

IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 721 of 2016

JENNY ABELINA BONILLA

CLAIMANT

AND

**DR. GILBERT LANDERO
ATTORNEY GENERAL OF BELIZE**

DEFENDANTS

BEFORE the Honourable Madam Justice Sonya Young

Written Submissions

Claimant 17.11.17

Defendants 29.11.17

Decision

15.1.18

Michael Chebat S.C. for the Claimant

Agassi Finnegan for the Defendants

Keywords: Assessment of Damages – Personal Injury – Negligent Removal of Womb and Ovary – No Children – 21 years old

JUDGMENT

1. Jenny Bonilla is now a twenty-two year old woman. As a consequence of abdominal pain associated with bleeding, she visited the Southern Regional Hospital and was transferred to the Western Regional Hospital where she was scheduled for a laparotomy or exploratory surgery. During this surgery and without a second professional opinion or Jenny's consent, her womb and left ovary were entirely removed. She was then twenty one. There was no

critical situation in which Jenny's life was at risk, there was no existing condition which made the hysterectomy the only appropriate option. Yet, when she regained consciousness all that remained of her reproductive ability was a solitary ovary and she had not yet had a child.

2. The defence has accepted liability and a Consent Order to this effect has been filed. The court is called upon now only to assess the quantum of damages for the breach of duty and her pain and suffering.
3. The law tells me that the award, so far as is possible, must restore Jenny to the position in which she would have been, had it not been for the negligent act - **Cornillac v St. Louis [1904] WLR 491**. Some may say that there are things far worse than losing the right to reproduce but at twenty-one, how do you fill the void or right the wrong. Well, there really is no precise or scientific way and the compensation will never be actual. But as best as judges can, we consider the injuries, we find comparables , amounts awarded by courts in circumstances as similar as possible and we make a notional monetary award which is reasonable. Finally, we hope that the assessment enables the onward journey to be a little less difficult.

Preliminary Objections:

4. In their written submissions Counsel for the Defendant raised that the evidence of Dr. Mauricio Navarette M.D. and Aimee Mercedes Jex were not properly before the Court and were inadmissible in whole or in part. The Court wholly agrees that parts of Dr Navarette's evidence is opinion evidence for which no permission was sought or granted to be admitted as expert evidence. The remainder has no bearing on the issue at hand since liability is not disputed and the court appointed expert deals quite adequately

with the state and condition of Jenny's removed organs. Dr Navarette's Statement has therefore been excluded. Aimee Jex on the other hand is a witness of fact. She treated Jenny as a psychologist and her evidence is permissible. She is not merely offering an opinion she is conveying facts about Jenny which she personally perceived as her psychologist and delivering a diagnosis based on those facts. This evidence is admissible and will be considered. In any event, I find this particular objection to be late and unfair. It was not made when leave was sought or granted for the statement to be admitted into evidence, it would not be countenanced now in submissions.

5. Finally, objection was raised to such parts of the Claimant's statement as were perceived to be scandalous, insulting and or disparaging. The court has considered paragraphs 9 to 12 not 9 and 12 as the defence submitted. In light of what had been ordered by this Court and what has in fact been presented in that affidavit, the Court strikes paragraphs 6 to 12 and have accordingly disregarded same.

Nature and extent of Injury:

6. Jenny's womb was capable of hosting a fetus but now she is castrated and unable to reproduce naturally. In a medical sense, she faces the possibility of premature ovarian insufficiency or early on set menopause. The expert, Dr. Nicholas, a consultant obstetrician and gynecologist at the Karl Heusner Memorial Hospital with ten years experience in gynecology assessments, explains that the risk is greater, the younger the patient is when they undergo surgery as that performed on Jenny. She adds that in any event the remaining ovary may fail within six months to three years. She explains that there exists a number of other consequential risks. Reliance was placed on data

from the Mayo Clinic which show “*an age-dependent association for both unilateral and bilateral oophorectomy in premenopausal women and increased risks of Parkinsonism, dementia, cognitive impairment, anxiety, and depression. These risk increase with the younger age at surgery*”.

7. Like Aimee Jex, Jenny’s psychologist, she explains that with Jenny’s sudden loss of reproductive capabilities, especially with no previous children, she will “*experience severe internal anguish*.”
8. Jenny herself explained feeling like an empty shell, less than a woman because the doctor had taken away her “*femaleness*”. She has been denied her right to reproduce and she can not comprehend why the possibility of a hysterectomy had never been discussed with her before surgery. She struggles with depression, guilt and feelings of worthlessness. She has difficulty with sexual arousal and intimate relationships. She has had two failed relationships since the surgery. Both partners apparently wanted children. She cries frequently, is moody, forgetful, resentful and sometimes even aggressive. She must also deal with the stigma and unkindness of those who are opinionated and ignorant and consequently she feels isolated and estranged. Her self esteem is tattered. Her mind tells her regularly that she is “*ugly, ... a monster, no man will ever love you*”.
9. Her dreams of having children of her own are forever crushed and she is filled with a sorrow so deep that she sometimes wishes she had died during surgery. She appreciates the psychologist’s counselling intervention and desires continued counselling. Beyond all this she yearns for an explanation, an apology, some form of justice.

10. Aimee Jex opines that Jenny “*is struggling with Depression and feelings of worthlessness related to the procedure and adjusting her ideas of how she can feel fulfilled as a woman and a wife, given her family expectations of becoming a mother as well as how she is treated by friends and family after the hysterectomy.... She also is coping with the grief over losing her ability to become a mother biologically and how she may be in a successful relationship given that loss*”. She continues that Jenny presents with “*symptoms of trauma and consequent post- traumatic stress disorder related to the hysterectomy by having intense psychological stress related to the hysterectomy*”.

Comparables and Discussion:

11. The Claimant presented the 12th Edition of the Guidelines for the Assessment of General Damages in Personal Injury Cases which places the award for infertility in a woman with severe depression and anxiety, pain and scarring between £84,500 to £124,500. This sum, according to the Central Bank of Belize rates provided by Counsel, converts to BZ\$225,000 - \$333,660. The level of award depends on whether she has had children or whether she desired no more children, the degree of depression, physical or psychological scarring, and the existence of an aborted fetus. The guidelines also place damages for severe post -traumatic stress disorder at £17,000 to £44,000 or BZ\$45,000 to \$117,920.
12. Counsel for the Claimant submitted that “*a person who is physically or mentally incapacitated by his injuries and is capable of appreciating the conditions to which he has been reduced is entitled to be compensated for the anguish that this creates*”. He then cites **Tanya Clarke née Tyrell v Dr Soe Win et al., Suit no C.I. 2000/C164 (Jamaica)**. The defence urged that damages should not be quantified separately for the physical and psychological injury. They referred to the relevant discussion in **Munkman on Damages 12th ed**

paragraph 6.46 which quotes Justice Turner in **Hicks v Barns (13 January 1988, unreported)** thus: “*There is no satisfactorily rational way in which to evaluate a claim such as this. It would be unrealistic to approach the individual injury or groups of injuries and award a sum for each and arrive at a total.*”

13. While the Court appreciates that where there is a loss, that loss must be fully and adequately compensated, an assessment for each injury ought not to be done separately and simply aggregated. This may result in a figure which is larger than is reasonable. Instead, the case should be looked at as a whole and an assessment made which is reasonable in all the circumstances.
14. The Claimant also presented ***George v Tower Hamlets Health Authority [1996] Lexis Citation 2169*** where an award was made, **as agreed**, in the sum of £75,000 (BZ\$201,000) for a total hysterectomy and the removal of the left ovary.
15. The Defence reminded the court to be cautious about using figures from jurisdictions which do not share similar social, economic and industrial conditions to Belize. They relied on ***Joseph et al v The Ministry of Health, North West Regional Health Authority and The Attorney General of Trinidad and Tobago et al, TT 2007 HC 210*** where Justice Moosai encouraged local and regional jurist to establish and follow indigenous trends but, until such time as these come into existence, to take guidance from elsewhere making the necessary and appropriate adjustment.
16. The Defence went on to submit that in any event, the award in **Tower Hamlets** ought to be discounted to reflect the glaring difference in the result and effects of the surgery. Unlike the present case, the Claimant was made to suffer a vesicovaginal fistula which caused urine leakage and continued

incontinence. She had wanted a large family and was forced to abandon her job since she would no longer lift her patients. They were silent on the age of the case itself.

17. At paragraph 39 of **Anna Crawford v Arthur Belisle Belize Claim No. 590/2008**, Justice Legall in assessing damages quoted Lord Carswell in *Seepersaud v Persad and anor (2004) 64 WIR 378 at 385* “*The board entertains some reservation about the usefulness of resort to damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded in modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons can do no more than demonstrate a trend in very rough and general terms*”.
18. Counsel for the Claimant presented three cases closer to home. **Roberts v Roopnarinesingh et al TT 2007 HC 172** where the court awarded TNT \$875,000 (BZ\$257,421.77) as general damages to a fifty-nine year old woman whose womb had been removed as a consequence of a gauze swab having been left in her abdomen during surgery.
19. The defence submitted that the circumstances of Roberts were so grossly aggravated that the case was wholly distinguishable from the instant. The gauze swab formed an abscess and had to be removed engendering additional surgery and the total hysterectomy. Thereafter, the Claimant was required to use a colostomy and nasal tube. Though the court agrees, it notes that they have, however, chosen to make no mention of the Claimant’s age and stage in life.

20. Next, reference was made to *Joseph et al v The Minister of Health, North West Regional Health Authority and The Attorney General of Trinidad and Tobago (ibid)*, where damages were awarded in the sum of TNT\$300,000 (BZ\$88,258.89 to a 27 years old mother of two) for having both fallopian tubes wrongfully removed.
21. The defence countered that even after surgery the Claimant in **Joseph** continued to experience chronic pain while Jenny’s “*ailment had been remedied. There have been no complaints on the record, of any abdominal pain, which was the ailment initially complained of before surgery was conducted.*” Suffice it to say that the court finds it most unfortunate, if not callous, that reference could have been made to what has happened to Jenny as a remedying of her ailment.
22. The Claimant then referred to *Clark v Win et al (ibid)* which the defence proffered best fit the present factual circumstances. That case involved a nineteen year old woman whose ovaries were both removed following a laparotomy. A biopsy revealed that the ovaries were not cancerous as had appeared to the operating physician. She was awarded Jam \$4,125,000 (BZ \$64,169.53) for the negligent removal of her ovaries and the pain and suffering experienced.
23. The defence sought to distinguish this case from the one at bar as the resultant effect of the surgery were “grave” – premature menopause including hot flashes, inability to conceive, pain and discomfort during intercourse, decreased libido, leg pains, inability to do physical activity, spotting, anxiety, depression and psychological trauma. They urged that the amount be discounted.

24. While again sending their salutary warning against rely on the UK guidelines, the defence then discussed two other British cases (both of some vintage) referred to in *Clark v Wia et al (ibid)*. The first was *Hiles v North East Thames - Regional Health Authority [1987]* where the sum of £45,000 (BZ116,890.88) was awarded for the unnecessary sterilization of the 19 year old Claimant. The other, *Butlers v Grimsby and Scunthorpe Health Authority [1998]* where £55,000 (BZ\$142,866.78) was awarded for puncturing her uterus. Following the latent evacuation of the uterus to remove after birth products from her first child at the hospital, the Claimant there developed a host of secondary issues. She was advised five years later to have the hysterectomy done.
25. This Court could see some differences between **Clarke** and the instant case but the court also considered that **Clarke** relied heavily on **Hiles** which was some fifteen years old by the date of that judgement. I am not sure that any adjustment was made for this. Although the judgment speaks to the “*updated sums in local currency*” one is simply not sure how this sum was updated. Further, there are inherent dangers in using adjusted awards since they may yield higher sums than may be recently awarded. For this reason I find serious difficulty relying blindly on **Clarke** even as a starting point for assessment.

The Assessment:

26. Jenny’s physical pain and suffering seemed to be no greater than it would have been for the laparotomy. Her pecuniary prospects have not been affected. There was no claim for special damages and it was unfortunate that there was no claim for future counseling sessions or the possible harvesting and preservation of her eggs for surrogacy when she so desired.

27. There is no doubt that Jenny's resulting loss is of a lasting nature. She is childless and will never experience the joy of biological motherhood with all its trappings. This was something Jenny greatly wanted – a big family with kids playing in the back yard. Without her consent she has been wrongfully deprived of a significant part of what makes her uniquely a woman and what informs her concept of femaleness and wife. Her world has been fractured in ways, unfathomable, in a society too quick to label her in derogatory terms and to view her as less marketable. No, she may have no apparent continuing physical side effects but her mental anguish is great and her hopelessness is real. She has difficulty with sexual arousal and intimate relationships. She is deeply depressed and has been diagnosed with PTSD. She will have to deal with menopause and the increased risk of a host of other illnesses. Her enjoyment of life has been greatly decreased.
28. Jenny has been harmed where an oath has been taken to first do no harm. But she is young, beautiful and bright and with her faith, continued counseling and support, her life will unfold most pleasantly if she only allows it to. If she relinquishes her need for the doctor to understand her pain and realizes that it really is only she who needs to understand, accept and overcome it. Her worth does not come from the doctor or anyone other than herself. A wrong has been done and it cannot be realistically righted but it can be given sufficient to heal, with time. The figure awarded should leave no confusion of how this Court views this egregious act.
29. As was expected, none of the comparables provided were exact. Many of them were of significant vintage. **Tower Hamlets (ibid)** being some twenty one years, **Clarke (ibid)** seventeen years and **Joseph and Roberts (ibid)** ten years respectively. This means that although they could offer some guidance

they had to be considered in light of changing times, gender sensitization, the enhanced view given to a woman's reproductive right and inflation. The problem seems rare, if not unique, to Belize as no cases have been provided from this jurisdiction.

30. In all the circumstances the Court choose to rely on the more recent **UK Guidelines (ibid)** and placed Jenny at the top of the range because of her age and the fact that she has had no children, suffers serious depression and PTSD but has no scarring and had not lost a fetus. The court reduced that sum by 25% to reflect the difference in the economies.

Determination:

31. Having considered all that is before me, I award \$250,000.00 general damages as I think appropriate, with interest thereon at the rate of 3% per annum from 19th December 2016 to the date of judgement herein and thereafter at the statutory rate of 6%. Costs shall be on the prescribed basis. I rely on counsel to calculate. I am grateful to counsel on both sides for their excellent analysis and assistance.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**