JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 116 OF 1998

SUIT NO. C.L. 1994 / M - 272

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**VINCENT MORRISON**	**PLAINTIFF/APPELLANT**
A N D	**NUTTALL MEMORIAL TRUST LIMITED**	**DEFENDANT/RESPONDENT**

Leonard Green and Sylvan Edwards instructed by Chen, Green and Company for the appellant.

Misses Nancy Anderson and Suzette Wolfe, instructed by Crafton Miller and company for the respondent

February 7th and 8th and July 31st 2000

PANTON, J.A.

This is an appeal from a judgment of **Cooke, J.** made on the 25th September, 1998, in favour of the defendant with costs to be agreed or taxed. The appellant, a pensioner since 1988, had filed a claim against the respondent on the 30th June, 1994, for negligence in respect of the administering of an injection which the appellant maintains has resulted in injury to his left foot.

The statement of claim

The relevant portions of the statement of claim read thus:

"3. On or about the 27th day of June, 1993, at about 7.00 p.m. the plaintiff was admitted to the defendant hospital for treatment of a kidney infection when a nurse in the defendant's employ negligently administered an intramuscular injection to the plaintiff's left buttock

Particulars of negligence

(a) Failing to properly administer the said injection

(b) Injecting the plaintiff in the peroneal component of the sciatic nerve.

4. By reason of the aforesaid the plaintiff has suffered personal injury, loss and damage.

Particulars of injury

(1) Damage to paroneal component of sciatic nerve

(2) Severe pain in the left foot

(3) Numbness in left foot

(4) Absent left ankle jerk

(5) Diminished to absent sensation along the lateral border of the left foot.

(6) Weakness in dorsiflexion of the left foot
Inability to ambulate on the balls of the feet."

The trial was a short one. The appellant was the only witness who took the stand. He said that he had been hospitalized due to a kidney ailment which required an operation. He was admitted to hospital on June 26, 1993, under the care of Dr. Mary Sloper. At the time of admission the appellant was 71 years old and, according to a medical report which was admitted into evidence, Dr. Sloper thought that he was suffering from "acute pyelonephritis with a possibility of non radio opaque renal tract calculi". She ordered "voltaren 75mg., buscopan 1 vial to be given by intramuscular injection four hourly as necessary." A nurse, apparently carrying out Dr. Sloper's

instructions, injected the appellant in the left buttock shortly after his admission. During the injection, the appellant felt an electric shock from the hip down into the toes. He lost sensation in the left foot. Next morning, when he attempted to walk the left foot gave way, and was completely dead for the period of eight or ten days that the appellant spent in the hospital. He was in pain for about six months. During his hospitalization, the appellant took tablets that had been prescribed by Dr. Sloper .

The medical opinion gleaned from the reports admitted in evidence suggested that damage had been done to the peroneal component of the sciatic nerve. The sudden, acute onset of symptoms following the intramuscular injection made this conclusion the more likely of two possibilities. The other possibility was damage to L5/S1 nerve roots.

The decision

The learned trial judge asked himself the following questions of fact:

1. Did the injection damage or cause damage to peroneal component of the sciatic nerve?

2. Were there injuries?

3. Were these injuries attributable to the damage to the peroneal component to the sciatic nerve?

He answered them in the affirmative. He then asked himself what he described as "the legal question": in administering the injection, was the nurse negligent? The appellant's attorney-at-law had placed reliance on the case **Dias Calderia v. Frederick Augustus Gray** (1936) 1 All E.R. Rep.540, a decision of the Privy Council. The learned judge expressed the view that although the facts of the quoted case bore close resemblance to the instant matter in that a quinine injection had been administered to the buttock resulting in injury to the sciatic nerve, that case "was not concerned with

negligence per se, but rather with the approach of Their Lordships' Board in reviewing findings of fact by a final tribunal." He then referred to the submissions made by the respondent's attorney-at-law which included a quotation of a passage from **Charlesworth on Negligence** (6^{th} edition) page 968, paragraph 969. In arriving at his decision, the learned trial judge stated that he accepted the passage as being a correct enunciation of the law. He delivered himself further thus:

> "To succeed the plaintiff on whose shoulders lies the burden of proof must adduce evidence:
>
> 1. to show that there was a normal practice in respect of administering injections to the buttocks
>
> 2. to prove on a balance of probabilities that the defendant had not adopted it
>
> 3. finally, to show that the way in which the injection was administered no professional nurse of ordinary skill would have injected the plaintiff in that manner had she, the nurse, been taking ordinary care."

The learned judge stated that there was no evidence before him as to what would be the normal practice so far as administering an injection in the buttocks was concerned. That being so, and there being no evidence as to a breach of the normal practice, he had no choice but to find in favour of the defendant. "The plaintiff", he said, "has failed to discharge the requisite burden".

The grounds of appeal

> "1. The learned trial judge erred as a matter of law in that he failed to allow an application made by counsel for the plaintiff to call Dr.Graham to give testimony and in disallowing the application the learned trial judge failed to apply the correct legal principles in coming to that determination.

> 2. The learned trial judge erred in that he failed to properly analyse the medical report of Dr. Sloper and by so doing did not conclude inescapably that an omission of the nurse to administer the injection in compliance with the directive of Dr. Sloper, constitutes an act of negligence on the part of the nurse res ipsa loquitur.
>
> 3. The learned trial judge erred as a matter of law in not finding in the circumstances that the defendant/respondent had a duty to rebut the probability that the conduct of the nurse was not in keeping with general and approved medical practice."

The submissions in respect of grounds 2 and 3

It seems appropriate and convenient to deal with these grounds together as they relate to the question of whether there had been negligence on the part of the nurse. Mr Green , although accepting that there were deficiencies in the appellant's case, submitted that the essential question was whether the nurse was negligent. While conceding that there was no direct evidence that the injection had been improperly administered, he further submitted that once the judge had found that the injection had caused damage, and there had been no answer or explanation by the respondent, negligence ought to have been assumed as proven. He cited in support of this proposition the judgment of Birkett, J. in the case **Voller v. Portsmouth Corporation and Others,** delivered on April 29, 1947, and reported at Volume 203 The Law Times, May 17, 1947. In that case, the plaintiff suffered a fractured femur and was admitted to a public hospital. Due to difficulty in uniting the femur at the point of fracture, a decision was taken to try to join the bones while the plaintiff was under an anaesthetic administered by a spinal injection. The anaesthetic was administered and the operation performed in the ward instead of in the operating theatre. The relevant staff prepared themselves properly for the operation by washing their hands etc. However, the plaintiff developed meningitis two days after the

operation and the defendants (two resident medical officers and a visiting surgeon) admitted that the meningitis must have been caused by an infection during the administration of the spinal anaesthetic or contained in the anaesthetic. The plaintiff was permanently paralysed in both legs. Birkett, J. held that the onus was on the plaintiff to show negligence and on the evidence there was no negligence either in the treatment of the fracture, in performing the operation in the plaintiff's bed in the ward instead of in the operating theatre, or in the treatment of the supervening meningitis. There must, however, have been some breach of the antiseptic techniques in the hospital, and, since the senior resident medical officer had prepared himself for the operation in the proper way, there must have been some infection in the apparatus used for which all the nursing staff would be responsible. The nursing staff were servants of the hospital and, therefore, servants of the defendant corporation, who, as the local authority maintaining the hospital, were liable for the negligence of the nursing staff. No negligence had been proved against the individual defendants.

There is a marked difference between the instant case and that which has been cited. In the latter, there was evidence to support the conclusion of Birkett, J. Indeed, there was a critical admission by the defendants as to the source of the meningitis. In the instant case, as Cooke, J. said, there is no evidence. Before inferences may be properly drawn, evidence has to be presented.

The appellant further submitted that the circumstances were such that once he had given evidence of having sustained an injury, res ipsa loquitur applied; and in the absence of any evidence from the respondent to explain the injury, the respondent would be liable. In this regard, he placed reliance on the case of **Cassidy v. Ministry of Health** (1951)2 K.B.

343. In that case, the plaintiff had entered hospital for an operation on his left hand which required post-operational treatment. While undergoing that treatment, he was under the care of the surgeon who had performed the operation and who was a full time assistant medical officer of the hospital. Other persons who were responsible for his post operational treatment were the house surgeon and members of the nursing staff of the hospital who were employed under contracts of service. At the end of the treatment, it was discovered that the hand had been rendered useless. The trial judge dismissed the action for damages for negligent treatment which had been brought against the hospital on the ground that the plaintiff had failed to prove any negligence. It was held that in the circumstances, the doctrine of res ipsa loquitur applied, and the onus lay on the hospital authority to prove that there had been no negligence on its part or on the part of anyone for whose acts or omissions it was liable, and that onus had not been discharged.

It seems that there was clear evidence of negligence in the **Cassidy** case. Counsel for the defendants admitted that on a detailed analysis of the evidence of one of the doctors the probable cause of the loss of use of the hand was interference with the circulation of the blood in the hand or fingers. The operation required a type of splinting which necessarily interfered with the circulation of the blood. The splinting was too tight and that resulted in the poor circulation. In addition, the plaintiff reported to the nurses that he was in exceptional pain but no remedial action was taken.

The real point in the case was, therefore, whether the defendant as employer of the various persons who treated the plaintiff was liable. And, with respect, that is how the learned judges of appeal dealt with the matter. For example, Singleton,L.J. concluded his judgment thus at page 359:

"The conclusions at which I arrive are:

> (1) The prima facie case made out on behalf of the plaintiff has not been displaced.
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> (2) It is clear that there was negligence in regard to the post-operational treatment.
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> (3) It is not possible for the plaintiff to say that the negligence was the negligence of any particular individual: it may be that a number of people were at fault, or that lack of system was the cause. Everything was under the control of the hospital authorities, and those immediately concerned were in the employ of the corporation.
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> (4) Responsibility lies upon the defendants. Even if it were shown that the whole of the trouble was due to negligence on the part of Dr. Fahrni—and that cannot be said to be the position—responsibility would still lie upon the Ministry. They are answerable whether the negligence was that of Dr. Fahrni or of Dr. Ronaldson, or of the nursing staff.
>
> No doubt the damage was increased by the leaving on of bandage and splint after the Monday, but it is unnecessary to go into this question if, as I think, responsibility for the whole of the damage lies upon the Ministry."

In **Dias Calderia v Fredrick Augustus Gray** (1936) 1 All E.R. Rep. 540, the respondent, a sales manager, had sued the appellant , a doctor, for damages on the basis of negligence. The respondent had been treated by the appellant for malaria, and it was the contention of the respondent that in giving him a quinine injection in the right buttock, the appellant had travelled beyond the safe area for injection, and that the quinine had injured the respondent's sciatic nerve, with the result that he had been permanently lamed. This was a case from Trinidad and Tobago. By the time it reached the Privy Council, Lord Alness was in a position to observe that the matter before them did not involve any issue of law.

They had a pure question of fact for determination. It was agreed that the onus of proof was on the respondent, and that if he were to succeed, he had to demonstrate "beyond reasonable doubt that the appellant was negligent , and that his negligence caused the injury of which the respondent complains". There was, said Lord Alness, ample evidence to support a "verdict for the respondent". The learned Law Lord then went on to discuss the circumstances in which an appellate Court would overturn a decision made below on the facts. The full extent of the evidence that was placed before the trial Court was not set out in the report of the judgment. Nevertheless, it must have been much more than was presented in the instant case as the Privy Council found that there was "ample evidence".

In its response to the arguments of the appellant, the respondent submitted that the injection was administered in accordance with the directions of Dr. Sloper, and there had been no breach of technique in the procedure. In any event, according to the respondent, there was no evidence of what was the normal practice; nor was there any evidence that the nurse had not adopted the normal practice. Further the respondent has challenged the application of the doctrine of res ipsa loquitur to the instant situation. The appellant, it was submitted, has simply failed to prove his case in that he did not adduce any evidence to support the allegation of negligence against the respondent.

The Court is of the view that the position adopted by the respondent is a very sound one. Due to the condition of the appellant when he was seen by Dr. Sloper, the latter prescribed certain medication which required the giving of an intramuscular injection every four hours, if necessary. Only one injection was given. Several days later clinical examination by Dr. Graham revealed that the appellant's peroneal component of

the sciatic nerve had been damaged. There is not the slightest suggestion that the diagnosis or prescription of Dr. Sloper was wrong. Further, there is no evidence to suggest that the injection had not been properly given. Neither Dr. Sloper nor Dr. Graham was called to give evidence at the trial. This is understandable as neither medical practitioner gave even a hint in their written reports of anything untoward having been done by those who had the care of the appellant at the defendant's institution. In a case of this nature it is not sufficient to say that there could not have been any injury if there had been no negligence. The plaintiff in a civil case has the burden of proving that which is alleged.

The case **Hucks v. Cole and Another** (The Times, May 9, 1968; The Solicitors' Journal,1968, Vol. 112 at page 483.) is of importance in this regard. The plaintiff had claimed damages against the defendant medical practitioner who had treated her. The trial judge (Lawton, J.) found that although the defendant had not been negligent in respect of the prescription, he had made a grave error in not prescribing more antibiotics when he had noticed that the plaintiff's lesions had not healed. In the Court of Appeal, Lord Denning M.R. said that a charge of professional negligence against a medical man was a serious charge, on a different footing to a charge of negligence against a car driver. The report in the Solicitors' Journal quotes Lord Denning as saying the following:

> "As the charge was grave so should the proof be clearer.
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> The burden of proof was correspondingly greater.
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> A doctor was not to be held negligent simply because something went wrong. He was not liable for schance, or misadventure; nor for an error of judgment.

> He was only liable if he fell below the standards of a reasonably competent practitioner in his field, so much so that his conduct was deserving of censure or inexcusable".

There can be no substitute for evidence, and so where it is lacking it will be difficult, if not impossible, for a plaintiff to succeed. The appellant in this case has not proven the negligence that has been alleged against the nurse. And the position of the nurse is no different, in the circumstances, from that described by Lord Denning (above) in respect of a doctor. The doctrine of res ipsa loquitur has been prayed in aid by the appellant. With respect, it is not so much as a straw that can be clutched at in the circumstances of this case. It is well known that the doctrine is applicable when an unexplained occurrence has taken place, and it is an occurrence which would not have happened in the ordinary course of events without someone being negligent. It does not apply when the cause of the "accident" is known. In the well known case **Bolton v. Stone** (1951) 1 All E.R. 1078, Lord Porter said at page 1081:

> "Where the circumstances giving rise to the cause of the accident are unknown, that doctrine may be of great assistance, but where, as in the present case, all the facts are known, it cannot have any application".

In the instant case, the appellant has produced evidence that it was the injection that caused his problems. However, he has not shown what is the normal practice; nor has he shown that there has been a deviation from the standard practice, thereby resulting in the injury. "Res ipsa loquitur" cannot be used to fill the lacuna in the evidence. The appeal cannot succeed on these grounds.

Ground 1

The appellant has challenged the decision of the learned trial judge in refusing to grant an adjournment to call a witness. In this regard, it was submitted that the plaintiff was denied the opportunity to call a witness to clarify the evidence in the case. The note of the judgment indicates that on the date of the conclusion of the case, that is, September 25, 1998, an application was made "for an adjournment to **subpoena** Dr. Graham". At that time, the respondent had already closed its case. The learned trial judge, in refusing the application, pointed out that the witness to be called had been in Jamaica continuously and that although the case had been tried over a period of three days, there had not been any indication that it was intended to seek an adjournment to call this witness. He described the application as "more than a little curious". It should be added that it did not escape the judge's attention that Dr. Graham's report bore a 1993 date - 5 years before the trial.

There is hardly need for a reminder that the granting of an adjournment is a matter which is in the discretion of the trial judge. Like all discretions, it must be exercised in a just manner, that is, taking into account the various competing interests and ensuring that justice is done. In **Maxwell v. Keun** (1928) 1.K.B. 645, the matter of the dismissal of an application for the postponement of the hearing of an action was the subject of an appeal to the English Court of Appeal. In reversing the decision of Lord Hewart, the Lord Chief Justice of England, the Master of the Rolls, Lord Hansworth, quoted from the judgment of another Master of the Rolls, Cozens-Hardy, in the case **Sackville West v. Attorney-General** (128 L.T.Journal 265):

> "...although it could not be said that under no circumstances would the Court of Appeal be justified in

> interfering with the discretion of the learned judge in a Court below as to the proper mode and time of trying an action, yet it would only be in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of the business in his own Court could succeed; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that, withstanding any exercise by the learned judge of the power of control which he would have over the action when it came on for trial, justice did not result and he had failed to see that such would be the effect of his decision".

Lord Justice Atkin agreed (page 653) that:

> "The Court of Appeal ought to be very slow indeed to interfere with the decision of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or the other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so".

At page 658, Lawrence, L. J., concludes:

> "This Court never interferes with the discretion of a judge below in arranging his list or in fixing the time for trying any cases before him unless that discretion is exercised so as to result in a denial of justice."

An examination of the circumstances reveals that the suit was filed on the 30th June, 1994, and the defence on the 27th July, 1994. It was more than four years later that the issues were tried in the Supreme Court. During the wait for trial, the appellant received the medical reports. There was ample time to study the reports and to prepare the case for trial. Indeed, a certificate of readiness would have been filed by the appellant. No circumstances were disclosed to the judge to indicate any problem with the availability of any witness. It was, we find, most unreasonable, if not a sign of

negligence, for the appellant to wait until the completion of all testimony in the case to then apply for an adjournment to seek the issuance of a subpoena for a witness. No party should be permitted to dictate the pace at which the Court may proceed especially after a wait of several years for a trial date. In any event, the report of the witness whom it was intended to call at that late stage does not show that there was any further evidence available to prove the negligence alleged of the nurse. We find that the learned judge was correct in refusing the application for an adjournment.

The appeal having failed on the grounds filed is dismissed with costs to the respondent to be agreed or taxed.

DOWNER, J.A.:

I agree.

WALKER, J.A.:

I also agree.