No. 19 of 1952.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF JUDICATURE OF JAMAICA

BETWEEN

LAWRENCE ADRIAN MOODIE (Plaintiff) . . *Appellant*

AND

LENNOX M. JOHNS (Defendant) . . . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal by Special Leave from a Judgment of the Court of Appeal of the Supreme Court of Judicature of Jamaica dated the 1st day of April 1949 whereby the Court by a majority (Cluer and MacGregor JJ., Hearne C.J. dissenting) reversed a Judgment of the Resident Magistrate of the Parish of Kingston, Jamaica, dated the 20th day of November 1948 whereby the Appellant was awarded against the Respondent sums amounting to £97 13s. for professional services rendered to the wife of the Respondent in the circumstances hereinafter set forth. pp. 51–67. p. 42.

2. The Appellant is a Registered Medical Practitioner and conducts a Nursing Home in Kingston where he practices as a gynæcologist and obstetrician. He instituted an action in the Resident Magistrate's Court for the Parish of Kingston on the 20th day of April 1948, claiming from the Respondent the sum of £31 10s. for professional services rendered by the Appellant personally to the wife of the Respondent during her confinement, and further sums amounting to £66 3s. for fees payable to certain consultants called in by the Appellant at the request or with the consent of the Respondent during the course of the said confinement. p. 1. p. 76.

3. The defences raised at the trial were (A) with respect to the claim for the Appellant's own fee of £31 10s. that his services had been rendered negligently, and (B) with respect to the claim for fees payable to the consultants, that the Appellant could not take action on their behalf. It will be necessary to refer in more detail hereafter to the allegations of negligence (which were particularised in the pleadings under seven heads), but it may be more convenient first to summarise here the result of the trial and the proceedings in the Court of Appeal. p. 2, line 20. p. 2, line 23. pp. 2–3, line 29 et seq.

4. The learned Resident Magistrate, after a hearing which lasted five days, and in the course of which three medical practitioners were called on behalf of the Respondent, held that the Appellant had not been guilty pp. 2–42.

p. 42. of any negligence. On the 20th day of November 1948 judgment was entered for the Appellant for the full amount of his aforesaid claim, and
pp. 45–49. on the 23rd day of December 1948 the learned Resident Magistrate gave his reasons in writing.

5. The Respondent's appeal from the said Judgment was heard by the Court of Appeal (consisting of Hearne C.J., Cluer J. and MacGregor J.) on the 22nd, 23rd and 24th days of February 1949, and
pp. 51–67. Judgment was reserved. On the 1st day of April 1949 the Court of Appeal by a majority, the learned Chief Justice dissenting, allowed that part of the appeal which related to the Appellant's own fees on the ground that negligence had been established against the Appellant, such negligence consisting of two allegations, whereof one was first raised during the hearing of the appeal and had not even appeared in the Grounds of Appeal dated
p. 50. the 3rd day of January 1949, and the other was not included in the afore-
pp. 2–3. said detailed Particulars of Negligence supplied before or at the opening of the trial and related to the conduct of a Nurse employed by the Appellant.

The Court of Appeal also allowed unanimously that part of the appeal which related to the fees payable to consultants on the ground that the Appellant could not recover those fees from the Respondent unless the Appellant had already paid them himself, which was not the case. The Appellant does not appeal against this part of the Judgment of the Court of Appeal, but only against that part of the Judgment of the Court of Appeal whereby the majority of that Court stigmatised him as negligent.

6. The questions arising on this appeal are therefore whether the majority of the Court of Appeal were justified in holding that the Appellant had been guilty of negligence; whether the Respondent should have been permitted to rely upon a particular allegation of negligence not mentioned in the Grounds of Appeal but first developed during the hearing of the Appeal; and whether the Judgments of the majority of the Court of Appeal were not vitiated by the facts that (A) both learned Judges based their opinions upon a complete misinterpretation (as the learned Chief Justice pointed out in his dissenting Judgment) of an answer given by the Appellant to a hypothetical question and (B) one of those Judges (Cluer J.) apparently based one of his findings of negligence upon his personal opinion about the efficiency of the local telephone service.

7. The Appellant respectfully submits that it is desirable now to set out the actual allegations of negligence made against him before or at the
p. 77. trial. Before the trial they were embodied in a letter dated the 4th day of February 1948 wherein liability for the Appellant's own fees was denied
p. 77, lines 22–23. because of "the grossly negligent manner in which the Appellant had dealt with the confinement of the Respondent's wife."

p. 2. At the beginning of the trial on the 14th day of September 1948 they were first epitomised thus:—

p. 2, lines 20–22. "1. Services rendered were rendered in negligent manner.

"2. Respondent's wife did not have benefit of that degree of "skill that a proper medical man has and should have possessed "and used."

They were then particularised thus :—

" (1) Appellant employed to attend Respondent's wife in her " expected confinement with view to safe delivery of the child. " As result of Appellant's error child not safely delivered—died " prior to delivery. p. 2, lines 29 et seq.

" (2) By reason of Appellant's failure to diagnose true condition " of Respondent's wife and his delay in taking appropriate measures " —ordering Cæsarian operation—child died within womb and " mother's life gravely imperilled.

" (3) On the day of expected confinement (which was the " 20th day of November 1947) Appellant absented himself from " Kingston, was unavailable to Respondent for twenty-four hours " after onset of symptoms which required medical attention.

" (4) Appellant when requested to call in a consultant refused " or failed to do so and assured Respondent no need for consultant, " when in truth and in fact the condition of Respondent's wife was " in fact a serious one.

" (5) Appellant, when after undue delay did decide to call in " consultant—delayed in securing the attendance of a consultant— " until it was too late to save life of child.

" (6) Appellant was so negligent that he failed to discover the " symptoms at the onset of death of child, that child died in there ; " Appellant being unaware of fact, imperilling life of mother and " aggravating her subsequent illness and suffering.

" (7) Appellant failed to recognise that the case was one in " which Cæsarian operation might be necessary, took wrong measures " for a case in which such an operation might be necessary. Failed " to take any steps to secure Respondent's wife removal to institution " where such an operation could be performed rapidly if such " operation became necessary ; failed to advise such operation until " it was too late to save life of the child and caused further delay " which gravely imperilled the life of the mother."

It will be observed that there was no allegation of negligence in the Nurse (Nurse Waite) whom the Appellant did in fact leave in charge of his Nursing Home during the afternoon and evening of the 20th day of November 1947 in circumstances which will hereinafter more fully appear.

8. At the trial evidence was given by the Appellant in support of his own case ; and the Respondent, besides giving evidence himself, called his wife, his wife's sister, two doctors who either saw or attended the Respondent's wife on or after the 21st day of November 1947, and an independent gynæcologist, Dr. Eric Don, most of whose twenty-six years of practice had been spent in England. In the course of the written reasons for his Judgment the learned Resident Magistrate said that he regarded the Appellant as a witness of truth, but that he did not so regard the Respondent. He said that he could not accept the evidence of the Respondent's wife as trustworthy, and that he was not impressed with the evidence or demeanour of her sister. He accepted the evidence of Dr. Don pp 3–16 pp. 20–25. pp. 17–20. pp. 37–39. pp. 25–30. pp. 31–36. pp. 45–49. p. 48, lines 10–13. p. 48, lines 13–19. p. 48, lines 25–26. p. 48, lines 21–24.

and one of the other doctors that the Appellant's diagnosis and treatment
p. 48, lines 27–29. were correct. He added that where the evidence of the Appellant and the Respondent and/or the Respondent's wife were in conflict, he preferred
p. 48, lines 29–33. the evidence of the Appellant. He took the view that, on the evidence of the experts called by the Respondent, he was right in finding that the diagnosis and treatment by the Appellant of the Respondent's wife was correct, that the Cæsarian Section was properly resorted to, and that there was no failure to diagnose properly, nor was there any delay or defect in treatment. In view of these findings the Appellant submits that it is unnecessary to set out *in extenso* the reasons for the learned Resident Magistrate's Judgment; but having regard to the arguments addressed to the Court of Appeal on behalf of the Respondent, it is perhaps convenient to quote a paragraph from those reasons which reads thus :—

p. 49, lines 21–29.

> " On the conclusion of the Respondent's case the Defence
> " placed main stress on the allegation of negligence—on the evidence
> " surrounding the conduct of the Appellant on the 20th November
> " 1947 (the ' due day '), and authorities were cited to support the
> " contention urged. Whilst I (the learned Resident Magistrate)
> " accepted the view that the negligence of a nurse in those circum-
> " stances could be laid to the doctor in charge of the case, yet I
> " (the learned Resident Magistrate) do not think the authorities
> " go as far, in view of my findings of fact and inferences drawn, to
> " establish the allegations of negligence on which the Respondent
> " based his claim that the Appellant is not entitled to recover."

p. 51, lines 25-29. 9. Upon the hearing of the appeal the Respondent did not challenge the findings of the learned Resident Magistrate that he had not established any of the allegations of negligence against the Appellant in relation to diagnosis, treatment, failure to call in a consultant or to operate in sufficient time. The Respondent based his appeal upon two grounds
p. 52, line 19. p. 53, lines 30 et seq. only : the first being the alleged negligence of the aforesaid nurse upon receipt of an alleged message from the Respondent or his wife or his sister-in-law on the 20th day of November 1947 ; and the second being the
p. 52, lines 22–24. alleged negligence of the Appellant upon learning of that message from the said nurse. (It was the second of these grounds which was not even
p. 50. mentioned in the Grounds of Appeal.) As the appeal—and its decision—centred upon the alleged message, it is desirable to refer to the relevant evidence in some detail.

10. In the course of his evidence in chief the Appellant stated as follows :—

p. 4, lines 11–18.

> " On 20/11/47 I had appointment with Dr. Stephenson,
> " Morant Bay, and I called up and asked Respondent's wife how
> " she was getting on. She said : ' Fine, no signs of labour.' I
> " went to my King Street Office . . . Left Kingston 1.40 p.m. for
> " Morant Bay to meet Dr. Stephenson. Returned after 10 p.m.
> " I left instructions with a nurse (Nurse Waite) that if anyone
> " came in ring me at Dr. Stephenson's home, or if very important
> " to call Dr. Stockhausen . . . On my return after 10 p.m. I
> " received report from Nurse Waite that she got call at 3.30 p.m.
> " from a person who said he was Mr. Johns, that his wife, whenever

p. 4, line 25. p. 5, line 3.

" she passed urine and used tissue, saw traces of blood. I (Nurse " Waite) asked if there were any pains, and the answer was ' No " ' pains.' I (Nurse Waite) said : ' If the pains start bring her in.' " The person on the telephone asked if I (the Appellant) had " already gone to the country. I (Nurse Waite) said ' He has " ' already gone down to King Street. I can't tell. He will be back " ' about 6 p.m.' (The Appellant had expected to be back at " 6 p.m.) I (Nurse Waite) got another call about 8.30 p.m. A " voice said, ' Speaking for Mrs. Johns,' and asked if the Appellant " had returned.

" I telephoned Mr. Johns that I was going out to the country.

" I rang up telephone number which I knew to be Respondent's " number. I got no answer.

" Next morning about 7.30 a.m. Respondent called me on the " telephone. He said : ' Any time my wife uses tissue she sees " traces of blood.' I said ' I will come down as soon as I could.' " I had an operation at St. Joseph's, and after that I went to " Respondent's about 8.30 a.m. . . . I found Respondent's wife " sitting on the veranda, Respondent present. She said ' I am " ' perfectly all right, and went for a motor car drive yesterday, and " ' after I came back I saw traces of blood whenever I used " ' tissues.' I told her to go inside and I examined her. I found " that blood was coming not from the vagina but from the bladder. " It would have been normal for blood to come from the vagina " and not from the bladder."

11. In cross-examination the Appellant said this :—

" I knew when I rang up Respondent's wife that 20th November p. 8, line 44.
" was the expected day of labour. I was in Kingston up to p. 9, line 11.
" 1.40 p.m. I never told Respondent that I had got message " about urine. I was never informed that wife had rung up in the " day, and that a nurse had told her that it was only a show.

" I agree that such a message should have been given to me. " I would say if I got a report that when labour was expected " 20th November and blood was found in the urine, it would be " gravest negligence not to examine the patient then and there.

" Blood in the urine is a serious sign at any time, and near " the end of pregnancy it is very serious. It means kidneys are " inflamed. It would mean that I must treat the kidneys. The " quicker the treatment, the better chance the patient has. The " condition tends to cause death to the child."

12. As appears from the Judgment of the learned Chief Justice, it p. 53, lines 1–8.
was argued for the Respondent that the Appellant had " admitted " that he had received a message about urine, and that " in view of that " admission and of his admission on that it would be the gravest negligence " not to examine on the 20th November, the day when labour was " expected, a patient who had blood in her urine, it was the gravest

" negligence in the nurse not to have arranged for Dr. Stockhausen to " see the patient, and also the gravest negligence in the Appellant not to " have seen the patient himself as soon as he had returned from Morant " Bay."

p. 53, lines 30–34. It was also argued (and this was one of the grounds of appeal) that :—

> " It was admitted that the failure of the Appellant's nurse to " give proper notice to and secure adequate professional attendance " for the Respondent's wife on her report of a serious symptom of " toxemia on November 20th 1947, was an act of gross negligence."

But this argument was illusory because, as the above quoted extracts from his evidence show, the Appellant never admitted that the nurse had been guilty of negligence in not taking action on the message which the nurse told him she had received.

p. 53, lines 37–42. As the learned Chief Justice said :—

> " The Appellant's position was quite clearly that it would " have been the gravest negligence not to have taken action there " and then, if the message was to the effect that blood had been found " in the urine, but that was not what the message indicated. It " was only that blood had been seen, traces of it, not in the urine " but on tissue that was used after urination."

As for the evidence given on behalf of the Respondent, none of the three witnesses who spoke to the Nurse (namely, the Respondent, his wife and his sister-in-law, Mrs. Neale) gave any direct evidence of having said to that Nurse that blood was found in the urine, nor did any of them deny that the message given to the Nurse was, as the Appellant said, that there was blood on tissue used after urination.

13. Finally, on this vital question, having regard to the allegations of negligence based upon it in the Court of Appeal, the evidence of Dr. Don, called, as will be remembered, on behalf of the Respondent, was entirely favourable to the Appellant (in his respectful submission). In the course
p. 56, lines 33–40. of his evidence in chief Dr. Don said this (and this passage was subsequently quoted by the learned Chief Justice in his Judgment) :—

p. 31, lines 16–23.
> " I have heard history of wife. Where it is certain that blood " is coming, not from the vagina but in urine, it is a serious condition " in a pregnant woman and she should see a doctor as early as " possible. It is the duty of a maternity nurse, where a patient " has a Doctor to inform the Nurse of such condition, that she should " tell that Doctor. I would instruct my Head Nurse that if she is " informed about such a condition she should tell this Doctor or " person answering for the Doctor. Such a condition affects health " of unborn child."

p. 56, line 40. As the learned Chief Justice added, the condition to which Dr. Don was referring was blood in the urine. Dr. Don proceeded as follows :—

p. 31, lines 24–28.
> " Where symptoms are recognised, then twenty-four hours' " delay might materially lessen safety of child or mother. The " earlier the treatment the better the chances. In this case, having

" heard the facts, condition notified early Thursday morning, " that the Nurse brushed it aside, if treatment had been given " then the mother and child would have had a better chance."

Dr. Don was again referring to a condition of blood in the urine, which had never been communicated to the Appellant or his Nurse according to the evidence already quoted.

14. Upon this evidence the Respondent based his two allegations of negligence before the Court of Appeal, namely of negligence by the Nurse in not obtaining other medical attention for the Respondent's wife upon receipt of the message, and of negligence by the Appellant in not seeing the Respondent's wife on the night of the 20th November 1947.

In refusing to accept the Respondent's submissions the learned Chief Justice dissented from the other members of the Court of Appeal on the following grounds, which he expressed in the course of his Judgment and which the Appellant respectfully submits were right and desires to adopt :— pp. 51–57.

(1) That the evidence disclosed that a discharge of blood is normal on or about the date when labour is expected. p. 56, lines 46–47.

(2) That there is an essential difference between a message that there are traces of blood on tissue after urination and a message that blood was found in the urine. p. 56, line 20. p. 57, line 1.

(3) " That it was not proved that the Respondent and his " witnesses had given a message to Nurse Waite that blood had " been *found in the urine* of the Respondent's wife." p. 57, lines 9–11.

(4) " That the message that the Appellant admitted that he " had received was not a message to the effect that blood had been " found in her urine." p. 57, lines 12–14.

(5) That Dr. Don's evidence specifically stated that only where it is certain that blood is coming not from the vagina but in urine is it a serious condition. p. 56, lines 3–4.

(6) That " Dr. Don was not asked nor was any medical witness " asked whether a message about blood on tissue should have " indicated even as a possibility that blood was coming from the " kidneys. No medical witness was asked whether it was a matter " of common prudence and ordinary practice for a medical man to " examine his patient on such a message being received by him. " If a discharge of blood is normal, as the evidence indicates, " or on about the date when labour was expected, would he be " failing in his duty not to examine his patient at once on hearing " *on or about that date* that ' when she passed urine and used " ' tissue she saw traces of blood ' ? These are medical questions " which a Judge can, of course, answer, but he cannot do so without " evidence on which to base his answers, and of evidence bearing " on these questions there was none." p. 56, line 41. p. 57, line 1.

(7) " That on the basis of the message that the Appellant " admitted that he had received, there was no evidence at all on " which it could be found that either he or the Nurse had been " negligent." p. 57, lines 15–17.

15. The grounds upon which the majority of the Court of Appeal found in favour of the Respondent and allowed his appeal were as follows :—

p. 64, line 38. p. 65, line 3. (i) That the evidence of Dr. Don quoted above meant " that " upon blood being discovered to be passing in the urine it is the " duty of the Nurse immediately to inform the doctor for him to " ascertain whether the source of the blood is the vagina, in which " event the condition may be of no importance, and just a show, " or the kidneys, in which event the condition is serious requiring " immediate medical attention. Nurse Waite is a woman in charge " of a Maternity Home with sufficient experience to have been " left solely in charge during the absence of the doctor for six " months. In my judgment (namely the judgment of MacGregor J. " with which Cluer J. concurred), when it was reported to her that " a state of things existed the cause of which may have been either " unimportant or so grave as to seriously affect the life of the " patient, then her duty was to have taken all necessary steps to " ascertain the cause. These steps should have been to request " Dr. Stockhausen immediately to examine Mrs. Johns as she was " instructed by the Appellant to do."

p. 67, line 5. p. 67, lines 5–8. (ii) That on the " admission " by the Appellant that upon receipt of such report it would be the gravest negligence not to examine the patient then and there, it was " not possible to escape " a finding that he was negligent when he received the message " from Nurse Waite in not going then and there to examine " Mrs. Johns."

p. 67, lines 21–26. (iii) That " the onus was on the Appellant, once his negligence " and that of the Nurse was established, to prove that, even if " Mrs. Johns had received attention on the 20th and all was done " that could have been done, then the child would have had no " better chance of living. This he made no attempt to prove. " His action should therefore have failed."

16. The Appellant submits that the foregoing grounds given by the majority of the Court of Appeal are quite untenable. They depend primarily upon the so-called admission by the Appellant that he had received a report that blood had been found in the urine, which was a complete mis-interpretation of his evidence which contained no such admission, and secondarily upon the inference (which was unsupported by the evidence as the learned Chief Justice held) that the Nurse received a message that blood had been found in the urine.

p. 58, line 8. p. 58, lines 10–29. p. 58, lines 28–29. p. 59, line 47. p. 60, line 24. p. 60, lines 14–18. 17. Mr. Justice Cluer, who expressed his entire agreement with the Judgment of Mr. Justice MacGregor, added certain personal comments upon the inconclusive nature of evidence (as given by the Appellant) on dialling telephone numbers without obtaining a reply and said that " to dial a number and fail to get a reply may well not amount to anything," so as to justify the allegation that the Appellant was negligent in doing nothing upon receipt of the message from the Nurse. The learned Judge also expressed the opinion that the learned Resident Magistrate was unreasonable and had misdirected himself in regarding the evidence on

behalf of the Respondent about the message to the Nurse as not " very " important," and the learned Judge treated the inclusion of the words p. 60, lines 10–13.
" and used tissue " in the phrase " whenever she (the Respondent's wife) " passed urine and used tissue she saw traces of blood " as " no more than " incidental detail." The Appellant suggests that this opinion of the learned Judge conflicted with the medical evidence and was the basis of the erroneous ensuing statement that the learned Resident Magistrate had misdirected himself. The learned Judge also interpreted the Appellant's p. 60, lines 21–24.
already quoted answer in cross-examination to the hypothetical question about a report of blood in the urine as constituting an admission that it was his duty to take more steps than he did on the night of the 20th November 1947.

18. In the respectful submission of the Appellant, apart from other criticism, the Judgments of the majority of the Court of Appeal were vitiated by the interpretation of the Appellant's answer to the hypothetical question put in cross-examination as an admission, as is peculiarly demonstrated by the concluding words of the Judgment of Mr. Justice p 60, lines 25–26.
Cluer that " it appeared to him that the case might well be said virtually " to have been concluded at this stage (i.e., the Appellant's cross-examination)."

19. The Appellant therefore humbly submits that the appeal from the Judgment of the Court of Appeal of the Supreme Court of Judicature in Jamaica should be allowed in so far as that Judgment related to the majority finding of negligence against him, that such part of the Judgment of the learned Resident Magistrate at Kingston as found him entitled to be paid his own fees amounting to £31 10s. should be restored, and that the Respondent should be ordered to pay the costs of this appeal for the following amongst other

REASONS

(1) BECAUSE there was no evidence whatever of negligence against the Appellant or his servant, Nurse Waite.

(2) BECAUSE the findings of negligence against the Appellant and his servant represent a miscarriage of justice.

(3) BECAUSE the finding of negligence against the Appellant's servant was not originally pleaded, and was based upon the interpretation placed by the majority of the Court of Appeal upon the Appellant's answer to a hypothetical question which was treated as an admission.

(4) BECAUSE the finding of negligence against the Appellant personally was based upon an allegation never raised before the hearing in the Court of Appeal, and also depended largely upon the aforesaid interpretation of the Appellant's answer to the hypothetical question as an admission.

(5) BECAUSE the allegation of negligence against the Appellant which was first raised in the Court of Appeal ought to have been scrutinised much more jealously than it was by the majority of the Court who held that it was established.

(6) FOR the reasons given by the Chief Justice of Jamaica.

(7) FOR the reasons given by the learned Resident Magistrate.

DOUGLAS LOWE.

In the Privy Council.

ON APPEAL
from the Supreme Court of Judicature of Jamaica

BETWEEN

LAWRENCE ADRIAN MOODIE (Plaintiff) . *Appellant*

AND

LENNOX M. JOHNS (Defendant) . . . *Respondent.*

Case for the Appellant.

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