In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. 084

BETWEEN:

KEMAR MAYBURY
(For the benefit of himself, his son Khaleel Maybury and as Intended Administrator of the Estate of Latifa Maybury, Deceased)

Plaintiff

-and-

THE BERMUDA HOSPITALS BOARD

1st Defendant

DR. SHAINA KELLY

2nd Defendant

DR. LINDA NANGOMBE–COX

3rd Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Jai Pachai, Wakefield Quin Limited, for the Plaintiff**
Mr Allan Doughty and Ms Amelia Oatley, Beesmont Law Limited, for the 1st Defendant

Dates of Hearing: **18–19 November 2019**

Date of Judgment: **23 January 2020**

JUDGMENT

Medical negligence; failure to diagnose colorectal cancer; whether causation established assuming breach of duty; whether causation established on proof of "material contribution"; expert evidence; damages for negligence resulting in death

Introduction

1. These proceedings arise out of the tragic death of Mrs Latifa Maybury ("Mrs Maybury") on 18 November 2013, aged 30, as a consequence of suffering from stage IV colorectal cancer. It is contended on behalf of the estate of Mrs Maybury that Dr Bisasor-McKenzie, a servant and agent of the Bermuda Hospitals Board, the First Defendant ("BHB"), misdiagnosed her condition when she attended the Emergency Department King Edward VII Memorial Hospital ("KEMH") on 17 August 2012. On that date Dr Bisasor-McKenzie diagnosed Mrs Maybury's medical condition as "internal-haemorrhoids" when in fact the correct diagnosis should have been colorectal cancer. BHB now accepts that it was a breach of its duty of care in misdiagnosing Mrs Maybury's condition on 17 August 2012 but maintains that even if the right diagnosis had been made on that date, it would have made no difference to the outcome given the advanced staging of the colorectal cancer. BHB maintains that in these circumstances it is not liable in negligence to the estate of Mrs Maybury and rejects any claim for loss and damage made on behalf of the estate.

2. The proceedings were commenced by a Specially Endorsed Writ of Summons filed on the 3 March 2016. Mr Kemar Maybury, the husband of Mrs Maybury, ("Mr Maybury"), is the Plaintiff who sues on his own behalf and on behalf of his minor son Khaleel Maybury ("Khaleel") and as Intended Administrator of the estate of Mrs Maybury. The action was originally commenced against the BHB, her family doctor, Dr Shaina Kelly and her gynaecologist, Dr Wendy Woods. Subsequently Dr Kelly's locum tenens, Dr Nangombe-Cox, was added as an additional defendant and indeed a Default Judgment was entered against her on 3 July 2017. Owing to lack of evidence, the case against Dr Woods was dismissed by consent on 7 March 2018. Accordingly, the existing action and the present trial only concerns the BHB.

Background

3. The factual background is largely uncontroversial and is taken from the written submissions submitted on behalf of the Plaintiff. Mrs Maybury is a native of Morocco and was introduced to her future husband, Mr Maybury, in 2009. The parties married in Morocco in 2010 and after marriage decided to settle in Bermuda on a permanent basis. Mr Maybury ran a successful small take-out and dine in restaurant in Bermuda and after their marriage Mrs Maybury joined in the business.

4. In or about May 2012, Mrs Maybury commenced having bouts of constipation and rectal bleeding. On 20 July 2012 she attended at the office of Dr Kelly complaining of bloating, cramps and rectal bleeding. Dr Kelly's locum tenens, Dr Nangombe-Cox, examined Mrs Maybury and conducted a digital rectal examination. Dr Nangombe-Cox noted on the file that there were no haemorrhoids, skin tags on blood on the glove. Mrs Maybury was given medications and told to return if the bleeding continued.

5. On 17 August 2012 Mrs Maybury noticed a significant amount of blood while using the toilet. As she had been constipated for some months with occasional rectal bleeding, she was concerned by what she saw and as a result Mr and Mrs Maybury attended KEMH, taking with them samples of the blood mixed with stool and placed in a plastic bag.

6. Mr and Mrs Maybury arrived at KEMH around 6 PM. Mrs Maybury reported rectal bleeding and abdominal pain suffered on and off for the past three months associated with some bloating. She was seen by Dr Bisasor-McKenzie, who conducted a digital rectal examination. The discharge summary shows that the diagnosis made by Dr Bisasor-McKenzie was that of "Internal Haemorrhoids with PR [rectum] bleed: Constipation". The discharge summary also records that there was a follow-up instruction to Dr Kelly stating "Arrange referral to specialist, for investigation of PR bleed: colonoscopy". Mr Maybury accepts that the word

"colonoscopy" was mentioned perhaps by Dr Bisasor-McKenzie but there is a dispute as to whether further details in relation to colonoscopy were provided to Mr and Mrs Maybury. They were told that the discharge summary would be sent to Mrs Maybury's GP, Dr Kelly. Blood was taken, Dr Bisasor-McKenzie ordered an x-ray and medicines (suppositories) were prescribed. Mr and Mrs Maybury left KEMH around 8 PM.

7. The rectal bleeding continued but Mr and Mrs Maybury took comfort in the fact that Dr Bisasor-McKenzie had diagnosed the condition as internal haemorrhoids. Mr and Mrs Maybury did not receive any further communication from their GP, Dr Kelly, following the visit to the Emergency Department on 17 August 2012. They had no reason to suspect that the discharge summary may not, contrary to their understanding, have been faxed to Dr Kelly.

8. On 25 September 2012, Mrs Maybury attended at Dr Kelly's office. During this visit her GP confirmed that Mrs Maybury was pregnant and wrote a letter to Dr Woods, her Obstetrics and Gynaecology Specialist ("Ob/Gyn"), describing her as a healthy patient. The file entry for this date makes no mention of rectal bleeding, suggesting that Mrs Maybury did not mention it and her GP did not ask about it.

9. On 24 October 2012, Mrs Maybury went for her first appointment at the Ob/Gyn's office, where the nurse carried out antenatal booking. This included the completion of the antenatal record booking sheet, part of KEMH's process which included an ultrasound and lab work at KEMH on 25 October 2012. On 15 November 2012, Mrs Maybury attended the first appointment with her Ob/Gyn, Dr Woods.

10. On 31 December 2012, Mrs Maybury returned to the Emergency Department of KEMH. She reported that she was 18 weeks pregnant and had constipation. She complained that her haemorrhoids were bleeding and that when she used the bathroom there was bright red blood in the toilet from her bottom. She also stated that her stomach felt very tight and complained of cramping stomach pain. Mr

Maybury reported that his wife had been diagnosed with haemorrhoids before they knew she was pregnant. The nurse's notes record at the time of arrival was 17:09 and that they left two hours later due to the wait time being assessed by a physician. The notes record at 19:33 that Mrs Maybury, "Eloped from treatment room before seeing physician".

11. On 18 January 2013, Mrs Maybury returned to the Emergency Department of KEMH complaining of chest pains and other palpitations, shortness of breath and that she had been experiencing episodes for around two months, although they resolved on their own. The attending physician reviewed her vital signs and lab test results and noted that her symptoms were ongoing but had improved. She was also prescribed medications.

12. Mrs Maybury returned to the Emergency Department of KEMH on 20 April 2013. Her arrival time is recorded at 16:30. She had attended the Agricultural Exhibition and complained that she was having difficulty breathing and that her heart was racing. She said she was having these episodes every two to three weeks during her pregnancy but, according to the file note, denied being in pain. She complained that her stomach felt tight. The attending physician, Dr Sarah Jones, prescribed medications and Mrs Maybury was discharged at 18:40. She was advised to return if the problems persisted.

13. On 8 May 2013 Mrs Maybury went into labour. The anticipated delivery date was 2 June 2013, but the baby was born on 9 May 2013 by cesarean section. Her Ob/Gyn noted that the patient was well but found that there was an obstruction to normal delivery. She stated that she thought it might have been impacted stools, given Mrs Maybury's previous complaints of constipation. Her Ob/Gyn administered an enema, but this did not assist. Following delivery, Mrs Maybury complained of pain in her stomach, and this was further examined by ultrasound, days after she gave birth by cesarean section. She was diagnosed with metastatic colorectal cancer which had spread to her lymph nodes, liver, lungs and the spleen. She underwent various surgeries and treatments, including a colostomy

and chemotherapy. Treatments were not successful and she died on 18 November 2013 at KEMH with her family.

The Pleaded Case

14. The Plaintiff contends that the BHB was in breach of its duty of care and/or breach of contract in that the digital rectal examination conducted by Dr Bisasor-McKenzie on 17 August 2012 was inadequate because (a) Mrs Maybury was informed that she had "internal haemorrhoids" when no such lesions were noted previously and therefore misdiagnosed; and (b) the rectal cancer diagnosed in May 2013 was within 2-3 centimetres from the anus and should have been diagnosed by Dr Bisasor-McKenzie (paragraph 15 of the Statement of Claim).

15. The allegation made in paragraph 15 of the Statement of Claim is denied by the BHB in its Amended Defence. At paragraph 21 the BHB avers that although it would have been reasonable for Dr Bisasor-McKenzie to suspect internal haemorrhoids, she never provided a firm diagnosis claiming that Mrs Maybury suffered from the condition; and that in any event Dr Bisasor-McKenzie did instruct Mrs Maybury, both orally and in writing, to arrange to undergo a colonoscopy via her GP.

16. In support of the case advanced in paragraph 21 of the Amended Defence, BHB instructed Mr J R C Heyworth, Fellow of the Royal College of Surgeons of England, to provide expert evidence. Mr Heyworth submitted his Confidential Expert Witness Report dated 8 November 2017, which formed part of the Trial Bundle. At paragraph 27 of his report, Mr Heyworth states that he would not accept the allegation that the BHB was negligent and or in breach of contract in that the digital rectal examination by Dr Bisasor-McKenzie on 17 August 2012 was inadequate because Mrs Maybury was informed that she had "internal haemorrhoids". He qualifies this opinion by stating that if Dr Bisasor-McKenzie had attributed the features of the presentation solely to “internal haemorrhoids”

and not recognised the need for further investigation including colonoscopy, then he would accept that this allegation had merit.

17. Mr Heyworth also gave evidence that he would not accept the allegation that the rectal cancer diagnosed in May 2013 was within 2-3 centimetres from the anus and should have been diagnosed by Dr Bisasor-McKenzie. In Mr Heyworth's view, it cannot be stated categorically that a digital rectal examination performed some nine months before the diagnosis of rectal cancer in May 2013 would have identified the presence of the palpable lesion.

18. The Plaintiff further contended that the BHB was in breach of its duty of care and/or breach of contract in that, despite the BHB's promise, Dr Kelly had not received the fax transmission from the Emergency Department of KEMH regarding the visit by Mrs Maybury on 17 August 2012 (paragraph 5 of the Statement of Claim).

19. The allegation made in paragraph 5 of the Statement of Claim is denied by the BHB in its Amended Defence. At paragraph 4.11 the BHB pleads that it does not admit to the allegation that the office of Dr Kelly did not receive the fax in question and at paragraph 15.1 it is pleaded that the BHB had no reason to suspect that Dr Kelly may not have received the fax transmission of Mrs Maybury's attendance at the Emergency Department on 17 August 2012.

20. The BHB has also sought to adduce expert evidence in relation to this issue and this is provided by Mr Heyworth in his Report of 8 November 2017. At paragraph 25, Mr Heyworth states that although he would accept that there is vulnerability regarding the fax system of sending Emergency Department discharge summaries, if this was the accepted practice in Bermuda at the time of the events in question, then he would consider this allegation to be unfounded.

21. Mr Heyworth summarised his opinion at paragraph 32 of the Report when he stated that in his opinion the expected standard of care was achieved when Mrs Maybury attended the Emergency Department on 17 August 2012.

22. On 11 September 2019 attorneys for the BHB filed Notice of Admission of the First Defendant which stated:

> "*In relation to paragraphs 4 and 15(b) of the Re-Re Amended Statement of Claim, the First Defendant admits that there was a breach of duty on the part of its servant an agent, Dr Bisasor-McKenzie, in that it is probable that the rectal tumor, which is referred to as being "colorectal cancer" in paragraph 12 and 15(b) of the Re-Re Amended Statement of Claim, would have been palpable during the course of the digital examination, referred to in paragraphs 4 and 15 of that pleading. In making this admission, the First Defendant avers that the filing of this Notice does not amount to an admission of negligence by the First Defendant on account of Dr Bisasor-McKenzie's actions, as the Plaintiff must still prove causation at the trial of this matter. For the avoidance of doubt, the First Defendant maintains its averments which appear in paragraphs 28.2 and 28.3 of its Amended Defence*"

23. At paragraph 28.2 the BHB pleads that at all material times Mrs Maybury had less than a 50% chance of surviving illness and at paragraph 28.3 it is pleaded in the alternative that on 17 August 2012 it was probable that Mrs Maybury's cancer had already advanced to "stage IV", meaning that there was a substantially less than 50% chance that she would have survived illness.

24. On 6 November 2019 attorneys for the BHB filed a Second Notice of Admission of the First Defendant which stated:

> *"In relation to paragraph 4 and paragraphs 14(A) and 14(C) of the Re-Re Amended Statement of Claim, the First Defendant admits that there was a*

breach of duty on its part in failing to ensure that a faxed copies of the notes taken during the visit of Ms Latifa Maybury (deceased), at the Emergency Department of the King Edward VII Memorial Hospital were received by the office of Dr Shaina Kelly, the Second Defendant to these proceedings".

25. This admission is also made without prejudice to the BHB's position that Mrs Maybury is unable to prove causation as a matter of fact and law.

26. Accordingly, the position at trial was that the BHB admitted that there was a breach of duty on the part of its servant and agent, Dr Bisasor-McKenzie in that it is probable that the colorectal cancer suffered by Mrs Maybury would have been palpable (identified) during the course of the digital examination which was conducted by Dr Bisasor-McKenzie when Mrs Maybury attended at the Emergency Department on 17 August 2012. BHB also admitted a breach of duty by failing to forward to Dr Kelly's office the notes in respect of Mrs Maybury's attendance at KEMH on 17 August 2012.

27. Both admissions in relation to breach of duty are made subject to the reservation that the BHB contends that on the facts and the law Mrs Maybury is unable to establish that the admitted breaches of duty caused the damage complained of. In this regard, the BHB contends that it is not liable to the Plaintiff on the basis that the Court should accept the expert evidence of Dr Hollister to the effect that even if Mrs Maybury had received an early diagnosis in or about the month of August 2012, her odds of surviving past five years were always below 50%. The First Defendant submits in its Skeleton Argument at paragraph 1.4 that this is the principal issue for determination for the Court.

28. The Plaintiff takes issue with the First Defendant as to the relevant test in relation to the issue of causation. The Plaintiff does not accept that the "but for test" is the appropriate standard for the purposes of establishing causation in this case. The Plaintiff maintains that following the decision of the Privy Council in *Williams v*

The Bermuda Hospitals Board [2016] UKPC 4, the relevant test for the Court to apply is whether the Court is satisfied on a balance of probabilities that the admitted breaches of duty by the BHB materially contributed to the injury suffered by Mrs Maybury.

29. The First Defendant also invites the court to consider whether the action of Mrs Maybury amounted to contributory negligence on her part.

Issue of Causation

30. In *Gregg (FC) v Scott* [2005] UKHL 2, Baroness Hale explained at [193] that it is now *"hornbook law"* that damage is the gist of the action in negligence. The defendant owes a duty to take reasonable care of the plaintiff, the breach of which has caused the plaintiff actionable damage. It must also be shown on the balance of probabilities that what the defendant negligently did or failed to do caused the plaintiff's damage. Baroness Hale referred to the following passage in *Tort Law* by Tony Weir (Oxford University Press, 2002) pp 74-75:

> *"Classically all that need be shown is that it would probably have made a difference if the defendant had not been in breach of duty. Certainty is not required. The essential thing is to persuade the judge that the harm would probably have been avoided if the defendant had acted properly: it does not matter whether he is easily persuaded, because it is obvious, or is persuaded only with difficulty, because the matter is far from clear. The tendency to state the matter in terms of percentages is to be avoided. 'More likely than not' is a matter of persuasion, not of proof."*

31. Lady Hale explained at [194] that the "balance of probabilities" test is not designed to produce proportional recovery to the cogency of the proof of causation:

> *"If it is more likely than not that the defendant's carelessness caused me to lose a leg, I do not want my damages reduced to the extent that it is less than 100% certain that it did so. On the other hand, if it is more likely than not that the defendant's carelessness did not cause me to lose the leg, then the defendant does not want to have to pay damages for the 20% or 30% chance that it did. A 'more likely than not' approach to causation suits both sides."*

32. To the same effect is Lord Phillips at [174]:

> *"Under our law as it is at present, and subject to the exception in Fairchild, a claimant will only succeed if, on balance of probability the negligence is the cause of the injury. If there is a possibility, but not a probability, that the negligence caused the injury, the claimant will recover nothing in respect of the breach of duty: Hotson v East Berkshire Health Authority [1987] AC 750; Wilsher v Essex Area Health Authority [1988] AC 1074."*

33. In this case Mr Gregg attended Dr Scott with a lump under his left arm. Dr Scott negligently misdiagnosed the lump as benign, when, in fact, it was malignant cancer. The cancer was discovered nine months later by another specialist. By that time, the tumour had spread to the chest and Mr Gregg underwent high-dose therapy. The trial judge held on the expert evidence that at the time of misdiagnosis, Mr Gregg had a 42% chance of surviving 10 years (10 year survival being taken as a "cure"). The effect of the delay in diagnosis, according to the experts, was to reduce the chance of survival for more than 10 years even further, from 42% to 25%. On the evidence, the judge held that the delay had not deprived Gregg the prospect of a cure because it would probably not have been cured anyway and his appeal against the judgment was dismissed by the Court of Appeal and the House of Lords.

34. *Gregg v Scott* follows an established line of authority that if the damage complained of would have occurred irrespective of the alleged negligence on the part of the defendant, the plaintiff's claim based upon negligence cannot succeed.

35. In *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068, three night watchmen attended the hospital complaining that they had been vomiting after drinking tea. The casualty officer, who was himself unwell, did not see them, but said that they should go home and call in their own doctors. The men went away, and one of them died some hours later from what was found to be arsenic poisoning. The court held that the casualty officer was negligent in failing to see the men and advising them to go away and call in their own doctors. However, the court dismissed the claim against the casualty officer on the basis that, irrespective of the casualty officer's negligence, the deceased would have died in any event.

36. To the same effect is the decision of the House of Lords in *Hotson v East Berkshire Area Health Authority* [1987] 1 AC 750. The plaintiff, then aged 13, fell some 12 feet while climbing a tree and sustained an acute traumatic fracture of the left femoral epiphysis. He was taken to hospital, but his injury was not correctly diagnosed or treated for five days. In the event, he suffered avascular necrosis of the epiphysis, involving disability of the hip joint with the virtual certainty that osteoarthritis would later develop. He brought an action for damages against the defendant, who admitted negligence in failing to diagnose and treat his injury promptly. The trial judge found that even if the Health Authority had diagnosed the injury correctly and treated the plaintiff promptly there had been a high probability, which he assessed as a 75% risk, that avascular necrosis would still have developed. The House of Lords held that the judge's finding of fact was unmistakably to the effect that on a balance of probabilities the plaintiff's fall had left insufficient blood vessels intact to keep the epiphysis alive, which amounted to a finding of fact that the fall had been the sole cause of the avascular necrosis in the circumstances the plaintiff had failed on the issue of causation and no question of quantification of damage could arise.

37. Relying upon these authorities, counsel for the First Defendant submits that if the court finds, on a balance of probabilities, that Mrs Maybury's prospects of a successful cure, when she attended the Emergency Department of KEMH on 17 August 2012, were less than 50% then the Court should conclude that Mrs Maybury cannot succeed because she would probably not have been cured anyway.

38. Counsel for the Plaintiff in his written submissions urges the court that in relation to the issue of causation, the Court need go no further than the Privy Council decision in *Williams*. He submits that *Williams* has established the test for causation in Bermuda and any and all other authorities are irrelevant for this purpose or must take second place to the *Williams* decision. In the circumstances, it is clearly necessary to consider with some care and determine what precisely was decided by the Privy Council in *Williams.*

39. Mr Kamal Williams, the plaintiff, who was initially admitted to hospital for acute appendicitis, was subject to a negligent delay in performing a CT scan. This delay prolonged a pre-existing condition of sepsis (which had developed over 6 hours) for 2 hours and 20 minutes. As a result, Mr Williams suffered heart and lung complications. Hellman J found that the delay of 2 hours 20 minutes was due to the negligence of the BHB. However, he also found that the process of rupture and therefore sepsis started to develop from 15:19, which was before commencement of the period of delay for which the BHB was responsible. The accumulation of sepsis became progressively worse with the passage of time. Hellman J concluded that, even if there had been a system in place for efficient diagnosis, it was not established that Mr Williams would have been operated on before the rupture of the appendix. Accordingly, Hellman J held that Mr Williams had not established that the negligent delay on the part of the BHB caused the complications.

40. The Court of Appeal (Ward JA) reversed the decision on the basis that Hellman J had erred in law "*by raising the bar unattainably high".* Ward JA stated that the test was no longer a question of all or nothing but one of sufficiency and in his view, the causal or causative links between the inordinate delays coupled with the defective system which together contributed to the Williams injury, were clearly established.

41. In the Privy Council, the entire argument of both parties appears to revolve around the contention whether Mr Williams claim could come within the parameters of the gateway established by the House of Lords decision in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613. Counsel for the BHB argued at [22] that *Bonnington* did not assist Mr Williams as, at its broadest, *Bonnington* was authority that a plaintiff may recover damages for personal injury where he can show that there was a single causative agent; the defendant contributed to the pathological process in a way that was material (i.e. could not be disregarded as insignificant); the defendant's contribution to the pathological process was concurrent with any non-negligent cause; and as a matter of probabilities the defendant's contribution increased the magnitude (and not merely the risk) of the harm which the plaintiff suffered. The facts were that sepsis had developed by 19:10 and Mr Williams could not prove as a matter of probabilities that the complications during and after surgery would not have occurred but for the ensuing delay in the performance of the operation.

42. Counsel for Mr Williams did not accept that the application of *Bonnington* principle was confined in the way suggested by the BHB [25]. Mr Williams' counsel submitted that the principle, that it is enough that the defendant's negligence has contributed to the plaintiff's injury, applies where the evidence points to the probability that there were cumulative causes. It does not apply where there are merely several possible causes, any of which may have been entirely responsible for the injury. In the present case, he submitted, the Court of Appeal had strong grounds to conclude that the complications were the product of

a steadily worsening accumulation of sepsis over several hours, which was caused in part by the negligence of the BHB.

43. Lord Toulson referred at [27] to the facts in *Bonnington* where the claimant contracted pneumoconiosis from the inhalation of dust, containing minute particles of silica, in the course of employment at a foundry. Most of the dust originated from the operation of pneumatic hammers, but some of it escaped from swing grinders. The former involved no-fault on the part of the employers, but the latter resulted from breach of statutory duty in failing to intercept and remove that part of the dust. Lord Toulson then set out the reasoning of Lord Reid in *Bonnington* for holding the employers liable:

> *"29. .... Lord Reid summarised the effect of the medical evidence as being that the claimant's disease was caused by a gradual accumulation in his lungs of minute particles of silica. He continued at p 621:*
>
> > *"That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is: which was the most probable source of the respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders? It appears to me that the source of his disease was the dust from both sources and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree." (Emphasis added.)*
>
> *"30. Lord Reid concluded, at p 623, that it was proved not only that the swing grinders may well have contributed, but that they*

did in fact contribute, a quota of silica dust which was not negligible to the claimant's lungs and therefore helped to produce the disease. That was sufficient to establish liability against the employers."

44. Having set out the reasoning in *Bonnington* Lord Toulson set out how the reasoning in Bonnington applies to the facts in *Williams:*

> *"35. The parallel with the present case is obvious. The Board is not persuaded by Ms Harrison's argument that* Bonnington *is distinguishable because in that case the inhalation from two sources was simultaneous, whereas in the present case the sepsis attributable to the hospital's negligence developed after sepsis had already begun to develop*
>
> …
>
> *41. In the present case the judge found that injury to the heart and lungs was caused by a single known agent, sepsis from the ruptured appendix. The sepsis developed incrementally over a period of approximately six hours, progressively causing myocardial ischaemia. (The greater the accumulation of sepsis, the greater the oxygen requirement.) 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.*
>
> *42. On the trial judge's findings, that process continued for a minimum period of two hours 20 minutes longer than it should have done. In the judgment of the Board, it is right to infer on the balance of probabilities that the hospital board's negligence materially contributed to the*

process, and therefore materially contributed to the injury to the heart and lungs."

45. It appears reasonably clear from the judgment delivered by Lord Toulson, that the Privy Council was applying the *Bonnington* principle to the facts in the *Williams* case. It does not appear that the Privy Council was seeking to formulate a wider principle of causation based upon material contribution.

46. In *Williams*, the Privy Council applied the *Bonnington* principle on the basis that the injury to Mr Williams' heart and lungs was caused by a common agent, sepsis from the ruptured appendix. Part of the accumulated sepsis resulted from the non-negligent delay but the other part resulted from the delay for which the BHB was responsible. The accumulation of sepsis and its effect on the heart and lungs was a continuous process. On that basis, the Privy Council held that it was right to infer on the balance of probabilities that the BHB's negligence materially contributed to the process, and therefore materially contributed to the injury to the heart and lungs. Here, the experts are agreed that when Mrs Maybury attended the Emergency Department on 17 August 2012 she had already developed colorectal cancer. The disagreement between the parties is to the staging of that cancer and Mrs Maybury's chances of lasting cure. It is not readily apparent if and how the *Bonnington* principle applies to the facts of this case.

47. The Privy Council appears to confirm the existence of the "but for" test of causation. In *Bailey v Ministry of Defence* [2008] EWCA Civ 883, Waller LJ held that in cases where a plaintiff relied on the argument that the defendant's negligence had made a "material contribution" to his harm, the but for test was "modified". At [46] Waller LJ explained the position as follows:

"In my view one cannot draw a distinction between medical negligence cases and others. I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-

tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed. Hotson exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed"

48. In *Williams,* Lord Toulson commenting upon *Bailey* said at [47]:" *The Board does not share the view of the Court of Appeal that the case involved a departure from the "but-for" test."*

49. Lord Toulson expressly referred to the House of Lords' decision in *Gregg v Scott* and in particular to the statements made by Lord Hoffmann without indicating that the authority of the case was weakened in any way. In *Gregg v Scott* the majority in the House of Lords held that the plaintiff who had a 42% chance of survival for more than 10 years when he was misdiagnosed by Dr Scott could not succeed because he would probably not have been cured anyway. This is the very same argument which the First Defendant seeks to advance in this case. The First Defendant seeks to argue that even if Mrs Maybury was properly diagnosed on 17 August 2012 her chances of survival, according to Dr Hollister, the First Defendant's expert, was only 45%. On the strength of Dr Hollister's evidence, the First Defendant seeks to argue that the Court should hold that, on a balance of probabilities, Mrs Maybury would not have survived even if there was proper diagnosis on 17 August 2012. On that basis, the First Defendant argues, following the reasoning in *Gregg v Scott*, there should be no liability on the part of the BHB for any breaches of duty on the part of the BHB arising out of Mrs Maybury's attendance at the Emergency Department on 17 August 2012.

50. I consider that the First Defendant is entitled to advance this submission to the Court and there is nothing in the *Williams* case and the principle of material contribution which prevents the First Defendant from doing so. It does not appear to me that the *Williams* case or the principle of material contribution provides an answer to such a submission. The issue for the court is whether the submission is factually made out.

Expert evidence in relation to causation

51. The issue of breach of duty on the part of Dr Bisasor-McKenzie and the BHB is now admitted**.** It is now admitted by the First Defendant that there was a breach of duty on the part of Dr Bisasor-McKenzie in failing to detect the rectal tumour, which would have been palpable during the course of the digital examination on 17 August 2012. It is also admitted that there was a breach of duty on the part of the First Defendant in failing to ensure that a faxed copy of the notes taken during the visit of Mrs Maybury on 17 August 2012 were received by the office of Dr Kelly. The direct consequence of these breaches of duty of care is that Mrs Maybury was denied the opportunity to obtain appropriate medical treatment for rectal cancer commencing on or about 17 August 2012.

52. It remains in dispute between the parties the precise stage the colorectal cancer had developed by 17 August 2012 and Mrs Maybury's prospects for a cure had proper diagnosis been made on that date. These two issues are related and subject to expert evidence adduced on behalf of the Plaintiff and the First Defendant.

53. The Plaintiff's expert evidence in relation to these issues was given by Dr Michael Leitman. Dr Leitman is the Chief of General Surgery at Mount Sinai Hospital in New York and Site Chair, Department of Surgery, at Mount Sinai Beth Israel, New York. Dr Leitman is a surgical oncologist and has substantial experience in the field of cancer surgery.

54. The First Defendant's expert evidence was given by Dr Dickerman Hollister. Dr Hollister is an independent consultant in the field of diagnosis and management of patients with cancer and haematologic disorders. He is currently the Chief, Section of Oncology, at Greenwich Hospital, part of the Yale NewHaven Health, in Connecticut, US.

55. In his first Report dated 26th of October 2017, Dr Leitman expresses his opinion that Dr Bisasor-McKenzie was negligent in failing to detect the rectal cancer that was ultimately diagnosed in May 2013. Dr Leitman states that the tumour was within 2-3 centimetres from the anus and should have been diagnosed by Dr Bisasor-McKenzie as a result of the digital examination which she conducted on 17 August 2012. Had the rectal cancer been diagnosed in August 2012, it is the opinion of Dr Leitman that Mrs Maybury's condition would have been treatable for cure, rather than hopeless, when she was ultimately diagnosed nine months later. He says that he holds these opinions, based upon review of the records, to a reasonable degree of medical certainty. Dr Leitman says that he is able to give this opinion based upon his 30 years of treating patients with rectal cancer and his training as a surgeon together with his familiarity and review of medical literature.

56. In his Report dated 5 November 2017, Dr Hollister expresses the opinion that it was not surprising to him that the tumour was not palpated by Dr Bisasor-McKenzie on 17 August 2012, as higher rectal lesions are often out of the reach of the examiner's finger.

57. Dr Hollister expresses the further opinion that in August 2012 it is likely that Mrs Maybury's rectal cancer had spread at least to the regional lymph nodes which would give her a clinical stage of IIIB (T3 N1-2 M0)[1]. He bases this opinion on

[1] Stage refers to the extent of cancer, such as how large the tumour is, and if it has spread. The TNM system is the most widely used cancer staging system. The T refers to the size and extent of the main tumour which is usually called the primary tumour. The N refers to the number of nearby lymph nodes that have cancer. The M refers to whether the cancer has metastasised meaning that the cancer has spread from the primary tumour to other parts of the body. When the cancer is described by the TNM system, there are

the fact that histologically Mrs Maybury's tumour was moderately differentiated and this suggests to Dr Hollister slow growth over many months in contrast to tumours that are "poorly differentiated"

58. Estimating the impact of any delay from the information available will depend on Mrs Maybury's tumour stage. Dr Hollister states that had she been diagnosed in August 2012 as stage IIIB, her five year survival would have been approximately 45%. In his view while any delay in diagnosis is unfortunate, by the time of Mrs Maybury's first visit in August 2012, Mrs Maybury already had an advanced cancer to which she would inevitably succumb. Dr Hollister also states that stage IIIB "*might"* even be an under estimate of Mrs Maybury's disease burden in August 2012. He suggests that it could be stage T3 N1 M1.

59. In his second Report dated 11 February 2018, Dr Leitman responds to the main points made by Dr Hollister. Dr Leitman states that Dr Hollister's statement that Mrs Maybury's staging in August 2012 might be T3 N1 M1 is speculation as there are no facts or basis to support this opinion. Dr Leitman exhibits a Table from *McCarthy, et al 2012 – "Pre-operative chemoradiation for non-metastic locally advanced rectal cancer*" showing five year survival rate for stage IIA (T3 N0 M0) at 40-60%. He also refers to study by *Lim, et al 2012, "Failure Patterns Correlate With the Tumour Response After Preoperative Chemotherapy for Locally Advanced Rectal Cancer*" where 581 patients were studied with rectal carcinoma and their overall five year survival rate was more than 70%. The patients involved in the Lim study exhibited locally advanced rectal cancer, as

---

numbers after each letter that give more details about the cancer. In relation to the primary tumour (T): TX denotes that the main tumour cannot be measured; T0 denotes that the main tumour cannot be found; T1,T2,T3,T4 denote the size and/or extent of the main tumour. The higher the number after the T, the larger the tumour or more it has grown into nearby tissues. In relation to lymph nodes (N): NX denotes cancer in nearby lymph nodes cannot be measured; N0 denotes there is no cancer in nearby lymph nodes; N1,2,3 denote the number and location of lymph nodes that contain cancer. The higher the number after the N, the more lymph nodes that contain cancer. In relation to distant metastasis (M): MX denotes metastasis cannot be measured; M0 denotes cancer has not spread to other parts of the body; M1 denotes cancer has spread to other parts of the body.

was the case, according to Dr Leitman, with Mrs Maybury in August 2012. On the basis of this medical literature, Dr Leitman states that had the rectal cancer been diagnosed in August 2012, it is his opinion that Mrs Maybury's condition would have been treatable for cure, rather than hopeless, when she was ultimately diagnosed nine months later.

60. In accordance with the directions given by the Court, Dr Leitman and Dr Hollister had a joint meeting (via telephone) on 12 September 2018 to discuss their respective reports and set out those issues on which they agreed explaining the basis of the agreement and those issues which remain in dispute between them and giving a detailed summary of their reasons for disagreeing and any necessary clarifications. After the meeting, Dr Leitman prepared a Joint Report which was circulated to Dr Hollister and with which he agreed.

61. The Joint Report set out the Experts agreement in relation to medical evidence and facts gathered from the records as follows:

> ***"The Experts all agree with the following****:*
>
> *1. Medical evidence and facts from records:*
>
> *a. Mrs Maybury was experiencing symptoms of constipation and rectal bleeding by at latest May 2012 [see the Plaintiff's Writ of Summons, and the notes taken at BHB on 17 August 2012]*.
>
> *b. On 10 May 2013 an ultrasound reported the presence of multiple lesions in the liver, the largest which had dimensions of 42mm x 34mm (the third dimension being unknown).*
>
> *c. Further examinations around this time revealed other metastases in the spleen and in the left lung.*
>
> *d. A liver biopsy was reported on 17 May 2013 as showing "Fragments of liver tissue almost entirely replaced by*

metastatic mucin secreting adenocarcinoma". A diagnosis was made of metastatic adenocarcinoma.

e. During the surgery on 28 May 2013 Dr Thouet noted the overt presence of multiple liver metastases of various sizes.

f. At the time of diagnosis the tumour occupied almost all of the lumen of the rectum.

2. As of 10 May 2013, Mrs Maybury had:

a. Moderately differentiated adenocarcinoma

b. Arising from a primary tumour in the large bowel

c. Which had resulted in metastatic spread to the liver, spleen and lung

d. Multiple overt liver metastases, one of which had been measured at that time with dimensions of 42 x 34 mm"

62. The Joint Report also set out issues and areas where there was agreement as a matter of medical opinion:

"There is agreement between the experts with the following medical opinions:

4. What is the average tumour volume doubling time for hepatic metastases in adenocarcinoma of the sort that effected Mrs Maybury?

The Experts agree that this opinion cannot be determined specifically for Mrs Maybury. ***There is a huge range from 3 months <u>to</u> 12 months.***

5. What is the average tumour volume doubling time for primary tumours in adenocarcinoma of the sort that affected Mrs Maybury?

The Experts agree that this opinion cannot be determined specifically for Mrs Maybury. ***There is a huge range from 3 months <u>to</u> 12 months****.*

6. *Are you able to estimate when the metastatic spread had begun? (For instance, would the cancer have metastasised in May 2011?)*

   This cannot be determined because the ***exact timing of metastases for individuals is unknown.***

7. *Noting the descriptions given of the primary tumour at and after diagnosis, would the primary tumour at that time be classified as; T3, T4a, or T4b?*

   All in agreement with T3

8. *At the time of diagnosis had a tumour spread to any lymph nodes? If so how many?*

   Yes but no way to determine how many

9. *In view of the analysis above of tumour size, doubling times and metastatic spread, is it likely that the tumour would have spread to lymph nodes as of July 2012?*

   All in agreement. It would be speculation to say because ***exact timing of metastases for individuals is unknown.***

10. *At the time of diagnosis what would have been the correct staging and grouping of Mrs Maybury's cancer (e.g. Stage 4C, T4b, N2, M3)?*

    TXNXM1b

11. *In percentage terms, what was Mrs Maybury's prospect of surviving five years at that time?*

    <5%

12. *Is it agreed that Mrs Maybury would need to have had her cancer diagnosed in or around May 2011 for her to have had better than 50% prospects of surviving five years?*

    Speculation to say because ***exact timing of metastases for individuals is unknown*** [Emphasis in the original]

63. Finally, the Joint Report set out issues upon which the Experts could not agree as a matter of medical opinion:

"Disagreement of Experts regarding the following opinions:

13. *Noting the recorded dimensions of the large hepatic metastasis reported on 10 May 2013, and applying the tumour volume doubling time discussed above, is it agreed that as of 20 July 2012 Mrs Maybury's cancer had spread to the liver?*

    Cannot be determined for Mrs Maybury. Based upon published ranges of doubling time and her symptoms, Mrs Maybury had more advanced disease

    a. *"Balance of probabilities"- Dr Falk*
    b. *"Stage 3b based on symptoms" "more likely than not" Dr Hollister*
    c. *"Speculative as published doubling times vary patient to patient" Dr Leitman*

64. In the final paragraph of the Joint Report the Experts explained that they "*have consensus that the disagreements here in are not due to disagreement or ambiguity as to the facts and cannot be resolved by further enquiry factual witnesses. No other information is required before reaching a view on any particular issue. The disagreements are as a result of <u>interpretation</u> of the medical literature".*

65. Both experts are agreed that the size of the tumour in August 2012 was T3 (it was embedded in the inner rectum wall but had not pierced that wall). The experts disagree on whether the cancer cells had spread from the primary site to the lymph nodes in August 2012. Dr Leitman says that there is no medical evidence supporting that this was the case whilst Dr Hollister disagrees. It is on the basis that the cancer cells had spread from the primary site to the lymph nodes that Dr Hollister concludes that Mrs Maybury had stage IIIB cancer (T3 N1 M0) in August 2012 which in turn leads him to conclude that her chances of survival for five years were reduced to 45%.

66. On examination Dr Hollister explained that in expressing his opinion that in August 2012 the cancer cells have spread from the primary site to the lymph nodes he relied upon histology, tissue obtained from the liver in May 2013 which indicated "moderately differentiated" adenocarcinoma of the bowel origin. Dr Hollister explained that "moderately differentiated" carcinoma suggests that the tumor is not a rapid grower and has a longer natural history. Given that there was only a delay of nine months between Mrs Maybury's August 2012 visit to the Emergency Department and the diagnosis of cancer in May 2013, a "moderately differentiated" tumour is not likely to go from no lymph node presence in August 2012 to extensive amount of cancer in the liver, spleen and the lungs in May 2013.

67. Dr Hollister also relied upon the fact that Mrs Maybury failed to gain more than 3 pounds in weight during pregnancy and this fact again indicated to him the presence of the disease. In addition, the tumours found in the liver and were identical to the primary site with identical histology, identical appearance under the microscope and identical differentiation which suggested to Dr Hollister that the rate of growth in the primary site is likely to be similar as secondary places. All these factors led to Dr Hollister to express the view that cancer cells must have spread to the lymph nodes by August 2012.

68. Dr Leitman explained in examination that the biological nature of a tumour varies from individual to individual. Some tumours whilst quite small can spread before they become large tumours whilst other tumours can become quite large over time but never spread at all. As a result it is impossible to predict for an individual a time when a tumour cell leaves the primary site, enters the bloodstream and settles down and grows in a non-adjacent organ. It is not possible to predict when a tumour will metastasise and spread. According to Dr Leitman, there is no way of knowing the exact time when the tumour spread to the liver and the spleen. Certainly the size of the tumour itself does not in any way indicate when it may or may not spread.

69. Dr Leitman confirmed in examination that the fact that the cancer cells spread to the liver and the spleen led him to believe that it was not a slow-growing tumour but rather an aggressive tumour.

70. Dr Leitman confirmed that the time it takes to progress cancer varies from patient to patient. It may progress over months or many years. It may take years to progress from an abnormal cell to metastasis and disease in other organs.

71. Dr Leitman explained that the rate of growth of cells or doubling in the size of the tumour in the rectum and other organs may be different because the blood supply is different and host conditions are different. It is possible for the tumour to grow faster in the liver than the rectum. In the circumstances it is not correct to state that the tumours grow at the same rate at the primary site and in the organs.

72. If it was found that the cancer had spread to Mrs Maybury's spleen in May 2013, Dr Leitman could not say when the disease in fact spread from the primary site in the rectum to the organs. According to Dr Leitman, it would be speculation to suggest that started metastasising in July 2012.

73. Dr Leitman disagreed with Dr Hollister that it was an appropriate or legitimate approach to look at the extent of the disease found in Mrs Maybury in May 2013 and work backwards to come to a determination when the disease started

spreading. In Dr Leitman's view using hindsight to make such a determination is speculative because in his opinion the way the cancer disease spreads is not susceptible to such an approach.

74. Dr Leitman confirmed to the Court that there is no evidence based upon Mrs Maybury's complaints and based upon her physical examination to suggest abnormal lymph nodes. Dr Leitman explained that lymph nodes could be enlarged in the rectum or in the groin but here there was nothing to suggest that lymph nodes were involved in the disease in August 2012. Dr Leitman stated that Mrs Maybury did not exhibit any of the symptoms which were consistent with the cancer cells having spread to the lymph nodes. Dr Leitman accepted that no biopsy of the lymph nodes was carried out to confirm the existence or absence of cancer cells and his opinion is based upon the medical records that express Mrs Maybury's symptoms and the physical examination that was done which all suggest that the lymph nodes were not involved.

75. Dr Leitman did not agree that the lack of substantial weight gain in pregnancy was an indication of metastasis. In his view, lack of weight gain during pregnancy could be due to many factors such as nausea or food aversion. Lack of weight gain could be an indication of many other causes and is not an indicator that it was due to hepatic disease.

76. Dr Leitman further explained that the hindsight approach adopted by Dr Hollister is in contradiction with the answers and the approach set out in the agreed section of the Joint Report.

    1. In Q4 Dr Hollister agreed that an opinion cannot be given in relation to the average tumour volume doubling time for hepatic metastases in adenocarcinoma of the sort that affected Mrs Maybury because there is a huge range from 3 months to 12 months.

2. In Q6 Dr Hollister agreed that it is not possible to estimate when the metastatic spread had begun because the exact timing of the metastases for any individual is unknown.

3. In Q9 the experts were asked whether in view of the analysis of tumour size, doubling times and metastatic spread, is it likely that the tumour would have spread to any as of 20 July 2012? Dr Hollister, in agreement with Dr Leitman, stated that would be speculation to say because exact timing of metastases for individuals is unknown.

4. In Q 12 the experts were asked whether it was agreed that Mrs Maybury would need to have had cancer diagnosed in or around May 2011 for her to have had better than 50% prospects of surviving for five years? Dr Hollister stated that it would be speculation to say one way or the other because exact timing of metastases for individuals is unknown.

77. Having considered carefully the evidence given by Dr Leitman and Dr Hollister and having observed both witnesses in examination in chief and under cross examination, I have come to the view that I prefer the evidence given by Dr Leitman. Accordingly, I do not accept the evidence given by Dr Hollister where it differs from the evidence given by Dr Leitman in relation to the issues of staging of Mrs Maybury's colorectal cancer on 17 August 2012 and the chances of survival as a result of that staging. My further reasons for preferring the evidence of Dr Leitman are the reasons given by Dr Leitman himself in his Reports and in evidence to the Court in support of his opinion in relation to the issues: whether the cancer cells had spread from the primary site to the lymph nodes in August 2012; the appropriate staging for cancer in August 2012; and Mrs Maybury's chances of survival in August 2012.

78. I also found Dr Leitman to be a reliable witness. His rationale for his positions in relation to the issues of staging and metastasis spread have been consistent

throughout his Reports, the Joint Report and the examination before the Court. In contrast, I found Dr Hollister's evidence based upon hindsight to be at variance with the agreed position set out in the Joint Report and agreed by (see paragraph 76 above).

79. Finally, the critical issue whether the tumour had spread to the lymph nodes in July/August 2012 was in fact an issue which appeared to have been agreed by both Dr Leitman and Dr Hollister in the Joint Report. Q9 in the Joint Report specifically asked whether having regard to (a) tumour size; (b) doubling times; and (c) metastatic spread, is it likely that the tumour would have spread to any lymph nodes as of 20 July 2012. Dr Hollister agreed at the trial that the answer to that question is "All in agreement. It would be speculation to say because exact timing of metastases for individuals is unknown". That answer given by Dr Hollister would appear to be at variance with the answer given to Q13 and the general tenor of his evidence given to the Court in relation to the issues of staging and metastatic spread.

80. Accordingly, I accept Dr Leitman's evidence that when Mrs Maybury visited the Emergency Department in August 2012 her primary tumour in the rectal should be classified as T3. There is no evidence that as at August 2012 that the tumour cells had spread to any lymph nodes. Accordingly, the cancer staging as at August 2012 should be IIA (T3 N0 M0).

81. I also accept Dr Leitman's evidence that had Mrs Maybury been correctly diagnosed in August 2012 Mrs Maybury's condition would have been treatable for cure. In this regard I accept Dr Leitman's evidence that her chances of survival were up to 60%. This is based upon the McCarthy study in 2012 which shows the chances of five year survival for stage IIA at between 40-60% and the Lim study in 2012 which shows chances of five year survival for locally advanced rectal cancer at "*more than 70%".* Dr Leitman explained that if a proper diagnosis had been made in August 2012, Mrs Maybury would have undergone a colonoscopy which would have confirmed precise cause of the bleeding. Necessary procedures would have been undertaken to confirm that the cancer cells had not spread to the

lymph nodes and the liver. She would have been treated with chemotherapy followed by surgery to remove the tumour. Had this procedure been followed Mrs Maybury would have been treatable for cure.

82. Having regard to all the circumstances and the evidence in this case I am satisfied on a balance of probabilities that if the First Defendant had not been in breach of its duty in terms of (i) failure by Dr Bisasor-McKenzie to detect the rectal tumour as a result of the digital examination performed on 17 August 2012; (ii) failure to ensure that a faxed copy of the notes taken during the visit of Mrs Maybury on 17 August 2012 were received by the office of Dr Kelly, Mrs Maybury would have been treatable for cure.

Contributory Negligence

83. In paragraph 29 of the Amended Defence, the First Defendant asserts that it was incumbent upon Mrs Maybury to follow-up with Dr Kelly as Mrs Maybury was firmly advised by Dr Bisasor-McKenzie on 17 August 2012 that she needed to undergo a colonoscopy.

84. As Counsel for the First Defendant notes in his written submissions, it is unusual for a Court to find that a patient was contributory negligent within the context of a clinical negligence claim. The Court of course accepts that there can be a claim for contributory negligence where it can be shown that some act or omission on the part of the plaintiff has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence.

85. In support of the claim for contributory negligence, counsel for the First Defendant relies upon *Pidgeon v Doncaster Health Authority* (Claim No: DN910695), a case heard in the Sheffield County Court by His Honour Judge Bullimore. The facts of that case are exceptional. The plaintiff was negligently advised in 1988 that her smear test for cervical cancer was normal, when it showed precancerous abnormalities. A further test in 1997 resulted in a diagnosis

of cervical cancer. In the intervening period the claimant had been spoken to on no less than seven occasions about the need to have a smear test, and had received four letters from the defendants' cervical cancer screening programme about the need to have a smear test. The plaintiff accepted that on occasions the doctor would have explained the importance of having a test, and in September 1992 she may have promised to have a test as a means of putting the doctor off. The plaintiff had not undergone the test because she found it painful and embarrassing. In the circumstances counsel for the plaintiff conceded that on a realistic view of the case she was guilty of contributory negligence (paragraph 6). In these exceptional circumstances, it is not surprising that the court found contributory negligence on part of the plaintiff.

86. In this case there is no clear evidence that Mrs Maybury was advised by Dr Bisasor-McKenzie that she should seek further investigation and/or undergo a colonoscopy if the bleeding continued.

87. The Court has not had the benefit of hearing the evidence of Dr Bisasor-McKenzie and have that evidence tested by cross-examination. A witness statement was admitted under Part IIA of the Evidence Act 1905. In her written statement dated the 9 October 2017, Dr Bisasor-McKenzie does not give direct evidence of what she told Mrs Maybury on 17 August 2012. As her statement makes clear that she has no recollection what, if anything, she may have advised Mrs Maybury. She simply recounts what would have been normal practice. Thus, at paragraph 13 of the statement she states: *"In cases where a patient like Mrs Maybury presents with rectal bleeding and where I cannot actually see the locus of that bleeding it is my practice to advise the patient to undergo further investigations that may include a colonoscopy*".

88. Mr Maybury, who attended the Emergency Department with Mrs Maybury on 17 August 2012, gave evidence in relation to this issue. His clear evidence was that whilst "colonoscopy" might have been mentioned there was no instruction that Mrs Maybury should undergo a colonoscopy. Indeed, Mr Maybury's evidence is

that they were greatly relieved that Dr Bisasor-McKenzie had confirmed that the bleeding was due to nothing more than haemorrhoids and did not involve any life-threatening condition. I accept Mr Maybury's evidence that they questioned Dr Bisasor-McKenzie whether she was sure that the bleeding was not due to cancer and she reassured them and said that she did not believe that they should be concerned, but if the bleeding continued to return and a colonoscopy would be needed to investigate the bleeding. I also accept Mr Maybury's evidence that Dr Bisasor-McKenzie did not advise them that they would have to see a specialist in order to undertake a colonoscopy.

89. I accept Mr Maybury's evidence that when they next attended Dr Kelly's office on 26 September 2012 no issue in relation to bleeding or the requirement of colonoscopy was raised for the simple reason that at this stage Mrs Maybury was not bleeding. I also accept Mr Maybury's evidence that Mrs Maybury's bleeding was intermittent and did not occur every day. In particular, I accept that there were three incidents of bleeding, namely, in May, August and the time of the stress test.

90. It is said that the discharge summary, which contained an instruction to Dr Kelly, was provided to Mrs Maybury. There is no independent evidence that this was so and it is to be noted that Mrs Maybury did not sign acknowledging receipt of that document. Instead, a copy of that document simply records that it was "given" to her.

91. In the circumstances and on consideration of the totality of the evidence, I am not satisfied that Mrs Maybury was instructed by Dr Bisasor-McKenzie that she should undergo a colonoscopy. In any event, Mrs Maybury was advised by the servants or agents of the First Defendant that the discharge summary would be faxed to Dr Kelly. The First Defendant now accepts that it failed to do so and that constitutes a breach of duty on its part.

92. Having regard to all the relevant evidence on this issue, I am satisfied that Mrs Maybury was not negligent in terms suggested by the First Defendant and do not consider that she should be held responsible in any way on the basis of contributory negligence.

Novus actus interveniens

93. In paragraph 16 of the Statement of Claim, the Plaintiff alleged that Dr Kelly was negligent in failing to follow-up for Mrs Maybury's known rectal bleeding, anaemia, constipation, abdominal bloating and abdominal pain and in particular, Dr Kelly was negligent in failing to refer Mrs Maybury for a colonoscopy. Relying upon this averment by the Plaintiff, the First Defendant in paragraph 23 of the Amended Defence avers that if these allegations are in fact true then the First Defendant is entitled to raise the defence of *novus actus interveniens.*

94. Counsel for the Plaintiff referred the Court to certain passages in *Clerk & Lindsell on Torts,* Twenty Second edition, to remind the court of what has to be proved in order to establish *novus actus interveniens*. The legal issue is summarised at [2-107] in terms that where the defendant's conduct forms part of a sequence of events leading to harm to the plaintiff, and the act of another person, without which the damage would not have occurred, intervenes between the defendant's wrongful conduct and the damage, the court has to decide whether the defendant remains responsible or whether the act constitutes a novus actus interveniens, i.e., whether it can be regarded as breaking the causal connection between the wrong and the damage. The relevant breaches of duty complained of against the First Defendant occurred on 17 August 2012. Accordingly, the Court is looking at the conduct of Dr Kelly subsequent to 17 August 2012 and in particular to the attendance by Mrs Maybury at Dr Kelly's office on 26 September 2012.

95. The relevant test which the Court is required to comply is set out at [2-111] of *Clerk and Lindsell:*

"No precise and consistent test can be offered to define when the intervening conduct of third party will constitute a novus actus interveniens sufficient to relieve the defendant of liability or his original wrongdoing. The question of the effect of novus actus "can only be answered on a consideration of all the circumstances and, in particular, the quality of the later act of event". Four issues need to be addressed. Was the intervening conduct of the third party such as to render the original wrongdoing merely a part of the history of the events? Was the third party's conduct either deliberately or wholly unreasonable? Was the intervention foreseeable? Is the conduct of the third-party wholly independent of the defendant i.e. does the defendant owe the claimant any responsibility for the conduct of the intervening third-party? In practice, in most of novus actus more than one of the above issues will have to be considered together.

96. It is said by the First Defendant that Dr Kelly should have made further enquiries of Mrs Maybury when she visited Dr Kelly's office on 26 September 2012 given the past history of Mrs Maybury's condition relating to constipation, bloating and bleeding. Had she done so she would have appreciated that it was important to advise Mrs Maybury to undertake a colonoscopy and indeed, Dr Kelly should have made arrangements for such a procedure to be undertaken. Had a colonoscopy been undertaken it would have disclosed Mrs Maybury's colorectal cancer. It is said that this constitutes a breach of duty on part of Dr Kelly of such a magnitude that it constitutes novus actus interveniens with the result that any breach of duty on the part of the First Defendant fades into insignificance.

97. I am unable to accept this submission. On 26 September 2012, when Mrs Maybury visited Dr Kelly, she was not experiencing any bleeding and it is for this reason there is no mention of bleeding in the medical notes. Mrs Maybury visited Dr Kelly on 26th of September 2012 because she was pregnant and required to be referred to a gynaecologist. At the time Dr Kelly described Mrs Maybury to the gynaecologist as a "healthy patient". In the circumstances, it is difficult to

describe Dr Kelly's omission to enquire about Mrs Maybury's bleeding as *"grossly negligent*".

98. As the passage from *Clerk and Lindsell* makes clear, all the relevant facts must be taken into account in determining the effect of novus actus. It is clear from the discharge summary of Mrs Maybury's attendance at KEMH on 17 August 2012 that Dr Bisasor-McKenzie considered it appropriate to provide an instruction to Dr Kelly to arrange for a colonoscopy to be undertaken by Mrs Maybury. It was the duty of the First Defendant to provide a copy of that discharge summary to Dr Kelly so that Dr Kelly could comply with that instruction. However, in breach of duty, the First Defendant failed to provide a copy of that discharge summary to Dr Kelly with the result that Dr Kelly was wholly unaware of Mrs Maybury's visit to the Emergency Department on 17 August 2012 and the instruction by Dr Bisasor-McKenzie to Dr Kelly to arrange for a colonoscopy. A fair assessment of the facts indicates that the reason why Dr Kelly did not arrange for a colonoscopy was due to the failure by the First Defendant to provide a copy of the discharge summary to Dr Kelly.

99. In the circumstances, I am satisfied that the conduct complained of on the part of Dr Kelly does not provide to the First Defendant the defence of novus actus interveniens. In the result the position remains that as a result of the breaches of duty owed by the First Defendant to Mrs Maybury, the Plaintiff is entitled to damages against the First Defendant as discussed below.

Claim for damages

100. The Plaintiff's claim for damages for the benefit of himself, his son Khaleel, who was born on 9 May 2013 and as Intended Administrator of the estate of his deceased wife, as noted by Mr Pachai, is governed by the Survival of Actions Act, 1949 and the Fatal Injuries (Actions for Damages) Act, 1949.

Claims under the Survival of Actions Act 1949

1. **General Damages**

101. The Plaintiff contends that the deceased suffered increasing and significant pain, nausea, and distress during the period between first apprehending serious illness and her demise. She was convinced that something was seriously wrong and her suffering was exacerbated by the failure of the First Defendant's staff to properly respond to her concerns. She expressed fear that she may not survive. Mrs Maybury was misdiagnosed on 17 August 2012 and she had a number of hospital attendances prior to her childbirth on 9 May 2013 when her rectal cancer, which had now spread to her liver, lungs and the spleen was diagnosed. After that, for the next six months she suffered excruciating and ongoing pain and suffering through to the date of her death on 18 November 2013. In the circumstances counsel for the Plaintiff contends that the appropriate award for pain and suffering is $110,000.

102. The First Defendant takes issue with the quantum suggested for pain and suffering and its counsel suggests that the appropriate figure should be $30,000.

103. The Plaintiff's counsel relies upon *Knauer v Ministry of Justice* [2014] EWHC 2553, in which the deceased, Mrs Knauer contracted mesothelioma (a type of lung cancer) for which she was diagnosed in March 2009. The cancer was described as a hideous and incurable disease causing appalling suffering. In March 2009 she developed a hydro-pneumothorax and a chest drain was inserted. By the following months, she had symptoms of breathlessness, pleuritic aching, loss of weight, loss of appetite and difficulty in breathing. On 16 June 2009 she underwent radical surgery, condition continued to deteriorate, she was in severe pain and took morphine every three hours. On 28 August 2009 (six months after diagnosis) she collapsed at home and died in hospital the same day. The general damages for pain, suffering and loss of amenity was assessed at £80,000 in 2014, which counsel for the Plaintiff contends, is equivalent in value to an award of

approximately $180,000. In contrast, the Plaintiff's counsel contends, Mrs Maybury suffered from her misdiagnosis for a period of some 18 months during which she suffered equally appalling pain and suffering.

104. The Plaintiff's counsel also relies upon *XX v Wittington Hospital NHS Trust* [2017] RWHC 2318 (QB), in which the claimant was 29 when she was diagnosed with stage IIB cervical cancer for which she suffered recurrent symptoms while the cancer remained undiagnosed from 2011 onwards. She then had several operations and ongoing problems and she was awarded general damages for pain and suffering of £160,000 in 2017, the equivalent of $320,000 in today's value.

105. The Defendant's counsel relies on the case of *Lapworth v George Eliot Hospital NHS Trust* (Lawtel document- 27/02/2018) in which the deceased wife was diagnosed with rectal cancer in September 2012 and before treatment was due to commence by way of chemotherapy, she died less than a month later on 7 October 2012 for which the plaintiff, her husband, received £15,000 for pain, suffering and loss of amenity.

106. Counsel for the First Defendant also relies upon *HR Royal Donncaster and Bassetlaw University Hospitals* (Personal Injuries Quantum Database) where the deceased was diagnosed with inoperable stomach cancer on 14 December 2007 and died on 4 February 2008 without treatment taking place, again for which general damages in pain and suffering was awarded approximately $30,000.

107. Having considered the relevant evidence I consider that the two cases relied upon by Mr Pachai are closer to the facts in this case. Accordingly I consider that a reasonable figure for pain and suffering and loss of the amenity is $100,000.

2. Special Damages

(a) Loss of earnings

108. The Plaintiff claims that Mrs Maybury stopped working on 1 February 2013 and she was paid between $700 to $900 per week by the truck business and therefore, her average earnings per week is $800. During this period she lost 291 days of pay or 41.57 weeks at $800 per week making a total of $33,257.14.

109. The First Defendant accepts that there is a claim in principle and the figure of $800 per week is accepted as reasonable. However, counsel for the First Defendant contends that this claim should be dramatically reduced due to 2 factors: first, that even if the cancer had been diagnosed in August 2012 she would have had to undergo lengthy treatment and recuperation during which she would be unable to work; and secondly, it was Mr Maybury's evidence that from earnings Mrs Maybury only really contributed family holidays three times a year.

110. I consider there is validity in both objections. Accordingly, on the basis that Mrs Maybury had been properly diagnosed her treatment was likely to have extended until the end of April 2013. On this basis the claim for lost earnings would be for the period 1 May 2013 to 17 November 2013, a period of 127 working days (which includes five national holidays) or 25.4 weeks. On the basis of $800 per week that equates to $20,230. I consider this figure should be reduced by 50% on account of monies retained by Mrs Maybury for her own use resulting in the final recoverable figure of $10,160.

(b) Medical expenses

111. This claim has not particularised and would appear not to be pursued.

(c) Child minding for Khaleel

112. Mrs Lowe, Mr Maybury's mother, gave evidence that after the birth of Khaleel on 9 May 2013 that she gave up a business and dedicated herself to care foe Mrs Maybury and her son Khaleel. I accept her evidence in this regard.

113. On the basis that reasonable remuneration for this period of child minding is on the same basis as Mrs Maybury's earnings as a nanny at $800 per week ($20 per hour) the total claim is for $22,057.14. This is calculated on the basis that the period covers 27.57 weeks (or 193 days) at the rate of $800 dollars per week.

114. Counsel for the First Defendant accepts that the rate per hour is reasonable. However, he questions the number of hours claimed per week. I consider the number of hours claimed to be reasonable.

115. The main objection taken on behalf of the First Defendant is that Mrs Lowe would have provided care to the child in any event. Given that the services were rendered gratuitously it is said that this claim cannot be pursued. Further, it is said that the claim is in the nature of a quantum merit and as Mrs Lowe is not a party to this action, the claim cannot be pursued.

116. I am unable to accept these submissions. Mr Pachai referred to paragraph 36-087 of *McGregor on Damages*, 18th edition and in particular to the case of *Berry v Humm* [1915] 1 KB 627 which makes clear that the value of gratuitous services rendered can be claimed. Further, paragraph 6-131 of *Charlesworth & Percy on Negligence*, 14th edition, expressly dealing with gratuitously provided care and assistance states:

> *"Where an injured claimant has a need for nursing care and/or domestic assistance consequent upon injuries sustained, damages are recoverable for the value of those services even if the services are rendered without charge. The principle has its origin in Roach v Yates [1938] 1 KB 256, where the claimant recovered damages for the cost of nursing care provided to him by relatives who had given up work to look after. In Cunningham v Harrison [1973] QB 942, a wife recovered damages to compensate for her unpaid assistance to her tetraplegic husband. Lord*

Denning MR expressed the view that such damages should be held in trust for the carer…."

117. In the circumstances, I confirm that the amount claimed of $22,057.14 is reasonable and can be recovered.

(d) Gratuitous care for Latifa and Khaleel

118. I accept Mrs Lowe's evidence that she stopped working in order to care for Mrs Maybury and her son. The claim is calculated on the basis of additional care provided by Mrs Lowe of 4 hours per day at $20 per hour for 193 days (calculated from 10 May 2013). On this basis this is a claim for $15,440.00 which I consider to be reasonable in all the circumstances.

119. The First Defendant again takes the objection that this claim is irrecoverable because the services were rendered gratuitously and the claim is in the nature of quantum merit pursued by Mrs Lowe. For the reasons given in paragraph 116 above I am unable to accept this submission. Accordingly I confirm that the sum of $15,440 is irrecoverable under this head.

3. Funeral Expenses

120. Funeral expenses in the amount of $4,000 are agreed between the parties and I make an order that this sum is recoverable.

Claims under the Fatal Injuries (Actions for Damages) Act 1949

4. Bereavement Award

121. An award in the sum of $15,000 is agreed between the parties and is hereby ordered by the Court.

5. Past Losses and Expenses

122. This claim is based on the assumption that Mrs Maybury had earned as a nanny between $540 to $1000 per week with a median figure of $690 per week; or $2,760 per month; and would have earned $33,120 per annum had she survived.

(a) Financial dependency

123. For purposes of this calculation no multiplier is used between death and the date of the trial in accordance with the decision in *Knauer v Ministry of Health* [2016] UKSC 9. Mrs Maybury's income from the date of death to the date of the trial (18 November 2019), a period of 312 weeks at the rate of $690 results in a total figure of $215,280. Mr Maybury's income during this period is calculated at zero given that he was not working. The combined income for this period therefore remains at $215,280. Given that Khaleel is a minor, a factor of 0.75 is applied in the *Coward v Comex* calculation producing a figure of $161,460.

124. Counsel for the First Defendant accepts that in principle there is a claim for financial dependency but he says that such a claim should, in practical terms, be calculated from the date the truck business collapsed. The business struggled after the death of Mrs Maybury in November 2013 and closed in 2016. It opened for a short period for the America's Cup in the summer of 2017 and closed permanently thereafter. Otherwise he agrees with the mathematical model that the claim should be calculated.

125. In my judgment there is no assurance that Mrs Maybury would have returned to the truck business after illness and recovery. In the circumstances, the claim should be calculated on the conventional basis by looking at the earnings from employment as a nanny prior to August 2012. I do not consider that it is appropriate or realistic that calculations should be based on Mrs Maybury working for the food truck business until August 2017.

126. In all the circumstances, I consider that the calculations put forward and the amounts claimed by the Plaintiff in this respect are reasonable and recoverable. I order that the sum of $161,460 should be recovered under this head.

(b) Service Dependency

127. The Plaintiff contends that Mrs Maybury was an extremely fastidious housekeeper. Since Mrs Maybury's death, the Plaintiff's mother has provided housekeeping and child minding services at a rate of $20 per hour. The claim for service dependency is calculated on the basis of 30 hours per week at the rate of $20 per hour making a total of $600 per week. For the period of 312 weeks (from the date of death to the date of trial) the claim is in the amount of $187,200.

128. The First Defendant's counsel accepted that the rate of $20 hours is reasonable and the hours claimed per week are also reasonable. In the circumstances no dispute in relation to the amount claim in respect of service dependency for this period. Accordingly, I order the amount of $187,200 to be recovered under this head.

6. Future Losses Post Trial

(a) Future Financial Dependency

129. For the purposes of this application the Plaintiff's counsel starts with Mrs Maybury's earnings prior to her death at $800 per week or $41,600 per annum. Whilst Mr Maybury is not working at this stage, it is proposed that an assumption be made that he will be able to earn $1,000 per week in the United Kingdom where he proposes to reside. On this basis the total household income would be $93,600 ($41,600 plus $52,000).

130. For the first period, until Khaleel reaches 21, the *Coward v Comex* percentage to be applied is 75% producing a figure of $70,200 and if one deducts the earnings

of Mr Maybury of $52,000 per annum, it produces a multiplicand of $18,200. Multiplier to Mrs Maybury reaching 65 years, according to Ogden Table 10, is 35.58. Multiplier to Khaleel reaching age 21, according to Ogden's Table 10, is 15. Accordingly, the future dependency under this period is $273,000 (15 X $18,200).

131. Under the second period, after Khaleel reaches 21, the multiplier is 20.58 (being the balance of 35.58). Under this period, one takes the *Coward v Comex* calculation at 66% of 93,000 producing a figure of $61,776. If one deducts the earnings of Mr Maybury of $52,000 per annum, the resulting figure is $9,776. Applying the multiplier of 20.58 to $9,776 produces a figure of $201,190.08.

132. The total claim for future financial dependency for the two periods is $474,190.08.

133. Counsel for the First Defendant does not challenge the calculations producing the future financial dependency at the figure of $474,190.08. He questions, however, whether it is safe to assume that having regard to Mrs Maybury's health condition, it can safely be assumed that she would survive until 65. Counsel did not make a positive submission in this regard and invited the Court to perhaps consider further expert evidence in this regard. I am clearly of the view that the expert evidence of Dr Leitman was that had proper diagnosis been made in 2012, Mrs Maybury would have been cured from the cancer. The clear implication of Dr Leitman's evidence is that she would have a normal life expectancy.

134. In the circumstances, I do consider that the appropriate figure to award in relation to future financial dependency is $474,190.08.

(b) Service Dependency

135. There is agreement between the parties in relation to the calculation of this claim. It is agreed that claim should be calculated for two periods. The first period

should be for costs incurred until Khaleel is 18 i.e. for a period of 13 years. The second period should be for the remainder of the claim for a period of 22 years.

136. For the first period the claim should be 30 hours a week calculated at $20 per hour resulting in a figure of $31,200 per annum and for a period of 13 years amounting to a total of $405,600. For the second period the claim should be 20 hours per week calculated at $20 per hour resulting in a figure of $20,800 per annum and for a period of 22 years amounting to a total of $457,600. The combined figure for these two amounts is $863,200 which I consider to be reasonable and appropriate under this head.

7. Loss of Maternal and Spousal care and affection

137. Counsel for the First Defendant submits that the statutory award of bereavement damages compensates for the loss of maternal and spousal care and affection, and there is no separate common law entitlement to damages under this head of loss and therefore no award is payable. He refers to the cases of *Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, and *Mosson v Spousal (London) Ltd* [2016] EWHC 53 (QB). I am unable to accept this submission. The commentary in paragraph 41 – 104 of *McGregor and damages*, 20th edition, states:

> *".... So, too, in Mehmet v Perry [1977] 2 All ER 529 an additional sum was award, though within modest limits, because "the children have lost the attention of their mother and... now have only one parent to look after them instead of two" indeed in that case the husband also was awarded an additional sum, again within modest limits, because he "has lost the care and attention of his wife". The award, having started life in Mehmet at around £1,500, had risen to £3000 by the time of Corbett v Barking Havering and Brentwood Health Authority, and was agreed at £4,000 in Hayden v Hayden [1992] 1 WLR 986... Awards will no doubt continue to rise over the years should inflationary trends continue.*

This head of loss is now firmly established for child claimants and features in nearly every case involving them".

138. Having regard to the sums ordered in the previous paragraph under this head and having regard to the inflationary pressures over the last 30 years, I consider an award of $10,000 to be reasonable and appropriate and I so order.

139. In summary I order that the following amounts should be paid by the First defendant to the Plaintiff:

SUMMARY OF AWARDS

1. Pain and Suffering	$100,000.00
2a. Loss of Earnings (February – November 2013)	$10,160.00
d. Child Minding	$22,057.14
e. Gratuitous Care	$15,440.00
3. Funeral Expenses	$4,000.00
4. Bereavement	$15,000.00
5a. Financial Dependency	
(November 18, 2013 – November 18, 2019)	$161,460.00
b. Service Dependency	$187,200.00
6. Future Losses –Post Trial	
a. Financial Dependency	$474,190.08
b. Service Dependency	$863,200.00
7. Loss of Maternal & Spousal Care & Affection	$10,000.00
Total	$1,862,707.22

140. As agreed at the hearing I invite counsel to calculate the interest payable in relation to the above awards and failing agreement have the issue determined at a hearing. I also invite Counsel to draft an order giving effect to this Judgment.

141. I shall hear the parties in relation to the issue of costs, if required.

Dated 23 January 2020

NARINDER K HARGUN

CHIEF PUISNE JUSTICE