

IN THE SUPREME COURT

THE MARKET SNODSBURY NHS TRUST

Appellant

-v-

EULALIE SOEURS

Respondent

Ms. Soeurs, a designer of haute couture ladies' lingerie, was born on the 14.02.1990 in France. She has been resident in the UK since 2012. Although her native language is French, she speaks English, and her grasp of the English language is generally good. However, although she likes to portray herself as a supremely confident person at all times, her English is not quite so good as it would appear, and she frequently does not quite appreciate the true meaning of English words and phrases, but is too proud to 'let on'.

On the 01.03.2019, when she was 17.5 weeks pregnant with her first child, Ms. Soeurs attended an appointment with the antenatal consultant, Mr. Augustus Fink-Nottle, at the Market Snodsbury NHS Trust. There was a history of Down's syndrome in Ms. Soeurs' family and Ms. Soeurs was concerned that her baby would be affected with the genetic condition. At the meeting with Mr. Fink-Nottle, Ms. Soeurs explained her family history and her fears about her own child, stated that she wanted her baby to be tested to see if it had Down's syndrome, and indicated that, if the child was affected by Down's syndrome, she would be minded to terminate the pregnancy. Mr. Fink-Nottle went through the NHS Trust's "check list" of items to be discussed with patients who were concerned that their unborn child might be affected by a genetic condition and were seeking advice about amniocentesis, and gave her a leaflet and a DVD to take home, which explained the procedure of amniocentesis and its risks and benefits. The leaflet referred to the risk of miscarriage following amniocentesis as being 1 in 100. However, when Ms. Soeurs viewed the DVD at home, she came away with the (erroneous) impression that there was a 75% risk of miscarriage as a result of the amniocentesis and that there was very little chance that both she and her baby would emerge unscathed from the procedure. As a result of her fears about these risks, she contacted the hospital and informed them that she had decided not to undergo amniocentesis.

During the last three months of the pregnancy, Ms. Soeurs suffered from gestational diabetes, which adversely affected the functioning of her kidneys, and from considerable gastric discomfort. She was informed that the latter was probably as a result of the pregnancy, and prescribed antacids. On 03.08.2019 she gave birth to a son, who had Down's syndrome. Following the birth, Ms. Soeurs continued to experience a great deal of gastric pain, and was very unwell. It was discovered that she had gall stones and a blocked bile duct and she underwent surgery on the 10.08.2019 to remove her gall bladder. Following the surgery, she was sent to a High Dependency Unit (HDU) at 13.00 on the 10.08.2019. Unfortunately the nurse in charge of the ward at the time, Bertram Wooster, did not keep any records of her arrival at the ward or her care on the ward between 13.00 and 17.00, and there was no record of her being seen by any clinical staff until 17.00. Ms Soeurs claimed that she did not see any

clinical staff between 13.00 and 17.00 on that day. By 17.00 Ms. Soeurs's health had deteriorated and she was very unwell and had developed pancreatitis. Her condition subsequently deteriorated markedly, and on the 11.08.2019 she underwent surgery to remove part of her pancreas, which had become infected. Following this surgery, she was returned to the HDU. By this time she was in a very weak and debilitated state. Some hours later, she vomited after drinking a small glass of elderflower cordial and showed signs of having aspirated her vomit. She was treated by medical staff, who gave her oxygen and antibiotics. She was also placed on haemodialysis to assist her kidney function. Some hours later she vomited again, inhaled the vomit, and suffered a cardiac arrest. Although she was resuscitated, she sustained some brain damage as a result of the cardiac arrest.

Ms. Soeurs brought an action against the Market Snodsbury NHS Trust in negligence. She alleged that:

1. The Trust were vicariously liable for Mr. Fink-Nottle's failure to take reasonable steps to ensure that she had understood the advice provided to her in relation to the amniocentesis, including the contents of the leaflet and the DVD. She alleged that had reasonable steps been taken to be sure that she understood the contents of the advice given, she would have had the amniocentesis and would have terminated the pregnancy.
2. That the Trust were liable for the period of negligent care whilst she was on the HDU between 13.00 and 17.00 on the 10.08.2019. As a result of the Trust's negligence during this period, her treatment was delayed and she became much more ill than would otherwise have been the case. She had inhaled her vomit and suffered a heart attack and brain damage because of her extreme weakness, which had been materially contributed to by the Trust's breach of duty.

The Trust conceded that there had been a period of negligent care between 13.00 and 17.00 on the 10.08.2019, but argued that Ms. Soeurs was unable to prove that this breach of duty had caused any loss.

The Trial Judge, Potter-Pirbright J, held that:

1. The Trust were not liable in negligence to Ms Soeurs for any alleged failure to ensure that she had understood advice provided in respect of the amniocentesis. A doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant treatments (*Montgomery v Lanarkshire Health Board* [2015] UKSC 11). He or she does not have a duty to make the patient understand (*Al Hamwi v. Johnston* [2005] EWHC 206). In the circumstances, Mr. Fink-Nottle had discharged his duty to the patient.
2. Although the Trust conceded that there had been a breach of their duty of care to Ms. Soeurs on the 10.08.2019, Ms. Soeurs' claim failed, as she had failed to prove that the negligent delay to her treatment had actually caused the damage claimed (*Tahir v. Haringey Health Authority* [1998] Lloyd's Rep Med 104).

Ms. Soeurs appealed to the Court of Appeal, who allowed her appeal on both grounds, holding that:

1. The learned trial judge had erred in holding that Mr. Fink-Nottle had discharged his duty of care to Ms. Soeurs. A doctor has a duty of care to take reasonable steps to ensure that the information given is understood, particularly where it is evident that English is not the patient's first language (*Lybert v. Warrington Health Authority* [1996] P.I.Q.R. P45; *Mordel v Royal Berkshire NHS Foundation Trust* [2019] EWHC 2591(QB)). In particular, Mr. Fink-Nottle was under a duty to ascertain that Ms. Soeurs had understood the information provided in the leaflet and DVD provided to her.
2. Potter-Pirbright J had also erred in finding that Ms. Soeurs had failed to establish causation in respect of the negligent care on the 10.08.2009. Although Ms. Soeurs would probably have developed the problems with her pancreas and kidneys in any event, the delay to her treatment had contributed materially to her weakness, which had subsequently led to her aspirating her vomit. Causation was therefore established (*Bailey v. Ministry of Defence* [2008] EWCA Civ 883; [2009] 1 WLR 1052).

The Trust now appeals to the Supreme Court on both of these grounds.

(This moot is not to be reproduced or re-used without the permission of the University of Leicester).