IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CIVIL APPEAL NO. 9 OF 2004

BETWEEN:

MIKE WILLIAMS **APPELLANT**

v.

ATANASCIO COB
UNIVERSAL HEALTH SERVICES CO. LTD.
UNIVERSAL SPECIALIST HOSPITAL CO. LTD.
doing business as
UNIVERSAL HEALTH SERVICES
MEDICAL ARTS & SURGICENTRE **RESPONDENTS**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Rodwell Williams S.C. for appellant
Mr. Phillip Zuniga S.C. for respondents

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14 October 2004: 9 March 2005.

CAREY J.A.

1. This is a plaintiff's appeal against a judgment of Awich J dated 12 May 2004, dismissing what is popularly called in the USA, a malpractice suit; it was a claim for professional negligence. It was pleaded that the first respondent, was a medical practitioner, an Ear, Nose and Throat Specialist employed by the second

respondent who owned the facility and with the third respondent, operated it by providing medical services to patients.

2. On the evening of 10 June 2002 the appellant and his wife went out to dinner at a restaurant, managed by his daughter, Michelle. They sat down with her to enjoy a steak dinner. In the course of the meal, Mr. Williams unfortunately, experienced a piece of steak getting stuck in his throat. He went home in the optimistic belief that it would go away if left alone. But that was not to be. He was much discomfited. He found that he could not keep any liquid down. His problem continued into the next day. He consulted a Dr. Hegar but he referred him to a hospital. He attended at the medical centre of the second and third respondents. He saw Dr. Cob, the first respondent. Dr. Cob, whom he knew to be an ENT Specialist, ordered an x-ray of the chest which would show the oesophagus. He was given a barium swallow and experienced, he said, surprisingly no difficulty having it.

3. After the doctor examined the x-ray, the appellant was told to attend later at Belize Medical Association when the obstruction would be removed. He had, he said, observed the obstruction on the x-ray. Dr. Cob told him that it was a simple operation and he would be able to go home immediately afterwards. Mr. Williams punctually presented himself, as requested. A procedure called a rigid endoscopy was performed on him but he did not feel any relief. Dr. Cob told him that it was not a piece of steak on which he

had choked but diagnosed cancer and stated further that his partner Dr. Lizarraga would operate the following morning to remove the cancer. On that very day, Dr. Cob required him to undergo a CAT Scan, a procedure performed by his swallowing barium. It was distressful to Mr. Williams, but in the end, the procedure was completed, but by this time Mr. Williams felt very ill; he had difficulty breathing and was generally distressed.

4. The diagnosis of cancer was a matter of considerable concern to Mr. and Mrs. Williams. The next morning they went to Miami, assisted by the family doctor who accompanied them and who advised a second consultation as to the cancer diagnosis. A referral letter was provided by Dr. Cob. Eventually Mr. Williams was admitted to Baptist Memorial in Miami where surgery was performed on him and he received follow-up treatment for about two months. Mr. Williams was, not surprisingly, put to considerable expense and loss which he put at $809,259.52.

5. The diagnosis in Miami at Baptist Hospital was that there was no tumour, no cancer, there was a perforated oesophagus with mediastinitis. Dr. Niberto Morreno, the Chief of Cardio-thoracic surgery stated that when he examined the patient in the emergency room, he was in a state of sepsis, that is, severe infection. The CAT Scan and x-ray showed that some of the barium swallow administered to Mr. Williams had leaked into the medistinum. That would have occurred because of the perforation in the oesophagus.

6. Dr. Cob the specialist to whom Mr. Williams was referred by the family doctor, Dr. Bulwer, is an otolaryongologist. As explained by Dr. Cob, he was an ENT Specialist and he has space at the Universal Health Services Medical Arts and Surgicenter. He was consulted by Mr. Williams who told him that while dining the previous evening, a piece of steak got lodged in his throat and that he was unable to swallow. He recommended an x-ray with a barium swallow and instructed Mr. Williams to return after the x-ray was completed. The x-ray confirmed an obstruction which in his opinion required removal. He explained what was involved in an oesophagoscopy, the operation required in which he would use a rigid scope to enter his throat and with a special forceps, the food would be safely removed. He indicated that it was a relatively simple procedure which would allow him to go home shortly afterwards if all went well. He was told that the procedure would be performed at the Belize Medical Associates at 5:00 p.m. He re-assured him by advising that the risk was small and Mr. Williams signed a form of consent to the procedure.

7. In the course of the operation, Dr. Cob found that the scope could go no further than the third distal oesophagus where he encountered an obstruction. He did not see any meat about which the complaint was made, but he observed swelling and inflammation which he considered to be a tumour and prompted him to do a biopsy. After Mr. Williams had recovered, Dr. Cob

explained to him and his wife that he had not seen the meat which Mr. Williams choked but rather, swelling and inflammation which suggested a tumour and this he had biopsied. He also advised that he would refer Mr. Williams to Dr. Lizarraga, a surgeon for a consultation. Mrs. Williams was not receptive to his suggestion. She said she preferred that her husband be treated in the U.S. Mr. Williams remained overnight in hospital.

8. Next morning Dr. Julio Diaz performed a CAT Scan on Mr. Williams. Both doctors examined the scan. It showed that a small amount of barium had leaked into the mediastinum. He deduced rightly as it proved, that there was a tear in the oesophagus. This was explained to Mr. & Mrs. Williams as a complication which required immediate treatment but they refused, saying they had already made arrangements at Baptist Memorial Hospital in Miami. He offered to give them a letter of referral and the x-ray films which they collected before their departure.

9. Dr. Cob who was trained in performing rigid oesophagoscopies, gave evidence that when he started practice at the Belize City Hospital in 1992, he performed most if not all the endoscopies until 1996. After that, he relocated at Medical Associates but he was also requested to carry out the procedure at the Karl Heusner Memorial Hospital as well.

THE PLEADINGS: PARTICULARS OF NEGLIGENCE

10. It is helpful to rehearse the averments in this regard.

(i) Performing a rigid oesophagoscopy when (Dr. Cob) was an Ear, Nose and Throat Specialist and not a gastroenterologist and was not equipped with the requisite skill, experience or qualification to perform same

(ii) Performing a rigid rather than a flexible oesophagoscopy

(iii) Perforating the plaintiff's oesophagus

(iv) Performing an unnecessary and wrongful biopsy that was in any event without the plaintiff's consent

(v) Wrongly diagnosing the plaintiff as having a tumour and prescribing wrong and harmful follow-up procedures

(vi) Ordering a Thorax CT Scan with a barium swallow in circumstances where, especially with a torn oesophagus, the barium liquid was certain to escape into and contaminate the mediastinum as well as the pleural cavity. Dr. Cobs at the time knew or ought to have guarded against the possibility of the torn oesophagus.

THE JUDGMENT

11. The learned judge found that there was no proof of negligence on the part of Dr. Cob. The unhappy result is that despite the expense the pain, the suffering and loss Mr. Williams has suffered, he can get no recompense from Dr. Cob.

THE APPEAL

12. Although the appeal was taken against the whole decision, the appellant, did not challenge the finding in favour of the second and third respondents.

13. The grounds of appeal thus challenged all the findings rejecting the particulars of negligence as pleaded save for the particulars as to (ii) above but first, it is convenient to begin with the law which must inform a consideration of this appeal. The law applicable to professional negligence has over the years been stated and restated in a number of cases and is now well settled. It has been said that negligence is not proved simply because something happens to go wrong. See Denning LJ in his direction to the jury in *Hatcher v. Black* The Times 2 July 1954. The cases accept that mistakes will be made in providing medical treatment, even when administered with due skill because risk is inherent in the treatment. The duty of the medical practitioner is to exercise reasonable skill and care or as it is said, he is not obliged to achieve success in every case that he treats. The most well known formulation of the relevant principle is that articulated by McNair J in directing the jury in *Bolam v. Friern Hospital Management Committee [1957]* 1 WLR 582 at p. 586:

> "… But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert

skill: it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art … he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art…Putting it another way round, a man is not negligent if he is acting in accordance with such a practise merely because there is a body of opinion who would take a contrary view".

It is right to point out that the learned judge cited this authority and applied it to the situation as he found in the instant case.

14. Mr. Williams S.C. did not suggest that Awich J in any way misunderstood the principle. He argued some six grounds of appeal.

GROUND 1

The learned trial judge misdirected himself in holding that the determination of negligence was a matter for expert witnesses.

The trial judge, in the course of his judgment, having listed the several medical men who had given evidence on behalf of the respective parties, observed that "medically skilled persons were necessary witnesses. It is from their medical expertise that the question of negligence must be decided. However the value of the testimony of each professional must depend on the quality of the

content. His views must be well grounded on medical sciences to be regarded as responsible opinion".

Learned counsel interpreted this unexceptional statement to mean that unless the experts determined that what had occurred, amounted to negligence, he was not able himself to determine that issue. As an illustration of the judge's abdication of his duty, we were referred to the following passage from his judgment (p. 703 para 25)

> "…so the decision as to whether Dr. Cob did not exercise the ordinary skill of an ENT Specialist also knowledgeable in throat and food canal, must be based on what is acceptable by the standard of such a skilled specialist exercising a specialist's ordinary skill, in the view of responsible and competent doctors. Even among the best, there will be the best of the best. It is not the standard of the single best of the best that is demanded".

With all respect to Mr. Williams S.C., this was the Bolam Test articulated in other words. The judge, far from demonstrating that it was the experts who determined the question of negligence, was pointing out that Dr. Cob was to be measured by what responsible and competent doctors said was the acceptable practice. The experts were not determining whether Dr. Cob reached any standard: They were setting out the standard which it would be for the court to ascertain and say whether the doctor's conduct was in accord with it. This in my view respects what was held by the

House of Lords in *Sidaway v. Bethlem Royal Hospital Governors and Others [1985]* 1 ALL ER 643, namely, that the test of liability in respect of a doctor's duty to warn his patient of risks inherent in treatment was the same as the test applicable to diagnosis and treatment, namely, that the doctor was required to act in accordance with a practice accepted at the time as proper by a responsible body of medical opinion. Lord Scarman in the same case said that "the law imposes the duty of care; but the standard of care is a matter for medical judgment." Learned counsel appreciated that this ground was not supportable when he was constrained to confess that there was no evidence which showed that the issue for the judge's determination, was decided by the experts. I fear that the conclusion must be that this ground is unsustainable.

15. It was then advanced that, the trial judge misdirected himself in holding that the first respondent's admission that he caused the perforation of the respondent's oesophagus cannot be taken to mean that he caused the perforation negligently.

This ground misconceives the relevant legal principle. It asserts that something has gone wrong, the judge admits he went wrong, the only inference which can be drawn is that negligence has been proven. That is not the law and Mr. Williams, accepts and acknowledges it to be so, namely, that negligence is proved when the doctor falls short of the standard of a reasonably skilled medical

man. I do not think that this ground calls for any detailed examination of the circumstances surrounding the aetiology of the perforation. There was absolutely no evidence as to how the perforation was caused. It was inferred that it must have occurred during the oesophagoscopy procedure. It was the escape of barium into the mediastinum which led to the inference of perforation. No one saw it. No evidence was led in that regard. It was not suggested or argued that a rigid oesophagoscopy was contrary to accepted practice. Dr. Morreno who treated Mr. Williams would have been expected, if that were the case, to have said so. Indeed, he stated that "rigid oesophagoscopy is one of the indications to be done with foreign body…". That was evidence from the (plaintiff's) expert witness. It scarcely proved accepted practice nor contributed to proving Dr. Cob's liability in negligence.

16. The learned judge carefully dealt with the question of the perforation in this way:

> "…There are two difficulties in answering the question as to whether the perforation was caused by negligence. First, the probable inferences from the evidence were that the perforation was caused (1) when Dr. Cob may have pushed the rigid oesophagoscope too hard when he reached "the point when it could go no further" or "reached the obstruction" or (2) by pinching which was part of taking biopsy of the tumour. Whichever inference is accepted, it must be demonstrated by

evidence that negligence accompanied it if liability for compensation is to attach. Second, is that there was no evidence as to the nature of the perforation from which one may deduce whether there had been negligence.

17. Dr. Moreno was the only other witness who had a look at the inside of Mr. William's oesophagus. He said he did not identify the perforation, and that was not unusual, 'because of the inflammatory process especially in almost 48 hours of the inflammatory process!' He suggested that it would have been in the form of a pimple. They would have had to wait for the perforation to heal by itself in order to examine the oesophagus. His opinion was that the oesophagus was, "pretty good". I suppose because of that explanation, he was not asked as to whether from his observation of the oesophagus he could say that the perforation had been negligently caused. His evidence suggested to me that the perforation was a tiny one though significant in the fistulization that occurred.

18. This is not a case of *res ipsa loquitur* – see the judgment of Lord Wilberforce in Whitehouse's case in the House of Lords, and of Lord Denning in the Court of Appeal. It is right to say that there has been no evidence to prove that the perforation by Dr. Cob was caused by negligence, that is, by an act which was below the standard of care demanded of a specialist. Counsel identified no such evidence. The particulars of negligence averred at (c), that is, perforating the plaintiff's oesophagus, have not been proved.

The learned judge in my respectful opinion, came to a right decision: his reasons as appears in his careful judgment cannot be faulted. I can find no reason to disagree with his approach or his conclusion.

GROUND 3

19. The trial judge erred in holding that the first defendant/respondent diagnosis of a tumour in the oesophagus was mistaken but not negligence.

GROUND 4

The trial judge erred in finding that although the first defendant/respondent admitted that there was no tumour, his biopsy of the non-existent tumour was not negligent.

Mr. Williams was allowed to argue these grounds together. It is of interest to note that among the particulars of negligence pleaded, there was no averment of mistaken diagnosis simpliciter: there was an allegation that wrong and harmful follow-up procedures were prescribed.

But in developing this ground of appeal, counsel was quite unable to argue with any degree of conviction that the averment of wrong and harmful follow-up had any support factually – Dr. Cob was not allowed to provide any treatment because the family was firm that they would proceed to Baptist Hospital in Miami on the following morning.

20. Dr. Cob undoubtedly made a wrong diagnosis of a possible tumour, but that was not proven to be an act of negligence. Nor was it any part of the case as advanced by Mr. Williams. In my view, it would be unrewarding to examine this point any further.

21. The criticism of illogicality being levelled at the trial judge with respect to his conclusion that it was not negligence on the part of the doctor (who had admitted there was no tumour) to perform a biopsy on a non-existent tumour, is, in my view misconceived. The doctor in the face of the evidence of Dr. Moreno of the Baptist Hospital that there was no tumour, accepted that the blockage was not cased by a tumour. Dr. Cob had carried out a biopsy on the blockage which had prevented the endoscope from passing through the oesophagus. Mr. Williams himself said that the x-ray showed a blockage. Dr. Cob did not see meat which Mr. Williams thought had caused the blockage. Dr. Cob did what any reasonable competent doctor would have done in the circumstances. He performed a biopsy. It was not shown the biopsy had been negligently carried out. Dr. Cob did not carry out a biopsy on a non-existent tumour. It was done as an investigative method of determining what was the nature of the blockage, and as it was suspected it could be a tumour, the biopsy would have removed doubt and settled the matter and Mr. Williams was constrained to concede that Dr. Cob did the correct thing.

22. The remaining ground can be dealt with quite shortly. Learned counsel candidly conceded that no expert witnesses gave any evidence as to the practice in requesting CT Scans. Dr. Cob in ordering the CT Scan gave the clinical data as "obstruction at third distal of oesophagus tumor" and his clinical diagnosis – oesophageal tumour 1/3 distal". The doctor was not then aware of the perforation. He could not have known then because it was discovered subsequently. The particulars of negligence (f), pleaded that the doctor had ordered the CT Scan with a barium swallow, but that was not supported by any evidence. Indeed the relevant document – a request form showed no such direction. These grounds must be rejected.

23. It is sufficient to say that contributory negligence does not arise in the circumstances of this case: Dr. Cob was not proven to have been negligent.

24. I have found this to be a distressing case. It is a very human story. Something went wrong, but that is not enough to prove professional negligence and Mr. Williams, unfortunately, will go without recompense.

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CAREY JA

MORRISON JA

1. At the conclusion of the hearing of this appeal on 14 October 2004, the appeal was dismissed, with costs to the respondents to be taxed, if not sooner agreed. These are my reasons for concurring in that result.

2. This is an appeal from the judgment of Awich J dated 12 May 2004 in which he found for the respondents in the appellant's action claiming damages as a result of alleged professional negligence on the part of the first respondent. The material facts of the matter are not substantially in dispute and the outline which follows is taken from the appellant's skeleton arguments before this Court:

    1. The Appellant says that on June 10, 2002 while eating dinner with his family a piece of steak "stuck in his throat", and a result of which he was unable to "keep anything down" and it caused him to retch and vomit.

    2. On the advice of his family doctor the Appellant attended at the Respondents on June 11, 2002 and consulted the First Respondent who ordered a chest x-ray with barium swallow, which suggested a partial obstruction at the gastroesophagic junction.

    3. The First Respondent advised and carried out a rigid endoscopy on the Appellant on June 11, 2002 and on the following day, he ordered a thorax CT-Scan of the Appellant which was conducted by Dr. Julio Diaz of the Third Respondent with a barium swallow.

    4. The First Respondent diagnosed a complete obstruction of the distal 1/3 esophagus by a tumor that bleeds easily and took a biopsy during the endoscopy. The chest CT-Scan found irregular thickening of the distal esophagus with escape of barium toward the mediastinal structures around the descending aorta. Dr. Julio Diaz of the Third

Respondent diagnosed the Appellant as having a tumor of the distal esophagus with fustulization toward the mediastinal structures around the descending aorta.

5. On learning of the diagnosis of esophageal tumor, the Appellant decided on June 11, 1002, to seek urgent foreign medical attention in Miami, one of the United States of America, and en-route to the Belize International Airport on June 12, 2002, his accompanying physician Dr. Bernard Bulwer, read the First Respondent's report and discovered for the first time that in addition to the diagnosis of esophageal tumor, barium had escaped into the mediastinal structures around the aorta and in to the free cavity due to the perforation of the Appellant's esophagus.

6. Emergency surgery was performed on the Appellant at Baptist Memorial Hospital in Miami on June 13, 2002 and it was determined by flexible endoscopy that he did not have any tumor, that his esophagus was perforated and he suffered from an acute case of mediastinitis due to a perforated esophagus.

7. Several surgical procedures were performed on the Appellant at Baptist Hospital and he was in intensive care for about six to eight weeks, an out patient for several weeks and was unable to work for about three months.

8. The Appellant alleged that the First Respondent was negligent and in breach of his duty of care to the Appellant, and that the Second and Third Respondents were vicariously liable to the Appellant for the negligence of the First Respondent.

9. The Appellant claimed (i) special damages in the sum of $809,000.00, (ii) general damages, (iii) interest and costs.

The appellant's pleaded case

3. The appellant's claim against the respondents was that the first respondent was negligent in his treatment of the appellant in the

circumstances outlined above. The particulars of negligence pleaded by the appellant were as follows:

Particulars of Negligence

(a) Performing an esophagoscopy on the Plaintiff when the First Defendant is an Ear, Nose and Throat Specialist and not a gastroenterologist, and not equipped with the requisite skill, experience or qualifications to perform same.

(b) Performing a rigid rather than a flexible espohagoscopy.

(c) Perforating the Plaintiff's espohagus.

(d) Performing an unnecessary and wrongful biopsy that was in any event without the Plaintiff's consent.

(e) Wrongly diagnosing the Plaintiff as having a tumor and prescribing wrong and harmful follow-up procedure.

(f) Ordering a thorax CT scan with a barium swallow in circumstances where, especially with a torn esophagus, the barium liquid was certain to escape into and contaminate the mediastinum (free cavity, periaortic space etc), as well as the pleural cavity. The first Defendant at the time knew, or ought to have guarded against the possibility of the torn esophagus.

The Defence

4. The essence of the respondents' defence was a somewhat laconic denial of the allegations of negligence on the part of the first respondent, coupled with an unparticularised allegation of contributory negligence on the part of the appellant in deciding to travel to Miami for medical treatment. The allegation that the first respondent was employed by the second and third respondents was also denied. At the close of pleadings, I think it is fair to say that the appellant had basically been put to proof by the respondents of the several allegations put forward on his behalf.

The trial

5. The matter was tried before Awich J who heard evidence from four medical doctors on either side. This is how the learned judge described the witnesses:

> "Mr. Williams called four doctors, namely; Dr. Niberto Moreno, a cardiovascular thoracic surgeon of 16 years experience, at the Baptist Hospital, Miami, Dr. Bernard Bulwer, a fellow in cardiovascular diseases at Havard (sic) University Medical School, Dr. Virginia Smith, and Dr. Julio Manuel Diaz, both radiologists at the Universal Health Hospital. Mr. Zuniga also called four doctors, namely; Dr. Cob himself, Dr. Victor Lizarraga, Dr. Leandro Hegar and Dr. Gregorio Pott, a consultant surgeon of 27 years and 31 years in all of experience as a doctor in Belize. Of course it was not a contest of numbers or of equations of numbers as obtains in Algebra, Chemistry or Physics. Medically skilled persons were necessary witnesses. It is from their medical expertise that the question of negligence must be decided. However, the value of the testimony of each professional must depend on the quality of the content. His views must be well grounded in Medical Science to be regarded as responsible opinion." (paragraph 26 of the judgment).

The judgment of Awich J

6. In a reserved judgment delivered on 12 May 2004, the judge found in favour of the respondents and dismissed the appellant's action, with costs to the respondents. With regard to the second respondent, Universal Health Services Company Ltd., the learned judge found that at the close of the evidence there had been no evidence led on behalf of the appellant to show that it had employed the first respondent or owned or operated the facility out of which he practised, and it is on that basis that the action against it was dismissed. With regard to the first respondent, the learned judge found that the evidence did not disclose that he had acted below the standard of care required from a doctor of his training and experience in the circumstances, and accordingly dismissed the action against him (and, it followed, against the third respondent) on that basis.

7. The learned trial judge expressly based himself on the law relating to professional negligence of medical practitioners as laid down in the well known decision of **Bolam v Friern Hospital Committee [1957] 2 All ER 118**, and subsequently approved in **Whitehouse v Jordan and another [1981] 1 All ER 267**, **Maynard v West Midlands Regional Health Authority [1985] 1 All ER 635**, **Chin Keow v The Government of Malaysia and another [1967] 1 WLR 812** and **Millen v University Hospital of the West Indies Board of Management (1986) 44 WIR 274**. He placed particular reliance

on the following well known passages from the directions to the jury of McNair J in the **Bolam case** (described by Lord Edmund-Davies in **Whitehouse v Jordan** (at page 276) as "the true doctrine …"):

> "[W]here you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."
>
> "I myself would prefer to put it this way: A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view."

8. After a careful review of the authorities, the learned judge accordingly concluded that the question whether the first respondent was negligent in his treatment of the appellant "must be based on what is acceptable by the standard of such a skilled specialist exercising a specialist's ordinary skill, in the view of responsible and competent doctors" (paragraph 25). That, if I may say so, is a conclusion which was fully justified by the authorities.

9. The learned judge then undertook a detailed assessment of the pleaded particulars of negligence and the evidence, against the measure that this test provided, and concluded that it had not been established that the first respondent had fallen short of the standard

of care that the law required of him. The learned judge found, to the contrary, that the "evidence from the plaintiff's own witnesses tended to prove that Dr. Cob acted in accordance with what other responsible professional experts expected and would accept as proper although a mishap took place" (paragraph 59).

10. Finally, on the question of contributory negligence, the learned judge expressed the view that "Had I decided that the defendants were liable, I would have found contributory negligence based on the decision of the plaintiff not to accept further treatment on the suggestion of Dr. Cob thereby delaying the necessary immediate treatment required, which delay aggravated his condition" (paragraph 60).

The Appeal

11. Dissatisfied with this result, the appellant appealed to this Court, filing initially two, but ultimately being allowed by leave of this Court, to argue some seven grounds of appeal in all. I will now deal with each ground, the arguments in support, the applicable law and my conclusion on each.

Ground I -

The learned trial judge misdirected himself in holding that the determination of negligence was a matter for expert witnesses

12. The appellant complained that the question of negligence or no negligence "is always a matter for the judge in trials without jury and not for expert witnesses to decide". The further complaint was that, by leaving the question for the expert witnesses, the trial judge

failed to make his own determination on the evidence and came to the wrong conclusion. This complaint was based on a number of observations made by Awich J in the course of his judgment, described in the appellant's skeleton arguments as "grave and weighty" misdirections and helpfully identified by him as follows:

> "So the decision as to whether Dr. Cob did not exercise the ordinary skill of an ENT specialist, also knowledgeable in throat and food canal, must be based on what is acceptable by the standard of such a skilled specialist exercising a specialist's ordinary skill, in the view of responsible and competent doctors" (paragraph 25)
>
> "Medically skilled persons were necessary witnesses. It is from their medical expertise that the question of negligence must be decided" (paragraph 26)
>
> "… responsible opinion of the expert witnesses called were [sic] not solicited as to whether in the circumstances, failing to inform Mr. Williams about the comparative risks in rigid oesophagoscopy and flexible oesophagoscopy would have been contrary to the practice accepted at the time as proper by a responsible body of medical opinion" (paragraph 39).
>
> "[Dr. Moreno] … was not asked as to whether from his observation of the oesophagus he could say that the perforation had been negligently caused" (paragraph 42).

"The next fact to prove was that the mistake was such that an ordinary specialist exercising and proffering that expertise might have not made that wrong presumptive diagnosis. The evidence must prove that if liability for negligence is to attach" (paragraph 45)

"All expert views agreed that oesophagoscopy was the correct treatment. So the decision to carry out oesophagoscopy was not wrong nor negligent" (paragraph 46).

"… I think expert opinion should have been solicited in evidence about whether due care in the circumstances would require that Dr. Cob specified that barium swallow was not to be used, and whether given what Dr. Cob had seen, it was reasonable to guard against perforation" (paragraph 57).

13. Before this court, Mr. Rodwell Williams, SC submitted that these observations of the learned trial judge demonstrated that, by leaving the question for expert witnesses, he had failed to make his own determination on the evidence and so came to a wrong conclusion. Mr. Philip Zuniga SC for the respondents, on the other hand, stated in his skeleton arguments that "The learned trial judge was simply applying the words of McNair J in [Bolam's case] …".

14. I agree with Mr. Zuniga. In my view, Awich J was doing no more in the extracts set out at paragraph 12 above than to restate in his

own words and in different ways the evidential basis upon which a court may be asked to conclude that a medical man has departed from acceptable standards of patient care, that is, expert testimony to enable the judge to make that assessment in an area that is not readily accessible to a layman. As Oliver J (as he then was) observed in the course of his celebrated judgment in **Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 570, 581**, (a case in fact cited by Mr. Williams SC) "… if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received." And, to similar effect, Lord Browne-Wilkinson observed in **Bolitho (Administratrix of the estate of Bolitho, (deceased)) v City and Hackney Health Authority [1997] 4 All ER 770, 778**, "The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence."

15. I therefore think that in the circumstances of this case the various statements of the learned trial judge of which Mr. Williams SC complained were wholly unexceptionable and fully justified by authority. This ground of appeal therefore fails.

Ground II -

The trial judge misdirected himself in holding that the First Defendant/Respondent admission that he caused the perforation of the Plaintiff's Appellant's oesophagus cannot be taken to mean that he cause the perforation negligently

16. The learned trial judge dealt with the perforation of the appellant's oesophagus as follows:

> "The particulars of negligence [sic] at paragraph (c) was stated simply as "perforating the plaintiffs' oescophagus". I expanded that to mean that it was pleaded that Dr. Cob negligently perforated Mr. Williams' oesophagus. That was still too general a statement. I suppose it was based on the clear evidence of a fistula that demonstrated that there was perforation in the oesophagus and on the circumstantial evidence to the effect that the perforation occurred during the oesophagoscopy carried out by Dr. Cob. He properly admitted that since there had been no escape of barium swallow, a contrast medium, into the mediastanum before the oesophagoscopy, but after, and since in the end there was no tumour as he had diagnosed, it was reasonable inference that the perforation may have occurred during the rigid oesophagoscopy he had carried out. It is to be noted that the admission was that he caused the perforation; it cannot be taken to mean that Dr. Cob admitted that he caused the perforation because of negligence on his part.
>
> There are again two difficulties in answering the question as to whether the perforation was caused by negligence. First, the probable inferences from the evidence were that the perforation was caused: (1) when Dr. Cob may have pushed the rigid oesophaguscope too hard when he reached "the point when it could go no further", or "reached the obstruction", or (2) by pinching which was part of taking biopsy of the tumour. Whichever inference is accepted, it must be demonstrated by evidence that negligence accompanied it if liability for compensation is to attach. Second, is that there was no evidence as to the nature of the perforation from which one may deduce whether there had been negligence." (paragraphs 40 and 41)

17. Mr. Williams SC complained that Awich J's statement as to the "probable inferences" with regard to the cause of the perforation

was “patently inconsistent and irreconcilable with the judge’s findings that the admission of Dr. Cob that he caused the perforation must not be taken to mean that he caused the perforation negligently. Pushing too hard at point of refusal and pinching in act of taking biopsy of non-existent tumor is negligent”. The respondents in their skeleton arguments were content to say that the judge’s reasons for his conclusions (set out at paragraph 16 above) were “quite correct and logical”.

18. I agree with the respondents. This was not a case, as Awich J pointed out at paragraph 43 of his judgment, put up on the basis of res ipsa loquitur, “where the event and injury speak for themselves”. As a case like **Whitehouse v Jordan [1981] 1 All ER 267** amply demonstrates, there can be no liability in this area without negligence, so that even if the plaintiff’s injury was the result of an error that a doctor acting with ordinary care might have made, there would be no liability in negligence. In this case, evidence showed that the incidence of “perforation with endoscopy”, certainly in the United States was not at all high (Dr. Moreno put it at one in ten thousand), thereby highlighting the critical need in a case such as this, in my view, for expert evidence upon which to ground a finding of negligence.

19. The Canadian case of **Gonda v Kerbel (1982) 24 C.C.L.T. 222**, referred to in the appellant’s skeleton arguments as providing a “parallel”, is in my view clearly distinguishable in a manner which

fully justifies Awich J's conclusion that there were evidential shortcomings in the instant case. That is a case in which the plaintiff underwent a bowel examination by sigmoidoscope inserted some ten inches into the rectum (a "sigmoidoscopy"). The evidence was that this was a routine and usually uneventful procedure, which nevertheless carried some risk of perforation of the patient's bowel, with painful and potentially dangerous results. The sigmoidoscopy performed on the plaintiff was very painful, but otherwise uneventful, until later in the day when the plaintiff developed excruciating cramps that necessitated his admission to hospital. After some delay, a perforated bowel was diagnosed, which required emergency surgery, followed by a long, slow and painful convalescence. The plaintiff sued his family physician, who had performed the original procedure, for negligence and expert evidence was called to establish that perforations of the bowel in such procedures were unlikely if due care was used, but that a perforation if made could easily escape the immediate notice of the doctor conducting the procedure. In the light of the evidence, the trial judge was therefore able to conclude "that the defendant on the balance of probabilities and on the preponderance of evidence was negligent, in that he perforated the plaintiff's bowel by failure to exercise reasonable care …" (page 237).

20. So, in the result, **Gonda v Kerbel** is a case in which the evidence was held to justify a finding of negligence, while in the instant case

the judge found that the appellant had not put forward anything beyond the fact of perforation of the oesophagus (indeed this was precisely how this allegation of negligence was particularized), therefore supporting in my view his conclusion that "there has been no evidence to prove that the perforation by Dr. Cob was caused by negligence, that is, an act which was below the standard of care demanded by a specialist" (paragraph 43). This ground of appeal accordingly fails.

Ground III -

The trial judge erred in holding that the First Respondent's diagnosis of a tumour in the oesophagus was mistaken but not negligent

Ground IV -

The trial judge misdirected himself in finding that although the First Respondent admitted there was no tumour as he erroneously diagnosed, his biopsy of the non-existent tumour was not negligent

21. These grounds were argued together by Mr. Williams SC. The learned trial judge had concluded "that the presumptive diagnosis [of a tumour] that Dr. Cob made may have been mistaken, but not negligent" (paragraph 51). With regard to the doing of the biopsy, the trial judge accepted the evidence of the first respondent that "a biopsy should be done at any time there is a suspicious legion [sic] which we do not know its nature" (paragraph 53). In this, the first respondent was supported by the evidence of Dr. Moreno, whose expert opinion as to what should be done "if an examiner through

an endoscope sees what he believes to be a tumour" was as follows:

> "More than likely it is an elective procedure, he should biopsy the tumour. Even if it is not an elective procedure, if the patent is stable then he should go ahead and do a biopsy."

22. I do not think that the trial judge's conclusion based on this evidence can be faulted:

> "I have to conclude that the plaintiff's own witness disposed of the particulars that taking biopsy was wrong and negligent. Particulars at (d) must fail.
>
> That specific consent to take a biopsy was required is unrealistic. Consent for it was implicit in the consent of the oesophagoscopy. The above quoted view of Dr. Moreno also seemed to suggest so. Moreover, it would involve terminating the oesophagoscopy and waiting for the patient to recover from general anaethesia then asking for his consent, and if obtained, administering general anaesthesia again and then proceeding to do the oesophagoscopy all over again in order to reach the "tumour" and do biopsy. My conclusion is that the biopsy was not without consent nor wrongful and negligent." (paragraphs 54 and 55).

23. At the end of the day, in any event, though the misdiagnosis of a tumour and the doing of the biopsy without consent were pleaded

as particulars of negligence, the fact is that absolutely nothing turned on these allegations of negligence in the overall context of the case. On the evidence, the appellant did not choose to travel to Miami primarily because of Dr. Cob's diagnosis of a tumour, but rather because, notwithstanding the efforts of Dr. Cob, he continued to feel very ill. So that no loss was shown to have flowed from either the misdiagnosis or the doing of the biopsy itself. It follows that these grounds also fail.

Ground V

The learned trial judge erred in find that the First Respondent was not negligent in requiring a thorax CT-Scan of the Appellant without guarding against the risk of injury from a perforated oesophagus

24. In support of this ground, Mr. Williams SC argued that the first respondent, in seeking to confirm or otherwise his preliminary diagnosis of a tumour, ought to have directed that the thorax CT-Scan which he ordered should not be done using a barium swallow, but some less harmful contrast medium, "given the risk of serious infection due to perforation." In response, the first respondent's skeleton argument points out that the CT-Scan ordered by him on June 12, 2002 made no reference to the contrast medium to be used, but it did state the preliminary diagnosis of "oesophagal tumour".

25. The learned trial judge dealt with the appellant's complaint on this point in this way:

> "First, the evidence shows that Dr. Cob did not know about the perforation until after the result of the thorax scan he had requested. Secondly, he did not specifically order that barium be used. Thirdly, I think expert opinion should have been solicited in evidence about whether due care in the circumstances would require that Dr. Cob specified that barium swallow was not to be used, and whether given what Dr. Cob had seen, it was reasonable to guard against perforation. Moreover, the radiologists, were experts in their field, could they not be trusted with making the right choice of the appropriate contrast medium? My decision is that negligence was not proved in the particulars at paragraph (f)." (paragraph 57).

26. Again, I think that the learned judge was correct in this, for the reasons given by him. In any event, it appears to me that the manner in which this ground was formulated and advanced before this Court involved a significant shift from the appellant's pleaded case on the point in the Court below, which was that the first respondent was negligent in "ordering a thorax CT scan with a barium swallow in circumstances where, especially with a torn esophagus, the barium liquid was certain to escape into and contaminate the mediastinum …" (paragraph 9(f) of the Amended Statement of Claim). The evidence adduced on behalf of the appellant at the trial did not support the allegation that the first

respondent ordered that the scan be performed using a barium swallow, so on that basis alone the appellant's complaint at the trial in this regard was bound to fail. Quite apart from this, there was no evidence to suggest that a doctor in these circumstances ordering a CT-Scan would ordinarily be expected to specify the contrast medium to be used. In the absence of such evidence, one would have thought, as the judge observed, that this was a decision for the radiologists. This ground of appeal accordingly fails as well.

Ground VI

The trial judge erred in holding that the Appellant refused to accept any further treatment beyond the CT-Scan under the supervision of the first Respondent and so caused or contributed to his own injury

27. This ground was not vigorously pursued before this Court by Mr. Williams SC, so I need not spend too much time on it in this judgment. Suffice it to say that, without expressing a concluded view, I might have found it difficult, if it remained a real issue in the case, to support the learned judge's view that "Had I decided that the defendants were liable, I would have found contributory negligence based on the decision of the plaintiff not to accept further treatment on the suggestion of Dr. Cob thereby delaying the necessary immediate treatment required, which delay aggravated his condition" (paragraph 60).

28. The evidence disclosed that the appellant and his family were caught up in the agony of an extraordinarily difficult moment and the unchallenged evidence is that their decision to travel to Miami

for further medical consultations when they did in all probability saved his life. In those circumstances, and on the state of the evidence generally, I would myself have been wholly unable to accept, as was pleaded in the Defence (paragraph 11) that "the matters complained of were caused or contributed to by [the] Plaintiff deciding on the advice of Dr. Bernard Bulwer to travel by aircraft to the United States of America on or about 12th June 2002."

Ground VII

The decision of the learned trial judge was unreasonable and against the weight of the evidence

29. As with Ground VI, this Ground was not pursued with any conviction in the hearing before us, correctly so, in my view, as in the light of all that has gone before I think it was bound to fail.

Conclusion

30. The learned trial judge acknowledged that the perforation of Mr. Williams' oesophagus and its very nearly tragic sequel constituted "a grave incident… [and] … an occurrence that invokes the sympathy of anyone, including mine" (paragraph 59). No one could possibly disagree with this assessment. Despite the natural "anxiety as to the result" (as Lord Slynn put it in the Bolitho case at page 779), that these concerns inevitably generate, I am satisfied that it has not been demonstrated that the learned judge fell into error on the basis of the evidence before him, in finding against the appellant, as he did. It is for these reasons that I agreed with the

disposition of the appeal in the manner indicated at paragraph 1 above of this judgment.

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MORRISON JA

MOTTLEY P

I have read the judgments of Carey JA and Morrison JA. I agree with reasons set out therein for our decisions.

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MOTTLEY P