REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 12217/2007

In the matter between

RETHAAN ISAACS Plaintiff

and

OMAR FARIED PANDIE Respondent

Coram	M I SAMELA, J
Judgment by	SAMELA, J
Adv for Plaintiff:	Adv A Bhoopchand - 021 424 5642
Attorney: Lynn Swartz 021 449 6209	De Klerk & Van Gend Inc.
Adv for Respondent	Adv A Albertus - 021 242 7803
Attorney	M.Y. Albertus Albertus Attorneys
Date/s of hearing	Commenced 13/9/2010 Ended 05/05/2011
Date of Judgment:	16 MAY 2012

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 12217/07

In the matter between

RETHAAN ISAACS Plaintiff

and

OMAR FARIED PANDIE Defendant

JUDGMENT DELIVERED ON 16 MAY 2012

SAMELA, J

Introduction

[1] On the 4th November 2004 at the Christiaan Barnard Memorial Hospital, Cape Town, the Defendant performed a caesarean and sterilisation procedures on the Plaintiff. The Plaintiff alleged that the Defendant had sterilised her without her giving consent to the procedure. The Defendant maintained that he had the necessary consent to perform the surgical operation.

[2] In the particulars of claim, it is alleged that the Plaintiff received treatment from the Defendant:

(a) By agreement, a term of which required the Defendant to display the degree of skill and expertise reasonably expected of an Obstetrician,

Alternatively,

(b) (i) In the belief that Defendant knew throughout the treatment period, that Plaintiff relied on his knowledge, skill and expertise as an Obstetrician,

(ii) And thus Defendant owed Plaintiff a duty of care to ensure that his

advices and treatment was of a standard reasonably expected of an Obstetrician,

Alternatively,

(c) (i) Expecting the Defendant to provide the treatment in terms of any applicable statutory provisions,

(ii) And in the premises to comply with the Sterilisation Act, 44 of 1998,

Alternatively,

(d) (i) Expecting the Defendant to provide that treatment in terms of the guidelines of his professional regulatory body,

(ii) And in the premises to comply with the Health Professions Council of South Africa ("HPCSA") guidelines for obtaining consent.

[3] The Plaintiff further alleged that the sterilisation procedure performed on her:

3.1. Constituted an assault on the Plaintiff by the Defendant:

3.1.1. as the Defendant failed to obtain any consent from the Plaintiff, written, informed or otherwise and,

3.1.2. as no clinical indication existed for the Defendant to perform the procedure,

3.2. Alternatively breached the agreement between the Plaintiff and Defendant, alternatively breached the duty of care that the Defendant owed to the Plaintiff in that:

3.2.1. The Defendant performed a procedure on the Plaintiff that was not clinically indicated,

3.2.2. The Defendant failed to take informed and written consent from the Plaintiff for the sterilisation procedure,

3.2.3. The Defendant failed to ascertain whether consent was obtained and recorded by the Plaintiff prior to performing the procedure.

3.3. Alternatively, Defendant failed to have regard to, and breached the statutory provisions of the Sterilisation Act and the guidelines of the HPCSA in that the Defendant failed to obtain written and informed consent for performing the sterilisation procedure on the Plaintiff.

[4] In the premises, the Plaintiff alleged that the Defendant acted wrongfully, negligently and in breach of his legal and professional duty in performing the sterilisation procedure on her. Mr A Bhoopchand represented the Plaintiff and Mr M.A. Albertus SC appeared on behalf of the Respondent.

Facts

[5] The Plaintiff was 33 years old at the time the Defendant operated on her. She was 39 years old at the time of the trial. She testified that she has four children, namely two daughters and two sons. Her first child was born by normal vaginal delivery. The three subsequent children were born by caesarean section. The Defendant delivered the fourth child by caesarean section on the 4th November 2004. At the time of the trial she was employed as casual contract driver, earning R5 000.00 per month.

[6] The Plaintiff's first consultation with the Defendant occurred on 7 April 2004 at the Christiaan Barnard Memorial Hospital in Cape Town. She was advised by the Defendant that it would be in her best interest to have a caesarean section to deliver her fourth child as the two previous children were delivered this way. She was asked by the Defendant if she was on contraception or not. There were no discussions about sterilisation on her first visit. The Plaintiff attended the Defendant at least once monthly thereafter for antenatal consultations. The issue of the performance of a sterilisation procedure arose on three occasions during the Plaintiff's antenatal visits. The Defendant asked her on all those three occasions whether she was considering a sterilisation. She had replied negatively on all those three occasions as she was only 33 years then and also needed time to consider it. The Defendant had informed her that she was healthy and could have two or three caesarean sections. The Defendant had told her that her skin was very resilient and very healthy, and that it healed quickly. She had asked the Defendant whether there would be any risk in having further caesarean sections, of which the Defendant had answered in the negative. The Defendant did not explain to her of any risks involved in her carrying any further pregnancies after her fourth child. She testified that the Defendant never told her that the sterilisation method would be in the form of ligating the fallopian tubes immediately after the delivery of the Plaintiff's fourth baby.

[7] She attended her last antenatal consultation with the Defendant on 3rd November 2004. The issue of sterilisation was one more time raised. The Defendant asked her if she was still going to have the sterilisation. She became a "bit irritated" with the Defendant. She told him "But I said that I am not going to have sterilisation". She did not understand why the Defendant asked her that question again. She was provided with a sealed letter by the Defendant to hand it in at the hospital, on the next day when she booked herself in at the maternity ward. She did not know of contents of the letter. On admission she was provided with a consent form. The consent document had hand writing on it. There were no amendments to the document when the hospital staff brought it to her, informing her of the proposed caesarean section and sterilisation. When the hospital staff presented her with the consent form and explained to her the procedure that was to be performed on her she "got even more agitated at that moment and irritated because she did not request any form of sterilisation". She had asked the hospital staff member to correct the consent form. The Staff member left and came back with the amended form. She then affixed her signature to the form after it was brought back to her with the amendments as she emphasised that she "never sign any document unless I have checked it thoroughly". When the document came back for

her signature, the two witnesses signatures were already there. The Defendant was not present when the document (consent form) was handed to her. The Defendant did not attend to her at any time before she went to theatre on the 4th November 2004.

[8] The Plaintiff only remembered that the hospital staff who presented the consent form was a female person and did not have further recollection of her. The issue of sterilisation was raised with the Plaintiff in theatre. The theatre nurse who had picked up her folder and whilst reading it came to the Plaintiff and said that she noticed that she was not having sterilisation. She became more agitated and informed the nurse that she had never asked for it and was not having sterilisation procedure on her. Dr Whitehead, the anaesthetist, made a comment that "I see you're not having the sterilisation".

[9] She saw the Defendant for the first time after she had been prepared for the caesarean section. The Defendant never spoke to her on entering the theatre, instead, he was in conversation with another surgeon. She was unable to say whether the Defendant looked at her folder in theatre before operating on her. She was also unable to see the Defendant operating on her because there was a screen between her and the Defendant. There was no interaction between herself and the Defendant during the course of the operation. The Defendant continued conversing with his assistant whilst operating on her. Her husband, Mr Prinsloo was also in theatre with her. The Defendant did not converse with her husband as well. She did not remember the Defendant enquiring from anyone in theatre, especially the theatre sister, whether he was still required to proceed with the sterilisation procedure. The Defendant in the theatre never asked her nor her husband if she was still having the sterilisation. Had the Defendant asked her or her husband if they wanted sterilisation, both would have answered him in the negative.

[10] The first time the Plaintiff realised that the Defendant had done the sterilisation procedure on her was when the theatre nurse held up a jar and shook the contents. She was not certain what it was until the anaesthetic lowered his head and said to her "But you didn't ask for a sterilisation". Her reaction was that she shook her head and said "No, I didn't" and immediately started to cry. She was wheeled into the recovery room for quite a while. During this time no one came to her to confirm whether the sterilisation had been done. The only communication she had with the Defendant in theatre was when the Defendant told her that she had a baby boy. She did not consult with the Defendant thereafter on the 4th November 2004. The Defendant visited her the following day, that is the 5th November 2004, after the operation in the maternity postnatal ward. The Defendant stood at the ward's room door and asked her if everything was fine. The Defendant did not examine her nor was there any discussion about the operation or the sterilisation.

[11] She complained of swollen glands beneath her armpits and swollen knees and ankles on the second day. She asked a sister to ask the Defendant to come and attend to her. The Defendant did come to her ward but never examined or looked at her swollen glands or her legs. She was discharged on the 7th November 2004. On the 6th November 2004 the Defendant did not examine her. She saw the Defendant in the nursery. She testified that at the hospital there was never a discussion with the Defendant regarding the reason for the Defendant performing sterilisation procedure on her. The Defendant avoided her ex-husband as well. She did not keep the postnatal appointment that was arranged for her with the Defendant at the Defendant's rooms after her discharge from the hospital. She had intended to have two more children.

[12] A year later she consulted Dr Basson, a Gynaecologist, when the type of sterilisation

done to her was explained. Dr Basson told her that the fallopian tubes had been cut on either side and that the operation was reversible. She had an x-ray which required the insertion of a dye into her pelvic area to see whether the fallopian tubes had been cut. The procedure was uncomfortable and very painful. She would want the sterilisation procedure performed on her to be reversed. She would consider undergoing in vitro fertilisation if it meant that she could conceive again.

[13] She told the court that the sterilisation done on her affected her emotionally and caused her pain and discomfort when she had to undergo the hystero-salpingogram. The sterilisation affected her relationship with her children and husband, and as a result her marriage ended. It was a difficult period for her. After about one to one and half years later, after her marriage had ended she tried other relationships which did not succeed as she was no longer able to bear any children. She regarded herself as not a "complete woman". She denied that the Defendant had discussed the sterilisation in detail with her on the 3rd November 2004. She told the court that the Defendant only asked "Are you still having the sterilisation?". Her husband and herself had answered in the negative as this was not what they had requested. She told the court that if the Defendant within the first week or month had apologised to her and fixed the error she would have been fine. If the Defendant had approached her and admitted that he had done something wrong, then she could have accepted the apology. She testified that for almost six years after this incident she had not heard from the Defendant.

[14] Under cross examination, the Plaintiff re-iterated that the Defendant performed a sterilisation on her contrary to her consent and express wishes. She had informed the Defendant not to proceed with the sterilisation. She was emphatic that there was no misunderstanding between the Defendant and herself. The Defendant would be lying if he stated the contrary. She testified that she only became aware of the contents of a referral letter by the Defendant on the 4th November 2004, when a nursing staff brought it to her. The letter indicated that she had to present herself the next day for a caesarean and tubal ligation (sterilisation).

[15] The Plaintiff wanted more children after the birth of her fourth child. She wanted two if it was possible. She told the court that at the time of the procedure her net salary was R7 500.00 and with commission and it amounted to R9 000.00 to R10 000.00 per month. At the time of the trial she was earning R4 000.00 per month doing contract work. Her husband was not contributing towards maintenance. She got R3 000.00 extra per month from a loan that was being paid off to her. Her net income derived from selling pies, samosas and koeksisters, together with her daughter's hairdressing income and contract work was R7 500.00 per month.

[16] On the two to three occasions she consulted the Defendant, she was in the company of her husband. When the Defendant discussed sterilisation on the first occasion, she had asked him if there were any risks involved and the Defendant had replied in the negative. After an examination was done on her, the Defendant had informed her that her skin was resilient and she could have two or more ceasars, and that her skin healed quite well. On the second occasion the Defendant asked if she wanted sterilisation. She testified that she told the Defendant that she did not want a sterilisation. The Defendant did not explained the different types of sterilisation with her because according to the Plaintiff "it wasn't a topic we needed to discuss any further, especially after I had said no".

[17] The Defence Counsel put to the Plaintiff that the Defendant had explained the sterilisation procedure in detail in the examination room. She told the court that sterilisation

was never discussed with her as she did not want sterilisation.

[18] Her husband wanted to confront the Defendant regarding the sterilisation he performed on her but the Defendant ignored him and walked away. The Plaintiff denied that she had misrepresented to the Defendant that she wanted sterilisation. She went further by saying that she could not understand how the word "no, I am not interested, or no I do not want a sterilisation, is a misrepresentation. It is clear as to what I wanted".

[19] Mr Graham Lewis testified as the Plaintiff's expert. He was of the view that the Plaintiff was an honest and highly credible person in his assessment and interaction with her. The Plaintiff was not exaggerating any information she provided him with. Regarding the sterilisation of the Plaintiff, Mr Lewis testified that she oscillated between feelings of sadness, anger, shock and disbelief. The Plaintiff currently, according to Mr Lewis, presents with lingering feelings of transitory sadness which is triggered when she sees for example, a mother with a child and she mourns the fact that she can no longer conceive children. After the delivery of her child, the Plaintiff was in the midst of grieving and mourning the loss of her ability to conceive. However, the feelings were no longer as prevalent. Mr Lewis's observations of the Plaintiff in the witness box and when he assessed her, was of the opinion that she was a very stoic woman.

Mr Lewis told the court that the Plaintiff may require psychological treatment in the future to enable her to undergo the procedures to reverse the sterilisation. If the reversal procedures failed, Mr Lewis was of the view that it would strongly, probably, reawaken feelings in relation to the sterilisation procedure having been performed in the first place. Mr Lewis said if the invitro fertilisation procedure fails, it is expected to raise similar feelings as a failure of the reversal procedure may evoke in her mind, that is, it would reawaken the sense of loss in her mind.

Mr Lewis made provision for 15 to 20 sessions of supportive psychotherapy. The cost was R599.50 for a 50 minute session. Mr Lewis said that children play an important role in the Plaintiff's life. The Plaintiff was left with a real sense of anger in relation to the Defendant, even to deny anger in terms of how she perceived she was treated postoperatively by him. She lived with a sense of uncertainty about what happened to her on the 4th November 2004, until she consulted Dr Basson. He was informed by her that she wanted two more children. Mr Lewis said that the Plaintiff is psychologically vulnerable. She has a mild to moderate anxiety and depression, this being the composite effect of her psychological state that was made up of various dynamics, including the sterilisation without her consent.

Under cross examination he said that with regard to the emotions that were sometimes triggered when she saw mothers with children, the Plaintiff would feel a sense of loss, the desire, the want, the part of her that would like to have the possibility to fall pregnant again, to like to have that option, that door of possibility open to her. It did not matter how many children a woman had, nor did her age matter. It was still a lost opportunity, a loss of being able to make that choice for herself. Where consent was not given, it magnified the event. Although the Plaintiff's other psychological problems were the main cause of any anxiety and depression that she felt, that did not discount the fact that on occasions she still experienced feelings of sadness and anger in relation to the loss in this instance.

Mr Lewis in replying to a question from the defence Counsel told the court that a test of malingering was only conducted when one was suspected of malingering. In the Plaintiff's case there was nothing that led him to do the test. He said that the Plaintiff's stoic and,

resilient nature came to the fore. The Plaintiff had not presented with a clinical condition, hence that she could be malingering. The Plaintiff had experienced that sense of loss but had managed to reconstitute herself and put herself back together. Although she was coping on that day, she did experience the transitory feelings of loss from time to time, but did not overwhelm her defences.

[24] Regarding collateral or the lack of collateral in formulating his opinion, Mr Lewis testified that one of the aspects that he drew on in terms of arriving at a conclusion was his clinical experience and the manner in which the Plaintiff revealed her sense of loss. He explained that her whole demeanour did not speak to him of someone who was exaggerating. The Plaintiff's dissociative coping style was not something that emerged straight off the cuff; it was something that he had to spend over a length of time with the Plaintiff to elicit. Mr Lewis gave a detailed explanation for the reasons he felt that the Plaintiff was telling the truth. He told the court that his observation of the Plaintiff over one and half days was that she had held it together and only at the end had she voiced her feelings of anger in relation to the Defendant, which gave a sense of real visible emotion. Mr Lewis said that observation was similar to the observation made in his consulting room. He was of the opinion that it was not the manner of someone that was purposefully setting out to mislead.

[25] Mr Lewis summed up by saying that it was his sense that the Plaintiff was genuinely expressing her emotions, including the fact that she had learnt to cope. The fact that she had expressed herself in an eloquent manner should not be held against her. The manner in which the information emerged was not set out in a manner to mislead or to deceive.

[26] Dr Rosemann, the second Plaintiff's expert, produced five written reports by him in court. In the first report, he expressed his opinion that the Plaintiff and her husband did give the consent for tubal ligation which was performed on the 4th November 2004. He later withdrew that opinion after he had received expert reports from Dr Van Helsdingen and Mr Lewis. He said that he had considered other information that was not available to him at the time he wrote his first report.

[27] In the second report, Dr Rosemann gave an opinion on the reversibility, the cost, the success rate and the possible complications of reversing the sterilisation that was performed on the Plaintiff. He testified that the surgical procedures and treatment modalities available to the Plaintiff to reverse the sterilisation includes a re-anastomosis procedure as well as in vitro fertilisation. The cost of a re-anastomosis would be approximately R35 000.00. The success chances with a re-anastomosis procedure are approximately 80% but the chances of bringing forth a live pregnancy are about 20%. This was applicable to persons less than 38 years of age. After 38 years of age, fertility drastically decreases. For the in vitro fertilisation method of conceiving, the cost is approximately R30 000.00 per cycle. The average number of cycles allowed is five cycles with a cost of R150 000. For the re-anastomosis method, the Plaintiff would require to be off work for 5 weeks as the abdomen would be open and the patient would require time to recuperate. The in vitro procedures are done on an outpatient basis. One would require a day off work for that procedure. In other words, that would mean five days off work.

[28] The third report, dealt with the consultation with the Plaintiff. He said that the Plaintiff might have used the word sterilisation when he consulted with her, and also that the

Defendant could have referred to the Plaintiff's skin as the evaluation of a scar on the patient's abdomen is part of the assessment. He testified that no gynaecologist would express an opinion by just looking at the scar.

[29] The fourth report, was addressed to the Defendant's attorney, the purpose which was to explain the difficulties that he had in preparing the reports and the reason for requesting a consultation with the Plaintiff. The fifth report was an addendum made after the evidence of the Plaintiff and Mr Lewis in court. In the report, Dr Rosemann stated his reasons for changing his opinion concerning tubal ligation.

[30] Dr Rosemann analysed in detail the Defendant's clinical notes. He concluded that some pages were changed, not dated and not signed. He was of the opinion that this made one dubious about the intention of changing one's notes. He said that it gave practice a bad impression unless the notes were signed and dated. Dr Rosemann pointed out that, for an example, he would have expected the Defendant to make a note on the entry for the 4th November 2004 that the T/L (that is tubal ligation) was done in error if the Defendant had been informed of this on the 4th November 2004.

[31] With regards to consent, Dr Rosemann testified that the Defendant should have asked either the Plaintiff or her husband as to whether they still wanted a tubal ligation, instead of speaking out loud and hoping that the patient would hear him. He testified that the consent for sterilisation is a special one, as it ends the reproductive life of a patient. It is equally important for the surgeon to inspect the consent form as it is for the theatre sister to do so. He pointed out that the regulations and guidelines of the HPCSA are adamant and that it is good practice that the surgeon should inspect the consent form prior to initiating treatment or operation. The regulations were quite explicit in that the doctor who is to undertake a particular treatment or operation must obtain the consent.

He testified that in practice, if a patient changes her mind about having an operation, that decision must be respected by the doctor. He was of the opinion that consent should be taken in the doctor's surgery. He concluded by saying that it is the duty of the doctor to inspect the consent form prior to commencing treatment.

The Defendant testified that he saw the Plaintiff for the first time on the 9th March 2004. On the 3rd November 2004, the Plaintiff was accompanied for the first time during her antenatal visits by a gentleman who sat approximately 2 to 3 metres away from them. While taking the Plaintiff's blood pressure or after taking her blood pressure he had asked the Plaintiff whether she wanted any more children. The Plaintiff said no. He proceeded to examine the Plaintiff's uterus to assess the baby. He knew at the time that the Plaintiff was going to have a third caesarean section. He felt the need to explain to her what the procedure entails. He explained in detail the risks and problems associated with caesarean procedure. He also explained what could happen with a fourth caesarean operation.

He told the Plaintiff that after she had the baby they would discuss contraception. At that juncture he raised sterilisation, which is a more permanent form of contraception. He turned to his chart and explained what sterilisation is to the Plaintiff. He also informed her that another name for sterilisation is tubal ligation, which is a permanent form of sterilisation, and like other forms of sterilisation, it is not 100% safe. He asked her if he wanted to be sterilised and she said yes. He also informed her that the procedure was reversible, telling her in detail the reversal procedure. The reversal procedure was not a guarantee that she would be

pregnant thereafter. "At that particular point in time", the Defendant told the court that the Plaintiff consented to the sterilisation. The gentleman who had accompanied the Plaintiff was within earshot of their conversation, that is, he could hear the whole conversation. He informed the Plaintiff that he would make bookings with the labour ward for the following day for caesarean and tubal ligation procedures.

He walked to his desk and phoned labour ward to make the bookings. He got a reply in the affirmative. He instructed his secretary to get his week's team. At that time the Plaintiff was seated at his desk. He wrote a letter stating that the Plaintiff was having a caesarean section and tubal ligation at 13h15 on the 4th November 2004. He denied that on two previous occasions he had broached the question of sterilisation with the Plaintiff. He could have made a note of this if it occurred. He denied that he had informed the Plaintiff that her skin was resilient and consequently she would have more caesarean sections.

He testified that he does not take written consent from a patient in hospital. He was not aware whether his colleagues did so. He does not check whether the consent form is signed by the patient or not, and was not aware whether his colleagues were doing likewise. He was certain that he did ask Sister Solomons whether the Plaintiff was for caesarean section and sterilisation and Sister Solomons had replied "yes". Sister Venter, the scrub sister had said to him "Dr Pandie your patient, Ms Prinsloo for the caesarean section is on the table".

He came to the theatre alone as his assistant was already scrubbed, gowned and gloved. He greeted everyone including the Plaintiff, and went to scrub up. He came back and commenced the operation. Once the uterus was closed and the bladder peritoneum had been restructured, he had turned to the scrub sister and asked her "are we still proceeding with this sterilisation?". The scrub sister replied "yes we are". The Defendant told the court that ultimately, it is the scrub sister who would have to check when the patient comes into theatre whether the patient has signed the consent form. He did not consider it necessary to ask the Plaintiff if she wanted sterilisation for two reasons, namely, (a) he had discussed the issue with the Plaintiff the previous day, and (b) the Plaintiff would not have been in a position to give him a proper answer given the euphoria of her baby being born.

When they came out of the change room, the scrub sister approached him and said "doctor, this patient was not for sterilisation". He was surprised because no one in the theatre had informed him that there was a change regarding the Plaintiff's procedures. He immediately went to the Plaintiff in the recovery room and informed her that he was very sorry for what had then happened. He told the court that at that stage the Plaintiff might have been dosing off. He needed to find out where the change took place. The Plaintiff was not sleeping at that time. He had informed the Plaintiff that he would come back once he had found out what had actually happened. He returned to the ward at 3 o'clock, but did not find the sisters involved with the consent. He left it at that, hoping to clarify that aspect the next morning when he came for his rounds.

He said that a day after the operation had been done, a full valuation was made of the Plaintiff's health, removing the blanket covering her, looking at the abdomen, inspecting the wound dressing and examining the abdomen. On the 6th November 2004, a clinical note confirms that the Defendant had seen the Plaintiff and had examined Plaintiff's files, but did not examine the Plaintiff and did not recommend that she should be discharged. He only examined the Plaintiff on the 7th November 2004.

He testified that some pages in his clinical notes were not a photocopy of the original notes. His attorney had requested copies of the original notes. He had sent them through fax. The

attorney informed him that the last two pages were not clear. His secretary had informed him that the reason for the copies not being clear was because of the original paper being too thin, and suggested that the Defendant rewrite them on a thicker photocopy paper and then fax it to him. He did that, and in addition wrote an extra note, a retrospective narrative for his attorney to read. He had added two extra paragraphs for the attorney's benefit and nobody else. When he wrote to the hospital for the Plaintiff's admission for caesarean and tubal ligation, he had included details of the Plaintiff's blood group and VDRL in the letter. He admitted that the annotation G3P2 was incorrect in the letter and it should have been G4P3. He explained that the mistake could have been the slip of his pen. He said that performing sterilisation was not for monetary gain if she did not want it, and the fees for sterilisation was about R250.00 if not less. He testified that he was certain that the Plaintiff had unequivocally given him consent to perform a sterilisation procedure on her. This, the Plaintiff granted in his rooms on the 3rd November 2004, that he should do sterilisation with or following the caesarean procedure.

Under cross examination, the Defendant was referred to a letter he wrote to the Plaintiff's attorney Ms Swarts. He said that he relied on his clinical notes, by drawing the Plaintiff's folder and also what he could remember happened at that time. He referred in the letter to the person who had accompanied the Plaintiff on the 3rd November 2004 as "her husband". When he testified in court he said that he did not know the person who accompanied the Plaintiff to his rooms on 3rd November 2004 or to theatre on 4th November 2004. He testified that he did not know what procedure his patients had to follow when presenting themselves at the hospital for admission. He conceded that he made a mistake as to the date of the Plaintiff's delivery as 4 October 2004 instead of 4th November 2004. Also in the letter had stated that the date of tubal ligation procedure was performed on the 4th October 2004 instead of 4th November 2004. He stated in the letter that before he commenced with tubal ligation, he paused and enquired whether "I am proceeding with the sterilisation". In court, the Defendant had testified that before he commenced with the sterilisation procedure he had asked a scrub sister whether or not consent for tubal ligation was obtained. In the letter, the Defendant had stated that it was when he was attending to the Plaintiff in the recovery room that he was informed of the Plaintiff's decision not to have sterilisation. In his evidence in chief, the Defendant had testified that when he came out of the change room, the scrub sister approached him and said "doctor, this patient was not for sterilisation". The Defendant had written that the Plaintiff had informed the ward sister (that she did not want the sterilisation) and that information was not relayed to the Defendant or to the labour ward staff or to anyone else in theatre. Replying to a question from the Plaintiff's counsel, the Defendant testified that this was only established four days afterwards. The Defendant wrote that due to other emergencies, he did not see the Plaintiff on the 7th November 2007. In his evidence in chief the Defendant testified that he had seen and examined the Plaintiff on the 7th November 2004.

The Defendant said that he ordered that the Plaintiff be discharged on the 8th November 2004. However, she was discharged on the 7th November 2004. He was not informed that the Plaintiff was discharged on the 7th November 2004. If he had been informed by the ward staff that the Plaintiff had changed her mind regarding sterilisation, he would have gone to the ward to take the written consent himself. He had written in the letter that the Plaintiff and her husband had an opportunity in the labour ward and theatre to inform the staff and himself about the Plaintiff's change of plan. In his evidence in chief he had testified that he arrived at the theatre when the Plaintiff was being anaesthetised. Therefore, there was no chance for the Plaintiff to inform him of any alleged change of mind in the labour ward. He did not ask the Plaintiff whether he was to proceed with the sterilisation as she would have been "helpless whilst she was attending to her baby, and that he never asks his patients about operation that

he was doing on them at that stage".

He conceded that in the letter he did not mention that he went to the recovery room and apologised to the Plaintiff for performing a procedure on her which she did not want. He had written that he had tried twice to reach the Plaintiff to discuss about what had happened at the theatre. In his testimony in court, he said that he wanted to contact the Plaintiff to apologise. He was aware that if he was found to have doctored his notes, that could lead him facing a disciplinary hearing. He agreed with Dr Rosemann's testimony that if a doctor changed his/her notes, he/she should sign and date them.

The Defendant conceded that he recorded the Plaintiff's symptoms in point form, that is, he recorded some of the symptoms without indicating for how long they were affecting the Plaintiff. If he were to be asked that question, he would not be able to answer that question from his notes, that is, he put a tick next to WT(weight), and was unable to say why he had put a tick there. The Defendant agreed that he used a lot of abbreviations in writing his notes, e.g. for "urine clear" he abbreviated to "UR CLR" in his notes. In another page he had written urine clear in its full form. The Defendant said that he wrote his notes contemporaneously with his consultations. It was put to him by the Plaintiff's Counsel that it appeared as if the words TL were squeezed in another page and this was also an observation by Dr Rosemann. At that point Counsel for Defendant objected saying it was put to Dr Rosemann that when one copies from another document, one may in the course omit to copy a word and then one could write it afterwards. However, Counsel for Defendant did not say that this did happen. In another sentence written by the Defendant in the following "letter addressed to sister in ward advising CS and TL," appeared like it was squeezed in and the same sentence again was spread over two lines in another page. The Defendant agreed but offered no explanation for this. There was a "3" which had a "1" written vertically over it. The Defendant's reply was that initially he had written a "1" for the date and then changed it to a "3" to represent the correct date in his original notes. The Defendant was unable to provide any explanation for adding stuff to a handwritten note when his attorney wanted an unaltered version of the original. Regarding the entry for the 4th November 2004 where the Defendant had written "the patient was discharged on Monday 7th November 2004", he conceded that the entry was not written on the 4th November 2004, but could not say when it was made.

The Defendant agreed with the Plaintiff's counsel proposition that the entry on the 8th November 2004, gave an impression that he was informed about the Plaintiff's changed mind to have sterilisation done on her on the 8th November 2004. The Defendant also conceded that the 8th November 2004 entry was written as a retrospective narrative.

The Defendant admitted that he had written notes pertaining to the 4 November 2004 entry only after he had done the operation. He testified that he was aware of the HPCSA guidelines relating to consent and the requirements laid down in the Sterilisation Act. He testified that at Christaan Barnard Hospital he had to take informed consent from the Plaintiff in his rooms. The prescribed consent form had to be signed by the Plaintiff at the hospital. He said that at that time, he did not have the consent forms in his rooms. He testified that the position has since changed, a change that might or might not had been as direct result of this case. The doctor now has to take the complete consent, has to check the consent forms before they leave his rooms.

In the post natal period, the Defendant did not examine the Plaintiff on the 6th November 2004. Between the 5th and the 6th the Defendant conceded that the Plaintiff's blood pressure was low. When asked to recall what exactly he told the Plaintiff on the 3rd November 2004, he testified that after he had told the Plaintiff (regarding sterilisation) in detail, he did not ask

her to think about whether she understood everything he had told her. He did not explain to her that to complete the process, she also had to give written consent. The written consent part was to be done by the nurses. Subsequent to this case, he is now emphasising to his patients that if they want to change their minds, they must inform him and not the staff. Concerning the two paragraphs he had added and sent to his attorney, he testified that he had informed his attorney that he would be adding two paragraphs. Having changed his version and said that he had informed his attorney about the two paragraphs after he had inserted them. He could not explain why the two paragraphs were not dated. The Defendant conceded that though he would have obtained little monetary benefit from sterilising the Plaintiff and the impact of sterilisation on the Plaintiff's mentality and on her child bearing capacity was significant.

Sister Dora Du Plessis was employed at Christaan Barnard Hospital as shift leader at the time of this incident. She had 18 to 19 years of experience. She testified as to how the consent was taken from patients, as doctors did not touch their forms. She testified that Serna Samsodien, a nurse, had admitted the Plaintiff. She was informed by nurse Samsodien that the Plaintiff had signed for caesarean section and bilateral tubal ligation and had changed as she did not want it any longer. She took the folder accompanied by the nurse to the Plaintiff. She asked the Plaintiff if it was true and the Plaintiff answered positively. She then deleted the words "sterilisation" and "bilateral tubal ligation". The Plaintiff was then asked to sign the altered form (consent). The sister requested the Plaintiff to tell the Defendant in the ward that the Plaintiff had decided not to have sterilisation any longer. She also told the nurse to inform the labour ward staff that the Plaintiff decided not have sterilisation procedure performed on her.

Under cross-examination she testified that part of her job was to take and check consent forms. She lectured to nurses on how the consent forms were to be filled. She conceded that paragraph 3 of the form written (do not consent) should have been countersigned. She was unable to explain why the form was incorrectly signed when the form was incomplete and yet according to her she did not see the Plaintiff signing the form. The sister testified that at 11 h30 reflected on the page indicated the time which the Plaintiff was admitted. From the record the sister testified that the Plaintiff and her husband verbalised on admission that they did not want tubal ligation/sterilisation. The sister said she made the Plaintiff responsible for conveying the change to the Defendant twice.

Dr van Helsdingen was called as an expert for the Defendant. He testified that the information about the Plaintiff's change of mind not to undergo sterilisation procedure, between the time of her admission and 13h10 when she was transferred to theatre, also the information regarding to what Sr. Du Plessis had said about the consent form and how it was changed, he obtained from the Defendant's legal representatives without any documents to support the content thereof. The expert indicated in his CV (Curriculum Vitae) that he had written a chapter in the book Basic Principles of Gynaecological and Obstetrical Surgery, the chapter was written / produced specifically for those who are going to specialise in obstetrics and gynaecology, that is, post graduates (people who were already qualified).

The expert made it clear in court that he would never include anything in the manual which was grossly incorrect. The expert agreed in court that a good obstetrician and gynaecologist would go and visit his patient in the labour ward before the operation, especially if he had to do caesarean later that day, he would have examined the patient or at least had a chat with the patient. He would check the charts, check vital signs and taken note of any complaints that the patient had and would have an opportunity to look at the patient's folder. When referred to step 6 in the chapter when he wrote especially the sentence "check the consent form" he changed his stance and failed to explain what he meant by this. He also testified that the

failure rate with in vitro fertilisation was 65% only, the success rate was 35% per cycle. He said that the re-anastomotic procedure was still an option for the Plaintiff to consider.

[52] Dr Whitehead (an anaesthetic) testified that he always assessed the patient beforehand. He was certain that he saw the Plaintiff in the room down the corridor before they went to theatre. When he assessed the Plaintiff in the ward he was under the impression that she was having a caesarean. He testified that he had noticed the altered consent form. No one had told him about the changes (in the consent form).

Issues to be decided

[53] Firstly, the Court is to decide whether the sterilisation operation procedure, performed by the Defendant on the Plaintiff on the 4th November 2004 was without Plaintiff's consent, and therefore unlawful. Secondly, the quantification of the Plaintiff's damages.

Applicable Law

[54] The following legal principles and cases are relevant to this matter and are mentioned below.

Section 12 of the Constitution (Act 108 of 1996) provides:

> "Everyone has the right to bodily and psychological integrity, which includes the right-
>
> a) to make decisions concerning reproduction;
> b) to security in and control over their body; and
> c) not to be subjected to medical or scientific experiments
>
> without their informed consent".

It is also important to bear in mind that section 36 of the Constitution (Bill of Rights) provides:

> 1. "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> d) the nature of the right-
> e) the importance of the purpose of the limitation;
> f) the nature and extent of the limitation;
> g) the relation between the limitation and its purpose; and

less restrictive means to achieve the purpose.

> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

[55] Section 4 of the Sterilisation Act 44 of 1998 provides:

"For purposes of the Act, 'Consent' means consent given freely and voluntarily without any inducement and may only be given if the person giving it has:

(a) been given a clear explanation and adequate description of the:

(i) proposed plan of the procedure; and

(ii) consequences, risks and the reversible or irreversible nature of the sterilisation procedure;

h) been given advice that the consent may be withdrawn any time before the treatment; and

i) understood and signed the prescribed consent form.

[56] The Health Professions Act of 1976 (Act 56 of 1974) gives health care practitioners certain rights and privileges. It is expected that the health care practitioners must maintain and meet the standards of competence, care and conduct set by the Health Professions Council of South Africa (HPCSA). The HPCSA produced a booklet which sets out the principles of good practice which all health care practitioners are expected to follow when seeking patients' informed consent to investigations, treatment, screening or research.

[57] The HPCSA guidelines clearly provide that before a doctor starts any treatment, he/she must ensure that the patient has been given sufficient time and information in a way that the patient would understand to make an informed decision. (See HPCSA Guidelines for Good Practice in the health care professions seeking patients' informed consent. The ethical considerations booklet 9. See also paragraph 3 of the HPCSA guidelines for good practice in Medicine, Dentistry and the Medical Sciences, published by HPCSA in July 2002).

A person is regarded as being negligent if he or she did not act as a reasonable person (diligens paterfamilias) would have done in the circumstances. Negligence must be alleged and proved by the party alleging it. It is a question of fact. A formula was developed to assist in determining whether a person was negligent or not by Holmes J.A. in Kruger v Coetzee 1966 (2) S.A. 428 (A) at 430 E-G, where the learned judge said the following:

"For the purposes of liability culpa arises if-

(a) a diligens paterfamilias in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps".

This has been constantly stated by this court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.

Paragraph 30 of LAWSA (Volume 17 Part 2 at 24- The Medical Profession and Medical Practice) provides:

> "A patient who consults a medical practitioner in private practice enters into a contractual relationship with the doctor concerned. Therefore, where a doctor fails to carry out terms of a contract he or she may be sued for damages resulting from such breach of contract. Apart from the contractual relationship the doctor also owes the patient a duty of care".

Regarding the standard of diligence required from medical practitioner's to observe, the court in Mitchell v Dixon 1914 A.D. 519 at 525 said the following:

> "A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care: and he is liable for the consequences if he does not". See also Dube v Administrator, Transvaal 1963 (4) ALL SA 260 (W) and Collins v Administrator, Cape 1995 (4) SA 73 (C) at 81T -82 A where the above dictum was endorsed.

In Van Wyk v Lewis 1924 AD 438 at 444 the court held further that:

> "... in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs".

The court held further at 457 that:

(2) "The general method or general system of operating in a modern hospital is an important factor in judging whether a surgeon operating in a hospital has exhibited a reasonable degree of skill, care and judgement.

The Court must ascertain from the medical profession what is the usual practice adopted in modern hospitals in this country when a surgeon conducts an abdominal operation. The Court cannot lay down for the profession a rule of practice".

The duties and relationship between the theatre sister and the operating surgeon were discussed and clearly explained by the court at 458-9 para 3 (supra) where the court held that:

> ".....sister or nurse in a public hospital to a surgeon operating in that hospital, is not that of master and servant nor is it analogous to such a relationship. The sister or nurse is an independent assistant of the surgeon

> though under his control in respect of the operation. ... She has to prepare the operating theatre to see that the instruments are sterilized and that everything is made ready for the operation. She has her nurses under her and sees that they do what is required of them. She receives her diploma from the State and is employed not by the operating surgeon but by the hospital authorities. The surgeon has no power to appoint her and she receives from him no fees. He has no right to dismiss her. Before and after the operation the doctor has no active control over her. The truth is that hospital sisters and nurses form a distinct branch of the hospital. They are members of an allied profession and have duties of their own to perform. They are subordinate to the surgeons but they are in no way their servants. The surgeon is not responsible for what the nurse does in the sense that a master is responsible for the acts of his servant".

Informed consent in medical negligence cases refers to a methodology of information sharing between the doctor and the patient regarding the risks or otherwise in a procedure or treatment by the health practitioner. The doctrine of informal consent is vividly summarised in Medico-Legal Experience in Obstetrics and Gynaecology by Drs Craig and Rbsemann (Cipla Medpro 2006) at 117 where it is stated:

1. "The National Health Act of 2003 is very strict and demands that full detailed information in the language of the patient must be supplied before obtaining consent from the patient. It is understood that the treating doctor who obtains the consent must ensure that the patient understands the nature of the condition for which treatment or surgery is proposed, and its prognosis, possible complications and material (common and serious) risks are to be explained in detail".

The doctrine of informed consent in South African Medical Law was discussed and explained in detail in Castell v De Greef 1994 (4) S.A. 408 (C) at 425 H-T The court also made further remarks at 426 F-G where it said:

> "I therefore conclude that, in our law, for a patient's consent to constitute a justification that excludes the wrongfulness of medical treatment and its consequences, the doctor is obliged to warn a patient so consenting of a material risk inherent in the proposed treatment; a risk being material if, in the circumstances of the particular case:
>
> j) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or
>
> k) the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it".

The court also emphasized that treating a patient without an informed consent is tatamount to assault not negligence.

General damages are not capable of being accurately measured in monetary terms. However, the court has a wide discretion to make an award in respect of non-patrimonial damages. In exercising such discretion a court must determine a compensation which is fair and just in the particular circumstances of the case. Watermeyer JA in ***Sandler v Wholesale Coal Suppliers Ltd*** 1941 AD 194 at 199 expressed the following dictum:

"(l)t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

The court is not bound by one or more method of calculating general damages, but has a wide discretion see ***General Accident Insurance Co SA Ltd v Nhlumayo*** 1987 (3) SA 577 (A). However, comparative awards in other cases might be a useful guide, they are not decisive. In ***Protea Assurance Co Ltd v Lamb*** 1971 (1) SA 530 (A) at 535H-536A, the following dictum is apposite.

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters."

Application of the law to the facts / analysis of the evidence

Assault

Mr Bhoopchand submitted that the sterilisation procedure performed by the Defendant on the Plaintiff constituted an assault, in that the Defendant failed to obtain informed or written consent. Also that there was nothing from the doctors' clinical notes or record which indicated that the required consent was present.

Mr Albertus countered Mr Bhoopchand's argument by submitting that the sterilisation procedure was a simple one, involving the ligating of the Plaintiff's fallopian tubes performed contemporaneously with the caesarean operation, carried out by the Defendant upon the Plaintiff, and in respect of which the Defendant had the necessary consent. He submitted further that the sterilisation procedure, if it is proved that it was carried out without the necessary consent, did not involve an invasion of the Plaintiff's rights to privacy, but rather a simple impairment of her capacity to bear further children in the future.

I agree with Mr Bhoopchand that in this matter written consent was not given by the Plaintiff. I disagree with Mr Albertus that the sterilisation procedure, if it was proved, to have been carried without the necessary consent, did not involve the Plaintiff's rights to privacy but an impairment of her capacity to bear further children. It is trite that assault is an injuria which undoubtedly in this matter invaded the Plaintiff's constitutional rights to dignity, privacy, reputation and safety.

The main focal point in this matter is whether consent was given by the Plaintiff to the Defendant to perform sterilisation procedure. It is trite that the consent should be given by the patient, freely and voluntarily without any undue influence to the treating doctor / health care practitioner. Section 4 of the Sterilisation Act of 1998, para 55 above, clearly describe what "consent" means. The Defendant in this matter admitted that the treatment provided to the Plaintiff was done or conducted in accordance with the provisions in the HPCSA (The Health

Care Professions Council of South Africa) guidelines, which determines the professional conduct and standards in the medical profession.

The HPCSA booklet entitled "Seeking Patient's Consent: The ethical considerations" published in July 2002 dealt with this vexing question of who obtains the consent. Paragraph 3.1 of the guideline expressly states that it is the responsibility of the doctor providing treatment to his/her patient to obtain consent. The provision also permits the doctor to delegate this function/duty of obtaining consent. Paragraph 3.2 of the guidelines provides that the treating doctor "will remain responsible for ensuring that, before doctor starts any treatment, the patient has been given sufficient time and information to make an informed decision and has given consent to the investigation or procedure".

Both medical (gynaecologists) experts called agreed that the treating doctor was also responsible to check the consent form. Dr Rosemann testified that in practice it is the theatre sister's responsibility to check the consent form and also the doctor has to check as well. Dr van Helsdingen in his booklet for gynaecologists and post graduates stated clearly that the treating doctor has to check the consent form. In court, unfortunately he was not prepared to boldly support that aspect, instead he changed his stance.

In court, a consent form (which was marked as an exhibit) was produced which clearly indicated that no consent was given for sterilisation by the Plaintiff, although Sister Du Plessis (Defendant witness) had testified that she had requested the Plaintiff to inform the Defendant that she had changed her mind and did not consent to sterilisation. The Defendant testified in court that the scrub sister was ultimately the person to check when the patient comes to theatre whether the patient had signed the consent form.

The Defendant had testified that he does not take written consent from a patient in hospital. He was also not aware whether his colleagues did so. Also he does not check whether the consent form was signed by the patient or not, and was not aware whether his colleagues were doing so. The above namely statute, HPCSA guidelines, experts indicate that in sterilisation, the ultimate buck remains with the doctor. The Defendant in his own admission did not check the consent form though he testified that the sterilisation procedure was done in accordance with the HPCSA guideline. The Plaintiff and Sister du Plessis confirmed that the consent form was written that no consent was given for sterilisation procedure.

In my view the Defendant was negligent for not checking the consent form before commencing the sterilisation procedure. On his own admission the procedure was done in accordance to the HPCSA guidelines which clearly provides that the treating doctor must also check the patient consent form. I am satisfied that the requirements for consent were not met. Consequently the informed or written consent was absent.

Breach of Contract

[73] Mr Bhoopchand submitted that the Defendant breached the contractual agreement in the following:

(i) performed the sterilisation procedure on the Plaintiff that was not clinically indicated;

(ii) failed to take the necessary consent as required for sterilisation

procedure; and

(iii) failed to ascertain whether consent was obtained by checking

the consent form before performing the sterilisation procedure.

[74] Mr Albertus submitted that the Plaintiff would have to prove the terms of the contract even if it involved proving a negative, in the sense that she did not consent to her fallopian tubes being ligated by the Defendant. He submitted further that on the facts of the instant matter, the Plaintiff failed to discharge the onus of proving that she did not give the required consent.

[75] It is trite that a patient who consults a medical practitioner in private practice enters into a contractual relationship with the medical practitioner concerned. Consequently, where a doctor fails to carry out terms of a contract, the doctor may be sued for damages resulting from such breach of contract. Undoubtedly I am of the view that the Defendant breach the contractual relationship between himself and the Plaintiff and is therefore liable. Consequently, I am of the view that the Defendant failed to take the required consent as per Sterilisation Act, and HPCSA guidelines from the Plaintiff. The sterilisation procedure was also not clinically indicated.

Delict

[76] Mr Bhoopchand submitted that the Plaintiff relies on the delictual cause of action founded on either an intentional act on the part of the Defendant in performing the sterilisation procedure on her, or a negligent act on the part of the Defendant in not at least checking the consent form prior to commencing the sterilisation procedure and satisfying himself that proper and complete consent was obtained for the performance of the procedure.

[77] Mr Albertus pointed out that regarding the element of negligence, the essential criterion remains that of a reasonable man (gynaecologist and obstetrician) in the position of the Defendant when he performed the sterilisation procedure on the Plaintiff. He submitted that ultimately, the question on the issue of negligence, is what would other gynaecologists and obstetricians in the position of the Defendant, have done. If they would have acted in the same way as he did, negligence cannot be attributed to him.

[78.1] The Defendant testified that "he does not take written consent from a patient in hospital. He was not aware whether his colleagues did so. He does not check whether the consent form is signed by the patient or not, and was not aware whether his colleagues were doing likewise" (see para 36 above). By not checking the consent form before commencing the sterilisation procedure on the Plaintiff, I am of the view that the Defendant did not act like a diligens pater familias (reasonable person). Knowing the seriousness of the operation he was about to commence namely, reversible or irreversible in certain circumstances, the Defendant should have satisfied himself by checking the consent form.

[78.2] A diligens paterfamilias (reasonable person) in the position of the Defendant would have foreseen the reasonable possibility of his conduct injuring another in Plaintiff's

person and causing her patrimonial loss; and would have taken steps to guide against such occurrence (by checking the consent forms), and the Defendant failed to take such necessary steps. The failure to check the consent form in my view was gross negligence on the part of the Defendant and therefore liable for damages to the Plaintiff.

Findings

[79] The Plaintiff was vigorously cross examined over a period of three days. She had no documents to assist her in re-calling the events that led to her sterilisation procedure being performed on her. It must be remembered that six (6) years has elapsed since the operation. She answered questions put to her in a calm, polite fashion. She impressed me as an honest and credible witness.

[80] Regarding the Defendant the following factors are important:

80.1. both medical (gynaecologists) experts called agreed that the treating doctor was also responsible for checking the consent form;

80.2. the Defendant had testified that the scrub sister was ultimately the person to check when the patient comes to theatre whether the patient had signed the consent form. He did not find it necessary to ask the Plaintiff because (a) he had discussed the sterilisation with the Plaintiff the previous day and (b) the Plaintiff would not have been in position to give him a proper answer given the euphoria of her baby being born;

80.3. the Defendant's testimony was that he had asked Sister Solomons at the labour ward's door the following: "caesarean section and tubal ligation?" and she had replied positively when infact there was a nursing note with Sister Solomon's signature specifically stating no T/L please with the T/L ringed;

80.4. he testified that he does not take the written consent from patients in hospital. He was also not aware whether his colleagues did so. Also he does not check whether the consent form was signed by the patient or not, and was not aware whether his colleagues were doing so;

80.5. the Defendant testified that the sterilisation procedure was done in accordance with the HPCSA guidelines, which states that the doctor remains responsible to ensure that before he/she commences any treatment, that the patient has been given sufficient time and information to make an informed decision and has given consent to the procedure or investigation, which in this matter was not done;

80.6. Sister du Plessis confirmed that the consent form was written, that no consent was given for sterilisation procedure and she had asked the Plaintiff to inform the Defendant that she had changed her mind. It is strange that Sister Du Plessis and experienced professional of her calibre, could rely on the Plaintiff (lay person) to pass such an important message to the Defendant (surgeon, also an experienced professional) in such a life threatening operational procedure;

80.7. consent forms which were an exhibit in court, clearly indicated that the required

written consent which was necessary for the Defendant to perform sterilisation procedure was absent;

80.8. the Plaintiff's case was that the Defendant had changed his clinical notes to reflect his case;

80.9. para 41, 42, 43, 44, 45, 46 and 47 above clearly indicate that the Defendant cracked under cross examination by Plaintiff counsel, which clearly indicates that the Defendant lied in court;

80.10. the omission in his clinical notes on the 4th November 2004 that he was informed on the same day of operation that the Plaintiff was not for sterilisation leaves much to be desired as these notes were not written on the same day, that is, the 4th November 2004;

80.11. Dr Rbsemann pointed out that some Defendant's clinical notes were not signed and dated. The expert was of the view that the Defendant had changed some pages in his notes;

80.12. his failure to ask the Plaintiff's husband or the Plaintiff whether he should proceed with the sterilisation in theatre, and his suggestion that they should have responded when he asked the question to the scrub sister is hard to believe;

80.13. inconsistencies which were widely exposed in cross examination by Mr Bhoopchand lead to one conclusion namely, that the Defendant is an outright liar; and

80.14. in this matter the Defendant is blaming the hospital staff, the Plaintiff and her husband for not informing him that he should not perform sterilisation. The hospital staff in return blamed the Plaintiff who according to Sister Du Plessis was tasked to inform the Defendant. In his own words the Defendant testified that on his arrival at the theatre the Plaintiff in her condition, could not be able to communicate to him.

The Defendant in my view was very economic with the truth, and consequently failed to impress me as an honest and credible witness.

[81] Sister Du Plessis is an experienced nursing staff member at the hospital who also lectures to other nurses on how to complete the consent form. However, she could not clearly explain why she did not initial all the amendments that were made in the Plaintiff's consent form and why not ascertaining that the Plaintiff did the same. She also testified that she had signed the consent form in the Plaintiff's presence, contrary to what was put to the Plaintiff by the Defendant's Counsel. It was put to the Plaintiff that the nurse (Samsodien who was never called by the Defendant) had signed the consent form and that the sister would take and sign it later after checking it. She testified that she twice made the Plaintiff responsible to tell the Defendant that she had changed her mind about the sterilisation procedure. The sister did not impress me as an honest, credible and truthful witness.

[82] Dr Whitehead denied having spoken to the Plaintiff in theatre about sterilisation nor did he see the changed Plaintiff's consent form. He seemed to distance himself from anything to do with this matter, though the Plaintiff also implicated him.

[83] Mr Lewis, a clinical Psychologist, testified as the Plaintiff's expert. After observing the

Plaintiff in court, he told the court that he was of the view that the Plaintiff was honest and highly credible. He also pointed out that the Plaintiff suffered a significant sense of loss as a result of the unwanted sterilisation procedure that was done on her. He answered questions put to him with ease and calm. He was an honest and a credible witness.

[84] Dr Van Helsdingen testified regarding consent that in his 45 years of experience he had never come across with any gynaecologist and obstetrician personally perusing the consent form before proceeding with a surgical procedure. This, according to him, was left to the scrub sister and the surgeon would simply enquire from her before proceeding with the relevant procedure. When asked by the Plaintiff's counsel about a chapter he wrote in a booklet "Basic Principles of Gynaecological and Obstetrical Surgery" which was produced for teaching purposes in the Department of Obstetrics and Gynaecology at the University of Cape Town for gynaecologists in training and post graduates especially on the doctor's role in the consent process, where it says "Check the consent form", his replies clearly indicated that he was covering for the Defendant as he could not come out boldly and tell the court that the Defendant was wrong. He instead blamed the hospital staff. On this important point the doctor was not at all honest.

[85] Dr Rosemann produced five reports [paras 26-29 above] and explained the reasons for such reports. He was of the view that the Defendant had changed some pages in his clinical notes without dating and signing them. He was very firm in pointing out that the Defendant should have asked either the Plaintiff or her husband whether they still wanted a sterilisation, instead of asking the scrub sister aloud, hoping that the patient would hear him. He testified and pointed out that the regulations and guidelines of the HPCSA were clear that the surgeon should inspect the consent form prior to initiating treatment or operation. He was a very impressive witness and I have no doubt in my mind that he testified honestly and was a credible witness.

[86] It is common cause that the Plaintiff and the Defendant had a discussion in the Defendant's surgery about sterilisation. The Defendant testified that he had explained in detail the sterilisation procedure to the Plaintiff. However, there was no evidence, in the form of clinical notes, which indicated the same. The Defendant conceded that he never asked the Plaintiff whether she understood or not. The Plaintiff denied that the Defendant explained in detail the sterilisation procedure. She informed the court that there was no need for detailed explanation as she had informed the Defendant that she did not want sterilisation. The Defendant omitted to tell the Plaintiff that the written part of the consent would be taken at the hospital. Consequently, the Plaintiff in a written form declined to give the Defendant the right to perform the sterilisation procedure on her. Nonetheless, without checking the consent form and without ascertaining from the Plaintiff or her husband whether she still would continue with the sterilisation procedure, the Defendant performed the sterilisation procedure on her. This procedure the Defendant claimed, was lawful.

[87] I find that the Defendant's conduct was unlawful for the following reasons:

87.1. the performance of the sterilisation procedure was done without the consent of the Plaintiff. It constituted an assault, which involved an invasion of the Plaintiff's personal rights to privacy, dignity, reputation and safety;

87.2. there was no clinical indication which existed, for the Defendant to perform the sterilisation operation procedure on the Plaintiff;

87.3. the Defendant's conduct clearly was contrary to the HPCSA guidelines which provides that before a doctor starts any treatment, he/she must ensure that the patient has been given sufficient time and information in a way that the patient would understand to make an informed decision;

87.4. the Defendant's conduct breached the statutory provisions of the sterilisation Act, in that the Plaintiff was not given a clear explanation of the procedure hence the Defendant never asked her if she understood or not. The Defendant did not advise her that she could withdraw her consent at any time before the operation procedure, and consequently she understood and signed the consent form;

87.5. the consent form, which was marked as an exhibit in court, was clearly written that no consent was given to the Defendant to perform the sterilisation operation procedure;

87.6. the Defendant by his own admission testified that he does not take written consent from the patient in hospital and was not aware whether his colleagues in practice were doing so;

87.7. Sister du Plessis confirmed that the consent form was written that no consent was given for sterilisation operation procedure;

87.8. experts called indicated that in sterilisation, the ultimate buck remains with the doctor;

87.9. By not checking the consent form before commencing the sterilisation on the Plaintiff, the Defendant did not act like a reasonable person. Knowing the seriousness of the operation he was about to commence with a procedure which was reversible or irreversible in certain circumstances, the Defendant should have satisfied himself by checking the consent form;

87.10. I am of view that the Defendant (as a reasonable) doctor would have foreseen the reasonable possibility of his conduct injuring another in the Plaintiff's person and causing her patrimonial loss and should have taken steps to guide against that occurrence (by checking the consent forms) and the Defendant in this matter failed to take such important and necessary steps. Therefore, I have no doubt in my mind that the doctor was grossly negligent on his part and therefore liable for damages to the Plaintiff;

87.11. the Defendant breached the contractual relationship between himself and the Plaintiff. It is trite that where a patient consults a medical practitioner in practice, he/she enters into a contractual relationship with the practitioner concerned. Should the practitioner fail to carry out the terms of the contract, (like in this matter) the practitioner may be sued for damages as the Defendant (in casu) breached the duty of care to the Plaintiff;

87.12. a reasonable gynaecologist and obstetrician in the position of the Defendant should have checked the consent form and asked the Plaintiff or her husband if they still wanted sterilisation;

87.13. the Defendant acted wrongfully, negligently in breach of his legal and professional duty in performing the sterilisation procedure on the Plaintiff; and

87.14. no clinical indication existed for the Defendant to perform the procedure.

Quantum

[88] I now deal with the question of quantum.

Past Medical Expenses

An amount of R4000.00 in respect of past medical expenses was claimed. The parties were in agreement, and I am of the view that no further detailed discussion is needed in respect of this item.

General Damages

The Plaintiff claimed R300 000.00 in respect of general damages. The claim is for pain and suffering at the time the unwanted sterilisation procedure was done on her; for pain and suffering that she endured since the sterilisation procedure; as a result of the procedure the loss of her amenities, especially the capacity of her child bearing and the disfigurement that resulted; and her mental state (the possibility that she may never conceive again, grief and effects thereof which will have on her psyche into her future).

The Defendant's view is that an award of not more than R5000.00 should be awarded. The Defendant submitted that the Plaintiff suffered no psychological disorders, had an abusive childhood and went into an abusive relationship with her husband. The Defendant submitted that in comparison with other cases, an amount of R300 000.00 would be punitive to the Defendant. Taking into account the nature and extent of the physical injuries, the emotional, mental state (sequelae), pain, suffering and loss of amenities of life, I am of the view that an amount of R200 000.00 would be reasonable and fair.

Future Medical Expenses

An amount of R210 000.00 was claimed by the Plaintiff in respect of future medical expenses. The Plaintiff relied on the calculation of the value of the two gynaecologists' (Dr Rosemann and Dr van Helsdingen) experts reports and testimonies in quantifying what the Plaintiff's losses were. The Plaintiff submitted that the amount was never contested by the Defendant. The Plaintiff in making the calculation relied on Dr Helsdingen's testimony with regard to future medical treatment which was R220 191.50. Taking into account 10% contingency deduction, the Plaintiff calculated the following amount, R198 172.35.

The Defendant submitted that in respect of reanastomosis or in vitro fertilisation, the Defendant did not support the claim because the Plaintiff does not have a spouse, and is not in any kind of a relationship, be it permanent or even temporary. It is not certain whether the reanstomosis would be successful as she was 38 years going for 39 years. This was an academic exercise as the doctors had said it was becoming almost risky for her. The same is applicable to in vitro fertilisation, and this looked like a money making exercise. The Plaintiff should fail because she had not demonstrated the basis for her award and not actuarially computed.

Taking into consideration both experts quantification of the Plaintiff's future medical

expenses and the lack of genuine challenges from the Defendant, I am of the view that an award of R198 172.35 is fair and equitable.

Loss of Earnings

The Plaintiff claimed an amount of R10 000.00 for loss of earnings. This claim was based on the experts testimonies that if the Plaintiff were to have the procedures, she will lose about a month's in full time salary which was R5000.00.

The Defendant submitted that the Plaintiff has not made out a case for loss of earnings. Taking into account the type of occupation the Plaintiff is engaged in, I am of the view that an award of R8 000.00 is reasonable and fair.

The Award

[89] In the light of the aforesaid findings, the total quantum of the award is as follows:

(a) Past medical expenses: R 4 000.00

(b) General damages: R200 000.00

(c) Future medical expenses: R198 172.35

(d) Loss of earnings: R 8 000.00

Total amount: **R410 172.35**

Order

[90] (i) Payment of the sum of R410 172.35 (four hundred and ten thousand, one hundred and seventy two, rand, and thirty five cents).

(ii) Interest on the aforesaid amount at the prescribed rate from date of summons to date of payment.

(iii) Payment of Plaintiff's costs of suit, which costs shall include, but not limited to:

(a) costs of attendance of Plaintiff's counsel;

(b) reasonable qualifying expenses and costs of attendance at court, if any, of the following expert witnesses: (i) Dr Rosemann and (ii) Mr Lewis.

SAMELA, J