortened.

The court of Appeal awarded \$60000 for pain and suffering and loss of amenities.

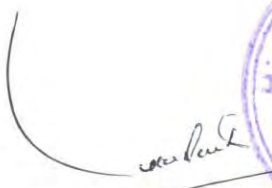
[28] In the cases cited above the injuries caused to the respective claimants were grievous and the disabilities were permanent in nature. In the present case the injury caused to the bladder was treated by the doctors and it is now cured.

[29] Taking all the circumstances of this case into consideration I find it is reasonable to award \$ 25000.00 as damages for pain and suffering.

[30] Accordingly I make the following orders.

#### ORDERS.

1. The defendant shall pay the plaintiff \$5040.00 as special damages.
2. The defendants shall pay the plaintiff \$25000.00 as general damages.
3. The defendant shall pay the plaintiff interest on aforesaid sum (\$30,040) in terms of section 4 of the Law Reforms (miscellaneous Provisions)(Death and Interest) Act (Cap 27) as amended by Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011.
4. The defendants shall pay the plaintiff \$3000.00 as costs (summarily assessed) of this action.

  
Lyone Seneviratne



**JUDGE**

29<sup>th</sup> April 2016