Neutral Citation Number: [2023] EWHC 872 (KB)

Appeal No.: KA-2022-CDF-000004
Claim No.: KB-2021-CDF-000027

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY
On Appeal from an Order of DJ Vernon dated 20 October 2022

Cardiff Civil and Family Justice Centre
(but handed down at the Royal Courts of Justice, Rolls Building, London)
Date: 18/04/2023

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

ALUN JENKINSON	**Claimant (Respondent)**
- and -	
HERTFORDSHIRE COUNTY COUNCIL	**Defendant (Appellant)**

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- -

Nigel Spencer Ley (instructed by **Parry Davies Clwyd-Jones & Lloyd LLP**) for the **Claimant**
Geoffrey Brown (instructed by **Plexus Law**) for the **Defendant**

Hearing date: 31 March 2023
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Approved Judgment

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

Introduction

1. The claimant suffered a bad fracture to his right ankle on 21 December 2017 when his foot went into an uncovered manhole or drain gully on Panshanger Lane in Hertford. The defendant admits liability for negligence or breach of statutory duty under s.41 of the Highways Act 1980.

2. The claimant issued his Claim Form on 9 September 2021. The defendant filed its Defence on 30 November 2021, admitting negligence but making no admission as to the extent of injury and putting the claimant to proof on *quantum*. It indicated an intention to instruct its own orthopaedic expert.

3. The case was listed for a CCMC on 7 April 2022. On 20 March 2022, the orthopaedic expert instructed by the defendant, Mr Machin, reported. His report was disclosed to the claimant on 31 March 2022. It opined that though surgical treatment of the damage to the claimant's right ankle, in December 2017, had been the appropriate intervention, following an accurate diagnosis and a correct assessment of the injury, the surgery was performed negligently.

4. Mr Machin concluded that "*had the initial surgery been carried out to the correct standard, then Mr. Jenkinson, in all probability, would have been able to return to work within 3 to 6 months post injury. He would have returned to the same job with minimal restriction and whilst he would have experienced some minor stiffness and ache this would not have prevented him carrying out his normal activities.*"

5. Whether or not the initial surgery was negligently performed, it is common ground that it did not have a good outcome. Over the course of the following three years or so, the claimant underwent six further surgeries, and has a much poorer prognosis than Mr Machin said he ought to have achieved. Mr Ley told me indeed that at one stage amputation was given serious consideration.

6. On 15 March 2022, the claimant wrote to the court proposing an 8-week adjournment of the CCMC to allow the parties to review the case in the light of (a) the claimant's return to work and (b) Mr Machin's anticipated report. The court refused the adjournment.

7. At the CCMC, the defendant renewed what had been the claimant's suggestion that there should be an adjournment to take stock, and indicated an intention to apply to amend the Defence and join the NHS Trust with responsibility for any negligence in the claimant's December 2017 surgery. The claimant resisted the suggestion and the CCMC went ahead, on the basis that any proposal to amend or join the NHS Trust would require a formal application.

8. Directions and a trial date were set without reference to the issues that would arise if the Defence were amended or if the NHS Trust were joined as co-defendant to the Claim and/or defendant to a Part 20 Claim. The trial was listed for 3 days commencing on 21 August 2023. Mr Ley accepted before me that if the Defence served in November 2021 had been the Amended Defence for which the defendant seeks permission, or permission for that Amended Defence had been granted at the

CCMC, in all probability a later trial date would have been required because the claimant would want to join the NHS Trust as a co-defendant.

9. The defendant issued its application to amend the Defence on 25 May 2022. It was heard by District Judge Vernon on 26 September 2022. He handed down a reserved judgment on 20 October 2022. For the reasons he gave in that judgment, and by Order of that date, DJ Vernon refused the application.

10. The defendant now appeals against that refusal, with permission granted by Jefford J, DBE.

The Decision

11. The proposed amendment to the Defence would add a new paragraph 3A, in the following terms:

"*3A. Furthermore, the Defendant denies that it can properly [be] held responsible for injury loss and damage arising from negligent treatment of the Claimant's original injury, by way of the surgical operation undertaken to reduce and fix the fracture dislocation of his ankle on 22 December 2017 … at the East and North Hertfordshire NHS Trust Lister Hospital. Such treatment was negligent in that:*

(i) The Claimant's ankle was not stabilised in the correct position;

(ii) The surgical fixation was inadequate in regard to reduction of the fracture fragments, lack of removal of the interposed die punch fragment in the tibia and metal work used to hold the fracture;

(iii) Non-removal of the die punch fragment precluded reduction of the posterior malleolar fragment and potentially the medial malleolar fragment;

(iv) The metal work used in the fixation was inadequate;

(v) The three-hole plate in the fibula fracture did not have adequate hold;

(vi) There was no lagging of the fibula fracture;

(vii) Use of a straight four hole locking plate with lateral placement for fixation of the posterior malleolus did not afford the posterior malleolar fragment a significant buttress effect across its entirety, such that the reduction was not as good as it should have been and was likely [sic., unlikely] to be maintained;

(viii) Use of a single posterior to anterior screw in the posterior malleolar fragment will have been insufficient to hold that fracture reduced and was a sub-optimal choice of hardware, even in combination with the plate;

(ix) The plate for the medial malleolar fixation was tenuous on account of its having been positioned too superiorly and the limited number of screws used and

(x) The fixation was inadequate, such that it failed within a few days.

It was as a result of such negligence that the Claimant had to undergo a further 6 operations and has significant problems with working and hobbies, significant pain and dysfunction. But for the negligent treatment, such would not have befallen him. Accordingly, responsibility for the above rests not with the Defendant but with the NHS Trust. Further or alternatively, any chain of causation between the accident and the above has been broken by negligent treatment, which constitutes a novus actus interveniens."

12. DJ Vernon directed himself (judgment at [33]) that on the authorities:

"*a) Assessing loss in cases of tort involves consideration of both factual causation and legal causation. An assessment of legal causation requires the court to consider the extent of the loss for which the defendant ought to be responsible;*

b) Every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible;

c) There is no rule of law that later negligence always extinguishes the causative potency of an earlier tort; and

d) In cases where alleged negligent medical treatment is given to address injuries sustained as a result of an earlier tort, only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation."

13. DJ Vernon derived that final proposition from *Webb v Barclays Bank and Portsmouth Hospitals NHS Trust* [2001] EWCA Civ 1141. He considered that *Webb* establishes as a rule of law that medical treatment of an injury caused by a defendant's tort *cannot* break the chain of causation unless it is such grossly negligent treatment as to be a completely inappropriate response to the injury ("the Specific Rule").

14. On that basis, DJ Vernon reasoned correctly, permission to amend ought not to be granted unless there was a real prospect, under the proposed amendment, of a finding at trial that the December 2017 surgery had been "*so grossly negligent as to be a completely inappropriate response*" to the initial injury caused by the defendant. He concluded that there was no real prospect of the defendant establishing such negligence.

15. On the basis, therefore, that the defendant had not shown a real prospect of establishing a necessary ingredient of the proposed defence, permission to amend was refused.

16. I agree with Mr Brown's submission that as a result, DJ Vernon did not exercise a discretion over whether to grant permission. The question did not arise and the refusal of permission was not on discretionary grounds. If, which is the defendant's case on appeal, *either* the Specific Rule does not exist *or* DJ Vernon was wrong to find that there was no real prospect of the defendant satisfying the Specific Rule at trial, then I shall be entitled to exercise my discretion afresh.

17. That said, DJ Vernon made some observations concerning the exercise of discretion that, if sound, I would consider it appropriate to take into account. Having expressed

his decision to refuse permission on the ground that the proposed amendment had no real prospect of success, he said this:

"*45. In addition, I should also say that there are a number of reasons why permission to amend should not be granted in this case which would have been relevant to the exercise of the Court's discretion.*

46. First, I agree with and accept the significance of the issues identified by Mr Ley in paragraphs 10 a. to c. of his written submissions. They are all matters which show that prejudice would be suffered by the Claimant in the event that permission for the amendment was granted. By contrast, I consider that there is little (if any) prejudice to the Defendant in my refusing permission. In light of my conclusion above on the prospects of success of the issue raised by the proposed amendment, there is no prejudice caused to the Defendant by way of possibly being found liable for losses which should not be attributed to the Defendant. That is a point reinforced by the fact that it is still open to the Defendant to issue proceedings for an indemnity or a contribution from the alleged negligent treatment provider.

47. Second, to grant permission for the amendment is very likely to cause real disruption to the litigation generally and is likely to lead to the loss of the trial which has already been listed. It is also a course of action which would necessitate extensive further case management and further costs management, including budgeting for an additional party."

18. I regret to say that I consider every element of that analysis to be flawed. The starting point for any exercise of discretion would be that contrary to the District Judge's conclusion, the proposed amendment had a real prospect of success. Only then would the question arise whether as a matter of discretion the court should grant permission. The defendant had acted promptly and the prospect of amending had arisen early in the proceedings, only a few months after Defence and before the CCMC listing. There was a trial listing, but only because the court had refused *the claimant's* request to allow the parties time to reflect on the implications of the possible negligence of the NHS Trust before holding the CCMC.

19. The points taken by Mr Ley in paragraphs 10 a. to c. of his written submission before the District Judge, with respect, were all plainly bad points:

(i) "*a. If the Defendant pleads a defence of novus actus whatever the merits of that defence, Mr. Jenkinson will need to be advised that the only completely safe course is to apply to join the Hospital as a second Defendant, so that if the defence succeeds, he is able to recover compensation from the Hospital;*"

That is not prejudice, it is merely the consequence of a properly arguable possibility (if it exists) that the Hospital was responsible, *and the defendant was not*, for a major part of the loss and damage that the claimant wants to claim. In any event, it would have been the situation faced by the claimant if the proposed amendment had appeared in the original Defence at the end of November 2021

(ii) "*b. a direct claim against the Hospital is now statute-barred (the operation took place on 22/12/17 and the 3-year limitation period expired in*

December 2020); Mr. Jenkinson would doubtless face a limitation defence and be forced to rely on s.33 of the Limitation Act, and to have a split trial on this issue against the Hospital;"

There was no explanation, or evidence, before the District Judge as to why 22 December 2017 (the date of the initial surgery) might be the 'date of knowledge' under s.14 of the Limitation Act 1980 for any claim by the claimant against the NHS Trust. There was and is no basis for any suggestion, nor was the suggestion made, that *if* such a claim was time barred, it was not already time barred when the claimant commenced proceedings. In any event, a time bar difficulty, if there is one, over suing the NHS Trust, was not arguably created by the failure of the proposed causation defence and associated allegation of negligence against the NHS Trust to appear in the original Defence at the end of November 2021. Mr Ley rightly conceded as much in the oral argument before me, accepting, on reflection, that he could not rely on any time bar issue as relevant prejudice.

(iii) "*c. if successful in being able to proceed against the Hospital, it would be necessary for Mr. Jenkinson to embark (unwillingly) on a clinical negligence claim against the Hospital, obtaining orthopaedic evidence either to confirm the allegations of negligence made by Mr. Machin or to rebut them; the costs of such further medical evidence would (at least initially) be borne by Mr. Jenkinson.*"

Like the first point, this is not prejudice at all, let alone prejudice caused by the causation plea not appearing in the original Defence, it is merely the consequence of a properly arguable defence that the NHS Trust *and not the defendant* has liability for much of the loss and damage the claimant seeks to claim.

20. The District Judge's conclusion, therefore, that the points taken by Mr Ley showed relevant prejudice, is flawed. His conclusion that the defendant would not be prejudiced by a refusal of permission to amend was irrelevant to any exercise of discretion, because it was premised on the prior conclusion that the proposed amendment had no real prospect of success. The question of discretion only arises if that prior conclusion is wrong.

21. Finally, as to discretion, the District Judge's reliance on the need for different case management decisions, and a new, later, trial listing, was to my mind misplaced in the circumstances of this case. The CCMC proceeded, and directions including a trial listing were set, in full knowledge that those directions, and trial listing, were suitable only if the expected amendment application either did not materialise or failed. To rely upon their existence as a reason to refuse permission to amend, if it were otherwise appropriate to grant permission, was unfair.

22. This was an amendment application brought in timely fashion, the defendant having acted promptly, prior to the CCMC, in making clear that it would wish to amend, once Mr Machin's report was to hand. There was no suggestion that the defendant could reasonably have obtained Mr Machin's report (or a similar report) any earlier; and it would not have been responsible to plead the causation defence proposed by the amendment without such a report. The trial listing and pre-trial directions set at the

CCMC were only apt if there was no such defence, and cannot fairly have been intended to pre-judge whether the expected amendment application should succeed.

23. In short, if the causation defence has a real prospect of success, then this was and is straightforwardly a case for granting permission to amend, to ensure that the real issues are contested and that the defendant is not at risk of being held liable for loss and damage that was not its responsibility merely because it only became able to put that defence forward a few months after it had been required to file its Defence.

24. The refusal of permission to amend here stands or falls, therefore, upon DJ Vernon's conclusion that the causation defence that the amendment would plead has no real prospect of success.

The Specific Rule

25. In *Webb*, the claimant, an employee of Barclays Bank, stumbled and fell over a protruding stone in their forecourt. In the fall, she hyper-extended her left knee, which was affected by the consequences of polio she had contracted as an infant. The knee was left in a grossly unstable condition. She accepted the recommendation of her long-term consultant, an employee of the Portsmouth Hospital NHS Trust, to have an above-knee amputation. That recommendation was negligently given. Amputation should only have been considered, if at all, as a last resort, and even then only with proper disclosure of the prospects and risks. The trial judge, Rougier J, had found *inter alia* that amputation "*has a notoriously bad outcome for old polio patients and it was the consensus of opinion that it should only be used as a very last resort and as a result of some secondary and potential life threatening complication*" (quoted by the Court of Appeal at [30]).

26. In the Court of Appeal, Henry LJ presided and gave a judgment with which Judge and Hale LJJ agreed. As Henry LJ put it, at [38]: "*In simple terms, [the claimant] should have been told: "Mrs Webb, amputation is the very last resort and until we can properly advise you as to the pathology of your left knee and have fully investigated with you modern bracing, you should not consent to amputation."–and [her consultant] should have given reasons why.*"

27. Barclays had pleaded that the amputation and subsequent problems related to it were not caused or contributed to by their negligence but were solely due to the intervening negligence of the claimant's treatment hospital and doctors.

28. In the event, however, Barclays settled with the claimant on terms that covered her claim against them *and* her claim against the NHS Trust. The only matter arising for determination by the Court of Appeal was Barclays' contribution claim against the NHS Trust under the Civil Liability (Contribution) Act 1978. For that purpose, Rougier J had held in a pre-trial ruling that the fact Barclays had pleaded that causation defence did not defeat the contribution claim, relying on s.1(4) of the 1978 Act: "*A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.*"

29. In his trial judgment, Rougier J had proceeded on the basis that "*many of the disabilities and aspects of financial loss have two concurrent causes, which would produce overlaps. The proper approach, therefore, is to look at the total settlement sum [and] assess to what extent the breach of duty of the [NHS Trust] contributed to that sum ...*" (quoted by the Court of Appeal at [51]). The Court of Appeal dealt with the appeal, in effect, on an assumption in the NHS Trust's favour that it would be a defence to the contribution claim against it to show that Barclays' pleaded causation defence was well founded. That meant:

"*52. ... The question here is whether, when an employee is injured in the service, and by the negligence, of her employer, his liability to her is terminated by the intervening negligence of a doctor brought in to treat the original injury, but who in fact made it worse.*

53. Unsurprisingly, there is no general rule on the question. As Laws L.J. said in Rahman v Arearose Limited [2001] [QB] 351 at 366G:

> *"... it does not seem to me to be established as a rule of law that later negligence always extinguishes the causative potency of an earlier tort. Nor should it be. The law is that every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible."*

54. The same question was considered in the High Court of Australia in Mahoney v Kruschick (Demolitions) Pty Ltd (1985) 156 C.L.R. 522 ...

55. Finally, we agree with the editors of Clerk & Lindsell on Torts, when they say:

> *"Moreover, it is submitted that only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation" (18th ed., 2-55)."*

56. We are of clear opinion that [here] the chain of causation was not broken. We have in mind that:

> *(a) the original wrong-doing remained a causative force, as it had increased the vulnerability of the claimant and reduced the mobility of the claimant over and above the effect of the amputation;*
>
> *(b) the medical intervention was plainly foreseeable, and it was also foreseeable that the claimant's pre-existing vulnerability would impose its own risks;*
>
> *(c) given the doctor's conduct was negligent, but was not grossly negligent, and given the findings expressed at (a) and (b) it would not be just and equitable, nor in keeping with the philosophy of the 1978 Act for the wrongdoer to be given, in these circumstances, a shield against (i) being liable to the claimant for any part of the amputation damages; and (ii) being liable to make such contribution to the Trust's amputation damages as was just and equitable.*

57. In short, the negligence in advising amputation did not eclipse the original wrong-doing. The Bank remained responsible for their share of the amputation

damages. The negligence of [the consultant] was not an intervening act breaking the chain of causation."

30. Henry LJ had also presided in the Court of Appeal in *Rahman v Arearose Ltd* [2001] QB 351, decided a month before *Webb*. In that case, Laws LJ gave a judgment, with which Henry and Schiemann LJJ agreed. Rougier J had again been the trial judge.

31. The claimant was a branch manager at the King's Cross branch of Burger King. He was subjected to a vicious assault by two black youths that caused *inter alia* a fracture of the orbital wall of his right eye, for which he was treated at UCLH. Surgery was carried out by way of bone graft to prevent the eye from sinking in its socket. The surgery was performed negligently, such that the bone graft impinged on the optic nerve resulting in permanent blindness in that eye. The claimant's employer was held liable for negligence in and about providing a safe place of work; the University College London Hospital NHS Trust was liable for the negligence in the surgery.

32. In addition to the physical injuries and impairments he suffered, the claimant was left with complex psychological injuries: PTSD largely in reaction to his right-eye blindness; a specific phobia of black people of Afro-Caribbean ethnicity caused by the assault and traumatic elements of criminal proceedings relating to it; and a severe depressive disorder of psychotic intensity with an enduring personality change due to the synergistic effect of the depression and the PTSD that would probably not have developed had the claimant not lost the sight of his right eye.

33. The NHS Trust conceded that the negligent execution of the surgery, causing blindness, was something for which it had sole responsibility, and the employer had none. That was of course the employer's case; and it was also the claimant's case: see the claimant's argument in the Court of Appeal at [2001] QB 354E-F. In light of the findings summarised in the previous paragraph concerning the claimant's psychological injuries, as Laws LJ put it at [23] ([2001] QB 354D): "*Upon the correct view of the sense to be accorded to "concurrent" tortfeasors, the case before us is … not one of concurrent torts. The reason is that on the evidence the respective torts committed by the defendants were the causes of distinct aspects of the claimant's overall psychiatric condition, and it is positively established that neither caused the whole of it.*"

34. The question arose whether the employer should be held responsible for loss or damage beyond that which the claimant would have suffered if the eye injury caused by the NHS Trust's negligence had not occurred (*per* Laws LJ at [26] ([2001] QB 365F)). It being conceded that the NHS Trust had sole responsibility for the loss of the eye, so it was not a case of concurrent torts, the employer argued that the only question for the court was what would the position have been absent the second tort (*ibid*).

35. Laws LJ concluded that, from the point of view of causation, there is no rule of English law that later negligence always extinguishes the causative potency of an earlier tort (*ibid* at [29]). The real question in such cases, he considered (*ibid*, at [33]), is "*what is the damage for which the defendant under consideration should be held responsible. The nature of his duty (here, the common law duty of care) is relevant; causation, certainly will be relevant–but it will fall to be viewed, and in truth can only be understood, in light of the answer to the question: from what kind of harm was it*

the defendant's duty to guard the claimant? … Novus actus interveniens, the eggshell skull rule, and (in the case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered" (original emphasis).

36. Applied to the facts of that case (*ibid* at [34]), Laws LJ rejected the submission that the NHS Trust's "*inevitable acceptance of responsibility for loss of the claimant's eye possesses an absolving effect upon [the employer's] responsibility for the psychological sequelae once the eye injury had been inflicted. … Once one leaves behind, as for reasons I have given one should, the dogmas of novus actus and eggshell skulls, there is nothing in the way of a sensible finding that while the [NHS Trust] obviously (and exclusively) caused the right-eye blindness, thereafter each tort had its part to play in the claimant's suffering.*"

37. If the Specific Rule existed, it is surprising that Laws LJ should consider the NHS Trust's concession of sole responsibility for the right-eye blindness and its consequences to have been inevitable and obviously correct. There was no finding of gross negligence, even if that meant only a high degree of negligent fault; there was not even a suggestion of gross negligence in the sense referred to in *Webb* of medical treatment amounting to "*a completely inappropriate response to the injury inflicted by the defendant*".

38. *Rahman* in the Court of Appeal is not, however, a decision against the Specific Rule, since the point was not taken, by either the NHS Trust or by the claimant, that the employer was liable to the claimant for the right-eye blindness (and its psychological consequences) because the eye surgery in response to the injury resulting from the employer's negligence as to the claimant's safety at work was an appropriate medical response, negligently executed, that did not break the chain of causation.

39. The suggestion in *Clerk & Lindsell*, endorsed by *Webb* at [55], appears in the current (23rd) Edition, at 2-124, as part of the discussion of the House of Lords decision in *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All E.R. 588. In that case, a miner with an additional top joint to the thumb injured that thumb at work. After initial treatment failed to relieve his pain, part of his thumb, including the additional top section, was amputated. The evidence was that amputation was not an appropriate treatment for the workplace injury. The House of Lords held (by a bare majority) that the inappropriate treatment operated as a *novus actus*. The Editors of *Clerk & Lindsell* prefer Lord Reid's dissenting view that only a "*grave lack of care and skill*" should suffice to break the chain of causation, expressing their position thus: "*It is submitted that Lord Reid was correct, and that only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation.*"

40. At 2-114, summarising the law more generally on the intervening conduct of a third party, *Clerk & Lindsell* has it that: "*No precise or consistent test can be offered to define when the intervening conduct of a third party will constitute a novus actus interveniens sufficient to relieve the defendant of liability for his original wrongdoing. The question of the effect of a novus actus "can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event" [per Lord Simonds, one of the majority, in Hogan, at 593]. Four issues need to be*

addressed. Was the intervening conduct of the third party such as to render the original wrongdoing merely a part of the history of events? Was the third party's conduct either deliberate or wholly unreasonable? Was the intervention foreseeable? Is the conduct of the third party wholly independent of the defendant, i.e. does the defendant owe the claimant any responsibility for the conduct of the intervening third party? In practice, in most cases of novus actus more than one of the above issues will have to be considered together." By a footnote to the end of that paragraph, the Editors note that it was considered at length by Aikens LJ in *Chubb Fire Ltd v Vicar of Spalding* [2010] EWCA Civ 981, who concluded that "*the ultimate question is: what is the extent of the loss for which a defendant ought fairly or reasonably or justly to be held liable*".

41. Notwithstanding the apparently unqualified endorsement of the Specific Rule in *Webb* at [55], it was not applied by the Court of Appeal to decide that case. Rather, Henry LJ at [56] considered a range of factors, only one of which was that there had been negligence but not gross negligence. Furthermore, I agree with Mr Brown that the concessions by both the claimant and the NHS Trust in *Rahman* were incorrect, not inevitable and obviously correct as the Court of Appeal considered, if the Specific Rule existed as a rule of law. Still further, I consider there is no logical justification or policy reason for creating a specific rule of law in the context of negligent medical intervention, and that a rule of law in terms of the Specific Rule is a recipe for litigation within litigation over when treatment otherwise proper in kind is so poorly executed as to become an inappropriate medical response.

42. On that last point, take this case, for example. One of the serious concerns raised by Mr Machin's report is that the surgical method was wrong (failure to remove the interposed fragment), and the surgical hardware selected was wrong (inappropriate surgical fixtures and fittings for the intended fixation). If a test of 'inappropriate surgical response' has to be satisfied, intended to stand in contradistinction to 'negligent execution of appropriate surgery', I do not find it difficult to see how, after a trial, Mr Machin's criticisms realistically might be thought to satisfy it. The real point, though, is that it is an unnecessary and unjustified distraction to be considering on which side of some such boundary the surgical negligence, if established, fell. The degree to which the claimant's treatment diverged, if it did, from good treatment competently delivered, will of course be relevant. At this stage, that is to say considering Mr Machin's report prior to seeing how it stands up to being tested at trial and what emerges from that scrutiny, it is realistic to envisage the possibility of a trial judge concluding that the divergence was very significant, and basic, if all of Mr Machin's criticisms stand up.

43. In my judgment, the Specific Rule does not exist as a principle of law defining a necessary ingredient of a *novus actus* defence in the context of medical interventions. It follows that by paragraph 33(d) of his judgment in this case, DJ Vernon misdirected himself.

44. Without the constraint of the Specific Rule as a principle of law, in my judgment there is a real prospect on the basis of Mr Machin's opinion, if accepted at trial, of a finding that the claimant's initial injury, admittedly the result of the defendant's negligence, was so badly mistreated that the defendant ought not, in fairness, to be considered responsible for the consequences of that mistreatment. How precisely, if that finding were made, the defendant's liability would be reduced from full liability for all loss

and damage the claimant will allege, is not something that arises for consideration at this stage. There was no suggestion that it could be said now to be plainly so minor in likely impact as to be fair to prevent the defendant from taking the point so as to avoid the added complexity and expense of involving the NHS Trust in the claimant's claim.

45. I have effectively already indicated why, if the Specific Rule exists as a rule of law, I also find myself in disagreement with DJ Vernon over whether the defendant in this case has raised a real prospect of success at trial by reference to it. The gist of DJ Vernon's reasoning (judgment at [41]) was to say that:

"*The fact that treatment was performed inadequately (including negligently) is not sufficient … and where the choice of treatment and the approach to treatment are not criticised and the focus of criticism is the quality of the surgery performed, its outcome and consequences, I am not persuaded that there is a real prospect of the Defendant showing that the treatment was grossly negligent.*"

46. That seems to me, with respect, wrongly to hold that the "*quality of … surgery performed*" could never turn what might otherwise have been appropriate treatment into a completely inappropriate response. DJ Vernon also appears to me to have read far too much into Mr Machin's comment that "*The choice to proceed to surgery was correct as was the surgical approach*." I consider that, on Mr Machin's report, it is realistically possible that his view, when explored as it can only be at a trial, may be held to amount to this, namely that whereas there was here a correct choice to recommend surgery and a correct view that the surgery should be an open reduction and internal fixation, what was actually done amounted, in substance, to no such thing, but rather was a botched job that did not amount to reduction and fixation worthy of those names, or as Mr Brown put it, less colloquially, that there was "*a comprehensive failure to carry out a correct surgical procedure*". A fracture repair that fails within a few days, it might realistically be concluded after a trial, was not a fracture repair at all.

47. Before concluding, I should make explicit that nothing I have said in this judgment should be taken as prediction or provisional view as to how the causation defence the defendant wishes to plead will in fact, or should, turn out at trial. At this stage, the only question is whether there is a real prospect, not only a fanciful possibility or barely arguable possibility, that it may turn out to be well founded. In my judgment, it does satisfy that test, and DJ Vernon erred in concluding otherwise.

Conclusion

48. This was a straightforward case in which permission to amend should have been granted but for the view that was taken that the proposed causation defence has no real prospect of success.

49. In my judgment, that view was wrongly taken, in that (a) the premise was that the Specific Rule exists, i.e. a rule of law requiring proof of "*medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant*", when there is no such rule of law, and (b) the conclusion was reached erroneously that there was no real prospect of satisfying that rule, because it was wrongly considered that poor quality surgery cannot turn appropriate treatment into

inappropriate medical response, and the potential import of Mr Machin's evidence was not correctly identified.

50. This appeal will therefore be allowed. I understand it to be agreed that in those circumstances, the appropriate course will be for me to deal with the costs of the appeal, and it may be any consequential adjustment to what was ordered below in relation to the costs of the application to amend that will now be allowed, but to leave other case management consequences of allowing the application to amend to a further hearing in the District Registry that I should direct.