Sumita Devi and Anor. v Jainendra Sharma & A-G

Fiji High Court, Lautoka
16th November 2001
22nd-23rd January, 11th April 2002
8th June 2007

Action No.
HBC0127.98L

Gates J

JUDGMENT

Claim for damages; negligence; known mental patient acutely disturbed brought to hospital under police escort; whether sufficiently stabilized, and supervised; whether adequately and correctly sedated; whether necessary to confine patient;; whether breach of duty of care; causation of injuries attributable to inadequate treatment and supervision; fractures to pelvis, both ankles, excision of right talus; victim left with stump, no ankle joint; continuing pain; 4½ months hospitalized; onset of osteo-arthritis; 34 years old at time of accident, 44 now; restricted ambulation; deformity and scarring .

Mr V. Mishra with Ms L. Vaurasi for the Plaintiffs
Mr S. Kumar for the Defendants

[1] The 1st plaintiff Sumita Devi sustained fractures to both ankles, her knee and to her pelvic bone as a result of a fall. Having been brought under police escort to the Lautoka Hospital whilst in a mentally disturbed state she threw herself from the second floor to the ground below thereby sustaining the injuries.

[2] The plaintiff claims by her mother as next friend that the doctor admitting her to and treating her whilst in hospital, as well the hospital authorities, were negligent. The nub of the allegation is that the hospital failed to provide sufficient stabilisation of the patient and second that they failed to confine her. The mother [2nd plaintiff] claims damages for herself for loss of income, having had to leave her employment to care for her daughter.

[3] The defendants in their pleadings say the plaintiff's injuries were not occasioned by any act or omission by the 1st defendant or by any other staff at the hospital. The defence denies liability and denies negligence. They claim Sumita voluntarily consented to accept such risk and waived any right of claim against the defendants.

[4] The evidence presented to the court for the plaintiffs was the oral testimony of the mother of Sumita, Mrs Vidya Pillay, a Dr Pravin Kumar, a GP and General Surgeon who examined her prior to trial, and Dr Rajat Ganeshwar a Hospital Risk Management specialist who commented on the original hospital file and notes. Both doctors wrote reports on their findings which were exhibited along with the hospital notes, and a report from the surgeon Dr Mareko.

[5] Dr Shisram Narayan, a psychiatrist from St. Giles Hospital, gave evidence and tendered his report for the defence.

The patient's prior history

[6] Sumita's mother, Mrs Vidya Laxmi Pillay said Sumita was born on 25th August 1962 and educated to form 6. Sumita wanted to be a Laboratory Technician, but failed to pass her qualifying exams. Instead she went on to do a computer course and was employed as a bank officer by the National Bank of Fiji. At that time Sumita was 25 and had the usual aspirations of a person of her age and attributes. She wanted to get married and have a family.

[7] But it was whilst she was at the bank, that she started to have headaches. She began to act strangely and at times would laugh without any reason. Her parents took her to St. Giles Hospital. That was in 1986. She was given medication which for a time controlled her problem.

[8] She stayed at home for a while. Later she worked in administration with the Department of Agriculture. Whilst at Agriculture she began to have the same problems. She was admitted to Labasa Hospital.

[9] From earning $150 pw at the Bank and $120 pw at Agriculture, she was then only able to earn $80 pw helping out at a hostel. But the same problems recurred. She spent 6 weeks in St. Giles. Later she took up a job at Courts for 8 months until she was made redundant following a downturn in business.

[10] She stayed at home thereafter. Within a year the same problems came back. This was in 1996. She could not sleep and used to walk around. She was taken again to St. Giles. She did not want to be admitted. She was aggressive. Later she had to be admitted. She had thrown all her mother's jewellery away and burnt her clothes. This pattern of behaviour was repeated. She had to be reviewed at St. Giles from time to time and was placed on medication.

[11] She made threats to her parents. She picked up knives threatening to kill them. On another occasion she locked them in the house and went away. Her behaviour was observed to be getting worse. The parents feared for their personal safety. On one occasion she overdosed and on another she drank jahola, a domestic bleach product.

[12] On 14th October 1996 Mrs Pillay took her daughter to St. Giles for review. The next day they returned to Lautoka. Mrs Pillay went to work, whilst Mr Pillay took Sumita home. Sumita had acted in a disturbed way when she reached home and damaged items in the house. Mrs Pillay was informed by her husband and went straight to the hospital. The police had been called to the house and Sumita was escorted to the hospital by the police.

[13] At the hospital Sumita was very angry and swore at her mother. A policewoman was sitting by her side. Mrs Pillay went and informed a lady doctor of the situation and of its urgency. She explained she had come from Suva with her daughter from St. Giles that morning. The doctor told her to wait her turn. She waited, and then approached the doctor again. Eventually the daughter was seen by Dr Jainendra Sharma [1st defendant].

[14] Mrs Pillay said Dr Sharma said he would admit Sumita and that she would be given an injection to go to sleep. She told him she did not know where Sumita had put her tablets. The doctor said she would be given an injection to make her sleep. He did

not say anything about St. Giles. Sumita was put on a trolley and taken to Women's Medical Ward in the lift. Her mother accompanied her together with a nurse and the policewoman.

[15] When Sumita was put in the ward with other patients, she was not confined, nor was any medicine or injection administered. Mrs Pillay was there for some time. Her daughter got angry with her and told her to go. Mrs Pillay left at about 5.30 pm. On 17th October, the next day, Mrs Pillay returned after being informed about her daughter's fall from the 2nd floor to the ground.

[16] I found Mrs Pillay to be a straightforward witness who did not embroider her evidence. I accept her evidence of the prior history and of what happened at admission to the Lautoka Hospital.

[17] The nurses notes recorded that Sumita was sedated by tablets on 16th October. However late in the morning of 17th October Sumita was found roaming around near the Laundry Department. She was given largactil and valium. She then refused lunch. She got out of bed and began walking around the ward. She was recorded as being "very aggressive when told to go back to bed." It was noted that a ward assistant tried to follow her. This was not successful and contact was lost. Sumita was later found on the ground level after she had jumped from a window on the second floor and injured herself.

[18] The first clinical notes for 16th October from the Lautoka Hospital record:

> "This lady was brought by police officers with the h/o becoming violent at home, destroying things in the house and threatening to kill and burn the house.
>
> O/E A young Indian lady still quietly looks depressed.
>
> Ass: Mental illness
> Ref. to Dr Sharma"

[19] There was enough information here at the outset to place the hospital doctors and staff on notice that this patient might injure herself or others.

[20] An hour later, she was seen by Dr Sharma. He recorded:

> "Violent aggressive behaviour ++
> Brought in by policewoman. pt. sitting quietly.
>
> Hallucinations ++ hearing voices to do these things or else will kill her. Not taking medication.
>
> P.I. Admit to WMW." (Medicines were prescribed).

[21] A careful and thorough history was taken at 6.25 pm that first day by another doctor. In that history, significantly it is noted that:

(i) The patient was a known mental case from 1987.

(ii) Had been regularly coming to the clinic at Lautoka.

(iii) Had become violent that same day and broken windows.

(iv) Had attempted to burn herself, but kerosene was taken away by her father.

(v) Had heard voices saying that she "should die."

(vi) Was brought in by police and parents.

(vii) Had twice previously overdosed on tablets and brought in to Lautoka Hospital. Both were suicide attempts.

[22] The doctor must have fully realized that the patient was acutely unwell suffering a mental disorder. Significantly, the doctor knew and noted that there had been three previous suicide attempts including that day's attempted burning with kerosene.

[23] The first error seems to have been not to have ascertained the recent history on the patient's mental illness from St. Giles Hospital. This would have provided the Lautoka doctors with a diagnosis based on a lengthier period of observation and treatment. Second, the current medication could have been ascertained. Third, an assessment of the risk of suicide could have been discussed together with the necessary and sufficient

approach to sedation and stabilisation. Fourth the need for confinement or immediate referral to St. Giles could also have been decided.

[24] Dr Gyaneshwar considered a special nurse should have been assigned to care for Sumita's safety until her condition had been stabilized. In this case a ward assistant may have been nominally in charge, but she allowed the patient to give her the slip. It is likely the assistant had to look after other patients and could not give her sole attention to the mentally disturbed patient.

[25] Dr Gyaneshwar was the Clinical Director of the Department of Obstetrics and Gynaecology of the Liverpool Health Service and the University of New South Wales. He had a wide field of experience in hospital practice and academe, including teaching and practice in Fiji. Significantly, he chaired the Hospital Committee on Quality Audit and Risk Management. This involved supervisory responsibility to ensure patients received a level of service which they were entitled to receive and expect. He analysed adverse outcomes of treatment, reviewed the reasons for it, and took appropriate action.

[26] Some of the cases involved patients with psychiatric problems. Treatment had to take into account the need to protect patients themselves, fellow patients in the ward, and hospital staff. I found Dr Gyaneshwar a focused and reliable witness. His comments seemed to have been well within his field of practice and experience.

[27] He told the court that anti--psychotic drugs had been given and initially they were sufficient. But once Sumita showed signs of continued disturbance the drugs given were inadequate and would have been too slow acting. Dr Gyaneshwar concluded:

> "Several issues at stake. Whether to involve the police, whether to schedule the patient so as to be kept in confinement until review (if she refused medication). Patient needed close supervision, and adequate sedation, needed to be supervised if not adequately sedated. Urgent psychiatric review necessary."

[28] For a patient of this kind, close observation was essential. Sedation could be achieved urgently and quickly. For this situation, oral sedation was not the proper

approach, he said. It should have been intravenous. All of the symptoms here, the aggression, the hallucinations, the violence, all suggested a significant relapse. Dr Gyaneshwar said the Lautoka Hospital would not have been able to refuse this patient. She would have had to be managed till appropriate care was available elsewhere. Nonetheless a patient such as Sumita creates a major concern for the hospital authorities, he said.

[29] Dr Shisram Narayan, consultant psychiatrist, for the defence exhibited his 8 page report on Sumita. She had had a long history of mental illness which was diagnosed in 1988 as paranoid schizophrenia. She had made numerous attempts on her own life. At various times she had had disturbed sleep, poor concentration, forgetfulness, restlessness with pacing the floor at night, depression, ill temper, irritability, destructive behaviour, hearing voices saying she should die, and she had expressed delusional and persecutory beliefs.

[30] She was treated by ECT and medication. She was sometimes admitted. There were relapses also. She was re-diagnosed as suffering from schizo-affective disorder.

[31] Dr Narayan considered a period of 2 years general well being was ended when she defaulted in 1996 on her domiciliary medication. She was admitted again on 16.4.96. Her antipsychotic medication was increased. But on home leaves it was thought she was non-compliant with oral medication. She was then put on long acting medication given by injection.

[32] Shortly before her last admission to Lautoka Hospital on 16.10.96, the Zone Nurse at Lautoka contacted a Dr Rajen Singh at St. Giles who had last reviewed her. She had been very violent and flushed all her tablets down the toilet. The doctor advised the nurse to give her an injection. By the time the nurse reached Sumita's home, she had already been taken to the Lautoka Hospital.

[33] Dr Narayan says he would have accorded different treatment to Sumita on the second day in hospital. Once she was unco-operative and aggressive and she was moving about the ward, he would have given her intravenous (IV) diazepam. This was to ensure

immediate sedation since she was in an open ward. He gave the same reasons for this method as Dr Rajeshwar.

[34] Also if possible, he would have confined the patient. Obviously the arrangements made for observation and security of the patient at the hospital were inadequate.

[35] The hospital authorities owed a duty of care to Sumita. They knew about her suicidal tendencies and the attempt made that previous day. They failed to acquaint themselves with the position from St. Giles on history, treatment and sedation. They failed to sedate her in the correct way on the second day and failed to confine her. That she should try to take her life was reasonably foreseeable, and was a known risk to be guarded against. Sumita was not in her right mind when she jumped from the window. She could not be considered to have voluntarily consented to accept the risk of injury. There was therefore a breach of the hospital's duty of care towards this patient. These omissions were negligent in the circumstances of this case. The 1st plaintiff has established her case on liability to the requisite standard.

Damages: Pain and suffering

[36] Sumita was aged 34 at the time of the accident. She is now 44. The plaintiff says that as a result of the negligence to be attributed to the staff, and vicariously the Hospital Authorities, she suffered injuries. It was to be anticipated that the plaintiff might harm herself. She did just that, for which the 1st plaintiff and the hospital authorities are to blame for the reasons I have set out. Causation of damage has therefore been proved from the breach of the duty of care: *Yorkshire Dale SS Co v Minister of Transport* [1942] AC 691 at p.706.

[37] As a result of the fall, Sumita had to be treated for fractures of both ankles and her pelvis. Both feet were then deformed. They bled from lacerations. The fractures were open and contaminated. She had fractures of both calcaneous bones and a dislocation of the talus type IV. Under anaesthetic the bones had to be manipulated, the wounds debrided, placed in cast, and her right talus had to be excised according to the consultant surgeon Dr Joeli Mareko in his report. She was left with deformity of the right foot and

ankle. She continues to suffer pain in both ankles. She has been found to have gross osteoarthritis of the left and right sub-talar joints. The surgeon said she had restricted ambulation because of the pain in both feet.

[38] Dr Pravin Kumar, originally a Senior Surgical Registrar, now in private practice, examined Sumita in 2001. He was asked for an independent opinion. He had an X-rray done and did an assessment on incapacity. He wanted to look at the state of her bones.

[39] The right ankle fracture had been a comminuted fracture which had become infected. The talus bone had been crushed. In effect the main-bone was missing, after the excision. Her tibia now sits on the calcaneous, leaving her with a totally distorted right ankle.

[40] He referred to a knee fracture, which he said was a normal fracture. She had a long stay in hospital from October 1996 till the end of February 1997, some 4½ months. She ended up with shortening in the leg which added to her limp. She has no ankle joint. There is no movement in the ankle to allow flexing or extension. It was Dr Kumar's opinion that she will be exposed to significant osteo-arthritis later in life.

[41] Because of the formation of new bone tissue around the articular surfaces, her ankle was very painful for a weight bearing joint. The condition of osteo-arthritis would reduce her mobility. Surgery could be done, but not in Fiji. She had a reasonable amount of movement though she had a fused ankle. It was difficult to intervene he said, and her situation will worsen. On the pain scale of 0-10, he said she was at 8. Exertion would bring on pain, which would be exacerbated by humid or cold weather.

[42] Dr Kumar said she could not run, and it was difficult for her to mount steps. Housework would be difficult for her with these injuries. Special shoes may assist a little. The fused bone acted like a stump with no flexion or extension. She had scars from the wound infection. These were shown to the court.

[43] Dr Kumar considered her incapacity to be 40%, though he expected her to have further restrictions on movement later.

[44] According to Sumita's mother, Mrs Pillay, Sumita continues treatment with the Zone Nurses. She is on 3 tablets. After the fall, Mrs Pillay believed Sumita went through 4 operations in all. After hospitalisation she was a further month in rehabilitation. At first she could not walk. Now she limps. She cannot wear normal shoes. Her pelvis is still painful for which she takes pain killers. Going to the toilet and sitting up in bed are difficult.

[45] It is trite to say no two cases of personal injury are the same. Some consideration of previous cases and awards can be helpful. One must be mindful of variations in circumstances and of the fact that some cases were decided some time ago.

[46] The fixing of satisfactory compensation for personal injuries is not an exact science as is well known. It has been said:

> "...the court must take into account, in making its assessment in the case of any particular plaintiff, the pain which he actually suffered and will suffer and the suffering which he has undergone and will undergo. Pain and suffering are not measurable by any absolute standards and it is not easy, if indeed possible other than in the most general way, to compare the degree of pain and suffering experienced by different people, however, the individual circumstances of particular plaintiffs clearly have an effect upon the assessment of damages."

[Kemp and Kemp Vol. 1 paras 2-007-10]

[47] In *Heaps v Perrite Ltd* [1937] 2 All E.R. 60 Greer LJ said:

> "We have also to take into account not only the suffering which he had immediately after the accident but the suffering that he will have throughout his life in future: the constant necessity of having assistance in the various things that he has to do for his own purposes, apart from earning money."

[48] In *Rajesh Prakash v Kamlesh Ramesh Parmar & Anor.* (unreported) Suva High Court Civil Action No. 350 of 1996; 19 November 1999 Pathik J awarded a cinema

technician aged 32 at the time of the road accident, $45,000.00 for pain and suffering and loss of amenities. He had suffered a fractured left ankle and was left with an obvious limp, a shortened left leg, painful arthritis and swelling, occasional headaches, difficulty in climbing ladders and in doing his job, inability to play his usual sports, and had been assessed at 20% disability. $45,000.00 was awarded by Scott J in *Dinesh Kumar v John Elder* (unreported) C.A. 560/95S for injuries to left tibia and fibula where disability had been assessed at 15%. The injuries were similar to those in *Rajesh Prakash*.

[49] In *Govind Sami v O'Brien and Serevi* HBC349.97L, 3 October 2002 a 62 year old man suffered a fractured left ankle, right calcaneum (heel bone) and fractured ribs. He was left with a limp, and suffered a good deal of residual pain. He was awarded $40,000 for pain and suffering.

[50] Specially aggravating in the instant case, is the fact that the plaintiff had to spend 4½ months in hospital with very painful injuries. The defendants must take their victim as they find her. Her mental difficulties must have made her situation more wretched and encouraged a sense of worthlessness from which she already suffered.

[51] She still suffers pain in the pelvis. Whatever slim chance she might have had of marriage or of any sex life must have gone completely. She cannot play any sports. Movement with her deformed and painful ankle will always be a problem. This will become more serious as time goes by. She was already a weak applicant in the job market. Her disabilities render her at greater risk. It would require a very understanding employer before she could be taken on.

[52] Her hospital ordeal of treatment, operations, and pain must have been difficult for her to endure. Gross osteoarthritis has now set in in both ankles. She might lose the ability to walk, certainly unaided I accept Dr Kumar's estimate of the scale of pain as 8 out of 10. The plaintiff's mental state makes her injuries that much more serious, and could shorten her life.

[53] In these circumstances I believe the proper award in general damages for pain and suffering (now and in the future) and for loss of the amenities of life to be $60,000. I award $3,000 for the scarring.

Interest on general damages

[54] Interest on general damages has been sought in the pleadings. It was held in *Pickett and British Rail Engineering Ltd* (1980) H.L. 136 at 137, which was a case of personal injuries, that "interest on general damages was awarded for the purpose of compensating a plaintiff for being kept out of the capital sum between the date of service of the writ and judgment ..."

[55] Such interest is usually awarded at the rate of 6%: *A-G v Valentine* ABU0019.98S. Unfortunately because these proceedings have taken so long to be processed through the courts and for judgment to be delivered, it would be unfair to overpenalize the defendants. Accordingly as a matter of discretion I allow interest at 4%, applicable to a rounded up figure of 9 years, equalling a sum of $22,680.

Loss of earning capacity

[56] If the plaintiff is observed and controlled in administering her medication she has some prospect of holding down low level clerical administrative or domestic employment. But there are many uncertainties involved in this assessment. The evidence was that when quiet and on the medication she could perform at this level, and that she had been employed reasonably satisfactorily. To all intents and purposes those prospects are now dim.

[57] Some award is necessary here for opportunities already lost, and some which would have lain in the future. Under this head, bearing in mind those uncertainties, I award $3,000 per year for 6 years, totalling $18,000.

Special damages

[58] Those claims were not strongly disputed, the special shoes, breakfast chair, and anti-biotics. As claimed, I award $165.

Future nursing and treatment

[59] Sumita's father has since died. Her mother is elderly. Her mother is in her late 60s. There will come a time when Sumita will be on her own. Counsel for the plaintiff suggests $4,000 per year for the employment of a carer for 15 years, and referred to *Flour Mills of Fiji Ltd v Jai Raj* ABU0056.99S where similar provision had been made for a 38 year old with severe injuries to both arms. In the instant case I award $4,000 per year for 12 years, totaling $48,000. I also award $10,000 towards future medical treatment.

[60] The 2nd plaintiff, Sumita's mother, had to give up her employment to look after her daughter. She claims loss of income of $7,200 from leaving her job as manager of a bookshop after Sumita was discharged from hospital and from rehabilitation. She also claims her transport to and from the hospital for 4½ months, a sum of $871. These are proper claims and reasonable sums necessary for Sumita's recovery and treatment. I will allow them.

[61] Costs are awarded to the plaintiffs in the sum of $4,500 exclusive of disbursements. The overseas medical witness' costs are to be met also.

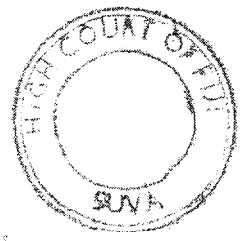
Summary

[62] I find for the plaintiffs. The award is:

(a)	Pain and suffering and loss of amenities	$ 60,000
(b)	Interest on (a)	$ 22,680
(c)	Loss of earning capacity of 1st plaintiff	$ 18,000

(d)	Scarring	$ 3,000
(e)	Special damages	$ 165
(f)	Future nursing	$ 48,000
(g)	Future medical treatment	$ 10,000
(h)	2nd plaintiff's loss of income	$ 7,200
(i)	Transport to hospital	$ 871
(j)	Costs [Exclusive of disbursements]	$ 4,500
	Total:	$179,916

[63] There will be judgment for the plaintiffs in the sum of $179,916 including costs but exclusive of disbursements which are to be taxed if not agreed. Liberty to either side to apply if there is an error in the calculations.



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