Neutral Citation Number: [2006] IEHC 89

THE HIGH COURT

Record No. 2000/2417 P

BETWEEN

JULIA SHUIT

PLAINTIFF

AND

MICHAEL MYLOTTE, DAVID O'KEEFFE, JOHN WINTERS AND THE WESTERN HEALTH BOARD

DEFENDANTS

Judgment of Mr. Justice Barry White, delivered on the 2nd day of March, 2006.

1. The plaintiff is a 51 year old married woman. She has two daughters aged 25 years and 23 years. She is Dutch. She has resided in the West of Ireland for upwards of 24 years. She has a good command of the English language.

2. The defendants are respectively, a Consultant Obstetrician/Gynaecologist, a Consultant Radiologist, a General Practitioner, and the statutory body responsible for University Hospital Galway.

3. The plaintiff sued the four defendants, alleging negligence on each of their parts, in her medical care and treatment between the years 1986 and 1996.

4. At the conclusion of the plaintiff's case, counsel on behalf of the second, third and fourth named defendants, respectively applied to me for a non suit of the plaintiff. I acceded, at that stage, to the applications made on behalf of the third and fourth named defendants, and, having heard the evidence of the first named defendant, I acceded to a renewed application then made on behalf of the second named defendant. Accordingly, the sole issue that remains for my determination is whether or not the first named defendant was negligent in deciding to carry out a radical hysterectomy on the plaintiff.

5. The first named defendant carried out what might loosely be described as a Wertheim-Meigs hysterectomy on the plaintiff against the following background:-

> The plaintiff was referred to the first named defendant by the third named defendant. In his letter of referral the third named defendant appraised the first named defendant of the fact that:
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> > "her cervical smear on the 23.11.95 showed on microscopy abnormal cells suspicious of Adeno-Ca. In 1991 she has a smear test which showed moderate dyskaryosis with viral change. She had another smear done in 1993 which showed that due to excess blood and degeneration of the smear test that it was unsuitable for evaluation. . . . On the 21.11.95 when I did the last smear I didn't notice anything abnormal on gross examination."

6. On the 12th February, 1996, the plaintiff attended the first named defendant's Colposcopy Clinic. Following examination of the plaintiff, the first named defendant wrote to the Third Named Defendant, on the same date, informing him that the plaintiff's colposcopic appearances were uncertain and appeared to be a picture of both pre-malignant and possibly malignant and inflammatory changes. He wrote:

> "I won't be surprised if she proves to have an early cancer and if so, she will need a Wertheim's hysterectomy. Alternatively if the tissue samples only suggest pre-malignant change, then in view of the cytology suggesting an adenomatous lesion, she would be best to have a simple hysterectomy. She is coming back next week for the results of the histology at which stage we can make a decision regarding treatment".

7. On the 19th February, 1996, the first named defendant wrote to the third named defendant and stated:

> "we plan to do extended hysterectomy on this lady on the 1.3.96 with removal of cuff of vagina and also sample her lymph nodes even though the histology on the biopsies taken from cervix did not show invasive carcinoma. A histological diagnosis of squamous CIN 3 of cervix and vagina intra-epithelial neoplasia grade II has been obtained. The clinical and cytological picture however is suggestive of invasive disease and with cytology raising the question of a glandular cell abnormality she needs a hysterectomy in any case."

8. On the 27th February, 1996, a CT Scan of the plaintiff's abdomen and pelvis was performed by the second named defendant. The scan reported right-sided internal iliac lymphadenopathy and noted that the cervix measured 5 cm in diameter. On the 29th February, 1996, the plaintiff was admitted under the care of the first named defendant, and, on the 1st March, 1996, a Wertheim-Meigs hysterectomy was carried out on the plaintiff by the said first named defendant at the fourth named defendant's premises.

9. Prior to surgery, the first named defendant had not been furnished with a written report in relation to the C.T. Scan carried out on the 27th February, 1996. However, he had received a verbal report thereon. Neither the written, when it came to hand, nor the verbal report referred to the plaintiff having a tumour, but for some inexplicable reason, the first named defendant formed the impression that the C.T. Scan had in fact revealed a tumour, and he so informed the plaintiff on the evening prior to her hysterectomy.

10. In fact, the plaintiff had first had a PAP smear carried out as far back as the 1st November, 1986. The Cytology Report whereon reads:

> "Microsocy – severe dyskaryosis with viral changes / CIN3. Suggest colposcopy and Biopsy."

11. The plaintiff was never made aware of the results of the smear tests carried out prior to November, 1995 and there was no follow up, notwithstanding their disquieting findings.

12. On the 24th September, 1997, the plaintiff, who had become interested in supporting other women who had had hysterectomies, wrote to the first named defendant raising a number of queries. By letter dated the 15th October, 1997, the first named defendant answered her queries and concluded by saying:

> "I hope this letter helps to answer your questions and clear up most of the confusion. If I knew then what I know now I wouldn't have treated you so extensively. Given the circumstances where we had certain tests predicting that you had

cancer we had to treat you radically or else run the risk of leaving you under-treated and therefore at risk of dying from the further development of the cancer which we though might be there."

13. In all probability, the sentence "if I knew then what I knew now I wouldn't have treated you so extensively" prompted the plaintiff to seek legal advice and ultimately to institute legal proceedings.

14. The plaintiff contends that the first named defendant was negligent and in breach of his duty of care in that:

(a) He failed to have any or any proper regard for the health and welfare of the plaintiff.

(b) He carried our improper treatment of the plaintiff.

(c) He commenced to carry out a most serious and irreversible operation upon the plaintiff without first having a full and clear radiological report in writing when such a report was imperative to the proper treatment of the plaintiff.

(d) He acted on some form of verbal communication between himself and the second named defendant, the information being given in that communication being either incorrect or in the alternative misunderstood or misinterpreted by the first defendant.

(e) He failed to exhaust preliminary tests before embarking on the more radical procedure of the Wertheim-Meigs Hysterectomy. In particular he failed, contrary to best medical practice, to stop the operation and to take as a precautionary measure, a frozen section of the lymph nodes in the plaintiff's abdomen before continuing with the surgery despite persistent findings contrary to expectations as referred to in his letter of the 15th March, 1996, to the third named defendant in relations to the alleged 5cm tumour. He also failed to obtain the appropriate biopsies from the cervix and the uterus before proceedings with the operation. Despite this, negligently the first named defendant proceeded and went on to complete the Wertheim-Meigs hysterectomy.

(f) He failed to carry out a hysteroscopy with biopsy of the endometrial cavity and endocervix to exclude adeno-carcinoma.

(g) He concluded incorrectly, despite the fact that he had carried out a full examination internally, and that the CT Scan writing at the 1st March, 1996, indicated that there was no tumour, that there was a 5cm tumour present.

15. The principles by which medical negligence is to be determined are set out in *Dunne (an infant) v. The National Maternity Hospital and Another* [1989] I.R. 91 wherein Finlay C.J. at 109 et seq. states:

"1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.

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.

3. If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general, and which was approved of by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such practice has inherent defects which ought to be obvious to any person giving the matter due consideration.

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.

6. If there is an issue of fact, the determination of which is necessary for the decision as to whether a particular medical practice is or is not general and approved within the meaning of these principles, that issue must in a trial held with a jury be left to the determination of the jury.

In order to make these general principles readily applicable to the facts of this case, with which I will later be dealing, it is necessary to state further conclusions not expressly referred to in the cases above mentioned. These are:

(a) '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.

(b) Though treatment only is referred to in some of these statements of principle, they must apply in identical fashion to questions of diagnosis."

16. He further states:

"In order fully to understand these principles and their application to any particular set of facts, it is, I believe, helpful to set out certain broad parameters which would appear to underline their establishment. The development of medical science and the supreme importance of that development to humanity makes it particularly undesirable and inconsistent with the common good that doctors should be obliged to carry out their professional duties under frequent threat of unsustainable legal claims. The complete dependence of patients on the skill and care of their medical attendants and the gravity from their point of view of a failure in such care, makes it undesirable and unjustifiable to accept as a matter of law a lax or permissive standard of care for the purpose of assessing what is and is not medical negligence. In developing

the legal principles outlined and in applying them to the facts of each individual case, the courts must constantly seek to give equal regard to both of these considerations."

17. Applying these principles and parameters, I am satisfied that it is not my function to determine, whether it would have been more preferable had the first named defendant carried out further and exhaustive investigations, before embarking on surgery. Rather, I must determine whether the plaintiff has proved that no obstetrician of like skill, acting with ordinary care, would have performed the operation carried out by the first named defendant.

18. I have heard evidence on the issue of negligence from Professor John Bonner and Dr. John Murphy, who were called on behalf of the plaintiff, and from Dr. Bill Boyd, Dr. Malachy Coughlan and Mr. Joseph Jordan who were called on behalf of the first named defendant. All five are eminent Consultants.

19. Both Professor Bonner and Dr. Murphy have sympathy for the first named defendant and the dilemma or predicament he found himself in, but neither of them considered that he was correct in his treatment of the plaintiff. With what I detected to be a certain degree of hesitancy, they concluded he had been negligent. Each of them considers that he is guilty of an error of judgment in not carrying out the appropriate investigations and as a consequence carried out surgery that was unnecessary. They consider that he should not have carried out the hysterectomy in the absence of a diagnosis of invasive cancer, albeit that in his report, Dr. Murphy seems to accept that a less radical hysterectomy might be acceptable. Both Professor Bonner and Dr. Murphy referred me to papers by learned authors in support of their contentions.

20. Neither Dr. Boyd, Dr. Coughlan, nor Mr. Jordan, accepted Professor Bonner's and Dr. Murphy's views or contentions. They averred that if placed in the first named defendant's shoes, would have carried out the same operation. They consider he acted properly and appropriately.

21. I am satisfied as to the *bona fide* of each of the five Consultants. I am satisfied as to the truth of their testimony and as to the *bona fide* of their export opinions, and I consider that there are two *bona fide* schools of thought on the issue as to whether the first named defendant acted appropriately in the circumstances presented to him.

22. It was put to Mr. Coughlan, and to Mr. Jordan, that their expert opinion might have been influenced by their friendship with the first named defendant. They each rejected that suggestion and I accept their denials.

23. In the light of my findings in relation to the integrity, and *bona fides*, of the expert witnesses called by the respective parties herein, the plaintiff has failed to satisfy me that no obstetrician of like skill, acting with ordinary care, would have performed the surgery carried out by the first named defendant, rather I am satisfied that a number of reputable obstetricians would have done as the first named defendant did.

24. Mr. Peart, on behalf of the plaintiff, has submitted that it is the first named defendant's case, or at least part thereof, that he was following a "general and approved practice", and that, accordingly I must consider both the first and third principles set out in Dunne. He submitted that the plaintiff has proved that such practice has inherent defects, which ought to be obvious to any person giving the matter due consideration. He submits that the subsequent histopathology has shown that the operation was unnecessary. He argues that had the first named defendant carried out the appropriate investigations, the operation would not have been carried out.

25. Mr. McGrath has submitted that it was never part of the first named defendant's case, nor has it been shown to be, that his defence was one of general and approved practice

26. I consider Mr. McGrath's submissions to be well founded. On the evidence before me, the first named defendant was treating, or intended to treat, a particular, individual patient, who had an unusual set or combination of symptoms, and a highly abnormal history. He considered her case history as a whole. He considered her symptoms and her family circumstances, and concluded that the appropriate treatment in her particular case was to carry out a Wertheim-Meig hysterectomy.

27. The first named defendant has sworn, in evidence, that his mistaken belief as regards the C.T. Scan disclosing or revealing a tumour did not influence him in deciding the nature, and extent, of the surgery he carried out. Having regard to his pre operative correspondence with the third named defendant, I consider it unlikely that his mistaken belief influenced his decision regarding the nature of the surgery he proposed carrying out, and I accept his testimony that it did not.

28. The plaintiff contends that in the course of her meeting, and discussion, with the first named defendant, on the evening prior to her hysterectomy, he informed her in shark, and devastating, terms that she would die if she did not have the operation carried out. The first named defendant accepts that the plaintiff did enquire as to what might happen, if she did not have surgery, and that he informed her of the possibility of death, in the event of her not having treatment.

29. Having regard to the fact that "informed consent" is not an issue before me, it is perhaps unnecessary for me to consider their discussion on the topic of death. Nevertheless, it seems to me that a person facing radical surgery is likely to be in a state of high anxiety. I consider the plaintiff is likely to have been in such a state, and, on hearing of the presence of a tumour was, in her own words, devastated. I consider the combination of high anxiety, and feeling of devastation, to have perhaps highlighted in her mind the word death, but I am satisfied this had never been the intention of the first named defendant.

30. In the circumstances the plaintiff's claim is dismissed.