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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00848 OF 2008

BETWEEN	**NICOLE WEST-HAYLES**	**1ST CLAIMANT**
AND	**ABIRA HAYLES (a minor, who sues by her mother and next friend, Nicole West-Hayles)**	**2ND CLAIMANT**
AND	**DR. LENNOX S. JACOB**	**1ST DEFENDANT**
AND	**MEDICAL ASSOCIATES HOSPITAL BOARD OF MANAGEMENT**	**2ND DEFENDANT**

Mr. Terrence Ballantyne instructed by Haughton & Associates for both Claimants

Mr. John Graham and Miss Khara East instructed by John G. Graham & Company for the 1st Defendant.

Miss Noelle-Nicole Walker instructed by Hart Muirhead Fatta for the 2nd Defendant.

OCTOBER 15, DECEMBER 15, 2008 AND JANUARY 30, 2009

Application to Strike Out Case Pursuant to Rule 26.3(1) (c) of the Civil Procedure Rules

MCDONALD, J

On March 18, 2008 the First Defendant filed a Notice of Application for Court Orders seeking the following Orders:-

1. That the claim against the First Defendant be struck out on the grounds that the Claimants' Statement of Case discloses no reasonable grounds for bringing this action.

2. That costs to the First Defendant/Applicant be agreed or taxed.

3. Such further or other relief that this Honourable Court deems just.

The First Claimant in her own capacity and as next friend of the Second Claimant claims against the Defendants for damages including aggravated and exemplary damages for loss and injury suffered as a result of negligence in the management of the First Claimant's pregnancy.

The First Defendant is an obstetrician and gynecologist and the Claimants allege that due to his negligence in his care and treatment of the First Claimant, the Second Claimant was born with severe injuries including severe meconium aspiration syndrome.

The First Defendant's application to strike out the Claimants' Statement of Case is made pursuant to Rule 26.3 (1) (c) of the Civil Procedure Rules which state that the court may strike out a Statement of Case if it appears to the court that "the Statement of Case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."

Mr. Graham submitted that the First Defendant's application under this rule is being made on the basis that the Claimants' Statement of Case fails on its face to disclose a claim which is sustainable as a matter of law.

He asserted that the claim is in negligence and it is necessary for the Claimant to set out with particularity the acts or omissions which constitute the breach of the duty of care owed to the Claimant and to show that the breach of duty was the cause for the injury complained of.

He referred the court in particular to paragraphs 11 – 26 (inclusive) of the Claimant's Particulars of Claim which read as follows:-

"11. That in June 2004, the First Claimant visited the First Defendant's office and explained to him that she was feeling tired and she felt reduced fetal movement. She was given sick leave and a kick chart by the First Defendant. We exhibit hereto and marked Annex 'NW-H2' for identification a copy of the kick chart.

12. That the First Defendant checked on the kick chart twice in June and indicated that it was ok, the kicks went back to being frequent and heavy.

13. That in or about July 2004, the First Claimant asked the First Defendant about the weight of the fetus and he indicated that it was not necessary.

14. That on August 23, 2004 the First Defendant swept the cervix of the First Claimant and explained to her that it would stimulate labour either the same or the next day.

15. That the First Claimant started bleeding after the cervix was swept on August 23, 2004.

16. That the First Claimant informed the First Defendant on August 24, 2004 that she was still bleeding and asked if that was normal and he replied by saying that it is a normal result.

17. That on August 29, 2004 when the First Claimant got up, there was no movement so she called the First Defendant.

18. The First Claimant went in by 9a.m. and a bio physical was done. There was no movement, no respiration and the fluid in four quadrants dropped. There was only a heart beat.

19. The First Defendant rated it 4 – 6 and the First Claimant was taken to emergency room for a caesarian section.

20. That the First Claimant did not see the Second Claimant until four (4) days later.

21. That the First Claimant was informed that the Second Claimant is alive but there is severe possibility that brain damage may occur if the Second Claimant survives.

22. That the First Claimant was not advised by the First Defendant of the risk of severe meconium aspiration syndrome.

23. That the Second Claimant was transferred from the nursery at Nuttall to the nursery at the Bustamante Hospital for Children on August 29, 2004. We exhibit hereto and marked Annex 'NW-H3' for identification a copy medical report from the Bustamante Hospital for Children.

24. That the Second Claimant was referred to out patient follow-up by Pulmonologist Dr. Karen Brightly-Brown. We exhibit hereto and marked Annex 'NW-H4' for identification a copy medical report from Dr. Karen Brightly-Brown.

25. That the Audiological Consultation Report from the Jamaica Association for the Deaf reveals that the Second Claimant suffers

from Eustachian tube dysfunction bilaterally. We exhibit hereto and marked Annex 'NW-H5' for identification a copy of the Audiological Consultation Report."

In my view the meaning of paragraph 13, above is not clear. Is one to imply that the First Claimant is asking the First Defendant to tell her how much the fetus weighs. The paragraph does not say so; and there is nothing in the pleadings later on that suggests that the weight of the fetus is of any relevance when she purported to particularize the negligence.

In respect of paragraphs 14 and 15, there is nothing contained in the particulars which states that the sweeping of the cervix was negligent or inconsistent with the way in which someone in her condition ought properly to have been treated.

In paragraph 22, the Claimant is not alleging that meconium aspiration syndrome is something caused by anything the doctor did or even if the doctor advised her of the risk of the syndrome, it could affect anything that he could have done about it.

The particulars of negligence of the Defendants outlined in paragraph 26 read as follows:-

(a) Failing to adhere to professional procedures for the management of the pregnancy.

(b) Failing to give any warning to the First Claimant of the possibility that the Second Claimant would be born with severe meconium aspiration syndrome.

(c) Failure to take any or any sufficient care of the First Claimant while she was in their care.

(d) Failing to refer the First Claimant to a suitable specialist or consultant surgeon.

(e) In the premises, failing to take any or any adequate care of the First Claimant on her, and unnecessarily exposing the Second Claimant to distress, discomfort and risk of severe meconium aspiration syndrome.

(f) Failure to take any or any sufficient care of the First Claimant while she was in their care.

In paragraph (a) the Claimant has failed to set out what the professional procedures for the management of pregnancy should be. The result is that the standard by which the Defendant's conduct should be measured is not known. Importantly, these general words are not sufficient to indicate any specific acts or omissions attributable to the Defendant that has caused the injury to the Second Claimant.

In paragraph (b) the Claimant contends that the Defendants failed to give any warning to the First Claimant of the risk that the Second Claimant would be born with severe meconium aspiration syndrome.

The law is that a doctor has a duty to warn patients of risks inherent in any treatment or procedure before the doctor administers such treatment. If the doctor fails to do so and the very injury of which he failed to warn occurs, then the doctor is said to have 'caused' the injury in the legal sense and may be found liable for negligence.

See Chester vs. Afshar (2004) 4 AllER 587.

In the instant case, the Claimant has not asserted that the doctor had a duty to warn the Claimant about the risk of this condition, and even if he had warned her about the risk, she has not asserted that there was anything that he could have done to prevent it.

I agree with Mr. Graham's observation that Paragraphs (c) (e) and (f) merely recite that the Defendant failed to take adequate or sufficient care of the Claimant while pointing to

no specific act which the Defendant ought to have done that he failed to do or any act that he did which he ought not to have done.

Paragraph (d) asserts that the Defendant failed to refer the First Claimant to a suitable specialist or consultant surgeon. It does not state for what purpose and at what point during the management of the pregnancy that would have become necessary; neither has it been asserted that this referral failure caused the injury complained of.

I find that mere general words to the effect that the Defendant did not take sufficient care is not enough to properly inform the Defence of the case he is required to meet. In addition the Claimant's Statement of Case has not established that this want of care on the part of the Defendant's has caused the injury to the Second Claimant.

The particulars of negligence pleaded do not give any information which would allow the First Defendant to meet any particular matters which he is supposed to have done wrong or which he ought to have done and failed to do.

Moreover the two medical reports exhibits NW-H2 and NW-H4 do not in any way suggest that the condition of the Second Defendant was in any way caused by the First Defendant.

The Claimants have not set out with particularity the acts or omission which constitute the breach of the duty of care owed to the Claimant and to show that the breach of duty was the cause or one of the causes for the injury. The acts or omission have not been identified in the pleadings and there has not been shown any casual link between an act or omission by the First Defendant and the injuries alleged to have been sustained by the Claimant. I find that there are no reasonable grounds for bringing the claim.

Mr. Ballantyne referred the court to a notice to produce the medical records of Nicole West-Hayles and Abira Hayles as a matter of urgency on or before the next sitting of the matter on October 15, 2008. This notice was filed by the Claimants' Attorney on October 14, 2008 and served on the First Defendant's Attorney on the same day at 3:50p.m.

There has been no compliance with this notice on the part of the First Defendant's Attorney.

Mr. Ballantyne argued that on one hand the deficiencies Mr. Graham had pointed out in the pleadings will be remedied once the Claimant's dockets are produced.

On the other hand, he said that if the medical records do not support the claim then "by all means Counsel will have to discontinue."

I find that the Claimants have failed to present a case to the court in which their Statement of Case on the face discloses a case which is sustainable as a matter of law.

In this regard, I am guided by Harris v. Bolt Burdon (2000) CP Rep. 70 where Sedley LJ held that because the Claimant's case was bound to fail it would be unfair to allow it to go on.

Notwithstanding the fact that the Claimant's Attorney is conceding that the material put before the court has not come up to standard, the Claimant is now asking the court in effect to make an order that will result in their getting some material which may or may not assist them.

In other words if they garner requisite information they will seek to amend their Statement of Case, if not they will discontinue.

In determining how to deal with this Notice the court must take into account the overriding objective of the Rules which is to deal with cases justly.

In my view it is unjust for the Claimant to file a suit against the First Defendant before there is a recognized and identifiable basis for the claim being brought.

In the Claimant's Statement of Case there is nothing to show that the doctor departed from the accepted form of treatment. There is no omission or commission on the part of the doctor to ground a claim in negligence.

The First Defendant has incurred fees in respect of this Suit.

The situation is also compounded by the fact that in the case of a doctor his reputation for professionalism is at the heart of the service he sells. There is also the likelihood that once he is sued, the fact of his being sued becomes public knowledge.

The Claimant made no request of the Defendant prior to filing suit for medical records which would have enabled them to make an informed assessment as to whether the First Defendant is guilty of any wrong doing.

The limitation period has not expired.

In respect to the Notice for production of the medical records I am guided by the principle of law enunciated in the Compagnie Financiere v Peruvian Guano Co. (1882) 11 QBD 55 at page 63 where Brett L.J said

> Any document which it is reasonable to suppose,
>
> "contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may lead him to a train of inquiry

which may have either of these two consequences", must be disclosed.

There is nothing in the Statement of Case initially to show that the First Defendant is at fault.

I am of the view that this principle enunciated .in the Compagnie Financiere vs . Peruvian Guano Co (supra) was not intended to be used as the basis to initiate a Suit as in the present case where there is no negligence to ground the claim in the first instance. The Claimant's cannot seek to advance something that does not exist.

In all the circumstances:-

1. Order made pursuant to the notice is refused
2. Order made in terms of paragraphs 1 and 2 of the Notice of application for court orders filed by the First Defendant on March 18, 2008.
3. Statement of Case filed against the Second Defendant is struck out with costs to be agreed or taxed.
4. First Defendant's Attorney to prepare file and serve this order.