

SUIT NO. C.L.M. – 036 OF 1991

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

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| BETWEEN | KIMOLA MERRITT (Suing by her mother and Next Friend Charm Jackson) | 1 ST PLAINTIFF |
| AND | NOW CONTINUING AS 1 ST PLAINTIFF UPON THE DEATH OF 1 ST PLAINTIFF By Order of the Court made on the 20 th Day of January, 1997 | |
| AND | THE SAID CHARM JACKSON | 2 ND PLAINTIFF |
| AND | DR. IAN RODRIQUEZ | DEFENDANT |
| AND | THE ATTORNEY GENERAL | ADDED DEFENDANT |

Norman Samuels and Miss Carol Vassall for the Plaintiff

Winston Spaulding Q.C. instructed by Miss L. Parker for 1st Defendant

Patrick Foster, Miss Kathleen Francis and Miss Karlene Larmond instructed by the Director of State Proceedings for the 2nd Defendant

HEARD: July 20-23; 26-29, 2004; September 27-29, 2004; October 1 and 8,
2004 and July 21, 2005

M. McIntosh, J.

The plaintiffs filed an action against the 1st defendant on the 4th February 1991, in which they alleged that the 1st defendant failed to properly treat the now deceased 1st plaintiff (Kimola Merritt) in September 1986 at Savanna-la-mar Hospital and this failure resulted in the 1st plaintiff being severely brain damaged and disabled.

The facts are that Kimola Merritt developed a high fever, running nose and swollen face on or about 4th September 1986. Her mother Charm Jackson (2nd plaintiff) took her to the Savanna-la-mar Health Clinic where she was given

medication. Three days later Kimola's fever had not abated and plaintiff took her to Dr. Norma Blythe, a private doctor practicing in the Savanna-la-mar area. Dr. Blythe gave Kimola medication and instructions that Kimola should return 2 days later. Two days later when Kimola returned the fever had not abated, Dr. Blythe increased the dosage of medication and told her to return 3 days later. On her return to Dr. Blythe 3 days later the fever had not abated and Dr. Blythe gave the plaintiff a note to take to the hospital for a lumbar puncture to be done on Kimola.

PLAINTIFF'S CASE

The plaintiff's evidence is that Kimola had developed a respiratory tract disorder characterized by a cold and high temperature and the plaintiff sought treatment for Kimola. A lumbar puncture was to have been done on Kimola and whatever appropriate treatment was required should be given to her she took Kimola to the Savanna-la-mar Hospital where the child was admitted.

It is the plaintiff's case that no lumbar puncture was performed on the date of admission and in fact the 1st defendant refused to perform a lumbar puncture. Further the plaintiff contends that for 14 days Kimola got no treatment whatsoever in the hospital and that the lumbar puncture was done 14 days after Kimola's admission and this was done only after the child collapsed in the bed.

This situation is set out in the evidence of the plaintiff who states that she saw no evidence of lumbar puncture being done up to three days from admission and on 15th September 1986 the plaintiff made enquiries of the 1st defendant as to the lumbar puncture. Her evidence is that the 1st defendant indicated that he would not be doing any lumbar puncture and reprimanded her for taking her sick child from place to place before bringing her to the hospital.

All this is denied by the 1st defendant

The plaintiff's case is that when Kimola was released from the hospital in October in 1986 the child had physical defects in that she was unable to walk, she could not speak or sit up and was totally irresponsible to anything.

In spite of all these obvious defects the plaintiff states that the 1st defendant assured her that Kimola would recover and should be given banana and arrowroot porridge which would aid in her recovery.

Finally the plaintiff alleges that although she made repeated requests of the 1st defendant, he never gave her a medical report in respect of the child

THE FIRST DEFENDANT'S CASE

Kimola Merritt was taken to Savanna-la-mar Hospital on 13th September 1986 after having been taken to the Savanna-la-mar Health Centre and days later to a private practitioner who examined and treated the child, increased her medication to no avail. The child was eventually referred to the Savanna-la-mar Hospital with recommendation for a lumbar puncture procedure to be performed because of suspected meningitis.

When Kimola was taken to the Hospital on the 13th September 1986 she was seen by Dr. Rodriques the 1st defendant, and the plaintiff gave a listing of the child's condition and background on the child's referral to the hospital.

There is much dispute between the parties as to whether the child was given a lumbar puncture, blood test and treatment by intravenous antibiotics when she was admitted on the 13th September. The plaintiff maintains that Kimola was not given any treatment, the 1st defendant strongly denies this.

The defendant contends that Kimola received the appropriate treatment in the hospital, a lumbar puncture was done and the specimen sent to the Cornwall Regional Office for testing on the day of admission. In addition a blood test was done. The 1st defendant further contends that a second lumbar puncture was done on the 22nd September 1986 when Kimola had a seizure.

The plaintiff as has already been stated insists that up to the 27th September (14 days after admission) no visible form of treatment had been administered and she had visited the hospital for those 14 days. The first Lumbar puncture the plaintiff insists was performed on the 28th September – 15 days after admission.

The results of the second lumbar puncture, the 1st defendant contends, were received from a private laboratory in Savanna-la-mar to which the specimen had been taken by the plaintiff.

Kimola's condition did not improve and the first week in October 1986 she was discharged from hospital. She had sustained brain damage and had been treated by private voluntary organization at the clinic after her discharge from hospital and she had been referred to the Bustamante Children's Hospital.

Dr. Rodriques was instrumental in having these facilities provided for Kimola as he had written to those medical and health care establishments explaining the condition of the child medically.

At the time when all records would have been intact no one requested any report from Dr. Roderiques.

THE 2ND DEFENDANT'S CASE

The 2nd defendant's defence is based on 2 limits:

- (1) The first is that the Plaintiff's case is statute barred under the PUBLIC AUTHORITIES PROTECTION ACT, which when this suit was brought, required that a claim against any public official for acts done in the execution of a public duty is to be brought within one year of the act giving rise to the claim.
- (2) The second limb is that the 1st defendant is not liable for the negligent acts and Kimola's condition resulted from plaintiff's delay in securing proper diagnosis and treatment of her illness and the failure of the private physician to diagnose the type of illness from which the child was suffering.

THE PLAINTIFF'S REPLY

In her reply the plaintiff raised the issue as to whether fraud operates to suspend the limitation period under the Public Authorities Protection Act. The plaintiff contends that she was not able to file the action in time because the defendants withheld from her information which would enable her to file the action and that the 1st defendant gave reassurances that Kimola would recover.

THE ISSUES:

Based on the pleadings the following issues are to be determined:

- (1) Was the claim statute barred under the Public Authorities Protection Act
- (2) Was the 1st defendant negligent in his diagnosis and treatment of Kimola.

In respect to the 1st issue – this was raised by the 2nd defendant in his defence filed on 27th April 1992 and also in the amended Defence filed 27th May 2003.

The plaintiff's contention is that the operation of the one year limitation period is suspended by virtue of fraud and/or concealment on the part of the servants or agents of the Crown.

The fraud alleged is that the servants/agents of the Crown withheld "every possible information from the plaintiff that would have enabled the action to be filed" and also "withheld the capacity in which the defendant dealt with Kimola." In effect the plaintiff is asking this Court to draw the inference that she did not have sufficient information about the treatment given to Kimola and the child's physical condition after she was discharged from the Savanna-la-mar Hospital in or about November 1986 because all this information was deliberately withheld from her by the Hospital Authorities and the 2nd defendant.

The 2nd defendant argues that the plaintiff's position is untenable for the following reasons: -

1. There is no evidence before the Court to substantiate any finding of fraud or any dishonest or improper conduct by the 1st defendant or any servant and/ or agents of the 2nd defendant that could in law suspend the operation of the Public Authorities Protection Act.
2. The plaintiff (having regard to the state of her knowledge about Kimola Immediately after she was discharged from the hospital) could have filed suit against the hospital and the 1st defendant for alleged negligence
3. The plaintiff was aware that the 1st defendant worked at the Savanna-La-mar Public Hospital and para 3 of the Amended Statement of Claim confirms that the plaintiff knew this and she gave no evidence to contradict this.
4. Fraud was not pleaded in the statement of claim and the belated allegation in the Reply is merely an effort to justify the filing of the suit outside the 1-year limitation period.

The 2nd defendant further submits that any fraud alleged by the plaintiff should be clear and manifest and no evidence has been provided by the plaintiff to prove any fraud. In her witness statement the plaintiff gave evidence that 1st defendant Dr. Roderiques assured her that Kimola would "soon be well" and should be fed "banana porridge" and "arrowroot porridge."

In her reply the plaintiff alleges that when Dr. Roderiques gave her this assurance he knew or ought to have known that Kimola had suffered irreversible brain damage, nevertheless she waited for 4 years (until 1991) to file this suit

even though she saw no evidence that the assurances she had been given were true.

The plaintiff's state of knowledge, when one considers the evidence presented, was the same in the year subsequent to the alleged negligence as it was at the time of filing of the suit and no valid reason has been advanced to explain the failure to commence action within a year of the alleged negligence.

The plaintiff in her statement of claim alleges that Kimola –

“could no longer sit up on her own her entire body was irresponsible to any attempt to attract her attention, she could no longer walk as she was beginning to do, she could no longer speak as she was beginning to do.”

The incident grounding this action occurred in 1986, the suit was brought in 1991. The witnesses' evidence placed before the Court relied almost entirely on memory and it is indeed unfortunate that this matter took such a long time to come to trial.

The Court had reserved the decision in respect to the preliminary issues raised by the defendants when the hearing of this matter commenced and the substantive case was heard, and all the issues raised preliminary and substantive will be dealt with at this time.

The plaintiff's case was brought 5 years after the alleged negligent acts which form the basis for this action and the plaintiff is contending that the one year limitation period under the Public Authorities Prevention Act was suspended by virtue of fraud. The evidence clearly reveals that the plaintiff was well aware that when Kimola was discharged from hospital her condition was worse than at the time she was admitted. See page 10 of 2nd defendant's submissions.

It is clear that Dr. Blythe knew and communicated to the plaintiff that something was wrong and it was something adverse to Kimola which Dr. Blythe “was afraid of” – something for which the hospital ought to have treated and when Dr. Blythe gave the plaintiff a note with the words “Lumbar Puncture”

written on it the plaintiff knew it was urgent that treatment be done – whether she knew meningitis had been suspected or not is irrelevant.

The plaintiff would have had knowledge within a year of the alleged negligence or access to sufficient information to enable her to file a suit. Her evidence is that she was at the hospital daily with Kimola and knew that no treatment had been given to the child.

The absence of a Medical Report preventing the filing of a suit is without merit. Kimola was obviously ill, she was deprived of proper treatment at the hospital and the fact that the plaintiff did not know the name of the specific illness which had incapacitated the child so badly is not a basis for failing to file an action.

There is no evidence whatsoever to indicate that the Medical Report from the Savanna-la-mar Hospital was concealed or deliberately kept away or destroyed. The evidence is that the plaintiff was directed to the Medical Records Office where records could not be located and it is noteworthy that the plaintiff's Attorney at Law requested the reports, provided incorrect information to the hospital for the purpose of locating the records which fact merely added to the problems being experienced in locating the records.

In her evidence the plaintiff states that she asked for the hospital report "about 6 months after October 1987". That would be about May 1988". In her affidavit she deposed that she requested the records 9 months after Kimola's discharge from hospital.

The plaintiff alleges fraud on the basis of false assurances given by the 1st Defendant (that Kimola would recover) and the absence of a Medical Report. The Court finds that there were not fraudulent acts and the plaintiff had ample opportunity and information between October 1 – 8 and October 1987 to get a confirmed medical analysis of her child's specific illness.

The allegation of fraud should be pleaded in the Statement of Claim in order for the Court to find that the operation of the Public Authorities Protection Act has been suspended because of fraud and this principle is summarized in the

headnote of DOW HAGER LAWRENCE v. LORD NORREYS AND OTHERS 15
LAW REPORTS 210.

The plaintiff's cause of action is grounded in negligence not fraud and allegations of fraud were not raised until the plaintiff filed her Reply to the Defence.

In respect to the issue of negligence what has to be first determined is whether or not the 1st defendant failed to act in accordance with the accepted practice in the particular circumstances and accorded Kimola the correct standard of care – in other words was he in breach of the duty of care he owed to his patient.

The second issue to be determined is whether or not the evidence establishes on a balance of probabilities that but for the negligence of the 1st defendant Kimola would not have suffered the resulting damages and finally had the plaintiff established on a balance of probabilities that the breach of duty was the proximate cause of the damage alleged and that consequently she has suffered damages, loss and has been put to expense.

The doctor owes a duty of care to anyone he accepts as a patient, and to prove negligence the plaintiff must show that the doctor's acts fell below the required standard of care and the standard of care applicable to the medical profession is stated in BOCAM v. FRIERN MANAGEMENT COMMITTEE {1957} 2 All ER 118.

The burden of proof of negligence lies with the plaintiff to establish that on the balance of probabilities, the defendant was negligent and the plaintiff must prove that the damage would not have occurred but for the negligence of the 1st defendant. There must be a casual link between the defendant's negligent act and the resultant damage to the plaintiff.

In determining whether the 1st defendant breached his duty of care, the Court has to assess the medical evidence of the expert witnesses. This evidence came from four experts – Doctors Grey and Cheeks for the plaintiff, Dr. Gabay for the 1st defendant and Dr. Henry for the 2nd (added) defendant. Both doctors Gabay

and Henry concluded that if the treatment given by Dr. Roderiques is as he has stated, then it would have been in accordance with practice of good medicine.

In his report, Dr. Grey stated that "the fever continued and she was taken to see a family doctor who suspected meningitis and commenced treatment with oral antibiotics. Once diagnosis of meningitis is suspected, as was the case when Kimola first presented to the family doctor, a lumbar puncture should be done to confirm this, since early diagnosis is the key to successful treatment with antibiotics."

This evidence and the evidence elicited under cross-examination of the plaintiff's expert Dr. Grey accords with that of the defendant's expert.

Does the evidence establish on a balance of probabilities that but for the negligence of Dr. Roderiques Kimola would not have suffered the resulting damage?

To determine this the evidence of both the plaintiff and the 1st defendant must be assessed.

All the allegations of negligence are based solely on the recollection of the plaintiff and her evidence conflicts in several material areas is inconsistent on important issues and contradicts the pleadings.

The 2nd defendant submitted that the plaintiff's evidence is "wholly unreliable and she cannot be regarded as a credible witness, and set out seven instances where the pleadings, witness statement and oral evidence in cross-examination were in conflict. Dr. Roderiques in his evidence stated that he was able to recall the treatment of Kimola from "13 years of recollecting, thinking, searching looking for documents and trying to remember what was done to the child" – His evidence was based on recollection and research and he testified that from the first date the child came to the hospital he had made a diagnosis – even before the results came from the laboratory and in fact the lab results confirmed his earlier initial suspicion of meningitis.

Dr. Roderiques denies that he told the plaintiff to give the child banana porridge and arrowroot porridge. He states that he does not know what arrowroot is.

He did tell the plaintiff to give the child banana porridge as it was customary to tell a mother what to give the child because the child can no longer eat as a normal child would. The Court accepts this explanation and it indicates that the recommendation as regards the child's diet was designed to accommodate a retarded child and not to facilitate a retarded child's recovery.

The attempts made to impeach Dr. Roderiques' evidence by use of the Daily Change Book was unsuccessful as the doctor did not make the record in the book, nor was he responsible for what was recorded in the book and therefore neither reviewed nor confirmed the entries recorded therein.

Finally it must be determined whether the plaintiff has established on a balance of probabilities that the breach of duty was the proximate cause of the damage alleged and that consequently she has suffered damage, loss and has been put to expense.

Kimola's brain damage could have resulted from a number of factors:

1. Meningitis – all the experts have in their evidence stated that even when a child is treated in a timely way a real and inherent risk of there being a resulting disability of brain damage exists.
2. The delay by the private physician Dr. Blythe in acting promptly when she first examined Kimola - particularly since the symptoms she displayed were consistent with meningitis.
3. The delay of the first Defendant (which is denied). Even if Dr. Roderiques did not, as the plaintiff alleges, perform a lumbar puncture procedure until 22nd September that alleged failure would not have constituted sufficient evidence of negligence.

This is based on the unchallenged evidence of Dr. Henry: -

“Even with appropriate antibiotic treatment the mortality rate for bacterial meningitis in children is 8% for H Flu meningitis, 15% for meningococcal and 25% for pneumococcal meningitis. As high as 35% of survivors have deafness, seizures, learning disabilities, blindness, strokes, hydro cephalus, mental retardation very serious deformities, cerebral palsy.

It is believed that on approximately the 9th of September, the first day of presentation of this child (in this case) to the private doctor, then this fever was as a result of meningitis. Five days of antibiotic treatment given by the private doctor would cause inappropriate or partial treatment of meningitis and this would likely cause complications to begin to develop. Prompt treatment at the hospital may or may not abort the development of these complications and prevent the development of further complications. Delaying treatment would definitely lead to serious complications with increased morbidity and possibly death.”

This action commenced outside the limitation period provided by the Public Authorities Protection Act and the Court finds no evidence of any fraud which would have prevented the time from running. The suit was therefore statute barred. Even if this insurmountable obstacle did not exist the case as presented is deficient.

The circumstances were unfortunate and the Court is not unmindful of the distress which the plaintiff must have suffered but on the totality of the evidence the plaintiff has not proved on a balance of probabilities that the 1st defendant was negligent and that such negligence resulted in Kimola suffering severe brain damage.

In the circumstances Judgment for the 1st and 2nd (added) defendants with costs to be agreed or taxed.

