IN THE REPUBLIC OF TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 28 of 2003

BETWEEN

DR. PATRICIA DEONARINE

Appellant

AND

RANA RAMLAL

Respondent

PANEL: **S. John, J.A.**
A. Mendonca, J.A.
P. Weekes, J.A.

APPEARANCES: For the Appellant Mr. F. Hosein, S.C. and Ms. N. Sharma
For the Respondent Mr. A. Ramlogan and Ms. J. Furlonge

Date of delivery: **7th February, 2007**

I agree with the judgment of Mendonca J.A. and have nothing to add.

S. John
Justice of Appeal

I too agree.

P. Weekes
Justice of Appeal

JUDGMENT

Judgment of the Court Delivered by A. Mendonca, J.A.

(1) This is an appeal from the judgment of the trial Judge where she found the Appellant had negligently misdiagnosed and treated the Respondent.

(2) The following are the material facts which were either undisputed or found by the trial Judge.

(3) On November 11, 1998 the Respondent, Rana Ramlal, went to the casualty department of the San Fernando General Hospital. She was approximately 18-20 weeks pregnant and experiencing severe lower abdominal pain and per vagina bleeding. The Respondent was examined briefly by a doctor in the casualty department and then referred to the gynaecological ward.

(4) At the ward she was seen by the Appellant, Dr. Deonarine. The Appellant at the time was part of a hierarchical structure within the ward, referred to as a firm, in which she was the most junior doctor. Others members of the firm included a house officer who was next in line; then the Registrar, Dr. Richards; and then the consultant Dr. Jehan Ali, as head of the firm. At the material time the Appellant had been an intern for approximately 2½ months and was in the gynaecological ward for approximately 6 weeks.

(5) The Appellant interviewed the Respondent and then conducted a physical examination including an internal examination. The Appellant found the Respondent's abdomen to be soft and non-tender. The Appellant however found that the os or mouth of the Respondent's womb was open with placenta-like tissue at the os. The Appellant's diagnosis was that the Respondent had suffered an incomplete abortion. She told the Respondent that the foetus that she was carrying was dead and that it needed to be expelled. The Respondent

protested that her baby was not dead as she was experiencing foetal movements. But the Appellant said that at such an early stage of her pregnancy she could not be experiencing such movements. She dismissed the Respondent's pleas that her baby was not dead and rejected her requests for an ultra sound or the use of a heart monitor to determine whether the foetus was alive or dead.

(6) The Appellant then proceeded, with the use of a sponge holding forceps, to remove what appeared to her to be placenta tissue at the os thinking that what she was seeing were wedged products of conception that the Respondent had attempted to pass. This exercise, which the Respondent described as "pulling at her insides", caused her severe pain. The Respondent begged the Appellant to stop. The Judge noted that "the intern, to her credit paid heed to the pleas of the [Respondent] asked her to get dress and to meet her out of the examination room".

(7) When they met outside the examination room the Appellant told the Respondent that her baby was dead and could have been dead for a few days. She further stated that carrying a dead foetus was poisonous and that the Respondent could die from it. According to the evidence of the Respondent, which the Judge accepted:

> "[The Appellant] brought a consent form for me to give her permission to induce abortion. I was then in severe pain. Pulling [at my insides] increased the pain and [the Appellant] had become hostile. She said she does not know why I came to the Hospital if I am not taking her advice. She keeps telling me that the foetus is dead and I keep saying that it is alive. [I signed the consent form] because I was afraid for my own life and was fearful that [the Appellant] would insert the scissors-type instrument to pull out the dead remains again."

(8) The Respondent was thereafter given syntocinon, a drug to induce uterine activity to assist in expelling the foetus. The drug was administered

intravenously via a drip. The Respondent however while on the drip continued to experience foetal movements and as a consequence she turned off the drip.

(9) The Appellant visited the Respondent early the next morning. She was furious that the Respondent had turned off the drip. The Respondent again explained to the Appellant that she was experiencing foetal movements. The Appellant again dismissed the Respondent's complaints and ordered that she undergo an ERPC, a surgical procedure to remove the unexpelled products of conception.

(10) In the operating theatre the surgeon noticed that the Respondent was crying and approached her. She told the surgeon that her baby was still alive. Upon examination, the surgeon found that the size of the Respondent's abdomen corresponded to the Respondent's date of gestation. He also felt foetal movement and consequently sent the Respondent back to the ward with a request for re-assessment by a senior medical practitioner.

(11) According to the Judge:

> "The Respondent by this time had not only lost confidence in the Hospital staff, and had become afraid of the possibility of a repeat of the tugging incident and discharged herself from the Hospital."

(12) The Respondent was re-assessed by her gynaecologist, Dr. Rampersadsingh and an ultra sound was performed on her by Dr. Boodoo. She was found to be carrying a live baby and not undergoing an abortion. What the Appellant had taken for products of conception at the open os was in fact an endo-cervical polyp which was removed by the Respondent's doctors.

(13) Approximately 6 weeks later, on December 21, 1998, the Respondent gave birth to a premature baby that died within 24 hours of birth.

(14) At the trial it was not disputed by the Apellant that she had mistaken the polyp for products of conception nor was it disputed that the Respondent at the material time was not experiencing an abortion nor was one threatened. The foetus was viable and in tact. The Appellant therefore admitted that she had misdiagnosed the condition of the Respondent and consequently administered treatment that was inappropriate for the Respondent's actual condition. She however contended that she was not negligent. There was evidence from doctors skilled in the field of obstetrics and gynaecology that a cervical polyp in pregnant women is extremely rare and can easily be mistaken for products of conception.

(15) The Judge held that the Appellant was not negligent for what she termed "the simple mistaken diagnosis". No one has sought to challenge this decision. The Judge however stated that where the Appellant must be held responsible is her failure to heed the complaints of the Respondent that she was experiencing foetal movements. The Judge accepted that the Appellant did go to a senior doctor to seek his guidance but held that the Appellant did not really take advantage of that opportunity. She had ignored the complaints of foetal movements and made no note of them. The senior doctor, who did not examine the Respondent himself, but relied on the Appellant's notes, did not therefore have a proper opportunity to come to an informed decision. In those circumstances the Judge was of the view that what the Appellant did was to seek a "rubber stamping" of her own diagnosis. The Judge concluded:

> "As a result of the [Appellant's] negligent failure to heed the [Respondent's] complaints, and confirmed in her view that the tissue seen in the [Respondent's] vaginal canal were products of conception, the [Appellant] embarked on a tugging exercise which resulted in pain and suffering to the [Respondent]. In the Court's view this aspect of the [Appellant's] negligence is actionable because it resulted in pain and suffering to the [Respondent]."

The Judge assessed damages in the sum of $7,500.00.

(16) The Appellant now appeals to this Court. It should be noted that the action was brought and maintained by the Respondent against not only the Appellant but the Attorney General pursuant to the provisions of the State Liability and Proceedings Act Chap. 8:02 and the South West Regional Health Authority (SWRHA) in which Authority the San Fernando General Hospital is vested. The Judge gave judgment against all the defendants. The SWRHA and the Attorney General have not appealed from the Judgment and have taken no part in this appeal. This appeal therefore concerns the Appellant and the Respondent.

(17) Counsel for the Appellant submitted that the Judge did not adequately analyse the evidence. He contended that there is evidence from experts that whether or not the foetus was alive would have made no difference to the diagnosis of the Respondent's condition and the consequential treatment. In the circumstances, Counsel contended that the Judge's finding of negligence was flawed and the Appellant should have been held not to be negligent. Counsel further submitted that even if she were negligent, the Respondent did not prove that she suffered any injury as a result of the Appellant's negligence and consequently failed to establish that she suffered any damage which is a necessary ingredient in the tort of negligence. Counsel for the Respondent on the other hand contended that there was ample evidence to support the Judge's finding.

(18) The relevant law is not in dispute. It is well settled that a medical practitioner is not obliged to achieve success in every case that he treats. His duty is to exercise reasonable skill and care. In ***Lanphier v Phipos*** (1838) 173 E.R. 581 the position was put this way:

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill and you will say whether, in this case the injury was occasioned by the want of such skill in the defendant."

(19) The principle has been restated over the years but perhaps the most often quoted formulation is the direction of Mc Nair J. to the jury in ***Bolam v Friern Hospital Management Committee*** [1957] 2 All E.R. 118 which is now commonly referred to as the Bolam test. In that case Mc Nair J stated (at p. 121-122):

> "How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge that by the conduct of the man on 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 whether there has been negligence or not is not the test of the man on 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 at the risk of being found negligent. It is well established law that it is sufficient that he exercises the ordinary skill of an ordinary competent man exercising that particular art …. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. …Putting it the other way around,

> 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.

(20) It has been said that the Bolam test is applicable to all aspects of a medical practitioner's work. (See ***Sidaway v The Board of Governors of the Bethlem Royal Hospital*** [1985] A.C. 871).

(21) In accordance with the Bolam test, for a plaintiff to succeed he must show that the medical practitioner failed to exercise a reasonable degree of skill and care. The medical practitioner can therefore be held liable if he failed to act in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. However as is evident from the passage quoted from the **Bolam** case, it is not sufficient for the plaintiff to adduce evidence to show that there is a body of medical opinion that considers the practice adopted by the medical practitioner to be wrong if there also existed a body of equally competent opinion that considered it acceptable (see ***Maynard v West Midlands Regional Health Authority*** [1985] 1 All E.R. 635. In ***Sidaway v The Board of Governors of the Bethlem Royal Hospital***, supra, Lord Scarman put it this way (at 881F):

> "A doctor is not negligent if he acts in accordance with the practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."

(22) In the area of diagnosis it has been said that in determining whether the diagnosis was correct often the sole question is whether the mistake was negligent and the issue is seldom resolved by reference to general approved practice or schools of thought (see ***Jackson and Powell on Professional Negligence*** (5th Edition) at para. 12-177). In this case the Judge did not think that there were competing schools of thought. She stated:

> "However there was no suggestion that within the medical profession, on any issue before the Court, there were two or more schools of thought, subscribed to by different but equally competent members of the profession."

(23) I however think that on a proper analysis of the evidence there are competing medical opinions and the experts do not speak with one voice as to the relevance of foetal movement in determining the proper diagnosis and treatment. To arrive at this conclusion obviously requires a review of the evidence, however, before doing so, I would like to revisit the Judge's finding.

(24) It appears that what the Judge meant by "a simple mistaken diagnosis" was the Appellant mistaking the polyp for products of conception. The Appellant was held not negligent in doing that. But mistaking the polyp for products of conception was one of the things that informed the diagnosis of incomplete abortion. There was evidence before the Court that where a patient presents with what appears to be placental tissue at an open os and complains of abdominal pain and bleeding per vagina that there are two reasonable possible diagnoses: either a diagnosis of inevitable abortion or incomplete abortion. Inevitable abortion as the term implies means that although the abortion has not begun it is inevitable and the foetus will be aborted. Incomplete abortion in essence means that the abortion has begun but is not completed. In the case of an incomplete abortion the baby is usually, though not always, dead, whereas in the case of an inevitable abortion the foetus is usually alive but will be aborted. In this case the medical evidence called on behalf of the defendants was divided on whether the appropriate diagnosis was an incomplete or an inevitable abortion. I do not, however, think that that dispute is critical to this appeal as the relevance of foetal movement does not seem to turn on which diagnosis is preferred. What is clear is that the Appellant made a diagnosis of incomplete abortion. In my judgment the Judge's finding of negligence has to be looked at against the broader diagnosis of incomplete abortion made by the Appellant. Attempting to

remove the polyp thinking it was a product of conception can be seen as part of the treatment consistent with a diagnosis of incomplete abortion. The question therefore is whether the fact that there was foetal movement should have made any difference to that diagnosis and treatment.

(25) Three doctors gave evidence on behalf of the Respondent. These were Dr. Boodoo who conducted the ultra sound on the Respondent; the Respondent's gynaecologist, Dr. Rampersadsingh; and Dr. Abdullah the surgeon whom she encountered when sent for the ERPC. It is reasonable to conclude from their evidence that foetal movement was relevant.

(26) Dr. Boodoo's evidence was short and to the point. It was as follows:

> Question: If patient stated that they are [sic] feeling foetal movement and you suspect miscarriage standard procedure?
>
> Answer: Advisable to confirm whether baby alive or not with the use of either foetal Doppler or an ultra sound.

(27) Dr. Rampersadsingh quite clearly thought foetal movement to be relevant. He stated that when at the hospital he examined the Respondent by placing his hands on her stomach he got "the shock of his life" when he felt foetal movement. He immediately arranged for an ultra sound to be conducted by Dr. Boodoo.

(27) With respect to Dr. Abdullah, who contrary to the Appellant's instructions did not proceed with the ERPC, he clearly thought that foetal movement was relevant. That and the size of the foetus were the factors that informed his decision to send the Respondent back to the ward for a re-assessment by a senior medical practitioner.

(28) With respect to the defendants, four doctors (not including the Appellant) gave evidence on their behalf. All of them are specialists in obstetrics and gynaecology. On my reading of the evidence two of them support the relevance of foetal movement and two do not. The two in support are Dr. David Ali and Dr. Rajkumar and the two who do not think that foetal movement has any relevance are Dr. Richards and Dr. Jehan Ali.

(29) With respect to the evidence of Dr. David Ali he had seen the Appellant on a previous occasion in September 1998 when he made a diagnosis of threatened abortion. On that occasion he sent the Respondent for an ultra sound. He stated that sending the Respondent for an ultra sound was in accordance with "standard practice and procedure".

(30) Dr. Ali was not asked what was the likely diagnosis of a patient presenting with the symptoms of the Respondent but he did state that one of the things that a bleeding polyp could be mistaken for was a product of conception. He was however alive to the fact that it could be other things. He stated in response to a question as to what else a bleeding polyp could be mistaken for:

> First thought is this a product of conception that is a piece of placental tissue, or a polyp or foreign body.

(31) He was of the opinion that even if the impression was formed that the polyp was a product of conception the appropriate treatment would be to treat the patient "expectantly" if the patient is experiencing foetal movement. I think the following extract from his evidence is relevant:

> "Question: According to you at 18 weeks mother can feel foetal movement?
> Answer: Yes
> Question: If she tells you that she is feeling foetal movement?

Answer: Yes

Question: If you form the preliminary opinion that it is products of conception what would you do?

Answer: You want to see if membranes are ruptured and if ruptured you put up a syntocinon drip.

Question: Mucus membrane?

Answer: No the water bag.

Question: What if membranes are not ruptured?

Answer: Treat patient expectantly by observation.

Question: Would you want to assess if baby alive?

Answer: If foetus moving baby is alive

Question: If they are not ruptured and the foetus alive you would put up the drip?

Answer: No

Question: If patient experiencing foetal movement would you not do tests to confirm that foetus alive?

Answer: Yes listen to the foetal heart with foetal stethoscope.

Question: May send her for an ultra sound?

Answer: Yes."

(32) Dr. Rajkumar gave evidence on behalf of the Attorney General. He stated that given the symptoms of the Respondent at the material time a reasonable diagnosis was that of inevitable abortion. Despite that however he was able to "concur" with the diagnosis made by the Appellant. At points in his evidence he seemed to be saying that foetal movement would not have made a difference because once the os is open and there is the presence of placental tissue the pregnancy has no real chance of survival. He stated that:

> "If I saw placental tissue through open os I would apply syntocinon because pregnancy cannot survive."

(33) Despite this however Dr. Rajkumar did state that it would be prudent to ascertain the state of the foetus. This is because even though in his view the pregnancy could not survive he could not be one hundred percent certain that it would not survive. The following is the relevant portion of his evidence:

> "Question: Even where os is open it is prudent to ascertain the state of foetus?
> Answer: Yes.
> Question: What method?
> Answer: Abdominal ultra sound.
> Question: Why is it prudent to do that?
> Answer: If os is closed there is a greater chance of saving foetus. If os is open whether instrument used on the patient whether or not she has a viable foetus and if she has a viable foetus that there is a high chance of miscarriage.
> Question: Would you instruct patient to abort that because both chances on high not 100% certain that she would in fact lose the baby?
> Answer: Would not use the term 100% for my patient.
> Question: In your professional experience is it possible for patients to defy medical diagnosis?
> Answer: Yes."

(34) The evidence of Dr. Jehan Ali and Dr. Richards support the view that foetal movement is irrelevant. I will first refer to the evidence of Dr. Jehan Ali. He gave evidence on behalf of the Appellant and the SWRHA. He was head of the firm that managed the Respondent. He was of the opinion that the appropriate diagnosis was that of inevitable abortion and insisted that that was in fact the diagnosis made by the Appellant despite the hospital records to be contrary (and I might add the oral evidence of the Appellant herself). He was, however, very clear that there were two situations where one would not do an

ultra sound to determine whether the foetus was alive and those are cases of an incomplete abortion and an inevitable abortion. He stated that once the os was open one would need to evacuate the foetus and this is because there are grave risks to the mother. He stated that his treatment would not differ whether the baby was alive or dead. He denied that in the case of an inevitable or incomplete abortion failure to do an ultra sound constituted inappropriate management of the patient.

(35) Dr. Jehan Ali went on to say that it is prudent to determine whether the foetus was still inside the mother since that could have an effect on the treatment. This is the note of his cross examination which is relevant to this point:

> Question: At 18-20 weeks pregnant I am putting it to you it would be prudent to ascertain whether foetus still in mother?
> Answer: Yes.
> Question: Prudent to ascertain that because it could affect the treatment?
> Answer: Yes.

(36) It however does not appear to me that Dr. Ali was referring to whether the foetus was alive or dead. He specifically referred to whether the foetus was still inside the mother – not whether it was alive or dead. There is evidence to the effect that an ERPC should not be considered until the foetus had passed. This, it seems to me, is what Dr. Jehan Ali was referring to when he said that it was prudent to determine whether the foetus was still in the mother as it was relevant to treatment. This is clearly consistent with the general tenor of his evidence.

(37) Dr. Richards also gave evidence for the Appellant and the SWRHA. According to his evidence a reasonable diagnosis of a competent doctor in examining an 18 week pregnant woman with abdominal pains and vaginal

bleeding and an open os is an incomplete abortion. When asked if foetal movement would make a difference he responded:

> "In the context of placental tissue being seen no different at 18 weeks foetus is not viable it will not survive – maternal interest supersedes foetal interest. Expulsion of products mandatory."

He therefore stated that it was standard practice where one had seen placental tissue not to use an ultra sound.

(38) As I mentioned the Judge stated that this was not a case where there were competing bodies of opinion. But on a proper analysis of the evidence it appears that the medical opinion as to the proper management of the Respondent is in conflict. The Judge did indicate:

> "In some instances, evidence was given, which may have been contradicted by another doctor and it fell to the Court to determine the credibility of the evidence in question."

But there is nothing to indicate that she treated the differing opinions referred to above as matters of credibility. The judge did not hold that the different opinions were opinions not honestly held and expressed.

(39) As I pointed out earlier in this judgment, it is not sufficient for a plaintiff to succeed to simply show that there was a body of opinion that may not have approved of the practice of the medical practitioner if there also existed a body of equally competent opinion that supported it. But the Court is not bound to hold that a defendant escapes liability for negligence just because he leads evidence from a number of medical experts who support the decision taken by the defendant. This was held to be so in ***Bolitho v City and Hackney Health***

Authority [1997] 4 All E.R. 771. In that case Lord Browne-Wilkinson stated (at p. 778):

> … "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 Bolam's case … Mc Nair J. stated that the defendant had to have acted in accordance with the practice accepted as proper by 'responsible body of medical men'. … Later he referred to a 'standard of practice recognised as proper by a competent reasonable body of opinion' …. Again, in the passage which I have cited from Maynard's case, 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 on 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."

(40) Lord Browne-Wilkinson however expressed the view that it would be an exceptional case where the Court holds that a view held by competent medical experts was unreasonable. He stated:

> "I emphasise that, in my view, it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgement which a Judge would not normally be able to

> make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the Judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed.

(41) The question that now arises is whether this is one of those exceptional cases in which the Court can be satisfied that the medical opinion expressed as to the irrelevance of foetal movements cannot be logically supported. The question whether the Appellant should have paid heed to the Respondent's complaints of foetal movements begs the simple question, and it seems to me rhetorical question, whether before proceeding to treat the Respondent for a miscarriage the Appellant should have requested that the Respondent undergo an ultra sound or have given her the option to do so, as the Respondent herself requested. In this case Dr. Boodoo who did the ultra sound after the Respondent discharged herself from the hospital, was able to confirm that the foetus was viable and in tact and there was no miscarriage. It was therefore correct to say, and this is conceded by Counsel for the Appellant, that had an ultra sound been done it would have revealed that the diagnosis of a miscarriage was wrong. There is evidence that ultra sound equipment was not readily available and certainly not in cases of emergency. It would have taken, according to the evidence of one witness, between one week to one month before an ultra sound could be done. It was therefore suggested that as these were possible risks to the health of the mother if the foetus was not expelled that time was of the essence.

(42) The fact that in 1998 a patient may have had to wait possibly up to one month to have an ultra sound done and could not get one done in cases of emergency seems to me to be in breach of the SWRHA'S duty to provide

efficient systems for the delivery of health care. Be that as it may there is evidence that where facilities at the hospital are not available that the option is given to the patient to use private facilities. That of course was not done. It is reasonable to infer that had it been done the ultra sound would have been done very quickly. In this case the ultra sound was arranged and performed within a very short time on November 12, 1998. In such circumstances the delay caused by the obtaining of the ultra sound could not have been a factor that could have caused any detriment to the health of the Respondent. An option that would have provided reliable information in a safe and non-invasive manner and which would have assisted in the true diagnosis of the Respondent was therefore overlooked. Instead the Appellant proceeded to treat the Respondent for a miscarriage. Part of that treatment included the administering of a drug which was designed to induce uterine activity and one of the possible side effects of which is that it might induce a miscarriage of a viable foetus if the diagnosis was wrong. The treatment also included an ERPC, a surgical procedure that carried its own risks.

(43) In my judgment, it is clear that having regard to the comparative risks and benefits the decision to ignore the complaints of foetal movement and proceed to treat the Respondent on the basis of a diagnosis of an incomplete miscarriage rather than pay attention to such movements and have an ultra sound done is not a defensible conclusion.

(44) In the circumstances although the Appellant's failure to pay regard to Respondent's foetal movements was in accordance with opinion expressed by witnesses called on her behalf, it exposed the Respondent to obvious risks that could have been guarded against had regard been paid to the fact that she was experiencing foetal movements. It has not therefore been demonstrated that the opinions relied on are reasonable or responsible. In the circumstances I think in the end that the judge was entitled to place the emphasis on the presence of foetal movements as she did. In accordance with reasonable and responsible

practice the foetal movements should have prompted the Appellant to ascertain the status of the foetus before embarking on a course of treatment that might have been consistent with a diagnosis of incomplete abortion. Had she in accordance with medical opinion expressed by other doctors herein done so and performed an ultra sound, which on the evidence could have been readily obtained, this would have provided information as to the real condition of the Respondent. It therefore follows that the Appellant would not have embarked on tugging on the insides of the Respondent and the administering of syntocinon and the other aspects of the treatment prescribed by the Appellant for an incomplete abortion that never was.

(45) There is a suggestion by Counsel for the Appellant that only the consultant of the firm could have given the Respondent the option to do the ultra sound but that is not supported by the evidence. Certainly there is no indication in the Appellant's evidence that she thought her authority to be so circumscribed. In any event, even if she did not have that authority reasonable and responsible practice dictated that the Appellant should have procured the consultant to direct an ultra sound.

(46) Counsel also submitted that as the Appellant, who was an intern at the material time, had sought the advice of her superior, she was not negligent. He relied on the judgment of the Court of Appeal in the case of ***Wilsher v Essex Health Authority*** [1987] Q.B. 730 in support of this proposition. But this case does not establish that a junior doctor discharges her duty of care if in every case she seeks the assistance of a senior doctor. In Wilsher the majority of the court considered that the standard of care required of junior hospital doctors should not be judged by the standard required of a person having his formal qualifications and practical experience. The majority was of the view that the junior doctor should be judged by the standard required of the post he occupied. The majority view was expressed by Mustill L.J. as follows:

> In a case such as the present, the standard is not that of the averagely competent and well-informed junior houseman (or whatever the position of the doctor) but of such a person who fills a post in a unit offering a highly specialized service.

(47) Measured by that standard, a junior doctor although he may have made a mistake, may not be negligent if he has performed to the standard expected of a reasonably competent doctor who fills the post occupied by him. Put simply, the matter that he is called upon to deal with may be beyond the competence of the post. In those circumstances the junior doctor should be expected to recognize that the matter is beyond his competence and to seek the assistance of a senior doctor. As Glidewell L.J. stated:

> I should add that in my view the inexperienced doctor called upon to exercise a specialist skill will, as part of that skill, seek the advice and help of his supervisor when he does or may need it. If he does seek such help, he will often have satisfied the test, even though he may himself have made a mistake.

(48) Counsel is therefore correct to the extent that in some cases when measured against the appropriate standard, the junior doctor discharges his duty if he seeks the help and guidance of his seniors. But this is not so in every case; it is not in every case that the junior doctor escapes liability if he seeks the advice of his senior. In a case coming within his competence a junior doctor does not discharge his duty by simply seeking his senior's advice. He will not be held to have discharged his duty to the patient if he has not fully measured up to the standard expected of him. So that in **Wilsher**, supra, Mustill L.J. (at p. 758) was prepared to hold the junior doctor negligent notwithstanding that he consulted with his senior because in his view he could not be regarded as measuring up to the standard required of his post.

In this case the weight of the evidence is that the Appellant, notwithstanding that she was an intern, was competent to treat the Respondent. As already discussed when measured against the standard which was expected of a person of ordinary skill she fell short of that standard.

(49) Counsel for the Appellant further submitted that even if the Appellant was negligent the Respondent was not entitled to succeed. He contended that in an action founded in negligence a plaintiff is not entitled to judgment unless he can prove that the defendant has been negligent and that he suffered damage as a result of the defendant's negligence. In this case Counsel submitted that there was no evidence that the plaintiff suffered damage as a result of the Appellant's negligence so as to found an action in the tort of negligence.

(50) It is of course quite clear that a plaintiff must establish that he suffered damage as a result of the defendant's negligence in order to succeed in an action in negligence. In this case there is an abundance of evidence that the Respondent endured considerable pain by the tugging on her insides by the Appellant. But it seems to be accepted by the parties that pain without evidence of physical injury is not sufficient to satisfy the element of damage in the tort of negligence.

(51) According to the evidence it was stated that one would expect to find lacerations and bruises at the point of the body where the polyp was attached but there is no evidence that there were such bruises and lacerations. There is however evidence that the polyp itself had been traumatised and the probable cause of this as the judge found was the tugging on it. Counsel for the Appellant submitted that this could not be considered as the polyp had to be removed in any event. Counsel however referred to no authority to support that proposition and I do not think that it follows that since the polyp had to be removed that any injury done to it cannot satisfy the requirement of proof of damage. It is not to the point to say as the Appellant has argued that one of the ways to remove the

polyp is by twisting it. That makes no difference to the position. The fact of the matter is that although the polyp could have been removed by twisting it off, that is not what the Appellant attempted to do and what she succeeded in doing was causing pain to the Respondent.

(52) In the circumstances I would dismiss the appeal with costs.

(53) Before leaving this appeal, I wish to refer to an observation made by Mr. Byam of the Chief State Solicitor's Department who is on record for the Attorney General. Mr. Byam sought leave of the court to make an observation relating to a finding made by the judge as to the negligence of Dr. Richards. Mr. Byam did not make any submissions as to whether the finding was justified on the evidence before the court. Indeed he was quite deliberate to point out that he did not wish to make any submissions on the substantive merits of the issues between the parties. His simple point was that Dr. Richards was not a party to the action, but was a witness and further that there were no averments in the statement of claim in which he was named. In those circumstances the judge should not have made any finding of negligence against him and consequently the finding should not be allowed to stand. I, however, think that it is important to bear in mind that the claim by the Respondent was not only against the Appellant but against the SWRHA and the Attorney General. So far as the SWRHA is concerned it is clear that the complaint against the Authority was in respect of the quality of medical care extended to the Respondent through its servants or agents. It is correct to say that Dr. Richards' name was not mentioned in the statement of claim, but evidence was led by the parties, including the SWRHA in which the role and involvement of Dr. Richards as one of the servants or agents of the SWRHA was explained. In determining the liability of the SWRHA, the trial Judge, it seems to me was entitled to review the action of its servants and/or agents and come to the finding that she did. In so saying I have not considered whether there was evidence to support the judge's finding and I am not to be taken as having expressed any agreement with it.

Dated this 7th day of February 2007.

Allan Mendonca J.A.