Locke v Camberwell Health Authority

[1991] 2 Med LR

LORD JUSTICE TAYLOR: This is an appeal by Mr Daniel Davies, the plaintiffs solicitor in the action, against the order of Morland J dated December 1, 1989 ([1989] 1 Med LR 253), that he pay personally the defendants' costs incurred from November 1, 1987, onwards, pursuant to order 62 rule 11 of the Rules of the Supreme Court.

The brief history is as follows. The plaintiff suffered from angina and on September 11, 1981, at the defendants' Kings College Hospital, a Dr Gishen commenced a cardiac catheterisation procedure. After unsuccessful attempts via the femoral arteries in the right and left legs, a further attempt was made via the right brachial artery. The artery went into spasm, there was clotting, the blood flow ceased and the procedure was terminated prematurely. Surgery was performed some 30 minutes later by Dr Bentley but was only partially successful. The plaintiff was left with continuing disability in her right arm. She accordingly instructed Mr Davies to make a claim. He in turn consulted Dr Sutton, an expert cardiologist, instructed counsel and obtained legal aid. An action for negligence was begun by writ issued on September 1, 1983. The statement of claim was served on October 21, 1984, and a defence on December 31, 1984. Attempts to obtain documents and particulars and various communications and consultations between Mr Davies, junior counsel and Dr Sutton continued during the period 1984 to 1988. In October 1988, leading counsel was instructed for the plaintiff and, after consultation with Dr Sutton on February 8, 1989, both counsel in a joint opinion advised the action should not proceed to trial and legal aid should be withdrawn. The defendants' solicitors would not agree to the action being discontinued unless Mr

Davies paid the defendants' costs personally. On May 15, 1989, Simon Brown J granted leave to the plaintiff to discontinue and adjourned the defendants' application for costs against Mr Davies. It came before Morland J and was heard over three days from November 6 to 81, 1989. On December 1, 1989, after further argument, he gave judgment and made the order now challenged on this appeal.

Order 62 rule 11 (1) provides as follows so far as is relevant:

"Subject to the following provisions of this rule, where it appears to the court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the court may -

"(a) order -

"(i) the solicitor whom it considers to be responsible ... to repay to his client costs which his client has been ordered to pay to any other party to the proceedings; or

"(ii) the solicitor personally to indemnify such other parties against costs payable by them ..."

There has been a divergence of judicial views as to the degree of culpability which must be shown before an order should be made against a solicitor pursuant to the rule. In *Holden v CPS* [1990] 2 QB 2617 it was held, in relation to criminal proceedings, that a serious dereliction of duty

had to be proved and the court stated that there was no distinction in this regard between criminal and civil proceedings. However, in *Sinclair Jones v Kay* [1989] 1 WLR 114, a civil case in which the question arose specifically in relation to order 62 rule 11 this court had held that the words used in the rule,

"costs incurred unreasonably or improperly or wasted by the failure to conduct proceedings with reasonable competence and expedition ..."

should be given their ordinary English meaning. In *Gupta v Comer* [1991] 2 WLR 494, this court followed the decisions in *Sinclair Jones v Kay* and the Master of the Rolls, Lord Donaldson, indicated that the observations in *Holden v CPS* were obiter in so far as they related to civil cases and to order 62 rule II. He reiterated in *Langley v NW Water Authority* "The Times" April 10, 1991, that this court is bound by *Sinclair Jones v Kay* and *Gupta v Comer.* Accordingly we are so bound. Mr Matheson wishes to reserve the point for possible consideration by the House of Lords. In view of the conclusions I have reached on the facts, however, the outcome of the present case would not be affected whichever test were adopted. It is therefore unnecessary to say more.

Ultimately, the issue in this case is focused upon facts within a small compass, but it is necessary to set out the background and rival contentions in some detail. Mr Davies is a solicitor with an extensive legal aid practice. He has one partner but deals himself with the firm's litigation. He impressed the trial judge both as a man and as a solicitor and the judge said of him ([1989] 1 Med LR at p 257 col I)-.

"I have no doubt he provides an excellent legal service in a socially deprived area."

Dr Sutton is a highly qualified cardiologist with a Harley Street practice and a consultant post at the Westminster Hospital. He had previously been director of the cardiac catheterisation laboratory of the National Heart Hospital. Junior counsel, Mr Spon-Smith, a former solicitor, had had ten years' experience at the Bar and was familiar with negligence claims.

Upon being instructed, Mr Davies promptly sought preaction discovery of documents and, after a long delay, the hospital records were disclosed, but only to the plaintiffs medical adviser. They were seen by Dr Sutton whose first report was dated July 13, 1984. It was somewhat equivocal and contained the following passage:

"On these grounds it would seem that substantial compensation is justified, although I believe that it should be stated that she has been the unfortunate victim of complications of medical procedures rather than the victim of medical negligence."

However, Dr Sutton raised three matters,

(1) There was no note of Heparin, an anti-coagulant, being administered during the catheterisation procedure.

(2) Dr Gishen, the doctor who performed it, apparently lacked experience, and

(3) Consideration of further operative procedures after the complications developed was lacking.

Junior counsel rightly advised that Dr Sutton be asked to clarify the inconsistencies in his report and drew attention specifically to the definition of professional negligence laid down by the House of Lords in *Whitehouse v Jordan* [1981] 1 All ER 267 at p 281. Dr Sutton's addendum in effect withdrew point (3) above but adhered, albeit cagily, to (1) and (2). Junior counsel advised there was a prima facie case and settled a statement of claim.

After delivery of the defence, counsel advised that Dr Sutton be asked what his opinion would be if the facts pleaded there were substantiated. In a second report dated April 9, 1985, Dr Sutton noted that the defence pleaded Dr Gishen had administered 3000 units of Heparin, but again commented on the absence of any note to that effect in the hospital records. He considered the allegation that the doctor lacked experience could no longer be pursued and that that somewhat weakened the case but that a claim for compensation was justified. Mr Spon-Smith was clearly concerned on reading this and sought a conference with Dr Sutton. This took place on June 12, 1985. Counsel took a full note and correctly required Dr Sutton to check it. He did so and gave it his approval. The note shows Dr Sutton to be supportive of the validity of the plaintiff s claim. He asked to see the hospital records a second time and having done so commented again

"... there is no evidence at all in the notes of Heparin being given at the time of catheterisation."

On December 28, 1985, Mr Davies served the plaintiffs' list of documents and requested the defendants' list. It was not until August 1986 that the defendants served their list and copies of their documents, despite Mr Davies' efforts, which included at one stage signing judgment against the defendants although it was set aside by consent. On receipt of the defendants' documents counsel advised that Dr Sutton be asked to confirm that they contained nothing he had not already seen. This was eventually confirmed by Dr Sutton in March 1987. Accordingly, by this time, Dr Sutton had reviewed the hospital records disclosed by the defendants three times. Each time he found nothing to support the allegation in the defence that Heparin had been given at the time of the catheterisation procedure.

Further and better particulars of the defence had been sought in August 1985, the court had ordered on November 5, 1986, that they be served in seven days and, after an "unless" order, they were finally served in April 1987. In October 1987 junior counsel advised on the merits in the following terms:

"At present I see no reason to doubt that the plaintiff has a good arguable case as pleaded. I rely, of course, upon the evidence of Dr Richard Sutton who, so far as I can judge, is suitably experienced and qualified."

Dr Sutton's reports dated July 13, 1984, April 9, 1985, and February 2. 1987, were disclosed to the defendants on February 15, 1988. Leading counsel, Mr John Archer QC, was instructed on behalf of the plaintiff in late 1988. On February 8, 1989, following consultation with Dr Sutton, both counsel concluded that the claim should not be pursued. Of the three pleaded allegations of negligence, Dr Gishen's experience could not now be attacked and Dr Sutton no longer considered failure to attempt post-operative surgery could be relied upon. This left the question whether Heparin had been used at the relevant time. Leading counsel's view was that despite the absence of any corroborative note, if (as the defence

rendered likely) Dr Gishen stated on oath he had used Heparin, the judge would probably believe him. In those circumstances leading counsel expressed his approach as follows in a letter to Mr Davies written after the present dispute arose and annexed to Mr Davies' affidavit:

"I considered with junior counsel not only our duty to the plaintiff and the Legal Aid Fund but also the desirability on public policy grounds of proceeding to trial where success would depend on showing a distinguished and experienced specialist to be lying or mistaken about whether he had omitted a routine precaution in the procedure and we came to the conclusion that the action ought not to be continued on legal aid."

When the defendants' solicitors made their claim for costs against Mr Davies personally, he asked them by letter for full details of their allegations well in advance of any hearing of the issue. By letter dated May 8, 1989, the defendants' solicitors wrote that in view of the contents of Dr Sutton's reports dated July 13, 1984, and April 9, 1985, they failed to see

"... how this litigation could justifiably have been continued to such a stage."

No other allegation was made. It is pertinent to point out (and Mr Justice Simon Brown did so when the matter was before him) that the defendants' solicitors had had Dr Sutton's reports for 15 months and had not thought it right to raise with Mr Davies their supposed inadequacy to support the plaintiff s claim.

Before Mr Justice Morland, Mr Archer QC sought to argue Mr Davies' case on the basis of the allegations contained in the letter of May 8, 1989. At the end of the first day of the hearing, Mr Grace, for the defendants, interrupted Mr Archer's argument to hand the learned judge a document he described as "the crown jewel in the case". He in fact produced three copies, handing one to the judge and one to Mr Archer. The document was one page headed "Cardiac Catheterisation Procedure Record" (CCPR) dated September 11. 1981. At the foot of the page was a space labelled "Remarks". In that space three drugs were mentioned, "Diazepam, Hep 3000 units, Isosorbide"; presumably "Hep" referred to Heparin. The inference Mr Grace sought to draw was that the CCPR proved Dr Gishen had given Heparin during the catheterisation procedure and that anyone reading the hospital notes should and would have seen this entry.

Somewhat surprisingly, when Mr Davies was cross-examined on Day 2 before Morland J, he was not asked any questions about the CCPR. The plaintiff's advisers at the hearing were clearly uncertain as to whether it had ever been produced to them but tended to accept that it must have been. On the other hand disclosure of hospital notes was only to Dr Sutton until copies of the defendants' documents were formally served in June 1986. Dr Sutton had asserted twice that there was no note of Heparin being used and confirmed a third time there was nothing about Heparin in the copy documents disclosed in 1986. In any event, it was common ground that Heparin had been administered by Dr Bentley half an hour after the catheterisation procedure was abandoned so there was room for confusion as to whether it had been administered at the relevant time.

The "crown jewel" figured prominently in the learned judge's judgment. He assumed that the CCPR was amongst the hospital notes, and that if those acting for the plaintiff, Mr Davies and junior counsel, had been doing their job properly they would have seen it and found in it clear confirmation of the plea in the defence that 3,000 units of Heparin were administered. The learned judge put the matter thus [1989] 1 Med LR at p 261 col 1:

"'By the time the hospital records were disclosed the only allegation still alive was the allegation that Dr Gishen had failed to administer Heparin before the brachial artery catheterisation. Examination of the records would have revealed that this allegation was not sustainable".

The learned judge castigated counsel for his advice of October 16, 1987, which was "very short", "inadequate", "cavalier" and "just not good enough" because it did not examine and analyse the medical records. He concluded his judgment ([1989] 1 Med LR at p 261 col 1):

"In my judgment Mr Davies in this particular instance when receiving counsel's advice on October 16, 1987, did not conduct the litigation with reasonable competence and was guilty of a serious dereliction of duty. He was guilty of negligence which requires reproof. It was not mere negligence or a slip but a real dereliction of duty. It was his primary responsibility to ensure that the hospital records were examined carefully by someone with the necessary legal expertise so that the strength or otherwise of the plaintiff s claim could be evaluated in the light of those records and Dr Sutton's report. This failure caused a waste of costs which the defendants can only recover from Mr Davies. In my judgment Mr Davies was guilty of serious dereliction of duty in failing to send back the papers to Mr Spon-Smith following receipt of the advice of October 16, 1987. He should have said, in view of the weakness of the plaintiffs case, "I consider you should have given an advice based on a detailed analysis of the medical notes and Dr Sutton's reports."

Thus the determining factor in the learned judge's analysis of the case was that had the notes been carefully scanned By Mr Davies or, at his prodding, by counsel, the CCPR would have been seen, its alleged significance would have been realized and the case would not have been

pursued. The criticisms of counsel's advice, and of Mr Davies for failing himself to examine the hospital notes or require counsel to examine them were all made on the assumption that the CCPR was there to be seen among the notes and would have destroyed the plaintiffs case.

On this appeal, application was made by Mr Matheson to put before the court fresh evidence bearing upon the CCPR, the so-called "crown jewel" which was so dramatically introduced before Morland J and which so impressed him. The evidence consists of a further affidavit by Mr Davies, one from junior counsel Mr Spon-Smith, one from leading counsel Mr Archer QC and two from Dr Sutton. The effect of those affidavits is to make it highly improbable that the "crown jewel" was ever displayed to the plaintiff's advisers, medical or legal, until it was produced in court. No deliberate suppression is suggested but the affidavits of those professional men individually and in the aggregate made a strong case for believing that somehow the CCPR was inadvertently omitted from the documents disclosed.

The application to introduce this evidence was tenaciously opposed. Applying the principles laid down in *Ladd v Marshall* [1954] 1 R 1489 it was clear that the fresh evidence would probably have an important influence on the result of the case and that it is credible evidence. This left the final question, whether the evidence could have been available at the hearing with the exercise of reasonable diligence. As to that, it was submitted that the way the CCPR was introduced, the fact that there had been no prior reliance on it or mention of it and the absence of any questions about it to Mr Davies made it impracticable for the plaintiff s advisers to deal with it to investigate it or prepare evidence about it at such short notice. We concluded there was force in that submission and accordingly allowed the evidence to be admitted.

Putting that fresh evidence together with the documentation already available revealed a strange situation with the following salient features.

(1) The running sequence of hospital notes, which undoubtedly were disclosed, contained two passages apparently in the hand of Dr Gishen and each signed by him. The first described the catheterisation procedure. It listed three drugs used. None of them was Heparin. The other passage was three pages later where Dr Gishen referred the plaintiff to Dr Bentley with an account of what had happened including again mention of the drugs he had used. None of them was Heparin. By contrast there were several express references in the same series of notes to the use of Heparin by Dr Bentley. Accordingly, absent the CCPR, Dr Sutton was clearly right in his repeated assertion that there was no note stating Heparin had been used in the catheterisation procedure, and in particular no note where one would have expected one.

(2) In his two further affidavits, Dr Sutton, after some temporary doubts, excluded the possibility that he had ever been shown the CCPR on three grounds:

(a) because he had expressly looked for a CCPR in the expectation there would be one but found none;

(b) because the CCPR produced at court showed a larger catheter had been used than he would have thought appropriate for the plaintiff (8 rather than 7) and he would have so commented had he seen it; and

(c) because the dosage of 3000 units was likewise inappropriate being less than half the dosage he would have used for a patient of the plaintiff's weight, a point he would have made had he seen the document.

(3) The CCPR was not identified in the defendants' list of documents. Nor was it contained in any bundle prepared for use at the hearing.

In these circumstances, Mr Grace conceded before this court the probability was that the CCPR had never been disclosed either to Dr Sutton or in the copy documents supplied in August 1986. That concession clearly shot away the foundation on which the judgment of the learned judge was based. The learned judge cannot be criticized for his misapprehension. Had he known the CCPR was being produced for the first time at the hearing he could not have found that the omission by Mr Davies or counsel to scan the records, whether culpable or not, had caused any waste of costs.

Nevertheless, despite his concession, Mr Grace persisted in contending that the learned judge's order could be upheld on broader grounds. He relied particularly upon a passage in the judgment following the criticism of counsel's advice. The learned judge said ([1989] 1 Med LR at p 261 col 1):

"ln my judgment any solicitor, even one with no experience of medical negligence cases, who had read Dr Sutton's reports and letters would inevitably have come to the conclusion that the plaintiff's case was very weak. With the disclosure of the contemporary hospital records there was the material upon which the validity of Dr Sutton's factual assumptions or his expert opinions and conclusions could be assessed. No such assessment took place. In my judgment if a competent assessment had then taken

place it would have been apparent that the plaintiff's case was unsustainable. Medical negligence cases by their very nature are extremely costly. In my judgment in all such actions after discovery it is to be expected of a solicitor conducting the action with reasonable competence that he will ensure that an assessment of the plaintiffs case takes place. Either the solicitor himself must carry out that stocktaking or ensure that counsel does. In this case no analysis of the hospital records was done either by solicitor or counsel. In most cases it would be necessary to have the assistance of the medical expert to help solicitor and counsel in the translation of abbreviations and technical medical terms and the medical significance of entries in the records. In practice this is almost always done in conference or consultation. In this case no such procedure took place."

Mr Grace submits that in that passage the learned judge is criticizing Mr Davies' failure to review the case after counsel's impugned advice and to conclude that the evidence was too weak to justify proceedings. I repeat that in my view the learned judge's criticism focused on the failure to discover the CCPR which the learned judge mistakenly believed was there to be found on a proper scrutiny. That is clear from the sentence I have underlined above and from the passages quoted earlier from the judgment. But although absence of causation would have been sufficient ground for upsetting the learned judge's order, fairness to Mr Davies and junior counsel requires consideration of the learned judge's strictures upon their conduct. I have reached the firm view that, with the greatest respect to the learned judge, those strictures were ill-founded.

Junior counsel

The learned judge's criticism centred on the advice of October 16, 1987. He complained of its brevity and that Mr Spon-Smith had not personally examined and analysed the hospital notes. Clearly, if counsel had received fresh instructions in a new medical negligence case to advise on liability

and had done so in the brief terms of Mr Spon- Smith's October 1987 advice, he would nowadays be open to criticism, whatever may have been thought acceptable or even heroic in earlier times. But here, two points of distinction seem to have escaped the learned judge.

First, Mr Spon-Smith had been advising on a regular and continuing basis for over three years. His first advice was in July 1984 and he had advised on at least seven occasions prior to the impugned advice of October 1987. Further, he had requested and conducted the conference with Dr Sutton in June 1985 expressly because of his concern about the inconsistencies in the doctor's reports and the strength of the case. He diligently took notes of that conference and submitted them for Dr Sutton's agreement. When the defendants' copy documents were disclosed in August 1986, Mr Spon-Smith checked with Dr Sutton that there was nothing new in them. Accordingly, I think the judge's complaint that no assessment took place after disclosure of the records was unjustified as was his assertion that no conference was held. The history shows that Mr Spon-Smith was meticulous in checking Dr Sutton's evidence with him at each stage and enquiring what impact any fresh development might have made on that evidence. It may be that in some cases counsel needs, as a matter of duty, personally to go through the medical record line by line with his medical expert. This may particularly be so close to trial if some issue has arisen on the notes so that counsel needs to be well briefed to examine his expert concerning those notes or cross-examine the opposing expert. But that situation had not yet arisen here and, whilst it might well have been proof of conscientiousness for counsel to have gone through the hospital records with Dr Sutton, (a) I do not see what gain would have resulted and (b) I think the approach of having continuing consultation with the doctor who saw the notes three times was a proper one in the circumstances.

Secondly, the learned judge does not seem to have registered that the purpose of the advice in October 1987 was expressly to have the limitation on the legal aid certificate removed. What was required therefore was simply the opinion of counsel, who had been advising and monitoring the

case throughout, that at this stage legal aid should be extended. Having examined the documents and chronology in detail. I consider that Mr Spon-Smith' s conduct of the case, cannot be criticized. He acted promptly throughout. He was alive to the difficulties of the case and the inconsistencies and lacunae in Dr Sutton's reports. At each stage he sought clarification or review where appropriate. I do not think his advice of October 1987 deserved the disparagement it received from the learned judge.

Mr Davies

Our attention was helpfully drawn to relevant authority especially as to the relationship between solicitor and counsel and as to how far the former can rely on the latter's advice. In particular, citation was made from the following cases: *Davy-Chiesman v Davy-Chiesman* [1984] Fam 49, *Orchard v SE Electricity Board* [1987] OB 565, *Swedac v Magnet and Southern plc* [1990] FSR 89 and *Manor Electronics v Dickson* [1990] NLJ 590. The principles relevant to the present case to be derived from those authorities can be shortly stated.

(1) In general, a solicitor is entitled to rely upon the advice of counsel properly instructed.

(2) For a solicitor without specialist experience in a particular field to rely on counsel's advice is to make normal and proper use of the Bar.

(3) However, he must not do so blindly but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it.

(4) Although a solicitor should not assist a litigant where prosecution of a claim amounts to an abuse of process, it is not his duty to attempt to assess the result of a conflict of evidence or to impose a pre-trial screen on a litigant's claim.

(5) The jurisdiction to order costs against a solicitor personally is one which falls to be exercised with care and discretion and only in clear cases.

Applying those principles to the present case, can Mr Davies' conduct fairly be criticized? In my judgment it cannot. He acted promptly throughout and followed to the letter the advice he sought and received from counsel. Any delays in the case were caused by the defendants' failures to disclose documents or serve particulars despite court orders, and by tardy responses from Dr Sutton. Although this field of litigation is not as esoteric as some, it was not one in which Mr Davies had much experience and he was justified in relying heavily on counsel's advice.

It is said against him that, on receiving Mr Spon-Smith's advice in October 1987, he ought to have sent the papers back and required counsel to give a more elaborate opinion "based on a detailed analysis of the medical notes and Dr Sutton's reports". As already indicated, I do not consider that Mr Spon-Smith's advice, brief though it was, was inadequate in the context of the whole history of this case. Certainly, there was no reason for Mr Davies to regard it as so glaringly or obviously inadequate as to require him to reject it.

Mr Grace submitted that Mr Davies, along with counsel or if necessary by exercising his sole judgment, should have appreciated the case was so weak that it ought not to be pursued. Further, that he would have appreciated that had he analysed the notes. Once it is conceded that the CCPR was not there, a close study of the notes would not have revealed any weakness in the allegation that Heparin had not been administered at the vital time. On the contrary, the notes tended to support the allegation, albeit by what was not recorded rather than by what was. It is true that when leading counsel was instructed, he and Mr Spon-Smith came to the conclusion the case should not be pursued. Whilst respecting that decision, Mr Matheson presented a persuasive argument to the contrary effect. Leaving aside the CCPR, Dr Gishen's two entries in the hospital notes made no mention of Heparin although other drugs used were mentioned in each entry. Heparin is used where catheterisation is via the arm, but not when it is via the leg. This procedure was transferred to the arm only when attempts via both legs had failed. The complications in the plaintiff's condition arose from clotting, precisely what Heparin is intended to prevent. Dr Gishen could only have been asked to cast his mind back upon service of the statement of claim in September 1984, three years after the event. Mr Matheson submits it was by no means fanciful that the court might have concluded the doctor was mistaken in his recollection that he had used the drug.

In all the circumstances of this unusual case, I can see no ground for criticizing the conduct of Mr Davies. It is particularly unfortunate that, for reasons unknown, one document the "crown jewel" - was by some mischance not revealed to the plaintiff's advisers on any of the three occasions documents were disclosed. Had it been produced the case would undoubtedly have taken a different course, and in all probability this application would never have arisen. As it is, I have no doubt that the appeal must be allowed.

A respondents' notice was served claiming that the learned judge ought to have awarded indemnity costs against Mr Davies, not merely costs on the standard basis. In the upshot that claim does not arise for decision, but I feel bound to say that I think it regrettable that it was ever made.

SIR GEORGE WALLER: I entirely agree with the judgment of my Lord. I will add a few words explaining my reasons.

The judge in the course of his judgment assumed that if the hospital notes had been carefully examined, the fact that Heparin was used would have been seen and the judge found that Dr Sutton was wrong in stating that the administration of Heparin is not recorded in the patient's record. From the evidence given before us it is now clear that these assumptions were not correct. The fact of the administration of Heparin was not recorded in the hospital notes disclosed to Dr Sutton and the plaintiff's advisers but was in a separate document disclosed for the first time before the judge. The evidence given before us shows that nothing that the plaintiff's advisers or Dr Sutton could do would have revealed this other document until it was produced in court. It was not in the defendants' list of documents. It was a separate document which up to then had not been disclosed at all.

This fundamentally alters the case which the learned judge had to consider. I do not repeat here the duties of a solicitor in conducting legal proceedings. It is sufficient for me to say that, viewed against the background I have mentioned above, it is not possible to criticize in any way Mr Davies' conduct of the case.

I would allow this appeal.

LORD JUSTICE PARKER: I agree with both judgments. I add to those already given some observations of my own only because we are differing from the learned judge.

The application before the learned judge unfortunately proceeded wholly on the assumption, common to both sides, and thus to the judge, that the allegedly crucial CCPR had been disclosed to Dr Sutton initially and thereafter on discovery to the plaintiff's advisers. Mr Grace very properly conceded in this court that it had not been disclosed to the plaintiff's advisers and that they had not seen it at all until it was produced by him in the course of the hearing before the judge. He did not concede that Dr Sutton had not seen it but the further evidence in my judgment makes it clear that he had not seen it either. It was this mistaken assumption which was the entire foundation of the judgment and there was no respondents' notice seeking to uphold the judgment on other grounds.

Mr Grace nevertheless sought to contend that the judgment was based only partly on the mistaken assumption and could still be upheld on other parts. This submission in my view singularly failed. The judgment was clearly based wholly on the assumption and on the assumption alone. In advancing his submission Mr Grace in truth sought to make out a separate case. But no such case can, in my view, be made out.

A somewhat bizarre feature of the case is that if the allegedly crucial document was the killer that it was thought to be, the defendants might well be accused of wasting costs by not having disclosed it at an earlier stage. Had they done so it must be part of their case that competent solicitors and counsel would at once have discontinued. In fact, however, the document was not in my view the killer that it was alleged to be. True it recorded Heparin as having been administered but, in Dr Sutton's view, at less than half the proper rate. It also recorded what Dr Sutton considered was the wrong size of catheter having been used. Hence it would have

been in my view perfectly proper to have continued the action, even if the document had been disclosed. The allegation of no Heparin might have been maintained because the failure to record any Heparin in the handwritten notes signed by Dr Gishen and his referral note must cast doubt on the assertion that Heparin was given at all and it would have formed valuable material for cross-examination. An alternative allegation of administration of too little Heparin might have been added, as also an allegation that the wrong size of catheter had been used.

Had the full facts been before him, I do not doubt that the learned judge would have found any strictures upon either junior counsel or Mr Davies to have been unjustified.

I conclude by recording my surprise that it should have been thought right to pursue this application once the fact that the document had not been disclosed had become clear and my even greater surprise that, the application to admit further evidence, once allowed, the defendants should thereafter have maintained their stance. The appeal therefore will be allowed.

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