BETWEEN

KOH BEE MOI **Plaintiff**

AND

DR HJH ROSELINA BTE DP HJ YAAKUB **First Defendant**
DR DAW NI NI AUNG **Second Defendant**

(High Court of Brunei Darussalam)
(Civil Suit No.60 of 2002)

Before: Judicial Commissioner James Findlay In Chambers.
Date of Hearing: 6th February, 2014.
Date of Handing Down Judgment: 12th February, 2014.

Ms Rudi Lee of Messrs Fathan, Rudi Lee, Annie Kon & Associates for the Plaintiff.
Ms Elaiza Merican (M/S Abrahams Davidson & Co.) for the Defendants.
Ms Pg Emelda Bte Pg Julaihi (A.G's Chambers)

J U D G M E N T

Findlay, J.C.:

On 27 April 1999, the plaintiff underwent a surgical operation to remove her uterus and ovaries. This operation was performed by the defendants.

The plaintiff alleges that, on 2 May 1999, her "abdomen opened up" and later it was discovered that she suffered a vesico-vaginal fistula. This, in layman's terms, is a hole in the posterior wall of the bladder and the contiguous anterior wall of the vagina. This causes urine incontinence.

The plaintiff alleges that these problems were consequences of the operation and were caused by the negligence of the defendants. The defendants deny any negligence and say, in essence, that, for various reasons, the plaintiff had a heightened risk of these "complications" which happened without any negligence by the defendants.

On 18 November 2013, the Registrar allowed an application by the defendants to dismiss the plaintiff's suit because of inordinate and inexcusable delay.

The plaintiff now appeals to me against this decision.

On the face of it, I believe a delay in prosecuting this action of some 13 years is inordinate. The question then is: Is that delay excusable?
The plaintiff says that there were delays between 2002 and 2009 because of interlocutory matters.

The plaintiff says the defendants expressly agreed to a deferment of the trial by writing on 4 August 2009 that "the defendants will not proceed to trial without sight of the expert report." This was a perfectly reasonable attitude and cannot be taken to mean that the defendants were saying that the plaintiff could take as long as she liked to produce that report.

The plaintiff did not obtain the report until 9 November 2012 and served it on the defendants on 31 January 2013. On 27 June 2013, the plaintiff served a notice of intention to proceed which triggered the defendants' application to strike out.

The plaintiff argues that the only relevant period of delay is the three years from the vacating of the original trial dates to obtaining the report and this is excusable having regard to the plaintiff's difficulties in getting such a report in Brunei and having to go overseas for this purpose. But, of course, this delay was not just three years. The plaintiff must have known, from the very inception of this action, that expert medical advice would be needed if she were to succeed in her claim. It is so that the plaintiff pleads that she also relies on the doctrine of *res ipsa loquitor*, but this does not tell against that obvious need. It would have been prudent to obtain expert advice even before launching this action. Otherwise, how could the plaintiff know she had any case at all?

So, the delay in obtaining the report, which is the cause of the plaintiff's failure to proceed to trial, is over 13 years not three. The plaintiff does not attempt to explain why it was left so late to seek the report so no attempt is made to excuse it. Whatever else was going on in the litigation does not prevent the plaintiff from, simultaneously, seeking the expert advice she needed. I cannot believe that expert advice could not have been obtained very much earlier.

The delay is particularly difficult to excuse in view of the fact that, in 2007, when the trial dates were vacated, the court expressed unhappiness about the delay. I would have thought that this should have spurred in the plaintiff into urgent action. Mr Li says that this was not an "unless" order. It was not, but it should have inculcated a sense of urgency in the conduct of the plaintiff's case.

In the result, I find that there was inordinate and inexcusable delay in the prosecution of this litigation by the plaintiff.

The defendants argue that the plaintiff has demonstrated that she had no serious intention to prosecute to the case. I do not accept that. The prosecution of her case has been dilatory, but I do not think I can infer from this that the plaintiff did not intent to proceed.

That, of course, is not the end of the matter. Such a delay is not sufficient to justify dismissal of the action. In addition, the defendants must show that, as a consequence of that delay, they have suffered prejudice in that there is a substantial risk that a fair trial is no longer possible.

The defendants' first affidavit by Ms Merican did not deal with this aspect of the matter. In her second affidavit, Ms Merican said that the second defendant had returned to Myanmar in 2008 on expiry of her contract and that, at that time, she suffered from a heart problem and renal failure and that it is "uncertain" if she will be able to travel for a trial.

The first defendant made an affidavit to explain "the evidence that I may or may not be able to give".

The first defendant says that the second defendant was main surgeon and the senior surgeon. She no longer has a recollection of the surgery from her own personal memory due to the long lapse of time. She believes that she operated on one side and the second defendant on the other, but she cannot say on which side she operated. Because the surgical notes do not disclose what each surgeon did, she was not able to say what she did or did not do. She identifies her note on the surgical notes saying "Written retrospectively on 3/5/99 – Rectus sheath was closed with Nylon & skin was closed with subcuticular Nylon 2/0.". She does not explain why she wrote that note a week or so after the operation. The only explanation that occurs to me is that the second defendant had some cause to revisit the surgical notes. I do not believe that it is a coincidence that the day before this note was written, as pleaded by the defendants, "upon removal of the nylon sutures that . . . the abdominal wall broke down." I believe it is probable that the defendants knew about this and knew that the complications had occurred. It is probable that the second defendant knew about the problems and decided to clarify the surgical notes.

I hasten to say that I am not suggesting that there was anything sinister in this, only that the defendants knew that, shortly after the operation they had performed, problems arose.

This is supported by the fact that the defendants plead that, on 25 May 1999, the plaintiff was seen by the second defendant and the vesico-vaginal fistula diagnosed.

It is inconceivable that the second defendant did not discuss the problems with the first defendant. They had performed an operation and complications had ensued. They must have got together and reviewed the operation, if only to satisfy themselves that they had done everything properly.

The relevance of this is that this is not a situation in which an operation had gone smoothly and the defendants had no reason to recall it until, years afterwards, the plaintiff commenced action. On the evidence, they knew soon after the operation that there had been complications. It must have occurred to them that the plaintiff might blame them for these complications and they must have mulled over the operation many times in their minds to assure themselves that they had done nothing wrong.

In another affidavit, Ms Merican produces medical reports regarding the second defendant. These are dated 2007. There is no explanation for the absence of a more recent report on her medical condition. It is for the defendants to satisfy me that there is a substantial reason to believe that a fair trial is not possible. Saying that, 7 years ago, the second defendant was ill and may be unable to travel, does not do that.

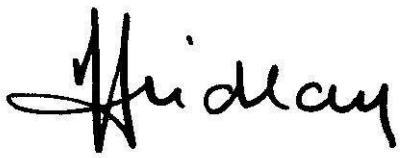
At trial, it will be for the plaintiff to prove that her problems were caused by the defendants' negligence rather than from complications that arose without the fault of the defendants. The plaintiff must prove as a matter of probability that, taking into account her pre-existing condition and health, the complications that arose could only be the result of the negligence of the defendants. That, of the face of it, is a difficult burden to discharge and I hope the plaintiff's advisors are aware of this.

In this situation, I do not see how the defendants are in difficulties arising from the delay in being able to defend themselves against this allegation of negligence. It is not for them to show they were not negligent. If, for example, it were put to them that they had misplaced or used the wrong sutures, or had negligently cut the plaintiff in the wrong place, I am quite sure they will be able to defend themselves on this score. Even if it is so that the defendants will be unable to remember which of them did what, they will, I am sure, be able to say that they are experienced, specialist surgeons and are quite sure that they did the right thing for the patient. That situation is not uncommon in litigation and the courts are accustomed to dealing with evidence of witnesses who depose to their usual practice, without being able to recall precise details in a particular case.

As I have said, the plaintiff seeks to use the doctrine of *res ipsa loquitor*. That does not depend on any possibly disputed evidence so the defendants are quite able to deal with this allegation. I am sure the defendants will argue, as has been done in such cases in the past, that the human body and its reaction to surgical intervention is far too complex for it to be said that, because there was a complication, the surgeon must have been negligent in some respect.

Dismissing the plaintiff's action is draconian measure. The courts are always reluctant to close the court doors on a claimant. It was for the defendants to show me that this course is justified in this case. I have to find that they have not done so.

In the result, the defendants' application to dismiss the action is refused, with costs here and below to the plaintiff.



JAMES FINDLAY
Judicial Commissioner