COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 75 of 2023

B E T W E E N

DR. RALEIGH BUTLER

Appellant

AND

MARSHA STUART

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Smith, JA

APPEARANCES: **Mrs. Gail Lockhart-Charles, KC with Mrs. Syann Thompson-Wells, Counsel for the Appellant**

Ms. Yolanda Rolle, Counsel for the Respondent

DATES: **16 October 2023; 18 January 2024**

****

Civil appeal – Negligence – Medical negligence – Judicial deference – Appellate caution – Findings of fact - Expert evidence

The respondent, who had been experiencing pain on the left side of her body, was referred by Dr. D. Farquharson to the appellant, a Gynecological Oncologist. The respondent underwent several diagnostic tests at the instruction of the appellant. The results of those tests led the appellant to perform a laparoscopy on the respondent. During the procedure, the appellant removed the respondent's right ovary. Following the procedure, the respondent continued to experience pain and was ordered to undergo another diagnostic test. This test revealed that her left ovary was still intact, and that her right ovary had been removed.

As a result, the respondent brought an action against the appellant in negligence and breach of contract. The respondent denied that he was negligent or breached his contract. He submits that during the procedure the respondent's right ovary looked suspicious and in keeping with good medical practice, following a consultation with Dr. Farquharson who was present during the

procedure, and within the parameters of the consent signed by the respondent, he decided to remove her right ovary.

The trial judge found the appellant negligent and gave judgment in favour of the respondent with damages to be assessed. The appellant now appeals that decision.

Held (Barnett, P dissenting): appeal dismissed. Costs of the appeal to the respondent, to be taxed if not agreed.

per Smith, JA: An appellate court should not set aside the findings and inferences of fact made by a trial judge unless the court is satisfied that the trial judge was "plainly wrong".

In cases involving allegations of medical negligence a doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that area of medicine, even if there is a body of opinion which takes a contrary view.

The trial judge took proper advantage of having seen and assessed the evidence of the witnesses, and her findings and conclusions cannot be faulted. It cannot be said that the decision of the trial judge was plainly wrong such that it would require appellate interference. Indeed, the trial judge was entitled to find that the actions of the appellant fell below the standard of an ordinarily competent professional exercising the skill of his profession.

Bahamasair Holdings Ltd (Appellant) v Messier Dowty Inc. [2018] UKPC 25 applied
Beacon Insurnace Co. Ltd. v Maharaj Bookstore Ltd. [2014] UKPC 21 applied
Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 applied
Bolitho v City and Hackney Health Authority [1997] 3 WLR 1151 considered
Browne v Dunn (1893) 6 R 67 considered
Chen v Ng [2017] UK PC 27 considered
Eckersley v Binnie [1988] 18 Con LR 1 mentioned
Horace Reid v Dowling Charles et al Privy Council Appeal No. 36 of 1987 considered
Lendeisha Culmer-Hanna v. Dr. Leslie W. Culmer et al 2013/CLE/gen/01365 considered
Yuill v. Yuill [1945] p15 applied

per Barnett, P: The issue to be decided is whether, having accepted the evidence of the appellant and Dr. Farquharson as to what they saw on the right ovary during the surgery, whether the decision to remove the right ovary was a negligent decision, rather than whether it was the correct or a good decision.

The evidence led at the trial did not justify the finding that the decision to remove the right ovary amounted to negligence.

Whitehouse v Jordan [1981] 1 WLR 246 applied

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Smith, JA:

INTRODUCTION

1. The Appellant, Dr. Butler, is a Gynecological Oncologist who is registered to practice in this country.

2. The Respondent, Ms. Stuart, was experiencing pains in the **left** side of her body. She was referred to Dr. Butler by another doctor. Dr. Butler performed certain tests and clinical examinations on Ms. Stuart and eventually decided to perform a procedure known as a laparoscopy, on Ms. Stuart. During the course of this laparoscopy. Dr. Butler removed Ms. Stuart's **right** ovary.

3. After the laparoscopy, Ms. Stuart continued to experience pain in her body and eventually sued Dr. Butler for removing what she claimed was her normal/healthy **right** ovary. Ms. Stuart's claim was based on both negligence and breach of contract.

4. Dr. Butler denied any negligence or breach of contract. He alleged that during the laparoscopy he observed that Ms. Stuart's right ovary looked suspicious in that it appeared to have calcification and dense adhesions. Therefore, in keeping with good medical practice and within the purview of the consent signed by Ms. Stuart, he decided to remove Ms. Stuart's right ovary and send it for further analysis.

5. The trial Judge, Charles, J. (as she then was) heard and considered the evidence, arguments and law advanced by both sides and decided that Dr. Butler's actions were negligent, in that it fell below the standard accepted by medical professionals. She gave judgment in favour of Ms. Stuart with damages to be assessed by the Registrar.

6. Dr. Butler now appeals the decision of the trial judge.

7. I find that the trial judge was entitled to come to the finding of negligence against Dr. Butler, or, as it is framed, she was not plainly wrong to come to her finding of negligence.

8. I see no reason to overturn the decision of the trial judge and would dismiss this appeal and order the Appellant to pay the Respondent's costs of the appeal to be taxed by a Registrar, in default of agreement.

SUMMARY OF UNDISPUTED FACTS

9. In or about 2005, Ms. Stuart, who suffered from fibroids, underwent a hysterectomy. Notwithstanding the hysterectomy, Ms. Stuart continued to experience pain and shortly thereafter, her gall bladder was removed. Again, shortly after the removal of her gall bladder

Ms. Stuart continued to experience extreme pains in her left side and she attended on one Dr. Farquharson who referred her for a pelvic scan. That scan revealed a complex left adnexal mass measuring 6x3x2.5 cm which was **"probably ovarian in origin".**

10. Dr. Farquharson referred Ms. Stuart to Dr. Butler for further investigation and treatment.

11. Ms. Stuart continued to complain of pain on her left side and on or about 3 February 2010 at the behest of Dr. Butler, she did a second scan. This second scan noted that:

> **"…both ovaries are well seen and are normal in size. There is a 2cms follicular cyst in the right ovary, smaller follicles are seen otherwise. Normal color Doppler flow is seen in the ovaries. No obvious adnexal mass noted … The previously described CT finding of left adnexal cystic lesion could be a follicular cyst or a post op seroma….. IMPRESSION: no significant ovarian or adnexal pathology detected in the present USG study, clinical and lab correlation is recommended."**

12. After this second scan, Dr. Butler saw Ms. Stuart again in February 2010. He examined Ms. Stuart and advised her that she had to undergo an operative laparoscopy. This is a surgical procedure in which a fibre-optic instrument is inserted through the abdomen to view internal organs or perform small scale surgery.

13. On 24 March 2010 Dr. Butler performed the laparoscopy. He was assisted by Dr. Farquharson. During this laparoscopy Dr. Butler removed Ms. Stuart's right ovary. However, in the post-operative notes immediately after the surgery which are in Dr Butler's handwriting, the following is stated:

> **Under the heading Pre-operative Diagnosis & Indications:**
>
> **(1) a complex <u>left</u> adnexal mass …**
> **(2) which is a tumour marking for potential ovarian malignancy.**
>
> **Under the heading Position of Patient during Surgery:**
>
> **…<u>left</u> retroperitoneal mass.**
>
> **Under the heading Specimens Removed:**
>
> **<u>Left</u> tube and ovary…**
>
> **Under the heading Operation in Detail:**

> **Dr. Butler testified that he wrote "We took out the left side.." [Emphasis added]**

14. A **"Surgical Pathology Report"** after the surgery indicated that the right ovary was examined and this:

> **"…show(s) a corpus luteum cyst and multiple cystic follicles. There is no evidence of neoplasia. The fallopian tube shows intact mucosa and wall."**

Both sides accept that this is a finding of a normal right ovary.

15. After the surgery, Ms. Stuart continued to experience pain and was referred by Dr. Butler for a third scan which was done on 17 March 2011. That scan revealed that Ms. Stuart's left ovary was intact, and the right ovary had been removed.

GENERAL LAW

16. Before setting out my analysis, I propose to state some basic principles of law in relation to two areas which would affect this appeal. Those two areas are summarized as: (a) appellate caution and (b) medical negligence and expert evidence.

(a) Appellate Caution

17. An appellate court should not set aside the findings and inferences of fact made by a trial judge unless the court is satisfied that the trial judge was **"plainly wrong"** (see **Beacon Insurance Co. Ltd. v Maharaj Bookstore Ltd.** [2014] UKPC 21 para 12). This principle is of central significance in this case because, as will be seen in the analysis to follow, the appellant seeks to challenge the findings and inferences of fact made by the trial judge. The Privy Council has expressed this principle in many cases by citing with approval the following dicta from **Yuill v. Yuill** [1945] p15, 19:

> **"It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion…"**

18. In the case of **Beacon Insurance Co. Ltd.**, the Privy Council advanced certain rationale for this appellate caution as seen in the following passages:

> **"15. …**
>
> > **The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial**

judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow…

16. …

The need for the appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance… of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

19. Nevertheless, as was stated by the Privy Council in **Bahamasair Holdings Ltd. v Messier Dowty Inc.** [2018] UKPC 25:

"36. …

3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced…"

(b) Medical Negligence and expert evidence

20. In cases involving allegations of medical negligence a doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that area of medicine, even if there is a body of opinion which takes a contrary view.

21. Those principles are derived from the case **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118 and subsequent decisions which have adopted and defined it. One local

case which was cited by the trial judge is **Lendeisha Culmer-Hanna v. Dr. Leslie W. Culmer et al** 2013/CLE/gen/01365 at paragraphs 90 to 92 and I quote from paragraph 90:

> "**[90] …**
>
> **The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. <u>It is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art… A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art</u>. Putting it the other way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. [Emphasis added]**"

22. Further, while it is the Plaintiff's duty to plead and prove negligence, it is the trial judge who decides on the issue of negligence. The trial judge is not bound to accept the opinion of any expert or to prefer any expert's opinion over others based solely on their qualifications. However, the trial judge should give due deference to what is proffered as a competent and reasonable body of opinion. The trial judge cited with approval the following dicta at paragraph 82 of her judgment:

> **"[82] …**
>
> > **<u>In resolving conflicts of expert evidence, the judge remains the judge, he is not obliged to accept evidence simply because it comes from an illustrious source: he can take account of demonstrated partisanship and lack of objectivity</u>. But save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason…" [Emphasis added]** (see **Eckersley v Binnie** [1988] 18 Con LR 1, 77).

23. Similarly, at paragraph 95 of her judgment the trial judge quoted Lord Browne-Wilkinson, in **Bolitho v City and Hackney Health Authority** [1997] 3 WLR 1151, 1158 which sets out the position that:

> **"…in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the Bolam case itself, McNair J. [1957] 1 W.L.R. 583, 587 stated that the defendant had to have acted in accordance with the practice accepted as proper by a "responsible body of medical men." Later, at p. 588, he referred to "a standard of practice recognized as proper by a competent reasonable body of opinion." Again, in the passage which I have cited from Maynard's case [1984] 1 W.L.R. 634, 639, Lord Scarman refers to a "respectable" body of professional opinion. The use of these adjectives – responsible, reasonable and respectable all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter." [Emphasis added]**

24. With these principles in mind, I now go on to analyze the findings of the trial judge.

Analysis of the Findings of the Trial Judge

25. The trial judge preferred the evidence of Ms. Stuart and her expert witness (Dr. Hirsch) over the evidence of Dr. Butler and his expert witnesses (Dr. Farquharson and Dr. Nahas). Based on this, she was able to come to a finding of negligence against Dr. Butler.

26. In her well written and reasoned judgment the trial judge set out in detail the evidence of these witnesses, then analyzed that evidence. I take the advice of Lord Kerr that **"Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination"** (see **Bahamasair Holdings Ltd.,** para. 36). Therefore, I propose to analyze that evidence in summary form.

27. The trial judge stated that she **"found the evidence adduced by Ms. Stuart to be more plausible and persuasive than the evidence of Dr. Butler."** The trial judge also stated that Ms. Stuart **"struck"** her as a sincere witness. (see paras. 77 and 78 of the Judgment of the trial judge).

28. That being the case the following matters of controversy were resolved in favor of Ms. Stuart:

- In discussion, professional consultation and clinical examination of Ms. Stuart only issues surrounding her left ovary were discussed.

- Ms. Stuart never experienced pain in her right side.

- The laparoscopy was supposed to be focused on the left ovary and its possible removal.

- (Even though it is not strictly relevant for this analysis) Ms. Stuart did not consent to the removal of a healthy, normal, right ovary.

29. In a similar vein, the trial judge stated that she preferred the evidence of Dr. Hirsch (Ms. Stuart's expert) over the evidence of Dr. Butler, Dr. Nahas and Dr. Farquharson. (See para. 88 of the Judgment of the trial judge.)

30. Dr. Hirsch was accepted as an expert in his field of obstetrics and gynecology. (See transcript of 28 August 2017, page 4, lines 9-11).

31. In accepting Dr. Hirsch's evidence, the following major opinions of Dr. Hirsch were accepted in preference to the opinions of doctors Butler, Nahas and Farquharson:

- From the reports of Ms. Stuart prior to the laparoscopy, Dr. Butler knew that her two ovaries were normal. (See transcript of 28 August 2017, page 12, line 25 and page 19, lines 16-19).

- The Pathology Report after the laparoscopy confirmed that the right ovary that was removed was normal and healthy. (See transcript of 28 August 2017, page 19, lines 16-19).

- Based on his 49 years of experience plus residency in analyzing these reports, if there was any calcification or adhesive disease (as Dr. Butler alleges) in the ovary that is examined, the Pathologist's Report would always mention it, and the Pathologist's Report on Ms. Stuart did not mention any of this. (See transcript of 28 August 2017, page 16, lines 20-26 and page 17, lines 5-8 and 27-30).

- A fortiori, the Pathology Report corroborated the ultrasound done on Ms. Stuart prior to surgery that **"everything was fine"** and that Ms. Stuart's ovaries were normal. (See

transcript of 28 August 2017, page 17, lines 18-22 and page 19, lines 16-19).

- From Ms. Stuart's medical history, Dr. Butler knew that there was no risk of cancer. (See transcript of 28 August 2017, page 13, lines 11-14).

- Ms. Stuart's complaints of pain in the left region of her body could not be caused by something on her right side. (See transcript of 28 August 2017, page 14, lines 17-21).

- There was no need to remove either the left or right ovary of Ms. Stuart. (See transcript of 28 August 2017, page 15, lines 7-14).

- Dr. Hirsch confirmed that based on the Pathology Report the cyst that was found on Ms. Stuart's excised right ovary was such that **"what a normal woman who was ovulating would have in her cycle"** and was **"so small that no one removes an ovary when the cyst is that size."** (See transcript of 28 August 2017, page 16, lines 2-16).

- The removal of the right ovary and tube of Ms. Stuart was a significant deviation from the standard of care. (See transcript of 28 August 2017, page 20, lines 4-13).

32. The attorney for Dr. Butler focused on a statement of Dr. Hirsch during cross examination which she said supported the case of Dr. Butler and his expert witnesses. Dr. Hirsch said that **"If you suspect ovarian cancer you don't biopsy, you remove it"** (see transcript of 28 August 2017, page 21, lines 23-24). His attorney suggests that this supports Dr. Butler's case that the right ovary looked suspicious and that he was justified in removing it for analysis for cancer.

33. However, that statement was made in a context of questioning and was modified and expanded upon by Dr. Hirsch who expressly stated that this was a hypothetical question that did not apply to this case since Dr. Butler knew from beforehand that Ms. Stuart's ovaries were normal, and this was confirmed by the Pathology Report. (See transcript of 28 August 2017, pages 22-23). A fortiori Dr. Hirsch opined that removal of the right ovary for analysis was **"the wrong method"** and that there were less radical treatment alternatives which **"a reasonable and careful surgeon who worries about cancer and is not sure that this is cancer in that ovary"** would employ. (See transcript of 28 August 2017, pages 24-26).

34. The trial judge rejected the case put forward by Dr. Butler. She found that the findings of Dr. Hirsch and the testimony of Ms. Stuart were more plausible and persuasive than the evidence of Dr. Butler. In summary the trial judge found that:

- Dr. Butler never discussed anything about cancer or tumors with Ms. Stuart.

- The purpose of the laparoscopy was examination and possible removal of Ms. Stuart's left ovary.

- Dr. Butler's observations of Ms. Stuart's issues pre-surgery and during surgery revealed a left adnexal mass yet inexplicably her healthy right ovary was removed.

- This was a **"colossal error"** and/or **"not an error of judgment"** that was **"of such a nature that no reasonably well informed and competent gynecological oncologist could have made."** (See paragraphs 79 and 120 of the Judgment of the trial judge).

35. Dr. Farquharson was one of Dr. Butler's expert witnesses. He was a general and vascular surgeon for over 20 years. He was present, assisting Dr. Butler during the laparoscopy. Dr. Farquharson stated in his Witness Statement that during the laparoscopy he noted that there was no pathology **"noted on the left adnexa"** but **"there was a cystic mass on the right ovary"** and that after discussion with Dr. Butler **"a decision was made that it was best to remove the right ovary since there was evidence of pathology there".**

36. The trial judge discounted Dr. Farquharson's evidence on this issue for the following two reasons:

1. He had not seen the second scan which Dr. Butler had ordered. This was a reference to the pelvic ultrasound report dated 3 February 2010 which, as mentioned at paragraph 11 above, revealed no significant ovarian or adnexal pathology on Ms. Stuart's ovaries. As the trial judge stated, this "**might have provided vital background information to Dr. Farquharson because it was a more recent scan".**

2. Further, the trial judge noted that Dr. Farquharson's involvement in the surgery was merely to assist Dr. Butler in and that **"His presence with Dr. Butler was to ensure that there was no bowel injury and there was no bleeding"** (being a vascular surgeon).

37. The trial judge also noted that Dr. Farquharson accepted that based on what he saw, the surgery was not in the category of life and death and what was done could have been postponed.

38. Given these findings, the trial judge concluded that Dr. Farquharson **"made a bad judgment call in concurring with Dr. Butler to remove an ovary which was normal and not life threatening."**

39. Dr. Samar Nahas filed a Witness Statement as her evidence in chief. The trial judge noted that **"there were impractical logistics for Dr. Nahas to attend, even by Zoom, at the court's convenience"** and **"At the end of the day"**, counsel for Ms. Stuart decided not to cross examine her.

40. Dr. Nahas was a highly qualified gynecological oncologist who gave her opinion why Dr. Butler's actions were **"within the standard of care".** In summary, she was of the view that Dr. Butler's observation of an abnormality from inflammation and adhesions made it difficult to differentiate **"between a benign versus a malignant pathology"** and so **"it was deemed necessary to remove the right ovary".** Dr. Nahas opined that the right adnexae was mistakenly labelled as the left, which is an error from the OR nursing staff and is not that uncommon. In any event **"mislabeling of the specimen has very minimal or no impact on the patient's outcome or prognosis."** Further, since only one of two ovaries was removed this was a **"good outcome"** with no negative impact on the patient.

41. The trial judge rejected Dr. Nahas' evidence for the following reasons:

- Dr. Nahas did not refer to the two scans performed on Ms. Stuart prior to the surgery.
- Dr. Nahas' evidence appeared to be **"speaking generally".**
- Dr. Nahas **"failed to comprehend"** that Dr. Butler removed a perfectly normal/healthy ovary.
- Dr. Nahas **"failed to comprehend"** that Ms. Stuart was still experiencing excruciating pain post-surgery. (Which does not suggest a positive outcome for Ms. Stuart.)

42. The above analysis of the evidence of the witnesses demonstrates to me that the trial judge based her findings upon:

a) the plausibility of the cases/evidence as presented by both sides

b) the demeanor of the witnesses, and

c) tested their demeanor against undisputed and contemporary records, namely the two scans performed on Ms. Stuart pre-surgery, the pathology report after surgery and Dr. Butler's handwritten note post-surgery.

43. This exercise is in keeping with traditional practice as set out by Lord Ackner in the case **Horace Reid v Dowling Charles et al** Privy Council Appeal No. 36 of 1987:

> **"It is important for him (the trial judge) to check that impression (demeanor) against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions …"**

44. In so doing, the trial judge took proper advantage of having seen and assessed the evidence of the witnesses, and her findings and conclusions which **"are inherently an incomplete statement of the impression which was made upon (her) by the primary evidence"** (see **Beacon Insurance Co. Ltd**.) cannot be faulted. Put another way and as stated in the cases cited at paragraphs 17 - 19 above, in the exercise of appellate caution, it cannot be said that the findings or inferences of fact by the trial judge were plainly wrong.

45. Further, as the cases cited above state, the trial judge was entitled to accept the opinion of Dr. Hirsch, over the opinions of the other doctors as to what was a reasonable standard of practice in relation to the removal of Ms. Stuart's right ovary during the laparoscopy. Having accepted the evidence of Dr. Hirsch, the trial judge was entitled to find that Dr. Butler's actions were negligent in that it fell below the standard of an ordinarily competent professional exercising the skill of his profession.

46. I therefore find no reason to set aside the decision of the trial judge.

47. While this is enough to decide this appeal, I mention here that the Appellant's submissions on appeal were based upon five grounds. The grounds do not, in my view, affect the decision on this appeal, but out of deference to the industry of counsel I will set them out, but deal with them in a summary way.

48. Ground 1 of the Appellant's Notice of Appeal is as follows:

> **"1. The learned Judge erred and misdirected herself (at paragraph 79 of the Judgment) in holding that "…unfortunately. [Dr. Butler] removed the wrong ovary. This was not an error of judgment but was of such a nature that no reasonably well-informed and competent gynecologic oncologist could have made..."**

49. As mentioned above, the trial judge stated that Dr. Butler's post operation notes immediately after the laparoscopy which were in his handwriting showed his observations before, during and after surgery. These observations referred to issues about Ms. Stuart's left ovary. There is no mention of any right-side mass or calcification. The learned judge disbelieved Dr. Butler's explanations about making an error, based on his demeanour, the plausibility of his story, the scans and pathology report and the testimony of Dr. Hirsch and she was not plainly wrong so to do.

50. Further, while Dr. Butler alleged that in fact, he had observed calcification in the right ovary and an adnexal mass, the pathology report, which, according to Dr. Hirsch, always mentions such matters did not do so. There was therefore, on the undisputed evidence, no reason to remove the right ovary for testing. The trial judge was therefore entitled to find that Dr. Butler removed the wrong ovary. In any event, as the evidence revealed, both the left and the right ovary of Ms. Stuart were normal and healthy and by removing either for testing Dr. Butler's actions (in the words of Dr. Hirsch) were **"a significant deviation of the standard of care."**

51. Ground 2 of the Appellant's Notice of Appeal is as follows:

> **"2. The learned judge erred and misdirected herself and failed to have regard to highly relevant factors in holding as she did (at paragraph 84 of the Judgment) that "I accept Dr. Farquharson's evidence and, if indeed he was present in the surgery room (Ms. Stuart did not recall seeing him), he too made a bad judgment call in concurring with Dr. Butler to remove an ovary which was normal and not life threatening." There was no basis for the Learned Judge to find that Dr. Farquharson made a bad judgment call having regard to the evidence of all experts, including Dr. Hirsch, that the appropriate course would be excise an ovary if cancer was suspected based upon the appearance."**

52. As stated before, the trial judge discounted the evidence of Dr. Farquharson for the reasons that (1) he had not seen the second (ultrasound) scan of 3 February 2010 and (2) he was merely assisting Dr. Butler in the laparoscopy. Further, as I discussed above at para. 33, Dr. Hirsch's statement about excising an ovary if cancer was suspected was taken out of context since Dr. Hirsch expressly stated that this was a hypothetical statement that did not apply to Ms. Stuart's case because there was no threat of cancer here and there were less radical alternatives.

53. Also, as stated before, the other evidence of Dr. Hirsch, the second ultrasound and the pathology report all belie the suggestion of Dr. Butler and Dr. Farquharson that the right ovary appeared suspicious and had to be removed for testing. Therefore, the trial judge had ample bases to find that Dr. Farquharson made a bad judgment call.

54. Ground 3 of the appellant's written submission is as follows:

> **"3. The learned judge erred in holding as she did at paragraph 82 of her ruling that "… in my considered opinion, Dr. Nahas failed to comprehend that Dr. Butler removed a perfectly normal ovary. She also failed to comprehend that Ms. Stuart still has excruciating pain and is afraid to undergo another surgery because the**

> **wrong ovary – a healthy ovary – was removed. All in all, I reject Dr. Nahas' evidence and opinions. On a balance of probabilities, I preferred the evidence of Dr. Hirsch to that of Dr. Butler and Dr. Nahas…" There was no basis for the Learned Judge's conclusion as to what Dr. Nahas comprehended, particularly as Dr. Nahas was not questioned by the Learned Judge and her evidence was unchallenged by the Plaintiff."**

55. This ground is lacking in merit. It is an attack on language that is more fit for an academic discussion of the English language and is of little consequence to the outcome of this appeal. Paragraph 88 of the trial judge's decision from where this ground is taken states as follows:

> **"[88] Dr. Nahas did not refer at all to the two scans which predated the surgery and she appeared to be speaking generally and not with respect to Ms. Stuart. She stated that one ovary was removed in accordance with Ms. Stuart's consent. In my considered opinion, Dr. Nahas failed to comprehend that Dr. Butler removed a perfectly normal ovary. She also failed to comprehend that Ms. Stuart still has excruciating pain and is afraid to undergo another surgery because the wrong ovary – a healthy ovary – was removed. All in all, I reject Dr. Nahas' evidence and opinions...".**

56. A proper reading of paragraph 88 of the trial judge's decision, in my view, makes it apparent that the trial judge was using the word 'comprehend' (perhaps infelicitously) in its meaning of "to grasp intellectually" or to appreciate. This is because the trial judge noted that Dr. Nahas' report failed to mention the fact that (1) Ms. Stuart's normal/healthy ovary was removed (2) Ms. Stuart continued to experience excruciating pain after the laparoscopy. The statement was not, on my reading of it, a reference to what Dr. Nahas allegedly understood or failed to understand.

57. In any event, the statements do not detract from the trial judge's reasons for rejecting Dr. Nahas' evidence as mentioned in paragraph 41 above. This 'ground' does not therefore advance the Appellant's case on its merits.

58. Further, I note that Dr. Nahas' opinions are based upon an assumption that Dr. Butler actually saw calcification and adhesions on the right ovary. As I stated before, the trial judge's acceptance of Dr. Hirsch's testimony and the Pathologist's Report put the lie to Dr. Butler's alleged observations, of calcification and adhesions on the right ovary and as such destroyed the basis of Dr. Nahas' opinion. Therefore, even if the trial judge was wrong to comment on what Dr. Nahas did **"comprehend"**, it would have made no difference to the decision of the trial judge to reject Dr. Nahas' opinion.

59. At the end of ground 3 as set out above, there is a reference to the fact that Dr. Nahas' evidence was unchallenged, in that counsel for Ms. Stuart did not cross examine Dr. Nahas.

60. In further argument under this ground, counsel for the Appellant cited the rule in **Browne v Dunn** (1893) 6 R 67 to buttress her argument that the trial judge ought not to have rejected Dr. Nahas' evidence.

61. The rule in **Browne v Dunn** can be stated that:

> **"in general a party is required to challenge in cross-examinations the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point." (See Phipson on Evidence, 17th Ed. At 12-12).**

62. It should be noted that the so-called rule in **Browne v Dunn** is a general 'rule' and not an absolute legal requirement.

63. As the Privy Council noted in the more recent case of **Chen v Ng** [2017] UK PC 27 at paragraph 52:

> **"52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case…"**

64. Further, the 'rule' has undergone serious modification and qualification since its promulgation in 1893. As was noted in the **Chen v Ng,** case cited above, the application of the rule is prescribed by the multifaceted requirements of fairness. At paragraph 55 of **Chen v Ng**, the Privy Council noted that:

> **"55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimizing cost in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be**

> **put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."**

65. In the present matter, in my view, no manifest unfairness was caused by not cross-examining Dr. Nahas. The trial processes in this case negated any unfairness that would have denied the right of counsel to address on the opinions expressed in Dr. Nahas' report or of the right of the trial judge to reject her evidence. These processes include but are not limited to the following:

- From the pleadings each side was fully aware of the opposing cases put forward with respect to the allegations of medical negligence.

- Discovery and inspection yielded all the relevant medical reports and other data upon which the experts based their reports.

- The Witness Statements which were exchanged clarified the evidence of each expert. Both counsel were able to address the court on the failings or the strengths of the medical evidence.

- Both Dr. Butler and Dr. Farquharson gave expert medical evidence on the same issues and Dr. Nahas' report was not indispensable evidence to advance the case of Dr. Butler.

66. In the circumstances, I am of the view that the strict 'rule' in **Browne v Dunn** was not applicable on the facts of this case.

67. I will deal with grounds 4 and 5 together because they deal with issues concerning the consent form which Ms. Stuart signed prior to the laparoscopy.

68. Grounds 4 and 5 of the Notice of Appeal are as follows:

> **"4. The Learned Judge erred and misdirected herself by holding as she did at paragraph 111 of the Judgment "…Ms. Stuart has not denied that she signed the consent form. She also initialed it. Nothing on this standardized consent form speaks to ovary. The form simply states that she authorized Dr. Butler to perform a laparoscopy. There is no mention of where in the body this laparoscopy was to be performed. Therefore, it must be inferred that during prior discussions between Dr. Butler and Ms.**

> **Stuart, that must have been clarified. Otherwise, Dr. Butler could remove the kidneys or lungs and, according to the consent form, once he performs it laparoscopically, he is protected. By no stretch of the imagination, could this be the proper interpretation of the consent form which, for all intent and purpose, is vague. As I prefer Ms. Stuart's evidence to that of Dr. Butler, the laparoscopy was with respect to the removal of Ms. Stuart's left ovary."**
>
> **5. The Learned Judge erred and misdirected herself by holding as she did at paragraph 120 of the Judgment "I find as a fact that the consent which Ms. Stuart gave was specific to the removal of her left ovary and, irrespective of what Dr. Butler discovered during surgery, the onus was on him to cease the operation and consult further with Ms. Stuart about his findings. In my considered opinion, Dr. Butler made a colossal error, not a judgment error, in removing Ms. Stuart's right ovary…"**

69. These issues with the consent form made no difference to the findings of the trial judge for the following 2 reasons.

70. First, while the meaning and effect of the consent form may have been relevant to a potential claim in respect of a course of action based on breach of contract, it is of no effect to the claim in negligence upon which the trial judge based her decisions. The claim in negligence was based upon whether Dr. Butler's actions met the standard of care of a reasonable professional. This was independent of anything on a consent form.

71. Second, even if anything in the consent form was relevant to the finding of negligence, the trial judge at paragraph 77 of her judgment based her findings of fault on, inter alia, an acceptance of Ms. Stuart's testimony over the testimony of Dr. Butler. As stated, before the trial judge accepted as fact that Ms. Stuart did not, on her own oral evidence, consent to nor was she made aware of any issue or medical concerns over her right ovary which may have required its removal. Therefore, the question whether the consent form gave this license to Dr. Butler or not would not affect the trial judge's preference of Ms. Stuart's testimony over that of Dr. Butler.

72. In oral submissions before the Court of Appeal, counsel for Dr. Butler focused and expanded upon the grounds of appeal mentioned above. However, counsel raised a new line of argument which I need mention here.

73. Counsel for Dr. Butler suggested that the trial judge did not expressly reject the observation of Dr. Butler and Dr. Farquharson that on the night that they performed the laparoscopy on Ms.

Stuart, they observed calcification and adhesions on Ms. Stuart's right ovary. This argument lacks merit for the following reasons.

74. With respect to Dr. Butler's observations, the trial judge stated clearly that she did not accept Dr. Butler's story. The trial judge noted that there were references in Dr. Butler's handwritten notes which were made immediately after the surgery where his observations pre-surgery and during surgery mentioned a left adnexal mass, and the notes post-surgery mentioned removal the left tube and ovary. There was no mention in these notes of any issues with the right ovary. The trial judge as she was entitled to do, came to the conclusion that this "**capture(d) what (Dr. Butler) did on the day in question**."

75. This, in my view, is a rejection of Dr. Butler's story about observing anything suspicious in the right ovary and the consequent need for its removal. At the very least, the trial judge did not accept his case about any observations or issues with the right ovary.

76. I note further, that the pathology report and the testimony of Dr. Hirsch support the trial judge's rejection of Dr. Butler's alleged observations of anything suspicious about Ms. Stuart's right ovary.

77. With respect to Dr. Farquharson's alleged observations of a cystic mass on Ms. Stuart's right ovary, as I stated above at paragraphs 36-37, the trial judge, as she was entitled to do, gave her reasons for rejecting Dr. Farquharson's judgment call with respect to the removal of Ms. Stuart's right ovary. This was, in my view, a rejection of his alleged observations or at the very least, a non-acceptance of his observation.

78. As with the case of Dr. Butler, the subsequent pathology report and the testimony of Dr. Hirsch in any event support the trial judge's rejection of Dr. Farquharson's observations.

79. Counsel for Dr. Butler also pointed out an error of the trial judge in paragraph 80 of the judgment when the trial judge stated **"when (Dr. Butler) caught himself he prepared another report a few days after which stated that the specimens submitted post-surgery were identified as the right tube and ovary."**

80. Counsel stated correctly that there is no other report of Dr. Butler a few days after surgery that formed part of the evidence in this case. Therefore, the trial judge's perception of Dr. Butler's actions was based on facts which were not correct.

81. Even if there were no other report of Dr. Butler, the basic substratum of facts as accepted by the trial judge that Dr. Butler's contemporaneous notes immediately after the surgery make no mention of any issue before or during the operation with respect to Ms. Stuart's right ovary and hence it was a **"colossal error"** to remove it, and also, the scan before the laparoscopy (3 February 2020), the pathology report after the laparoscopy and Dr. Hirsch's testimony, all confirm the findings of the trial judge that Dr. Butler's actions fell below the standard of care expected from a reasonable professional and that he was therefore negligent.

Conclusion

82. For the reasons stated above, I would dismiss the appeal and order the Appellant to pay the costs of this appeal to the Respondent to be taxed by the Registrar in default of agreement.

____

The Honourable Justice Smith, JA

83. I agree.

____

The Honourable Justice Isaacs, JA

Dissenting judgment delivered by the Honourable Sir Michael Barnett, P:

84. I have read in draft the judgment prepared by Smith, JA in this matter.

85. I regret that I do not agree with that decision. In my judgment this appeal should be allowed, and the judgment of the trial judge should be set aside.

86. I do not propose to set out the facts in my judgment. They are accurately set out in the judgment of Smith, JA.

87. The issue in this appeal is whether the Judge was wrong to have found that Dr. Butler was negligent in removing the Respondent's right ovary. It is important to note that the trial judge said in paragraphs 79 and 89:

> **"[79]. There is no doubt in my mind that Dr. Butler is an outstanding Gynaecologic Oncologist but, unfortunately, he removed the wrong ovary. This was not an error of judgment but was of such a nature that no reasonably well-informed and competent gynaecologic oncologist could have made. I find that the notes/postoperative record dated 24 March 2010 which was penned in Dr. Butler's handwriting about 20-30 minutes after the surgery accurately captured what he did on the day in question namely the removal of Ms. Stuart left ovary and tube.**

> **…**
>
> **[89]. In my judgment, Dr. Butler negligently removed the wrong ovary." [Emphasis added]**

88. There were two surgeons in the theatre when the surgery was being performed and the decision was made to remove the right ovary. They were the Appellant and Dr. Delton Farquharson; the Respondent's first doctor who had referred her to Dr. Butler.

89. The basis for the decision to remove the right ovary was found in the evidence of both Dr. Butler and Dr. Farquharson.

90. In paragraph 100 of her judgement, the trial judge records Dr. Butler's evidence. She said:

> **"[100] Dr. Butler stated that, during the surgery, he conducted a comprehensive examination of the left ovary and determined that it was grossly normal and no intervention was called for. <u>The right ovary, however, was tethered by dense adhesions and had a firm calcified mass. He discussed the appearance of the right ovary with Dr. Farquharson who also observed that there was evidence of pathology on the right ovary. After the discussion, they both agreed that it would be best to remove the right ovary.</u> In his oral testimony before this Court, he listed the reasons which, according to him, supported his decision, foremost among them being ovarian cancer which, if not detected early enough, is lethal." [Emphasis added]**

91. The judge summarized Dr. Farquharson's evidence as follows:

> **"[60] Dr. Farquharson asserted that, in March 2010, he received a request from Dr. Butler to assist with the surgical management of Ms. Stuart during a laparoscopic surgical procedure to investigate her pelvic pain. <u>He further asserted that, at the time of the procedure, he observed that there was no pathology noted on the left adnexal. However, a cystic mass was on the right ovary.</u>**

[61] He corroborated Dr. Butler's evidence that, in the surgery room, they held discussions and decided that it was in the best interest to remove Ms. Stuart's right ovary since there was evidence of pathology there. As a result of this decision, a right salpingo-oophorectomy was completed on 24 March 2010…" [Emphasis added]

92. It is to be noted that in her judgment the trial Judge never said that she did not accept as truthful the evidence of Dr. Butler that:

> "**[100] …during the surgery he conducted a comprehensive examination of the left ovary and determined that it was grossly normal and no intervention was called for. The right ovary, however, was tethered by dense adhesions and had a firm calcified mass…**"

Nor did she say that she did not accept the evidence of Dr. Farquharson that:

> **"[60] …he observed that there was no pathology noted on the left adnexal. However, a cystic mass was on the right ovary"**.

93. Indeed, in her judgment, she specifically states:

> **"[84] …I accept Dr. Farquharson's evidence and, if indeed he was present in the surgery room (Ms. Stuart did not recall seeing him), he too made a bad judgment call in concurring with Dr. Butler to remove an ovary which was normal and not life-threatening."**

94. Later she said at paragraph 88 of the judgment:

> **"[88] …With respect to Dr. Farquharson, I found his expert testimony to be reliable, except for the bad judgment call to remove the right ovary…"**

95. Again, the trial Judge does not say she rejects the evidence of Dr. Farquharson as to what he saw concerning the right ovary and his discussion with Dr. Butler. She simply says that the decision to remove it was **"a bad judgment call**".

96. In paragraph 58 of his judgment, Smith JA states:

“58. Further, I note that Dr. Nahas’ opinions are based upon an assumption that Dr. Butler actually saw calcification and adhesions on the right ovary. As I stated before, the trial judge’s acceptance of Dr. Hirsch’s testimony and the Pathologist’s Report put the lie to Dr. Butler’s alleged observations of calcification and adhesions on the right ovary and as such destroyed the basis of Dr. Nahas’ opinion. Therefore, even if the trial judge was wrong to comment on what Dr. Nahas did “comprehend”, it would have made no difference to the decision of the trial judge to reject Dr. Nahas’ opinion.”

97. With respect, as I pointed out earlier, the trial Judge in her judgment never said that she did not accept the evidence of Dr. Butler that he saw calcification and adhesions on the right ovary. Indeed, Dr. Farquharson’s evidence was to the same effect. The trial Judge never said that those doctors were lying. As I said she indicated that she **“accept(ed) Dr. Farquharson’s evidence”**. This must mean that she accepted as truthful Dr. Farquharson’s evidence that he saw a cystic mass on the right ovary. The trial Judge’s view was that even if he and Dr. Farquharson saw what they saw, the decision to remove the right ovary was a **“bad judgment call”**.

98. In my judgment, the issue is whether having accepted the evidence of Dr. Butler and Dr. Farquharson as to what they saw on the right ovary during the surgery, the decision to remove the ovary was a negligent decision. Not whether it was the correct decision or a good decision, but whether it was a negligent decision. The answer appears to me to be in the evidence of Dr. Hirsch, the expert called by the Respondent whose evidence the trial Judge preferred. In paragraph 57 of the judgment the trial judge records:

“[57] Dr. Hirsch was asked the hypothetical question that if you have a patient during a laparoscopy and you suspect ovarian cancer how do you diagnose whether there is ovarian cancer or not, how do you rule that out, or how do you obtain a definitive diagnosis? Dr. Hirsch stated that “If you suspect ovarian cancer, and you observe something in the abdomen that looks like cancer you do not biopsy, you excise it.”

99. This was consistent with the views of Dr. Nahas as recorded in paragraph 86 of the judgment. Dr Nahas said:

“[86] …in view of the difficulty of her surgery and excessive BMI and the amount of adhesions, Dr. Butler elected to remove her right tube and ovary that looked abnormal from all the inflammation and adhesion which

> **makes it very difficult to differentiate between a benign against a malignant pathology and it was deemed necessary to remove the right ovary at that point which was a very reasonable judgment as the gynaecologic oncologist in that scenario…"**

100. As mentioned above, the issue on this appeal is whether having accepted the evidence of the doctors in the theater as to what they saw and the evidence of the experts including Dr. Hirsch, could the Judge reasonably find that the appellant was negligent.

101. This is not a dispute as to a finding of fact. If the judge had said that she did not believe or accept Dr. Butler's evidence and Dr. Farquharson's evidence as to what they saw of the right ovary which gave rise to their decision to remove it, then that would be a finding of fact with which this appellate court could not interfere or set aside.

102. The issue is given those facts was the decision to remove the right ovary a negligent one; that is an issue of law. In **Whitehouse v Jordan** [1981] 1 WLR 246 Lord Fraser at page 263E said:

> **"…Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent."**

103. All of the expert evidence was to the effect that if the doctor saw a mass which they considered suspicious it was not unreasonable to excise the ovary. Dr Hirsh's evidence was that Dr. Butler knew that what he saw was not suspicious and therefore should not have removed the right ovary. He said that because nothing in the pathology before the surgery suggested that there was anything wrong with the right ovary. To accept Dr. Hirsch's evidence over that of all other doctors on this issue could only be based on a rejection of the evidence of both Dr. Butler and Dr. Farquharson that they saw a mass on the right ovary that they considered suspicious. The judge did not make a finding that she rejected the evidence of Dr. Butler and Dr. Farquharson as to what they saw at the time of the surgery. If she did not accept that evidence, she was obliged to expressly make that finding. Such a finding would have been inconsistent with the specific finding that she accepted Dr. Farquharson's evidence. The trial Judge did not find that their evidence was not credible on what they saw and regarded as suspicious. Her judgment was to the effect that even though they saw the mass and thought it was suspicious, the decision the remove the right ovary was a decision that no reasonable doctor could have made and amounted to negligence.

104. With respect, the evidence led at the trial did not, in my judgment, justify the finding that the decision to remove the right ovary amounted to negligence.

105. It is to be noted that in her judgment, the trial judge found that the negligence was in removing **"the wrong ovary".** It was not a finding that the Appellant was negligent in removing any ovary. The negligence was in removing the **"wrong"** ovary. This suggests that had the Appellant removed the left ovary it would not have been negligent to do so. This is consistent with the judge's finding at paragraph 88 when she rejects the evidence of Dr. Nahas when she said that:

> **"[88] …In my considered opinion, Dr. Nahas failed to comprehend that Dr. Butler removed a perfectly normal ovary. She also failed to comprehend that Ms. Stuart still has excruciating pain and is afraid to undergo another surgery because <u>the wrong ovary - a healthy ovary - was removed</u>…" [Emphasis added]**

106. With respect, if the trial judge was going to accept the evidence of Dr. Hirsch that the left ovary should have been removed, then she must make a finding that both Dr. Butler and Dr. Farquharson lied when they said that they did not see anything wrong with the left ovary and found the mass on the right ovary. This she did not do. Instead, in paragraph 88, she specifically found that **"With respect to Dr. Farquharson, I found his expert testimony to be reliable, except for the bad judgment call to remove the right ovary".** The clear inference is that she accepted his evidence as to what he observed.

107. I would have allowed the appeal.

____

The Honourable Sir Michael Barnett, P