[2012] JMSC Civ 85

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 05051

BETWEEN	**PAULA WHYTE**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**FIRST DEFENDANT**
AND	**SOUTH EAST REGIONAL HEALTH AUTHORITY**	**SECOND DEFENDANT**

IN OPEN COURT

Nelton Forsythe instructed by Forsythe and Forsythe for the claimant

Marlene Chisolm and Latoya Bernard instructed by the Director of State Proceedings for the defendants

MEDICAL NEGLIGENCE – CAUSE OF ACTION NOT CLEARLY PLEADED – EVIDENCE DOES NOT ESTABLISH NEGLIGENCE

May 30, 31, June 1 and July 6, 2012

SYKES J

[1] This claim arose from the alleged negligence of the health care team at the Spanish Town Hospital which falls under the supervision of a statutory body called the South East Regional Health Authority (SERHA).

[2] Nearly a decade ago, on Monday, October 7, 2002, Miss Paula Whyte was admitted to the Spanish Town Hospital as a high-risk obstetric patient. According to Miss Whyte, on Thursday of the same week she was informed that a Caesarean section (C-section) was to be done on her. She was prepared by the staff to undergo the operation. Dr Donat Mair who testified for the defendants said that the C-section was the best treatment option for Miss Whyte having due regard to all the factors and circumstances of her case.

[3] Miss Whyte waited all day and the operation was not performed. Eventually, she delivered the baby normally. It was a live birth. Unfortunately, the baby died. The reason given for not doing the C-section was that the operating theatres were busy. In economic terms, the demand for operating theatres was greater than the supply available at the Spanish Town Hospital. It was not the case that Miss Whyte's case was not urgent but it turned out that there were more urgent cases. Dr Mair testified that when he came on duty at about 4:00 pm on the Thursday, the operating theatres were already in use and continued to be in use until very late into the night.

The pleading issue

[4] Miss Marlene Chisolm took the point that the claim as pleaded does not amount to cause action in that the injury alleged is not one that gives rise to a claim. Learned counsel submitted that it is well known that to succeed in negligence the claimant must allege and prove (a) duty owed, (b) the breach, and (c) damage or injury flowing directly from the breach of duty. Her submission was that the particulars of claim do not show any connection between the conduct of the hospital staff and any damage suffered by Miss Whyte. She also submitted that the particulars actually speak to injury to the child but the child has not brought an action and therefore there is no claim in respect of the child before the court. Miss Chisolm highlighted the parts of the pleadings set out below in support of her submissions.

[5] The particulars of injury in the particulars of claim read:

a. The claimant who is now 30 years having been born on the 28th day of August 1977 suffered:

    i. Neonatal death of a female child

[6] There was further pleading in respect of the baby under the heading ‘Particulars of Injury of [Baby] Paula Whyte:

a. Cerebral oedema with moved haemorrhage of tentorial membrane.

b. Subarachnoid haemorrhage, marked in occipital lobes.

[7] According to Miss Chisolm the pleaded case is that the child died and further, that the child suffered from the conditions stated under the particulars of injury to the baby. However, the particulars of claim do not say what the alleged acts of negligence are in respect of the death of the child. This Miss Chisolm said was vital because once the child was born alive, which it was, then the child has its own independent cause of action which can be pursued by the appropriate adult as a next friend. This was not done. Just to say what the child suffered from would not be enough. It would be necessary to make the connection in the pleadings between the injury allegedly suffered by the child and the conduct of hospital staff. Also the claim would have to be properly constituted and that is not the case here.

[8] Miss Chisolm also insisted that death of child born alive is not an injury to the mother. There may be an injury to the child but that does not translate into an injury to the mother unless there is a claim for some kind of mental distress. The claimant’s case has not been presented as one of mental distress or anything of the kind. Indeed, Miss Chisolm closed this aspect of her submission by pointing out that no injury to the mother was in fact pleaded and the claim before the court is in respect of the mother and not the child.

[9] Miss Chisolm submitted that until the child is born, that is to say, a live birth has occurred, it has no independent legal personality. She also submitted that a foetus cannot sue. Counsel cited the case of **Burton v Islington Health Authority** [1992] 3 Al ER 833; [1993] QB 204 (CA) which affirmed the analysis and conclusion of Phillips J in **de Martell v Merton and Sutton Health Authority [**1992] 3 All ER 820**; [1993] QB 204.**

[10] Mr Forsythe responded by saying that paragraph 23 was sufficient to make the case for Miss Whyte. Paragraph 23 of the particulars of claim reads:

> **By reason of the aforesaid the claimant suffered excruciating pain, loss and expenses. The injury, loss and damage to the claimant were caused by the negligence of the defendants, their servants or agents.**

[11] As can been seen, this paragraph does not specify the injury allegedly suffered. It is also well known that pain in child birth is not unusual and therefore is not necessarily the consequence of negligence on the part of the health professionals. Having read the case, this court agrees with Miss Chisolm's submissions. They are well supported by existing authority. The claim could be dismissed on these grounds but the court will examine the case on the merits in order to show that the claim would have failed in any event for the additional reasons given by Miss Chisolm.

The facts

[12] Miss Whyte gave evidence and was cross examined. It is clear that she was and still is quite distressed by the experience. She fully accepted that medicine is not a precise endeavour and mishaps can happen. She is still incensed at the insensitive way she was treated when her child died. She testified that no one came to her and told her that her child died. The first inkling that she got that all was not well was when she observed that the other mothers on the ward had their babies with them and she did not. She said that no one explained to her why this was the case. The second indication that she got that her child died was when the nurse

appeared by her bed side, pushed a paper in her face and instructed her to sign so that the body of the child could be removed. Understandably, she was quite distraught.

[13] The court must say that Miss Whyte is not a vindictive woman who is looking for someone to blame. In spite of her loss and her poor treatment in terms of how the death of the child was told to her, she appeared to be quite reasonable. It is indeed sad that she lost the child and was treated in such an insensitive manner.

[14] Miss Whyte's evidence in chief even on the most favourable interpretation does not establish a case of negligence. To make the case expert evidence would be needed. The expert evidence came in the form of Dr Ademola Odunfa, a pathologist. He admitted under cross examination that he was not an obstetrician. There was no evidence that he was a pediatrician either.

[15] Dr Odunfa did a post mortem examination of the child and may have examined the medical record of Miss Whyte. The court says 'may' because under cross examination Dr Odunfa appeared to be uncertain whether he had seen the Miss Whyte's medical record. He also admitted that he did not examine Miss Whyte at the material time. In light of Dr Odunfa's specialty and his uncertainty whether he examined Miss Whyte's medical records, it does not seem that the court can accept the conclusion expressed by Dr Odunfa that had an emergency C- section been done the baby would have lived. Even if the court were to accept this evidence, the claimant before the court is in respect of Miss Whyte and not the child. In short, Dr Odunfa's evidence is not relevant to the issues being tried.

[16] Dr Odunfa's evidence stands in sharp contrast to Dr Donat Mair's. Dr Mair examined Miss Whyte at 4:30pm on Thursday, October 10, 2002. He preferred to deliver her by C-section since that was the best treatment option but could not do so because of the lack of sufficient facilities at the hospital. However, he maintained that the foetus was not distressed. In other words, despite the fact that Miss Whyte

was a high-risk patient the evidence of Dr Mair is that there was nothing done that placed the mother or child in danger.

[17] It may well be said that this evidence from Dr Mair is self serving. However, there is no reliable evidence to contradict or cast doubt on what he has said. Dr Odunfa's area of specialization is not one which would allow this court to say his evidence is more reliable than that of Dr Mair's. In any event, Dr Odunfa was labouring under three significant disabilities. First, he did not examine the mother. Second, it is not entirely clear what role the medical records of Miss Whyte played in his assessment. Three, he is a pathologist and he gave no evidence to suggest that he was an expert in obstetrics generally and specifically, he gave no evidence indicating his expertise in the treatment and management of high-risk pregnant mothers.

[18] Miss Chisolm relied on two cases which she said made it plain that the present claim cannot succeed on the facts. The case of **Wilsher v Essex Area Health Authority** [1988] AC 1074 reaffirmed that the burden of proof lay on the claimant and unless the claimant adduces sufficient evidence to raise a case of negligence the claim must fail. The next case relied on by counsel was the outstanding direction given to the jury by McNair J in the rightly-famous case of **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582. In what must be one of the most influential directions ever given to a jury, McNair J said at page 586:

> *Before I turn to that, I must tell you what in law we mean by "negligence." In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the*

> *action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.*

[19] And at page 587 his Lordship continued:

> *I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.*

[20] Miss Whyte would have to prove that the health care team did not act in accordance with accepted medical practice for the treatment of high-risk pregnant mothers and not merely that she could have been treated in another way. It has to be shown that the actions of the health care team fell below the standard expected of ordinary skilled persons professing to have the skill to manage high-risk pregnant

mothers. Miss Whyte cannot succeed by showing that the Spanish Town Hospital staff were not the highest qualified experts in the field. From what Dr Mair has said the defendants have shown that what was done fell within the ordinary skill and competence of health professionals caring for pregnant high-risk mothers. On the facts, therefore, Miss Whyte's claim fails.

[21] A faint suggestion was made that the health care team at the Spanish Town hospital did not explore the possibility of transferring Miss Whyte to another institution. However, that was not the pleaded case. As is well known, what is not pleaded cannot be relied on.

Conclusion

[22] The pleaded case does not indicate the damage suffered by Miss Whyte and even if the child suffered any damage and died as a result of the negligence of the hospital staff, the child, despite being born alive has not brought any claim in her own right. The only claimant is the mother.

[23] On the facts, Miss Whyte has not established that the care she received fell below that of the reasonably competent hospital staff offering health care to pregnant high-risk mothers.

Disposition

[24] The claim is dismissed with costs to the defendants to be agreed or taxed.