Booker v. Harper, [1996] O.J. No. 955

Ontario Judgments

Ontario Court of Justice (General Division)

Cumming J.

Heard: February 7-8, 12-13, 15-16, 19, 1996.

Judgment: March 25, 1996.

Court File No. 12492/91U

[1996] O.J. No. 955

Between Patricia Anne Booker, Michael Anthony Booker, and Johnathon Charles Booker, an infant by his Litigation guardian Patricia Anne Booker, plaintiffs, and Dr. John Harper and Dr. T. Owolabi, defendants

(19 pp.)

Case Summary

Medicine — Liability of practitioners — Negligence or fault — Standard of care — Surgical operations by doctors — Obstetrical or gynaecological care.

Action by the plaintiff against the two defendant gynaecologists, Harper and Owolabi. She first consulted Harper after experiencing abdominal pains. An ultrasound revealed that there was a cyst on the right ovary, but the plaintiff understood that it might be follicular and might disappear. Four months later, a second ultrasound suggested a cyst on the right ovary of about the same size as the one shown in the first ultrasound. An X-ray indicated a very large dermoid cyst associated with the left ovary. The cyst on the right ovary was to be removed. The plaintiff claimed she was not told anything about a problem with the left ovary, until after the first surgery, when the left ovary and fallopian tubes were removed because of the dermoid cyst. She experienced more pain and was advised that she had a small follicle cyst on the right ovary. She consulted another doctor who testified that she could feel a probable dermoid cyst on the right ovary. Another ultra sound confirmed a cyst on the right ovary. A second operation was required to remove that cyst. Expert opinion indicated that an inspection of the right ovary should have been done at the time of the first surgery when the cyst was present and would have been discovered. The defendants said that they carefully examined the right ovary and that it looked and felt normal.

HELD: The action was allowed and the plaintiff awarded $12,500 in general damages.

The defendants did not exercise their knowledge and skill with reasonable diligence and care in respect of the inspection required of the right ovary. They made an unfortunate mistake and missed a diagnosis which should not have been missed, thereby avoiding a second operation.

Statutes, Regulations and Rules Cited:

Court of Justice Act, R.S.O. 1990, c. C-43. Family Law Act, R.S.O. 1990, c. C-3.

Counsel

J.M. Regan and William C. Wolfe for the plaintiffs. Sheena McCaskill and D.R. Ferguson for the defendants.

CUMMING J.

Introduction

1 The plaintiff, Patricia Anne Booker, is married with one child who was born in May 1988. She is employed as a claims examiner for an insurance company. The defendant, Dr. John Harper, was her gynaecologist from 1972 until March 1990. Both defendants in 1989 were staff members with the Department of Obstetrics/Gynaecology at St. Michael's Hospital in Toronto.

2 The female plaintiff underwent surgery October 5, 1989, with Dr. Harper as the surgeon in charge, assisted by Dr. Titus Owolabi. The surgery resulted in the removal of a dermoid cyst from her left ovary and the removal of her left fallopian tube and left ovary. She was operated on again February 27, 1991, by Dr. Heather Morris at Women's College Hospital for removal of a dermoid cyst from her right ovary.

3 There are many kinds of ovarian cysts, two of which are relevant to the issues in this case. One type is a follicle or follicular cyst which is a small fluid filled sac. These are fairly common. They are associated with ovulation. A follicular cyst will disappear on its own over time and usually within a couple of months. A second type is a dermoid cyst which is solid in nature and is composed of many types of tissue or cells. A dermoid cyst requires surgery as it can grow over time and may be malignant. A dermoid cyst may grow slowly or quickly. It will not disappear on its own. As well, a dermoid cyst is often "bilateral" in nature. That is, if a dermoid cyst is found on one ovary there is a 10% to 15% chance that a dermoid cyst will be found on the other ovary.

4 The female plaintiff agrees there was a large dermoid cyst on her left ovary at the time of the October 5, 1989, surgery performed by Dr. Harper and that it was appropriate to remove this cyst, the ovary and fallopian tube. Her position is that both ovaries should have been inspected during the course of the surgery, that a careful inspection would have revealed an approximate 3.5 cm. in diameter dermoid cyst on the right ovary, and that it was reasonable to remove that cyst from the right ovary during the October 5th surgery.

Issues

5 The issues are two-fold: first, from a factual standpoint, was there a dermoid cyst on the right ovary of Mrs. Booker at the time of her October 5, 1989, surgery? Second, if so, were Dr. Harper and Dr. Owolabi negligent in failing to identify the existence of the cyst and remove it by surgery?

The Evidence

6 Mrs. Booker began to experience abdominal pains about the end of 1988. She saw Dr. Harper on March 17, 1989. A physical examination suggested there might be a cyst associated with the right ovary. An ultrasound on March 27, 1989, suggested to Dr. Harper a right ovarian cyst of about 3.5 cm. in diameter. The ultrasound report

used language which would suggest only a follicular cyst. Dr. Harper elected to monitor the situation and prescribed a birth control pill which is known sometimes to shrink the size of follicular cysts. All of the expert medical evidence agreed that this was the reasonable diagnosis to make resulting from the first ultrasound report, and the prudent course of action to follow. Mrs. Booker testified that she understood from an April 5, 1989, visit to Dr. Harper that the cyst might simply be a follicular cyst that could go away without surgery.

7 Mrs. Booker continued to experience abdominal pain. A second ultrasound was done July 18, 1989, which suggested a cyst on the right ovary of about the same size as indicated by the earlier ultrasound. The second ultrasound report suggested that the cyst might be dermoid in nature. This ultrasound report was not a definitive diagnosis. The cyst might have been a haemorrhagic cyst.

8 An x-ray was requisitioned by Dr. Harper on June 21, 1989. The x-ray indicated with certainty a very large dermoid cyst of about 9 cm. in diameter associated with the left ovary. An x-ray will not show a follicular cyst because x-rays will only detect calcification (conversely, an ultrasound may not show a very large dermoid cyst). The radiologist's report in respect of the June 21 x-ray did not suggest any cyst at all on the right ovary but, rather, only in respect of the left ovary. Dr. Harper's clinical notes of August 17, on the occasion of Mrs. Booker's first visit following the June 21 x-ray, do not make any reference to the result of that x-ray. There is a reference in the clinical note for that day to "right ovarian cyst" as shown by an ultrasound.

9 Mrs. Booker met with Dr. Harper on August 17, 1989. She then made a decision, based upon Dr. Harper's advice, to have surgery to remove the cyst on the right ovary. She testified that she was not told anything at all about a problem with a cyst on her left ovary until after the October 5, 1989, operation. I accept her testimony. She impressed me as a credible witness who was telling the truth. Dr. Harper's own clinical notes and records in respect of attendances by Mrs. Booker at his office April 5, June 21 and August 17, 1989, all refer only to a right ovarian cyst. Dr. Harper's notes indicate that arrangements for the October 5, 1989, surgery were made on August 17, 1989. Mrs. Booker testified that she was informed that an attempt would be made to save the right fallopian tube and right ovary but that removal might be necessary.

10 There is a dispute as to whether or not doctor and patient met in person again on September 22, 1989. She did go for pre-operation lab work on that day. Dr. Harper's records which were put into evidence refer to a dermoid cyst over the left sacrum but he was not certain when that entry was made.

11 The "medical chart" of St. Michael's Hospital (which is made up of several documents, including the following), relating to the surgery performed on Mrs. Booker on October 5th, was put into evidence. The "Gynaecological Admission Form" for St. Michael's Hospital refers in different places to a right ovarian cyst as confirmed by ultrasound. The "medical notes" dated October 4, 1989, taken by the Clinical Clerk (someone who is a fourth-year medical student) refer only to an ovarian cyst on the right side, that the second ultrasound of July showed a cyst of the same size as in the first (March) ultrasound, and that the cyst was partly solid. The concluding "medical note" by the resident physician referred to a right ovarian cyst of solid and cystic components. The "consent" form signed by the patient in respect of the surgery referred only to a right ovarian cystectomy and possible right oophorectomy. (However, the form also authorized "such additional or alternative diagnostic, operative or treatment procedures as in the opinion of the medical staff performing the surgery are seen as immediately necessary.") The St. Michael's "Physician's Orders" attached to the "Medication Prescribing Sheet" for the date October 4, 1989, refer to a right ovarian cyst.

12 In summary, all documentation in the "medical chart" preceding the surgery refers only to right ovarian cyst. All of these documents suggest strongly that Dr. Harper overlooked the fact that the report relating to the x-ray indicated a second cyst which was on the left rather than right ovary.

13 There is no reference on the hospital "medical chart" to any left ovarian cyst until a note made by the defendant Dr. Owolabi, after the operation.

14 An operation took place at St. Michaels Hospital in Toronto on October 5, 1989, described as a left sapingo-oophorectomy in the dictated "Operative Note" by Dr. Owolabi of October 5. This involved the removal of the left ovary and fallopian tube because of a dermoid cyst.

15 A record is completed by the "circulating nurse" in the operating room in the course of the surgery being performed. The "Pre-op Diagnosis" thereon refers to "right" ovarian cyst with the word "right" crossed out and the word "left" substituted. The description of the actual "operation" itself seems to have referred initially to a "left" salpingo-oopherectomy, with "left" then crossed out and replaced initially by "right" with this then being crossed out also and replaced by "left". Confusion is apparent. Undoubtedly, the person who made this record was confronted with a reality (a left salpingo-oophorectomy) unfolding before her/his eyes in conflict with the existing documentation which referred only to a right ovarian cyst and a possible right salpingo-oophorectomy.

16 The documentation itself suggests that the reason Mrs. Booker was scheduled for surgery October 5 was because Dr. Harper suspected that she had a dermoid cyst associated with her right ovary. All of the hospital documentation suggests that Dr. Harper was cognizant of only one dermoid cyst and a problem in respect thereof as relating only to the right ovary. Dr. Harper's own clinical note for October 5, 1989, seems to refer to a "R" salpingo-oophorectomy that appears changed after the initial notation to a "L" one.

17 The medical chart is confusing on another point as well. There is no assistant surgeon named in the Circulating Nurse's record. Dr. Harper is named as the only surgeon. The "operative note" dictated immediately after the surgery by Dr. Owolabi for transcription suggests that Dr. Owolabi was the surgeon in charge. I accept the evidence of the defendants that, in fact, Dr. Harper was the surgeon in charge with Dr. Owolabi acting as the assistant surgeon.

18 There is no issue as to the necessity of the left salpingo-oophorectomy surgery. However, Mrs. Booker testified that she was not told that there was a cyst on her left rather than, or in addition to, the one on her right ovary. She says she was not told for some time after the surgery that her left ovary and fallopian tube were removed. She testified that she was released from the hospital under the impression that a dermoid cyst of about 8 cm. had been removed from her right ovary and that both ovaries and fallopian tubes were still intact.

19 Dr. Harper testified that he told Mrs. Booker in the hospital, in the presence of medical students, that the surgery performed included the removal of a dermoid cyst, ovary and fallopian tube. I accept his testimony that there was a discussion about the surgery after the operation. However, I accept Mrs. Booker's testimony that she did not understand there had been a removal of the fallopian tube or ovary or that the dermoid cyst was one other than that on the right ovary. No effective communication as to what had happened during surgery was made to her.

20 Ms. Booker returned to work three weeks after the October 5th surgery. However, as she continued to experience pain in her lower abdomen, she went to Dr. Harper again on January 30, 1990. She says Dr. Harper advised her that she had a small follicle cyst on the right ovary, which was confirmed by an ultrasound performed on February 23, 1990. Mrs. Booker was querulous given that she believed that a cyst had been recently removed from her right ovary. She was distressed that a cyst would reappear so soon. She testified that she realized only at this time from Dr. Harper that her left ovary and fallopian tube had been removed on October 5, 1989.

21 Mrs. Booker then sought the opinion of Dr. Heather Morris of Women's College Hospital and came under her care. Dr. Morris testified that she could feel, on palpation, a probable dermoid cyst of 6 cm. on the right ovary in her physical examination of Mrs. Booker on December 11, 1990. Dr. Morris testified she was totally confused by the medical record and reports relating to Mrs. Booker. They made no sense to Dr. Morris given Dr. Harper's response to Dr. Morris' inquiry that the October 5, 1989, surgery had been in respect of the left ovary.

22 As Mrs. Booker had only her right ovary and fallopian tube and very much wanted to become pregnant she then took a fertility drug, chlomide, for some months. She was not successful at conceiving. She continued to experience

abdominal pain. An ultrasound performed on May 2, 1990, confirmed a cyst on the right ovary. A clinical examination in December 1990 revealed that the cyst was growing.

23 Ms. Booker then followed Dr. Morris' advice to have the cyst on the right ovary removed. Surgery was performed on February 27, 1991, by Dr. Morris, to remove the cyst from the right ovary with the right ovary and fallopian tube being left intact. The Department of Pathology of Women's College Hospital confirmed the pre-operative diagnosis that the cyst was dermoid. It was about 7 cm. in diameter.

24 Dr. Gerald I. Urbach testified. He is an obstetrician and gynaecologist with the Wellesley Hospital in Toronto. He emphasized that the June 21, 1989, x-ray unequivocally showed a dermoid cyst on the left side. In his opinion, the appropriate action called for was surgery by laparotomy, and the left salpingo-oophorectomy given the cyst associated with the left ovary. In his opinion, a careful inspection should be done of the right ovary at the time of the surgery. The inspection can be done without any risk to the patient, by the surgeon lifting the ovary and observing as to whether there is a cyst.

25 Dr. Urbach testified that the July 18 ultrasound report indicates that the cyst on the right ovary was still present, four months after being first noted on the ultrasound of March 17, and that it had not diminished in size. In his opinion, this is inconsistent with the cyst being follicular. As well, the July 18 ultrasound by itself made a positive suggestion that the cyst could be dermoid in type. The cyst had solid components. The internal echo pattern delineated by that ultrasound suggested the presence of a dermoid cyst associated with the right ovary.

26 The July 18 ultrasound cast doubt upon the interpretation made in respect of the earlier (March 17) ultrasound as to the presence of a possible follicular cyst. In Dr. Urbach's view, there was now documentation as to the presence of cysts on both ovaries. Accordingly, in Dr. Urbach's opinion, surgery for removal of the dermoid in respect of the left ovary was called for with a diligent inspection of the right ovary for a probable dermoid cyst. Dr. Urbach testified that a dermoid cyst on one ovary means that there is a 10% to 15% chance that there will be a dermoid cyst on the other ovary. It is undisputed that it is standard medical procedure to look at both ovaries in all situations where surgery is initiated in respect of one ovary.

27 The ovary is located somewhat behind the uterus. Thus, to view and feel or palpate the ovary in the course of inspecting it for the presence of a dermoid cyst, the surgeon must reach in with his/her hand behind the uterus to the cul de sac holding the ovary, pick up the ovarian ligament and bring the ovary into clear view. An ovary with a dermoid cyst is different in colour, texture, and feel from a normal ovary. If a dermoid cyst is found, the appropriate course of action is to remove it. However, if the ovary looks grossly normal it is not standard to bisect the ovary for internal examination, even though a dermoid cyst has been found on the other ovary. There is a risk of getting adhesions with bisecting. The risk of adhesions increases the chance of compromising fertility. This would be a particular concern for a woman who only has one remaining ovary.

28 In Dr. Urbach's opinion a dermoid cyst was present on the right ovary at the time of the October 5th surgery. As well, in his opinion, a proper inspection would have discovered that cyst.

29 Given the history of Mrs. Booker's problem and the concern as to there being a dermoid cyst on the right ovary, Dr. Urbach was also of the opinion that a surgeon doing an inspection in respect of that ovary, at the time of removal of the dermoid cyst from the left ovary, would have made a detailed description of the findings from that inspection in the "operative note" of the medical chart. If there was good chance that a dermoid cyst was expected to be found on the right ovary, and none was found on inspection, one would expect the surgeon to make a clear express finding in this regard.

30 However, the dictated "operative note" of Dr. Owolabi following the surgery does not make any such express reference to the finding with respect to the right ovary. It suggests the fallopian tubes were normal and "that no pathological process was noted no where [sic] within the pelvis or abdomen". There is no "operative note" note by Dr. Harper. As the "operative note" is what any subsequent physician would view in determining Mrs. Booker's

medical history, it would be important that it contain an express statement as to the findings in respect of the right ovary. The defendants rely upon the undated handwritten operating room consulting note of Dr. Owolabi which states that "right tube and ovary and cul de sac normal".

31 All the pre-operative documentation suggests that the intent on booking the surgery was to enter the abdomen and remove the right cyst seen from the two ultrasounds and, depending upon what was found, the right ovary itself might have to be removed. Dr. Harper scheduled the surgery because he thought there was a probable dermoid cyst on the right ovary.

32 The February 23, 1990, ultrasound indicates a possible approximate 3.5 cm. dermoid cyst on the right ovary. This is five months after the October 5 surgery. Therefore, there are three ultrasounds (March and July 1989; February 23, 1990) each of which indicates a cyst on the right ovary. Each one indicates a cyst of about 3.5 cm. in diameter. The second and third ultrasounds suggest that the cyst is quite possibly a dermoid cyst. The physical examination by Dr. Morris in December 1990 indicated a cyst on the right ovary. The consistent showing of a cyst by three ultrasounds over the eleven-month period suggests a continuing dermoid cyst.

33 The second surgery in February 1991 revealed an actual dermoid cyst on the right ovary. This history indicates that the same dermoid cyst was present on the right ovary over the entirety of the period from March 1989 to the removal of this cyst in February 1991.

34 Dr. Harper's opinion is that Mrs. Booker must have had a follicular cyst on the right ovary which had disappeared by the date of the October 5, 1989, surgery and that is why no cyst was then seen. While it is possible, as theorized by the defendants, that there was only a follicular cyst in July 1989 and it had disappeared by the time of the October 5 operation and the dermoid cyst then grew on the right ovary subsequent to the October 5 surgery, this scenario is improbable and very unlikely.

35 The plaintiff's two expert witnesses were of the opinion that the same dermoid cyst existed in respect of the right ovary over the period from March 1989 to February 1991. I have already referred to the testimony of Dr. Urbach.

36 Dr. Marvin I. Steinhardt, a radiographer with Mount Sinai Hospital, stated that a comparison of the three ultrasounds of March 1989, July 1989 and February 23, 1990, leads one to the conclusion that there was a dermoid cyst on the right ovary at the time of the surgery on October 5, 1989. Dr. Steinhardt testified that the cyst had the same size, shape and appearance over this eleven-month period with internal echoes suggestive of a dermoid. Dr. Steinhardt testified that the third ultrasound of February 23, 1990, was consistent with what he found from his examination of the first two ultrasound tapes of March and July 1989.

37 Dr. Steinhardt also stated that the July 1989 ultrasound performed by Dr. M. Miskin was abdominal and transvaginal which would give a more authoritative picture than the March ultrasound which was simply transabdominal. As well, Dr. Steinhardt stated that the x-ray of June 21, 1989, showed some calcification in the region of the right ovary. This indicated a dermoid cyst. In his opinion, this calcification most likely indicated a dermoid cyst on the right ovary and that this was a separate cyst from the one shown clearly by the x-ray for the left ovary.

38 Dr. Steinhardt testified that, from his review of the clinical evidence, he would be very hesitant to accept the assertion that the dermoid ultimately found on the right cyst was not there at the time of the surgery on October 5, 1989. He thought it was an untenable assertion that the lesion seen on the March 27 and July 7, 1989, ultrasounds in respect of the right ovary represented a follicular cyst that disappeared by the time of the October 5, 1989, surgery.

39 Dr. Harper and Dr. Owolabi both testified that they carefully inspected the right ovary at the time of surgery, October 5, 1989, and that it looked and felt normal. They testified that they discussed its normal appearance with each other. I do not accept their evidence on these matters. I do not find their evidence credible in this regard.

These physicians have each done thousands of laparotomies. I do not think they have any detailed recollection of the findings in respect of the specific situation of Mrs. Booker's surgery. Rather, they are rationalizing after the fact knowing what the standard procedures are and what they do in the usual course of events in respect of laparotomies. Because they usually do an inspection of both ovaries, they assume they must have done so on this occasion and that it must have been done with care.

40 There is no question that Dr. Harper and Dr. Owolabi are experienced, capable gynaecologists. They have the knowledge and skill to distinguish between an normal ovary and an ovary with a dermoid cyst. What happened in the instant situation was that they did not exercise their knowledge and skill with reasonable diligence and care in respect of the inspection required of the right ovary. They made an unfortunate mistake. They missed a diagnosis of a dermoid cyst on the right ovary that should not have been missed.

41 I find on the evidence that what happened was as follows. Dr. Harper's diagnosis after the July ultrasound was that there was a probable dermoid cyst on the right ovary and surgery was advisable. Dr. Harper overlooked the fact that the x-ray of June 21 indicated a dermoid cyst on the left ovary. Rather, the x-ray report was seen simply as confirming his diagnosis of there being a dermoid cyst present. He proceeded on the basis of surgery being required. On October 5, 1989, during surgery, Dr. Harper expected to find one dermoid cyst. He had the x-ray with him. As the dermoid cyst shown by the x-ray was so pronounced it was a useful one for showing to medical students for educational purposes.

42 There not being any resident or intern available to assist Dr. Harper the morning of October 5 in respect of his intended surgery, Dr. Harper enlisted Dr. Owolabi to assist him. Dr. Owolabi had not seen any of the hospital documentation nor was he aware of the ultrasound reports. He was cognizant only of the large dermoid as shown by the x-ray. Dr. Harper had overlooked the fact that the x-ray was showing him something different from the ultrasounds. The x-ray was showing a clear dermoid cyst about 8 cm. (the size of a grapefruit) associated with the left ovary. However, the ultrasounds indicated a cyst in respect of the right ovary but, for some reason, did not indicate a cyst on the left ovary.

43 Dr. Harper had failed to realize that the x-ray and ultrasounds were illustrating different cysts. He thought he was dealing with the only problem present upon the removal of the large dermoid associated with the left ovary. From Dr. Owolabi's standpoint, the expectation was that there was only one cyst, which was the one removed from the left ovary.

44 Dr. Harper and Dr. Owolabi had removed a cyst of about 8 cm. in diameter, the size of a grapefruit, from the left ovary. This could not possibly be the same cyst as shown on the ultrasounds of March and July, 1989, as the cyst shown on the ultrasounds was (on the right rather than the left ovary and) only about 3.5 cm. in diameter. The difference in size alone as between the cyst removed and the cyst as shown on the ultrasounds would call for a very careful inspection of the right ovary. The evidence indicates that Dr. Harper did not realize that the history of the patient indicated two cysts. He did not suspect the presence of two cysts on October 5th.

45 Considering all the evidence, I find that only a cursory inspection was made by Drs. Harper and Owolabi in respect of the right ovary. The dermoid cyst then present in respect of that ovary was missed. Dr. Urbach testified that a proper inspection would have found an approximate 3.5 cm. dermoid cyst. I accept this opinion. Dr. Thomas G. Ryley, a gynaecologist testifying as an expert for the defendants, testified that a dermoid cyst might not be noticed provided it was not more than 3 cm. in diameter.

The Law

46 A physician is under a duty to exercise reasonable care and diligence in providing treatment to a patient. It is the duty of a specialist to have and exercise the degree of care and knowledge and skill reasonably expected of a normal, prudent physician in her/his specialty: see Wilson v. Swanson, *[1956] S.C.R. 804* at 817, *5 D.L.R. (2d) 113*

per Abbot J.; Crits v. Sylvester, *[1956] S.C.R. 991* at 997, *5 D.L.R. (2d) 601* per Rand J.; Gent and Gent v. Wilson, *[1956] O.R. 257* (C.A.) at 265 per Schroeder J.A.

47 A doctor is not liable for a mere honest error of judgment provided she or he acts after a careful examination in what she or he sees as the patient's best interests: see Ferguson v. Hamilton Civic Hosp. *(1983), 23 C.C.L.T. 254* at 313 (Ont. H.C.); Wilson v. Swanson, supra at 812.

Conclusion

48 I find, taking into account all the evidence, that there was a dermoid cyst of about 3.5 cm. in diameter on the right ovary on October 5, 1989. Further, I find that Drs. Harper and Owolabi were negligent in not providing the standard of care required in the course of the surgery performed on October 5, 1989, in not carefully inspecting the right ovary to determine the existence of the dermoid cyst. This negligence necessitated the subsequent, second surgery, performed by Dr. Morris in February 1991.

49 I turn now to the matter of damages.

50 Mrs. Booker was understandably upset with the confusion and uncertainty surrounding her October 5, 1989, surgery. She experienced intermittent and mild abdominal pain until the cyst on the right ovary was eventually removed. She suffered the anxiety normally associated with surgery in having the second operation. She had to undergo a second gynaecological surgical procedure because of the negligence of the defendants. There was associated post-operative recovery pain. The entry in the second surgery was through the scar left by the first surgery, so that there is no further scar associated with the second surgery.

51 I assess Mrs. Booker's general damages for pain and suffering at $12,500. See generally Lefebvre v. Osborne (1983), 38 C.P.C. 93 (Ont. H.C.J.) and Paling v. Mander, *[1993] O.J. No. 1205* (Gen. Div.) for roughly analogous situations where the general damages awards were $10,000 and $12,500 respectively.

52 Mrs. Booker missed a month of work in her employment as a result of the second surgery and her recovery. The parties agree that special damages for lost income for this period is $3,085.

53 The claims of the male plaintiff and infant plaintiff pursuant to the provisions of the Family Law Act, R.S.O. 1990, c. C.3 as amended, were not proven. Accordingly, they are dismissed without costs to any party.

54 The plaintiff, Patricia Anne Booker, is entitled to judgment against both defendants on a joint and several basis for the total amount of $15,585.00 plus prejudgment interest as determined by the Court of Justice Act, *R.S.O. 1990, c. C. 43*.

55 Costs shall ordinarily follow the event; provided however, I may be spoken to.

CUMMING J.

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