Neutral Citation Number [2011] IEHC 52

THE HIGH COURT

2007 434 P

BETWEEN

SONIA LAYCOCK

PLAINTIFF

AND

BARRY GAUGHAN AND THE GOVERNOR AND GUARDIANS

OF THE HOSPITAL FOR THE RELIEF OF POOR LYING-IN WOMEN

DEFENDANTS

JUDGMENT of Mr. Justice John Quirke delivered on the 21st day of January 2011

In these proceedings the plaintiff, Ms. Sonia Laycock, makes the following two separate and distinct claims against the defendants.

She claims that she suffered an initial personal injury arising out of a diagnostic laparoscopy, which was undertaken by the first defendant in St. Joseph's Hospital, Raheny, on 22nd January, 2004.

The first defendant is a consultant obstetrician and gynaecologist and he performed the diagnostic laparoscopy on the plaintiff for the purpose of investigating persistent abdominal pain from which the plaintiff had suffered for a number of years.

The plaintiff claims that during the course of that laparoscopic procedure the first defendant incorrectly located a secondary port in her abdomen which punctured her right inferior epigastric blood vessel, thereby causing bleeding and consequent bruising to her abdomen.

She claims that she suffered unnecessary additional pain and distress arising out of that alleged negligence.

The plaintiff separately claims that, on the 19th March 2004, the first defendant performed a right salpingectomy upon the plaintiff by way of open surgery when it was possible and desirable for him to have performed the surgery laparoscopically.

It is claimed that, as a consequence of the open surgery, the plaintiff now has an unnecessary abdominal scar and has suffered unnecessary post-operative pain, discomfort and distress.

The pleadings delivered in the proceedings allege that between 3rd March, 2004, and 19th March, 2004, the defendants failed to adequately monitor the plaintiff's symptoms and condition, wrongly advised her that she was routinely pregnant when her pregnancy was ectopic and, thereafter negligently and unnecessarily delayed appropriate investigation and treatment thereby exposing her to the risk of serious and life threatening injury.

Although Dr Paul Fogarty, the consultant obstetrician and gynaecologist who testified in support of the plaintiff's claims disagreed with some of the measures adopted when the defendants were investigating and monitoring the plaintiff's pregnancy between the 3rd March and the 19th March 2004 his testimony fell far short of establishing negligence of the kind which has been pleaded in that respect.

Accordingly the plaintiff's second claim against the defendants is confined to the contention that a right salpingectomy necessarily performed upon her on the 19th March 2004 was negligently performed because it was completed by open surgery and not laparoscopically.

1. 22nd January 2004.

The plaintiff had a history of abdominal pain which was laparoscopically investigated by the first defendant in December 2000 and November 2001, on referral from her General Practitioner Dr. Hampson. Her pain had also been separately investigated medically at that time for other potential causes.

On 22nd January 2004, the first defendant, (again on the referral of Dr. Hampson), performed a further investigative laparoscopy upon the plaintiff under general anaesthetic in St. Joseph's Hospital, Raheny. She was discharged on the same evening after an uneventful examination and conversation with the first defendant.

She stated, in evidence, that a few days later, she developed bruising all over her abdomen from "the bellybutton to the hairline".

She said that she attended Dr. Hampson on 30th January and that he telephoned the first defendant.

She said that, arising from that telephone call, she visited the first defendant later that day at his private clinic where he examined her and told her that a blood vessel had been damaged by his instruments during surgery. She said that he apologised to her for that and for the bruising. Her account of those events was challenged on behalf of the first defendant.

The first defendant has no recollection of the plaintiff's visit or of any conversation or apology. He has no recollection of extensive bruising of the kind of which the plaintiff described having been brought to his attention.

Dr. Hampson did not testify in these proceedings.

The first defendant stated in evidence that if, during the insertion of a port, he had punctured the plaintiff's epigastric blood vessel, either on the right or left side, it would have been inconceivable that he would have failed to become aware of that fact. He said that

epigastric blood vessels are major arteries and a puncture would result in extensive and very noticeable bleeding, with substantial risks to patients.

He stated that there are many minor blood vessels within the abdomen and it is possible that he may have damaged a small vessel whilst locating a port and this could have resulted in minor internal bleeding which would manifest itself as bruising at a later stage.

He said that such damage is not necessarily consistent with negligence on his part, but he agreed that it is not satisfactory from a patient's point of view. He said that, if he became aware of some bruising at a later stage, he might have apologised to the plaintiff for any additional discomfort or distress which she suffered.

Dr. Paul Gogarty, testifying in support of the plaintiff's claim, was of the opinion that bruising as extensive as that described by plaintiff at the location where he found scarring was consistent with the puncture of the plaintiff's right inferior epigastric blood vessel.

He agreed, however, that the plaintiff had expressly told him that the second port had been inserted by the first defendant in her left inguinal region and not on the right side of her abdomen and he found this difficult to reconcile with his findings. The plaintiff confirmed in these proceedings her recollection that the relevant port had been located on the left side of her abdomen.

It was acknowledged by the plaintiff that her abdominal bruising disappeared relatively quickly and she agreed that she suffered pain, distress and inconvenience for no more than a few weeks after the date upon which the laparoscopy was performed.

Dr. Michael Turner, who is a Professor of Obstetrics and Gynaecology at University College Dublin, and a consultant gynaecologist who practices from the Coombe Women's Hospital in Dublin, stated, in evidence, that if the first defendant had punctured the plaintiff's inferior epigastric blood vessel during the course of a laparoscopy, then he would definitely have been aware of that fact. He said that the epigastric blood vessel is a major artery, which, if pierced, would have resulted in extensive and obvious bleeding which would have been readily apparent even to an inexpert eye.

He was of the opinion that the plaintiff's account was consistent with the first defendant having caused or permitted one of many minor arteries in the abdominal area to become damaged with resultant bleeding and visible bruising over the following days.

He did not believe that this was consistent with negligence on the part of the first defendant because there are a substantial number of blood vessels present at the relevant location and contact with a minor vessel may cause superficial damage but does not place a patient at risk of serious injury. He said that the plaintiff was never at risk of serious injury as a result of this incident.

Dr. Peter Boylan, who is a consultant gynaecologist and former Master of the National Maternity Hospital in Holles Street stated in evidence that if the first named defendant had punctured the plaintiff's inferior epigastric blood vessel on 22nd January, 2004, it would have resulted in profuse bleeding which would have been apparent almost immediately.

He said that bruising after a laparascopic procedure was not unusual, particularly where there were more blood vessels present in the subcutaneous tissues, which would have been the case in relation to the plaintiff.

He said that, based upon the history recounted by the plaintiff , her epigastric blood vessel had not been punctured by the first named defendant on 22nd January, 2004.

I accept the evidence of the plaintiff that her post-operative recovery from the laparoscopic procedure which she underwent on 22nd January, 2004 was more painful and uncomfortable than had been the case after her earlier similar procedures.

I accept also that she noticed significant abdominal bruising during the days following the laparoscopy and that this bruising was more extensive than had occurred after her earlier similar procedures.

I am not satisfied, however, that she has established by way of evidence and on the balance of probabilities that the first defendant performed a laparoscopic procedure on 22nd January 2004 negligently.

In particular, I am not satisfied that she has established, on the evidence and as a matter of probability, that the first defendant incorrectly located a secondary port in her abdomen which punctured her right inferior epigastric blood vessel.

I accept the evidence of the first defendant and also the evidence of the other professional witnesses who testified that the inferior epigastric blood vessel is a major artery and that its rupture would have been readily apparent to the first defendant and to other medical staff members within a short time if it had been ruptured in the manner alleged by the plaintiff.

Furthermore, Dr. Fogarty based his conclusion that the first defendant had punctured the plaintiff's right inferior epigastric blood vessel upon his supposition that the first defendant had inserted the second port on the right side of the plaintiff's abdomen.

However, in evidence the plaintiff was clear in her recollection that the port had been inserted in her left inguinal region and not on the right side of her abdomen. She was similarly clear in her recollection when providing Dr Fogarty with her initial history of the event in August 2006.

In summary it is not clear on the evidence, precisely what caused the plaintiff's abdominal bruising and additional pain and discomfort during the days after the laparoscopy.

It has not been established on the evidence and on the balance of probabilities that it resulted from a puncture of the plaintiff's right inferior epigastric blood vessel.

It is probable that a minor blood vessel within the plaintiff's abdomen was penetrated during the course of the procedure with consequent bleeding and later bruising.

No expert medical evidence has established that such a penetration comprised negligence in the performance of the procedure.

It follows that the plaintiff has failed to discharge the onus of proving that she has suffered an injury as a result of negligence on the part of the defendants (or either of them) arising out of the laparoscopic procedure on 22nd January, 2004.

The plaintiff's claim in that respect is, therefore, dismissed against both defendants.

2. 19th March, 2004
On or immediately after 24th February, 2004, the plaintiff's General Practitioner, Dr. Hampson, confirmed that she was pregnant. The plaintiff was, understandably, delighted.

On 3rd March, 2004, the plaintiff was referred by Dr. Hampson to the second named defendant hospital ("the hospital") for investigation in relation to vaginal bleeding and a continuing abdominal pain.

She underwent an ultrasound scan and her pregnancy was confirmed. She was told that the sac was intact within her uterus. She was advised to return to the hospital on 10th March for blood tests.

On 10th March, 2004, she attended the hospital and was referred to the early pregnancy unit (EPU) where a pregnancy hormone serum HCG blood test was carried out. She was advised that there was no sac now present in her uterus and that it was suspected that she was undergoing an ectopic pregnancy.

A short time later, she was telephoned by a female doctor from the EPU who advised her that she had a high Beta HCG level of 687 units per litre.

Although she had been advised to return to the hospital on the 17th March 2004, she presented on 15th March, 2004 where it was noted that she was "still bleeding". A further serum HCG blood test was undertaken by the second named defendant. The Beta HGC level had fallen to 220 units per litre.

On the evening of 18th March, 2004, the plaintiff was telephoned by the first defendant who arranged for her admission to the hospital that day.

It is acknowledged on behalf of the plaintiff that this was an appropriate admission in the circumstances because the first defendant suspected that the plaintiff's pregnancy was ectopic and he intended to perform a laparoscopy upon the plaintiff in order to confirm that diagnosis.

On the 19th March the first defendant performed a necessary right salpingectomy upon the plaintiff after confirmation of ectopic pregnancy and chronic salpingitis.

The salpingectomy was performed after the first defendant converted a laparoscopy into a laparotomy because blood in the pouch of Douglas obscured his view of the plaintiff's right fallopian tube.

It is contended on behalf of the plaintiff that the salpingectomy should have been performed laparoscopically by the first defendant (or by an appropriately qualified practitioner) and not by way of open surgery. It is not contended that the salpingectomy was not necessary or that it was not an appropriate treatment in the circumstances.

As I have indicated earlier, Dr. Paul Fogarty, in evidence, disagreed with some of the measures adopted when the defendants were investigating and monitoring the plaintiff's pregnancy between 3rd March and 19th March.

In particular, he questioned an apparent failure of hospital doctors to carry out blood tests for the plaintiff's serum HCG on 3rd March, 2004.

Four medical experts have stated in evidence that it would have been unnecessary and inappropriate to carry out such a test before 10th March. Those experts included (a), two experienced consultant Gynaecologists, (b), Dr Horgan, the specialist registrar who treated the plaintiff on the relevant occasions and, (c), Dr. Sharon Moss, who was the senior registrar in the EPU at the relevant times. They were unequivocal in their view.

On the evidence it is entirely unclear how such a blood test, if undertaken on the 3rd of March 2004, would have altered the plaintiff's dilemma. Dr. Fogarty suggested that it might have resulted in the plaintiff undergoing a laparoscopic investigative procedure one week earlier than she did.

In his report dated the 31st October 2006 he referred to the possibility of intervention by way of an injection of Methotrexate on the 10th or 11th March 2004 and the possible avoidance of the need for surgery. However, this reference was not pursued in evidence.

Regardless of when or if an earlier blood test was carried out it is not in dispute that the plaintiff's pregnancy on the 19th March 2004 was ectopic and that this fact was unrelated to any negligence of any kind by on the part of either of the defendants.

It is also undisputed in evidence that on the 19th March 2004 the plaintiff required a salpingectomy as a result of her ectopic pregnancy and that this requirement was unrelated to any negligence of any kind on the part of either of the defendants.

It has certainly not been established in evidence as a probability that a salpingectomy or any other procedure undertaken one week earlier than 19th March, 2004, or at any other time, would have resulted in a better or worse outcome for the plaintiff.

What has been alleged in evidence is that the surgical method or technique used by the first defendant on the 19th March 2004 was incorrect and inappropriate and negligent and that, as a consequence, the plaintiff has suffered a greater level of pain, disfigurement and inconvenience than was necessary in the circumstances.

No other credible evidence indicating that the plaintiff has suffered injury or loss as a result of negligence on the part of either of the defendants has been adduced in these proceedings.

In evidence the first defendant described how he carried out a laparoscopy upon the plaintiff on 19th March, 2004. He said that he discovered that the plaintiff was bleeding from an ectopic pregnancy within her fallopian tube and it was necessary for him to stop the bleeding.

The volume of blood present within the plaintiff's peritoneal cavity made it difficult for him to see the plaintiff's right fallopian tube clearly so he proceeded to laparotomy because he was more comfortable operating that way rather than laparoscopically.

During the laparotomy the ectopic pregnancy was confirmed and removed.

The first defendant said that at the relevant time, there were only three practitioners within the hospital who were trained to undertake the relevant surgery laparoscopically. Two of those were Australian nationals (one was Dr. Moss). None of the three was of consultant standing and experience.

He said that he was not experienced in or comfortable with laparoscopic surgery of this kind so he proceeded by way of laparotomy.

He did not consider referring the plaintiff to one of the three practitioners within the hospital who were experienced in laparoscopic surgery because it was 6.00pm on a Friday evening and the plaintiff was bleeding from a pregnancy in her fallopian tube which needed to be addressed urgently. He said that if she continued to bleed she might not survive and her health and safety were his principal concerns.

He thought that it was unlikely that any of the three junior doctors who were skilled in laparoscopic surgery of this kind were present within the hospital at 6.00pm on that Friday evening. He agreed that he could not say whether or not he had made enquiries as to their whereabouts.

Dr Turner questioned whether there was any clinical advantage in performing the surgery laparoscopically and said that there were "pros and cons" in respect of both types of surgery.

He said that the first defendant was confronted with a potentially life threatening emergency and was obliged to take the safest course from his patient's viewpoint. It was not appropriate for him to simply wake up his patient and postpone treatment while he sought information about the whereabouts of some junior practitioners who might be in a position to perform surgery which might be slightly more satisfactory cosmetically but was no safer and had other drawbacks.

He said that he himself has not trained in this kind of laparoscopic surgery and, if faced with the same situation today, he would not seek assistance from a colleague trained in laparoscopic surgery. He would simply proceed to perform the surgery by laparotomy.

It was put to Dr Turner that the Royal College of Obstetricians and Gynaecologists Guideline No. 21 on the surgical management of tubal pregnancies contains a recommendation that the relevant surgery should, where possible, be undertaken laparoscopically. He rejected that general contention and pointed out that the RCOG Guideline No 21 applies to another jurisdiction. He said that the guideline was introduced in Britain in May 2004 after the events which gave rise to these proceedings. He said that its introduction does not alter his expressed views.

Dr. Peter Boylan agreed with the views expressed by Dr Turner and with those of the first defendant. He stated in evidence that surgery by laparotomy was the appropriate treatment for the plaintiff in the circumstances.

He said that he would have been critical if the first defendant had performed the surgery laparoscopically when he did not feel comfortable with that particular procedure and when he believed that he did not have the necessary skills to perform the surgery safely.

He stated that 37% of ectopic pregnancies diagnosed in the National Maternity Hospital in 2004 were surgically treated by laparotomy. Some are still treated by that procedure.

His recollection was unclear as to whether or not he, himself, would have had the training and skills to perform laparoscopic surgery in 2004, but he now has sufficient training and experience to do so.

In *Dunne v. National Maternity Hospital* [1989] I.R. 91 the Supreme Court (Finlay C.J.) identified the principles applicable to claims of this kind in the following terms (at p. 109):

> "2. If the allegation of negligence against a medical practitioner is based on proof that he deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications. …
>
> 4. An honest difference of opinion between doctors as to which is the better of two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been negligent.
>
> 5. It is not for a jury (or for a judge) to decide which of two alternative courses of treatment is in their (or his) opinion preferable, but their (or his) function is merely to decide whether the course of treatment followed, on the evidence, complied with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant. …
>
> "General and approved practice" need not be universal but must be approved of and adhered to by a substantial number of reputable practitioners holding the relevant specialist or general qualifications."

Dr. Gogarty described the relevant laparscopic surgery as the "gold standard" for this type of surgery. That description has not been seriously challenged on behalf of the defendants.

However, evidence of a failure on the part of a medical practitioner to provide a patient with the most advanced and technically perfect treatment available is not necessarily evidence of negligence by the practitioner.

In this case the duty imposed upon the first defendant was to provide the plaintiff with surgical treatment of a standard consistent with that which would be provided by a careful medical practitioner of like specialisation and skill to that which he possessed.

The onus resting upon the plaintiff has been to prove that the course taken by the first defendant was one which no medical practitioner of like specialisation and skill would have followed had he (or she) been taking the ordinary care required from a person of like qualification.

The unambiguous evidence of Dr. Turner was that he would have performed precisely the same open surgery which the first

defendant performed if he had been faced with the same circumstances as those faced by the first defendant.

The evidence of Dr. Boylan established that some 37% of ectopic pregnancies diagnosed in the National Maternity Hospital in 2004 were treated by medical practitioners of similar specialisation and skill as those possessed by the first defendant in precisely the same manner as that adopted by the first defendant on the 19th March, 2004.

Conflicting expert medical evidence was adduced as to the respective merits of open surgery and laparoscopic surgery as a means of removing the plaintiff's ectopic pregnancy on the 19th March 2004.

It was agreed that laparoscopic surgery resulted in a more satisfactory cosmetic outcome and accomodated a speedier recovery.

However I accept the evidence of Dr Turner and that of Dr Boylan that it would have been unsafe and potentially dangerous for the plaintiff if the first defendant had chosen to remove the ectopic pregnancy laparoscopically when he was unsure that he could safely do so.

I also accept the evidence adduced on behalf of the defendants that it would not have been reasonable or appropriate in the circumstances for the first defendant to have suspended his investigation in order to search for laparoscopically skilled practitioners at a time when the plaintiff required immediate surgical intervention to stop bleeding which was compromising her health and wellbeing.

In summary, the evidence adduced on behalf of the plaintiff falls far short of establishing that, by performing open surgery upon the plaintiff on the 19th March, 2004, the first defendant was in any way negligent or in breach of any duty owed by him to the plaintiff.

It follows that the plaintiff's claim fails and must be dismissed and I so order.