COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/01377

BETWEEN

SABRINA E. HEPBURN

Claimant

AND

THE PUBLIC HOSPITAL AUTHORITY

Defendant

Before:	**The Honourable Madam Senior Justice Deborah E. Fraser**
Appearances:	**Elsworth Johnson of Johnson & Associates for the Claimant**
	Melissa Wright and Sandra Moncur of Public Hospital Authority for the Defendant
Hearing Dates:	**27 June 2023**

Negligence – Professional Medical Negligence and Breach of Duty of Care by a Medical Doctor – Toxic Anterior Segment Syndrome (TASS) – Hearsay Evidence

JUDGMENT

FRASER, SNR. J:

[1] This is a claim in negligence brought on behalf of the Claimant Sabrina E. Hepburn ('the Claimant") against the Public Hospitals Authority ("the Defendant"). The Defendant is the entity responsible for the Princess Margaret Hospital where the Claimant underwent eye surgery for the treatment of cataracts. By a Statement of Claim dated 29 January, 2020 claiming special damages in the amount of $38,083.89, general damages, exemplary damages, interest and costs

[2] The Claimant alleges that the Defendant was negligent by failing to provide sanitized equipment for her cataract surgery.

BACKGROUND

[3] On 26 September, 2018, the Claimant visited the private office of Dr. Geoffrey Sweeting ("Dr. Sweeting") where Dr. Sweeting referred the Claimant to have surgery for the removal of cataracts. Prior to this, the Claimant has had a long history of eye issues.

[4] Cataract surgery was performed by Dr. Sweeting on the Claimant's right eye. The surgery was performed at Princess Margaret Hospital on 28th September, 2018.

[5] The Claimant alleges that after the procedure, she was informed by Dr. Sweeting, who was informed by a nurse, that the autoclave, a device used for the sterilization of surgical instruments failed to properly sanitize the tools used for her procedure.

[6] Two days after the procedure, the Claimant reported pain in her right eye impaired vision. She was diagnosed with Toxic Anterior Segment Syndrome ("TASS").

[7] The patient was re-admitted to the Princess Margaret Hospital where she was treated for TASS and was released some days later.

[8] A few days after her release from hospital she experienced pain in her eye and was referred to an Ophthalmologist in Florida where she underwent numerous other eye procedures.

EVIDENCE

[9] Both parties provided expansive affidavit evidence which has been summarized below.

Sabrina E. Hepburn

[10] On 26 September, 2018, Ms. Hepburn recounts reporting to the Princess Margaret Hospital as a public patient for cataract removal surgery to her right eye. The surgery was performed by Dr. Geoffrey Sweeting.

[11] The Claimant provides that immediately following the surgery. Dr. Sweeting was informed by staff of the Princess Margaret Hospital that one of the section of the autoclave (bottom middle)

had failed its spore test. The Claimant further provides that she was then informed of the failure and was told that there was a possibility of an eye infection developing in the following 12-48 hours.

[12] On 28 September, 2018, the Claimant was referred by Dr. Sweeting to Dr. Supira Aurora, where the Claimant was noted to have significant edema to her right eye as well decreased vision of her right eye. The Claimant was then diagnosed with Toxic Anterior Segment Syndrome (TASS).

[13] The Claimant was later admitted to the Princess Margaret Hospital, on 28 September, 2018 for treatment of her TASS and was later released on 2 October, 2018 after edema in her right eye lessened. The Claimant was discharged with various medication to be continued to be administered at home.

[14] On 5 October, 2018, the patient reported to Dr. Aurora where she was advised to discontinue the use of fortified topical antibiotics and oral antglaucoma medication.

[15] On 7 October, 2018 the Claimant attended Dr. Russell-Hermann where it was reported that the pressure in her right eye had risen to painful levels. As a result, the Claimant was administered a Voltaren shot and was referred to the care of Dr. Geetha Vedula of Your Eye Specialists, Florida, United States. The Claimant later reported to Dr. Vedula on 17 October, 2018.

[16] The Claimant then reports an extensive amount of surgeries performed to her right eye beginning from 19 October, 2018 through 28 November 2021.

Bryann Hepburn

[17] Bryann Hepburn is the daughter of the Claimant and provided an affidavit for the Claimant.

[18] Ms. Hepburn outlines that due to her mother's eye health, she was responsible for transporting the Claimant to and from appointments, which included accompanying the Claimant to Florida to attend Dr. Vedula's office, transporting the Claimant to her appointments, distributing medication, helping with feeding, dressing and general care of the Claimant.

[19] Whilst taking care of the Claimant, Ms. Hepburn notes that the Claimant went through much pain and suffering as the Claimant has since developed psychological issues.

Dr. Geoffrey Sweeting

[20] Dr. Geoffrey Sweeting is a licensed Ophthalmologist with over 30 years of experience and provided an affidavit for the Claimant.

[21] Dr. Sweeting performed cataract extraction surgery on the Claimant on 26 September, 2018. After the procedure, Dr. Sweeting was approached by a Ms. Blossum Johnson (deceased), who served as a scrub technician and was informed by her that a part of the autoclave failed the

spore test and that the Hospital was in receipt of a written report. Dr. Sweeting provides that no urgent call was made to the Hospital to alert the staff of the failed spore test.

[22] Dr. Sweeting then provides that he informed the Claimant of the status of the autoclave and that there was a risk of developing inflammation in the next 12-48 hours.

[23] Dr. Sweeting filed an incident report, reporting the incident on the same date of 26 September, 2018.

[24] Dr. Sweeting's expert opinion is that the complications of the Claimant derived from the non-sterile instruments that were used during the Claimant's cataract surgery, resulting in increased pressure, inflammation and exasperated corneal edema of the right eye.

Defendant's Evidence

Nurse Marsha Bain

[25] Nurse Bain provided evidence for the Defendant asserting that after the Claimant's procedure, she was informed by another nurse, Valerina Taylor, that a section of the autoclave failed the spore test.

[26] Nurse Bain then informed Dr. Sweeting of the failed autoclave test and informed him to fill out an incident report.

[27] Nurse Bain then requested the autoclave to be retested where the results showed that the autoclave passed the spore test. A copy of this passed report was included in her Affidavit.

Dr. Supriya Arora

[28] Dr. Arora provided evidence for the Defendant. Dr. Arora is a medical doctor certified in Ophthalmology and at the time of this incident was employed with the Public Hospitals Authority as a Consultant Ophthalmologist and Retina Specialist.

[29] In her Affidavit Dr. Arora confirmed that she saw the Claimant some days after the surgery performed by Dr. Sweeting, where she diagnosed the Claimant with TASS and implemented treatment of the same, which included hospitalization.

[30] By October 2nd, 2018, the Claimant's condition improved greatly and Dr. Arora was satisfied with the treatment of the Claimant's TASS. The Claimant was subsequently released from the Princess Margaret Hospital.

[31] Dr. Arora noted that a malfunctioned autoclave may have contributed to the TASS. However, Dr. Arora further noted that the procedure done at the Princess Margaret Hospital was to treat the Claimant's cataracts, while the procedures performed in Florida were complicated and targeted towards the Claimant's glaucoma.

Dr. Donovan Calder

[32] Dr. Calder provided expert witness for the Defendant. Dr. Calder is duly registered and licensed by the Medical Council of Jamaica and holds a specialization in Ophthalmology from the Royal College of Surgeons of Edinburgh.

[33] Dr. Calder acknowledged that while the TASS developed by the Claimant may have been attributed to the malfunctioned autoclave, that there are other factors that could have contributed to the TASS occurring. These factors include, the use of intraocular fluids and devices during surgery and the use of topical ointment at the end of the surgery.

[34] Dr. Calder noted that Mrs. Hepburn responded positively to the TASS treatment instituted by Dr. Arora. Ms. Hepburn was then released from the hospital and sought treatment for her glaucoma.

Allison Scavella

[35] Allison Scavella serves as the Supervisor in the Microbiology Department of the Princess Margaret Hospital and provided evidence for the Defendant. As Supervisor in the Microbiology Department. Ms. Scavella is responsible for the implementation of policies and providing standard operating procedures for review and implementation, as well as inspection and quality control of microbiology equipment.

[36] In her Witness Statement. Ms. Scavella recalls on 26th September, 2018, being asked to perform a test on the autoclave to ensure that it was properly sterilized. Once a sample was taken to the lab, an incubation period takes place. After the incubation is complete, a purple colour will reveal a pass and a yellow colour will reveal a fail.

[37] Ms. Scavella maintains that the sample from the Eye Ward Theatre at the Princess Margaret Hospital had a purple colour which indicated that the equipment had passed and that the autoclave was functioning and sterile.

Dr. Wayne Thompson

[38] Dr. Wayne Thompson is a licensed Psychologist who has found the Claimant to be suffering from adjustment disorder as well as mixed anxiety and depression which may have been exacerbated by trial.

[39] Dr. Thompson recommended regular therapy sessions for a period of twelve (12) – eighteen (18) months.

Claimant's Submissions

[40] The Claimant argues that the Court must determine six key issues, including whether the autoclave used in the surgery failed a spore test, whether the Defendant's negligence caused the Claimant to develop TASS. Additionally, the Court must assess whether the Claimant's subsequent eye surgeries in the U.S. were a result of the initial infection and whether the Public Hospitals Authority (PHA) failed in its duty of care during the Claimant's hospital visit on September 26,

2018. The Claimant contends that direct documentary proof of the autoclave's failure is unnecessary, arguing instead that testimony from Dr. Sweeting and Nurse Bain, along with a spore log entry showing a failed test, is sufficient evidence.

[41] The Claimant further asserts that the tobradex ointment was not a probable cause of TASS and relies on expert testimony stating that unsterilized equipment was the most likely cause. Additionally, the Claimant argues that Dr. Sweeting was not responsible for the autoclave's maintenance, as it belonged to the PHA, and its nurses handled any issues. The argument is that the PHA's failure to ensure properly sterilized equipment led to inflammation, which caused increased intraocular pressure and subsequent vision loss, ultimately necessitating the surgeries in the U.S. Therefore, the Claimant holds the PHA accountable for negligence in failing to provide a safe surgical environment.

[42] Finally, the Counsel for the Claimant argues that the Defendants were negligent. The Claimant relies on the case of **Cassidy v Ministry of Health 1951 Kings Bench 343** that the Hospital and by extension its authority owe any patient reasonable care. The Claimant further argues that since the nurses are employed by the PHA, and the autoclave belongs to the PHA, that the PHA is liable for any negligence that would take place. The Counsel for the Claimants also rely on evidence of Dr. Sweeting and Nurse Bain that they were verbally informed of the malfunctioning of the autoclave. Ultimately, the PHA owed a duty of care to the Claimant, the Claimant received damage and that damage was a result of the failure of the PHA to provide sterilized equipment for the Claimant's procedure.

Defendant's Submissions

[43] Counsel for the Defendants presents four key issues for the Court to determine, including whether the autoclave failed its spore test, whether the Claimant's TASS infection was caused by unsterilized equipment or the post-surgery ointment, whether Dr. Sweeting was an independent contractor responsible for the procedure, and whether the Claimant's later surgeries in the U.S. were linked to the initial infection. The Defendants argue that the autoclave passed its spore test, as confirmed by a microbiologist's report, and that the Claimant failed to provide any documentary evidence proving otherwise.

[44] Relying on expert testimony from Dr. Calder, Counsel for the Defendants asserts that TASS is an inflammatory, not infectious, condition and that antibiotic ointment—known to contribute to TASS—was used post-surgery. Counsel argues that the ointment, not unsterilized equipment, was the likely cause. Furthermore, the Defendants contend that any negligence in the surgery falls on Dr. Sweeting, as he acted in a private capacity, renting the operating theatre from the Public Hospitals Authority, despite being its employee at the time. This issue was not fully ventilated by either party at trial, and so the Court makes not finding in that regard.

[45] Finally, the Defendants rely on the expert opinions of Dr. Aurora and Dr. Calder. Dr. Aurora provided under her cross-examination that while TASS may have been a factor for the

surgery performed in Florida, the fact of the matter is that the surgeries were extremely complex and there were other major factors that exacerbated the outcome of the Florida surgeries.

LAW

[46] The Claimant contends that the Defendant was neglectful by failing to provide sterilized equipment in her operating theatre at the time of her cataract surgery.

[47] In determining whether Dr. Sweeting had a duty of care to ensure that the equipment was properly sanitized or was it the responsibility of the hospital I relied on the legal principles laid down in **Lendisha Culmer-Hanna and Dr. Leslie W. Culmer v ACL Medical Office Centre 2013/CLE/gen/01365**, where Charles Snr. J eloquently set out the elements for medical negligence, in paragraphs **[86] –[87]** and **[89] –[90].** She states:

> **"[86] In the tort of negligence, liability is based on the conduct of the defendant and has three elements or requirements namely:**
>
> 1. **The existence of a duty of care situation (i.e. one which the law attaches liability to carelessness). There as to be a recognition by law that the careless infliction of the kind of damage complained of on the class of person to which the plaintiff belongs by the class of person to which the defendant belongs is actionable;**
> 2. **Breach of the duty of care by the defendant, i.e. he failed to measure up to the standard set by law; and**
> 3. **A causal connection between the defendant's careless conduct and the damage.**
>
> **Existence of a duty of care**
>
> **[87] In general, a duty of care will be owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care the plaintiff will be harmed: see Clerk & Lindsell on Torts (9th Ed), at paras. 8:05 et seq. It is the law that a physician "owes a duty of care to the patient to use diligence, care, knowledge and skill in administering the treatment.**
>
> **….**
>
> **[89] <u>A Defendant will be regarded as having breached his duty of care if his conduct falls below the standard required by law</u>. The standard normally set is that of a reasonable and prudent man. In Blyth v Birmingham Water Works [1856] 11 Exch. 781 at 784, Anderson B said:**
>
> **"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."**
>
> **[90] Negligence, as defined by Anderson B is in ordinary or general language but the standard required by law with respect to medical doctors, has developed over the century. There is now a myriad of cases which set out the test that the Court must apply in determining whether a medical practitioner breached his duty of care and was negligent. The locus classicus is Bolam v Friern Hospital Management Committee [1957] 2 All E.R. 118 at pages 121-122 McNair J laid down the following test:**
>
> **"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 that it is sufficient if he exercises the ordinary skill of an**

ordinary competent man exercising that particular art….<u>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."

[48] The Court in its determination must be satisfied that the medical opinion is sufficiently logical, this test was explained by Lord Browne-Wilkinson in **Bolitho v City and Hackney Authority [1997] 3 WLR 1151** where he affirmed the **Bolam** test stating:

> **"My Lords, I agree with these submissions to the extent 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 if 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."**

[49] In the decision of **Desmond Andrew Darville v Minister Responsible for Education Science & Technology and AG 2017/CLE/gen/00377**, our local Courts provided the necessary elements to prove negligence in tort. At paragraph 49 of this case, the Honourable Madam Senior Justice Indra Charles (as she then was) provided:

> **"The Claimant bears the burden of proving that (i) the defendant owed him a duty of care, (ii) the duty was breached and (iii) such breach caused the damage."**

[50] It may also prove useful to outline the law on hearsay evidence. **Section 39** of **the Evidence Act, Chapter 65** of the Statue Laws of The Bahamas provides:

> **"39. (1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence.**
>
> **(2) Hearsay evidence may be admitted —**
>
> **(a) where the statement is a necessary part of any fact or transaction which is being investigated by the court;**
>
> **(b) where the knowledge, intention, motive, state of feeling, state of mind or state of body of any person is a fact in issue and the statement proves or disproves the said knowledge, intention, motive, state of feeling, state of mind or state of body;**
>
> **(c) where the statement is an admission or confession made by or to the prejudice of the party against whom it is sought to be proved but subject to the provisions of sections 14 to 19;**

(d) where the statement was made in the presence and in the hearing of the person against whom the evidence is tendered, and where such person had an opportunity of replying to such statement;

(e) where the statement is contained in any official record, book or register, kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept;

(f) where the statement was made by a person since dead as to the cause of his death or as to any of the circumstances of the transaction resulting in his death in cases in which the person's death is the subject of a criminal charge:

Provided —

- **(i) that the person at the time he made the statement was in actual danger of death and in the expectation of death; and**
- **(ii) that the statement was of such a nature that it could have been given in evidence in legal proceedings if the person making it had survived;**

(g) where the statement was made by a person, since dead, in the ordinary course of business, in discharge of a duty incumbent upon such person for the purpose of recording or reporting something which it was the duty of the person to perform, at or near the time when the matter stated occurred and of his own knowledge:

Provided that evidence of such statement shall not be admitted in order to prove any fact mentioned therein which it was not the duty of the person making it to embody in such statement;

(h) (i) where the statement was made by a person since dead, whether by himself or by some person shown to be duly authorised in that behalf, and was made against his pecuniary or proprietary interest at the time he made it, and related to the circumstances of which he had special knowledge: Provided that the person making it had no interest to misrepresent the matter stated,

(ii) a statement charging a person with a liability in one part of it is a statement against his pecuniary or proprietary interest even though in another part, it may discharge him from such liability;

(i) where the statement was made by a person, since dead, and gives the opinion of such person as to the existence of any public right or custom, or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter, had arisen;

(j) where the statement is tendered in proceedings in which the existence of any relationship of blood or marriage is a fact in issue and where the statement related to the existence of the relationship and is made by a person since dead and shown to the satisfaction of the court to be himself related by blood or marriage to the parties thereto: Provided that the statement was made before the question in dispute had arisen;"

Burden of Proof

[51] The burden of proof in civil matters. This burden lies with the Claimant. Madam Justice of Appeal Charles posited in the case of **Larry A. Ferguson and RBC Royal Bank (Bahamas) Limited SCCivApp Np. 79 of 2023** at paragraph 102:

> **"The burden of proof often lies with the Claimant/appellant because he is the party asserting the claim. However, according to the principle of onus probandi actori incumbit (he who asserts must prove), it may also lie with the defendant/respondent, if the defendant is asserting affirmative defences or claims of its own. Once the party bearing this burden of proof has provided evidence in support of its claim, the burden then shifts to the other, thus allowing this party to rebut the evidence with its own."**

[52] Charles, JA further relied on **Section 82 of the Evidence Act 1996** which reads:

> **"82. (1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact the burden of proof shall lie on that person."**

[53] At paragraph 102 in the case **of Claudia Edwards Bethel v The Attorney General of The Bahamas et al 2015/CLE/gen/00245**, the Honourable Madam Justice Charles, as she then was, relied on the case of **Miller v Miller [1947] 2 All ER 372** at

> **"[102] In Miller v Minister of Pensions [1947] 2 All ER 372, Denning J, as he then was, said: "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not. Expressing that in percentage terms, if a judge concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win…"**

Discussion and Analysis

[54] As highlighted in the **Desmond Andrew Darville v Minister Responsible for Education Science & Technology** case above, there is a three part test when proving negligence. Firstly, the Claimant must prove that the Defendant owed her a duty of care. Secondly, the Claimant must prove that that duty was breached. Lastly, the Claimant must prove that such breach caused the damage.

[55] The Claimants submitted the authority of **Bolam v Friern Hospital Management Committee [1957] AER 118** which I rely on here.

> **"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 that particular art."**

[56] In regards to the circumstances of this case, the Defendants did have a duty of care to ensure that its equipment met the standards for surgery. This includes ensuring that the autoclave was functioning and properly sterilizing the surgery tools and equipment. This therefore,

satisfies the first part of the test for negligence, that the Defendant did owe a duty of care to the Claimant to ensure that the equipment was appropriate for surgery.

[57] However, I am unconvinced that, the second part of the test for negligence, that is, that the duty was breached, is satisfied. The Claimant contends that the autoclave was malfunctioning and as a result the surgical equipment used on her during the procedure resulted in her developing TASS.

[58] While it was acknowledged by expert evidence that the unsterilized equipment may cause TASS, it was also recognized that other factors such as may contribute to the development of TASS. The Affidavit of Nurse Marsha Bain provided that a retest of the autoclave was ordered and the results came back normal, showing that there was no spore development. The report for this was in the bundle of documents. Contrastingly, the Claimant's evidence that the autoclave was not working is entirely hearsay as she was informed of the malfunction by Dr. Sweeting, who was informed by a Nurse, who was informed by another Nurse. There is no report before the Court which supports that the autoclave was not functioning on the day of the Claimant's operations.

[59] Additionally, the evidence of Dr. Donovan Calder provides that unsterilized equipment is not the only circumstance that can cause TASS. Dr. Calder mentioned other factors such as the use of intraocular fluids and devices during surgery and the use of topical ointment at the end of the surgery.

[60] Therefore, in consideration of the evidence, which provides that the autoclave was functioning on the day of the surgery, the TASS incurred by the Claimant, although unfortunate, does not appear to stem from unsterilized equipment due to a malfunctioned autoclave. Consequently, the second stage of the test for negligence has not been satisfied.

[61] In consideration of the above and the evidence provided by the parties, I am of the opinion that the Claimant was unable to substantially provide evidence to this Court that the autoclave had failed the spore test, other than hearsay evidence of medical staff. Contrastingly, the Defendants have provided a report outlining that the autoclave was functional, which would result in the equipment being used in the surgery being properly sterilized. Therefore, with a functional autoclave, the Claimant's TASS cannot be linked to improperly sterilized equipment. In other words, it is more probable due to the number of procedures, which were under immediately afterwards than not that the Claimant's TASS developed due to something other than the Defendant's equipment used for the surgery on 26 September 2018.

CONCLUSION

[62] In conclusion, I find that the Defendant owed the Claimant a duty of care, however, based on the circumstances of the case and the available evidence presented, it has not been proven that that duty of care was breached as no conclusive evidence was produced that the equipment was not functioning at the time of the surgery.

[63] I therefore order:

1. The Claimant's claim for negligence is dismissed.

2. The Claimant is to pay the Defendant costs, to be taxed if agreed.

Senior Justice Deborah Fraser

Dated this 26th day of February 2025