IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 163

District Court of Appeal No 53 of 2021

Between

Sheng Ling Huo

… *Appellant*

And

(1) Orthosports@Novena
(2) David Paul Bell
(3) Ang Kian Chuan

… *Respondents*

JUDGMENT

[Tort — Negligence — Medical Negligence — Informed Consent]

Sheng Ling Huo
v
Orthosports@Novena and others

[2022] SGHC 163

General Division of the High Court — District Court of Appeal No 53 of 2021
Choo Han Teck J
17 May 2022

12 July 2022 Judgment reserved.

Choo Han Teck J:

1 The plaintiff, Mr Sheng, was born on 11 June 1945, and so is now 77 years old. He worked as a business developer, but retired in 2010. On 19 December 2013, when he was 68 years old, he had a total knee replacement of his left knee at the Mount Elizabeth Novena Hospital ("the Hospital"). The surgery was fully sponsored by the Lion Befrienders Service Association. That organisation was participating with the Hospital in a social charity programme for the needy. It was not disclosed at the time that Mr Sheng was covered by an insurance policy under the AIA. The defendants' evidence was that had that been disclosed, Mr Sheng would not have qualified for the sponsored surgery.

2 The surgery for Mr Sheng's knee replacement was performed by Dr David Paul Bell and Dr Ang Kian Chuan, the second and third defendants respectively. They practised under the name of Orthosports@Novena, the first defendant. The procedure was not a complicated one, and it involved inserting

a knee implant named Genesis II, a product of Smith & Nephew, a medical company from the United Kingdom. After post-surgical physiotherapy, Mr Sheng was discharged uneventfully on 24 December 2013.

3 Mr Sheng's first post-surgical medical review was conducted by Dr Bell on 27 December 2013, and he reported that all was well. He was reviewed again on 6 January 2014 by Dr Ang. He said that he saw Dr Bell on 6 January 2014 and reported severe pain. The defendants' records show that Mr Sheng was attended to by Dr Ang, and that there were no complaints about the knee. He was given medication for nausea, unrelated to the knee. He was also seen by the physiotherapist on the same day and no complaints were made regarding pain in the knee even though he had gone through 10 minutes of cycling and 5 minutes of walking on the treadmill.

4 Mr Sheng had a total of ten consultations with Dr Bell and Dr Ang after the surgery, and seven sessions of physiotherapy. Although he now claims that he was in severe pain all the while, the evidence does not support this claim. There is no medical record of the claim, and there is no reason for the court below to find that the doctors had not or would not have recorded the complaint, had it been made.

5 The evidence that the trial judge accepted included the review on 16 June 2014 in which Dr Bell noted that Mr Sheng was walking with no difficulties up to 2km daily. And, it was also ascertained that Mr Sheng travelled to Batam for a conference in June 2015. The trial judge concluded that there were no problems with the surgery or the knee at that point.

6 The earliest record that there was a problem with the knee replacement was on 27 May 2015. The examining doctor suspected a displacement of the polyethylene liner in the replacement knee module. Consequently, Mr Sheng had a scan done on 7 July 2015 and the suspected displacement was confirmed when he was examined by Dr Bell on 13 July 2015. The scan shows that the polyethylene liner had been displaced by 8mm. Dr Bell thus advised that they could do a revision knee replacement surgery, but Mr Sheng declined, saying that he was averse to surgery, and on 24 May 2016, he commenced this action against the plaintiffs. He sued for failure to obtain consent, a claim that was dismissed by the trial judge. The trial judge also dismissed Mr Sheng's claim in negligence.

7 So far as the allegation of the defendant doctors' failure to obtain informed consent from him is concerned, Mr Kronenburg, counsel for Mr Sheng, referred me to *Chester v Afshar* [2005] AC 134, in aid of his argument that the defendants' failure to inform Mr Sheng of the risk of dislodgement of the polyethylene liner is, in itself, a sufficient ground to find liability. In other words, Mr Sheng does not need to prove causation by showing that he would not have gone for the surgery had he known of the risk of dislodgment.

8 But the learned DJ found that the defendants had adequately informed Mr Sheng of the risk of dislodgment of the polyethylene liner. An appellate court will not reverse the findings of fact made by the judge of first instance unless such findings are plainly wrong or against the weight of the evidence (*Alagappa Subramanian v Chidambaram s/o Alagappa* [2003] SGCA 20 at [13]). On the facts, the evidence of Dr Bell that he had advised Mr Sheng of the risk of implant failure was not challenged or disproved at trial because on his

own evidence, Mr Sheng could not remember what was told to him in his consultation with Dr Bell. And Dr Bell's evidence is corroborated by the medical notes and the consent form. Dr Bell was also not challenged at trial as to the consent-taking process. Furthermore, Mr Sheng's own witness, Dr Ho Yew Min, a consultant orthopaedic surgeon testified that a displacement of the polyethylene liner was extremely rare, almost unheard of. For these reasons, I am of the view that learned DJ's finding cannot be said to be plainly wrong or against the weight of the evidence. It would be sufficient for me to dismiss Mr Sheng's appeal on this point. And it is not necessary for me to address Mr Kronenburg's arguments relating to causation, save to say that *Afshar* does not represent the law in Singapore (*Tong Seok May Joanne v Yau Hok Man Gordan* [2013] 2 SLR 18; *D'Conceicao Jeanie Doris (administratrix of the estate of Milakov Steven, deceased) v Tong Ming Chuan* [2011] SGHC 193).

9 The majority in *Afshar* referred to and found support in *Chappel v Hart* (1998) 195 CLR 232 ("*Chappel*"). In brief, the plaintiff in *Afshar* had back pains and was advised to have surgery. The surgeon did not advise her that even if the surgery was successful, there is a small (1% to 2%) but unavoidable risk that she might still suffer from a condition known as *cauda equina syndrome*, causing paralysis. In *Chappel*, the plaintiff was not warned by the surgeon of a possible perforation of the oesophagus in the proposed surgery. The majority, as the majority in *Afshar*, found the respective doctors liable for the injury arising from the failure to advise that those injuries could arise. In both majorities, the judges made repeated references to common sense as the foundation for establishing liability in such situations. As always, there are often disagreements as to what a common sense answer really is, leaving Lord Hope to say, finally, that common sense on its own is inadequate, and can pull in two or more directions (*Afshar* at [83]). The learned Law Lord then explains that

common sense must apply in context. A little later on in his judgment, he held that the issue of causation was one arising from legal policy which a judge must decide (at [85]).

10 In the present case, Mr Sheng was 68 years old at the time, and had a bad knee that troubled him. It was a problem that could be alleviated with a total knee replacement. The surgery carried a risk that the polyethylene liner might be displaced but that possibility was only about 1.2%. It could, should that eventuality occur, be rectified by a revision surgery in which a new module is inserted to replace the previous one. The risk in question was, like *Afshar*, an event that might have arisen spontaneously, without any negligence on the part of the surgeon. Two general facts should be noted. First, sometimes, there are cases in which the risks are high, or though not high, have a severity that might make a patient think twice before accepting them. Second, even in either or both, there are cases in which without surgical intervention, the patient would either not live much longer or may suffer a long painful existence, prospects which, if put to them, the patients would baulk.

11 It is clear to me that a failure to provide advice on a risk cannot, in itself, lead to culpability for the injury arising from that risk. Culpability must be considered in the context of legal liability. And culpability is to be examined not only against the conduct of the defendant but also the plaintiff. It is therefore far too simplistic and narrow to apply the *Afshar* logic that if a doctor does not warn of a risk, and that risk materialises, causing injury to the patient without negligence on the part of the doctor, the latter becomes, without more, liable to the patient. In medicine, in every procedure, and every medication, there may be risks; often many. Some are small, like that in *Afshar*, and the present case. In many such cases, the patient may, in all probability, be willing to run the risk.

It cannot be in the interests of justice to hold, as a matter of principle, that in every case where the doctor did not warn of a risk, he or she must be held liable without at least some inquiry as to whether the patient would probably not take the risk.

12 Given Mr Sheng's age and the pain his knee was giving him before the surgery; the fact that he was offered the surgery completely free without his personal expense; the risk was a small one that was not life-threatening or serious; that it materialised, as the judge found, almost two years after the surgery, and Mr Sheng was offered a corrective surgery without cost, should the defendants here be liable just because there was no inquiry as to whether Mr Sheng would have consented to the surgery had he been told of the risk of a displacement of the polyethylene liner? I think not. But as the court below found, this issue is academic because Mr Sheng is unable to prove that there was no informed consent.

13 There are two additional findings of fact that are material in the context of this case. First, the trial judge accepted that Mr Sheng was still ambulant with no ostensible pain, a fact that I will not reject having seen how Mr Sheng, now 77 years old, leapt from his seat in court and bounded three or four steps to his counsel with instructions. His counsel also declined to challenge the defendants' private investigator Mr Gilbert De Siva, who filed an affidavit stating that he observed Mr Sheng for seven days from 19 April 2016 to 2 May 2016, and saw him walking and climbing "with remarkable use of both legs…over long distances".

14 Second, Mr Sheng's reason for not wanting to have corrective surgery may not be the truth. He may well not be suffering pain in spite of the

displacement of the polyethylene liner. In or around June 2014, Mr Sheng submitted the hospital bill to his insurer AIA to seek reimbursement for the total knee replacement surgery. AIA made an insurance pay-out of $7,846.20 to the Hospital because the bill was paid under the charity project and Mr Sheng incurred no personal costs. The Hospital subsequently refunded the monies to AIA. Dissatisfied, Mr Sheng issued a Letter of Demand to the Hospital on 13 June 2014, demanding reimbursement from the Hospital for that sum of money. He is now claiming in this action the monetary costs of corrective surgery and all the attendant costs, which corrective surgery the doctors had already offered him free of charge and he declined.

15 So far as to when the polyethylene liner was displaced, the trial judge found no evidence to support counsel's claim that it must have happened within three hours of the surgery. The peripheral evidence also suggests that this was a spontaneous displacement, the time of occurrence of which is unknown, especially given that Mr Sheng was suffering no ostensible pain.

16 Mr Kronenburg raised a further argument that was neither pleaded nor run at the trial. He submitted that the surgeon tugged at the liner after the operation and that tugging contributed to the displacement. This argument must be rejected because it is not a particular of negligence that had been pleaded, and there is also no evidence that supports it. Even if the surgeon tugged at the liner, he must be allowed to adduce evidence to challenge this. Generally, in a civil case, a party need not put his general case to the other party. This is a common misunderstanding of what is known as the *Rule in Brown v Dunn*. But in this instance, where a party is alleging a specific fact, especially for the first time in court, and not having made it in his affidavit of evidence-in-chief, he

must put it to the other party so that he has an opportunity to explain his position. This was not done, and Mr Kronenburg has no basis to make this argument now.

17 The trial judge found on the facts, no evidence of negligence against the defendants, and I agree fully with her. This appeal is entirely without merits and is therefore dismissed with costs to be taxed if not agreed.

- Sgd -
Choo Han Teck
Judge of the High Court

Edmund Kronenburg (Braddell Brothers LLP) (instructed), Lee Kwang Chian (Michael Hwang Chambers LLC) for the appellant; Lim Min (K&L Gates Straits Law) (instructed), Charles Lin Ming Khin (Charles Lin LLC) for the respondents.