EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2017/0002

BETWEEN:

RAWLE HANNIBAL

Appellant

and

THE BVI HEALTH SERVICES AUTHORITY

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Keith Scotland for the Appellant
Mr. Terrance B. Neale for the Respondent

2018: May 17;
2019: December 13.

Civil appeal – Medical Negligence – Causation –Whether judge applied correct law on causation – Whether judge erred in finding that appellant failed to prove causation – Expert evidence – Approach of appellate court to findings of fact based on expert evidence – Whether judge erred in resolution of conflicting expert evidence – Conclusions made from non-disclosure of relevant evidence – Whether judge wrongly concluded on effect of failure to disclose relevant evidence – Costs – Costs follow the event – Whether judge erred in awarding costs to the successful party on the claim

The appellant, Dr. Rawle Hannibal was hypertensive and diabetic. On 17th December 2012, Dr. Hannibal presented himself at the Peebles Hospital for treatment. He was diagnosed as suffering from a Transient Ischemic Attack ("TIA") secondary to uncontrolled hypertension. The following day it was determined that he had suffered a stroke and was immediately transported by air ambulance to the Jackson Memorial Hospital in Miami, Florida.

Dr. Hannibal instituted a medical negligence claim against the respondent, the BVI Health Services Authority, which operates the Peebles Hospital. Dr. Hannibal's main claim was that, had the Hospital's employees taken reasonable care in administering urgent and active treatment with respect to the TIA, he probably would not have suffered a stroke within 24 hours of his admission. The Health Authority denied the alleged negligence and contended that even if there had been a breach of duty, Dr. Hannibal's medical history was such that the breach would not have made any difference to his condition and that he would still have suffered the stroke. At trial, Dr. Hannibal and the Health Authority relied on the expert evidence of two medical practitioners to prove and resist the claim that the Hospitals' treatment was the cause of his stroke. Both experts were rigorously cross-examined at trial.

The learned judge found that although, on a balance of probabilities, the hospital's treatment of Dr. Hannibal fell below the standard of care required, Dr. Hannibal had failed to sufficiently prove that the Hospital's treatment of him was the cause of his stroke. The learned judge rejected the expert evidence advanced on Dr. Hannibal's behalf, and further found that there was an evidential lacuna caused by his failure to disclose his medical records from the Jackson Memorial Hospital. Dr. Hannibal's claim was accordingly dismissed.

Being dissatisfied with this result, Dr. Hannibal appealed, the central issue for determination before the Court of Appeal being, whether the learned judge erred in her treatment of and findings with respect to the conflicting expert evidence.

Held: dismissing the appeal, affirming the costs order in the court below, and ordering that Dr. Hannibal pays to the BVI Health Services Authority two-thirds of cost below as costs on the appeal, that:

1. The general policy of the courts is to apply the "but for" test of causation but this is not invariable. The test for causation to be applied by the court will depend on the circumstances of the case. There was no contention in the court below that there were multiple causes contributing to the appellant's stroke to justify a departure from the "but for" test. Accordingly, and in the circumstances, it was clearly open to the judge to apply that test.

   Sienkiewicz v Greif (UK) Limited [2011] 2 AC 229 considered; International Energy Group Ltd v Zurich Insurance plc UK [2015] UKSC 33 considered; Durham v BAI (Run off) Ltd (**"the Trigger Litigation"**) [2012] 1 WLR 867 considered; Petroleum Company of Trinidad and Tobago Ltd v Ryan & Anor [2017] UKPC 30 considered; United States v Oberhellmann 946 F 2d 50, 53 (7th Cir. 1991) considered; R v Kennedy [2007] UKHL 38 considered; Williams v The Bermuda Hospitals Board [2016] UKPC 4 considered.

2. When faced with conflicting expert evidence, a judge must find a basis for preferring the evidence of one expert over another, such as the objectivity and responses of an expert under cross-examination. The judge carefully weighed the evidence of the experts for the appellant and respondent, and made assessments on the credibility of the conflicting expert reports. The judge was

clearly unimpressed with the appellant's expert and her answers under cross-examination, and the judge's conclusions on the issue of causation are supported by the evidence of the respondent's expert. In the circumstances, there is no basis for appellate interference with the judge's findings of fact and resolution of the conflicting expert evidence.

Fage UK Limited and Anor v Chobani UK Ltd and Anor [2014] EWCA Civ. 5 considered;Re B (A Child) [2013] UKSC 33 considered; Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 considered; Wilsher v Essex Health Authority [1988] AC 1074 considered; Barclays Bank PLC v Christie Owen & Davies Limited [2016] EWHC 2351 (Ch.) considered; Alsco Pty Ltd v Mircevic [2013] VSCA 229 considered; Williams v The Bermuda Hospitals Board [2016] UKPC 4 distinguished.

3. It was the appellant's duty to prove that the damage suffered was caused by the negligence of the respondent. In the circumstances of this case, and as the respondent's expert witness rightly stated, the appellant's medical records from the Jackson Memorial Hospital could have assisted with providing that proof. It was therefore open to the judge to comment on the failure to produce the medical record, and to find that the failure to produce the records was intentional and resulted in an evidential lacuna.

4. An appellate court will interfere with a trial judge's discretion as to costs where the judge is found to have erred in principle, failed to take account of a material factor that should have been taken into account, took into account an immaterial factor, or where the judge was plainly wrong. The fact that the judge made findings that the Health Authority breached its duty of care towards Dr. Hannibal, did not necessarily warrant a departure from the normal rule that the unsuccessful party should be made to pay the costs of the successful party. In fact, it is not unusual for a claimant to fail on causation in a negligence claim. In the circumstances, the judge cannot be said to have erred in principle in making the costs order or that the order was wholly wrong.

JUDGMENT

[1] BAPTISTE JA: Dr. Rawle Hannibal was hypertensive and diabetic. At around 3:30 a.m. on 17th December 2012 he presented himself at the Peebles Hospital (the main public hospital in the British Virgin Islands) complaining of weakness on the left side of his body and an unusual sensation in his head. At 4:15 a.m. he was provisionally diagnosed as suffering from a Transient Ischemic Attack ("TIA"). At 5:30 p.m. after examination by the internist specialist he was diagnosed with a probable TIA secondary to uncontrolled hypertension. The

following day it was determined that he had suffered a Right Cerebral Vascular Accident (a "stroke") and was immediately transported by air ambulance to the Jackson Memorial Hospital in Miami, Florida.

[2] Dr. Hannibal instituted a medical negligence claim against the BVI Health Services Authority ("the Health Authority") which operated the Peebles Hospital. He asserted that had its employees taken reasonable care in administering urgent and active treatment with respect to the TIA, his condition would probably not have deteriorated to the extent that he suffered a right cerebral vascular accident within 24 hours of his admission. Dr. Hannibal further alleged that even if such an event had occurred, he would probably have recovered with little or no disability within three months of its occurrence. The Health Authority denied the alleged negligence and contended that even if there had been a breach of duty, Dr. Hannibal's medical history was such that the breach would not have made any difference to his condition and that he would still have suffered the stroke.

[3] Expert evidence formed an important plank of the parties' case. Dr. Hannibal relied on Dr. Marjorie Yee-Sing MBBS, FRCS, FCCS, FACS, a general surgeon and private practitioner; the Health Authority relied on Dr. Robert Hardie TD, MD, MA, FRCP a consultant neurologist. Both experts filed comprehensive expert reports, which Ellis J found to be in radical disagreement on crucial matters. The experts were rigorously cross-examined by opposing counsel.

[4] Ellis J recognised that a pivotal tipping point in the case is the expert evidence. Dr. Yee-Sing's opinion was that 'if antiplatelet therapy was administered within the 1-3 hours window, it would have given Dr. Hannibal more than an 80% chance of avoiding the stroke which he subsequently sustained'. Dr. Yee-Sing's conclusion was premised on the Rothwell Study. Dr. Hardie asserted that Dr. Yee-Sing's conclusion and reliance on the Rothwell study was misconceived. Dr. Hardie observed that the conclusion that early initiation of existing treatment after TIA is associated with an 80% reduction in the risk of

early recurrent stroke is based on data collected at the point of the 90 day follow up, not overnight. Dr. Hardie asserted that Dr. Yee-Sing's contention is false. Ellis J found that Dr. Yee-Sing's interpretation and application of the Rothwell Study was misguided because the conclusions were based on data collected at 90 day follow up, not overnight.

[5] Ellis J found that Dr. Hannibal's treatment fell below the standard of care required and, on a balance of probabilities, the Health Authority's servants or agents breached their duty of care to him. The specific findings were that there was/were:

(a) Periods where there was failure to adequately monitor Dr. Hannibal, which was particularly startling given the nature of his complaint. It begs the question, how Dr. Hannibal's blood pressure could have been adequately controlled if he was not constantly being monitored?

(b) Failure to administer some specific antithrombotic treatment on the morning in question - either a large dose of aspirin or a loading dose of clopidogrel or both. Dr. Hannibal did not receive any aspirin until the next day.

(c) Failure to promptly administer proper treatment based on the recorded readings.

(d) Failure at the very least even to consider thrombotic therapy after it became clear that Dr. Hannibal had deteriorated neurologically on the night of 17th December 2012.

(e) A general lack of urgency on the part of the medical staff that manifested itself in the internist not presenting himself until 6 p.m. (several hours after Dr. Hannibal had been triaged at 8:15 a.m.); this is critical since it appears that there was no other specialist care (neurological) available.

(f) A delay in transferring Dr. Hannibal to the Intensive Care Unit.

(g) The antithrombotic medication was not promptly administered until the following day despite the fact that it had been prescribed much earlier.

[6] While finding that Dr. Hannibal' s care was negligent, Ellis J held that the totality of the evidence made it impossible for the court to conclude that his condition was significantly compromised by the negligence. The simple fact being that, on the critical issue of causation, the expert opinion of Dr. Hardie was not significantly undermined. Dr. Hannibal therefore failed on the issue of causation. The claim was accordingly dismissed. This appeal arises out of that dismissal.

Grounds of appeal

[7] In summary, the grounds of appeal are: (i) the judge failed in applying the "but for" test for causation; (ii) the judge misapplied the case of Tahir v Haringey Health Authority;[1] (iii) the judge erred in holding that Dr. Hannibal's case was premised on the case of Gregg v Scott;[2] (iv) the judge erred in stating that Dr. Hannibal must prove that some measurable damage was caused by the delay in his case and accordingly must go further than proving that there was a material increase of the risk or that the delay can cause damage; (v) the judge erred in finding there was no contention that there were multiple causes contributing to the stroke; (vi) the judge erred in finding that there was no evidence that the delay had caused additional injury; (vi) the judge erred in finding that Dr. Yee-Sing's interpretation of the Rothwell study was misguided; and (vii) Dr. Hannibal's failure to disclose his medical records from the Jackson Memorial Hospital was a deliberate non-disclosure which left a gaping lacuna in the evidence.

[1] [1998] Lloyd's Rep. (Med) 104.
[2] 2005 UKHL 2.

[8] Although several grounds of appeal are advanced, the appeal essentially represents a challenge to the judge's findings on causation. Central to this issue is whether the judge erred in her treatment of and findings with respect to the conflicting expert evidence. Before treating with these issues and the submission of the parties, I will refer to the law on causation.

Causation

[9] In Sienkiewicz v Greif (UK) Limited,[3] Lord Phillips stated at paragraph 16:

> "It's a basic principle of the law of tort that the claimant will only have a cause of action if he can prove, on a balance of probabilities that the defendant's tortious conduct caused the damage in respect of which compensation is claimed. He must show that, *but for* the defendant's tortious conduct he would not have suffered the damage. This broad test of balance of probabilities means that in some cases a defendant will be held liable for damage which he did not, in fact, cause. Equally there will be cases where the defendant escapes liability, notwithstanding that he has caused the damage, because the claimant is unable to discharge the burden of proving causation."

[10] The general policy of the courts is to apply a "but for" test of causation but this is not invariable. As the English and Wales Court of Appeal put it in International Energy Group Ltd v Zurich Insurance plc UK: 'English law does not have a monolithic doctrine of causation: different circumstances giving rise to different legal rules may require different causal requirements.' [4] In Durham v BAI (Run off) Ltd (**"the Trigger Litigation"**),[5] Lord Mance observed at paragraph 55, that:

> "Rules regarding causation are created by the courts for the purpose of determining when liability arises in particular contexts. Normally, they reflect a common sense understanding of what is ordinarily understood when we speak of a cause in a particular context."

[3] [2011] UKSC 10.
[4] [2015] UKSC 33.
[5] [2012] UKSC 14.

[11] In Petroleum Company of Trinidad and Tobago Ltd v Ryan & Anor[6] it was emphasised that in the majority of cases, the burden remains with the claimant to establish causation; the exceptions to this requirement are limited. As a general proposition, the form of causation theory used by the courts is a matter of policy in which the context is important. As Judge Posner said in United States v Oberhellmann: 'Causation is a complex, contextually variable concept, in law as in life.'[7] Lord Bingham similarly stated in R v Kennedy: 'Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises.'[8] In Williams v The Bermuda Hospitals Board,[9] the Privy Council employed the material contribution test of causation and held that delay in treatment had materially contributed to Williams' injury.

Judge's analysis

[12] In addressing the issue of causation, Ellis J stated that Dr. Hannibal has to prove that the breach of duty caused or materially caused his stroke and that it was foreseeable as a result of the breach. The claim will fail unless it can be proven on a balance of probabilities. The learned judge posited that the question for the court was: would the injury have been suffered but for the negligence of the defendant? If yes, the defendant was not liable, if no, the defendant was liable.

[13] The learned judge recognised that in proving causation, the courts have on occasions applied a different test than the "but for" test, and stated that where two or more causes exist which operate concurrently, it may be factually impossible to determine which one was the cause on a balance of probabilities. In order to circumvent this difficulty, the courts have developed

[6] [2017] UKPC 30.
[7] 946 F 2d 50, 53 (7th Cir. 1991).
[8] [2007] UKHL 38 at [15].
[9] [2016] UKPC 4.

the "material contribution" test, by which the claimant does not have to prove that the defendant's breach was the sole or even the main cause of the damage, provided he can demonstrate that it made a material contribution to the damage. The learned judge opined that on the evidence there is no contention that there were multiple causes contributing to the stroke and therefore that, in the court's view, the usual "but for" test of causation was the appropriate test to be applied.

[14] Ellis J clearly appreciated the different tests applicable to causation – the "but for" test as well as the "material contribution" test – and was fully cognisant of the context in which the question of causation arose. The learned judge had no doubt that the relevant risk factor in Dr. Hannibal's case was hypertension, which should have been controlled and properly monitored if he were to reduce the risk of a stroke. Further, while Ellis J had no doubt that proper monitoring and the earlier administration of anti-platelet therapy were obvious elements of appropriate care, she found that in order to succeed, Dr. Hannibal must demonstrate that but for the purported failures, a stroke would have been averted. The learned judge concluded that the "but for" test of causation was the appropriate test. In the circumstances, it was clearly open to the judge to apply the "but for" test.

Submissions of the parties

[15] Mr. Scotland, Dr. Hannibal's counsel, contended that the Health Authority failed to provide appropriate treatment for Dr. Hannibal's hypertensive condition and failed to treat the TIA which was diagnosed and should have been the subject of urgent and active treatment at the time of admission. Had Dr. Hannibal received such treatment, his condition would probably not have deteriorated to a right cerebral vascular accident within 24 hours. Even if a stroke had set in, he would have recovered with little or no disability within 3 months.

[16] Mr. Scotland asserted that the judge's conclusion that there was no evidence that the negligent delay in treatment had not caused additional damage to Dr. Hannibal was erroneous and based on a misunderstanding of the evidence. Mr. Scotland argued that the conclusion was based on Dr. Hardie's speculative conclusion that Dr. Hannibal had small vessel disease and accordingly a stroke was inevitable, having regard to his diabetic and hypertensive history. Mr. Scotland argued that the conclusion is speculative because there was no definitive test on which Dr. Hardie based his conclusion. Mr. Scotland pointed to the evidence in cross-examination in which Dr. Hardie agreed that to confirm the diagnosis of small vessel disease, he would have had to look at the heart with an echocardiogram and perform an ultrasound examination of the carotid artery. Dr. Hardie also agreed that there is no evidence that an angiogram was done.

[17] Mr. Scotland posited that there was clear evidence from Dr. Yee-Sing that the delay in treatment had caused Dr. Hannibal's condition to deteriorate to the extent that he suffered a stroke. He stated that Dr. Yee-Sing indicated categorically in her report and oral evidence that the delay had caused damage to Dr. Hannibal. Mr. Scotland contended that Dr. Hannibal came to the hospital with a TIA and while there, suffered a stroke in circumstances where he was not being monitored as a patient, and in particular, a patient with high blood pressure. High blood pressure was acknowledged as a serious risk factor for a stroke. There was no evidence before the court that patients with TIAs inevitably go on to experience acute ischaemic stroke.

[18] Mr. Scotland contended that Ellis J and Dr. Hardie failed to properly analyse the Rothwell study and its conclusion; further, the study shows that it was already established that there is a 10% risk of early recurrent stroke within one week after a person suffers a TIA. With early treatment, that risk is reduced by 80%. Mr. Scotland submitted that while the data was collected after a 90 day follow up, there was no reason that the conclusions with

respect to the value of early treatment would not be applicable to patients who had, overnight, suffered a TIA. The 90 day data collection was done to show the long term effect of early treatment and did not cheapen the value of early treatment for those who had just suffered a TIA.

[19] Mr. Scotland argued that Dr. Yee- Sing's conclusion with respect to the Rothwell Study and her assertion is such that the stroke could have been avoided had it not been for the negligent treatment by the hospital. Mr. Scotland submitted that the rejection of Dr. Yee-Sing's evidence was plainly wrong. Counsel also asserted that Ellis J felt that the 90 day period of evaluation meant Dr. Yee-Sing could not conclude that early treatment would have reduced the risk of a stroke occurring at all. He further contended that the court ignored the clear wording of the study which dealt with the fact that the 10% risk of recurrent stroke within a week when a person suffered a TIA is reduced by 80 to 90% with early treatment and assessment. What increases the risk is clearly the presence of risk factors and their management.

[20] Mr. Neale, for the Health Authority, contended that the learned judge was correct to find that the vital element of causation had not been proved. Mr. Neale argued that the court was bound to treat Dr. Yee-Sing's conclusion on the issue of causation with a great degree of scepticism; he submitted that it was an unsubstantiated opinion of a medical practitioner who was not a neurologist, but a general surgeon who appeared not to fully appreciate or understand the medical issues with which she was required to assist the court. Mr. Neale submitted that regardless of the treatment Dr. Hannibal received at the hospital during his stay, it would have made no difference to his medical outcome and he would most likely still have suffered the stroke which he did. Mr. Neale posited that Dr. Hannibal's medical history was such that there was always a possibility that his condition would have deteriorated

and that, upon the occurrence of a stroke, he would have suffered some disability.

[21] Mr. Neale referred to the fact that Dr. Hardie reviewed Dr. Hannibal's CT scan which showed that 'on the morning of 18 December he had a dense hemiplegia by 06:00 and infarction was already visible and established on the repeat CT brain scan done at 10:47'. Mr. Neale argued that Dr. Hannibal, who had the burden of proving his case, deliberately withheld his medical records from the Jackson Memorial Hospital in Miami which would have conclusively established the cause of his stroke. There was no credible evidence before the court that the Health Authority's delay in treatment had caused Dr. Hannibal to suffer the stroke and the court was right to accept Dr. Hardie's evidence which was found to be credible and which was not undermined during cross-examination.

The law

[22] The challenge to the findings on the issue of causation, involves an attempt to assail Ellis J's assessment, evaluation and conclusion with respect to the expert evidence. An appellate court will be reluctant to interfere with a trial judge, not only on findings of primary fact based on the credibility or reliability of witnesses, but also where conclusions of fact involve an assessment of a number of different factors which have to be weighed against each other and involve an evaluation of the facts. The law is settled as to the need for appellate caution in overturning findings of fact. The difficulties associated with such a challenge are well known, but will be addressed again in view of Mr. Scotland's invitation to the court to look at the primary facts and documents that were before the judge. Mr. Scotland stated that the exercise is not focused on credibility, truthfulness and weight, but the court will be asked to draw inferences from the facts that were before the court and

consequently draw its own inferences. In this regard, Mr. Scotland referred to Benmax v Austin Motor Co Ltd.[10]

[23] An appellate court is constrained when called upon to interfere with factual findings. Compelling reasons are needed to interfere with factual findings, the evaluation of those facts and inferences to be drawn from them. The general approach of an appellate court to appeals on questions of fact was summarised by Lewison LJ in Fage UK Limited and Anor v Chobani UK Ltd and Anor,[11] he said:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.

Where a trial judge has reached a conclusion on the primary facts, it is only in rare cases that an appellate tribunal will interfere with it. Circumstances warranting interference include (i) where there was no evidence to support the conclusion; (ii) where the conclusion was based on a misunderstanding of the evidence; or (iii) where the conclusion was one which no reasonable judge could have reached: Re B (A Child),[12] per Lord Neuberger at paragraph 53. In Henderson v Foxworth Investments Ltd,[13] Lord Reed said at para 67:

> "… in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot be reasonably explained or justified."

[10] [1955] 1 All ER 326.
[11] [2014] EWCA Civ. 5, at paragraph 114.
[12] [2013] UKSC 33.
[13] [2014] 1 WLR 2600.

[24] A first instance judge's assessment of or evaluation based upon expert evidence adduced at trial must be approached by an appellate court with similar caution. Since the evaluation of expert evidence is likely to be bound up with a wider evaluation of matters of fact, an appellate court will still be very slow to intervene. An appeal court always proceeds with caution in considering appeals against findings of fact or findings based on an assessment of expert evidence: see Thomson v Christie Manson & Woods Limited & ors.[14]

[25] Where the judge's decision is based on preferring the evidence of one expert rather than the other, the appeal court similarly shows deference to the judge's determination since the judge has the advantage of seeing and hearing the experts give evidence. As Lord Bridge explained in Wilsher v Essex Area Health Authority:

> "Where expert witnesses are radically at issue about complex technical questions within their own field and are examined and cross-examined at length about their conflicting theories, I believe that the judge's advantage in seeing them and hearing them is scarcely less important than when he has to resolve some conflict of primary fact between lay witnesses in purely mundane matters."[15]

Resolution of conflicting expert evidence

[26] There was conflicting expert evidence before the court on the issue of causation which called for resolution. The appropriate approach of the court in resolving such conflict falls for consideration. As explained in Barclays Bank PLC v Christie Owen & Davies Limited,[16] it is not simply a matter of which expert is preferred. The court is enjoined to make a judgment as to the expert witness, the weight to be placed on different aspects of their evidence and the assistance to be derived from it, and then reach its own conclusion.

[14] [2005] EWCA Civ. 555.
[15] [1988] AC 1074.
[16] [2016] EWHC 2351 (Ch.).

In similar vein, the Judicial College of Victoria in its guidance for judges on assessing expert evidence, stated that:

> "It is not sufficient for the judge to refer to the existence of competing medical opinions and then to prefer one opinion over the other. The obligation to give reasons requires judges to refer to the contradictory evidence and explain the judge prefers one view.[17]

[27] In Alsco Pty Ltd v Mircevic,[18] Robson AJA also provides useful guidance on the question of judicial resolution of conflicting expert evidence. Robson AJA stated that judges are not to resolve such conflicts by purporting to develop their own expertise and substitute their own opinion for that of the experts. Instead, the judge will find a basis for preferring the evidence of one expert over another such as: which opinion best aligns with the primary facts the judge finds; which opinion appears to be more credible; a comparison of the qualifications, expertise or experience of the competing experts; which expert appeared to be the most objective and the responses of the expert under cross-examination.

Analysis of **Ellis J's assessment of the expert evidence**

[28] Ellis J was alive to the fact that a pivotal tipping point in the case was the expert testimony and pointed out that the issue of causation is often determinative of a negligence claim. She stated that Dr. Hannibal's medical expert must identify precisely what the Health Authority did wrong and show exactly how its error caused him to be injured. Ellis J recognised that the experts radically differed on crucial points which significantly bear upon the issues which concern the court, and it was the court's duty to resolve the conflicting expert testimony. In that regard she was guided by the approach of Bingham LJ in Eckersley v Binnie[19] who stated:

> "In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes

[17] Judicial College of Victoria Serious Injury Manual, Chapter 4 (Meaning of Serious Injury), Section 7 (Expert Evidence): http://www.judicialcollege.vic.edu.au/eManuals/SIM/index.htm#54372.htm.
[18] [2013] VSCA 229, paragraphs 85 to 95.
[19] [1988] 18 Con LR 1.

> from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason."

In seeking to resolve the conflict Ellis J was also mindful of Lord Bridge's guidance in Wilsher v Essex Area Health Authority.

[29] The learned judge referred to the objection which had been mounted to Dr. Yee-Sing's report based on the ground of lack of impartiality (her non-disclosure that she was a former colleague of Dr. Hannibal and a former employee of the Hospital Authority) and her acceptance of a retainer on a contingency basis, and stated that caution must be exercised before accepting the opinions she articulated.

[30] Ellis J stated that the conclusion that if aggressive anti-platelet therapy had been administered within the 1 – 3 hour window, it would have given Dr. Hannibal more than an 80% chance of avoiding the stroke was based upon Dr. Yee-Sing's use and application of the Rothwell Study. The learned judge observed that when it was put to Dr. Yee-Sing that she may have misinterpreted the study in the Report, she replied that she did not conduct the study herself but obtained the Report from the internet and merely quoted therefrom. Ellis J noted that Dr. Yee-Sing declined to make any comment about the observation made by Dr. Hardie in respect of this study which indicates that the conclusions drawn were in respect of a long term study and not a short term episode.

[31] The learned judge reasoned quite properly, that the critical issue being causation, it was not enough when challenged for Dr. Yee-Sing to suggest to the court that she did not conduct the study herself but obtained the report from the internet and merely quoted therefrom. Ellis J opined, it was critical that Dr. Yee-Sing vigorously defend her analysis and conclusions rather than simply decline to

comment about Dr. Hardie's critique on this issue. Ellis J stated that Dr. Yee-Sing's blithe reiteration that the study was done and the conclusions were used to explain why early intervention was necessary did little to assist the court. The learned judge lamented that the court was asked to rely on the analysis of Dr. Hannibal's attorneys who in written legal submissions filed after the trial, attempted to interpret the medical study. In my judgment, these were important observations made by Ellis J which certainly would have affected the weight attached to and her reliance on Dr. Yee-Sing's evidence.

[32] An expert may give evidence based on his knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works: Kennedy v Cordia (Services) LLP.[20] As Lords Reed and Hodge stated at paragraph 48 in Kennedy 'an expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or 'bare ipse dixit' carries little weight …'. In Makita (Australia) Pty v Sprowles,[21] Heydon JA explained that it is only possible to evaluate expert evidence if the expert explains the 'essential integers' underlying the opinion and that it is the duty of experts to furnish the trier of facts with criteria enabling evaluation of the validity of the expert's conclusions.

[33] In my view Ellis J justifiably criticised Dr. Yee-Sing's evidence. This was a case where conflicting expert evidence was before her for resolution. The learned judge undoubtedly recognised that the evidence of an expert witness must be able to withstand intense scrutiny if it is to be afforded weight. Further, if it is found wanting, that would affect the weight the trier of fact attaches to it, and more so where the court has other conflicting evidence on which it can rely and place greater weight. Ellis J clearly found Dr. Yee-Sing's evidence wanting and

[20] [2016] UKSC 6, at paragraph 41.
[21] (2001) 52 NSWLR 705.

stated the reasons why it was so found. This necessarily affected the weight she attached to the evidence.

[34] Ellis J stated that ultimately, a critical issue in the case is the question of causation and this is where Dr. Hardie was most critical of Dr. Yee-Sing's evidence. Dr. Hardie opined that Dr. Yee-Sing's conclusion and reliance on the Rothwell Study was misconceived. Dr. Hardie explained that the Rothwell Study is a population based study of all incident and recurrent TIA and stroke in Oxfordshire, England. More importantly, Dr. Hardie noted that the conclusion that early initiation of existing treatment after TIA is associated with an 80% reduction in the risk of early recurrent stroke was based on data collected at the point of the 90 day follow up and not over the course of 24 hours. For that reason, he stated that Dr. Yee-Sing's contention is flawed.

[35] The learned judge was satisfied that Dr. Yee-Sing's testimony was successfully impugned during the trial. She found that Dr. Yee Sing's interpretation and application of the Rothwell Study was misguided because the conclusions were based on data collected at 90 day follow up, not overnight. Ellis J concluded that Dr. Yee-Sing's failure to grasp the true scope of the study was a serious shortcoming which would have seriously misrepresented the conclusions drawn and ultimately compromised the premise that: 'if anti-platelet therapy had was administered within 1-3 hours window, it would have given Dr. Hannibal more than an 80% chance of avoiding the stroke which he subsequently sustained.'

[36] Ellis J asserted that Dr. Hannibal's case was further taxed by Dr. Hardie's contention that the delay in administering the treatment was not the cause of the stroke because, on a balance of probabilities, he would have probably suffered the stroke anyway. Ellis J found that the relevant risk factor in Dr. Hannibal's case was hypertension, which should have been controlled and properly monitored if he were to reduce the risk of a stroke. Further, proper monitoring and the earlier administration of anti-platelet therapy were obvious elements of

appropriate care. But, in order to succeed, Dr. Hannibal must demonstrate that, but for the purported failures, a stroke would have been averted.

[37] Ellis J pointed out that Dr. Hardie specifically asserted that it is extremely unlikely that a single dose of either aspirin or clopidogrel or both given would have altered the outcome if Dr. Hannibal had been given anti-thrombotic treatment on admission on 17th December. She referred to Dr. Hardie's evidence that:

> "Despite initial therapeutic optimism when thrombotic therapy was first investigated two decades ago, and enormous efforts to make it available in healthcare systems in the developed world, the benefits have proved disappointing. Even in the best centers around the world, it has been calculated that between 3 and 8 eligible patients have to be treated with tPA to prevent one severe stroke causing death or disability at 3 months."

Dr. Hardie asserted that, on a balance of probabilities, thrombolytic therapy would have made no material difference and therefore strongly disagreed with Dr. Yee-Sing's conclusion that Dr. Hannibal would or should have recovered with little or no disability within three months, had the correct treatment been administered.

[38] Ellis J referred to Dr. Hardie's assertion that the severity of Dr. Hannibal's stroke was determined by the underlying pathology which he surmised was likely small vessel disease secondary to him being a smoker with poorly controlled hypertension and diabetes. In that regard, Ellis J stated that there was much force in the criticisms of Dr. Hardie's opinion. Ellis J recognised that Dr. Hardie's opinion was assailed as unsupported by any positive evidence; the process of elimination by which he arrived at his conclusion was speculative; and that before his hypothesis can be accepted, it would have been necessary to carry out proper radiological tests to confirm its accuracy.

[39] Ellis J found that there was equal force in the Health Authority's contention that Dr. Hannibal had failed to discharge his burden to prove causation. Ellis J held that in the absence of objective cogent evidence as to the cause of the stroke, the court had no way of knowing whether the treatment suggested by Dr. Yee-Sing would have made any real difference to the outcome. Essentially, the court had no way of determining, on a balance of probabilities, whether the hospital's negligence actually caused the damage. Ellis J stated that 'in answering the question: is there a causal connection, the court has had to consider the contrasting expert testimony presented.' She concluded that 'the totality of Dr. Yee-Sing's evidence does not satisfy the court, on a balance of probabilities, that the negligence of the Health Authority actually caused the Defendant's stroke.'

[40] I am very much mindful that an appeal court always proceeds with caution in considering appeals against findings of fact or findings based on an assessment of expert evidence. Ellis J recognised the pivotal role the expert evidence played and the need to resolve their conflicting evidence. The learned judge did not simply choose one expert over the other; she carried out an evaluative process in respect of the competing expert opinions, explained why she preferred Dr. Hardie's evidence and came to her conclusion.

[41] The learned judge rejected the contention that had the Health Authority taken reasonable care in urgently administering active treatment with respect to the TIA, Dr. Hannibal's condition would probably not have deteriorated to the extent that he suffered a right cerebral vascular accident within 24 hours of his admission to the Hospital. She also rejected the contention that even if such an event had occurred, he would probably have recovered from that event with little to no disability within 3 months of the occurrence of the same. The learned judge stated that the contention was premised solely on Dr. Yee-Sing's expert testimony which was successfully impugned during the trial. It was certainly open to Ellis J to arrive at her conclusion after carrying out her

assessment and evaluation of the expert testimony. Ellis J's factual conclusion involved an assessment of the weight and persuasiveness of the expert witnesses. This was of critical importance. She was clearly unimpressed with Dr. Yee-Sing for the reasons articulated and her conclusions on the issue of causation are supported by the evidence of Dr. Hardie. It cannot be said that Ellis J's conclusion is one which no reasonable judge could have reached. In the circumstances, I see no basis for appellate interference. Ellis J's conclusion with respect to the expert testimony and causation is essentially dispositive of the appeal.

The Williams v The Bermuda Hospital Board decision

[42] Before briefly addressing some of the other grounds, most of which have been subsumed within the above analysis, I will look at Williams v The Bermuda Hospitals Board.[22] Mr. Scotland relied on Williams in support of the complaint regarding delay in administering treatment to Dr. Hannibal and in respect of his reliance on the material contribution test. Williams went to the emergency department suffering from acute appendicitis; later that day he had an appendectomy but there were complications. He was seriously unwell for a period of weeks and sued the hospital board alleging that the complications were the result of negligent delay in treatment. The trial judge found that there had been negligence but Williams had not proved that the complications he developed during and after surgery were probably caused by the hospital board's failure to diagnose and treat him expeditiously. The Court of Appeal reversed the judge's finding on causation. It held that the proper test for causation was not whether the negligent delay and inadequate system caused the injury but whether the breaches by the hospital board contributed materially to the injury. The court concluded that it was beyond argument that it did. The hospital board appealed to the Privy Council.

[22] [2016] UKPC 4.

[43] At para 39, in discussing the relevance of sequence of events, Lord Toulson stated that the sequence of events may be highly relevant in considering whether as a matter of fact a latter event has made a material contribution to the outcome, or conversely whether an earlier event has been so overtaken by later events as not to have made a material contribution to the outcome. Importantly, Lord Toulson noted that those are evidential considerations, and further stated that, as a matter of principle, successive events are capable of each making a material contribution to the subsequent outcome.

[44] It is instructive that at paragraph 40 Lord Toulson stated that a claim will fail if the most that can be said is that the claimant's injury is likely to have been caused by one or more of a number of disparate factors, one of which was attributable to a wrongful act or omission of the defendant.[23] In such a case, the claimant will not have shown, as a matter of probability, that the factor attributed to the defendant caused the injury, or was one of two or more factors which operated cumulatively to cause it.

[45] At paragraph 41, Lord Toulson noted the judge's finding that the injury to the heart and lungs was caused by a single known agent – sepsis – arising from the ruptured appendix. The sepsis developed incrementally over a period of approximately six hours, progressively causing myocardial ischaemia. The sepsis was not divided into separate components causing separate damage to the heart and lungs. Its development and effect on the heart and lungs was a single continuous process during which the sufficiency of the supply of oxygen to the heart steadily reduced. At paragraph 42, Lord Toulson stated that on the trial judge's finding, this process continued for a minimum period of two hours twenty minutes longer than it should have. Lord Toulson found it right to infer that, on the balance of probabilities, the hospital board negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs.

[23]See Wilsher v Essex Area Health Authority [1988] AC 1074.

[46] In Williams, Lord Toulson stated at paragraph 43 that 'the purpose of the appeal has been to determine a question of principle about the proper approach to causation in the circumstances of this case.' In discussing the relevance of sequence of events and material contribution in paragraph 39, Lord Toulson recognised that it was a factual issue engaging evidential considerations. Ellis J assessed and evaluated the evidence before her and made findings of fact on the issue of causation which were clearly open to her on the evidence. In my judgment, Williams does not take the matter further.

The remaining grounds of appeal

[47] There were a number of other grounds of appeal which for reasons earlier indicated, do not advance the matter. Mr. Scotland took issue with Ellis J's finding that there was no evidence that the delay had caused additional damage. With respect to delay, the thrust of the complaint was that Ellis J wrongly rejected the evidence of Dr. Yee-Sing that delay in treatment caused Dr. Hannibal's treatment to deteriorate to the extent that he suffered a stroke. This complaint cannot be sustained in light of the court's finding with respect to the expert evidence; likewise, the complaint with respect to the Rothwell Study.

[48] Mr. Scotland contended that Ellis J misdirected herself in treating the case of one of loss of chance and compounded her error by finding that there was no measurable damage which the proven negligence of the hospital had caused. Mr. Scotland posited that the argument is not one of loss of chance but rather the fact that the hospital's negligence was a material contributing factor to Dr. Hannibal suffering the stroke and that, but for that negligence, he would not be in the position that he is in today. While Mr. Scotland is correct that the argument was not one of loss of chance, Ellis J made factual findings on the issue of causation which were open to her on the evidence.

[49] Mr. Scotland complained that Ellis J erred in finding that there was no contention that there were multiple causes contributing to Dr. Hannibal's stroke. The thrust of this ground is that Ellis J erred in her understanding of the evidence in its totality when drawing the conclusion that only one cause was alleged on the evidence, since Dr. Hannibal always contended that the stroke was caused by several factors including his uncontrolled hypertension which when coupled with the Health Authority's negligence created the perfect storm, resulting in damage to Dr. Hannibal.

[50] Mr. Neale submitted, and I agree, that the appellant's argument is difficult to follow since he based his causation on the expert opinion of Dr. Yee-Sing which was to the effect that "if antiplatelet drug was administered within the 1-3 hours window, it would have given Dr. Hannibal more than an 80% chance of avoiding the stroke which he subsequently sustained." The expert evidence of Dr. Yee-Sing having found to be flawed, Dr. Hannibal cannot now contend on appeal that his claim was on the basis that 'his stroke was caused by several factors including his uncontrolled hypertension which when coupled with the Respondent's negligence created the perfect storm resulting in damage to the Appellant'.

[51] Mr. Scotland argued that Ellis J erroneously concluded that it was being advanced that there was only one cause of the stroke – the hospital's negligence. Mr. Scotland argued that Ellis J treated the case as being one of either inevitability due to Dr. Hannibal's underlying pathology of high blood pressure and diabetes or caused by the negligence of the hospital. Mr. Scotland contended that Ellis J did not appreciate the evidence so that she could see that it was not a case of 'either/ or' but rather a case where the hospital's negligence materially contributed to the stroke suffered by Dr. Hannibal. This complaint falls away in light of Ellis J's factual finding on causation, a finding which, as I indicated, was open to her on the evidence.

[52] Mr. Scotland argued that having identified the need to prove measurable damage, Ellis J found that Dr. Hannibal had not proved measurable damage. Mr. Scotland contended that by misdirecting herself that Dr. Hannibal had not shown measurable damage, Ellis J used the wrong principle and the wrong test. Mr. Scotland submitted that the damage was the stroke that was caused several hours after he was admitted. Mr. Scotland submitted that where the case is treated as one in which measurable damage is caused, Dr. Hannibal would have to show that, on a balance of probabilities, the negligence materially contributed to the stroke. Dr. Hannibal's case is that he entered the hospital with a TIA and that the negligence of the hospital caused him to suffer a stroke. The cerebral injury was the measurable damage. Mr. Scotland also complained that Ellis J misapplied the case of Tahir v Haringey Health Authority and also erred in holding that Dr. Hannibal's case was premised on Gregg v Scott.

[53] To conclude on the complaints just discussed, as indicated earlier Ellis J's analysis of and conclusion with respect to the conflicting expert evidence and the issue of causation is pivotal to this appeal. In the words of May LJ in Thomson v Christie Manson & Woods Limited & Ors,[24] that:

> "[E]ven accepting that individual points such as these are amenable to judicial appellate evaluation whatever the expert opinion, the appellate court should not cherry pick a few such points so as to disagree with a composite first instance decision which, in the nature of a jig-saw, puzzle, depended on the interlocking of a very large number of individual pieces, each the subject of oral expert evidence which the appellate court has not heard."

I respectfully agree and find this most appropriate to this appeal.

Failure to provide medical record

[54] Mr. Scotland complained that Ellis J erred in finding that Dr. Hannibal's failure to provide his medical record from Jackson Memorial Hospital left a gaping

[24] [2005] EWCA Civ. 555 at paragraph 141.

lacuna in the evidence. Ellis J noted that Dr. Hardie suggested that those records would have provided conclusive evidence as to what caused the stroke, because that hospital would no doubt have conducted the very tests/investigations which were planned by the Peebles Hospital but which were not done before Dr. Hannibal was airlifted to Miami for emergency medical treatment. The learned judge found that the deliberate non-disclosure left a gaping evidential lacuna. She stated that in the absence of objective cogent evidence as to the cause of the stroke the court has no way determining whether the treatment suggested by Dr. Yee-Sing would have made any real difference to the outcome. Essentially, the court had no way of determining on a balance of probabilities whether the negligence actually caused the damage.

[55] It was certainly open to Ellis J to comment on Dr. Hannibal's failure to produce his medical record in the terms that she did. Ellis J found that the failure to produce the medical records was intentional and resulted in an evidential lacuna. It was certainly Dr. Hannibal's duty to prove causation. Undoubtedly, in the circumstances of this case, as observed by Dr. Hardie, medical records could have gone a long way in providing such proof. I do not consider this ground of appeal to be meritorious.

Costs

[56] Mr. Scotland contends that the costs order against Dr. Hannibal was unfair and not in keeping with the guidance and spirit of the Civil Procedure Rules 2000 ("CPR 2000"). Mr. Scotland argues that there are exceptions to the general rule that the successful party is entitled to his costs. In that context, he submits that having regard to the proven deficiencies in treatment, the appellant cannot be faulted for having pursued the claim or any of the allegations contained therein. In the circumstances, Mr. Scotland submitted that the award of costs appears to be punitive having regard to the findings of the learned judge.

[57] The position is that CPR 2000 confers a wide discretion on trial judges with respect to costs and prescribes the way in which the court's discretion should be exercised. The general rule is that costs follow the event; that is, the unsuccessful party will be ordered to pay the costs of the successful party. There may be reasons provided by CPR 2000 which may justify departing from that principle, but that, prima facie, is the starting position.

[58] The Court of Appeal must exercise restraint when asked to upset orders for costs made by a trial judge. Circumstances warranting or justifying appellate interference with the trial judge's discretion as to costs would be where the judge erred in principle, left out of account a material factor that should have been taken into account or took into account an immaterial factor, or where the judge was plainly wrong in the exercise of her discretion.

[59] In considering costs orders, the court is enjoined to pursue the overriding objective as established in CPR 2000 of making an order that deals justly with the issue of costs as between the parties. In considering what costs order it should make, the court has to make an evaluative judgment as to where justice lies on the facts and circumstances as it has found them to be. An appeal court will only rarely find that the exercise of discretion by the judge below is wholly wrong. The reason is not only because of the wide nature of the discretion but the trial judge is usually uniquely well placed to make the required assessment having heard the relevant evidence.[25]

[60] Having regard to these principles, the learned judge was uniquely placed to make the required assessment having heard the evidence and arrived at her findings. I do not consider Ellis J to have erred in principle in making the costs order, or that the order was wholly wrong. The order is in keeping with the principle that costs follow the event. To the extent that Mr. Scotland relies on Ellis J's findings of breach of duty of the Health Authority, that would not

[25] Sirketi v Kupelli [2018] EWCA Civ. 1264.

necessarily warrant a departure from the normal rule. It is not unusual for a claimant to fail on causation in a negligence claim. Ellis J's finding with respect to the non-disclosure of Dr. Hannibal's medical record from Jackson Memorial Hospital was conduct which Ellis J seriously frowned upon. In the circumstances I would affirm the costs order.

Order

[61] I would dismiss the appeal and affirm the costs order that Dr. Hannibal pay prescribed costs to the BVI Health Services Authority in the court below. I would order that Dr. Hannibal pay two-thirds of those costs on appeal.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar