

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 385 OF 2014

HELLEN KIMOSHOPLAINTIFF

5 VERSES

1. WAKAPITA

2. CASE MEDICAL CENTER

3. MEDICAL&DENTAL PRACTITIONERS COUNCIL.....DEFENDANTS

BEFORE HON. LADY JUSTICE H. WOLAYO

10 JUDGMENT

Introduction

The plaintiff sued the first defendant Wakupita and 2nd defendant Case Medical Center, in the tort of professional negligence.

The plaintiff prayed for declarations that

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- 1) the 1st defendant Wakupita negligently dispensed medical advice to the plaintiff that subsequently put her life and that of her unborn child at risk;
 - 2) The 2nd defendant (CMC) as an employer of Wakupita neglected to carry out its due diligence and employed Wakupita who is not licenced as a doctor or dermatologist and consequently put the plaintiff's life at risk.

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She also prayed for punitive damages against both defendants.

The plaintiff further prayed for an order directed at the 2nd defendant to dismiss the 1st defendant from its employment on grounds of his negligent actions and lack of a license to practice as a doctor and dermatologist.

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- She further prayed for general damages for the inconvenience caused to the plaintiff as a result of the defendant's negligent actions; any other relief and costs.

The defendants filed written statements of defence denying liability.

Issues framed for determination

Both counsel filed a joint scheduling memorandum in which the following issues were agreed for determination.

- 5 1) Whether the 1st defendant negligently and unlawfully prescribed the drug methotrexate to the plaintiff.
- 2) Whether the 2nd defendant is vicariously liable for the negligence of the 1st defendant.
- 3) Whether the 2nd defendant failed in its professional duty owed to the public to ensure the verification of all its employees' professional qualifications and competences.
- 10 4) Remedies .

Under section 101 of the Evidence Act, the legal burden of proof is on the one who desires judgment as to any legal right or liability dependent on the existence of facts which he or she must prove. In the instant case, it is the plaintiff who asserts the defendants were negligent and therefor liable for alleged wrongs to her.

- 15 On the other hand both parties have the evidential burden to prove their respective evidence on a balance of probabilities .

Both parties filed written submissions and authorities that I have carefully considered.

Whether the 1st defendant negligently and unlawfully prescribed the drug methotrexate to the plaintiff.

- 20 The gist of the plaintiff's case is that the 1st defendant negligently and unlawfully prescribed methotrexate which led her to suffer a miscarriage at an early stage of pregnancy.

- As rightly pointed out by both counsel in their submissions the tort of negligence was first recognised in **Donoghue v Stevenson** where Lord Atkin found a manufacturer liable in negligence for injury suffered by a consumer who bought and consumed ginger ale only to
- 25 find a snail at the bottom of the bottle. The test as articulated by Lord Atkin is the duty to take care when relating with people who are so likely to be affected by the defendant's acts or omissions and breach of which duty gives rise to liability in negligence.

With respect to medical negligence, the duty to take care is at the level of following standard practice and procedures and what a reasonable ordinary medical professional would have done and failure to do so may impute professional negligence .

In HCCS No. 29 of 2011 Hon. Benard Mulengani v AG and two others, Hon. Justice Kabito cited with approval an Indian case Post graduate Institute of Medical Education and Research, **Chandigarh v Jaspal Sing and others Supreme Court of India Civil Appeal No. 7950 of 2002** where it was held that to establish liability of a health worker, it must be shown there was deviation from the normal practice, that the medical worker has not adopted the practice and that the course adopted by the health worker is one that no professional of ordinary skill would have taken.

It is not in dispute that Wakupita is registered with the Allied Health Professionals council as demonstrated by Dexh. dated 24th November 2014 , as a medical clinical officer with an Advanced Diploma in Dermato-venereology and a valid practicing licence for 2014.

In a further letter dated 6th August 2015, the deputy registrar confirmed Mr. Wakupita

‘covered general dermatology among other course units which allowed him to see patients with skin infections and prescribe medication with Uganda clinical guidelines and other specialised service providers. ‘

The two letters from the deputy registrar Peter Naumutale of Allied workers professionals council were submitted by DW1 Issa Bulafu the general manager of the 2nd defendant (Cease Medical Centre Ltd).

Under section 73 and 76 of the Evidence Act, the letters are public documents whose contents are taken at face value without any other proof.

The Allied Health Professionals Council is established by the Allied Health Professionals Act cap 268 and therefore a public body.

Contrary to practice, the 1st defendant did not specify whether his first qualification is a degree or diploma and when and from where he obtained the same. The only specifics he gave were that he holds an Advanced Diploma in Dermato-venereology from the University of Dar es Salam. This is relevant because the Medical and Dental practitioners council denied he is a dermatologist in their letter dated 27th October 2014. Yet in PE 1 the medical

insurance claim, he is described as a dermatologist, someone with specialist knowledge in that field.

In cross examination, the 1st defendant describes himself as a specialist and that therefore it was not necessary for him to consult a specialist. In the absence of evidence of his basic professional qualifications, it is impossible to verify his claim to being a specialist .

The letters from the deputy registrar clearly demonstrate that the 1st defendant was allowed to see patients with skin infections in consultation with Uganda clinical guidelines and specialised service providers. The logical conclusion is that the 1st defendant was not a specialist as he claims and therefore had an obligation to prescribe treatment in consultation with specialists in the field.

As a professional , he owed a duty to comply with standard procedures prescribed in the Clinical Guidelines including consulting a specialist, taking samples etc before administering treatment to the plaintiff. By his own admission , he complied with neither of the procedures and only clinically examined the plaintiff and took down her history. According to the 1st defendant, he was a specialist and therefore his own guide a position contradicted by the deputy registrar of the AHP council.

In the absence of proof by the 1st defendant he is a specialist and based on the confirmation by the deputy registrar the 1st defendant is not a specialist, and the denial by the Medical and Dental practitioners council the 1st defendant is a dermatologist, I find on a balance of probabilities that the 1st defendant acted negligently when he did not follow the Uganda Clinical guidelines and when he prescribed methotrexate without consultation with a specialist.

Dw 3 Dr. Kyeyune examined the plaintiff on 6th August 2014 and he confirmed she had missed her period but that when she was prescribed methotrexate on 22nd July by a dermatologist whom he did not name, she wasn't pregnant. Upon ascertaining by a lab test her pregnancy status, he discontinued the drug because it is not prescribed to pregnant women.

Dr. Kyeyune's testimony was she was about five weeks pregnant by 6.8.2014 but she was not pregnant when the 1st defendant put her on methotrexate .

According to Dr. Kyeyune the plaintiff miscarried on 16th August 2014 about ten days after he had discontinued the impugned drug.

The question here is whether the plaintiff took contraceptives to prevent pregnancy after she was put on the drug.

- 5 Dr. Kambugu 's evidence is that he was informed by the 1st defendant that he had advised the plaintiff to take contraceptives during the time she was on treatment , a fact that is also echoed by the 1st defendant.

The defendants rely on clinical notes dated 22nd July 2014 as proof the plaintiff was advised to start on contraceptives but PE1 the medical insurance claim form is dated 21st July 2014
10 and shows methotrexate as the prescribed treatment and nothing more.

Being aware of the risks attached to the drug when taken by a pregnant woman, it was strange the prescription for contraceptives is not reflected on PE1 but instead reflected on the treatment notes recorded on 22.7.2014.

The plaintiff denied being advised to take contraceptives and bearing in mind the 1st
15 defendant ignored guidelines for treatment by Allied health professional, I find on a balance of probabilities that it is more probable than not the plaintiff was not advised to take contraceptives and neither where they prescribed. It is for this reason she conceived most probably when on treatment as confirmed by Dr. Kyeyune DW3 who examined her on 6th August 2014 and discontinued the methotrexate .

20 It is not disputed that the plaintiff suffered a miscarriage at approximately five weeks as confirmed by Dr. Kyeyune . The expert witnesses Dr. Kyeyune and Dr. Katusiime confirmed the impugned drug has adverse effects on pregnancy and causes congenital abnormalities, abortion, intra uterine fetal death among other defects (report by Dr. Katusiime).

25 Although Dr. Kambugu in his report rates the drug as gold standard for nail psoriasis, he does not state its effects on pregnant women . His report is therefore not helpful at all .

The fact that the plaintiff suffered a miscarriage is a direct consequence of the impugned drug.

Counsel for the defendant submitted the plaintiff contributed to the injury suffered because she did not have protective sex and did not take contraceptives as advised by the 1st defendant.

I have found that the 1st defendant did not properly advise the plaintiff to guard against pregnancy during the treatment and therefore the fault lies with him and not the plaintiff.

Counsel for the defendant submitted the plaintiff was an unreliable because she lied she had not conceived after the miscarriage. While I find that indeed the plaintiff lied when she denied she producing a child in 2016 after the miscarriage in August 2014, the lie does not go to the root of her case which is that she suffered a miscarriage after taking methotrexate prescribed by the 1st defendant. Whether she produced a child or children thereafter does not take away the professional duty of the 1st defendant to take reasonable care and observe all standards procedures before prescribing drugs.

On the first issue , I find that the 1st defendant acted negligently when he did not consult specialist service provider and when he did not carry out all procedures under the clinical guidelines before prescribing methotrexate to the plaintiff and he did not advise her to take contraceptives which led her to conceive while on the drug and suffer a miscarriage.

Issue No. 2: whether the 2nd defendant is vicariously liable for the negligence of the 1st defendant.

PW1 Issa Bulafu general manager of case Medical Centre confirmed the 1st defendant was their employee. In all cases of breach of duty or professional duty by an employee committed during the course of employment , the employer is vicariously liable. As held in **Barnett v Chelsea & Kensington Royal Hospital [1961] QB 428**, a hospital is liable for the acts of its staff where they are negligent in giving treatment .

I therefore find that the 2nd defendant is liable for the negligence of the 1st defendant, its employee.

Issue No. 3: Whether the 2nd defendant failed in its professional duty owed to the public to ensure the verification of all its employees' professional qualifications and competences.

As rightly submitted by counsel for the defendant, no evidence was availed by the plaintiff to show that the 2nd defendant did not regularly do due diligence on its prospective employees.

Moreover, counsel for the plaintiff did not canvass this issue in his submissions.

In the absence of evidence to support this sweeping claim, I find it has not been proved on
5 a balance of probabilities.

Issue No. 4: Remedies

From the submissions of counsel for the plaintiff, it is apparent the plaintiff dropped all prayers in the plaint save general damages.

The plaintiff testified she was attended by the 1st defendant who looked at her finger nails and
10 prescribed methotrexate . She swallowed the drugs as prescribed and two days later , she
woke up with a pain in the back and was unable to bend , lift or carry anything. On 6th
August 2014, she visited Case Medical Center and Dr. Kyeyune who confirmed she was
pregnant which later aborted.

The principle that guides the award of damages in torts is that the claimant is put in the
15 position he or she would have been had the tort not been committed. The claimant is
therefore compensated for the pain and suffering she endured.

In this case, the plaintiff is entitled to general damages as of right for the professional
negligence of the 1st defendant for which the 2nd defendant is vicariously liable. She will also
be entitled to compensation for the pain , suffering and inconvenience of a miscarriage in
20 early pregnancy.

Doing the best I can, the plaintiff is awarded general damages of 20,000,000/ for the
professional negligence and the pain and suffering caused by the negligence.

In the premises, the plaintiff's suit succeeds with the following orders:

1. General damages of 20,000,000/ is awarded against the 1st and 2nd defendants
25 severally and jointly .
2. Interest at the rate of 10% p.a from date of judgment till payment in full.
3. Costs of the suit to the plaintiff.

DATED AT KAMPALA THIS 27TH DAY OF NOVEMBER 2018.

HON. LADY JUSTICE H. WOLAYO

Legal representation

Abbas Advocates for the plaintiff

5 D & G Associated Advocates for the defendants