[2020] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 81/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**DR VEON WILSON**	**APPELLANT**
AND	**VICTOR THOMAS**	**RESPONDENT**

Ms Carol Davis for the appellant

Ian Wilkinson QC and Lenroy Stewart instructed by Saverna C Chambers for the respondent

4 June 2018 and 3 July 2020

PHILLIPS JA

[1] This appeal arose out of a claim made by the respondent, Mr Victor Thomas (VT), against the appellant, Dr Veon Wilson, his medical practitioner, for damages for negligence which resulted in severe injuries to his right eye, loss and damage. These allegations were vigorously denied by Dr Wilson. The matter was tried by Cole-Smith J who found that Dr Wilson was indeed negligent, and that that negligence was the probable cause of the injuries suffered by VT. The learned judge awarded general and special damages with costs to be agreed or taxed to VT. The appellant is now seeking

to have that decision set aside on the basis that the learned judge erred in her findings on negligence and causation.

Background facts

[2] The facts, as stated, are taken from the respective pleadings and witness statements of the parties.

[3] On Thursday, 7 December 1995 (when VT was 26 years of age), VT had been repairing his Nissan bus at his home at 26 Main Street, Spanish Town in the parish of Saint Catherine. He had "placed a section of the front end across four (4) blocks and ... was using a chisel to hammer it when a piece of metal went into his right eye". His right eye started to "feel foggy" and he noticed blood in it.

[4] VT decided to seek medical attention and visited Dr Wilson's office in Spanish Town. He was accompanied by four persons, one of whom was his brother, Noel Thomas, who was present during his consultation with Dr Wilson. VT indicated that Dr Wilson had questioned him as to the problem he was having, and he told her, in his brother's presence, that he "was hammering a front end part which was from [his] bus and while hammering it a piece of metal went into [his] right eye" which "caused [his] eye to hurt". VT stated that Dr Wilson then "examined [his] right eye by searching [it] with a light, rubbed it with a piece of cloth and gave [him] eye drops from her office and told him to return the following Monday for a follow-up visit if [his] vision did not come back". VT paid Dr Wilson $500.00 for the visit and $500.00 for the eye drops.

[5] However, during the night of Friday, 8 December 1995, VT's right eye became swollen with pus and blood coming out of it and the pain VT had been experiencing worsened. Early the next morning (Saturday, 9 December 1995), VT visited the Spanish Town Hospital (STH) where his eye was examined, and he was given an injection along with a referral letter and instructions to go straight to the Kingston Public Hospital (KPH). VT immediately visited KPH where he was admitted and an x-ray done. On 11 December 1995, VT underwent surgery on his right eye from which a metal particle was removed. He spent 27 days at KPH and was discharged on 4 January 1996. One of the doctors who treated him at KPH was Dr Donovan Calder.

[6] VT required further treatment for his right eye which he sought and obtained from Pannu Laser Institute in Fort Lauderdale, Florida in the United States of America. That institution specialised in eye care treatment. VT made several trips to Florida to obtain treatment from that institute, and while there, he was treated by Dr Vasant J Balar. VT stated that he experienced severe pain and discomfort, on and off, from the date of his surgery until late February 1996. VT's right eye was examined by Dr Carl Phillip Hamilton, in Jamaica, on 11 June 1996, who indicated that VT's right eye was shrunken and he had a complicated cataract. After another visit to Pannu Institute on 27 July 2004, VT was examined by Dr Bita Sabripour, who, after performing several examinations and tests, confirmed that VT had no vision in his right eye. VT's eye had also been examined in Jamaica by Dr Calder, who conducted a number of tests, and has prepared a medical report.

[7] VT indicated that he had obtained several medical reports from the various doctors who had examined him over the years, and since 9 December 1995, he has had no vision in his right eye. His attempts to seek and obtain treatment for the injury to his right eye resulted in considerable expense, debt, and an inability to work from 7 December 1995 to 14 July 1997. VT stated that the loss of vision in his right eye has affected his daily life as he has lost confidence in himself, and he is often reluctant to speak to people who often stare at him and make fun of his "one eye". He also had to cease driving at nights due to the difficulty he had experienced doing so.

[8] As indicated, VT filed a claim by writ of summons on 30 July 1997 against Dr Wilson for damages for negligence, in that, he was negligently treated, attended to and advised by Dr Wilson, and as a result, sustained severe injuries to his right eye, suffered loss and damage, and incurred expenses. In his amended particulars of claim, filed 10 February 2009, VT pleaded seven particulars of negligence set out below:

> "(a) Failing to diagnose or suspect that [VT] had a foreign object or foreign objects lodged in his right eye and failing to give or procure any treatment for the same or any investigation which would have discovered the same.
>
> (b) Failing to observe or heed or to take any reasonable steps to investigate the complaints of [VT] as to his condition.
>
> (c) Failing to observe or to act upon or to investigate properly or at all the condition of [VT's] right eye.
>
> (d) Causing the foreign object to be lodged further in [VT's] right eye by rubbing same with a piece of cloth.

(e) Failing to recommend [VT] to an eye specialist or other person competent to deal with the matter.

(f) Failing to take any or any adequate or proper precautions to avoid doing further damage to [VT's] eye.

(g) [VT] will further, if necessary, rely upon the doctrine of Res Ipsa Loquitur." (Underlined as in original)

[9] The particulars of injuries were also set out. They were as follows:

"1. Loss of sight in right eye

2. Visual Acuities: Right eye - eye - hand movements - left eye - 6/5

3. Small Hypopyon

4. Scleral laceration nasally

5. Radio-opaque mass in right orbit

6. Pus in vitreous humor

7. Painful infection of right eye

8. Total posteriad synechiae with blood

9. Vessels on posterior capsule and rubeosis red and swollen conjunctiva.

10. Blind right eye

11. Disfigured right eye

12. At least 16% visual impairment" (Underlined as in orginial)

[10] VT therefore claimed special and general damages, with interest, costs and attorneys' costs.

[11] Dr Wilson indicated in her witness statement that she was a general medical practitioner in Jamaica with a diploma in public health. She accepted that VT had visited her office to seek treatment on 7 December 1995. She stated that VT had informed her that:

> "...he was working under a motor vehicle and some part of the engine fell on his face. He said he was in pain and his behaviour appeared to be that of a person in pain. He had is right hand over his orbital area."

[12] Dr Wilson stated that she had examined VT and made notes which she attached to her witness statement. Based on her experience, she diagnosed VT with photophobia which she said occurs "when the eye closes the lid so that light cannot enter the pupil", which, she said, is a usual response following an injury to the eye. In order to examine the eye, Dr Wilson opened it and shined a light into it, where she noticed that "the pupil did not respond", whereas, in a normal eye the pupil would retract in size. Dr Wilson stated that she noticed sub-conjunctival haemorrhage, which she described as "bleeding underneath the outermost superficial layer of the eye – the thin film that covers the eye". She stated that VT had said that "he felt as if something was sticking him in the eye", and so she "carefully turned over the eyelid" to ascertain the cause. She placed some anti-inflammatory drops in VT's eye to reduce pain and congestion, and to flush out any debris that may have been in the eye. She then used a sterile gauze from a sterile commercial packet to "sweep" the eye. It was a "feather like movement" applied without any pressure. Upon her examination, although VT was

complaining of pain from obvious injury to his eye, his visual acuity appeared to be intact.

[13] Dr Wilson stated that she had enquired of VT whether the sticky feeling in his eye remained after her examination, because, if it did, she would have referred him to a specialist. She stated that VT had told her that he was "feeling better and the sticking was not there". She then gave him eye drops named "Tobradex" to reduce inflammatory reaction and infection. She denied rubbing VT's eye with a piece of cloth and denied telling VT that his eye would be fine. Instead, she stated that she told VT that "if he felt any discomfort in the eye in the next 24 to 48 hours he was to return immediately on feeling the discomfort", and that there was a possibility he could be referred to a specialist.

[14] She accepted that VT had been correct to go to the hospital when he felt pain subsequently, as if he had attended her office, she would have immediately referred him to a specialist. However, she denied any negligence in her treatment of VT, as she treated him in accordance with normal medical practice, and with regard to the symptoms for which he had complained when he visited her office. She further "emphatically" denied that any aspect of her treatment of VT caused the loss of sight in his right eye or any of the symptoms about which he currently complained.

The trial

[15] In the pre-trial memorandum filed by VT, he set out the issues which were to be decided at the trial, namely:

1. whether having been told that there was a foreign particle in VT's eye, Dr Wilson had a duty to seek advice from an eye care specialist and not proceed to treat VT;
2. did Dr Wilson's use of a sterile gauze on VT's eye push the particle further in his eye causing the extent of the damage sustained;
3. whether Dr Wilson, in treating VT, was negligent in undertaking work which was beyond her competence;
4. in dealing with and treating VT, had Dr Wilson displayed proper standards of the medical profession;
5. had she discharged her duty properly in taking the details of VT's injury; and
6. ought she to have recognised the seriousness of the situation and recommended tests, admission to hospital, or make an immediate referral to an eye care specialist.

[16] As indicated, the matter was tried before Cole-Smith J between 10 February 2009 and 27 October 2010. During the trial, evidence was elicited from witness statements and from oral testimony.

[17] In his oral testimony, VT amplified and emphasised certain statements made in his witness statement which had been tendered and admitted into evidence. In cross-

examination, he accepted that he was not a "full mechanic", and that when he had been chiselling metal from the bus, he had not been wearing any goggles. He stated that he had not told Dr Wilson that while he had been lying on his back and working on the engine something had fallen on his face, for if that had happened, his nose would have broken. He stated that it was not true that after drops were placed his eye, he waited for three quarters of an hour and then told Dr Wilson that he no longer felt anything in his eye. Although he did not know what a sterile gauze looked like, he stated that Dr Wilson swept his eye with a piece of cotton cloth and not a sterile gauze.

[18] VT stated that Dr Wilson never told him that if he felt anything after 24-48 hours she would refer him to a specialist. However, he confirmed that Dr Wilson had told him that if his eye sight did not return, he should visit her on the following Monday. He insisted that he had told Dr Wilson that a piece of metal had gone into his eye, as he had felt it, and that she had said that she had not seen anything in his eye. He said that when he visited Dr Wilson, he could hardly see and he was in lots of pain with blood coming out of his eye. He indicated that from the night of Friday, 8 December 1995, until the date he was giving evidence in court, he had been unable to see from his right eye.

[19] A medical report prepared by Dr Calder was tendered and admitted into evidence. So too was an expert medical report dated 12 June 2000 prepared by Dr Carl Phillip Hamilton, an ophthalmologist and a medical doctor, who testified on VT's behalf as an expert witness. In Dr Hamilton's medical report, he indicated that he first saw VT on 11 June 1996. He set out the history that VT gave him which included that "a bit of

metal got into his right eye and caused a little bleeding". On examination, he deduced that VT had:

> "a shrunken right eye (phthisis bulbi) due to complications caused by a metallic intraocular foreign body which resulted in inflammation of the vitreous humour and a complicated cataract."

[20] He had been asked four questions in respect of the production of the report. I will endeavour to summarise his response.

[21] The first question related to whether VT's injuries were aggravated by the doctor who first attended to him by rubbing his eye, and if so, in what manner. In response, Dr Hamilton indicated that this was unlikely, as the metal likely hit the eye at great speed and went through the coats of the eyeball. If the metal particle was embedded in the wall of the eyeball, inexpert attempts at removal could have pushed it further, but that effect would "not be so severe". However, he stated that "the initial damage and risks of later complications increases as the depth of penetration of the foreign body into the eye increases".

[22] The second question asked was whether the blindness to the right eye could have been prevented or the injuries minimised if the particle had been removed immediately upon discovery. I shall set out his answer to this question in its entirety as paraphrasing or summarising the same may lose some of its portent. It is as follows:

> "Removal of metallic intraocular foreign bodies as soon as possible yield the best results as toxic effects of the

> breakdown of the metallic material can start very early. Also growth of fibrous tissue and blood vessels can start as early as four days after injury, especially if there is bleeding in the eye. So early removal of a foreign body may possible [sic] reduce consequential injuries and reduce the risk of blindness. Please note, however, that the outcome is more related to the nature of the foreign body, the training of the surgeon and the nature of the surgery done, than the time lapse before the foreign body is removed."

[23] Question three asked whether the eye could have been saved if something had been done within two days of the injury. Dr Hamilton said "possibly" but referred to his comments made above in answer to the second question posed. And also, in answer to whether it was the fact that the foreign body had been left unattended for two days that had caused the blindness to the right eye, Dr Hamilton responded in the negative, and said that other factors were at work for blindness to be the result.

[24] The fourth question asked whether the doctor who attended to VT initially had been negligent at all or to what degree. Dr Hamilton indicated that it was difficult for him to say that the doctor was negligent as he did not know what history she had been given, what were her examination findings, or her treatment or management of the patient. However, he made this closing statement:

> "...in a case of this sort the history suggests the presence of an intraocular foreign body, and early referral to an ophthalmologist, and/or special tests such as X-rays and ultrasound to make the diagnosis is required unless the doctor is certain that there is no scleral (outer coat of eyeball) perforation."

[25] In his oral testimony, Dr Hamilton confirmed his credentials as an ophthalmologist and a fully trained medical doctor who specialises in treatment of the conditions of the eye. He confirmed also that he knew Dr Calder, who was also an ophthalmologist. He disagreed with the permanent percentage impairment given by Dr Calder as 16%, as he thought it should be a higher percentage. Referring to the American Medical Association Guidelines, in his view, there was also a loss of 4% for the loss of peripheral vision in the blind eye, and 15% for the loss of binocularity – "the ability to use both eyes to see an object and to estimate its distance", and also the loss of stereoptsis – "the ability to see form in 3 dimension depth, width and height".

[26] He explained normal vision, namely, 20/20, as against poor vision, 20/200, and further deterioration until one can only discern hand movements or worse, just the ability to perceive light. He described photophobia as "an aversion to light which may cause discomfort", and stated that it was very likely that the presence of a foreign object in the eye could cause photophobia. He stated also that the presence of a foreign object in the eye could cause sub-conjunctival haemorrhage - "bleeding under the conjunctiva which is the thin covering over the white of the eye". He stated further that the eye would "look blood shot" if there was conjunctival haemorrhage.

[27] In cross-examination, he testified that if a patient consults him with a foreign object in his eye, he would first take the history of the situation as that would provide him with a good basis of where and what to look for. He said one would then conduct an examination externally with a flashlight, and internally with an ophthalmoscope which would permit one to see to the back of the eye and any evidence of damage if

the visual media is clear. He indicated that it was possible for a foreign metallic object in the right eye to cause blindness, as by entering the eye, it could damage several structures of the eye, namely, the cornea - "the white of the eye"; the iris - "the pigmented part of the eye which has the colour"; the retina - "the vascular coating of the eye beneath the cornea"; the vitreous humour - "which fills the back cavity of the eye"; and possibly, the optic nerve.

[28] In the instant case, it was his understanding that the metallic foreign body had penetrated the sclera and entered into the vitreous cavity causing bleeding, infection, and possibly retinal problems. He said that the penlight and/or the ophthalmoscope might have discovered the foreign body in the eye. He cautioned that a general practitioner may not have been able to discover the foreign body using other tests, but an ophthalmologist should have been able to detect it. He indicated that he was not familiar with or was uncertain as to the use of sweeping or swiping the eye in circumstances when there may be a foreign object therein, but stated that it may depend on where the object was in the eye.

[29] In further cross-examination he accepted a proper representation of the eye shown to him (which was also tendered and admitted into evidence). Dr Hamilton stated that in the instant case, the metallic object had gone through the vitreous body but had not necessarily gone through the cornea. It would have gone through the sclera, the thick white of the eye, and possibly gone through the lens. He clarified that the entire sclera is the eyeball and the metallic object had gone through the sclera into the cavity.

[30] He said that whatever the doctor might have done there is a risk that the eye may have been lost. He said that he had not had an opportunity to examine the metallic object, but he was aware that it had been removed in surgery by the use of a magnet. He confirmed that when a surgeon does an operation on the vitreous body there is always a risk. Using a magnet to remove the foreign object could, he said, possibly cause damage to the lens. But that, he said, would not cause blindness to the extent observed in VT's case. He confirmed how important the history of the case told by the patient to the doctor is, and that it should be taken down on history cards.

[31] He further confirmed that even if the history given to the practitioner was that VT had been lying down and that an engine fell on his face, and that he was experiencing severe intra-orbital pain that, he said, would still necessarily suggest an intra-orbital foreign body in the eye. He identified, in court, the instrument known as "an examination light" which he said was appropriate for use by a general practitioner. He said that he was familiar with a sterile gauze, and passing the same over the eye without pressure would be appropriate. Also, putting anti-inflammatory drops in the eye would be appropriate. So too, would allowing the patient to remain for three quarters of an hour, and advising him to return if he experienced any discomfort within 28-48 hours, and informing him that if he felt any such discomfort he would have to be referred to a specialist.

[32] In re-examination, Dr Hamilton made it clear that an otoscope or auroscope is multifunctional and can serve as an examination light, but indicated that it is different from an ophthalmoscope. He stated that using the otoscope, a doctor might be able to

detect sclera perforation, and if she had detected that, Tobradex would not have been the appropriate medication for use. But if she had not detected sclera perforation, then Tobradex would have been appropriate. If she was unable to determine if there was sclera perforation, it would not have been appropriate, he said, for VT to have returned to see Dr Wilson in 48 hours, without seeing a specialist.

[33] That was the case for VT including other exhibits which had been agreed and tendered into evidence.

[34] Dr Wilson's witness statement was adduced into evidence and she testified on her own behalf. In her oral examination, the notes that she had taken contemporaneously with the meeting with VT on 7 December 1995 were also adduced into evidence. The notes are in her handwriting and tend to support her contention of what she says took place during that examination, including his report about the engine falling on his face, the diagnosis of photophobia, and that if he felt anything, subsequently, that he would have to see a specialist.

[35] In cross-examination, Dr Wilson indicated that she had used an opthalmoscope to examine VT's right eye as it is a good instrument for the examination of pupil movement. She confirmed that she had no experience in ophthalmology, but she said that all doctors had some basic training in eyes, even though they were not specialists. She accepted that there were other doctors better qualified than her to treat patients. She saw herself as a first port of call, and her purpose was to send the patient on to be seen by an experienced and qualified specialist. In this case, she had not done so as VT

had assured her that he was "feeling normal". Her response, therefore, was to tell him to come back in the morning if he had "any issues".

[36] She said that VT never told her when he came to see her that something had "jooked" him in his eye. She stated that VT came to her in excruciating pain but 45 minutes after administering the drops and giving VT pain tablets, he indicated that the pain had gone, and he had been able to see out of both eyes perfectly. There was no swelling in the eye, but at her office, the eye had initially presented "totally closed". After medication, the eye was half open and she had seen a "blood clot – sub-conjunctival haemorrhage". She had examined the eye but the pupils were not responsive. She therefore could not see into the back of the eye. She said that she had initially used the otoscope hoping to do that, but could not use the opthalmoscope due to the fact that the pupils were constricted.

[37] She indicated that she had not known that a foreign object was in VT's eye. The opthalamoscope could have assisted in detecting that a foreign object was lodged there. She agreed that an ophthalmologist could have used other equipment to detect whether a foreign object was in the eye. She also accepted that a foreign object had been removed from VT's eye subsequently. So, an internal examination could have been done, which she had not been able to do.

[38] She said that she had not referred VT to a specialist, as she had diagnosed his condition as only having superficial foreign bodies in his eye, which had caused abrasion to the conjunctiva. She stated, however, that as she had made a prognosis

which was "questionable", she had felt that she should leave the case open, and she advised VT that he should come back in the morning if he was feeling any discomfort at all.

[39] She testified that in retrospect, VT's case should have been treated as an emergency, particularly since he deteriorated so quickly, the next day, with severe pain and pus in his eye. She maintained that she did not know that there was an intra-ocular foreign body in his eye. In her view, they were superficial foreign bodies. She said it was the intra-ocular body that had caused the injury. She said that she had prescribed Tobradex and Tobramycin (an antibiotic), which could have been inadequate for the intra-ocular body in his eye. She testified that his eye had not been half closed when he left her office, indeed, it had been normal. She had not given him pain killers when he was leaving her office to take home as she did not want to mask the pain, she only wanted it lessened, so that he would know if something was going wrong. She insisted that she had told him to return the following day and not on the following Monday.

[40] She said that she had viewed the sclera, but she had not observed anything noticeable about it. But she had only had an external view, that is, a superficial examination of it, not a proper one of the sclera as she did not have the equipment to examine the intra-ocular area. She said that in retrospect, based on what she knew now, she should have sent him to a specialist. But she had told him to return on the following day. She, however, had no way of contacting him to ascertain his condition. She indicated she had been concerned, because he had an eye injury, but she only had an address for him, no telephone contact information had been taken.

[41] She stated that her office notes had been made on the day following the treatment of VT in her office. She said that she had tried to ascertain whether he was feeling well before he had left her office. She insisted that the history of the matter was that a part of the engine had fallen on him. In answer to a question from the court, she accepted that there would have been trauma on VT's face if any part of an engine had fallen onto his face.

[42] She accepted that she was not equipped to perform surgery. However, it was VT's judgment whether to go to the hospital or to go home. Had he returned to her office the following day, as she had advised him to do, and was still experiencing pain with pus in the vitreous humour of his eye, which meant that his eye was infected, she would have sent him to a specialist. She confirmed that she had not seen any bleeding in his eye as she had only examined the external aspect of the eye, not the internal aspect of the same. She said that people get "blood shot" in the eye for all reasons, for example, blood pressure. Sub-conjunctiva does not mean, she said, that there was bleeding inside the eye. She stated that she had not questioned VT about the alleged engine falling on his face, but as he came in as an emergency case, she had treated him as such accordingly.

[43] That was the case for the defence, including the exhibits adduced into evidence on her behalf.

Judgment of Cole-Smith J

[44] The learned judge gave a detailed decision in the matter based on all the oral and documentary evidence before her. She referenced the background facts, the pleadings and the issues in the case which I have already referred to herein. She explored the law as it relates to negligence and causation.

[45] In relation to the law on medical negligence, the learned judge drew attention to an extract from a leading text, Clerk & Lindsell on Torts, 19th Edition, at paragraph 10-59, where the learned authors set out what amounts to medical negligence. They stated that medical negligence was "any alleged error in diagnosis and/or treatment [which] must be shown to derive from a failure to attain the required degree of skill and competence of a reasonable practitioner". The expectation of the level of skill was related to the specialisation and the post that one held. So, a general practitioner was not expected to attain the standard of a consultant specialist.

[46] The learned judge also referred to another statement from the learned authors of Clerk and Lindsell on Torts, set out in paragraph 10-62. It reads:

> "The standard of care demanded of medical practitioners is that required of any professional person. However, the vital question in *Bolam v Friern H.M.C.* [[1957] 1 WLR 582] makes it clear that, in determining whether a defendant has fallen below the required standard of care, great regard must be shown to responsible medical opinion, and to the fact that reasonable doctors may differ."

[47] She then chronicled important aspects of the matter in order to assess whether in her opinion there was negligence in the circumstances of this case. She set out the competing recollections of what VT said had occurred and what he said he had told Dr Wilson, as against what Dr Wilson said had been told to her by VT, and also the treatment that Dr Wilson said that she had administered, and the advice she said that she had given him. There were certain aspects of Dr Wilson's evidence that the learned judge noted, namely, that:

(i) as she was only a general practitioner, perhaps, in retrospect, she ought to have sent VT on to a specialist;

(ii) she did not have the necessary equipment to examine VT's right eye as his pupil was constricted;

(iii) a specialist would have been able to ascertain if a foreign body was in his right eye;

(iv) it was VT's decision whether to obtain further medical treatment;

(v) the treatment that she had given VT was inadequate, and in retrospect, she should have dealt with him as an emergency; and

(vi) she accepted everything that the expert Dr Hamilton had stated.

[48] The learned judge referred to the report of Dr Hamilton already set out herein. She set out the history given to both Dr Hamilton and Dr Calder by VT, which was noted in their respective reports, and stated that at the end of it all, in summary, as stated by Dr Calder, "VT had a blind right eye and a normal left eye."

[49] The learned judge then referred to the competing positions of the parties on the law of causation and its applicability to the specific facts of this case. Counsel for Dr Wilson submitted that for VT to recover damages he must prove that the actions of Dr Wilson caused or contributed to the damages he suffered, particularly, the loss of sight in his right eye, which he had failed to do. Counsel for VT said that VT was only required to show that, on a balance of probabilities, VT would not have suffered as he had if he had been referred immediately to a specialist. And further, that Dr Wilson would have had to give evidence that even if she had done her best, VT would still have lost the sight in his right eye, and he submitted that no such evidence had been adduced. The learned judge noted that the case of **Hotson v East Berkshire Area Health Authority** [1987] AC 750 had been referred to and relied on by counsel for Dr Wilson, and distinguished by counsel for VT, and so, the ratio decidendi was therefore duly noted and acknowledged by her.

[50] The learned judge then set out her several findings on the written and viva voce evidence adduced, and the detailed and comprehensive submissions made. I shall also attempt to summarise those findings as best as I can.

[51] These were her findings:

1. She accepted VT's version as to what he had told Dr Wilson in her office in respect of the piece of metal going into his eye. In spite of the contrary statement in Dr Wilson's notes, she found that Drs Hamilton and Calder supported VT's version.
2. In any event, there should have been a greater focus on Dr Wilson's examination of VT, and there was a delay in diagnosis.
3. She accepted that VT was told by Dr Wilson to return on the following Monday and not the next day.
4. Dr Wilson was not forthright in her evidence; was not experienced to deal with the type of injury suffered by VT; and she did not possess an ophthalmoscope which would have assisted her in seeing the back of the eye (she accepted Dr Hamilton's evidence to that effect).
5. Not being able to do a thorough ophthalmological examination on VT, Dr Wilson did not refer VT to a specialist or a hospital, and so he was not given a chance of recovery.
6. The evidence of Dr Hamilton was very compelling, particularly with regard to the penetration of the

sclera as a result of the metallic foreign body entering the vitreous cavity. This penetration might have been detected by penlight by the general practitioner, but definitely by an ophthalmologist.

7. Dr Wilson's evidence that a specialist would have been able to ascertain if a foreign body was in the eye; that her treatment of VT was inadequate; and that in retrospect, she should have treated the matter as one of emergency, all together made a finding of negligence compelling.

8. The non-referral of VT to a specialist or hospital immediately, did not, on a balance of probabilities, give him an opportunity to see whether the sight in his right eye could have been saved, particularly given the responses of Dr Hamilton in his report.

9. As a consequence, the case of **Hotson** was distinguishable, and on a balance of probabilities, the negligence of Dr Wilson was the probable cause of VT's blindness.

[52] The learned judge did a thorough analysis of the injury suffered, and the special and general damages claimed by VT. She ultimately made the following orders:

"1. Special Damages $68,009 with interest at 6% from 7th December 1995 (date of injury) to 21st June, 2006 and 3% from 22nd June 2006 to 17th June, 2012.

2. General Damages

Pain and suffering and loss of amenities $4.5 m with interest at 6% per annum from 15th September, 1997 (date of filing of defence) to 21st June, 2006 and 3% from 22nd June 2006 to 17th June 2012,

3. Costs to be agreed or taxed

4. Stay of execution granted for a period of 3 weeks."

The appeal

[53] A notice of appeal was filed on 15 June 2012, in which Dr Wilson sought an order that the judgment of Cole-Smith J be set aside, and that that there be judgment for her with costs. In the interim, a stay of execution of the judgment was also sought and granted until the determination of the appeal.

[54] There were five grounds of appeal which are set out below.

"a. The Learned Judge erred in giving judgment for [VT].

b. The learned judge erred in finding that [Dr Wilson] was negligent.

c. The Learned Judge's (sic) failed to properly assess the evidence to determine whether [Dr Wilson's] diagnosis and/or treatment of [VT] derived from a failure to attain the required degree of skill and competence of a reasonable practitioner.

d. The Learned Judge erred in finding that the negligence of [Dr Wilson] was the probable cause of [VT's] blindness.

> e. That the finding of the Learned Trial Judge that the negligence of [Dr Wilson] was the probable cause of [VT's] blindness was against the weight of the evidence and in particular the evidence of [VT's] expert witness Dr Hamilton."

There were no grounds of appeal filed or relied on by Dr Wilson relating to the quantum of damages, and so nothing more will be said on that.

Submissions

For the appellant

[55] Counsel referred to the grounds of appeal and stated that there were two main issues to be determined on this appeal, namely: (i) whether Dr Wilson was negligent; and (ii) whether the negligence (if any) caused the injury to VT.

[56] Counsel canvassed the law, as mentioned in the judgment of Cole-Smith J, and as set out in Clerk & Lindsell, that Dr Wilson's treatment of VT and competence should be judged by the standard of medical opinion relative to that of a general practitioner, and not that of a specialist. She stated that Dr Wilson "must not be condemned with hindsight". She referred, in great detail, to the oft cited speech of McNair J in **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118, referring to the test of negligence being that of "the standard of the ordinary skilled man exercising and professing to have that special skill" which, she indicated, has been applied several times in this court. She referred also to the "but for" test settled in **Barnett v Chelsea & Kensington Hospital Management Committee** [1968] 1 All ER 1068, and noted that the principle enunciated clearly in **Hotson** was that it was for the claimant to prove, on a balance of probabilities, that the acts of the defendant had, at least,

materially contributed to the injury suffered by the claimant. If he failed to do so, he would have failed on the issue of causation, and no question of quantification could arise.

[57] Counsel referred to all the findings of the learned judge set out in paragraph [51] herein, and submitted that the learned judge had erred as she had failed to apply the **Bolam** test in determining whether Dr Wilson was negligent. Counsel argued that there was no evidence that any of the matters found by the learned judge were "improper or inadequate practice not to be expected from a general practitioner". She stated that negligence of a medical doctor was not to be determined in retrospect" but based on what was expected of a general practitioner at the material time. It was her contention that there was no evidence that the conduct of Dr Wilson had fallen below that standard of responsible medical opinion. She criticised the learned judge's analysis of the evidence of Dr Hamilton with regard to the assessment of the conduct of Dr Wilson.

[58] Counsel indicated that the specific finding of the learned judge that Dr Wilson was negligent was in error, in that, even if Dr Wilson had not been thorough, there was no evidence to say that her actions fell below the required standard, or that the delay in the diagnosis was negligent. The report of Dr Hamilton, counsel submitted, did not support that conclusion. And, in any event, the chronology of events showed that the surgery of VT had not taken place until Monday, four days after she had examined VT (although he had been admitted into KPH on Saturday, two days before the surgery). Counsel stated that it was not disputed that Dr Wilson was not experienced to deal with

the type of injury that had occurred, and it was also not disputed that an ophthalmologist would have been so experienced. However, even if the ophthalmologist would have used the ophthalmoscope in spite of the constriction of the eye, and detected the piece of metal in the inner eye, counsel submitted that was irrelevant in the instant case, as the issue was whether Dr Wilson, who was not an ophthalmologist, had acted properly in the circumstances. Counsel concluded that any admissions by Dr Wilson as to what she would have done "in hindsight' were not evidence that she had been negligent on the day in question.

[59] With regard to the issue of causation, counsel submitted that the learned judge erred in that she failed to apply the "but for" test. Counsel said that the learned judge had misconstrued the evidence of the expert, Dr Hamilton, whose evidence was that he could not say whether the early removal of the piece of metal would have prevented blindness in the right eye. She submitted that what he said meant that there were other factors involved, which underpinned other risks. As a consequence, counsel submitted that "from the evidence it cannot be said that 'but for' the negligence of [Dr Wilson] (which is denied), [VT] would not have lost his sight".

For the respondent

[60] Queen's Counsel for VT submitted that the instant appeal had no merit. The learned judge, he said, had not erred in finding that Dr Wilson was negligent, and "was left with no alternative but to find, on a preponderance of probability, that [Dr Wilson] was responsible for the losses suffered by [VT]". He referred to the grounds of appeal filed and relied on by Dr Wilson and the two main issues identified by counsel for Dr

Wilson on appeal. He also itemised the findings of the learned judge and submitted that she had assessed the evidence properly, and had concluded correctly, that, on a balance of probabilities, Dr Wilson was the probable cause of the ultimate injury, that is, blindness in VT's right eye.

[61] In dealing with the law, Queen's Counsel commenced with the well-known principle that an appellate court will not lightly disturb findings of fact made by a judge of first instance who had the advantage of seeing and hearing the witnesses. He relied on a case from the Judicial Committee of the Privy Council, on appeal from Jamaica, **Industrial Chemical Co (Ja) Limited v Owen Ellis** (1986) 23 JLR 35 for that statement of the law, and referred to several other cases from this court which endorsed that principle. He too relied on the seminal speech of McNair J in **Bolam** and stated that he accepted and acknowledged that the test in relation to negligence was clearly set out therein.

[62] Queen's Counsel referred to the findings of the learned judge set out in paragraph [51] herein, and to other important evidence commented on by of the learned judge. He focused on the fact that Dr Wilson was not a specialist and had failed to refer VT to one; the fact that she did not have the proper equipment to do a proper ophthalmological examination, yet had not suggested that VT see a specialist; and also, the fact that she had suspected that there was a foreign body in VT's eye, yet knowing that she could not examine the eye properly, she still had not sent him on to a specialist. She also gave inadequate treatment; did not treat the matter as an emergency; did not do a comprehensive examination; delayed making a diagnosis; had

not told VT to return the following day; and had not referred him to a specialist or hospital immediately.

[63] Queen's Counsel submitted that Dr Wilson had been held to the standard of a general practitioner and not to that of a specialist, and when her actions had been weighed in the balance, they had been found wanting. Queen's Counsel contended that it was "not proper medical practice for a doctor to know that a patient has an ailment outside of her speciality, and proceed to diagnose and treat that patient while not having the necessary equipment to assess that patient properly". Queen's Counsel submitted further that there had been enough evidence for the court to find that the treatment given had been inadequate, and therefore below the standard to be expected of a general medical practitioner. He argued further that the negligence of Dr Wilson's treatment had been assessed at the material time and based on subsequent events. Queen's Counsel said that this was not a case of "bad results following good treatment, but bad results following bad treatment".

[64] Queen's Counsel submitted that even if there was no medical evidence stating what the standard conduct was, and whether Dr Wilson's conduct had fallen below it, the court could nonetheless examine the conduct, and if the situation warranted it, make such a finding based on the evidence before it. Queen's Counsel submitted that there was sufficient evidence for the learned judge to have found that there was a breach of the duty of care owed to VT, and to find that Dr Wilson was liable in negligence.

[65] With regard to the issue of causation, Queen's Counsel stated candidly, that the learned judge could have expressed her reasoning on this aspect with more precision. But, he stated, it was clear that she had brought her mind to bear on the matter, as she had properly distinguished the ruling in **Hotson** and the facts therein from those in the instant case. Queen's Counsel relied on the principles expressed in **Williams v The Bermuda Hospitals Board (Bermuda)** [2016] UKPC 4, where the Privy Council reviewed **Hotson**, and concluded in that case, that there was no room for the resulting injury to have been caused by a combination of the two factors, the fall and the subsequent treatment in relation thereto. The court having found that it was the fall that caused the injury and not the treatment, the claim therefore failed. In the instant case, Queen's Counsel submitted that the learned judge having reviewed all the evidence, had concluded that Dr Wilson's negligence was the probable cause of VT's blindness. Queen's Counsel submitted that in the circumstances of this case, it could not be said that that finding was plainly wrong.

Issues

[66] I find that the following issues can be distilled from the judgment in the court below, the grounds of appeal and the extensive submissions on behalf of counsel:

1. Whether the learned judge erred in finding Dr Wilson negligent-
   (a) in her treatment of VT (including the advice given); and

(b) in the circumstances considering the required degree of skill and competence of the reasonable practitioner; and

2. Whether the learned judge erred in her finding that the negligent treatment of VT by Dr Wilson was the probable cause of the injuries suffered by VT, namely, complete blindness in the right eye.

Discussion and analysis

[67] As indicated, Queen's Counsel for VT relied heavily on the principles emanating from **Industrial Chemical Co (Ja) Limited v Owen Ellis**. In that case, the Law Lords dealt with the issue of the approach of the appellate court in respect of findings of fact of the single judge in the court below, namely, that where those findings are dependent on the credibility of witnesses, that the court should only reverse those findings if satisfied that the judge was "plainly wrong". Lord Oliver, on behalf of the Board, endorsed the well-known passage from Lord Thankerton's judgment in **Watt or Thomas v Thomas** [1947] AC 484, at pages 487 and 488, where he stated:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court,

> either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[68] In fact, in **Clarence G Royes v Carlton C Campbell and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005, Smith JA, on behalf of the court, described Lord Thankerton's dictum above as the established principles, and emphasized further that Lord Macmillan in **Watt v Thomas** had stated that the printed record was only a part of the evidence, as the demeanour and the candour of the witnesses were of paramount importance.

[69] This principle is relevant with regard to the history of this matter which, in my view, is crucial to this case. Queen's Counsel for VT, in his submissions, queried what was the true account given to Dr Wilson by VT when he attended on her office on Thursday, 7 December 1995. It was VT's contention that he told Dr Wilson that while using a chisel to hammer the front end of his motor car (which he had placed across four blocks), a piece of metal had gone into his right eye. We have seen from Dr Hamilton that that event ought to have triggered certain action from Dr Wilson. A piece of metal entering the inner eye with some speed or force is potentially a serious injury to the eye, which would require attention. Dr Wilson's contention was that some part of VT's vehicle had fallen on his face. Her notes accorded with this. The learned judge did not believe her. She accepted the evidence of VT. She also accepted VT's evidence that

Dr Wilson did not tell him to return the following day, but to come back on the following Monday, and that she did not have or use an ophthalmoscope. These findings were crucial to the case, and as there was a basis for the learning judge's findings, in my view, this court ought not to interfere with them. I will now explore the issues that were raised in this appeal.

Issues 1(a) and (b): Did the learned judge err in finding Dr Wilson negligent?

[70] Once an important issue in the case concerns medical negligence, the powerful statement of McNair J in **Bolam** bears repeating in its entirety. At pages 121-122 of that judgment, he said:

> "In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where 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 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 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 do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time.

> That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent. Counsel for the plaintiff was also right, in my judgment, in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable. But the emphasis which is laid by counsel for the defendants is on this aspect of negligence: He submitted to you that the real question on which you have to make up your mind on each of the three major points to be considered is whether the defendants, in acting in the way in which they did, were acting in accordance with a practice of competent respected professional opinion. Counsel for the defendants submitted that if you are satisfied that they were acting in accordance with a practice of a competent body of professional opinion, then it would be wrong for you to hold that negligence was established. I referred, before I started these observations, to a statement which is contained in a recent Scottish case, *Hunter v Hanley* ([1955] SLT 213 at p 217), which dealt with medical matters, where the Lord President (Lord Clyde) said this:
>
> > 'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.'"

[71] In this case, there is no difference of medical opinion as Dr Wilson said that she agreed with everything that Dr Hamilton, the medical expert called on behalf of VT, had said. So, in essence, what is it that he had said? He said that although inexpert attempts (rubbing of the eye) may have pushed the metal further into the eye, the

initial damage or final result may not have been so severe. But the initial damage and risks of greater complications increase as the depth of penetration of the foreign body in to the eye increases. So the rubbing of the eye with a piece of cloth may have contributed to the injury. Dr Hamilton also said that early removal of a foreign body may possibly reduce consequential injuries and reduce the risk of blindness.

[72] Of importance, he added, was the nature of the object, the surgery to remove it, and the skill of the surgeon effecting that outcome. Unfortunately, we have none of those details, except to say, that the piece of metal was removed under surgery with a magnet. Dr Hamilton said that the eye could have been saved if something had been done in two days. However, it was not that fact alone that had caused the blindness. He also said that the presence of an intra-ocular foreign body warranted referral to an ophthalmologist for special tests to be done, so that a proper diagnosis could be made, unless there was certainty that there had not been any perforation of the outer wall of the eyeball. There was no such evidence.

[73] He said that the presence of the foreign object in the eye could have caused photophobia and sub-conjunctival haemorrhage. He said that a proper history of the injury must be taken on first consultation in order to make an accurate diagnosis. An ophthalmologist, he said, would have detected the foreign object in the eye, which in his estimation had gone through the vitreous body of the eye, and the sclera, although not necessarily the cornea, but possibly the lens.

[74] Dr Wilson diagnosed photophobia and sub-conjunctival haemorrhage which is indicative, Dr Hamilton said, of a foreign body in the eye. So, having diagnosed those conditions, Dr Wilson still said that she did not know that there was any intra-ocular foreign body in VT's eye, although she accepted that he was complaining of something "sticking him in the eye". Yet anti-inflammatory eye drops, use of the sterile gauze and sending him home, without more, was her treatment and reaction to his pain, aversion to light and discomfort, and bleeding under the conjunctiva. She acknowledged that an ophthalmologist would have had the equipment to detect the foreign body in the eye, and could have done so, and that she did not have that equipment. It was her diagnosis, incorrectly, that only superficial foreign bodies were in his right eye. She was aware that the foreign object had been removed from the eye subsequently. In her opinion, it was that intra-ocular body which had caused the injury to VT's eye.

[75] In the light of the finding of the learned judge that Dr Wilson had been told about the piece of metal going into VT's eye, and the fact that there had been signs of that having occurred, it meant that she failed to take due care in attending to him to ascertain what could be the cause of his injury so that it could be treated appropriately. That, coupled with the physical signs of photophobia and sub-conjunctival haemorrhage (which she said she saw and diagnosed) and the history of how the incident occurred, any reasonable practitioner, displaying reasonable skill, should have come to no other conclusion than that there was a foreign body in the eye, which could lead to the breakdown of toxicity in the eye, infection without removal, and resultant blindness, which is what occurred. A referral to a specialist or immediate admission to a hospital

was the only proper route, so that specialised equipment and persons with specialist training could have been utilised in order to detect the extent of the injury caused by the intra-ocular object, and to proceed to surgery for its removal.

[76] The learned authors of Clerk & Lindsell on Torts, in reviewing the standard of competence to be achieved in determining whether a finding of negligence was applicable to certain medical professionals, noted that a practitioner who undertook treatment beyond his competence was held liable for not recognising his limitations and referring the patient to a consultant (see **Payne v St Helier Group Hospital Management Committee** [1952] CLY 2992 and **Poole v Morgan** [1987] 3 WWR 217 where a newly trained ophthalmologist was held liable for not referring a complicated case to a consultant).

[77] In the instant case, Cole-Smith J found that VT was sent home by Dr Wilson with eye drops and told to come back in four days. Failing to act in a manner which required urgent attention and referral to trained specialists, and thus not displaying the skill and competence of a reasonable practitioner, was, in my opinion, negligent within the **Bolam** test. There was clear evidence to that effect, and the finding of the learned judge, in those circumstances, cannot be faulted, and is a finding in respect of which we ought not to interfere.

Issue 2: Did the learn judge err in finding that Dr Wilson's negligence was the probable cause of VT's injury?

[78] There is no doubt that in medical negligence cases, causation can be very difficult to prove, but the ordinary rules on causation remain applicable, and in the

instant case, the burden would be on VT to establish that Dr Wilson's negligence caused, or at the very least materially contributed to his illness. There are several aspects of the law on causation with which the courts have had to grapple over the years. These relate to, for instance:

1. whether there is liability where subsequent hypothetical acts could have taken place, but the injury would have been suffered anyway, and so causation would not have been proved;
2. where there are several causes of a patient's injury, but only one involves the defendant's negligence. As the burden of proof rests with the claimant, he would fail if he cannot show that the defendant's negligence was the cause; and
3. where the claim is based on allegations of a lost chance of recovery from the illness, or injury, or alternatively that there is an increased chance of succumbing to a particular illness or disability, and if one can prove that on a balance of probability it was the defendant's negligence that caused the injury, one can recover in full, but if not, then one would recover nothing.

[79] In the House of Lords case of **Bonnington Castings Ltd v Wardlaw** [1956] AC 613, a steel dresser was employed to a foundry for eight years. During the course of his employment he contracted pneumoconiosis and sued for damages. He was deployed in a dressing shop which housed three types of machines: the hammer, floor grinders and swing grinders which removed irregularities from and smooths the surface of steel castings. All of the machines produced dust particles containing silica which could cause pneumoconiosis.

[80] Throughout Wardlaw's eight-year service at Bonnington, he operated a pneumatic hammer. Although he had been exposed to the dust mostly from the hammer, he had no complaint about it, as at that time, there were no known means of collecting or neutralising the dust. He also made no complaint in relation to the floor grinders, as the dust extracting plant in relation to them was effective, and in any event, the dust that escaped therefrom was negligible. The main crux of his complaint was with regard to the considerable quantity of dust that escaped from the swing grinders because the dust extraction plant was not kept free from obstruction, and frequently became choked and ineffective. This was in breach of statutory duties imposed under relevant regulations.

[81] The first issue that therefore arose in that case was whether this breach of the regulation caused Wardlaw's disease. The court stated that the onus lay on Wardlaw to prove, on a balance of probabilities, that the statutory breach caused or materially contributed to the injury, and not that it was possible that it could have been so

caused. It held, on the facts of that case, that the dust from the swing grinders had materially contributed to the disease.

[82] Another issue which arose was whether Bonnington was liable merely because there was a breach of duty pursuant to the regulation and that it was possible that the injury may have been caused by that breach. Additionally, once there was a breach of a statutory duty, did the onus shift to the employer to show that the breach was not the cause. The court found that the onus remained on the employee to prove that there was not only negligence or beach of duty, but that such fault caused or contributed to the injury. In finding that Wardlaw proved the cause of the injury that he had suffered, Lord Reid made these insightful comments at page 621 of that judgment:

> "The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years. That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is: which was the most probable source of the respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders? It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material."

[83] It was also stated clearly in the opinion of Lord Tucker at page 623 that:

> "...the inference to be drawn from these facts is that the silica dust discharged from the swing grinders contributed to the harmful condition of the atmosphere, which admittedly resulted in the pursuer contracting pneumoconiosis, and was therefore a contributory cause of the disease."

[84] The question that must therefore arise in the instant case is what caused VT's blindness? Was it a combination of factors - the piece of metal going into the inner eye, and the failure of Dr Wilson to diagnose the condition correctly and timeously, and to refer him to a specialist or the hospital, where the metal would have been detected and surgically removed? It is then important to query what is the proper question to be asked? Should one also query whether Dr Wilson's failure to pay attention to the patient, recognise her limitations (no access to ophthalmoscope), and refer the patient to a specialist, factors that materially contributed to the injury ultimately suffered by VT? Or could her actions be considered *de minimis*, negligible or insignificant? I think not.

[85] **Wilsher v Essex Area Health Authority** [1988] AC 1074, a much later decision of the House of Lords, made it clear that the starting point for any consideration of the relevant law of causation was the decision of the House of Lords in **Bonnington**. In **Wilsher**, the earlier House of Lords case of **McGhee v National Coal Board** [1973] 1 WLR 1 was discussed in detail. Lord Bridge of Harwich in **Wilsher** expressed the concern that certain paragraphs in the speech of Lord Wilberforce in **McGhee** could have suggested that in certain circumstances, the burden

of proof of causation was reversed, with the employer being liable in the absence of proof that the alleged culpability had no effect. Lord Bridge said that that position would have run counter to the "unanimous and emphatic opinions expressed in **Bonnington**" and, in his view, not in keeping with the other speeches in the House of Lords in **McGhee**.

[86] The facts in **McGhee** were that a workman had been employed in emptying pipe kilns at a brickworks. He was sent to empty brick kilns elsewhere where the conditions were hotter and dustier. He contracted dermatitis and sued for damages. It was admitted that the dermatitis was attributable to his work in the brick kilns. The breach of duty pleaded was the employer's failure to provide washing facilities including showers, and that if they had been provided, McGhee would not have contracted the disease. The difficulty in **McGhee** was that the medical evidence could not state categorically how the abrasion of the brick dust repeatedly to the skin resulted in dermatitis. But the workman, cycling home, caked with sweat and dust, was liable to further injury until he could wash. The Lord Ordinary found the employers to be at fault, but dismissed the claim as he was not satisfied that the breach of duty caused or materially contributed to Mr McGhee's injury. His ruling was upheld by the First Division of the Court of Session. The appeal by McGhee to the House of Lords was allowed. It held (as stated in the head note) that:

> "... though the medical evidence for the workman could not establish that, had he been able to wash immediately in showers provided by his employers, he would not have contracted the disease, yet, in the absence of complete medical knowledge of all the material factors relating to the

> disease, there was no substantial difference between materially increasing the risk of injury and making a material contribution to the injury and, accordingly, the workman was entitled to recover damages from his employers in respect of their admitted breach of duty for an injury within the risk which they had created..."

[87] In clarifying the ratio decidendi of **McGhee**, Lord Reid said at page 4:

> "It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury. That is well illustrated by the decision of this House in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613."

He said later:

> "The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why that is so. But experience shows that it is so. Plainly that must be because what happens while the man remains unwashed can have a causative effect, though just how the cause operates is uncertain."

He concluded commenting on the view taken by the Lord Ordinary that:

> "There may be some logical ground for such a distinction where our knowledge of all the material factors is complete. But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the

> pursuer and saying that what the defender did made a material contribution to his injury."

[88] Lord Simon of Glaisdale made his contribution at page 8 thus:

> "But *Bonnington Castings Ltd v. Wardlaw* [1956] A.C. 613 and *Nicholson v. Atlas Steel Foundry and Engineering Co. Ltd.* [1957] 1 W. L.R. 613 establish, in my view, that where an injury is caused by two (or more) factors operating cumulatively, one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so concurrently or successively.
>
> The question, then, is whether on the evidence the appellant brought himself within this rule. In my view, a failure to take steps which would bring about a material reduction of the risk involves, in this type of case, a substantial contribution to the injury."

[89] Lord Kilbrandon, in finding that McGhee had succeeded in showing that his injury was more than probably caused or contributed to by the defendant's failure to provide a shower bath, stated that "[t]he pursuer has after all, only to satisfy the court of a probability, not to demonstrate an irrefragable chain of causation, which in a case of dermatitis, in the present state of medical knowledge, he could probably never do".

[90] Lord Salmon said at page 11 that:

> "I, of course, accept that the burden rests upon the pursuer to prove, on a balance of probabilities, a causal connection between his injury and the defenders' negligence. It is not necessary however, to prove that the defenders' negligence was the only cause of injury. A factor, by itself, may not be sufficient to cause injury but if, with other factors, it materially contributes to causing injury, it is clearly a cause of injury."

[91] In **Wilsher**, the facts of the case were slightly different and the outcome of the matter unusual. In that case, the plaintiff was born prematurely. He was placed in a special care baby unit in a hospital managed by the defendants. He required extra oxygen to survive. In two different periods, the oxygen was administered negligently and sent by way of catheter to his vein instead of his artery. He developed retrolental fibroplasia, a condition of the eyes which resulted in blindness. The plaintiff did not succeed. There was no evidence or any presumption raised that the excess oxygen, rather than one of the other factors, caused or contributed to the plaintiff's condition. There was also conflicting expert evidence as to whether the excess oxygen in the first two days of the plaintiff's life had caused or contributed to his condition and also the judge had failed to make relevant findings of fact, which could not be resolved on appeal on the transcript alone. The issue of causation was therefore remitted to be tried by a different judge.

[92] Lord Bridge stated that that case was very different form **McGhee** since it was clear that the dermatitis had been caused by brick dust. The question in **McGhee** was whether the extended presence of the dust, without washing, materially caused or contributed to the dermatitis. In **Wilsher**, there were so many agents including oxygen

which could have caused the retrolental fibroplasia, for example, hypercarbia intraventricular haemorrhage, apnoea or patent ductus arteriosus. The plaintiff had suffered from these conditions at various times, in the first two months of his life. There was no evidence that the excess oxygen was more likely to have caused the retrolental fibroplasia than any of the other agents could have done.

[93] So, what can be gleaned from these authorities is that, if there are two or more factors that are causes of the plaintiff's injury/illness, it is enough if one of the causes is the fault of the defendant. And that is so even if one of the causes is not specifically known or explained. However, it is not enough to say that there are several factors which could have caused the complaint and it is possible that one of them may be the cause of the injury, but it is not possible to identify which one or to say that one is more probable than the other. In that situation the claimant will not succeed.

[94] In **Williams v The Bermuda Hospitals Board**, a the Privy Council appeal from the Court of Appeal of Bermuda relied on heavily by counsel for VT, Lord Toulson on behalf of the Board, acknowledged and accepted the principles enunciated in **Bonnington**, **McGhee** and **Wilsher**. He referred particularly to Lord Reid's concise statement in **Bonnington**, that an employee must prove his case by the ordinary standard of proof required in all civil cases, "he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury". In **Williams**, the issue related to whether the delay between when Williams entered the hospital complaining of abdominal pain and the time that the surgery was done for a burst appendix was the cause of the complications he experienced.

[95] There was some argument by counsel for the hospital in the case that the injury was divisible and so distinguishable from the facts in **Bonnington**, where there was no suggestion that the pneumoconiosis was "divisible". The particles from the swing grinders were the cause of the entire disease. They were only a part of the cause, but were a partial cause of the entire injury, as distinct from being a cause of only part of the injury. The argument in **Williams** was that "the sepsis in his abdomen attributable to the hospital's negligence developed after the sepsis had already begun to develop". The argument that the timing of the origin of the contributory causes must be simultaneous did not find favour with the court. Lord Bridge referred to Lord Simon of Glaisdale's comments in **McGhee** indicating that if there were two or more cumulative factors, it was immaterial if they operated concurrently or successively. Lord Bridge therefore stated that, as a matter of principle, "successive events are capable of each making a material contribution to the subsequent outcome".

[96] In **Williams**, the injury to the heart and the lungs was caused by a single known agent, sepsis from the ruptured appendix. This damage was caused over a period of six and a half hours. The damage by sepsis was not divided into separate parts causing separate damage to the heart and lungs. The development of the sepsis was one continuous process.

[97] As Lord Bridge recounted, the trial judge found that the process continued for a minimum period of two hours longer that it should have. On a balance of probabilities, therefore, the hospital board's negligence of failing to diagnose and treat him

expeditiously, materially contributed to the process and to the injury of both his heart and his lungs.

[98] So, if there are one or two factors of causation of the plaintiff's illness, the fact that they occur one after the other is not material: the defendant's actions found to be responsible for one or the other can make that defendant liable for the injury sustained.

[99] As indicated previously, counsel for Dr Wilson relied on two cases in relation to the law of causation, namely, **Barnett v Chelsea and Kensington Hospital Management Committee** and **Hotson**. The first case dealt with three night watchmen who had drunk some tea at about 5:00 am. They started vomiting and so at about 8:00 am they went to the hospital. They sought assistance from a nurse who telephoned the casualty officer on duty, who was also a medical doctor, and told him of the men's complaint. He did not see the men, but through the nurse, instructed them to go home and call their own doctors. A few hours later one of the men, Barnett, died from arsenic poisoning, which was a very rare occurrence. It was clear that even if he had been examined, admitted into the hospital and given the only antidote available, he would not have received that medication before the recorded time of his death.

[100] In those circumstances, one can readily understand why Nield J found that the hospital's casualty officer, in failing to examine the deceased, admit him into hospital and to treat him, was negligent, and that the hospital had not discharged the duty of care owed to him in all the circumstances. The learned judge also found, however, that the plaintiff (the deceased's widow) had failed to prove that the negligence of the

hospital was the cause of his death. So, although there was a duty owed and the hospital had breached it, a detailed review of the medical evidence showed that the deceased's death resulted from arsenic poisoning from a disturbance of the enzyme processes. The only method of treatment for that condition was the antidote "BAL [British Anti-Lewisite compound]", and the medical evidence was that there was no reasonable prospect of the deceased being given that medication before he died. The hospital was therefore not liable to the plaintiff for the death of the deceased.

[101] The facts in **Hotson** are taken from the head note. The claimant, then 13 years old, fell from a tree and fractured his left femoral epiphysis. He was taken to hospital but his injury was not correctly diagnosed or treated for five days. He suffered avascular necrosis of the epiphysis, involving disability of the hip joint with the virtual certainty that osteoarthritis would later develop. He brought an action for damages against, *inter alia*, the defendant health authority, who admitted negligence in failing to diagnose and treat his injury promptly. The learned judge at first instance found that even if the health authority had diagnosed the injury correctly, and treated the plaintiff promptly, there was nonetheless a high probability of 75% risk that avascular necrosis would still have developed. He therefore found that the plaintiff was entitled to damages for the loss of the 25% chance that he would have made a full recovery, which he assessed at £11,500. The Court of Appeal dismissed an appeal by the health authority.

[102] The House of Lords allowed their appeal. The burden, they found, was on the plaintiff to establish that the delay in treatment had at least materially contributed to

the development of the avascular necrosis. It was for the judge to resolve, on a balance of probabilities, the conflict in the medical evidence as to what had caused the avascular necrosis. The judge's findings were clear that, on a balance of probabilities, the plaintiff's fall had left insufficient blood vessels intact to keep the epiphysis alive, which meant that as a finding of fact, the fall had been the sole cause of the avascular necrosis. The plaintiff had therefore failed on the issue of causation. No question of quantification would therefore arise.

[103] As Lord Bridge of Harwich put it, on the evidence there was a clear conflict as to what caused the avascular necrosis The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence at its highest was that the delay in treatment was a material contributory cause. This was a conflict, he said, like any other, about a past event which the judge could not avoid resolving. The judge found that the fall was the sole cause of the injury. Unless the plaintiff could have established that the delay in treatment was at least a contributory cause of the avascular necrosis, the plaintiff would have failed to establish a cause of action in respect of the avascular necrosis and its consequences. In this case, there was no room for finding that the avascular necrosis was caused by a combination of two factors. Lord Bridge, at page 783, also added that he knew "of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well have still developed".

[104] So, where there are two or more causes of the claimant's injury, it is important for the claimant to show that one of those causes relates to the defendant, and that those acts caused or materially contributed to the claimant's illness/injury. If, however, it is clear that although it appears to be two factors, but on closer analysis there is only one sole cause of the claimant's illness, which is not attributable to the defendant, then that will eliminate liability as there would be no room for a claim on an alternate basis for the cause of the injury.

[105] It is clear that in this case there were at least two contributory causes for VT's injury. There was no evidence, as in **Hotson**, that one of the known factors was the sole cause. Although VT said that he had not seen out of that eye since the injury, Dr Wilson said that before he left her office he had been able to see out of both eyes perfectly. Additionally, Dr Hamilton did not support the position of the entry of the metal into the eye being the sole cause of VT's blindness. So, the principles applicable to the facts arising in **Hotson** and **Barnett** are inapplicable to the facts existing in this case.

[106] The contributing causes in this case are: (i) the swift lodging of the piece of metal in VT's inner right eye penetrating the sclera and possibly the lens, resulting ultimately in blindness of that eye; and (ii) the failure of Dr Wilson to respond timeously to VT's condition, and to refer him to a specialist or the hospital to undergo surgery for removal of the piece of metal in order to stave off further deterioration in the eye. The surgery which was required did not take place until four days after the injury. This provided time for toxic degradation, and growth of fibrous tissue with continuous

bleeding in the eye. On the evidence as disclosed in this case, the learned judge found that there was negligence on the part of Dr Wilson, a finding on facts which this court could not conclude was plainly wrong.

[107] With regard to the principles which have been set out in respect of causation, the issue is whether there was sufficient evidence to demonstrate that VT has satisfied the burden placed on him that Dr Wilson's negligence, as identified, caused and or materially contributed to his injury. I would say that like in **McGhee**, her actions increased the risk, and so, as the Law Lords found, that equals material contribution to the injury. Additionally, like in **Bonnington** and **Williams**, her negligence was clearly one of the factors that caused or materially contributed to his injury. The learned judge found that her negligence was the probable cause of VT's injury. The facts of this case are also distinguishable from **Wilsher**, as there are no several other factors which are unidentifiable as the cause, and which could be one or more probable causes for the injury, equal to the identified negligence of Dr Wilson. Those are not the facts of this case.

Conclusion

[108] In the light of all of the above I would say that issues 1 and 2 have been settled in VT's favour. Dr Wilson's negligence materially contributed to and so was a probable cause of the permanent injury to VT, the blindness in his right eye. I would therefore dismiss the appeal with costs to the respondent to be taxed if not agreed.

[109] It would be remiss of me not to apologise for the delay in delivery of this judgment. Although it was unavoidable, it is indeed regretted.

SINCLAIR-HAYNES JA

[110] I have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion.

PUSEY JA (AG)

[111] I too have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. The appeal is dismissed.
2. Costs to the respondent, Victor Thomas, to be agreed or taxed.