IN THE COURT OF APPEAL OF BELIZE AD 2019

CIVIL APPEAL NO 30 OF 2016

DR GEORGE GOUGH Appellant

v

ALICE ARANA GILLETT Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa President
The Hon Madame Justice Minnet Hafiz Bertram Justice of Appeal
The Hon Mr Justice Murrio Ducille Justice of Appeal

N Barrow for the appellant.
N Uc Myles for the respondent.

_____

14 June 2017 and 27 December 2019.

SIR MANUEL SOSA P

I - *Introduction*

[1] On 4 October 2009, Alice Arana Gillett, aged 33, of the town of San Ignacio in the Cayo District ('the respondent') was rushed by ambulance to the premises of Belize Medical Associates Limited in Belize City, where she learned from a doctor that she was suffering from stones in her gall-bladder and required surgery. On 18 December 2009, on those premises, Dr George Gough ('the appellant'), an experienced general surgeon with a sub-specialty in laparoscopic surgery, performed upon the respondent an operation known in the field of surgery as a laparoscopic cholecystectomy ('the lap chole'), by which operation her gall-bladder was removed. Unfortunately, as is now clear, her common bile duct (hereinafter, save where the context otherwise requires, 'CBD') was lacerated in the process. On 26 December 2009, at the same premises, the appellant performed difficult

exploratory surgery ('the exploratory surgery') upon the respondent. In view of what the exploratory surgery revealed, there was immediately carried out a repair procedure called an anastomosis ('the anastomosis'), which, on the evidence of both the appellant and the sole expert witness at trial, is not, in strictness, surgery. The exploratory surgery and the anastomosis, it is now also clear, were both successful. Such success notwithstanding, the respondent continued feeling unwell and sought and obtained treatment and/or attention from several doctors here in Belize as well as in Chetumal, Quintana Roo, Mexico during the weeks that followed. In the end, she travelled to New York City, USA, where she received further medical treatment from a Dr Franklin E Kasmin, who, on the evidence, is a physician but not necessarily a surgeon, during the period February to March 2010.

[2] Some three years later, on 14 March 2013, the respondent issued proceedings in the court below against the appellant and a second defendant unsatisfactorily identified only as 'Belize Medical Associates'. The claim, brought in negligence, met with only limited success. Abel J ('the Judge'), delivered his written judgment ('judgment' or 'the judgment') on 12 July 2016. Acknowledging, implicitly as well as explicitly, that the claim before him was one in negligence only (paras [1], [83] and [85], judgment), the Judge held that the appellant was not negligent in performing the lap chole (paras [114], [121] and [137], judgment).

[3] But, decidedly unorthodoxly, the Judge, even before arriving at that finding, stated, out of the blue, as it were, that, 'incidentally' (para [112], judgment), he was unable to find that the appellant had warned the respondent of the risks involved in the lap chole. Immediately thereafter, he further found that the respondent was lulled into a false sense of security in relation to such risks (para [113], judgment). See also para [144], judgment. He went on to find later in the judgment that the appellant ought to have 'come clean' with the respondent about what he suspected to be the cause of the elevated level of bilirubin in her blood and her jaundice (para [134], judgment). But he was, alas, not precise in speaking of the point of time at which the appellant ought to have thus 'come clean', referring confusingly in one breath both to the period 'following [the lap chole]' and to that

'following [the exploratory surgery and the anastomosis]'. He then further found that the appellant ought to have informed the respondent of the laceration of her CBD. He considered that disclosure as to the laceration should have been made after the carrying out of the anastomosis. This inability to find that a warning had been given and these findings of non-disclosure plainly somehow led the Judge to conclude that the appellant was liable in negligence or some other undisclosed cause of action. He went on to award the respondent general damages and special damages in the amounts of $21,324.75 and $31,177.49, respectively; and he ordered that she have only 50 per centum of her costs. The claim against the second defendant, having been previously abandoned, was not made the subject of any order.

[4] The appellant has appealed from the orders of the Judge; and the respondent has, by a respondent's notice ('the RN'), sought a reversal of the decision that the appellant was not negligent in performing the lap chole, an increase of the award for general damages and all of her costs.

[5] It shall be necessary later, on coming to examine the grounds of appeal and the reasons for variation set out in the RN, to revert to the facts of this case in some greater detail.

II - *The pleadings*

1. The negligence allegations

[6] In her amended statement of claim, which is dated 6 January 2014 but whose filing date is not ascertainable from the Record, the respondent averred negligence on the part of the appellant in cutting what she there referred to, without specificity, as her 'bile duct' during surgery on 18 December 2009. By way of 'particulars of negligence', she pleaded the following:

‘1. Failing to take all necessary precautions in performing surgery.

2. Discharging the [respondent] from the hospital before it was safe to do so.

3. Failing to properly observe and provide post operative (*sic*) care to the [respondent].

4. Failing to properly diagnose and remedy the reason for the worsening condition of the [respondent].

5. Failing at all times to notify the [respondent] of the negligent clipping of the bile duct during surgery.

6. Failing to properly repair the sectioned [CBD].’

It is in this last particular that the respondent, for the first time, provides the court below with the proper name of the bile duct in question. That having been noted, I pause here to make the necessary observation that what I have just quoted was not exemplary pleading. Particulars of negligence should relate to an express allegation of negligence previously set out in the statement of claim concerned. The so-called particulars of negligence in this case effect a back door introduction of completely new express allegations, purportedly of negligence. In the case of the fifth of these ‘particulars’, the blurring effect is quite pronounced. Is a mere alleged failure to inform being elevated to the level of professional negligence?

[7] In reply to this wholly unconventional multiplication of express purported negligence allegations, the appellant in his amended defence, dated 18 April 2013 but, again, filed on a date not ascertainable from the Record, averred that he was not negligent in performing the surgery in question. He pleaded further that he was neither admitting nor denying the matters put forward by the respondent as particulars of negligence for

the reason that he had no knowledge of them. He was, he further averred, putting the respondent to proof of such matters.

[8] Later in the amended defence, however, as if by afterthought, the appellant, further addressed the six 'particulars of negligence'. In so doing, he set out several specific additional responses. To the first of these so-called particulars, the additional response was that all necessary precaution was taken in performing the surgery 'in the habitual manner that can be reference (*sic*) with any similar surgery done in the Second Defendant's hospital', a not unambiguous qualification. To the second, it was that the respondent was 'readmitted' and 'restudied' and that a decision and corrective action was then taken. To the third, it was that surgical postoperative protocols for the relevant type of procedure were followed. To the fourth, it was, as far as I can see, that the respondent was, from the day of her second admission to hospital, advised of the complications that might be encountered before all studies could be carried out: para 27, amended defence. To the fifth, it was that the respondent was in fact advised of the cause of the complications of the lap chole and that, in addition, the cause of those complications was stated in the medical report dated 29 January 2010 and attached to the statement of claim. (I shall return to this medical report in due course.) To the sixth, it was that the exploratory surgery and the anastomosis were respectively done according to international surgery protocols and 'to the … successful resolution of the found complication'. The amended defence further drew attention in this respect to 'documents exhibited to the claim' which were said to disclose that 'diagnostic studies done abroad confirmed that a complete functional surgical repair was performed during [the anastomosis]'. (It is not clear exactly what documents were here being referred to; but it should be noted that, in the course of the trial below, a number of paragraphs, including some containing observations favourable to the appellant, were struck out from the witness statement of Dr Kasmin, the New York physician, who in the end gave no *viva voce* evidence: see Record, pp 201 and 258.)

2. The other allegations

[9] Without actually characterising it as negligence, the respondent further referred in her amended statement of claim to an alleged failure on the part of the appellant to inform her as to two matters. The first of these matters was described as 'the error in the surgery'; the second, as 'the serious complications caused by [the respondent's] negligence in cutting her bile duct during the [lap chole]'. The relevant paragraph of the amended statement of claim, ie para 12, thus brings into sharp focus the difference in characterisation (the unusual 'particulars of negligence' – with their unwelcome blurring effect – aside) of, on the one hand, the alleged failure to inform and, on the other, the cutting of the bile duct. Whereas the latter is described as negligent, the former is not.

[10] The appellant in his amended defence opened his response to this allegation of failure to inform with a bald denial of para 12 of the statement of claim. But, as already stated at para **[8]**, above, he went on specifically to deal with the allegation of failure to inform as to the complications caused by the cutting of the 'bile duct'.

III - *The judgment in the court below*

1. The focus on inflammation

[11] In view of the way in which a large part of the oral argument proceeded on the subsequent appeal (see, eg, pp 19-24, 27-37, 60-62, 67-70, 121-122, 177-187 and 225, Appeal Transcript), it is useful to note at the outset that the Judge, in the judgment, made an issue, figuratively if not literally, of 'inflammation in [the respondent]' during the lap chole. He found (para [11]) that it rendered necessary a 'higher skill set' on the part of the appellant in order for the lap chole successfully to be performed. It posed, he said, a risk, which, as he further found, was not explained in advance to the respondent. He concluded (para [16]) that it rendered the surgery 'difficult', making stretching of the relevant ducts 'more difficult'. He did not refer to the evidence which caused him to reach these findings. (It is important to note that the full extent of the – in retrospect, undeserved – attention

given to the topic of inflammation on the hearing of the appeal is not immediately apparent from the Appeal Transcript given that it repeatedly speaks erroneously, and thus misleadingly, of 'information' rather than 'inflammation': see, for three examples of this unfortunate error, p 33 thereof.)

[12] Much later in the judgment (para [47]), the Judge mentioned the topic of inflammation again, albeit only in passing. On this occasion, he clearly had in mind the contents of what both sides regarded as the medical notes of the exploratory surgery, as distinct from the lap chole. (I shall deal later with the value or otherwise of both these notes as evidence: see sentence in brackets at para **[33]**, below.) The Judge simply noted that, during the exploratory surgery, the appellant found severe inflammation in 'Calot region (*sic*) [Calot's triangle?]'. Although the Judge did not so acknowledge, what he was there noting was a mere jotting found in the medical notes: for which jotting, see Record, p 111, 1st para.

[13] The Court had raised at the hearing the question whether, in the light of what then seemed to be the importance of the presence of inflammation in relevant areas of the respondent's body in December 2009, it ought to exercise powers available to it under section 19 of the Court of Appeal Act. After prolonged and anxious further consideration of the matter following the hearing, I have, for my own part, concluded that such powers cannot properly be exercised in the present case. I consider it necessary for the parties to know my reasons for so concluding and shall accordingly state them at a more convenient point towards the end of this judgment: see para **[100]** *et seq*, below.

2. The Judge's identification of issues

[14] Turning now to the real, as opposed to apparent, issues before the Judge as regards both liability and damages, these were set out by him in the judgment as follows:

> 'In relation to the question of liability whether [the appellant] was negligent in the care, treatment and diagnosis of [the respondent]; specifically:

(a) Whether [the appellant] in removing [the respondent's] gall bladder (*sic*) fell below the reasonable standard of care to be expected of a reasonable surgeon within Belize by lacerating [the respondent's] bile duct?

(b) Whether the time it took in identifying that the cause of [the respondent's] post-operative (*sic*) symptoms (the jaundice, the vomiting, the increased level of bilirubin in [the respondent's] blood) was the damage to her gall bladder (*sic*) during the operation and (*sic*) fell below the reasonable standard of care to be expected of a reasonable surgeon within Belize?

(c) Whether the treatment by anti-biotics (*sic*) given to [the respondent] fell below the reasonable standard of care to be expected of a reasonable surgeon within Belize?

(d) Whether the discharge of [the respondent] for Christmas in light of her symptoms and laboratory results and tests and have her return on the 26th December when the [exploratory surgery and the anastomosis were] done fell below the reasonable standard of care to be expected of a reasonable surgeon within Belize?

In relation to damages and its quantum, if legal liability is found to have been proved, whether [the respondent] is entitled to any damages?' (underlines added)

3. The Judge's shorthand references to the negligence test

[15] It is as well straight away to point out that, despite the repeated references in the above formulation of issues to 'the reasonable standard of care to be expected of a reasonable surgeon within Belize' (underline added), Ms Barrow for the appellant, without demur from Mrs Uc Myles for the respondent, made it clear at the hearing of the appeal that there was no question in her mind as to whether the correct principle of law was

applied by the Judge: see pages 234-235, Appeal Transcript. (See, also, Skeleton Submissions of the Appellant (hereinafter '**Ms Barrow's Appeal Submissions**'), para 1.1.) As I understood her, the expression just quoted was a sort of simplified form of reference to the principle enunciated by McNair J well over 60 years ago in directing the jury in the famous English case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. It is necessary to make an important point in this regard. The principle in question, I wish to stress (in leading up to my point), is one which has stood the test of time in the area of professional negligence claims. Thus, this Court, in *Meenavalli v Matute and anor*, Civil Appeal No 16 of 2008 (judgment delivered on 30 March 2012) said, at para 56:

> 'There is no dispute between the parties that, as recognised by this court in *Cloud v Nunez* (*sic*) *and others* (Civil Appeal No 19 of 2000, 8 March 2001), the applicable test of negligence was set out in McNair J's direction to the jury in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 586:
>
> > "In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the man on the top of the Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is

> well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." ' (underlines added)

As the added underlines here serve to highlight, the emphasis in this test is on skill and competence, not on reasonableness. We are here speaking of a surgeon of ordinary skill and competence, not of one who is simply reasonable. This is the point to which I have been leading up.

[16] And, as regards the foregoing observation on the longevity of *Bolam* as the leading authority, I would add this. On the unsuccessful appeal (citation: [2014] CCJ 8 (AJ)) from the decision of this Court in *Meenavalli*, the Caribbean Court of Justice, disapproving of nothing contained in the passage quoted in the immediately preceding paragraph, itself applied the relevant principles enunciated in *Bolam*, saying at para [34] of its judgment:

> 'The classic statement of the standard of care of a professional exercising some special skill or competence is contained in the direction of McNair J in Bolam v Friern Hospital Management Committee which was cited with approval by Sir Hugh Wooding [writing for the Board] in *Chin Keow v Government of Malaysia* [reported at [1967] 1 WLR 813] :
>
> > "… where you get a situation which involves the use of some special skill or competence, … the test … is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." ' (underlines added)

[17] The purpose of this digression of sorts into the true nature of the *Bolam* test having now been achieved, one may return briefly to the Judge's evident attempt at a handy, user-friendly reformulation of the test.

[18] It is my understanding from what counsel told the Court that neither side had any difficulty with the Judge effectively stating the principle in coded language. I, for my part, fail to see the justification for a judge inaccurately wording a principle of law on grounds of convenience or ease of reference. It is not something I have encountered before or look forward to encountering again. The judgment in a case is not written for the exclusive use and benefit of counsel who appeared in that case. It must make sense to, and avoid unnecessarily confusing, other people who read it as well. It is not good enough, in my respectful view, that the principle was more, if not fully, accurately set out at a later point, ie para [87], in the judgment.

4. The Judge's resolution of issues

[19] Those necessary remarks having been recorded, I now turn to attempt clearly to identify the Judge's resolution of the issues before him. I do so at the risk of being accused of, to some degree, stating the redundant, having regard to what I have already noted at paras **[2]**-**[3]**, above. As regards issue (a), the Judge was not prepared to find that the appellant, falling below the applicable standard of care, cut the respondent's CBD, in other words, that the appellant negligently cut it. The Judge would only go so far as to find that it was cut and that the appellant was the one who cut it.

[20] With respect to issue (b), it is to be observed, in passing (since nothing turns on it in the present appeal), that the reference in the Judge's above formulation thereof to damage to the 'gall bladder (*sic*)' is patently erroneous. The gall-bladder was removed *in toto*. What was damaged and remained in the respondent's body was the CBD. The Judge found that, in taking as long as he did to identify that the cause of the respondent's postoperative symptoms was a laceration of the respondent's CBD during the lap chole, the appellant did indeed fall below some relevant standard of care.

[21] In regard to issue (c), the Judge found that the appellant did not fall below the applicable standard of care in treating the respondent with antibiotics upon her

readmission to hospital following the lap chole and before the exploratory surgery and anastomosis.

[22] Concerning issue (d), the Judge did not find that the respondent was discharged on the date in question, ie 23 December 2009. He found, rather, that she was simply conditionally allowed to go home for Christmas and that the appellant did not fall below the relevant standard in allowing her so to do.

[23] In relation to issue (e), the Judge held that the respondent, having proved some legal liability on the part of the appellant, was entitled to the award of damages already noted above.

IV - *The main appeal*

1. Grounds of Appeal

[24] The appellant filed nine grounds of appeal, all except one of which I shall set out when I come to deal with them, whether individually or in groups. The exception is the ninth ground which was as follows:

> 'ix. The decision of the [J]udge is against the weight of the evidence.'

2. Submissions and discussion

(a) Introductory

[25] The ninth ground, which is set out above, was not separately argued either in writing or orally. I propose to deal with the remaining eight, which were all argued mainly in writing, by first identifying the principal submissions advanced in support of and against them on behalf of the appellant and the respondent, respectively, and then going on to my discussion thereof. I shall, however, so deal with them in the order, so far as possible,

in which Ms Barrow, for the appellant, and Mrs Uc Myles, for the respondent, chose to present them in their respective written arguments. The qualification 'so far as possible' is important, given (a) the manifest interlocking nature of the grounds and (b) the fact that they were not treated in exactly the same order by counsel. (In the latter respect, it will be noted, for example, that whereas, so far as the written argument is concerned, Ms Barrow, dealt with the fourth ground thirdly and by itself, Mrs Uc Myles chose to deal with it fifthly but as part of a group.)

(b) The fifth and sixth grounds

[26] These two grounds may conveniently be dealt with together. They are, respectively, as follows:

> 'v. The [J]udge] erred in law and misdirected himself in finding as he did ([j]udgment para 142) that the time it took (8 days) in identifying the cause of the [r]espondent's post-operative (*sic*) symptoms fell below the reasonable standard of care to be expected of a reasonable surgeon within Belize.
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> vi Further in this regard, the [J]udge] misdirected himself in failing to give any or any proper consideration or weight to the significance of the uncontested evidence of the expert witness that most of the times the treatment of bile duct injury is done as a delayed procedure one (1) to eight (8) weeks after surgery.'

• Submissions

[27] Before outlining her submissions in support of these two grounds, Ms Barrow indicated that she regarded them as her main grounds, relating as they do to what she saw as the Judge's sole finding of negligence against the appellant. There was, in the submission of Ms Barrow, no evidence or authority before the Judge to substantiate his finding of medical negligence. She laid emphasis on the evidence of the expert, Dr

Quetzal, that bile duct injury is usually treated as a delayed procedure, one to eight weeks after being sustained, following a proper diagnosis thereof.

[28] Mrs Uc Myles, in seeking to rebut this argument, purported to place reliance on the very same witness. It was his evidence, she argued, that the symptoms complained of by the respondent during the period between the two surgeries was indicative, as she put it, of either an obstruction or a laceration. She submitted that, on the evidence of Dr Quetzal, the appellant should have known from the increase of bilirubin in the respondent's body to a 'high level' that the cause of her symptoms was either an obstruction or a laceration, neither of which could be cured by treatment with antibiotics but, instead, required further surgery. Antibiotics, contended Mrs Uc Myles, were appropriate, on the expert testimony, in the event of sepsis, infection or pulmonary congestion, but the respondent was not afflicted by any of these. Moreover, she argued, there was evidence of dilatation, albeit mild, by the fourth day after the lap chole, an indication, on the testimony of the expert (according to her), of the presence of an obstruction. Surgery, she maintained, ought to have been resorted to by no later than that fourth day.

• Discussion

[29] I have had no difficulty in reaching the conclusion that the submissions of Mrs Uc Myles are direly lacking in evidential support and untenable. They are, with respect, substantially based not on the evidence but on an ingenious theory of her own making, which, to her credit, she fairly put to the appellant but which, to my mind, he convincingly rejected out of hand. I refer to the theory that, in essence, the appellant's treatment of the respondent with antibiotics was a waste of precious time given that, as Dr Quetzal agreed under cross-examination by her, the respondent's level of direct bilirubin could not be reduced by antibiotics. The difficulty with this theory was most fundamental in nature. As the appellant was at pains to explain to Mrs Uc Myles, cogently in my view, the treatment of the respondent with antibiotics was not, as she (Mrs Uc Myles) kept insisting, directed either at ridding the respondent of the condition or symptom of jaundice or at reducing the elevated level of bilirubin in her blood: Record, pp 237-238. Rather, as the appellant

further compellingly explained, it was aimed at the risk of infection. In the words of the appellant, it was a preventive or prophylactic treatment: Record, pp 237 and 239. This was part of a gradual and cautious medical approach which found ample and unmistakable support in the spirit, if not the language, of Dr Quetzal's expert testimony. Such testimony counseled against a rush to further surgery, with its usual attendant risks, surgery which might ultimately prove a mistake, costly in more senses than one. Thus, in the course of cross-examination by Mrs Uc Myles herself, Dr Quetzal pointed out that –

> 'You would have to determine what was the cause of the [b]ilirubin before knowing how to reduce it.'

In elaborating on this crucial point under further cross-examination by Mrs Uc Myles, the expert witness left it in no doubt that in a case of an elevated level of bilirubin in the blood the cause of the elevation was never a foregone conclusion. There were, he testified, several possible causes, including (a) the destruction of red blood cells; (b) medication; (c) injury to a biliary duct; (d) transient obstruction of such a duct (caused by a stone which had somehow remained inside the body after the lap chole); and (e) liver failure. It is significant, as I see it, that counsel for the respondent did not so much as attempt at any stage to elicit from Dr Quetzal an expression of direct disapproval of the five-days-of-observation-and-study approach adopted on 21 December 2009 by the appellant with respect to the problem of the respondent's elevated bilirubin level: for mention of which approach, see Record, pp 237-239. And I would single out for special emphasis the response of the appellant contained in the following pertinent exchange at Record, 238-239, a response which, when recorded, was erroneously punctuated by the stenographer to the disadvantage of the appellant:

'Q. I am asking you: did you take any measures to treat the bilirubin level in her system?

A. Yes - observation. Because you don't treat it with antibiotics. You don't treat bilirubin with antibiotics.' (underline added and emendations, shown in green, made to stenographer's punctuation)

The approach to the bilirubin problem, then, was going to be one of observation or study and, it is to be inferred, this was going to continue over the same period of five days during which the preventive treatment with antibiotics would be administered.

[30] But it was in the appreciably more enabling environment of his cross-examination by Ms Barrow that Dr Quetzal came across as well-nigh scoffing at the notion that there should have been greater speed in taking the respondent back to the operating theatre. He stated, for example (Record, p 213), that –

> '… [Y]ou have to investigate. You just cannot go and operate a patient because the [total] bilirubin is at 12**,** even though it's immediate post-operatively (*sic*). You have to investigate what is the reason of (*sic*) the elevation.' (Emendations, shown in green, made to stenographer's punctuation)

In the same breath, he said, in language of his own which I here paraphrase, that, where undue haste was the order of the day, a person whose jaundice and high bilirubin were, in fact, being caused by, say, liver damage, could find himself/herself needlessly subjected to additional surgery. He also pointed out that the approach of ruling out possible causes for the symptoms under consideration before turning to further surgery was one to be adhered to even if the symptoms were presenting themselves, as in the instant case, very shortly after a lap chole: Record, *ibid*. Dr Quetzal was here responding to a question from Ms Barrow from which it was as plain as could be that what was wanted from him was enlightenment as to 'standard practice' amongst surgeons in Belize: Record, *ibid*. There is therefore no reason to think that Dr Quetzal was here propounding his own idiosyncratic views; and, certainly, no suggestion to that effect was ever even put to him.

[31] It is the case, of course, that it was not until 23 December 2009 that the all-important signs of mild dilatation of certain biliary ducts first came to light, via an Upper Abdomen CT with Contrast. The timing of this medical study was never questioned by the expert witness. Nor was the fact that a follow-up one was done on 26 December. But Mrs

Uc Myles has nevertheless strenuously contended before this Court that there was culpable delay, ie negligence, on the part of the appellant in not proceeding to exploratory surgery until 26 December 2009. This contention, too, must in my view, summarily be rejected. To accept it in the absence of any basis therefor in the expert testimony of Dr Quetzal would be less than responsible and fair. And I am quite unable to find such a basis for it. What matters here is not the criticism of counsel, who is (like I am) no more than a layperson as far as the subject under discussion is concerned, but what in *Bolam* was referred to as 'a responsible body of medical opinion skilled in the particular form of treatment'. (In the instant case, the relevant opinion would have to be that of surgeons rather than physicians.) Far from suggesting that a responsible body of surgical opinion was against a delay of some three days (from 23 to 26 December) in going to exploratory surgery, Dr Quetzal effectively endorsed, amongst other things, the timing of the surgical intervention of 26 December. The following exchange, occurring at the butt-end of Ms Barrow's cross-examination of him, is, in my respectful view, more than sufficiently instructive in this regard:

> 'Q. My final question to you, Doc, were the surgeries - - sorry, I need to ask two questions. Was medical best practice/protocol used in doing the first surgery?
>
> A. Well [from?] what I read on the file, yes.
>
> Q. And based on your reading, was medical best practice used in doing the second surgery?
>
> A. Yes, the patient was studied, identification was done. Remember, there was a question there about the time to re-operate. And you divide (*sic*) [one would think the witness, a Mexican national, said 'decide' rather than 'divide'] time to re-operate a patient based on the results that you are obtaining. Now some patients will dilate until five days, seven days and that is why we have a framework. You either do a repair immediately or you

could delay the repair seven days after - up to eight weeks after. So, based on what is the chronology of the file, yes, it was done with the best standards as well.' (Underlines added and emendations, shown in green, made to stenographer's punctuation)

[32] In the light of the last of these answers, the submission that it was negligent on the part of the appellant to perform the exploratory surgery until Boxing Day, a public and bank holiday in Belize, must be seen, in my opinion, as lacking a solid foundation. The artificiality and contrived nature of the entire argument is, it seems to me, spectacularly exposed by the following exchange that occurred in the course of the cross-examination of the respondent herself (Record, p 189):

'A. Am I right in saying that there was very little time between when you were admitted to the hospital and told of this surgery was there very little time?

Q. Yes, Ma'am.'

This uncomplicated point of view, offered with such utter spontaneity, and Mrs Uc Myles' argument, so carefully put together, nay, overwrought, about delay cannot have been more sharply at odds with one another.

[33] As to the suggestion of Mrs Uc Myles that there quickly came a point at which matters boiled down to the simple question whether the cause of the respondent's postoperative symptoms was an obstruction or a laceration, I fear that, again, we are here faced, largely, with wishful, if creative, theorising from the bar table rather than with medical science. The very collocation of obstruction and laceration as alternative causes invites skepticism. After all, there was no evidence, expert or otherwise, to the effect that an obstruction and a laceration are mutually exclusive. In the absence of such evidence, I would hesitate to dismiss the possibility that the laceration of a patient's CBD can result in an obstruction somewhere in the biliary system. In other words, it will require more than the word of counsel to convince me that, where there is a laceration of a bile duct, there

cannot also be an obstruction, eg of the flow of bile from the liver. But putting theory aside, I would observe that Dr Quetzal, as already noted at para **[29]**, above, opined that there were several (rather than only two) possible causes of the symptoms in question. More importantly, the appellant (not Dr Quetzal), was, in the present real-life case, the man on the spot during the critical period between the two surgeries. From his evidence, given in his witness statement and under cross-examination, the clear impression is formed that he was not concerned at any time during that period about a possible obstruction. (Lest a diligent reader with access thereto should wonder whether I am aware of the second page of the purported note of the appellant for 21 December 2019 – Doctor's Progress Notes – with its reference to 'transient obstruction', I will here point out that, in my view, such note, without more, did not constitute evidence in the case; and, as for Dr Quetzal's reference to it whilst under cross-examination by Mrs Uc Myles – Record, p 203 – that, coming from his (Dr Quetzal's), rather than the appellant's, mouth, was pure hearsay.) Possible obstruction was not so much as mentioned in the appellant's witness statement; and it only surfaced in his cross-examination when raised by respondent's counsel. Dr Quetzal, questioned with evident gusto on the subject by Mrs Uc Myles, was gracious in providing his answers; but, with the greatest respect, none of those answers could elevate this purely academic point to the level of a live issue in the case. The exploratory surgery performed at the end of the period in question revealed (para 13, of the appellant's witness statement) that the true problem was a leakage of bile into the abdomen from a spot on a cystic stump where a titanium clip had been applied (an important item of evidence virtually ignored by counsel for the respondent and the Judge) and as well, it may fairly and safely be inferred, from a laceration to the CBD. The problem was, to put it another way, not shown to have been an obstruction, thus fully vindicating, to my mind, the appellant's unconcern earlier on (on the actual evidence) about a possible obstruction. The scant relevance of the topic of possible obstruction was blown out of all proportion, in my respectful view, by the overzealousness of respondent's counsel in her cross-examination of a somewhat too indulgent Dr Quetzal. And it is instructive to note in this connexion, from the exchange reproduced below, how what seems like an attempt to do likewise in her cross-examination of the appellant was, contrastingly, stopped dead in its tracks (Record, p 241):

‘Q. So am I correct to say that from the 23 of December you had knowledge that it had to be an obstruction that was taking place in [the respondent], correct?

A. No.’

Implicit in that tersest of replies, to my mind, was the assertion that, whatever a layperson (such as counsel) might want to think, for the appellant as an experienced physician and general surgeon with a sub-specialty in laparoscopic surgery, a hospital study showing the presence of mild dilatation was not sufficient reason to conclude that the respondent was suffering from an obstruction. (I pause to note that counsel took No for an answer; and the point was not further pursued.) In all this, sight must not be lost of the stubborn reality already highlighted above, viz that, even after the exploratory surgery of 26 December 2009, there was no evidence of the obstruction which, in hypothetical form, figured so prominently in Mrs Uc Myles’ cross-examination of Dr Quetzal.

[34] I therefore categorically reject the suggestion that the appellant was faced, whether at an early stage or at any time later, with the simple and straightforward question whether the cause of the symptoms under discussion was an obstruction or a laceration. I consider that, if Dr Quetzal subscribed to Mrs Uc Myles’ view of the position, he would never have given his unambiguous blessing, as he most assuredly did, to the approach actually adopted by the appellant, with its careful and conservative progress towards, and arrival at, a decision to perform the exploratory surgery during the period running from 21 December to Boxing Day.

[35] To summarise, the question of negligence *vel non* is not one to be determined on the subjective layperson’s common sense assessment of counsel. Whether the appellant took too long to discover the true cause of the symptoms exhibited by the respondent between the time of her readmission to hospital and the time of her return to the operating theatre is, in keeping with the canonical statement provided in *Bolam*, a matter for the opinion of a responsible body of surgeons skilled in the performance of the exploratory

surgery undergone by the respondent on Boxing Day 2009. It is, in my view, abundantly clear from the evidence of Dr Quetzal (who might have been more pointedly questioned on behalf of the respondent, as onus bearer, but was not) that the time which the appellant allowed to elapse before carrying out such exploratory surgery was not excessive and, hence, such as to render him negligent. It follows from that conclusion that the appellant cannot be said to have taken too long to discover the cause of the symptoms in question. (I see no small measure of consistency with these concluding views of mine in the Judge's finding, already noted at para **[21]**, above, regarding the appellant's treatment of the respondent with antibiotics.)

[36] For reasons already given above (para **[14]**), I would not, in framing my conclusion, adopt the entirety of the phraseology of the fifth ground (and of the Judge) and hold that the time taken to identify the cause of the respondent's postoperative symptoms did not fall below the standard of care to be expected of a 'reasonable' surgeon within Belize. I would hold instead that the time taken to make the identification in question did not, on the evidence, fall below a '[standard of] practice accepted as proper by a responsible body of [surgeons] skilled in that particular art': *per* McNair J in *Bolam's* case, p 587.

[37] In respect of the sixth ground, again for reasons already given above, I would hold that the Judge misdirected himself by not giving any measureable weight to the uncontested evidence of Dr Quetzal that the treatment of bile duct injury is most often carried out as a delayed procedure one to eight weeks after a lap chole.

(c) The first, third and fourth grounds

[38] It will be convenient separately to deal with each of these three grounds.

THE FIRST GROUND

[39] The first ground is as follows:

‘i In rejecting the [a]ppellant’s testimony that before [the exploratory surgery] he told the [r]espondent that he did not know what was wrong ([j]udgment para 29), the [J]udge utterly failed to consider the evidence which he later rehearsed that:

a) ([j]udgment para 40) the [a]ppellant had informed the [r]espondent that they would do an emergency surgery at 12.00 pm (*sic*) to find out the problem; and

(b) ([j]udgment para 42) before [the exploratory surgery] the [a]ppellant informed the [r]espondent that they would go in to find out what was wrong.’

• Submissions

[40] In respect of this ground, Ms Barrow acknowledged that it is not clear from the judgment what, if anything, turned on the finding of the Judge that the appellant did not disclose to the respondent, before the exploratory surgery, that he (the appellant) did not, at that stage, know what was wrong. She nevertheless submitted that this finding was erroneous and, besides, inconsistent with other findings of the Judge. Citing *Thomas v Thomas* [1947] AC 484, at 486 and 487, she invited the Court to displace this finding on the basis that it is unsatisfactory by reason of material inconsistencies.

[41] Mrs Uc Myles grouped together the appellant’s first, third and fourth grounds for purposes of her response to them. That done, however, she proceeded, for some unknown reason, to focus on only one of them, viz the fourth and ended up not addressing the core of the first and third. It is clear, however, that she saw no difficulty with the Judge treating as negligence what she described in oral argument as ‘the respondent not being told of what took place and so forth’: see Appeal Transcript, p 189.

• Discussion

[42] In my view, the first ground is not a proper ground of appeal. Ms Barrow appropriately draws attention to the fact that the Judge did not specifically state what, if anything, turned on the finding which she impugns. And she does not venture to suggest that anything, in fact, turns on it. As appellate courts have said time and again, appeals are against orders made by lower courts, not against any and every error committed by them. The principle is so universally accepted that there is no need to cite authority for it. For the pedantic reader, however, if such there shall be, I would refer to the following words of Lady Hale, delivering the judgment of the Privy Council in the recent case of *Seepersad (a minor) v Ayers-Caesar and ors* [2019] [UKPC] 7, at para 11:

> '… no useful purpose can be served by pursuing this appeal: appeals are against orders, not against the reasons given for making them.'

I would think that, by the same token, unless a finding is such that a particular order turns on it, a ground of appeal which challenges it is not to be countenanced. Lest, however, I should be wrong in thinking that such principle applies in the circumstances of the present case, I shall take the precaution of giving consideration to the first ground.

[43] As the second sentence of paragraph **[41]**, above plainly foretokens, I am unable, try as I might, to find in Mrs Uc Myles' Skeleton Arguments (*sic*) on Behalf of the Respondent (hereinafter '**Mrs Uc Myles' Appeal Submissions**') any meaningful reply to the first ground. Nowhere in such written argument is it even faintly suggested that, contrary to the complaint contained in the first ground, the Judge, in rejecting the relevant claim of the appellant (viz, that, between the readmission and the exploratory surgery, he told the respondent he did not know what was the matter with her), did take into account that which is incorrectly referred to merely as 'evidence' in Ms Barrow's formulation of the ground but is, subsequently, in **Ms Barrow's Appeal Submissions** (at para 12.0), correctly called 'findings'. (These two findings, as will be recalled, were (i) that on 26 December 2009 the appellant informed the respondent that emergency surgery, ie the exploratory surgery, would be performed to find out the problem and (ii) that, before that same surgery, the appellant told the respondent that his team would go in and find out

what was wrong.) Indeed, the argument of Mrs Uc Myles is not inconsistent with the truth of the appellant's rejected evidence (ie that before the exploratory surgery he told the respondent that he did not know what was wrong with her). She repeatedly suggests in the course of such argument that, whether during the period in question, or any other relevant period, the appellant never did tell the respondent what was wrong with her.

[44] The first ground (if, indeed, it is a proper ground of appeal) must, in my view, succeed. It appears to me that when the Judge rejected the admission of the appellant that he told the respondent he did not know what was the matter with her, he (the Judge) did not have uppermost in his mind that which he clearly stated, as a finding, elsewhere in the judgment.

[45] Clarity will, I think, be enhanced if, before further examining that which, as already noted, Ms Barrow variously called both 'evidence' and 'finding', consideration is given to the way in which the appellant's rejected admission in question arose at trial. The roots of this admission obviously lie in a claim emerging for the first time, albeit indirectly, in the witness statement of the appellant. The claim is found at paras 9 and 10 of such statement, which paragraphs, as material for present purposes, read as follows:

> '9. On the 26th December, 2009 after numerous discussions with the clinical team and with the support of radio-diagnostic and laboratory test (*sic*) a decision for surgery was taken to explore the common bile duty (*sic*) [duct?] region to establish the definite cause of the Jaundice (*sic*).
>
> 10. The decision was explained to [the respondent] …'

It is implicit in this evidence both (a) that the appellant did not at the relevant time know what was wrong with the respondent and (b) that this was part of what he explained to her on Boxing Day 2009. That, the absence of the pronoun 'I' from para 10 notwithstanding, it was the appellant himself who did the explaining is not, and never was, in dispute. Thus, at para 25 of her witness statement, the respondent herself, speaking

of a conversation with the appellant on the morning of Boxing Day 2009, says that he told her, *inter alia*, that 'they would do an emergency surgery at 12.00 pm (*sic*) to find out the problem.' If the last five words of this short quotation do not succeed in making it plain that the appellant was telling the respondent he did not know what was wrong with her, one is hard-pressed to think of other words that might succeed in that regard.

[46] The respondent herself was perfectly clear as to what the appellant was telling her in that conversation on the morning of Boxing Day. That much is to be gathered from the following exchange occurring in the course of her cross-examination (Record, p 188):

> 'Q. Did [the appellant] not explain to you what [the exploratory surgery] was for?
>
> A. They told us that they just needed to go in explore to see what was the problem. That was what we were informed that they were going to go in and see what the problem is. At that point they said "explore" being that they don't know what the problem is, they are going to see what the problem is.' (inverted commas, immediately before and after the word explore, added)

[47] The passage from the respondent's witness statement reproduced at para **[45**], above is echoed by the disclosures made in the witness statement of her mother, Maria Gordon, at para 24. And the witness statement of the respondent's sister, Andrea Arana, whilst it does not speak of surgery 'to find out the problem', does clearly place the appellant at the bedside of the appellant on the morning of 26 December 2009 talking of the then imminent exploratory surgery. Therefore, in the light of the disclosures contained in the witness statements of the respondent and two of her witnesses, it can hardly matter that para 10 of the appellant's witness statement does not explicitly state that it was the appellant himself who explained to the respondent the decision to operate with a view to establishing the cause of the jaundice.

[48] Coming now to the rejected admission itself, it was made, in very direct fashion, by the appellant whilst under cross-examination at trial. And, it is not in the least

surprising, given the disclosures of the respondent and Ms Gordon just noted at paras **[45]** and **[47]**, above, respectively, that he was invited to make this admission by respondent's counsel herself. The relevant short exchange appears at Record, pp 239-240 and is as follows:

> 'Q. Isn't it true, Doc, that what you told [the respondent] is that you don' know exactly what is wrong and you have to go into [the exploratory surgery] to explore to be able to tell her what it is? Isn't it so?
>
> A. Yes.' (emendations, shown in green, made by me to stenographer's punctuation)

[49] Despite the fact, then, that that which the appellant was admitting was the same as that which both the respondent and Ms Gordon were asserting, the Judge, evidently (if puzzlingly) treating the matter as a disputed claim rather than an admission by the appellant, unambiguously stated at para [29] of the judgment that he was not accepting it. This entirely odd approach to the clear evidence of both sides in the litigation calls, in my view, for a rational explanation by the Judge. I have not been able to find such an explanation in the judgment: see, further, on this, para **[52]**, below.

[50] But, as should be obvious from what I have stated above, that is not the only difficulty I am constrained to have with the Judge's approach. There is also, of course, the matter of that which, in counsel's formulation of the ground, is referred to (incorrectly, as I have opined above) merely as 'evidence' rehearsed by the judge. I have identified this 'evidence' at para **[43]**, above and indicated at para **[45]**, above that I proposed further to examine it later. Though, as already noted above, it is referred to by Ms Barrow in her wording of the first ground only as rehearsed evidence, what the judge sets out at p 165, judgment in truth constitutes a contradictory finding of fact. Ms Barrow, as has also been noted before, subsequently comes to appreciate this, as is clear from para 12.0, **Ms Barrow's Appeal Submissions**. This contradictory finding is to be found at para [40], where the Judge states that –

> '… the [respondent was told [that] the good news was … that they would do an emergency surgery at 12.00 pm (*sic*) to find out the problem ...'

and, at para [42], where he further states that –

> '[b]efore the surgery the [respondent] was told by the [appellant] that they would go in to find out what was wrong …'

These statements, from whatever angle viewed, together amount, for reasons which shall appear in the paragraph next following, to a finding that the appellant told the respondent that he did not know what was wrong with her.

[51] I consider that this finding is to be preferred to that which is set out at para [29] of the judgment and which purports to make naught of the appellant's admission under discussion. It is, importantly, an essentially disciplined finding in the sense that it is arrived at in keeping with the guide provided by the Judge himself in para [4] of the judgment (hereinafter 'para [4]'), under the sub-heading *Introduction*. That is a guide as to which matters set out in the section of the judgment entitled *Background* are to be taken to constitute findings by the Judge. It provides for only two types of situation. The first of these is where the relevant evidence is common ground between the parties. In that type of situation, as I understand para [4], the Judge will treat the relevant evidence as fact. The other type of situation is where there is no common ground. In that type of situation, as I read paragraph [4], the Judge will state his finding. What the Judge does at para [29] is in flagrant disregard of the guide he has thus provided in para [4]. Instead of treating the evidence which is common ground between the parties as fact, he purports not only to reject it but to do so without vouchsafing a rational explanation for disregarding his own guide. In contrast, in para [42] the Judge follows that guide and sets out a finding to the effect that the appellant did in fact tell the respondent that he did not, even as he spoke, know what was wrong with her. In my opinion, the first ground, must in the circumstances,

succeed. And such success must be seen as firm deprecation of the manifest indiscipline giving rise to the purported finding at para [29], judgment.

[52] But what the Judge further said by his second and third sentences in para [29], judgment needs also briefly to be addressed, since it seems to be advanced by him as an explanation of the impugned finding. In those sentences, he suggests that, during the period in question, the appellant was in fact making diagnoses and communicating them to the respondent. This, the Judge seems to be suggesting, shows that the appellant was not at all telling the respondent that he did not know what was wrong with her. The problem, however, is that the Judge is there failing to give effect to two basic distinctions. The first of these distinctions is that between what, on the evidence, the appellant said to the respondent and what he merely recorded in his notes, which, one must repeat, is not evidence in this case. And the second is the distinction between a mere symptom and the cause thereof. The Judge speaks in the second sentence of a diagnosis of jaundice and, in the third, of a 'possible diagnosis' of sepsis. Jaundice, however, is, by definition, a symptom or condition of something else that is wrong inside the body. To tell me I have jaundice is not to tell me what is wrong with me. But the fact is that the respondent gave no evidence that the appellant ever even told her she had jaundice. There is no allegation to that effect in any of the relevant paragraphs (nos 18-25) of her witness statement. In fact, the word 'jaundice' is not even used in those paragraphs. The term of choice therein is 'yellowness'. The same goes for the so-called 'possible diagnosis' of sepsis. Nowhere in the relevant paragraphs of the respondent's witness statement is sepsis mentioned. In contrast, there is mention in the notes of the appellant of both icteria (ie jaundice) and sepsis; but not only are those notes not part of the evidence in this case: neither is there any indication in them that the appellant ever said anything to the respondent about jaundice or sepsis. Nor is there anything in the *viva voce* evidence of the appellant to suggest that such 'diagnoses' were ever communicated by him to the respondent: see the pertinent portions of his evidence at Record, pages 236-238.The Judge, in short, employed faulty reasoning, not to mention non-existent evidence, to arrive at the conclusion that the appellant had in fact been telling the respondent, between her readmission and the exploratory surgery, that jaundice and/or sepsis were the things that

were wrong with her. As the extract from his witness statement set out at para **[45]**, above makes crystal clear, the appellant was actively seeking to discover the cause of the jaundice, not crying out 'eureka' for having recognised that symptom. In my respectful view, the Judge's explanation of the finding is not a rational one.

[53] In those circumstances, I am unable to understand, and must disagree with, the Judge's rejection of the appellant's admission in question. What it boils down to is a rejection of credible matter which was common ground between the parties and which, besides, goes against the grain of the guide provided by the Judge himself at para [4]. It is the Judge's contrary finding, ie that the appellant told the respondent that he did not know what was wrong with her, that must stand.

[54] It remains to respond to counsel's invitation to apply *Thomas's* case in displacing the finding complained of in this ground. It is an invitation which I find myself bound to resist. I consider that the ground succeeds for the reasons given above and none other. The principles stated in *Thomas* apply where the appellate court is asked to set aside a finding of the judge of first instance and replace it with a finding of its own. That is not the position here. All that the Court is called upon to do in the present case is tidy up the mess created by the presence of two conflicting findings of fact by the Judge. What I have done above is to demonstrate why I would set aside one of those findings and leave the other one standing. I have not, to use the words of Lord Thankerton in *Thomas* (pages 487-488) 'come to a different conclusion on the printed evidence'. Nor, in dealing with this ground, am I, as Lord Simonds puts it in the same case (p 491) 'taking a different view of the facts of this case from that taken by the [Judge]'. Rather, I have simply preferred one of two contradictory conclusions of fact arrived at by the Judge himself.

THE THIRD GROUND

[55] The third ground is as follows:

‘iii. Further in this regard, the [J]udge misdirected himself in equating the failure to inform of the discovery made during an exploratory surgery with medical negligence ([j]udgment para (*sic*) 134-142).’

The four opening words, ‘[f]urther in this regard’, refer back to the complaint of judicial conflation made in the second ground, for the terms of which see para **[75]**, below.

• Submissions

[56] As regards the third ground, the attention of the Court was directed to the contention, made elsewhere in **Ms Barrow’s Appeal Submissions**, that the Judge erroneously found that the appellant admitted in cross-examination to never having informed the respondent as to the laceration of her CBD. That finding, maintained Ms Barrow, was the Judge’s premise for the further error focussed upon in the third ground. To equate failure to inform, wrongly treated by the Judge as established, with negligence (whilst refraining, admittedly, from calling it negligence) was, however, in counsel’s submission, in itself incorrect. This finding, urged counsel, could not properly ground an award of damages of any kind. What was here conspicuous in its absence, as I understood counsel’s argument, was an actionable wrong.

[57] I have already pointed out at para **[41]**, above that **Mrs Uc Myles’ Appeal Submissions** do not focus on the core of the third ground. Counsel essentially limited herself to the virtually bald submission, deployed in oral argument, that it was the obligation of the appellant to inform the patient: see Appeal Transcript, p 152. One uses the adjective ‘virtually’ here since, in fairness, it must be recognised that she sought to invoke the testimony of the expert witness in support of that submission: *ibid*.

• Discussion

[58] With respect to the third ground, again, as in the case of the first, the second sentence of para **[41]**, above, all but foreshadows its failure. As there pointed out, **Mrs**

Uc Myles' Appeal Submissions omit to address the respective cores of the pertinent grounds. The logical answer to this particular ground would, of course, be that the Judge did not misdirect himself in equating failure to inform of the discovery in question with medical negligence. After all, it has to be admitted that the Judge did exactly what the appellant complains of. Para 153, judgment reads, in relevant part, as follows:

> 'In relation to the assessment of general damages this court specifically takes into account the following findings:
>
> (a) …
>
> (b) that following the [exploratory surgery and anastomosis] the appellant ought to have informed the respondent about the findings of such surgery, namely the laceration of her bile duct during the [lap chole]. This, as found by this Court, did not take place.'

The claim filed by the respondent, as already emphasised above, was a claim in negligence and nothing more. The only general, or special, damages that the Judge could properly award was in respect of negligence. As it is put in **Ms Barrow's Appeal Submissions**, para 11.4:

> 'Given that an award of damages is compensation to make good the consequences of an actionable wrong, the [Judge] had to have equated the [a]ppellant's found failure to inform with medical negligence to have considered it in assessing general damages.'

But the logical answer just mentioned in the third sentence of this paragraph is not to be found anywhere in **Mrs Uc Myles' Appeal Submissions**. Indeed, one searches in vain therein for a single instance where the clearly critical term 'medical (or professional) negligence' is employed. There is here, as it seems to me, an inexplicable refusal by counsel to, so to speak, seize the charging bull by the horns. There is, to put it a little

differently, no effort on her part to show a legal basis for the Judge to have concluded that this failure to inform could properly be treated as negligence. As far as concerns the expert witness' testimony of, in Mrs Uc Myles' paraphrase, responsibility to tell the patient (Appeal Transcript, p 152, lines 13-15), it must be remembered that his expertise is in medicine and surgery, not in law. It was for the respondent, under legal advice, to decide whether to bring an action in negligence alone, as she ended up doing, or in both negligence and contract, and to settle and file appropriate pleadings. Going to the trial court and hanging an unpleaded claim on the opinion evidence given there by a surgeon who can hardly have been *au fait* with the difference between a claim in negligence and one in contract is simply not good enough. (It is, I think, by now a commonplace of the law that an expert witness should never take on the role of an advocate; and a corollary to that would seem to me to be that counsel in a trial should refrain from trying to press such a witness into service as a fellow advocate.) The further question whether the appellant was under a contractual duty to disclose the matters concerned is not one for decision on this occasion: see, also, para **[74]**, below, where *Lee v South West Thames Regional Health Authority* [1985] 1 WLR 845 is noted.

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THE FOURTH GROUND

[59] The fourth ground is as follows:

> 'iv. The [J]udge misdirected himself in fact and erred in law in concluding as he did ([j]udgment para 138) that the [r]espondent first learned of the laceration of her bile duct when she went to Chetumal.'

• Submissions

[60] In regard to the fourth ground, Ms Barrow, reproducing the relevant portion of the Trial Transcript, challenged the finding of the Judge that the appellant had admitted under cross-examination to never having informed the respondent as to (a) the discovery in the course of the exploratory surgery of an injury to her CBD caused by the appellant during

the lap chole and (b) the anastomosis carried out during the exploratory surgery. Ms Barrow submitted that there was no denying that the Trial Transcript revealed that the appellant had in fact testified to the contrary. On the other hand, in the further submission of Ms Barrow, not only was it the case that the respondent in fact failed to give evidence of having learned of the laceration for the first time in Chetumal: her (the respondent's) recollections also betrayed uncertainty and hence unreliability. As if that were not enough, contended Ms Barrow, it was actually admitted by the respondent that she had been given a copy of the appellant's notes relating to the surgeries in question; and such notes made express mention of the laceration discovered during the exploratory surgery.

[61] As to this ground, Mrs Uc Myles submitted that the Judge's conclusion that the respondent first learned of 'the diagnosis and laceration to the [CBD]' through her medical records and in Chetumal was based on his proper examination of the evidence and on directions given to himself accordingly. She contended that the respondent's witness statement contained (a) evidence to the effect that the appellant never told her what was wrong with her or of the injury during the lap chole and (b) an explanation of how she came to know of the injury and of the efforts which she thereafter made to see the appellant. That, she said, was, like evidence to similar effect from Ms Andrea Arana and the respondent's husband, Eldon Gillett, uncontested. Neither in his defence nor in his witness statement, added Mrs Uc Myles, did the appellant address the question whether he had notified the respondent as regards the injury done to her CBD during the lap chole. And, in terms of the evidence at the trial, there was none to show that the appellant had spoken to the respondent after the exploratory surgery and anastomosis, save for the claim that the respondent had made a complaint to him by phone.

• Discussion

[62] As to this last remaining ground in the group of three identified at p 21, above, I am unable to find in the judgment any basis for the submission of Mrs Uc Myles that the Judge concluded that the respondent first learned of the laceration of her CBD from <u>both</u> 'her medical records' and the doctors at Clínica Campestre in Chetumal. All that appears

from the judgment (paras [60] and [138]) is the conclusion of the Judge, based on hearsay at that, that it was in Chetumal that the respondent was first told and learned (inferentially, by and from a doctor) of the laceration. The Judge nowhere suggests that the pertinent discovery was made on the respondent's reading of the records in question. Indeed, as far as the Record goes, there was no evidence at trial that such a reading ever took place. It is unhelpful, moreover, that counsel's phrase 'her medical records' lacks specificity, leaving it unclear whether the reference here is meant to be to the notes of the appellant already mentioned above or to other medical records. The end result, as I see it, is that there was before the Judge no admissible evidence of anything learned by the respondent in Chetumal. Whatever any doctor there may have said or written (and Mrs Uc Myles adverted to a 'letter' written by a doctor in Chetumal in her oral argument: see Appeal Transcript, pp 164-165) could not have been transformed into evidence by virtue merely of being repeated by someone else at a trial in which he/she (ie such doctor) did not testify. (I would here readily confess to having myself, in the heat of the back-and-forth at the hearing, incorrectly read from a purported letter from Dr Irvin Gabourel: see Appeal Transcript, p 166.) It is in the sense that I have here described that I accept the submission of Ms Barrow that the respondent failed to produce evidence of having learned of the laceration for the first time in Chetumal.

[63] It is further to be noted, for whatever it may be worth (obviously very little), that the matter was not as simple and straightforward as the judgment might suggest, in that there was conflicting hearsay given on behalf of the respondent herself, that she had learned of the laceration in Belize rather than in Chetumal. Though at no stage mentioned by the Judge in the judgment, Mr Gillett had said in his unchallenged witness statement (at para 18) that Dr Gabourel, who is a well-known doctor practising in Belize City, had told 'us' that 'the tubes were cut wrongly' when the respondent's gall-bladder was removed. It is only two paragraphs later that Mr Gillett brings up the obviously subsequent consultation with a doctor in Chetumal and the advice given by him to 'us'. The Judge, it is plain to see, did not hesitate to make use of the hearsay introduced by witnesses for the respondent in the context of the visit to Chetumal but said nothing of the hearsay introduced by this witness for the respondent in the context of the interaction with Dr

Gabourel in Belize City. The truth, of course, is that it was not open to the Judge to make use of any hearsay as to what either doctor, ie the one in Chetumal or Dr Gabourel, told any of the witnesses testifying at trial. (One may note for completeness' sake that even respondent's counsel, who was not shy to make use of hearsay introduced by other witnesses regarding advice from other doctors, was strikingly silent as to this hearsay introduced by Mr Gillett regarding advice from Dr Gabourel: see the section headed *Background* of her Skeleton Arguments on Behalf of the Respondent (Respondent's Notice) ('**Mrs Uc Myles' RN Submissions**'), a document to which I shall return in due course.)

[64] What has been said thus far in this discussion can, however, hardly be an end of the matter. The rest of the evidence seems to me to render impossible a sound conclusion to the effect that, as he claimed, the appellant ever informed the respondent that the exploratory surgery revealed that her CBD had been lacerated during the lap chole. It is not open to this Court to turn a blind eye to the different pieces of evidence here involved. Whereas, on the one hand, the appellant stated in evidence that he did inform the respondent at some point after the exploratory surgery that the same had revealed that her CBD had been lacerated in the course of the lap chole (for the pertinent brief exchange, see para **[66]**, below), there was, on the other hand, the testimony of, to begin with, Mr Gillett. He provided evidence of a visit paid by the appellant to the warded respondent sometime after the exploratory surgery and anastomosis on Boxing Day. It was his testimony that he himself arrived at the ward 'late in the evening' and that the appellant arrived sometime thereafter. On his (Mr Gillett's) arrival, the respondent was asleep. On the appellant's arrival later, there was some dialogue between him (Mr Gillett) and the appellant. One is left to infer that the respondent did not wake up during the appellant's visit.

[65] The respondent herself also said something on the matter. That is to the effect that she 'saw' the appellant 'about 1 (*sic*) time again' after the anastomosis: para 28, witness statement, at Record, p 98. There is nothing in the remainder of the witness statement to suggest that any words were exchanged between the two on that occasion. This evidence

of a single encounter of sorts between the respondent and the appellant after the anastomosis is supported by the testimony of Ms Andrea Arana. It is far from clear from this supporting evidence, however, that words were actually exchanged between the respondent and the appellant on this occasion. (The respondent was asleep at one stage and awake at another; and there is no indication whether the appellant went in whilst she was awake or that she awoke during his visit.) See para 25, witness statement, at Record, p 54. As to Ms Gordon, who, naturally, was often at the bedside of the respondent during the material period, she gave evidence that she did not see the appellant again after the anastomosis: para 28, witness statement, at Record, p 64.

[66] The appellant neither challenged Mr Gillett by cross-examination nor gave a conflicting account of the visit in question. Which brings us back to the essential dichotomy in respect of the appellant's evidence and his notes. As far as his testimony as such is concerned, he did not claim to have visited the respondent after the exploratory surgery and anastomosis at all. His notes, on the other hand, only some parts of which found their way into the Record by incorporation into the written report of Dr Quetzal, do refer to a visit of 27 December; but, again, not having been made the subject of the appellant's actual testimony at trial, the reference in question cannot, in my respectful but firm opinion, properly be considered evidence in the case. (See *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 revised – 17/09/2001, paras 54-82 for a helpful discussion of this area of the law under the sub-heading ***Another aspect of Professor Morton's evidence***, and, in particular, paras 70 and 80, read together, from which it is clear that, consistently with common sense, where an expert witness refers – as here – to matters of which he has no first-hand knowledge, such matters remain hearsay unless and until substantiated by admissible evidence.) I pause here to note that the notes proper were evidently not considered by the parties, during settlement of the Record, to belong therein, as they are conspicuously absent therefrom and only surfaced, in their entirety, during the hearing before this Court: Appeal Transcript, p 136. At the risk of belabouring the obvious, it is one thing to make a statement by way of a jotting in a note-book but quite another to make that same statement orally from a witness box. In the course of oral argument, I animadverted on the failure of respondent's counsel to press the appellant

for details in the context of the last reply contained in the following exchange (Record, p 242):

> 'A. Now, after this [exploratory surgery and anastomosis] was done, did you tell [the respondent] look, in the [lap chole] there was a laceration to your duct and I had to connect your duct to your intestine and this is what I did in this [anastomosis]?
>
> Q. Yes, it is in the notes.
>
> Q. Not if you wrote it, if you told her?
>
> A. Yes.'

Such failure leaves one wondering (in the light of the apparent absence of opportunity for actual conversation) what answers would have been given by the appellant had he been questioned about the date, time etc when these disclosures were supposedly made by him to the respondent.

[67] This brings me to the appellant's insinuation, in the first of his replies in the exchange last quoted above, that he gave 'the notes' to the respondent. I am not surprised that this did not avail him any before the Judge. Before continuing on the subject of these notes, however, I pause to underline the fact that what the appellant had pleaded in his defence (see para **[8]**, above) was that the respondent had been informed as to the matter in question by way of a medical report, not notes, a copy of which medical report had been annexed to the respondent's statement of claim, presumably in compliance with rule 8.7, Supreme Court (Civil Procedure) Rules 2005. There is, however, no indication in the Record that such medical report, which, as already stated above, was dated 29 January 2010 and a copy of which was produced at the hearing before this Court, was ever admitted in evidence. Coming back now to the notes, they, as just indicated in the immediately preceding paragraph, must be regarded with caution. They, too, like the

report, were never admitted in evidence. More relevantly for present purposes, however, they are written, somewhat illegibly, in the proverbial 'physician's scrawl' and employ medical jargon as well as abbreviations which can hardly be classified as standard and well-known. Instead of a straightforward, layman-friendly statement to the effect that a laceration of the CBD was discovered during the exploratory surgery of Boxing Day 2009, what appears in the notes is, in material part, the following:

> 'SURGERY 26th/Dec/09 12 HRS midday
>
> Pre Op …
>
> Post op co ['co' is a guess] >Bile leak (cystic [illegible word follows])
> >Common Bile Duct laceration
> >Biloma (20 cc approx.)
> >Severe inflamation (*sic*) of Calot Reg [last word not fully reproduced in my copy of the notes]
>
> SURGERY …' (original emphasis)

I would emphasise that I am assisted in reading and, as I think, comprehending this handwritten note by the knowledge of the relevant medical terms which I acquired in preparing for the hearing of this appeal as well as during such hearing. It is also noteworthy that the word 'laceration' is badly scribbled in the notes and might not have been decipherable to me had I not been familiar with the content of the Record. The respondent, quite apart from the fact that she had a difficult period of convalescence which may not have been exactly conducive to perusal of the appellant's notes, did not, in late December 2009 and early January 2010, enjoy these advantages.

[68] The Judge was obviously not satisfied that merely giving the respondent a copy of these notes amounted to informing her of the discovery of the laceration in question. I see no ground, in the circumstances just described, for criticising him in this regard. I note in

passing, moreover, the absence of evidence of the circumstances in which these notes of the appellant found their way into the possession of the respondent. The respondent, who made them the subject of pre-trial disclosure, contents herself with mentioning them in, and exhibiting them to, her witness statement (see para 30 thereof at Record, p 98). The appellant, for his part, goes no farther than insinuating, in the reply to Mrs Uc Myles already reproduced above, that a copy of them was given to the respondent.

[69] In the final analysis, then, it is not possible, on the evidence, to see when the appellant would have so much as had an opportunity to speak to the respondent after the exploratory surgery and anastomosis, let alone that he actually availed himself of such an opportunity. If what has already been said above, were not enough, I would direct attention to the following two paragraphs occurring under the sub-heading *Summary of the Basic Facts Not in Dispute* of **Ms Barrow's Appeal Submissions**:

> 'There were clear findings of fact by the [J]udge and they are not in dispute.
>
> …
>
> After [the repair surgery], the [r]espondent (*sic*) never saw the [a]ppellant (*sic*) a further time and had no further contact with her.'

The six closing words of the last quote make it clear to me that Ms Barrow (and the Judge, whose words she was for the most part repeating) in fact meant to write that the appellant never saw the respondent again, not the other way around. Anyway, whichever way counsel may have meant to put it, the bottom line is that the purport of the pertinent finding is clear: there was no further verbal contact between surgeon and patient. And the finding is undisputed by the appellant. There is, accordingly, no basis for a conclusion that the appellant ever told the respondent that her CBD was lacerated during the lap chole. This state of affairs does not, of course, fill the gap in the respondent's case left by the fact that no admissible evidence was adduced of the findings and advice of the doctor consulted by the respondent in Chetumal. But that, to my mind, is not a material gap. The

Judge did, in my view, go overboard in finding that the appellant was finally enlightened in Chetumal. But that was not a critical finding. What matters, and matters a great deal, is that the evidence of the appellant himself rules out any possibility that he disclosed the laceration, since such evidence is that there was no further contact between him and the respondent after the exploratory surgery and the anastomosis. The success of the ground is undeniable; but it is a hollow victory for the appellant. The burning question remains: did the pertinent absence of advice as to the discovery of a laceration give rise to liability in negligence (the claim having been one in negligence only)? To this I must return in discussing the two grounds next to be dealt with, given that both concern the questions whether there was ever an issue on the pleadings as to the owing by the appellant of a relevant duty and, more fundamentally, whether such a duty even exists in law.

(d) The second and seventh grounds

[70] It will also be convenient to deal separately with these two grounds; but I will take them in reverse order.

THE SEVENTH GROUND

[71] The seventh ground is as follows:

> 'vii. The [J]udge misdirected himself in fact and in law in concluding as he did ([j]udgment para 144) that the [a]ppellant failed to inform [the respondent] of the ever-present risk involved in any surgery and in fact also lulled the [r]espondent into a false sense of security about the risks which were attendant on [the lap chole].'

• Submissions

[72] On the seventh ground, appellant's counsel drew the Court's attention to para 19 of the respondent's amended statement of claim and, in particular, to the particulars of negligence provided therein. Nowhere amongst those particulars, she contended, was there any mention of failure by the appellant to inform that all surgery involved risk. In consequence of the way in which the respondent had pleaded her case, said Ms Barrow, no evidence had been adduced by the appellant as to advice in fact given to the respondent prior to the performance of the lap chole. The absence of evidence, in those circumstances, was no indication that, had the respondent's pleading been different, the appellant would not have had any evidence to place before the Judge.

[73] As to this ground, it was, again, no part of Mrs Uc Myles' response that one of the issues in the trial had been whether the appellant had informed the respondent prior to the lap chole that every surgery involves risk. She pointed to nothing in the amended statement of claim which would have paved the way for the emergence of such an issue. Counsel limited herself to submitting that the Judge had conducted a proper examination of the evidence and that, beyond all doubt, such evidence supported the finding in question, viz that the appellant had misrepresented to the respondent that a lap chole was a simple non-invasive surgery with minimal or no risks. The respondent had thus been lured into undergoing the surgery and made to feel an unwarranted sense of comfort. The assurances in question had been given by the appellant in spite of his knowledge that there were 'signs of inflammation near the site of the [lap chole]'.

• Discussion

[74] I have to say that the appellant's fundamental argument in support of this ground was, as noted in the immediately preceding paragraph, left unanswered by the respondent and is, as I see it, unanswerable. Unlike, for example, the action that was brought against a professed architect in *Cloud*, the claim in the present case was one brought for professional negligence only. There was no alternative claim for breach of contract. (See the written arguments relied upon by the respondent in the court below, viz Claimant's Closing Submissions, para 9, reproduced at Record, p 119 and the reply of

Mrs Uc Myles to the Judge at Record, p 260.) Therefore, Ms Barrow rightly focussed her attention on the particulars of negligence contained in the amended statement of claim (for which, see para **[6]**, above) in contending that the Judge was deciding a non-issue when he found that the appellant was under a duty to disclose to the respondent matters going beyond his (the appellant's) actual findings on her condition. Unsurprisingly, nowhere in those particulars of negligence, or the rest of the amended statement of claim for that matter, is there anything which even remotely suggests that such a duty was owed, let alone that it was breached. One would have thought that a claim in contract would have been a prerequisite for a pleading of such a duty and its breach. It is instructive, by analogy, that in *Lee*, cited above, a case helpfully referred to by Ms Barrow, the English Court of Appeal (Sir John Donaldson MR and Mustill LJ) expressed the view, at p 851, that, assuming that a hospital owed to a patient a duty to answer questions as to treatment he/she has had, it was a matter 'for consideration' whether a patient who is refused information to which he/she is entitled could not bring 'an action for breach of contract' against the hospital concerned. (In the present case, for reasons best known to the respondent and her attorney, the claim against Belize Medical Associates, described as a hospital at para 2 of the statement of claim, ended up not being pursued: para **[3]**, above.) There is, in my view, abundant merit in the appellant's fundamental complaint under this ground, which must accordingly also succeed, without the need to consider any other submission deployed in its support.

THE SECOND GROUND

[75] The second ground is as follows:

> 'ii. The [J]udge erred in law, misdirected himself and reached a conclusion which was so aberrant that no reasonable judge could have reached (*sic*) when he conflated the [a]ppellant's failure to share with the [r]espondent before [the exploratory surgery] the suspected causes of the high bilirubin

and jaundice with concealment and a possible cover-up of what took place during [the lap chole] ([j]udgment, para (*sic*) 134-137).'

• Submissions

[76] Ms Barrow's fundamental complaint, on behalf of the appellant, in respect of the second ground was that the judge erred in reaching a conclusion on a matter that was not a live issue before him. He found in effect, so she submitted, that the appellant was under a duty to disclose more than his actual findings on the condition of the respondent, when the latter had not even alleged that such a duty was owed. Moreover, there was no such duty under the law. The decision of the judge on this point was, therefore, in counsel's submission, aberrant to the point where it could properly be rejected by this Court on the ground of irrationality.

[77] In her reply to the submissions of Ms Barrow on this ground, Mrs Uc Myles omits to address what I have already referred to above as the fundamental complaint made on behalf of the appellant. Nowhere in her response does she submit that the amended statement of claim in fact alleged that the appellant was under a duty to disclose, during the period between the respondent's readmission and the exploratory surgery, everything which he suspected (as opposed to knew) to be the cause of her symptoms. The appellant had, she submits, since19 December engaged in a series of 'indifferent actions and reactions to cover up his negligent acts': **Mrs Uc Myles' Appeal Submissions**, para 16. Counsel urges upon the Court the contention already considered above, (paras [33]-[34]) viz that the appellant knew or ought to have known that the symptoms complained of by the respondent during the period between the lap chole and the exploratory surgery 'lead to one conclusion either an obstruction or a laceration'. She submits that this contention found support in the expert testimony of Dr Quetzal, an argument which I have also already disposed of above: *ibid*. And to this she adds that the appellant apart from being guilty of misdiagnosing, had prescribed antibiotics which failed to bring remedy to the respondent. Was the appellant, she seems rhetorically to ask, engaging in concealment

of mistake or in concealment of incompetence? And she suggests that, whatever was being concealed, this was a case of proven negligence.

• Discussion

[78] The second ground, too, must inevitably succeed. Like the seventh ground, it is sustained by the irrefutable argument that the Judge had no justification for arriving at conclusions on matters which, having regard to the pleadings, were not in issue and in respect of which, as a result, the appellant had adduced no evidence.

[79] It follows from the success of both these grounds that the answer to the crucial question posed at para **[69]**, above, is, in my view, that the pertinent absence of advice as to the discovery of a laceration cannot be held to have given rise to liability in negligence. Whether it gave rise to liability in contract or anything else was, similarly, never a legitimate issue in this litigation.

(e) The eighth ground

[80] The eighth ground is as follows:

> 'viii. The [J]udge misdirected himself and erred in fact and in law in finding as he did ([j]udgment para 152) that it was reasonable for [the respondent] to go outside for further medical attention for a second opinion and, on medical advice to go to the USA for a third opinion.'

• Submissions

[81] I deal with this ground by itself because although it was, on the one hand, collocated by Ms Barrow with the third ground, it was, on the other, separated from all the other grounds by Mrs Uc Myles. Ms Barrow treated this ground and the third as fit to be argued together for the reason that, in her submission, the Judge had premised both on

what, to her, was his mistaken finding that the appellant had admitted in cross-examination that he had never informed the respondent of the laceration of her CBD. The interlocking nature of the grounds is very much in evidence here. I have previously concluded that, whilst the appellant may not have made such an admission in cross-examination, it is, on the other hand, (a) not at all reasonable to find that he so informed the respondent by merely providing her with his notes (para **[68]**, above) and (b) not possible to see when he would have had the opportunity orally so to inform her (para **[69]**, above).

[82] There is, within the strict confines of the main appeal, that is to say the appellant's appeal, no need to consider this ground since the relevance of this finding of the Judge is, so to speak, parasitic upon affirmation by this Court of the Judge's decision that the appellant was liable in negligence or, altogether counter-intuitively, some other unidentified cause of action. Given the conclusion which I have already expressed above that the Judge was wrong in holding that the appellant was so liable, the question of his reasoning as regards the factors coming into play with respect to the quantum of damages can, in strictness, hardly arise. I will nevertheless briefly consider this ground given that it was argued.

[83] As already pointed out, it was dealt with together with the third ground in **Ms Barrow's Appeal Submissions**. The written argument in its support is contained in paras 11.0 to 11.7. For the most part, such argument is aimed at establishing the validity of the complaint which lies at the heart of the third ground, viz that the Judge erred in equating failure to inform with professional negligence. It is only in two of these paragraphs, ie paras 11.6 and 11.7 that the substance of the eighth ground is addressed. At 11.6 the contention is that the Judge determined that it was 'the facts and circumstances found', none of which he there identified, which rendered it reasonable for the respondent to go outside of Belize for further medical attention. And, furthermore, counsel draws attention to the fact that the special damages awarded relate to expenses incurred by the Respondent in going abroad rather than to expenses incurred during the eight-day period running from the performance of the lap chole to the performance of the exploratory

surgery. Counsel then suggests at 11.7 that the Judge pinned those 'special damages' to things which were referable to the exploratory surgery and anastomosis rather than to the lap chole, when no actionable wrong was shown to have been committed after the exploratory surgery and anastomosis, both of which, of course, were successful.

[84] The response to Ms Barrow's contentions on this ground is found in a single paragraph of **Mrs Uc Myles' Appeal Submissions**, viz that numbered 14. That response, in essence, is that there was an ample basis for the impugned finding in the unchallenged evidence adduced at trial. The Judge was clear that it was on medical advice that the respondent travelled outside of Belize. At trial, said Mrs Uc Myles referring to selected pages of the Record (erroneously called 'the Transcript' by her), medical reports (presumably containing such advice) had been admitted into evidence without objection from counsel for the respondent.

• Discussion

[85] In my view, the respondent, in the absence of any disclosure by the appellant of what he had discovered on performing the exploratory surgery, acted entirely reasonably, purely as a matter of fact, in seeking medical attention and advice in nearby Chetumal. One can readily understand the decision to obtain the assistance of a doctor in Chetumal who was unlikely to be a friend or acquaintance of the appellant or to be, for some other reason, reluctant to say anything that might prejudice him (the appellant). In expressing this view, however, I am not in the least suggesting that the appellant was under a legal duty, contractual or otherwise, to make such a disclosure. And the judgment does not itself reveal any basis for such a duty.

[86] Going to relatively faraway New York to see a doctor who was not shown on the evidence to be more than a physician specialist is, however, from both a factual and legal standpoint, another matter. One is properly reluctant to discuss in this judgment that which was supposedly said to the appellant by the various doctors whose names were bandied about by witnesses at trial but who never actually stepped into the witness box. On the other hand, one is perfectly entitled, indeed bound, to point out that there was no

admissible evidence at trial of any recommendation made to the respondent by any doctor, whether in Belize or Mexico, to travel to New York for further medical attention or advice. Mrs Uc Myles' three references to 'the Transcript' take us to nothing capable of advancing the respondent's cause in this regard.

[87] I would consider these references in turn. With respect to the first (Record, p 59), surely that is not a reference to admissible evidence of medical advice. Mr Gillett there refers in his witness statement, para 19, to certain advice from Dr Arriaga and Dr Hidalgo (both well-known doctors practising in Belize City), neither of whom gave evidence at trial. The details of that advice has to be and remain hearsay, whether or not objected to by appellant's counsel: see, for example, the judgment of this Court (Rowe P and Liverpool and Sosa JJA) in *Chan v Carabeef Ranch Ltd*, Civil Appeal No 15 of 2000 (judgment delivered on 8 March 2000), fifth and twentieth paragraphs (unnumbered). (Mrs Uc Myles herself raised just this type of objection during the re-examination of the appellant: Record, p 246.) In the circumstances, Mr Gillett's further evidence, at witness statement, para 20, of the respondent subsequently seeing a doctor in Chetumal cannot be connected to the (strictly speaking) 'unknown' advice received from Dr Arriaga and/or Dr Hidalgo.

[88] Turning to the second reference (Record, p 100), that, again, yields no evidence of medical advice, going, as it does, no farther than narrating that one of the very same two doctors concerned, viz Dr Arriaga or Dr Hidalgo, gave the respondent certain medical advice. As just noted above, neither of these doctors testified at trial. Letters purportedly signed by them and exhibited to the witness statement of the respondent are not converted into admissible evidence merely because the appellant never objected to their admission as such. (See, for example, *Makita*, at para [70], where it is noted that the strict application of hearsay rules is often relaxed in civil proceedings where there is no jury because, at the end of the day, the judge will disregard as non-probative such hearsay as was thus allowed to creep in.)

[89] Coming to the third and final reference (Record, p 354-355), no evidence of medical advice proceeds therefrom either. There the Judge, showing himself to be in a state of some confusion as to (a) the line between admissible evidence and inadmissible hearsay and (b) the details of the latter, asks counsel whether the doctor in Chetumal did not advise the respondent to go and see a biliary surgeon. The truth, as is clear by now, is that if that, indeed, was what the doctor in Chetumal advised (and it was not), it could not be taken into account by the Judge, given that such doctor gave no testimony at trial. Moreover, as appears at Record, p 59, the inadmissible hearsay was that it was Dr Arriaga and Dr Hidalgo, not the doctor in Chetumal, who gave such advice. (In the purported certifying letter from the doctor in Chetumal – pure hearsay, of course – it is merely said that the respondent may in the future need CBD reconstruction in a medical centre specialising in biliary surgery.) The Judge was doubly wrong, as it were. But, as appears from Record, page 355, he misinterpreted Ms Barrow's effort to show that, since insurers were involved, the medical advice had to come from a doctor in Belize rather than a doctor in Chetumal, and he steadfastly clung, from all appearances, to his patently erroneous position that 'she was advised by a doctor in Chetumal to go and see a biliary specialist'. It was, ironically enough, Mrs Uc Myles' reliance upon, and reference to, certain extracts from the Trial Transcript in the course of oral argument before this Court (Appeal Transcript, pp 167-169) which showed the Judge labouring, at trial, under the erroneous impression that the doctor in Chetumal had advised the respondent to seek help from a biliary surgeon, an impression of which he never disabused himself, as para [60] of the judgment reveals.

[90] This absence of admissible evidence of which I have been speaking also renders irrelevant the admittedly intriguing question whether, having been advised to seek further help from a biliary surgeon abroad, the respondent instead sought further help in New York from a doctor, albeit a physician specialist, rather than from a biliary surgeon. (Noteworthy in this connexion is that Dr Kasmin, who ended up, to put it colloquially, a 'no-show' at trial, speaks in his severely truncated witness statement of practising medicine and specialising in gastroenterology, and in disorders of the pancreas, biliary tree and endoscopic ultrasound but says nothing to suggest he is a biliary surgeon or

even a general surgeon.) In the resulting vacuum, the decision to travel to New York to seek the help of Dr Kasmin is left to be seen as no more than a decision arrived at, without the benefit of relevant professional urging or guidance, by the respondent and Mr Gillett, her husband. Indeed, Mr Gillett comes close to putting it that way himself: see his witness statement, at para 23.

[91] In summary, I would hold that the judge did not, as a matter of pure fact, misdirect himself as contended by the appellant in finding that it was reasonable for the respondent to go outside Belize, ie to Chetumal, for further medical attention or a second opinion. That said, however, nothing in the judgment reveals any semblance of a basis for holding that the appellant was under a legal duty to disclose his findings in the course of the exploratory surgery. But I would hold, as well, that the Judge did so misdirect himself, both in fact and in law, in finding that it was reasonable for the respondent to go on medical advice to the USA for a third opinion. This partial victory of the respondent smacks, however, of a purely pyrrhic one, given my opinion, earlier expressed, that there was no basis for the quite cryptic finding of the Judge that the appellant was simply liable, without specifying whether this was (to his mind) in negligence or in some other cause of action. Absent legal liability, there can be no award of damages.

V – *The RN*

1. Respondent's reasons for contention that decision of Judge should be varied

[92] The respondent set out in the RN two reasons, referred to therein as 'grounds', for contending that the decision of the Judge should be varied ('reasons for variation'), viz:

> '1. The [Judge] erred in law in finding that there was not sufficient evidence to infer or conclude on a balance of probabilities that the [a]ppellant was negligent in lacerating the [r]espondent's bile duct during [the lap chole].

2. The [Judge] failed to consider the full extent of evidence of scaring (*sic*), pain and suffering and future medical expenses in awarding $21,324.75 as general damages to the [r]espondent.'

On the basis of the first of these reasons for variation, she sought the following variation ('the first variation'):

> 'The [a]ppellant's standard of care fell below that expected of a competent surgeon within Belize and was negligent in the laceration of the respondent's CBD in the [lap chole].'

On the basis of the second reason for variation, she contended for a further variation ('the second variation') in the following terms:

> 'The award made by the [Judge] for general damages in respect to the [r]espondent be increased in accordance with the case law submitted by the [r]espondent in her quantification of damages and closing submissions to the court below.'

The respondent also contended in the RN that the judgment of the court below should be varied to include an award to her of all of her costs in the claim ('the third variation').

[93] Self-evidently, given my above conclusion that the Judge was wrong to find the appellant liable for non-disclosure and failure to inform, the second reason for variation and the third variation can, in my judgment, only arise for consideration if the first reason for variation is accepted as sound.

2. Submissions and discussion

(a) The first reason for variation (concerning the finding that the evidence that the appellant was negligent in lacerating the CBD was insufficient)

• Submissions

[94] The Court received written submissions with respect to the RN only from the respondent. (**Mrs Uc Myles' RN Submissions** were mentioned, in passing, at para **[63]**, above.) In the course of oral argument, I prompted Mrs Uc Myles to address the first variation and, by necessary implication, the first reason for variation: Appeal Transcript, p 175. In her reply of sorts, she evinced what came across as a dominant concern to make the point that, even if this Court were to reject her contention that the Judge was wrong not to find that the appellant negligently cut the respondent's CBD, the award of damages nonetheless stood to be increased: Appeal Transcript, p 176. In the event, she ended up not providing the oral submissions invited from the bench; though it should be acknowledged that, in the course of submissions on damages later on in oral argument, she did, albeit in somewhat matter-of-fact manner, note the position being taken under the RN in regard to the laceration of the CBD: Appeal Transcript, pp 194-195. Counsel at that stage sought to make mileage of the point that the appellant would have had knowledge of the presence of inflammation in the relevant areas inside the respondent's body even before performing the lap chole. It is worthy of note in this connexion that counsel also made clear later that she was relying on all her written submissions: Appeal Transcript, p 199.

[95] What, then, was the thrust of the respondent's written submissions in support of the first reason for variation? Essentially it was that, contrary to the finding of the Judge, there was before him sufficient evidence to support a finding that the appellant was negligent in causing injury to the respondent's CBD during the lap chole. It is possible to discern two main planks in Mrs Uc Myles' argument.

[96] First, she said that the appellant had given no evidence of what had transpired during the lap chole to cause the laceration of the respondent's CBD and she submitted that the only inference from this was that the laceration had resulted from a failure by him properly to identify 'the structures'. In this connection, counsel sought to lay emphasis on what she regarded as relevant evidence of inflammation. Dr Quetzal, she reminded the

Court, had explained that surgery performed at a site near to which there was inflammation called for 'a higher level of skill' on the part of the surgeon. And Dr Quetzal, she added, had been clear as to the necessary steps to be taken by any surgeon performing a lap chole, viz pulling, stretching, identifying, clamping and cutting. On that evidence of Dr Quetzal, she submitted that it was a failure properly to identify structures, a failure amounting to negligence, that had resulted in the cutting of the CBD. That failure, in turn, so contended counsel, pointed to a want of the higher level of expertise previously adverted to.

[97] Secondly, counsel focussed on admissions made by the appellant regarding what he called 'incidents' occurring during operations of the type in question in the course of his career in the field of surgery. These admissions, elicited from the appellant in cross-examination, were to the effect that such incidents may have taken place in 5-10 per centum of the more than 200 laparoscopic cholecystectomies which he had conducted, or in which he had been involved (it is not clear which of the two), over a period beginning in early 2000. Mrs Uc Myles complained that the Judge wrongly refused to hold the appellant liable in negligence, resting such refusal on the ground that the respondent had adduced no evidence to show the percentage of laparoscopic cholecystectomies in Belize in which there are 'incidents'. She suggested that the Judge had applied double standards to the extent that he had, in the absence of any evidence of accident, held that the laceration had been the result of an accident.

[98] It was, concluded Mrs Uc Myles, the negligent cutting of the respondent's CBD which had been the sole cause of all health complications subsequently experienced by the respondent.

[99] She referred for the relevant principles of law to the cases of *Bolam*, cited above, *Ashcroft v Mersey Regional Health Authority* [1983] 2 All ER, and *Joyce v Merton Sutton and Wandsworth Health Authority* [1996] 7 Med LR 1 and also cited from Charles J Lewis, Medical Negligence: A Practical Guide, 4th ed, p 183.

[100] As already pointed out above, the Court received no written submissions from Ms Barrow in respect of the RN.

• Discussion

[101] I have not been able to find any substance in this reason for variation.

[102] I would begin my discussion by examining the point sought to be made by Mrs Uc Myles from her understanding of the authorities and textbook upon which she relied. I have already referred above to the test of negligence as stated in *Bolam* and reaffirmed in *Meenavalli*. As is inevitable in the current state of the law, **Mrs Uc Myles' RN Submissions** acknowledge the primacy of *Bolam* (albeit adopting, like the Judge, the unfortunate word 'reasonable' already disapproved of by me at para **[15]** and ff, above). But Mrs Uc Myles goes on therein, in my respectful opinion, to seek to add a gloss to the test of negligence provided in *Bolam*. Mrs Uc Myles stages this attempt notwithstanding the firm counsel given to judges in the second decided case cited by her, viz *Ashcroft*, that the test of negligence should be applied without the addition thereto of any gloss. In reading *Ashcroft*, a decision of Kilner Brown J sitting in the English Queen's Bench Division in 1983, one should, in my considered view, not be led astray by the absence from the judgment of any express mention of *Bolam*, an authority of some 26 years' standing at that time. In *Ashcroft*, Kilner Brown J, having already reminded himself (p 247) that his findings and conclusions must have regard to the state of the law, said, ibid:

> 'The question for consideration is whether on a balance of probabilities it has been established that a professional man has failed to exercise the care required of a man possessing and professing special skill in circumstances which require the exercise of that special skill.'

In so saying, the learned judge obviously had in mind the test of negligence commended to the jury by McNair J in *Bolam's* case. If he did not recite word for word the test as set out in *Bolam*, it was, I suggest, because his immediate and overriding concern was to

scotch any lingering remnants of the idea that there was some added burden on plaintiffs in medical negligence cases. Nevertheless, there can be no doubt that he was implicitly referring to *Bolam* when he went on to describe the test he had just endorsed as 'the test which has long been established in the law'. That, clearly, was the test in the application of which, judges were, in the words of Kilner Brown J, 'to avoid all commentary or gloss': p 247.

[103] As already adumbrated, Mrs Uc Myles went on, despite the wise counsel from the judgment in *Ashcroft* to which I have just referred, to suggest that something needs to be added to the established test found in *Bolam*. She began by quoting a passage from Medical Negligence: A Practical Guide primarily concerned, as I understand it, with Mr Lewis' view on the validity of a perceived extension of 'the *Bolam* test'. This, according to the author, is an extension whereby the need for expert evidence of an accepted practice was replaced by a lesser need for evidence of a single instance of a clinical decision or clinical judgment. In the present case, however, the expert witness was, as already noted above, consistently speaking of the accepted practice, as he knew it, in the field of surgery. The relevance of the entire discussion in the quoted passage is therefore hard to find. In my view, the passage is reproduced by counsel for no other reason than that the author comments therein that, since *Bolam*, 'it has seemed at times as if all that is needed for a successful defence [in a claim brought by a patient] is for one or two doctors to state on oath that they would have acted as the accused doctor acted'. Counsel seems to see in these words of Mr Lewis a fit introduction to *Joyce's* case, the subject of the next paragraph of **Mrs Uc Myles' RN Submissions**, ie para 16.

[104] Mrs Uc Myles' obviously heavy reliance on the content of this paragraph justifies the following full quotation thereof:

> 'In [*Joyce*] the Court of Appeal [of England and Wales] said, significantly, that the test was not simply whether what was done was in accordance with accepted general practice but also involved the question whether that clinical practice stood up to analysis. Roch LJ said that it would have been a misdirection to himself if the

> judge below had simply stated that a defendant was not guilty of negligence if his acts or omissions were in accordance with accepted clinical practice, because he would have needed to add 'provided that that general practice stood up to analysis and was not unreasonable in the light of the state of the medical knowledge at the time'. Roch LJ said that addition was very important because without it, it left the decision of negligence in the hands of the doctors, whereas that question must at the end of the day be one for the courts.'

[105] I do not believe that McNair J was of the view, when he directed the jury in *Bolam*, that matters had come to the point in the administration of justice where 'the decision of negligence' was being 'left' in 'the hands of the doctors'. But McNair J did not see fit to make part of what was to become known as the *Bolam* test anything resembling the addition spoken of by Roch LJ in *Joyce* some 40 years later. I for my part would, notwithstanding Roch LJ's view as the desirability for an addition, remain faithful to Kilner Brown J's dictum in *Ashcroft* concerning the addition of glosses. And I would bear in mind, in this regard, the gloss-free form of the *Bolam* test which was upheld and commended by the Caribbean Court of Justice in *Meenavalli*, some 20 years after the decision in *Joyce*. In any event, in the present case, it is difficult to see why Mrs Uc Myles makes an issue of Roch LJ's *obiter* remark in *Joyce*. After all, the Judge, having noted Dr Quetzal's opinion on the standard of care adhered to by the appellant, at para 116 of the judgment, relevantly spoke in the terms following:

> 'This latter piece of evidence, on the ultimate issue to be determined by this court, was obviously not taken on board whole-sale (*sic*) by this court in reaching its own deliberative opinion based on all the evidence in the case.'

In his own words, the Judge was here making clear that he had not left the decision whether the appellant had been negligent in the hands of the expert medical witness.

[106] Coming now to the first plank of Mrs Uc Myles' argument, I do not agree with her that the silence of the appellant left it open to the Judge to conclude that the laceration of

the respondent's CBD was the result of a negligent failure to identify any structures in the relevant area of her body. To begin with (and here my purpose shall be to kill two birds with one stone), the emphasis on the topic of inflammation is entirely out of place. The reality is that was there was at trial no evidence, as such, of the presence of such inflammation to the extent where it would have become problematic for the appellant in his performance of the lap chole. To seek to make an issue of inflammation in the context of a discussion of the lap chole is as vain an endeavour as attempting to make a mountain out of a mole-hill. This reality not only pulls the rug from under the feet of counsel in her effort to support this reason for variation (the first 'bird', so to speak) but also explains why this Court would be wrong to seek to exercise powers given to it by section 19 of the Court of Appeal Act in the present case (the second proverbial bird), the latter of these two matters having been touched upon at para **[13]**, above. Properly examined, the Trial Transcript reveals that the appellant gave no evidence to the effect that inflammation posed any special problem for him in performing the lap chole. All that he ventured in his witness statement, at para 14, was that the decision to perform the anastomosis, on Boxing Day 2009, employing the J-Roux surgical technique, rather than doing primary repair of the relevant leakage and laceration, was 'due to the level of inflammation' in 'Calot's region (*sic*) [triangle?]' . The contention that inflammation was so severe during the lap chole on 18 December 2009 as to render identification of structures difficult seems to have been spawned out of a transposing of hearsay material found in the notes of the exploratory surgery, as distinct from the lap chole, which were placed before this Court by Mrs Uc Myles during the hearing of the present appeal. Such a transposing was completely wrong. (Those notes, as already pointed out at para **[33]**, above, were not evidence in the present case.) I am not for a moment here suggesting that there cannot have been any inflammation at all in the relevant area of the respondent's body during the lap chole. After all, the appellant himself pointed out under cross-examination that the inflammation present on 4 October 2009, when the respondent was supposedly diagnosed with gallstones by another doctor (a matter of hearsay again), had not gone away by the time when the respondent was taken into the operating theatre on 18 December 2019 (Record, p 244). (And he essentially repeated this in re-examination: Record, p 248). On the other hand, there was no indication whatever from the appellant

that inflammation was present to such a degree that it rendered difficult his identification of structures during the lap chole. (It was Dr Quetzal, who, of course, was not in the operating theatre during the lap chole, who was led by counsel to speak from the witness box of inflammation and the problems that it can potentially bring for a surgeon: Record, pp 202 and 215.) What must, to my mind, arouse some curiousity, is that, whereas inflammation is not mentioned at all in the notes of the lap chole, it is mentioned in the notes of the exploratory surgery. Without committing the cardinal sin of forgetting that these notes are not evidence, I would venture to say that if they were, in fact, evidence, they would provide some basis for a suggestion that, if inflammation was ever a problem, it was a problem during the exploratory surgery, rather than during the lap chole. And, in such a hypothetical situation, it would be significant that the indication from the notes of the exploratory surgery is that the inflammation observed during such surgery not only followed but was the result of the lap chole performed no more than eight days earlier. (I say this because (a) the appellant testifies at para 13 of his witness statement that the said 'level of inflammation' was secondary to a small biloma, ie a collection of bile, found in Calot's triangle during the exploratory surgery and (b) I consider it more probable than not that this accumulation of bile would have been the result of leakage from the cystic stump, and hence of the lap chole.) But, even assuming (in the absence of evidence) that inflammation was present to the extent where it created difficulties for the appellant during the exploratory surgery, the fact remains that, (obviously) surmounting such difficulties, he successfully performed that surgery, a fact which, when we come to counsel's contention that the appellant is a surgeon lacking in skill and competence, decisively knocks the wind out of her sails. To adopt the perhaps more graphic imagery of prizefighting, this submission of counsel, a veritable verbal haymaker, goes wide off the mark, even if unwarranted assumptions favourable to the respondent are made.

[107] The remarks of Dr Quetzal on the successful performance of the exploratory surgery must also be kept in mind in this regard. He testified at Record, p 202 that -

> '[inflammation] would tend to make difficult the identification of certain structures.'

But, paying a strong, albeit indirect, compliment to the appellant, he said a little later, *ibid*:

> 'As a surgeon, with this inflammation I would take extra care when performing the surgery. I would not say it required a high [higher?] standard – it does demand higher skill. (underline added and emendation, shown in green, made to stenographer's punctuation)

Significantly, in this regard, it is no part of the claim filed by the respondent on 14 March 2013 that the exploratory surgery was negligently performed. But it is not merely by inference from that fact that one may conclude that the appellant possessed the 'higher skill' of which Dr Quetzal spoke. Demonstrative of this is the following exchange between Ms Barrow and Dr Quetzal at Record, p 220:

> 'Q: So [the appellant] being able to perform this type of surgery is [means?] that he has a higher skill set than a regular surgeon, does he [it?] not?
>
> A: Well certainly you have to have quite a bit of skills to be able to perform it.
>
> THE COURT: I think you mean to perform it successfully.
>
> A: Yes.
>
> MS BARROW: I appreciate the qualification, My Lord.
>
> Q: From the review of Dr Casmin's (*sic*) notes and [the appellant's] notes, was this surgery performed successfully on the patient?
>
> A: The second surgery.
>
> Q: Yes.

A: Yes, it was.

Q: In short, the [exploratory surgery] fixed the problems arising from the [lap chole], did it not?

A: Yes, it did.'

[108] Proceeding now to the second plank, I must begin by making clear that I have not, in the course of close scrutiny of the Judge's rationale for this finding in favour of the appellant, found anything therein which invites criticism. The Judge was eminently right, in my view, to tread carefully in dealing with the relevant evidence. It would have been the height of irresponsibility to find the appellant liable in negligence in respect of the lap chole. There was simply not enough in the relevant admission of the appellant regarding the incidence of 'incidents' in his career as a surgeon to satisfy any self-respecting court that his laceration of the respondent's CBD was, more probably than not, the result of negligence. (The 'admission' could not assist the Judge to draw any meaningful conclusion as to the appellant's negligence or otherwise in the performance of the lap chole since the appellant was permitted to get away with using the vague term 'incident' without ever defining it.) Whether, in speaking of 'incident broadly-defined', he was thinking of an incident in which there had been an element of negligence is far from clear.

[109] As to the criticism levelled at the Judge's statement on accident being the explanation for the laceration of the respondent's CBD, I am wholly unable to see any validity in it. The remark, to my mind, amounted to no more than a throwaway one made by the Judge largely in default. He was holding that the appellant had cut the respondent's CBD but that he had not done so negligently. There was, quite properly, not the slightest suggestion at any stage that the cut had been intentionally inflicted. The conclusion that it had to have been accidentally caused may have been, strictly speaking, unnecessary; but, that said, it was not a conclusion requiring prior consultation with the oracle at Delphi. Moreover, it was not a crucial conclusion, certainly not one on which the fate of the RN can possibly turn. No analogy was sought to be drawn by counsel with the proper

treatment of the complete defence of accident in the summing up of a trial judge in a criminal trial; and that is to her credit, given that none can appropriately be drawn.

[110] Finally, in respect of Mrs Uc Myles' closing point noted at para **[98]**, above, whilst it may be largely correct to say, with her, that the cutting of the respondent's CBD was, on the balance of probabilities, the sole cause of the respondent's health complications in the immediate aftermath, the lingering difficulty is counsel's contention that such cutting was negligent. That remains a contention which, for the reasons already given above, I find impossible to accept.

VI - *Conclusions in summary*

1. Main Appeal

(a) From success of fifth and sixth grounds

[111] First, the Judge was wrong to find that the time it took the appellant to identify the cause of the respondent's postoperative symptoms fell below the reasonable standard of care to be expected of a reasonable surgeon in Belize. I would set aside that finding and find instead that, in taking the time he took to identify the cause of the symptoms in question, the appellant did not fall below a '[standard] of practice accepted as proper by a responsible body of surgeons skilled in that particular art': per McNair J in *Bolam*, p 587. Secondly, the Judge wrongly failed to give proper consideration or weight to the significance of the evidence of the expert witness that the treatment of bile duct injury is mostly done as a delayed procedure one to eight weeks after surgery.

(b) From success of first, third and fourth grounds

[112] Before summarising conclusions, I reiterate that the first ground is not, in my view, a proper ground of appeal but that if I am wrong in that view, it is a ground which must succeed. The first conclusion flowing from such success is that the Judge wrongly

rejected the appellant's testimony that he told the respondent before the exploratory surgery that he did not know what was wrong with her, given that he rightly held elsewhere in the judgment that he would be performing the exploratory surgery in order to find out what was wrong with her. The Judge's said rejection of the appellant's testimony in question being wrong, the second conclusion is that it should be set aside and that the contrary finding of the Judge should be left standing.

[113] In respect of the third ground, the necessary conclusion is that the judge was wrong effectively to find that it was negligence or some other, unidentified, cause of action not to have informed the respondent of the discovery (that her CBD had been cut) made during the exploratory surgery. My further conclusion is that the absence of a legal basis for this finding renders its setting aside essential.

[114] As regards the fourth ground, the conclusion to be drawn from what, in my judgment, is its success is that it was wrong on the part of the Judge to find that the respondent first learned of the laceration of her CBD in Chetumal. I repeat, however, that whilst I am in agreement with the Judge that, on the evidence, the appellant at no time informed the respondent that he had lacerated her CBD during performance of the lap chole, I am not at all in agreement with him when he proceeds to find, without troubling himself to state a clear basis for so doing, that, as a result of not having so informed the respondent, the appellant incurred liability in, as one is left to presume, negligence or some other unidentified cause of action.

(c) From success of seventh and second grounds

[115] If, as I consider, the seventh ground succeeds, the conclusion which follows is that the Judge was wrong to find that the appellant (a) failed to inform the respondent of the ever-present risk involved in every surgery and (b) lulled the respondent into a false sense of security about the risks attendant on the lap chole. I reiterate that the Judge was wrong so to do because (a) whether there had been such a failure and (b) whether the respondent had been lulled into a false sense of security were not issues in the case put

before the Judge. It is my further conclusion that this finding of the Judge should, in the circumstances, be set aside.

[116] If the second ground succeeds, as I would hold, it is to be concluded that the Judge wrongly found that the appellant was guilty of concealment and possibly of the perpetration of a cover-up by virtue of not having shared with the respondent before performance of the exploratory surgery, his mere suspicions, as opposed to findings, as to the cause or causes of the high level of bilirubin and the jaundice exhibited by her. I repeat that, in my view, it was wrong to arrive at these findings for the reason that they pertained to matters not in issue in the claim that was before the Judge. In my opinion, they should therefore be set aside.

(d) From success of eighth ground

[117] Before going to the appropriate conclusion, I state again that I did not regard it as necessary to consider this ground but, having done so all the same, found in the judgment some factual, but no legal, basis for finding that it was reasonable for the respondent to go outside of Belize for further medical attention and advice. The overall success of the ground compels the conclusion that such finding was wrong and should be set aside.

2. RN

From failure of first reason for variation

[118] It follows that, having rejected the first reason for variation, the first conclusion which I have reached is that the Judge rightly found that there was insufficient evidence before him to establish, on a balance of probabilities, that the appellant was negligent in cutting the respondent's CBD in the course of the lap chole. I conclude, secondly, that such finding of the Judge should be confirmed.

[119] Given what I have stated in the immediately preceding paragraph and my conclusion in the main appeal that the judge was wrong to find the appellant liable in some unspecified cause of action for not having, respectively, warned, informed or made disclosure to the respondent in respect of the matters already identified at para **[3]**, above, I further conclude that no question as to damages can arise on the RN. In consequence, the second reason for variation calls for no consideration.

VII – *Disposition*

1. Main appeal

[120] I would allow the main appeal with costs to the appellant, to be taxed if not agreed. I would further order that those parts of the order of the Judge identified under the sub-heading Judgment Under Appeal in the Notice of Appeal be set aside. And I would order as well that the respondent pay the appellant prescribed costs of the claim.

2. RN

[121] I would reject the contention of the respondent that the decision of the Judge be varied and would award to the appellant, ie Dr George Gough, his costs of the RN, to be taxed if not agreed.

[122] I would also order that the above orders as to costs be provisional in the first instance but become final in 10 days from today's date unless the respondent should, before the expiration of those 10 days, apply in writing to the Registrar for a different costs order. I would further order that, in the event that such an application is made as aforesaid, the matter of costs be determined by this Court on the basis of written submissions to be filed and delivered by both sides in 10 days from the date of such application.

VII - *Postscript*

[123] This is an unfortunate case. One derives no pleasure or satisfaction from the conclusions reached above. The harsh reality is that patients' claims in medical negligence will not all succeed. The outcome of an appeal will be led to by the application of the correct law to the facts as found by the judge of first instance or, if, as here, he was 'plainly wrong' in his effort to find the facts, then by the facts as found by the appellate court in keeping with the relevant legal principles as set out in the authorities, perhaps most notably in *Thomas*, cited above. ***Bolam's*** case is one of many outstanding examples of failure on the part of a hapless patient to obtain compensation for terrible injury suffered whilst undergoing medical treatment. In that case, McNair J, saw fit to include in his directions and remarks to the jury the following words of Denning LJ in *Roe v Minister of Health* [1954] 2 QB 66, at 83 and 86, respectively, which, to my mind, serve as a fitting addendum to the present judgment:

> 'But I do not think that [the pertinent anaesthetists'] failure to foresee [the cracking of certain ampoules] was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure [a term synonymous, of course, with 'accident']. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks.'
>
> 'These two [patients] have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken.'

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

[124] I had the pleasure of reading the judgment of the learned President, Sir Manuel Sosa, in draft, and concur in the reasons for judgment given, and the orders proposed therein.

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HAFIZ-BERTRAM JA

DUCILLE JA

[125] I have perused the judgment of the Learned President and am in full concurrence with his reasoning and disposition and can add nothing further.

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DUCILLE JA