



[2020] JMSC Civ. 102

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 01678

BETWEEN	OCTAVIA CHAMBERS	CLAIMANT
AND	THE SOUTH EAST REGIONAL HEALTH AUTHORITY	1st DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2nd DEFENDANT

Mr Sean Kinghorn instructed by Kinghorn and Kinghorn for the claimant.

Ms. Christine M McNeil instructed by the Director of State Proceedings for the defendants

Assault – Medical Negligence - Informed Consent- Information as to options for medical treatment – Hysterectomy – Liability of hospital- Amendment on Court’s initiative

May 27, 28, 2019 and March 12, and May 27, 2020

LAWRENCE-BESWICK J:

THE CLAIM

[1] On 20th March, 2012 Mrs. Chambers filed this suit claiming¹ that whilst she was a patient at the Spanish Town Hospital, medical personnel employed there (its servants

¹ Para. 5 of Particulars of Claim

and/or agents) removed her uterus without her consent and thereby assaulted her. Alternatively, she claims that the medical personnel negligently removed her uterus in the course of treatment, and alleges that she has thereby sustained serious personal injury and has suffered loss. She claims damages from the defendants for assault and battery or alternatively, for negligence. The Attorney General is sued by virtue of the Crown Proceedings Act.

[2] Along its journey through the Court for various and varied applications over several years, the 1st defendant has been named and/or referred to as “The South East Regional Health Authority (also known as The Spanish Town Hospital)” and also as “The South East Regional Health Authority “. An examination of the substance of the pleadings, the witness statements and the submissions shows clearly that all parties understood the Spanish Town Hospital to be the hospital concerned in this matter. However, on the claim form the 1st defendant is named as “The South East Regional Health Authority (also known as The Cornwall Regional Hospital)”. The error is obvious. In the interest of accuracy of documentation, I therefore, of my own initiative, empowered by s.26(2) of the Civil Procedure Rules, ordered the amendment of the heading of the Claim Form and all other relevant documents by deleting the words “(also known as The Cornwall Regional Hospital)”. The affected parties were given the opportunity to make any representations in that regard. They agree with the amendment made and the claimant has filed and served amended copies of the pertinent documents.

THE DEFENCE

[3] It is agreed that the 1st defendant, the Southern Regional Health Authority, manages and operates the Spanish Town Hospital in which the claimant received treatment. The defendants contend that Mrs. Chambers had consented to treatment for her condition, septic miscarriage. She had therefore not been assaulted.

[4] The further defence is that while the treatment was in progress, her life became threatened because of uncontrollable bleeding. The universally accepted medical response to such an emergency is a hysterectomy and that was the procedure adopted by the medical personnel at the Hospital. The defendants had therefore not been negligent.²

THE EVIDENCE

[5] On 6th October 2011 the claimant had been admitted to the Spanish Town Hospital for treatment of a septic miscarriage.

[6] On 7th October 2011, she signed three consent forms including two directly concerned with the “evacuation of retained products of conception”, referred to as Erpoc.

[7] On 9th October 2011, she was taken to the operating theatre for the procedure. It is only the 1st defendant who is able to give evidence as to what is alleged to have been occurring at the time when the decision was made to perform the hysterectomy, as from all indications, the claimant was not conscious.

[8] The evidence is that whilst in the process of removing the products of conception, the doctor noted that the claimant was bleeding profusely. She tried to curtail the bleeding but the haemorrhaging continued unabated. This necessitated the surgical opening of the abdomen which revealed that there was damage to the uterus and there was necrotic tissue, that is, tissue already dying.

[9] The claimant’s evidence was that she did not know what septic miscarriage was, and that no one had explained it to her and she never asked. There was no explanation

² Amended Defence filed 19th December 2012

to her as to the risk which she faced of losing her uterus during the procedure of removing the products of conception and she had not consented to its removal. She had not been presented with all options for treatment.

[10] The defendants focussed on providing medical evidence to show that the claimant had understood the procedure and had consented to it. In addition, in any event, during the procedure Mrs. Chambers' condition deteriorated, resulting in a medical emergency. The hysterectomy was done to preserve her life and was in keeping with the universally acceptable response to that emergency. Three doctors provided that evidence.

[11] The first was *Dr. Sherika Pearson* who at the time of the incident in 2011 was the Junior Resident in Obstetrics and Gynaecology at the Spanish Town Hospital.

[12] Her witness statement³ outlined that on 9 October 2011 it was she who diagnosed the claimant with a septic miscarriage. The treatment for that is the evacuation of the infected "products of conception". Dr. Pearson testified further that there are three methods to evacuate the uterus and each comes with a risk. They are by way of a tablet inserted into the vagina, the dilation and curettage (D&C) and also vacuum curettage.

[13] According to Dr. Pearson, Mrs. Chambers had given consent for the evacuation of the retained products of conception from her uterus. Forms bearing Mrs. Chambers' signature consenting to procedures were exhibited. The evidence continued that it was at the time of giving consent that the patient would be told of the risk of a hysterectomy from the procedure.

³ Filed 2 December 2016

[14] Dr. Pearson readily agreed that it is a breach of duty to the patient if the patient is presented with a Consent Form to a procedure and is invited to sign without being counselled.

[15] She examined carefully the docket concerning Mrs. Chambers and could find nothing there to indicate that any thorough explanation was given to her by any doctor about possible procedures.

[16] She testified however that she herself had examined and counselled Mrs. Chambers about the risk of the D&C method, including the possibility of losing her womb by that method. According to Dr. Pearson, Mrs. Chambers had then enquired as to how often that happened, to which the Doctor replied that it was not very often. The counselling had lasted for minutes during Ward rounds on the 8th October when she had told Mrs. Chambers what the plan for her treatment was.

[17] Dr. Pearson testified that at no time did she tell Mrs. Chambers of the less risky third option of vacuuming the womb because it was not offered in the Public Hospitals. It was the University Hospital of the West Indies at which it was available.

[18] Dr. Pearson had not recorded the conversations which she had had with Mrs. Chambers although it is the norm to put in her notes the information which she communicates to her patients. She did however, see in her notes, where Mrs. Chambers had subsequently been informed of the loss of her uterus, but there was no note of the counselling which she had testified that she had given before the procedure. Her explanation was that it was not her practice to put notes of her counselling in the docket because it is routine to talk to the patients about the procedure.

[19] Dr. Pearson also testified that it was interns, that is, junior doctors, who had in fact counselled Mrs. Chambers initially. They had not been supervised when they had counselled her because counselling is routine and the interns learn how to counsel properly by witnessing how it is done. Counselling would involve an explanation of the treatment involved.

The Surgery

[20] At the start of the procedure, the doctor had not asked Mrs. Chambers whether or not she had given consent because she had already seen two consent forms in Mrs. Chambers' docket. However, neither of those forms spoke to a risk of a hysterectomy though she regarded the loss of the womb in a hysterectomy, as a serious risk, one which is feared by both the doctor and the patient. Neither could Dr. Pearson show on the docket where Mrs. Chambers had been told that there were three options available to treat her condition, including the less risky vacuum curettage.

[21] Further questions sought to focus on the precise moment when the decision to remove Mrs. Chambers' uterus was made and whether at that time the doctor had been in a condition to properly make decisions. She remembers that surgery in particular because of the claimant's inexplicable bleeding on the operating table.

[22] The matter of the fatigue of the doctor whilst making decisions and whilst performing procedures came up for examination. Dr. Pearson recalled that Ms. Chambers' surgery was the last of five surgeries for the night. Dr. Pearson testified that she had been on duty from 8 am on October 8 to 8 am on October 9, 2011. She however denied having told the complainant that she was tired. She said she had been working those hours "forever" and so was quite accustomed to that schedule.

[23] *Dr. Kingsley Ford*, who at the time was the Senior Registrar at the Spanish Town Public Hospital, was the next doctor to testify on behalf of the defence. His evidence was that it was when Dr. Pearson was evacuating the products of the conception that he, Dr. Ford, became aware of Mrs. Chambers' condition. By then she had lost about half of the blood in her body within 5 to 10 minutes.

[24] Dr. Ford's evidence is that in order to identify the source of the severe bleeding he performed an exploratory laparotomy. When he opened Mrs. Chambers' abdomen, *"the claimant was still bleeding heavily and laboratory investigations revealed a*

*hemoglobin level ... (which) meant that over 75% of the claimant's blood volume had already been lost which essentially meant that her life was in jeopardy."*⁴

[25] Mrs. Chambers had a gaping hole on the entire right side of her uterus. There was tissue in her abdomen which was dead and decaying and which could not be repaired. It was Dr. Ford's opinion that the hysterectomy was the most effective way to stop the haemorrhaging. It could not have been avoided because the uterus was the source of the bleeding. Dr. Ford therefore removed her uterus in order to save her life.

[26] The final witness for the Defence was *Dr. Leslie Samuels*. He is a fellow of the American College of Obstetricians and Gynecologists. It was his opinion that the diagnosis of septic abortion had been accurate and that "*the Defendant's agents followed the guidelines in the management of this type of medical complication (septic abortion) in a timely fashion, in a systematic and logical manner and using appropriate methods at all times.*"⁵

[27] Dr. Samuels also opined that the hysterectomy which was to save Mrs. Chambers' life, was done in accordance with international standards.

SUBMISSIONS BY THE CLAIMANT

[28] Counsel for the claimant argued that since the claimant was not informed as to the three methods by which her septic miscarriage could be treated, nor of the risks, she had not therefore given informed consent about her treatment. It followed therefore that any subsequent surgery would have been an assault.

⁴ Paragraphs 4 and 5 of witness statement

⁵ Paragraphs 4 and 5 of witness statement

[29] Alternatively, went the argument, the fact that the claimant had not consented and yet her uterus had been removed showed a clear breach of the defendants' duty of care to her, amounting to negligence.

[30] Further, the failure to provide her with sufficient information to make an informed decision amounted to negligence, based in part on her inability to give informed consent. The medical personnel had failed in their duty of care to her.

[31] Counsel relied on the case **Annissia Marshall v North East Regional Health Authority and the Attorney General**⁶ as authority for submitting that the case at bar showed assault and/or negligence by the defendants as there had been no informed consent to the particular medical procedure.

SUBMISSIONS BY THE DEFENDANTS

Assault

[32] The main pillar of this submission is that the removal of the uterus was a lifesaving procedure and did not in fact require consent.

[33] In any event, the claimant had consented to procedures to be done to treat her condition and a patient's consent is a defence to a claim for assault, if the patient has been informed of the nature of the procedure intended and thereafter consents.⁷ The argument was that here the claimant gave informed consent after having been counselled and advised.

⁶ [2015] JMCA Civ 56

⁷ **Chatterton v. Gerson** [1981] QB 432

[34] Further, contend the defendants, the claimant had not led any evidence to challenge the assertion that the doctors' actions were to save her life. Therefore, in the circumstances of the case at bar, it cannot be said that the claimant was assaulted.

Negligence

[35] Counsel for the defendants argued that proof of negligence required proof that the defendants breached a duty of care owed to the claimant resulting in damage to the claimant.

[36] Counsel admitted that the defendants owed the claimants a duty of care but argued that there was no breach of the duty and also no loss to the claimant. The argument was that the defendants acted in accordance with proper medical practice and exercised the standard level of care in the emergency situation.

[37] The further submission was that the claimant had put to the court no evidence whatsoever whether in the form of a medical report or otherwise which would establish that the defendants' doctors had breached their duty of care to the claimant.

The submission therefore was that the claim should fail as the evidence had not established negligence.

DISCUSSION

Was there an assault?

[38] An assault is an intentional and overt act causing another to apprehend the infliction of immediate and unlawful force.⁸ It follows that if there is consent then there

⁸ Halsbury's Laws of England- Tort (Volume 97 (2015)⁸ at p.528

would be no assault. To provide a defence to assault, the consent would, of course, have to be based on accurate and fulsome information.

Consent

[39] Dr. Pearson's evidence is that the claimant had been informed that "*the products of conception*" had to be removed as they were making her ill and that she had consented to the procedure. The medical record of the claimant from the Spanish Town Hospital was admitted as an agreed document. Within the record are three consent forms signed by the claimant.

[40] There is no denying that the claimant read and signed consent forms. However, to what was she consenting? Did she understand fully? Was the consent real? One form, signed on October 7, 2010, concerned her agreement to the evacuation of the products of conception. It reads

"I, Octavia Chambers, recognize the need for hospital care and hereby consent to services at the STH (sic) as ordered by the attending physician including anesthesia, laboratory procedure, medical or surgical treatment, x ray examination, or other hospital services rendered under the general and specific instructions of the physician."

[41] Those printed words are not highlighted in any way to focus the patient's mind on particular contents or on any specified treatment and in fact they were located on the back of a document headed, "*Hospital Medical Record System. Face(sic) Sheet. Spanish Town Hospital*". The evidence is that the front of the form had been filled out by a nurse. It contained basic factual personal information about the claimant.

[42] To my mind that was consent to her general treatment in the hospital. It allowed the medical staff to do the general necessary procedures, as, for example, blood works and x-rays. It would obviate the necessity to obtain her consent for every general

aspect of her treatment at each juncture of the process. However, the immediate question to follow must be as to whether she consented to removal of the products by the specific method which was eventually used in her treatment.

[43] The second consent form which Mrs. Chambers signed, on the same day is headed, "Consent to Operation, Procedures, Anaesthetic and Other Medical Services." It reads, where relevant, that

"I fully understand the nature and purpose of the operation or procedure, or possible alternative methods of treatment, the risk involved, and the possibility of complications have been fully explained to me.(sic)

I understand that the operation or procedure may be beneficial in the diagnosis or treatment of my condition, but that there is no absolute guarantee as to the results. I agree that any additional procedures will only be carried out if necessary for medical reasons and considered to be in my/the patient's best interest."

[44] This form is more specific than the other. Indeed, in the upper portion of the form the specific "operation or procedure" to which Mrs. Chambers consents is named as being the "*insertion of cytotec*". This is the insertion of the pill that is one of the methods used to assist in the evacuation of the products of conception and which is the least risky.

[45] This second consent form does not refer to any type of curettage at all, be it dilation and curettage or vacuum curettage. Indeed, at the lower portion of the form there is a signature purporting to be that of a doctor confirming that "*I have explained to the patient/relative the nature and the effect of the above surgical procedure.*" I view that form as being clearly restricted to the procedure specified, that is, '*insertion of cytotec*'.

[46] The third consent form, also dated October 7, 2011 bears the same heading as the second form. Here Mrs. Chambers consents to the procedure noted as being “ERPOC”. It refers to another doctor having explained to her the nature and the effect of “ERPOC.” This is in fact the evacuation of the products of conception but her unchallenged evidence is that at the time she was not aware of what that was.

[47] In none of the consent forms therefore is there a specific reference to her consent to dilation and curettage. Nor is there recorded a warning to the claimant about the risk possible of a hysterectomy from dilation & curettage. The forms do not record any reference to the claimant being informed of any available alternatives for removing the products of conception.

[48] The defendants have provided no documentary evidence to challenge Mrs. Chambers’ evidence that during her stay in the hospital she had not received any understandable information about her options.

[49] In particular, the defendants do not dispute Mrs. Chambers’ evidence that she was never told about one of the options for treatment of her condition, known as vacuum/suction curettage, which was available at another hospital and was less risky than the dilation and curettage. (D&C).

[50] To my mind this means that in considering her options, she had been deprived of the information about that less risky method. Any consent which she gave was given without a full knowledge of the available options for her treatment and the possible consequences. The “consent” would be based on incomplete information, that is, uninformed consent. Such consent is not real and must be regarded as being no consent at all. In my judgment therefore, the defence to assault, that of consent, could not apply because there was no real informed consent to the procedure.

[51] In **Annissia Marshall v. North East Regional Health Authority and the Attorney-General of Jamaica**⁹ the appellant had claimed damages for negligence in that she had not consented to the particular surgery which had been done. At the commencement of the trial, the appellant sought to amend the claim to include damages for assault as an alternative, based on an absence of informed consent by the appellant to the particular surgery. That amendment was refused by the learned trial judge and that decision, inter alia, was appealed.

[52] The Court of Appeal in allowing the appeal held that an operation done without valid informed consent would be an assault on the patient. The alternative claim of assault “*would therefore not be a claim without any merit....*”¹⁰ The learned trial judge had had the discretion to have allowed the amendment. Phillips JA opined that,

*“.....if.....there was the possibility of the court concluding that there was no informed consent,then any surgery performed on the appellant without her consent could amount to a battery which would be an assault on her.”*¹¹

[53] The learned trial judge had erred in refusing to allow the amendment to add assault to the suit when such a cause of action clearly could have arisen where there was surgery without informed consent.

[54] Therefore, in the case at bar, any treatment performed on Mrs. Chambers, either with no consent or with uninformed consent would amount to assault. The patient must be told clearly what she is consenting to and there must be an explanation of the procedure and risks. Here I find on a balance of probabilities that Mrs. Chambers did

⁹ 2015 JMCA 56

¹⁰Par. 108

¹¹ Par. 108

give some consent in general terms but as it concerns the particular surgery and procedure, she was not properly informed and therefore was incapable of giving informed consent for the procedure. Her claim in assault was well founded. Nonetheless I continue to consider the alternative claim in negligence.

Was there negligence?

[55] To succeed in proof of this, the claimant must prove the elements of negligence, namely that

- the defendants owed a duty of care to the claimant;
- the defendants have acted in such a way as to breach that duty; and
- the claimant suffered damage as a consequence of the breach.

[56] It is accepted that the Doctors and hospital owed Mrs. Chambers, a patient there, a duty of care.¹² The issue to be resolved therefore, is if the other elements of negligence have been proved on a balance of probabilities.

[57] Was there a breach of the duty of care in removing and/or causing Mrs. Chambers' uterus to be removed?

It is accepted that Mrs. Chambers' uterus was removed. Did that amount to a breach of the defendants' duty of care? That must depend on the circumstances in which the uterus was removed.

¹² **Cassidy v. Ministry of Health** [1951] 2 KB 343

Circumstances of removal

[58] The question must be asked as to what the standard medical procedure would have required in the circumstances. It has been recognised that where a doctor acts in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, he is not guilty of negligence.¹³

[59] The unchallenged evidence in this case is that it was during the procedure of dilation and curettage that the uterus was seen to be bleeding to such an extent that the Senior Registrar was asked to assist his junior in the operating theatre. The inference from the evidence is that the extensive bleeding suddenly arose, that is, Mrs. Chambers' medical condition required urgent, emergency attention in order to save her life.

[60] Having commenced along that path of "no informed consent" where the dilation and curettage was in progress, the medical situation descended into an emergency situation. The unchallenged medical evidence is that what was done, that is, the hysterectomy, is what is considered best practice in the medical field in the circumstances of that emergency.

[61] Where there is an emergency scenario, that is, an unplanned urgent state of affairs, the medical provider must be the decision maker. The decision, in order to avoid being regarded as being negligent, must be based on the best medical practices in the circumstances. The defendants had a duty to provide the best care for the claimant in the emergency circumstances in which she found herself, moreso where she was incapable of consenting in the emergency situation.

¹³ **Bolam v. Friern Hospital Management Committee** [1957] 2 All E.R.118 ; **Kimola Meritt v. Dr.Ian Rodriquez et anor (unreported)** Supreme Court Suit No. CLM 036/1991.

[62] In **F v West Berkshire Health Authority and another (Mental Health Act Commission intervening)**¹⁴ the plaintiff was unable to consent to a procedure because of a diminished mental capacity. The court made a declaration that the health authorities would not be acting unlawfully if, at the request of her mother, they performed a recommended procedure on the plaintiff without her consent. Lord Bridge of Harwich said

“It seems to me to be axiomatic that treatment which is necessary to preserve the life, health or well-being of the patient may lawfully be given without consent.”¹⁵

[63] Also, in **Montgomery v Lanarkshire Health Board**¹⁶, the Law Lords held that the doctor is also excused from conferring with the patient in circumstances of necessity, as for example where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision.

[64] In this suit, the hysterectomy occurred in an emergency scenario and in my view there was no breach of duty in performing that surgery at that time. The response of the doctors to that sudden excessive bleeding was required, even without her consent, to save Mrs. Chambers’ life according to the best medical practices.

[65] It was not possible at that stage, while the claimant was on the operating table, to obtain a “real” consent from her. Decisions had to be made to save her life and those that were made included removing her uterus. This means, in my view, that the doctors removed her uterus in an emergency situation in order to save her life, in accordance with the best medical practices. There was no negligence in that regard.

¹⁴ [1989] 2 ALL ER 545

¹⁵ pages 548-549,

¹⁶ [2015] UKSC 11

[66] However, what were the circumstances that caused the emergency to have arisen? It can accurately be said that it was the procedure to which the claimant had not consented that resulted in the emergency. Although the emergency itself was handled in accordance with the best international practices, the dilation and curettage procedure which ultimately caused the emergency to arise amounted to a breach of a duty of care to Mrs. Chambers because she did not give informed consent to that dilation and curettage procedure.

[67] Whilst acknowledging that she had not told Mrs. Chambers of the suction curettage, Dr. Pearson explained that she did not so inform her because that was not available at the Spanish Town Hospital, which is where Mrs. Chambers had been hospitalised, nor was it available at any public hospital. It was only available at the University Hospital of the West Indies.

[68] In my view there is a duty placed on a doctor to provide to the patient all reasonable options for treatment. A patient faced with a medical condition must be properly informed as to the several reasonable methods which are available for its treatment, as well as to all the risks involved. It is only then that the patient is able to give informed consent.¹⁷

[69] My view is fortified by the opinion expressed by the Learned Law Lords in **Montgomery v. Lanarkshire Health Board** that,

*“The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.”*¹⁸

¹⁷ Supra. Par. 50

¹⁸ [2015] UKSC 11 at par. 87

[70] In the case at bar there is no reason given for the failure of the defendants to inform the claimant of the third alternative option for treatment of her condition. Whatever may have been the reason, the undisputed evidence is that the patient was not given that option, and to my mind that breached the defendant hospital's duty of care which includes properly informing the patient of treatment options in order to allow for an informed choice of treatment to be made.

Was there damage?

[71] By the end of the claimant's stay in the hospital, she had been damaged as a result of the removal of her uterus. She had lost her uterus and with it the ability to "gift" her husband with a son.

[72] There was no evidence from Mrs. Chambers of any other physical damage to her resulting from the removal of the uterus, as for example, the effect on her body of the absence of a uterus. Did she develop any additional challenges, as in other conditions directly related to that removal?

[73] There was also no evidence of any psychological challenges on the mind of the claimant, as for example an indication of any effect on the marriage such as a reduction in the sexual appetite of either partner for the other.

[74] As it concerns the breach in not providing Mrs. Chambers with information of her options for treatment, Mrs. Chambers has also not provided evidence of any damage resulting from that omission.

[75] The claimant has provided no medical evidence, for example, to show that there would have been no excessive bleeding or no hole in the uterus, if she had been properly informed and had chosen the vacuum curettage.

[76] There is no evidence, medical or otherwise, as to how the absence of information on the third treatment option damaged her. In the absence of proof of

damage resulting from the breach of duty to properly inform the claimant of options, the claim for negligence in that regard must fail.

[77] It is of some interest that Mrs. Chambers has not provided evidence that she would have chosen the vacuum/suction curettage option if it had been explained and offered to her.

CONCLUSION

[78] The claimant was suffering from septic miscarriage for which there are three methods of treatment. She was not informed of one of the methods, vacuum/suction curettage, which was in fact less risky, albeit less available, than the dilation and curettage method which was used. She was therefore deprived of the opportunity of selecting that less risky treatment and any consent which she gave to treatment must thus be considered to be uninformed and therefore not real.

[79] Further, the consent forms which are exhibited, support the claimant's evidence of not having given informed consent. They contain no written consent for the procedure which was done, nor any record of the claimant having been informed of the risks of any or all of the possibilities. I therefore conclude on a balance of probabilities that the claimant gave no informed consent to the treatment of her condition. In the absence of informed consent, the treatment which was done must be considered by law to be an assault on the claimant.

[80] As it concerns the claim for negligence, it is clear that the defendants owed a duty of care to Mrs. Chambers to provide proper treatment. In performing the hysterectomy without the informed consent of the claimant, they were negligent even though the actual surgery itself accorded with best international practice. That surgery had arisen in negligent circumstances.

[81] We as a society operate in an era when patients accessing medical care no longer are expected, or required, to accept the opinions and judgment of medical

personnel without question. Such was the approach centuries ago. Patients are now taken to have rights, including the right to be an active participant in the choice of treatment to be administered having been made fully aware of the known risks.

[82] There is a duty on the medical profession to properly inform patients of available options to allow for the patient to make an informed decision as to her own treatment. An uninformed signing of a consent form whilst awaiting treatment in a hospital is not enough. Of course this will consume more of the time of the medical personnel who, it is well known, work with limited time for the large volume of patients. Nonetheless this care to properly inform must be a vital ingredient of the medical care given. Its omission can have dire consequences, both physically and otherwise.

DAMAGES

[83] The damage of the claimant's loss of her uterus and the ability to "gift" her husband with a son resulted from the 1st defendant's actions which are both an assault and a negligent act. The claim was correctly framed in the alternative and I proceed now to consider the amount of damages to be awarded to compensate the claimant for the suffering which she endured as a result of the assault and the accompanying loss of her uterus.

Special Damages

[84] The claimant seeks \$16,000 as damages to recover the payment in that amount for the medical report.

[85] Counsel for the defendants argues that there was never a challenge to the assertion that the claimant had had a hysterectomy and it was therefore not necessary to obtain a medical report. No award should be made for damages in that regard.

[86] I reject that argument. It is an age old concept in law that he who alleges must prove. Before being able to responsibly file this suit based as it is on the removal of her uterus, the claimant must put herself in a position to prove that. True it is that she was so informed by a doctor at the defendant hospital. However, she would not have been at liberty to file suit based on that hearsay information. She would have to prove the removal. She sought to do so based on a medical certificate in that regard. Had Mrs. Chambers not provided that certificate, it is likely that the defendants would have argued forcefully, and indeed with merit, that there was no proof of her injury.

[87] She is, in my view, entitled to recover the cost of obtaining that medical certificate. There being no challenge to the accuracy of the figure of \$16,000 claimed, and supported as it is by a receipt, I will award it as special damages.

General Damages

[88] Counsel for the claimant submitted one authority to support the submission that an award of \$18million is appropriate. The authority was **Tanya Clarke v. Dr. Soe Win, Dr. Bennett and the Attorney General of Jamaica**¹⁹ in which the defendants there erroneously removed both ovaries of a 19 year old unmarried lady in response to abdominal pains which she was having. The result was that she could not thereafter conceive children and the defendants were held liable for that. There the Court awarded an amount which converts now to \$17,604,793.98.²⁰ Here, in this case, the unchallenged evidence is that Mrs. Chambers had intended to give her husband “the gift of a son”, which she cannot now do utilising her uterus. She described her womb(uterus) as being important to her.

¹⁹ CL2000/C164

²⁰ As updated by Consumer Price Index of November 2019-269.3

[89] Counsel for the defendants urged the Court to regard that authority as pertaining to a claimant who had suffered more serious injuries than had Mrs. Chambers. There Ms. Clarke had lost her ovaries a few weeks before her marriage, she had entered a premature menopause at 19 years of age whilst still childless. Further she had been exposed to increased risks of several life threatening diseases, had no desire to have sex with her husband, was depressed and could not do ordinary household chores without vaginal bleeding.

[90] The claimant there had been diagnosed as having ovarian cancer when in fact there was no malignancy in her ovaries, but rather there was an ovarian cyst. Counsel for the defendants submitted therefore that the Court should take more guidance from **Juliet Robinson v Hospital Management Board (Spanish Town Hospital) and Others**²¹.

[91] There the tubes of the 28-year-old claimant were cut whilst she was undergoing a C-section to give birth to her fourth child. She was thereby rendered infertile and was not aware that the tubes had been cut. She subsequently sought medical advice as to the cause of her delay in conceiving her fifth child and was then informed of the earlier surgery. There the court considered that the enjoyment of life which she and her husband experienced was diminished due to the tubal ligation, that is, the cutting of the tubes, as also to the scarring and infertility. Their fifth child resulted from in vitro fertilization and they again had recourse to that method to try to conceive the sixth child.

[92] Having considered the **Tanya Clarke** authority, Daye J concluded that the injuries there were more than **Juliet Robinson's**, both mentally and physically. He thereafter awarded Ms Robinson general damages of \$8 million, which when updated converts now to \$9,536,963.25²² Counsel for the defendant submitted that in the case

²¹ [2014] JMSC Civ 159, delivered September 25, 2014

²² Nov. 2019 CPI Index 269.3

at bar the circumstances warrant a much reduced award more comparable to that in **Juliet Robinson**.

[93] The submission is that here the claimant already has children and is married. Further there is no evidence before the court pertaining to the claimant's sex life before or after the hysterectomy nor to any diagnosis of psychiatric trauma as a result of the hysterectomy. In assessing the amount appropriate, I have considered the authorities submitted.

[94] Here, the claimant Mrs. Chambers, 32 years old at the time, was older than 19-year-old claimant **Tanya Clarke**. She would thus have had less child bearing years remaining.

[95] Mrs. Chambers was also already married and the medical records, as agreed, show that she had at the time, 3 live children. Their genders were not indicated but the evidence is that she wished to give to her husband the "gift of a son", as distinct from the "gift of a child".

[96] In **Tanya Clarke**, there was evidence of emotional trauma to herself and also to her marriage and of wide ranging physical consequences which could lead to death. There is no evidence in this matter of any physical or emotional or psychological injury other than the unchallenged evidence that the claimant has been deprived of her womb during her child bearing years as a married lady, and that she is affected emotionally by not being able to give her husband a son.

[97] I pause here to observe that even if Mrs. Chambers were to have been able to conceive again, in the normal course of events, the gender of any such "product of conception" could not be guaranteed to be male. Would the birth of a daughter also have been regarded as a "gift" to her husband? Because of the sparsity of evidence of

the damage she suffered, I agree with counsel for the defendants that her injuries are less than those of **Tanya Clarke**.

[98] How does Mrs. Chambers' damage compare to that of **Juliet Robinson**? In **Juliet Robinson** there was evidence that the enjoyment of life which she and her husband experienced had been diminished due to the tubal ligation, with its resultant scarring and infertility. In the case at bar, there is an absence of comprehensive evidence of the suffering and loss which Mrs. Chambers has experienced as a result of the assault. I therefore limit the award for damages to the evidence provided which is less than that in **Juliet Robinson**.

[99] In the circumstances here where the married claimant was wrongfully deprived of her uterus and the opportunity of possibly bearing a son, I start from the amount of \$17.5 million and discount that amount for reasons explained above. I regard the amount of \$9 million as being appropriate for general damages according to the evidence provided in this matter.

DISPOSAL

[100] **Judgment** for the claimant against the defendants, the South East Regional Health Authority and the Attorney General of Jamaica.

Damages assessed and awarded in the amount of \$9 million for *general damages* with interest at the rate of 3% per annum from date of service of the claim form until today

And \$16,000 for *special damages* with interest at the rate of 3% per annum from October 9, 2011 until today.

Costs to the claimant to be agreed or taxed.