(23)

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 11 of 1988

BETWEEN:

JOYCELYN EVANSON - Plaintiff/Appellant

and

ANDREW E. HOLM LIMITED - Defendant/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Miss Justice Joseph (Acting)

Appearances: Mr. Gerald Watt for the Appellant
Miss B. Lake, Q.C. and Miss J. Kentish for the Respondents

1990: June 11,12,13,14,
Nov. 26.

JUDGMENT

BISHOP, J.A.

On the 9th February, 1983, Joycelyn Evanson, a waitress and cashier employed by Andrew E. Holm Ltd. at Anchorage Hotel, fell on her back while on duty,and suffered injury. At the time she was pregnant with her fourth child.

On the 17th February, 1988, her pregnancy was terminated by suction curettage at the Holberton Hospital. The procedure was performed by Mr. Ivor Heath, a surgeon who worked essentially in the fields of obstetrics and gynaecology from about 1960. He also carried out the procedure of tubal ligation to prevent future pregnancy.

In a Statement of Claim filed on her behalf on the 9th January, 1985, it was alleged that she suffered the following injuries as a result of the incident (a) vaginal haemorrhage (b) back pains, and (c) resulting termination of her eight week pregnancy. It was also asserted that as a result of the surgical procedure used to terminate the pregnancy, Joycelyn Evanson suffered the following further injuries: (a) cardiac arrhythmia and (b) tachycardia. Special damages of $4067.00 and general damages were claimed.

/On the 17th....

On the 17th March, 1988, judgment was awarded in the amount of $6317.40 special damages and $15,000.00 general damages for pain and suffering. Total $21,317.40.

Joycelyn Evanson was dissatisfied with the award and filed a Notice of Appeal setting out the following ground: The learned trial Judge erred when he assessed damages at $15,000.00 for pain and suffering only, basing his finding on the case CORNILLIAC V. ST. LOUIS 7 W.I.R. 491 in that the evidence disclosed the loss of an 8-week pregnancy by the appellant due to medical termination of the said pregnancy necessitated by the resulting haemorrhage and threatened abortion as a result of the fall at the respondent's hotel.

Andrew E. Holm Ltd., through its solicitor, filed a respondent's Notice of Appeal on the 9th May, 1988, contending that the decision of the trial Judge ought to be varied (1) by setting aside (a) so much of the said Judgment as adjudged that the respondent was responsible for the termination of pregnancy and the tubal ligation performed upon the appellant (b) so much of the Judgment as adjudged that the appellant had not released the respondent from all further claims with respect to injury arising from the fall (c) the award to the appellant of $6317,40 special damages and $15,000.00 general damages,and (2) by ordering that judgment be entered for the respondent company or for the appellant in a lower figure for special damages and general damages, the said respective sums to be in accordance with the variation at (a) above, and that the appellant pay the respondent's costs of the appeal and in the court below, to be taxed.

The following grounds were strenuously argued on behalf of the respondent:

1. The learned trial Judge erred in law in finding upon a balance of probabilities that the fall was the sole cause of the abortion which led to the termination of the pregnancy by suction curettage and tubal ligation.

2. The learned Judge erred in law in failing to find that on a balance of probabilities, the plaintiff did not prove that the said termination of the pregnancy was occasioned by the fall.

3. The learned trial Judge erred in failing to appreciate the distinction between suction curettage and the surgical procedure of tubal ligation which led to the appellant's post-operative deterioration and occasioned the appellant's pain and suffering and consequential loss.

4. The learned trial Judge's finding of causation of the termination of the pregnancy and the tubal ligation is contrary to the weight of the evidence.

/...

There was no complaint with the finding of the trial Judge that there was negligence on the part of the barman at the Anchorage Hotel, which led to the fall and injury suffered by Joycelyn Evanson.

It is necessary to recall the following facts and circumstances of the appellant's medical history before and after the surgical procedures were performed.

During 1980, Joycelyn Evanson was a patient of Dr. Rodney Williams on a regular basis. He found that she exhibited symptons of palpitation, dizziness, dyspnoea (shortness of breath or difficulty in breathing) and occasional blackouts. She also had what the dorctor called "an apical systematic murmur". He was unsure of the diagnosis and he referred her to Dr. Luther Wynter who diagnosed "a mitral valve prolapse". The Court below did not hear from Dr. Wynter (he had passed away by that time), nor did it have the benefit of any record kept by him. It was the evidence of Dr. Williams that his patient told him that she was told so by Dr. Wynter.

From about October, 1980, the appellant knew that she was suffering from cardiac insufficiency and that, as she expressed it, "You don't get better from cardiac insufficiency; you do all the work in the world and nothing happens, and then when you're doing nothing it comes on".

In 1981, on one of the many visits to the United States of America, the appellant went to a Dr. Roker, a cardiologist, who thereafter provided medical attention (in New York) along with Dr. Melville Lambert (in Antigua) by monitoring her condition and prescribing where necessary.

In 1982 it was Dr. Lambert who monitored her cardiac insufficiency at regular intervals, though she also paid two visits during that year to Dr. Williams. He testified that on those occasions she appeared to him to be fairly healthy.

An unsatisfactory feature of the trial was that the learned Judge did not have the benefit of either seeing or hearing Dr. Lambert testify. He was undoubtedly a vital witness with respect to the appellant's heart condition before and after she fell. So too with Dr. Roker. There was no explanation on record for the absence of either witness, and there came to mind the Australian case of O'DONNELL V. REICHARD 1975 V.R. 916 in which it was stated (at page 929):

> "Where a party without explanation fails to call as a witness a person whom he might reasonably be expected to call if that person's evidence would be favourable to him, then although the injury may not treat as evidence what they may

/as a ma[illegible]....

> as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that the person's evidence would not have helped the party's case."

As far as I could see, in the instant case, no explanation having been proferred for the absence of the doctors, the learned Judge was left to consider the interpretation by Mr. Heath of such of Dr. Lambert's notes and other records as were made available. Thus the analysis of the case had to be carried out with this clearly in mind.

In January, 1983, the appellant went to New York on a visit to her husband. According to her evidence, she discussed with Dr. Roker, the medical implications of becoming pregnant. He told her that she could have children but she would have to be monitored in New York when she was 7 months pregnant. The trial Judge was not in a position to know what prompted such advice. The appellant became pregnant and thereafter she went to Dr. Lambert. She told the Court below that when Dr. Lambert learnt that she was pregnant, he just laughed and said 'this is the first patient like this'. In the absence of explanation from the doctor there could be no worthwhile speculation on what was meant by the doctor's reaction.

On the 4th February, 1983, Joycelyn Evanson went to Dr. Lambert for a check up in connection with her pregnancy; according to her, he told her that there was a vaginal haemorrhage. Three days or so later she was examined in New York and she was told that she had a urinary tract infection. She testified to the effect that she preferred the latter diagnosis but not only was there no explanation from her for her preference, but there was no positive medical evidence to support her statement that she had a urinary tract infection.

In his evidence Mr. Heath explained that Dr. Lambert's chart of the 5th February, 1983, noted "spotting since yesterday". In addition, Joycelyn Evanson said under cross-examination: "By the 4th February, 1983, I had signs of blood coming from my private parts". Mr. Heath interpreted the note of Dr. Lambert and the evidence of the appellant to mean that there was spotting per vagina ("blood coming out through the vagina"); and he said further: "It is a bleeding which can be slow or profuse. A bleeding can be a haemorrhage condition".

The chart dated 5th February, 1983, also stated "no haemos", and Mr. Heath interpreted it as 'no haemorrhage'. It remained uncertain whether Dr. Lambert told the appellant on 4th February, 1983, that there

/was vaginal.....

was vaginal spotting but no haemorrhage. A medical report written by Dr. Lambert on 5th February, 1983, showed as a provisional diagnosis: "threatened abortion", and other notes of his which were recalled or interpreted by Mr. Heath, showed multiple fibroids in the body of the uterus for which antibiotics were prescribed.

Dealing with the appellant's case Mr. Heath gave his opinion on what might cause blood in the vagina. He mentioned (1) fibroids in her uterus which is often associated with instability of the pregnancy and (2) the patient was placed on antibiotics which would suggest association with P.V. spotting (P.V. meant per vagina). Mr. Heath also told the trial Judge this:

> ".....If the patient was beginning to abort at the date when Dr. Lambert examined.....he would have found vaginal haemorrhage. According to the treatment recorded on the 5th February I would not have expected that treatment to be administered if there was vaginal haemorrhage or signs of abortion. The form of treatment would be, if there was a threat of abortion, the patient would have been confined to bed and some muscle sedation would be performed."

In my view Mr. Heath made it clear in his testimony that on the 5th February, 1983, Dr. Lambert did not refer the appellant to him for termination of pregnancy, even though on that day she had a cardiac condition and fibroid problem. In this case the appellant clearly invited the trial Judge to find from the evidence that there was something more than those conditions which prompted the doctor to refer the appellant on the 10th February, 1983 for termination of her pregnancy (T.O.P.), and that the additional factor was the fall she sustained.

Many of the views of Mr,Heath, as given under cross-examination, were hypothetical or general. He did not examine Joycelyn Evanson before 10th February, 1983. However, he told learned Counsel for the respondent that Dr. Lambert's medical report did not show that a test for urinary tract infection was carried out or requested. So then, it must be remembered that it is in evidence that at the beginning of February, the appellant was found to have multiple fibroids in the body of the uterus and to be about nine weeks pregnant; and this, in addition to evidence of cardic insufficiency diagnosed years previously. Mr. Heath also gave the following answers for the guidance of the Judge:

> "There are in my records patients with cardiac conditions and fibroids who have decided to continue their pregnancies and have done so successfully - sometimes against medical advice. I agree it is an inherent risk, increased risk with patient with cardiac condition to have a

/pregnancy.....

> pregnancy..... Where there is conception in the uterus encumbered by fibroids there is an increased risk of abortion. Pregnancy poses added risk with patient with heart condition. As a doctor, a patient with heart condition and fibroids and who has children already I would advise her to terminate the pregnancy but I would not insist if she wanted to continue as I do not think the risk is that great. I would not insist because I could not insist.
>
> With respect to women who have heart condition and fibroids, I would say that half would bring the pregnancy to full term. It is impossible to say how high the failure would be.....there are many women in this condition who want to have a child. You tell them the risk and they would go ahead. I would say about a third would go to a successful pregnancy. This is a high risk pregnancy."

As far as Joycelyn Evanson was concerned Mr. Heath told the Court that he would be guessing if he said that she would have had a successful pregnancy; and that it was impossible to say that a successful pregnancy could not have been secured.

So much for the appellant's medical history before 9th February, 1983.

At about 5.30 p.m. on 9th February, Joycelyn Evanson fell when getting down from a stool on which she was seated as she did her work. She fell on her back and had to be assisted from the ground. She resumed work and was transferred to the dining room from the bar. She worked there for about 2 hours but because she was not feeling well she was allowed to leave work about two and half hours early. During the night she was unable to sleep. In the early hours of the following morning she was having severe pain across her back and there was vaginal haemorrhage. Shortly before 9.00 a.m. she was taken to Dr. Lambert. He examined her and sent her to Mr. Heath. He examined her and gave her a letter to the Holberton Hospital for immediate admission. At that time the appellant was taking medication to regulate her heart beat. It was the evidence that Dr. Lambert referred her to Mr. Heath for termination of her pregnancy. According to Mr. Heath, the letter stated in part "10th February: by stumbling over box at work increasing haemorrhage". Mr. Heath interpreted this to suggest "that there must have been early haemorrhaging". Then he explained that when he examined her before he sent her to hospital he noted (a) she had a cardiac condition which was under treatment and (b) she had a fibrous uterus and had gone 2 months without a period.

The trial Judge also had before him a noteby Dr. Lambert to the effect that the appellant consulted him on 10th February, 1983, at 9.15 a.m. "complaining of vaginal haemorrhage"; she gave a history of having tripped on a garbage box while at work at Anchorage Hotel around 5.15 p.m. on 9th

/February,.....

February, 1983. In addition, Dr. Lambert's note stated that on the 25th January, 1983 having done a pelvic examination on the appellant he concluded that she was then about nine weeks pregnant. The note ended with these words:

> "I referred her for admission to hospital on February 10, because of her complaint."

Of additional if not greater significance was a letter written by Dr. Lambert to Dr. Roker a week or so later than the note just mentioned. It was written on 27th March, 1983 and read:

> "Following on her return from U.S. Mrs. Evanson was found to be 8 weeks pregnant on January 25. On February 4 vaginal spotting began. Increase in the uterine haemorrhage over the next few days was such that T.O.P. was indicated by February 10 and this was actually done on February 17, in hospital."

Certainly Dr. Lambert was there advising the cardiologist of an increase in uterine haemorrhage over the days between 4th and 10th February 1983 - to such a degree that termination of pregnancy was indicated. The cause of the increase in uterine haemorrhage was a matter on which Dr. Lambert could probably have been able to testify and make clear. The Court was left to draw its own conclusions, asking itself at the same time, whether it was significant that there was no mention in the letter of a complaint that Joycelyn Evanson had fallen sixteen hours or so before he examined her on the 10th February, 1983?

Mr. Heath, in his evidence on oath, pointed out that Dr. Lambert had noted that there was "increasing haemorrhage" and he (Mr. Heath) stated "I must assume that this factor was the one which tipped the scale and made him decide to refer the patient for termination of pregnancy and tubal ligation".

Relying on notes from the hospital Mr. Heath said that on the 11th February, the appellant was examined by a Dr. Shoba but the notes on record did not reflect a finding "vaginal spotting". Joycelyn Evanson was also referred to a Dr. Sahay, physician specialist, who examined her on the 15th February. He found that she had mitral valve prolapse syndrome and ischaemic heart disease, but he advised that the surgery which was being contemplated could proceed as her heart condition was being treated and under control.

On the 17th February, 1983 the pregnancy was terminated by suction curettage. In addition her tubes were ligated. Mr. Heath said that in the light of the patient's history he "ran a case of threatened abortion"; and when cross-examined answered as follows:

/I am not.....

> "I am not in a position to give an opinion as to whether the patient's heart condition deteriorated as a result of surgical procedures. The patient was in the care of Dr. Sahay both post operatively and pre-operatively."

Here again the trial Judge was denied the benefit of direct evidence from Dr. Sahay and no opinions were available. Mr. Heath used notes written by Dr. Sahay in an effort to assist with the post operative condition of the patient. He said that Dr. Sahay advised that she be kept in hospital until 16th March, 1983 and not discharged within the usual period of seven days. Mr. Heath explained.

> "We were concerned because the patient complained of dizziness when she got out of bed and on one occasion she stated that she blacked out..... We decided to get Dr. Sahay's advice as to whether it was safe to discharge her from hospital even though the sutures were removed."

It would seem that while Mr. Heath was concerned with the surgical procedures performed, it was Dr. Sahay who was in the position of advising on her heart condition after the operations.

It is appropriate to recall here that in 1980 Dr. Williams found that Joycelyn Evanson was suffering from dizziness and occasional black-outs with shortness of breath; and that thereafter she was monitored and treated for cardiac insufficiency, or a heart condition.

Mr. Heath did testify on her general condition after the operation. He said that there were signs of infection. "She developed a slight temperature and slight oozing from the wound. She also complained of feeling unwell with giddiness. She was put on antibiotics and Dr. Sahay was called in on consultation..... Following the operation, on the 17th and 18th patient slept very well. After the operation the patient had symptons which prompted us to get specialist opinion. Dr. Sahay gave his opinion". Again the trial Judge was not afforded the benefit of the specialist's opinion; and when Mr. Heath was asked, he answered:

> "I prefer not to give an opinion as to whether her condition deteriorated as a result of surgical procedures."

In my view, as the surgeon who carried out the procedures, Mr. Heath could hardly have been expected to answer the question any differently. In the circumstances the Court was left without an informed opinion on whether the termination of pregnancy (T.O.P.) by suction curettage and the tubal ligation led to a deterioration in the appellant's post operative condition; and, in my view, it was not a matter for conjecture.

/Between.....

Between 2nd and 5th March, 1983 - according to Mr. Heath - the symptoms "kept repeating themselves". On the 8th March, 1983, the patient complained of a black out. There was no distress in breathing on the 10th March, 1983, but on the 12th March "she complained again of difficulty in breathing and was given oxygen. She complained of chest pains in the evening..... From around 15th March, 1983 the plaintiff seemed to be steadily improving". Based upon his experience and on seeing her nearly every day Mr. Heath expressed the view that her general condition suggested that she "had a very uncomfortable period (time) from the operation to the 15th March, 1983. She had to be sedated and put on oxygen". When she was discharged, according to Mr. Heath, she was annoyed over the fact that she was being moved from one ward to another and she decided to go home. She was discharged with medication - preanissolone and given sodium choloride - that would produce a euphoric effect.

On the question of the effect of the anaethesia, Mr. Heath agreed that it could have an adverse effect on the heart, but he did not regard it as accurate to say that a light anaesthesia in the patient would cause very little risk. In so far as the suction curettage was concerned, according to Mr. Heath, that would require a light anaesthesia for the termination of the pregnancy at the time the appellant was referred to him. As for the tubal ligation, Mr. Heath said that to the best of his recollection he used the method of entry by the abdominal wall because of her fibroid condition; for that a heavy anaesthesia was used. In his opinion, with her condition of fibroid uterus and cardiac insufficiency the prevention of further pregnancy was dictated. Mr. Heath did not include in his evaluation, the fact that the appellant had suffered a fall on the day prior to her referral for termination of the pregnancy. The tubal ligation was also dictated by her heart condition and fibroids.

The evidence before the learned trial Judge showed undisputably that Mr. Heath and Joycelyn Evanson discussed the tubal ligation before it was performed. He explained the risk of further pregnancy and what the procedure involved. She consented to the operation. Indeed she testified that she had given up the idea of having any more children because, in her words, "I had suffered so much before having the T.O.P. that I could not go through with that any more"; and: "I had both operations done at the same time".

The trial Judge also heard from Joycelyn Evanson about her post operative experience. She said that she had chest pains and could not breathe properly. To a large extent she confirmed what Mr. Heath recalled from the notes he considered.

/After discharge,....

After discharge, the appellant was given about six weeks sick leave on a certificate from Dr. Shoba dated 18th March, 1983. On the 21st and 22nd March, 1983, Dr. Lambert examined her and in a certificate dated 27th March, 1983, he wrote to the effect that she was undergoing medical treatment by him for a heart ailment, since January 28, 1981 and that he sent her to Holberton Hospital on February 10, 1983. Then he wrote as follows:

> "The History of the surgical management at the hospital together with my examination of her in my office on March 21 and 24 lead me to the opinion that her heart condition deteriorated as a result of the surgical procedures."

It is not known what facts were contained or considered in the history to which Dr. Lambert referred and of course he was not relying on direct findings other than those revealed by his own examination. It must also be recalled that one of the surgical procedures took place only after discussion with, and consent of, the appellant.

During the period of her sick leave the appellant still suffered pain in her back and she did not resume work on the 1st May, 1983. Her leave was extended by another medical certificate dated June 14, 1983, in which Dr. Lambert certified that he examined her on the 1st May and found that she was suffering from "cardiac arrhythmia and tachycardia, U.T.L." and she would be fit to resume work on June 29, 1983". Joycelyn Evanson was also seen and examined by Dr.Roker in New York after she was discharged from the Holberton Hospital. She told the Court that it was in October 1983 that following advice of Dr. Roker she returned to work.

After a trial lasting about 11 days, the learned Judge in a written judgment stated the following findings and conclusions, in so far as this appeal is concerned:

1. "Taking the evidence as a whole I come to the irrestible conclusion that the plaintiff's pregnancy was not in any danger on the 4th February, 1983 and that the foetus was alive on the 9th February, 1983 when she sustained the fall."

2. "In light of all the medical evidence and the evidence of the plaintiff herself, I find, on a balance of probabilities, that the plaintiff was still pregnant on the 9th February, 1983 and that she would have gone on to have the baby."

3. "I also find that if the pregnancy was not terminated then there would have been no need to have done a tubal ligation."

4. "It is my view.....that the termination of the pregnancy was a result of the fall and the tubal ligation was also as a result of the fall. There was a link between the fall, the termination of the pregnancy and the tubal ligation."

"The fall. ...

5. "The fall was a substantial cause of the tubal ligation."

6. "The fall was the sole cause of the abortion which led to the termination of the pregnancy by suction curettage and tubal ligation."

7. "The defendant is therefore liable in damages to the plaintiff for pain and suffering."

With respect, I hold the view that the trial Judge misinterpreted or wrongly evaluated the evidence on the tubal ligation. It was clear that the procedure was carried out on the same day as, and following the suction curettage; but equally clearly, they were totally unrelated procedures carried out as a result of totally different considerations and with totally different objectives. The tubal ligation was consequent upon medical advice given and accepted with unfettered choice; and its objective was to prevent future pregnancy. The suction curettage was as a result of referral following a medical examination and in which the patient had no option. It is also significant that there was no allegation in the Statement of Claim that the tubal ligation was as a result of a fall sustained or that it led to cardiac arrhythmia or tachycardia. Again, the performance of a tubal ligation was not as a result of the T.O.P. and at best, on the evidence it was probably a matter of convenience that the surgical procedures were carried out on the same day. As Counsel agreed, so too it was clear that, the tubal ligation played no part in the claim.

I would say, with respect, that the learned Judge erred when he found that (1) if the pregnancy had not been terminated there would have been no need for the tubal ligation (2) the tubal ligation was as a result of the fall and there was a link between the fall, the termination of the pregnancy and the tubal ligation (3) the fall was a substantial cause of the tubal ligation and (4) there was an abortion that was caused solely by the fall and it led to the termination of the pregnancy by suction curettage and tubal ligation. Briefly, the findings with regard to the tubal ligation were erroneous.

The Statement of Claim indicated unmistakeably that Joycelyn Evanson was called on to prove that vaginal haemorrhage, back pains and "resulting termination of her eight week pregnancy" were caused by the fall sustained at work at the Anchorage Hotel; also, that the surgical procedure of suction curettage caused her to suffer cardiac arrhythmia and tachycardia.

It was not disputed that the appellant fell and ws injured nor was it disputed that she suffered back pains or that during the early hours of the morning the pains became severe and later persisted to varying degrees for almost a month after she entered the hospital. Joycelyn Evanson testified that the pain continued until about June or July 1983 - four or five months after she fell.

Andrew E. Holm Ltd. was liable in damages for such pain and suffering and the trial Judge awarded an amount of $15,000.00.

The learned trial Judge was also required to determine (a) whether or not vaginal haemorrhage was caused by the fall and (b) whether or not the pregnancy which was terminated (be it an eight or nine week pregnancy) had to be terminated because Joycelyn Evanson sustained a fall about eight days before the suction curettage.

As the case was conducted, there was no dispute that there was vaginal haemorrhage which increased between 4th February, 1983 and 10th February, 1983. Nor was there any dispute that there was a pregnancy that was terminated by surgical procedure.

Learned Counsel for the respondent submitted that there was no medical evidence that the termination of the pregnancy was brought about because of the fall, and that based upon the medical opinions expressed by Mr. Heath, the appellant had failed to establish that vaginal haemorrhage and back pains which led to the T.O.P. were caused by the fall Further, Counsel submitted, the evidence that abortion was threatened since the 4th February 1983 and then over the next few days there was increased vaginal haemorrhage was not enough to show that the surgical procedure on the 17th February, 1983 was attributable to the fall; rather, it indicated no more than a threat to the foetus. Counsel contended that if the T.O.P. did have anything to do with the fall and if Dr. Lambert did make any causal link between the T.O.P. and the fall, then he would certainly have mentioned the fact of the fall to his colleague who was assisting in the medical care of the appellant; and so the fact that Dr. Roker's mind was not directed to this indicated that in Dr. Lambert's estimation the fall was of little or no significance in causing the T.O.P.

Miss Lake also submitted that the learned trial Judge failed to consider the pre-accident medical history of the appellant against the post accident medical history and management in order to determine whether the resulting procedure of termination of pregnancy was caused by (a) the pre-accident medical circumstances or (b) the fall; and that instead of addressing his mind to these issues, the Judge went outside the scope of the medical evidence and came to a conclusion that was neither canvassed nor warranted, viz, that the appellant was still pregnant on the 9the February, 1983 and that she would have gone on to have the baby.

In my view there was ample evidence of the existence of a pregnancy from about 25th January, 1983; and that this pregnancy was ended by suction curettage on the 17th February, 1983. There was no evidence to contradict these facts and therefore it must be beyond any or all argument that on the

/9th February.....

9th February, 1983 Joycelyn Evanson was still pregnant. To this extent I agree with the trial Judge. However, I cannot agree that there was evidence to justify a finding that she would have gone on to deliver a full term baby. Mr. Heath's evidence was to the effect that in the light of her heart condition and fibroids it would be guessing to say that she would have had a successful pregnancy; and earlier I mentioned his evidence on the extent of the risk to pregnancy in patients with her conditions, as well as the advice that he would have given her. Such evidence as there was with respect to her having a full term baby was, in my view, tenuous and could only invite conjecture. I found no positive or reliable evidence to support the Judge's finding in this respect. Additionally, I think it is important that the claim was not for the loss of a full term baby but for the termination of an eight week pregnancy; and there was no question of an abortion leading up to a T.O.P.

Learned Counsel for the respondent submitted also that the learned trial Judge failed to determine whether or not the appellant had proved that the fall was the cause of the vaginal haemorrhage and back pains resulting in T.O.P., though as I understood her, Miss Lake conceded that there was evidence from which it could be properly inferred that the fall on the 9th February, 1983 was one of three causes which contributed to the termination of the pregnancy. It was not the sole cause nor did it initiate the surgical procedure of suction curettage.

On the question of causation Miss Lake cited numerous authorities in the course of an erudite analysis for which this Court must acknowledge its indebtedness. The cases dealt, as I understood them, with the change of emphasis from strict adherence to legal principles to a more moralistic concept of justice and fairness; and in so doing they showed that the courts at one time altered the onus of proof. However, although there was from time to time what Counsel called a "stretching of the principles by the Judges", in more recent times the legal principles and hallowed onus of proof in civil cases were restored by the judges. Miss Lake referred to some of the cases on which the trial Judge relied in his judgment and submitted that they no longer set out the prevailing law. I do not think it will assist in any way for me to embark upon a similar analysis in this judgment. It will suffice to say that I have read the cases which Counsel cited, namely: BRYCE V SWAN HUNTER GROUP (1988) 1 All E.R. 658; WILSHER V ESSEX AREA HEALTH AUTHORITY (1988) 1 All E.R. 871; MCGHEE V NATIONAL COAL BOARD (1972) 3 All E.R. 1008; FITZGERALD V LANE and another (1987) 2 All E.R. 455; KAY V AYSHIRE & ARRAN HEALTH BOARD (1987) 2 All E.R. 909; HAAG V MARSHALL 61 D.L.R. (4th) 371; BELKNAP et al v MEAKES 64 D.L.R. (4th) and KRALJ et al V MCGRATH et al (1986) 1 All E.R. 54. In his judgment Redhead J referred to Wilsher's case as reported

/at (1986).....

at (1986) 3 All E.R. 811 which was the decision of the Court of Appeal affirming the decision of the Judge; but the Court of Appeal's decision was reversed by the House of Lords in 1988 (as revealed by the above reference used by learned Counsel). Then again, Redhead J. relied upon the Lloyds Law Reports 1987, volume 2 for the law in Bryce's case; however the report used by learned Counsel showed unequivocally what was the present state of the law and it pointed out that subsequent to the decisions of the Court of Appeal in Wilsher's case (in 1986) and in McGhee's case (in 1972) the House of Lords (in 1988 and in 1987 respectively) reversed the positions.

On the quentum of damages Counsel for the respondent contended that since the award of the trial Judge included an amount based upon the finding that the fall was a substantial cause of the tubal ligation, then that amount - $4,000.00 - ought to be deducted from the final award, it having been agreed that the tubal ligation and the fall were not in any way related. Counsel also submitted that the evidence of Mr. Heath showed that the suction curettage had gone well and therefore the trial Judge should not have awarded more than was a proper sum "within the immediate area of the injury as a result of the fall". Counsel urged that if this Court was satisfied that there was a causal link between the fall and the termination of the pregnancy then the figure of general damages awarded was "more than adequate" but she was not seeking any alteration of the award of damages by thelearned Judge.

Learned Counsel for the appellant conceded that the tubal ligation had nothing whatever to do with termination of the pregnancy and he said, quite properly in my view, that he could not support the finding that the fall was the cause of the tubal ligation.

Mr. Watt submitted that the crux of this case was: whether or not the fall was the direct cause of (a) the vaginal haemorrhage that Dr. Lambert and Mr. Heath found on the 10th February, 1983 (b) the back pains (c) the loss of the pregnancy terminated by Mr. Heath on 17th February, 1983 and (d) the symptoms of her heart problem (dizziness, palpitation, black outs) and pain suffered during and after hospitalisation.

Mr. Watt agreed with Miss Lake that there were cases which reflected a gradual change from the legal to the moralistic concept; he held the view that "for a while there was a line of authorities, including McGhee's case and Wilsher's case heard by the Court of Appeal, which sought to shift the burden of proof on to the defendant to show, on a balance of probabilities, that the injuries caused to the plaintiff were not caused by the defendant's act". In the instant case Mr. Watt accepted that it

/was for....

was for Joycelyn Evanson to prove, on a balance of probabilities, that the injury was caused directly by the negligant act of Cecil Joseph, barman at the Anchorage Hotel. Counsel contended that there could be no doubt that the injury and loss of her pregnancy were a direct result of the fall. He referred to her pre-accident medical history and to the following facts and opinions: (i) that at 35 years of age Joycelyn Evanson wanted another child (ii) that she was not told by the cardiologist that she should not get pregnant, and (iii) that in the light of statements attributed to Dr. Roker and Dr.Lambert, it was an acceptable risk for her to take. Learned Counsel asked us to say that it was shown that Dr. Roker felt that notwithstanding her cardiac condition, Joycelyn Evanson would reach a 7 month pregnancy; therefore she could be delivered of a full term child.

I do not agree that the statement attributed to Dr. Roker by the appellant amounted to an assurance that she would reach 7 months if she became pregnant. I would say, with respect, that as I interpret the evidence, Dr. Roker advised the appellant that if ever she became pregnant and if she reached 7 months, then she ought, at that stage, to get a check done in New York. Dr. Roker would have known that Joycelyn Evanson was also under Dr. Lambert's care.

Learned Counsel further submitted that (1) there was no evidence that in 1983 Joycelyn Evanson was not living a full and productive life and no evidence of heart problems either immediately before February, 1983, or from 1982; (2) on the evidence the learned Judge was justified in finding that in early February, 1983, Joycelyn Evanson was in good health. Between 5th and 9th February, 1983, there was - other than vaginal spotting - nothing in the nature of haemorrhage. Haemorrhage was observed on the morning of 10th February or after she had suffered a serious fall. That haemorrhaging necessitated immediate hospitalisation; (3) if the fall materially contributed to the injury then the respondent would be liable (4) although it was unnecessary to lead medical evidence to prove that the fall materially contributed to the injury, there was evidence - from Mr. Heath - that the vaginal haemorrhage tipped the scale and led to the T.O.P. (5) the evidence established that the fall was either the sole cause of the injury and damage, or that it materially contributed to them and (6) the evidence proved that the anaesthesia used in the surgical procedures led to a recurrence of her heart problem.

Mr. Watt also contended that the letter to Dr. Lambert dated 27th March, 1983 was not intended to be a full reproduction of the patient's history and so it was not necessary to refer to the fall in order to obtain "a full clinical and cardiological work up on Mrs. Evanson".

/On damages,.....

On damages, learned Counsel argued that if this Court accepted the trial Judge's findings with respect to the fall (except those related to the tubal ligation) then the appellant was entitled to substantial damages for the loss of her foetus. He invited this Court to find that (a) it was an oversight by the trial Judge to omit loss of pregnancy from the award (b) there ought to have been an award for dizziness, palpitation and black-out experienced after the fall, (c) the respondent was liable even if it did not forsee that the heart problems would re-occur (SMITH V LEECH BRAIN & CO. LTD (1961) 3 All E.R. 1159),and (d) special damages awarded should not be altered.

In support of his submissions and arguments learned Counsel cited the following cases, in addition to McGhee's case: BURKE & UNSWORTH V ELDER DEMPSTER LINES LTD. (1939) 3 All E.R. 339; SELWOOD V TOWNLEY & FIRE CLAY CO. LTD. (1939) 2 All E.R. 132; THOROGOOD V VAN DEN BERTHS & JURGENS LTD. (1951) 1 All E.R. 682; ROBINSON V POST OFFICE & ANOTHER (1974) 2 All E.R. 737; BRICE et al v BROWN et al (1984) 1 All E.R. 997, and BONNINGTON CASTINGS V WARDLOW (1975) 1 All E.R. 615.

He informed us that his research failed to reveal a case decided in the Caribbean in which there was a claim for loss of pregnancy; and in an effort to assist this Court, Counsel drew our attention to two cases mentioned in the 1986 edition of KEMP & KEMP on Damages, GARRICK V HANTS AREA HEALTH AUTHORITY 1977 and SILVER V O'DOWD 1962 under the heading "Internal Organs".

I have already considered the evidence of the pre-accident and post accident medical history of Joycelyn Evanson and do not think it necessary to say more about the tubal ligation or the back pains.

In my view it would be incorrect, on the evidence adduced at the trial, to say that haemorrhaging per vagina began on the morning after Joycelyn Evanson fell. There is evidence to establish that there was bleeding on the 4th February, 1983 and that on the days following there was an increasing haemorrhage. By February 10th T.O.P. was indicated. On the basis of what Joycelyn Emerson told the Court below and on an analysis of the medical notes and inferences drawn therefrom by Mr. Heath, I am satisfied that there was an increase in vaginal haemorrhage and that such increase was probably brought on by the fall on the night of the 9th. The fall materially contributed to but was not the sole cause of, the vaginal haemorrhage seen on the 10th February, 1983. The learned trial Judge did not determine - as he was required to do - whether the appellant had succeeded in proving that the fall led wholly or in part to the vaginal haemorrhage.

/In Hotson's.....

In Hotson's case (supra) the facts were set out in the opinion of Lord Bridge of Harwick. Briefly, the plaintiff suffered avascular necrosis of the epiphysis - a layer of cartilage separating the bony head from the bony neck of the femur in a growing body; and Lord Bridge pointed out that

> "On the evidence there was a clear conflict as to what had 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, like any other about some past relevant event, which the Judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at least a material contributory cause of the avascular necrosis he failed on the issue of causation and no question of quantification could arise."

Lord Bridge went on to state that the appeal must be allowed, on the narrow ground that the plaintiff failed to establish a cause of action in respect of the avascular necrosis and its consequences.

In the same case Lord Ackner said in part:

> ".....this case was a relatively simple case concerned with the proof of causation, on which the plaintiff failed because he was unable to prove, on the balance of probilities, that his deformed hip was caused by the authority's breach of duty in delaying over a period of five days a proper diagnosis and treatment. Where causation is in issue, the judge decides that issue on the balance of probabilities. Unless there is some special situation.....there is no point or purpose in expressing in percentage terms the crtainty or near certainty which the plaintiff has achieved in establishing his cause of action."

In the instant case since the fall was shown to have been a material contributory cause of the vaginal haemorrhage, then the appellant was left to establish that it was this condition which resulted in the termination of the pregnancy at that stage. In my view there was unchallenged evidence from which this conclusion could properly be drawn. However, the evidence which was before the learned trial Judge did not merit a finding that, on a balance of probabilities, the suction curettage performed to end the pregnancy caused Joycelyn Evanson to suffer a recurrence of cardiac arrythmia or tachycardia. The appellant failed in this aspect of her claim.

I turn now to the question of damages. Particulars of special damage were set out in the Statement of Claim and amounted to a total of $4067.40. At the trial leave was granted to amend the particulars by adding an item amounting to $4800.00. The learned Judge awarded the sum of $4800.00 loss of wages from 1st July to 31st October, 1983 and the sum of $1517.40 for

/medical.....

medical expenses - a total of $6317.40. As the case was conducted this award was not seriously challenged by the respondent, nor did the appellant ask this Court to interfere with the award. Indeed the appellant asked that it be not altered.

As for general damages, the trial Judge made it clear that he awarded a sum of $4000.00 in respect of his findings on the tubal ligation. For reasons already explained this was an erroneous award and $4000.00 must therefore be deducted from the award of $15,000.00. However, the learned Judge failed to make an award for increase in vaginal haemorrhage and for loss of a foetus eight or nine weeks old. These items must be included in the award of general damages. I would award $20,000.00. Special damages quantify at $6317.40 and General damages at $31,000.00 a total of $37,317.40.

The appeal of Joycelyn Evanson succeeds. The judgment of the trial Judge is varied and judgment entered for the appellant in the sum of $37,317.40 with costs here and in the Court below, to be taxed. The respondent's appeal is dismissed.

E.H.A. BISHOP,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

MONICA JOSEPH
Justice of appeal (Acting)