Privy Council Appeal No. 19 *of* 1952

Lawrence Adrian Moodie - - - - - - - - *Appellant*

v.

Lennox M. Johns - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF JUDICATURE OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1953

Present at the Hearing:

LORD NORMAND
LORD REID
SIR LIONEL LEACH
MR. L. M. D. DE SILVA

[*Delivered by* LORD REID]

This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Judicature of Jamaica dated 1st April, 1949, by which that Court by a majority (Cluer and MacGregor, J.J., Hearne, C.J., dissenting) reversed a judgment of the Resident Magistrate of the Parish of Kingston dated 20th November, 1948. The appellant is a gynaecologist practising in Kingston. In this action he sued the respondent for £97 13s. 0d. as remuneration for professional services rendered to the respondent's wife, Mrs. Johns. That sum included the appellant's own fee of £31 10s. 0d. and fees of £66 3s. 0d. due to consultants. The respondent's defence was first that the appellant had been guilty of professional negligence and was therefore not entitled to remuneration and secondly that the appellant could not sue for fees for other medical men. The Resident Magistrate entered judgment for the appellant for the full amount claimed with costs, but on appeal the Court of Appeal entered judgment for the respondent with costs. The appellant does not appeal against this decision in so far as it deals with consultants' fees. The sole question in this appeal is whether any negligence has been proved against the appellant.

In 1947 Mrs. Johns was 37 years old. She had been married for 15 years but was then pregnant for the first time. She attended the appellant's clinic once a month and it was arranged that she should enter his nursing home at the appropriate time. Her last visit before her confinement was on 13th November, 1947. It is not suggested that up to this time there was anything to indicate that the confinement would be more difficult than would normally be expected with a first child at that age.

The appellant had estimated that the confinement would be on or about Thursday, 20th November. He had to go to Morant Bay that day—some thirty miles from Kingston—and before leaving he telephoned to Mrs. Johns and was informed that she was well and that there were no signs of labour. There is acute controversy about what happened later that day and their Lordships must deal with that in detail later. The appellant saw Mrs. Johns on the morning of Friday 21st and found that there was blood in her urine. She was taken to the nursing home and treated for toxemia. She developed pains and other symptoms of a pre-eclamptic condition but no labour pains. These started on

the morning of Saturday 22nd but owing to rigidity birth could not take place and Mrs. Johns was taken to another hospital for a Caesarian section. It was found that the baby was dead.

Before the trial of this action particulars of negligence alleged against the appellant were given under seven heads: on six of them the respondent failed completely and it was not argued either before the Court of Appeal or before their Lordships that the evidence disclosed any negligence either on Friday 21st or Saturday 22nd November. The sole question now is whether there was negligence on Thursday 20th.

Evidence was given as to the events on that day by the appellant and by the respondent, his wife and Mrs. Neale, her sister. The Resident Magistrate disbelieved the evidence of the respondent and of his wife and of Mrs. Neale and therefore if the respondents are to succeed it can only be because the facts admitted by the appellant are sufficient to establish negligence. Much the greater part of the appellant's evidence dealt with matters no longer in issue and there are only two passages which deal with the events on Thursday, 20th November.

In his evidence in chief the appellant stated as follows:—

> "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. Delivered a patient with forceps about 12.30 p.m. Left Kingston 1.40 p.m. for Morant Bay to meet Dr. Stephenson. Returned after 10 p.m. I left instructions with a nurse that if anyone came in ring me at Dr. Stephenson's home, or if very important to call Dr. Stockhausen. Nurse Waite at Barton Court. She worked with me for over 10 years and during my absence abroad she ran the Nursing Home satisfactorily for me for six months. 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 she passed urine and used tissue, saw traces of blood. I asked if there were any pains, and the answer was 'No pains'. I said: 'If the pains start bring her in.' The person on the telephone asked if I had already gone to the country. I said 'He has already gone down to King Street. I can't tell. He will be back about 6 p.m.' (I had expected to be back at 6 p.m.) I got another call about 8.30 p.m. A voice said, 'Speaking for Mrs. Johns,' and asked if you had returned.
>
> I telephoned Mr. Johns that I was going out to the country.
>
> I rang up telephone number which I knew to be defendant's number. I got no answer."

In cross-examination the appellant said:—

> "I knew when I rang up defendant's wife that 20th November was the expected day of labour. I was in Kingston up to 1.40 p.m. I never told defendant 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."

There is some obscurity in both these passages but their Lordships have no doubt about what is meant. In the first passage "I" sometimes means Nurse Waite and sometimes the appellant but that creates no real confusion. The gist of the matter is that the appellant left a nurse in charge to deal with messages: if she thought that any message

was of sufficient importance she was either to telephone to Morant Bay or to call in Dr. Stockhausen. The appellant admitted that two calls had been received about Mrs. Johns, the first a message that whenever she passed urine and used tissue she saw traces of blood and the second an enquiry whether the appellant had yet returned. In the second passage the cross-examiner tried to get an admission that the first message was in a different form. The respondent's witnesses gave very different accounts of the number and substance of the telephone conversations and the cross-examiner was putting the substance of his witnesses' evidence to the appellant seeking an admission that the message was that Mrs. Johns had found blood in her urine, but had been told by the nurse that this was only a "show". The appellant denied receipt of any such message but admitted that if that had been the message he ought to have been told and the patient ought to have been examined at once.

The first question to be determined is whether the nurse ought to have done something when she received the respondent's message. It is admitted that it was the appellant's duty to leave someone in charge capable of dealing with such messages and that if a qualified person ought to have taken some action on receipt of the message then the appellant is responsible for the nurse having done nothing. If the message had been that there was blood in the urine then undoubtedly immediate action should have been taken on such a message as it would have indicated a very serious condition. But it is not proved that that was the message. Nurse Waite was not called as a witness and the respondent's witnesses were not believed so the respondent cannot prove by direct evidence what the message was. There is nothing but the appellant's own evidence from which the terms of the message can be inferred and the appellant denies that there was any mention of blood in the urine.

It follows that the respondent could only succeed on this point if he could show that, although there was no direct reference in the message to blood in the urine, yet the terms of the message were such as either to make it clear to a qualified person that the blood must be coming from the kidneys or to raise such a doubt in his mind as to require some immediate enquiry or investigation. That is a matter which their Lordships cannot decide without evidence. There is uncontradicted evidence by the appellant that it is normal for blood to come from the vagina at that stage of a pregnancy, but that is all. There is no evidence whether blood from the vagina could mark tissue used after urination without otherwise inconveniencing the patient, nor is there any evidence that a qualified person, hearing only that blood had so been found, ought to regard that as so suspicious as to require immediate investigation. Mr. Harvey, for the respondent, strenuously argued that that is obvious: but their Lordships cannot so hold especially as the appellant, who was accepted as a witness of credit, appears to draw a distinction between blood being found in the urine and blood being found on tissue used after urination. Three medical witnesses were called for the respondent but not one of them was asked what inference he would draw from blood being found on the tissue: all that these witnesses say is that if blood is found in the urine immediate action must be taken but that is admitted by the appellant himself. Their Lordships must therefore hold that it has not been proved that Nurse Waite was at fault in taking no action on receipt of a message in the terms spoken to by the appellant.

The next question is whether the appellant was himself at fault when he got the message from the nurse on his return at 10 p.m. He tried to telephone to the respondent but getting no reply he did nothing more till the morning. Their Lordships have already stated their view that it has not been proved that a qualified person ought to have taken immediate action on receipt of that message and in this case in addition the appellant was entitled to have in mind that no further symptoms had been reported and that a visit at that late hour might disturb the patient. It follows that if it has not been proved that Nurse Waite was negligent then still less has it been proved that the appellant was himself negligent.

Up to this point their Lordships have not referred to the judgment of the Resident Magistrate on this matter. He dealt fully and adequately with the other points in the case which are not now in issue but he only dealt with this matter in a few lines at the end of his judgment and their Lordships have difficulty in determining exactly on what grounds he found against the Respondent. Their Lordships have therefore thought it right to examine the whole matter afresh.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and that judgment for £31 10s. 0d. and costs should be entered for the appellant. The respondent must pay the costs of this appeal.

(19542) Wt. 8267 24, 100 7/53 D.L./PI/3

In the Privy Council

LAWRENCE ADRIAN MOODIE

v.

LENNOX M. JOHNS

[DELIVERED BY LORD REID]

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