IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE BUTTERFIELD)

QBENI 96/1088/E

Royal Courts of Justice
Strand
London W2A 2LL

Tuesday 1st July 1997

B e f o r e

LORD JUSTICE STUART-SMITH
LORD JUSTICE MORRITT
LORD JUSTICE SCHIEMANN

POWELL AND ANOTHER — Appellants

v.

BOLDAZ AND OTHERS — Respondents

(Handed down transcript of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD Tel: 0171 831 3183
Official Shorthand Writers to the Court)

DR MICHAEL POWERS QC and MR GORDON CATFORD (instructed by Messrs Lindsay Roland Houghton, Lancashire) appeared on behalf of the Appellants (Plaintiffs).

MR ANDREW PRYNNE QC and MR ANDREW HOCKTON (instructed by Messrs Le Brasseur J Tickle, London WC2B 5HA) appeared on behalf of the Respondents (Defendants).

J U D G M E N T
(As approved by the court)

LORD JUSTICE STUART-SMITH: The Plaintiffs in this action, Mr.and Mrs. Powell, are the parents of Robert Powell, who died at the age of 10 years and 4 months on 17 April 1990 of a rare disease called Addison's disease. Unhappily the disease was not diagnosed; if it had been in time Robert could have been treated and the treatment would probably have been successful.

The First to Fifth Defendants are general practitioners, practising in partnership at the Ystradgynlais Health Centre; Robert Powell was their patient. The Sixth Defendant, the West Glamorgan Health Authority, is responsible for the management of Morriston Hospital, Swansea, and as such vicariously liable for the acts and omissions of the staff at the hospital, in particular Dr. Forbes, a consultant paediatrician.

By a writ issued on 13 April 1993 the Plaintiffs claimed 'damages on their own behalf and on behalf of the estate of Robert Powell deceased pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1978 by reason of the negligence of the Defendants which caused the death of the deceased' together with interest.

The statement of claim, which was subsequently re-amended in circumstances I shall refer to, ran to 74 paragraphs. The Plaintiffs claimed under the Law Reform Act damages on behalf of Robert's estate in respect of pain and suffering experienced by him prior to his death and also funeral expenses. They also claimed the costs of an appeal hearing to the Secretary of State, this claim was not pursued under this head. In addition the Plaintiffs claimed damages for bereavement pursuant to S.1(a) Fatal Accidents Act 1976 and personal injury alleged to have been sustained by them in the form of post-traumatic stress disorder suffered by the First Plaintiff and panic disorder suffered by the Second Plaintiff caused by witnessing the pain, suffering and subsequent death of Robert. All these claims were based, as the writ indicates, upon the alleged negligence of the Defendants in the treatment of Robert prior to his death. The claim by the First Plaintiff for

damages for post-traumatic stress disorder caused by events prior to Robert's death has now been abandoned.

Although all Defendants denied negligence in their Defences, the Health Authority subsequently admitted liability, primarily on the basis of the failure to diagnose and treat the Addison's disease.

Indeed immediately following the determination of the proceedings which gave rise to this appeal, these claims of the Plaintiffs were settled. The Health Authority agreed to pay Mrs. Powell £80,000 together with £20,000 costs and upon payment the action of both plaintiffs was dismissed against it.. And the action against the First to Fifth Defendants in respect of these claims was discontinued. It is clear that the settlement sum must have included a substantial figure in respect of the psychiatric injury sustained by Mrs. Powell.

Not content with these claims there are further allegations of fact in the Statement of claim relating to what happened after Robert's death, in what may broadly speaking be called a 'cover-up operation'. These facts are alleged to give rise to further causes of action at the suit of the Plaintiffs causing psychiatric injury to the First Plaintiff and exacerbation of the Second Plaintiff's psychiatric complaints; there is also a claim for economic loss based on these post death events.

The cover up is said to have consisted of the removal of two original documents from the medical reports of the Morriston Hospital and the General Practitioners records and the substitution for them of different documents and the insertion into the latter records of a letter of referral to the hospital, dated 12 April 1990 which was in fact drafted and typed after the death.

By summons dated 29 May 1996 the General Practitioner Defendants applied to strike out those parts of the Statement of Claim relating to the post-death events pursuant to RSC Order 18 Rule 19

on the basis that they failed to disclose a reasonable cause of action, were scandalous, frivolous or vexatious and amounted to an abuse of the process of the Court. On 24 June 1996 Butterfield J., having granted the Plaintiffs leave to re- amend the Statement of Claim, struck out the allegations. The Plaintiffs now appeal the Judge's order with his leave, though they accept that some of the allegations cannot be sustained.

It is necessary to set out in more detail the facts alleged in the re-amended Statement of Claim. Although in many respects they are in dispute, particularly in relation to the alleged cover-up, they must for the purposes of an application made under Order 18 Rule 19 be taken as true. On 5 December 1989 Robert received a home visit from the Third Defendant, Dr. Hughes, because he was vomiting and complaining of abdominal pains. Dr. Hughes arranged for his admission as an emergency to Morriston Hospital where he was treated as an in-patient under the care of Dr. Forbes. On admission Robert was dehydrated, febrile and had abdominal tenderness. A provisional diagnosis of gastro-enteritis was made, but tests carried out in the course of his treatment led Dr. Forbes to consider the possibility of adrenal insufficiency. A procedure known as ACTH Stimulation Test is available to determine whether such deficiency exists. That test was not carried out and Robert was discharged home on 9 December 1989.

At that time a clinical summary sheet was prepared in order to inform the general practitioners what treatment he had received in hospital. The clinical summary sheet was sent to the Health Centre and a copy retained by the hospital. There is no dispute that such a document was sent. There is a dispute as to its contents and indeed the document is central to the alleged cover-up. According to the Plaintiffs the original document, referred to as CSS/1, contained on its reverse side inter alia the following details:

(a) that the deceased needed an ACTH test;

(b) that the deceased's parents had been so informed;

(c) that the deceased suffered from hormonal imbalance;

(d) that Addison's disease was being considered.

The Defendants' version of the document which the First Plaintiff saw for the first time in November 1990 in circumstances to which I shall refer, contains nothing on the reverse side. On the front under the heading 'Management' is the entry 'Needs ACTH'. The other matters referred to in paras (b), (c) and (d) were not mentioned. But Dr. Powers QC on behalf of the Plaintiffs accepted that the ACTH test is the relevant test for Addison's disease, which is an hormonal/adrenaline imbalance. He also accepts that 'Needs ACTH' would probably be understood to refer to a test to discover whether Robert had the condition rather than treatment for it.

Robert attended Morriston Hospital as an outpatient on 18 January for follow up appointment. He saw Dr. Forbes who told Mrs. Powell that Robert "looked wonderful" and that his December admission was as a result of gastro-enteritis caused by a throat infection. By implication Dr. Forbes no longer considered Addison's disease a realistic diagnosis. No tests were arranged. Robert was discharged from further attendance. After the consultation on 18 January 1990 Dr. Forbes wrote a letter to the general practitioner of which the hospital would have retained a copy. Again there is no dispute that a letter was written. But the Plaintiff alleges that the original letter F1 was typed on A5 paper. The Defendants have produced a letter F2 together with a copy retained by the hospital, dated 18 January 1990, which they say is a genuine document. It is typed on A4 paper. The Plaintiff is unable to say whether the contents of F1 differed from the contents of F2. They say F2 is a forgery. The Defendants say F1 never existed in so far as it is different from F2. F2 is in these terms:

"Dear Dr. Boladz,

Re: Robert Darren Powell - d.o.b. 29.12.79.
138 Brecon Road, Ystradgynlais.

Robert was in hospital just before Christmas with a severe episode of gastroenteritis when he produced low levels of sodium and chloride. It was queried at the time whether he might have adrenal insufficiency.

However, on review, he has gained almost a stone in weight and seems extremely well. There is no previous history of vomiting and I feel he may simply have had a severe gastritis and vomiting.

At this point I have discharged him from the Clinic but would be pleased to see him again if there are any recurrent episodes.

Yours sincerely,

W.R. Forbes F.R.C.P.
Consultant Paediatrician

Thereafter Robert remained well until the beginning of April when he developed a sore throat and pain in his jaw. He saw Dr. Hughes on 2 April; he could detect nothing wrong and Robert went back to school next day. On 5 April he was sent home from school feeling unwell. According to the Statement of Claim his pigmentation was abnormal. His father took him to the Health Centre on 6 April. He was seen by Dr. Flower, the Fifth Defendant. He stayed off school; he was weak and lethargic.

On 10 April he vomited whilst eating a meal. His parents took him to the Health Centre next day where he was seen by Dr. Williams, the Fourth Defendant to whom the present symptoms were described. Dr. Williams told him he would immediately contact Dr. Forbes because of the vomiting, but failed to do so. Robert's condition continued to deteriorate. He was taken to the Ystradgynlais Hospital on 15 April (Easter Sunday). By this time he was so weak he had to be carried into the consultation room. He was examined by Dr. Boladz , who diagnosed glandular fever, prescribed amoxycillin and arranged for a blood test to be carried out on 17 April.

Next day, the 16th, Robert vomited again. Dr. Hughes visited at the Plaintiffs' home. He examined Robert; arranged further blood tests and told the Plaintiffs he would arrange for his admission to hospital if his condition deteriorated. It did. Next day in the afternoon Robert

collapsed. Dr. Flower visited; she was told Robert had been unconscious, with blue tinted lips, and that Dr. Hughes advised that he should be admitted to hospital if his condition deteriorated. Dr. Flower declined to admit the child to hospital and said there was nothing to worry about.

Half-an-hour later the Plaintiffs, still desperately anxious, phoned Morriston Hospital. They were told that Robert could only be admitted at the request of a referring General practitioner. At the Plaintiffs' request Dr. Flower visited again. Though still of the opinion admission to hospital was unnecessary, she was prevailed upon to write a letter of referral, but declined to order an ambulance. Accordingly the Plaintiffs took him to hospital by car, arriving at about 7pm. His condition, which was serious, declined further. At 9.45pm he suffered cardiac arrest and died.

Those are the events upon which the Plaintiffs' claim for negligence in respect of the failure to diagnose and treat Robert are based, together with the Second Plaintiff's claim for damages for psychiatric injury as a secondary victim.

I turn then to the facts following the death which are alleged to give rise to the claims which have been struck out. On 20 April Dr. Hughes visited Mr. Powell at home and showed him the complete medical records. On 22 April Dr. Williams visited Mrs. Powell in connection with her shock and grief. He told the Plaintiffs that he had referred Robert to Dr. Forbes on 11 April. It is alleged that this statement was untrue and that Dr. Williams knew it was untrue.

On 23 April Dr. Hughes visited and again brought the deceased's general practitioner records which were looked at by Mr. Powell and the Revd. Dr. D.G. Thomas. These documents contained CSS/1 and F1 but no letter of referral of 11 or 12 April.

On 30 April the First Plaintiff made a formal complaint to the Family Practitioner Committee about

the 1st, 2nd, 3rd, 4th and 5th Defendants.

On 25 May the Plaintiffs conferred with Dr. Forbes. He told them that no letter of referral had been received by the hospital; this was subsequently confirmed in writing. It is alleged that on 25 May the hospital records contained the hospital copy of CSS/1.

It is alleged that on some date unknown prior to 5 July a meeting took place at the hospital between the general practitioner Defendants and Dr. Forbes. It is alleged that those people were either aware at that meeting that the medical records had been falsified by removing CSS/1 and F1, and substituting CSS/2 and F2, or they agreed to falsify them.

On 22 November the Plaintiffs were sent copies of the general practitioners medical notes and hospital notes by the West Glamorgan FHSA as part of the procedure for investigating their complaint. CSS/1 and F1 were not there. CSS/2 and F2 were, as was also a referral letter from Dr. Williams to Dr. Forbes dated 12 April. 22 November is a crucial date because it is alleged that the First Plaintiff's psychiatric illness was caused by the realisation that the documents had been tampered with. Thereafter both the hospital and the general practitioners maintained that CSS/2 and F2 were the genuine documents. On 23 November Dr. Hughes is alleged to have accepted that the referral letter of 12 April was not on the file when seen by Mr. Powell in April.

The hearing before the Medical Services Committee took place on 13 December 1990. The complaint against Dr. Flower was found to be made out in whole or in part. The complaints against the other general practitioners were not upheld.

The Plaintiffs appealed against these findings to the Secretary of State for Wales. Hearings took place in March and September 1992, but the appeal was not concluded, because the Plaintiffs

withdrew their appeal.

After the proceedings in this action were under way and the Defendants had served their defences Dr. Powers QC, counsel for the Plaintiffs, instigated an approach to the Director of Public Prosecutions on the basis that the general practitioners might have been guilty of forgery and attempting to pervert the course of justice. A police enquiry ensued over the next two years. In May 1996 the Defendants were informed that no prosecution would be brought against any of them.

The re-amended Statement of Claim leaves a great deal to be desired. It is prolix; tends to plead evidence and not merely the material facts relied upon; it makes little attempt to define the causes of action or to identify the material relied upon in support of such causes of action; and even after re-amendment it is not always clear what is being alleged. Dr. Powers accepted that much of this criticism was justified. But he submitted to the Judge, and the Judge accepted, that it is the facts that matter and if they give rise to a cause of action, the pleading should not be struck out simply because this cause of action is not identified. I too accept this; but it has not made the Court's task any easier in trying to identify what it is that the Plaintiffs rely upon as constituting their various causes of action said to arise on these facts.

Essentially the material facts are these. In April the Plaintiffs were told the reason why their son had died and were shown the correct medical records. No complaint is made of the Defendant's conduct at this time, save as to Dr. Williams' statement that he had referred the deceased to hospital. On 22 November the Plaintiffs learnt that two documents had been substituted; it is far from clear that the substitution of CSS/2 for CSS/1 made any material difference to the medical history and the Plaintiffs do not plead any case to the effect that the substitution of F2 for F1 did so, since they do not know what F1 contains. Additionally, although in April they were told there was no referral from Dr. Williams to the hospital, in November there was a draft letter dated 12 April in

the GP's records; but it did not appear in the hospital records, which would appear to confirm that it was not sent. It is the First Plaintiff's case that it was the realisation that the genuine documents had been substituted with false ones that caused his psychiatric illness. The pleading of the personal injury is also somewhat unsatisfactory. So far as the first Plaintiff is concerned it is alleged in para 69:

"(a) The First Plaintiff

Suffered from Post Traumatic Stress Disorder (PTSD)

(i) Secondary to [which Dr. Powers says means caused by] witnessing the pain, suffering and subsequent death of the deceased. [This allegation is no longer pursued]

(ii) Secondary to

(1) The frustration caused by his inability to ascertain the true facts surrounding the death of the deceased; and

(2) Being deliberately misled by the Defendants as aforesaid [a reference to the substitution of the documents].

(3) Consequent upon the actions of the Defendants individually and collectively whereby relevant information was concealed.

(b) The Second Plaintiff

The Second Plaintiff who was born on 6 July 1955 suffered from Panic Attacks as defined by Diagnostic and Statistical Manual of Mental Disorder 3rd Edition Revised 1987 [DSM - 111-R]:

(i) Secondary to witnessing the pain, suffering and subsequent death of the deceased [this claim has now been settled].

(ii) Secondary also to:

(1) The frustration of her inability to ascertain the true facts surrounding the death of the deceased; and

(2) Being deliberately misled by the Defendants as aforesaid
(3) The effect of the First Plaintiff's PTSD [Dr. Powers accepted that sub-paragraph 3 was unsustainable in law and should be struck out]

(iii) The actions of the Defendants individually and collectively whereby the relevant information was concealed."

The Plaintiffs did not comply with the requirements of Order 18 Rule 12(1)(A) in that no medical report substantiating the injuries accompanied the Statement of Claim. Subsequently reports of Dr. Reveley, Consultant Psychiatrist at Maudsley Hospital were provided. Under the heading 'Impression' Dr. Reveley says:

> "Mr. Powell has developed Post Traumatic Stress Disorder following his discovery that the death of his son may have been preventable and that the hospital discharge letter which alerted the GP practice of possible Addison's disease had disappeared from the notes. He discovered this in November 1990. Mr. Powell says 'My head exploded'."

I would point out that the facts pleaded do not support the statement that he only learnt that the death of Robert was preventable in November. This was disclosed in April.

In relation to Mrs. Powell, Dr. Reveley said:

> "The suffering experienced by Mrs. Powell can hardly be imagined by anyone who has not lost a child. Not only has she had her grief to bear, but she has also witnessed the deterioration of her husband from a well-adjusted family man to an agonised obsessed man who isolates himself and drinks to excess to blot out the torment.
>
> In the aftermath of her son's death Mrs. Powell has developed Panic Disorder according to DSM-111-R (Diagnostic and Statistical Manual of Mental Disorders 3rd Edition Revised, 1987). This disorder is characterised by the presence of panic attacks occurring without warning at a frequency of at least four times in a four week period. She has been taking benzodiazepine tranquillisers for this since September 1990. Her mother also suffers from anxiety and it is likely that Mrs. Powell has an innate pre-disposition to develop the disorder. It has been triggered by the intense grief and frustration over her son's death and the alleged negligence and cover-up by the doctors. There is no evidence from her, from her medical records or from her friends and relatives that she ever suffered anxiety or panic before her son's death."

There is nothing to suggest that the discovery in November was a separate cause of the psychological condition which Mrs. Powell had been suffering from since Robert's death.

Dr. Powers submitted that the pleaded facts arguably gave rise to the following causes of action:

1. Negligence, in that there was a breach of the duty of care owed to the Plaintiffs.

2. A species of trespass to the person exemplified by the case of Wilkinson v Downton [1897]

2 QB 57.

3. Conspiracy to injure by unlawful means, though Dr. Powers accepted in this Court that this would not cover personal injury. But he submitted that economic loss in the form of the costs expended on the abortive appeal to the Secretary of State was recoverable.

4. In a supplemental skeleton argument he contended that the Defendants were in breach of a fiduciary duty. Though this too was eventually abandoned.

Before Butterfield J. Dr. Powers had also sought to argue that the tort of deceit was made out and that there had been actionable interference of some right which the Plaintiffs enjoyed. The Judge rejected these submissions. He was plainly right to do so; they were misconceived. Dr. Powers does not seek to argue the contrary.

I turn then to consider whether the pleaded post-death matters can give rise to an action for negligence. It is at first sight somewhat surprising that the tort of negligence was in the forefront of the Plaintiffs arguments, when so much emphasis is placed on the dishonest and fraudulent conduct of the Defendants in relation to the relevant documents. If there is a duty of care and breach of it, it is not necessary to allege and prove dishonesty. Mr. Powers submits that the duty of care arises under the principles enunciated by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1990] 2 AC 605 at 616E - 618F namely where the following three elements are present:

(a) foreseeability of damage arising from the relevant act or omission;

(b) a sufficient relationship of proximity between the parties;

(c) as a matter of legal policy it is fair, just and reasonable that a duty of care should exist.

I propose to consider first whether a sufficient relationship of proximity existed. It must be appreciated that prior to 17 April 1990, although the Plaintiffs were patients of the Defendants in the sense that they were on their register, the only patient who was seeking medical advice and

treatment was Robert. It was to him that the Defendants owed a duty of care. The discharge of that duty in the case of a young child will often involve giving advice and instruction to the parents so that they can administer the appropriate medication, observe relevant symptoms and seek further medical assistance if need be. In giving such advice, the doctor obviously owes a duty to be careful. But the duty is owed to the child, not to the parents. As Lord Diplock said in Sideaway v Gov. of Bethlem Royal Hospital [1985] AC 871 at p890 "a doctor's duty of care, whether he be a general practitioner or consulting surgeon or physician is owed to that patient and none other, idiosyncrasies and all."

After the death the Defendants may owe the Plaintiffs a duty of care; but this depends upon whether they are called upon or undertake to treat them as patients. There are many situations where a doctor will have close contact with another person, without the relationship of doctor patient arising so as to involve the duty of care. Two examples are to be found in the speech of Lord Browne-Wilkinson in X (minors) v Bedfordshire CC [1995] 2 AC 633 at p752D-753A, one being a psychiatrist examining a child and interviewing a parent for the purposes of discharging the Local Authority's care responsibilities, the second is the examination of a claimant or plaintiff by a doctor on behalf of an insurance company. In neither of these cases does the doctor undertake to treat the person as a patient and his only duty is not to damage him in the course of the examination.

These are cases where the doctor's obligations are to the Local Authority or insurance company and there may well be a conflict of interest between them and the person examined. Another example can be found in the case of a doctor who goes to the assistance of a stranger injured in an accident. He does not as a rule undertake the patient/doctor relationship so as to make him liable for lack of care, but only a duty not to make the condition of the victim worse. (see Capital and Counties v Hants CC [1997] 2 All ER 865 at p883f).

I do not think that a doctor who has been treating a patient who has died, who tells relatives what has happened, thereby undertakes the doctor-patient relationship towards the relatives. It is a situation that calls for sensitivity, tact and discretion. But the mere fact that the communicator is a doctor, does not, without more, mean that he undertakes the doctor patient relationship. It is of course possible that the doctor in such a situation may realise that the shock has been so great that some immediate therapy is needed, but even so this situation is probably more akin to the doctor giving emergency treatment to an accident victim. Though no doubt it will be a question of fact and degree in each case whether doctor/patient relationships came into existence by the doctor undertaking to treat and heal the person as a patient

If the relatives concerned happen to be on the doctor's register as patients, the position in my judgment is no different, though if the doctor perceives that counselling or medicinal treatment is required and it is given by the doctor or is sought by the patient, then the doctor-patient relationship will exist in relation to the advice and treatment given and the duty of care will arise.

Like the Judge, I have some doubt whether the pleaded facts go so far as establishing the relationships in respect of bereavement counselling or treatment of the Plaintiffs in the immediate aftermath of Robert's death, but I am prepared to assume that they did and that Dr. Hughes' and Dr. Williams' visits in April were inter alia for this purpose. But no complaint is made with regard to what happened at this time. It is only much later, specifically in November that the breach is said to have occurred. Even though the Plaintiffs were still on the doctors' lists as patients what happened in response to their complaint to the M.S.C. had nothing to do with the Defendants' treatment as healers of the Plaintiffs. So far from being in a proximate relationship, they were in one of confrontation as complainant and respondent before a tribunal having relevant jurisdiction to determine the complaint.

Dr. Powers submits that psychiatric injury to the Plaintiffs was reasonably foreseeable. Despite the fervour with which his submission was made, I do not accept it. Dr. Powers submitted that the contents of the substituted documents were immaterial, it was the fact of substitution alone which a reasonable man would have foreseen would give rise to psychiatric injury. I do not agree. I cannot see how the reasonable man should foresee that the mere substitution of a document written on A5 paper for one with the same contents being written on A4 could possibly cause injury or that Mr. Powell would be so overcome when he saw CSS/2 which conveyed substantially the same message as CSS/1. And that is so bearing in mind that Mr. Powell was still grieving at the bereavement. In my judgment it was a 'mere possibility that would never occur to the mind of a reasonable man'. to use the words of Lord Dunedin in Fardon v Harcourt-Rivington (1932) 146 LT, 391, 392. As the case is now presented Mr. Powell did not sustain post-traumatic stress disorder until November 1990; he was not therefore someone who the doctors knew was especially vulnerable.

So far as Mrs. Powell is concerned, I agree with Mr. Prynne QC for the Respondents that any exacerbation to her condition from subsequent events falls to be compensated for as part of her claim as a secondary victim witnessing the trauma of Robert's suffering and death, unless the subsequent events amounted to a novus actus interveniens. Quite obviously they do not, first because the Defendants deny the existence of the subsequent events and secondly they do not plead any such novus actus, which in any event, if it existed would be their act and not that of a third party.

Finally on this aspect of the case Dr. Powers relied on certain obiter dicta of Sir John Donaldson MR in Lee v South West Thames Regional Health Authority [1985] 1 W.L.R. 845 at 850 and Naylor v Preston Area Health Authority [1987] 1 W.L.R. 958 and 967 as giving rise to a duty of candour owed to a patient. I do not think these observations advance the Plaintiffs' case. It is

clear that if the doctor patient relationship exists, subject to the Bolan principle which is now well recognised and was held in Sideaways case to be applicable to all aspects of treatment and advice, a doctor must give careful, truthful and candid information to his patient for the purpose of his treatment or, if need be, to advise him that no treatment is required. Failure to do so resulting in injury will expose the doctor to liability in negligence. But these dicta afford no authority for the proposition that there is some kind of free standing duty of candour, irrespective of whether the doctor/patient relationship exists in a healing or treating context, breach of which sounds in damages, such damages involving personal injury. This would involve a startling expansion of the law of tort.

For these reasons the claims based on breach of the duty of care fail.

The facts of Wilkinson v Downton [1897] 2 Q.B. 57 are well known. The respondent, by way of practical joke, falsely represented to the Plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The Plaintiff believed it to be true and suffered serious shock which rendered her ill. She had expended 1s 10½ d in railway fares for persons she sent to assist her husband. The jury awarded her this sum together with £100 for nervous shock. The 1s 10½ d was recoverable as damages for the tort of deceit. The real question related to the £100.

Wright J. at p58 said "It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by Pasley v Freeman (1789) 3 TR 51 and Langridge v Levy (1837) 2 M&W 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injury of that kind. I think, however, that the verdict may be supported upon

another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff - that is to say , to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injury is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs."

The case is therefore authority for two propositions: first, that making a statement known to be false with the intention that it should be believed and with the intention of causing injury, which in fact results, is actionable. And secondly, that where the Defendant's act is plainly calculated to produce some effect of the kind which was produced, an intention to produce it ought to be imputed to the defendant. Regard being had to the fact that the effect was produced on a person in an ordinary state of health and mind. Another way of putting the second proposition is to say that a man who foresees the consequences of his act is to be taken to intend those consequences, even if he does not desire them. As Lord Scarman said in Reg. v Hancock [1986] A.C. 455 a jury may require guidance on probability when considering intention. At p473 he said : "They also require

an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended."

The pleading in relation to this tort and also the tort of conspiracy is to be found in paragraphs 56 and 66(c) of the re-amended Statement of Claim.

'56. It is averred that on a date unknown to the Plaintiffs, but probably after 5 July and before the MSC hearing a meeting took place at the Hospital attended by all the Defendants (the Sixth through Dr. Forbes). At that time, if not earlier all the Defendants herein were either aware that the medical records of the Deceased had been falsified or agreed to falsify them by removing CSS/1 and F/1 and substituting CSS/2 and F/2 with the intent that the true nature of the communications passing between the Hospital and the Health Centre would not be made known to the Plaintiffs and that the falsified documents would be used at the MSC hearing in December. It is alleged that the predominant purpose of the aforesaid unlawful acts was to reduce the likelihood that the 1st to 5th Defendants would suffer the penalties associated with being found in breach of their Terms and Conditions of Service with the FHSA, or that any or all of the Defendants would suffer any professional loss which might otherwise accrue from their failure properly to provide medical care to the Deceased. They did so notwithstanding that it was reasonably foreseeable to the Defendants that such action might injure the Plaintiffs psychologically and/or financially and would obstruct their right to complain and to have a fair hearing of their complaint.

66(c) the use of of the false words and statements uttered either with the knowledge that they were likely to cause injury or with reckless disregard as to whether such words and statements would cause injury. It is the Plaintiffs' case that the injuries alleged are those particularised under paragraph 71(a) and 71(b) herein."

The underlined parts are the re-amendment allowed by the Judge. It is to be noted that it is not alleged that the defendants intended to injure the Plaintiffs. Dr. Powers accepted that it was impossible to allege that the Defendants intended to injure the Plaintiffs in the sense of desiring or wishing to do so. But he submitted that such an intention could be imputed to them because of the high degree of likelihood of it resulting. In my view not only does the pleading fall conspicuously short of such an allegation, reasonable foreseeability alone being relied upon, but for the reasons I have already given the facts do not begin to establish the necessary degree of foresight for imputed intent.

Finally, I must consider the tort of conspiracy. The substance of the allegation is set out in para 56 of the Statement of Claim already cited. This is an unlawful act conspiracy. Dr. Powers now accepts that damages for personal injuries are not reacoverable under this tort. But he submits that the costs of pursuing the appeal to the Secretary of State are economic loss caused by the tort.

There are to my mind three answers to this submission. First although in an unlawful act conspiracy it is not necessary to prove that the predominant purpose is to injure, it is necessary to prove that the conspiracy was "aimed or directed at the Plaintiffs and it can reasonably be foreseen that it may injure him, and does in fact injure him". (see per Lord Denning MR in Lonrho v Shell cited with approval by Lord Bridge of Harwich in Lonrho v Fayed [1992] 1 AC 448 at p467) or as Woolf LJ said in Lonrho v Fayad in the Court of Appeal [1990] 2 Q.B. 479 at p494:

"If a defendant has deliberately embarked upon a course of conduct, the probable consequences of which to the plaintiff he appreciated, I do not see why the plaintiff should not be compensated".

This is neither pleaded, nor for the reasons I have already given made out in the facts.

Secondly the unlawful act relied upon must be actionable at the suit of the Plaintiff. It is not sufficient that it amounts to a crime or breach of contract with a third party. (See Clerk & Lindsell on Torts 17th Ed. para 23-80, Marinan v Vibart [1963] 1 Q.B. 234 & 528. Hargreaves v Bretherton [1959] 1 Q.B. 45. Lonrho v Shell [1982] A.C. 173 per Lord Diplock at p.186 etc). For this reason this form of unlawful act conspiracy adds little to the remedies available to a plaintiff.

And finally I am quite unable to see as a matter of causation how these expenses can be said to have resulted from the unlawful acts of substituting forged for genuine documents in the medical records. The Plaintiffs appealed to the Secretary of State because their complaint that the first four Defendants had failed to treat Robert properly was dismissed by the M.S.C. Although the question of falsification of the documents was apparently raised on the appeal to the Secretary of State, that was not the reason for the appeal.

I would finally wish to add this. The allegations made by the Plaintiffs against these doctors of falsification of records are very serious. If proved they probably amount to the criminal offence of forgery and possibly an attempt to pervert the course of justice, though it is not apparent how the differences in wording of CSS/1 and CSS/2 could have had any material effect for reasons I have already given. Equally if proved such conduct would undoubtedly deserve censure from the General Medical Council. For the purpose of this appeal we have had to assume that the allegations are true. But it is only fair to the Defendants to point out that the allegations are strongly denied; they depend on the accuracy of Mr. Powell's recollection of the shape, format and content of documents, his recollection apparently being supported by Dr. Thomas. As against this it is difficult to see how the alleged difference in the contents of the documents could possibly assist the Defendants' case before the M.S.C. and the copy documents which have been shown to the Court appear to show from the date stamps upon them that CSS/2 and F2 were in existence long

before April 1990 or alternatively that the conspiracy was much wider than one between the first five Defendants and Dr. Forbes.

For my part I have the greatest possible sympathy for Mr. and Mrs. Powell for the loss of their son. I readily understand that the knowledge that the death would have been avoidable if proper care had been taken by the Health Authority and those for whom they are vicariously liable is likely to add keenly to their grief. But this fault has been acknowledged and not ungenerous compensation paid, although no amount of compensation can ever seem adequate for so great a loss. Dr. Flower has also been criticised by the M.S.C., albeit Mr. Powell does not consider the penalty adequate. I can only express the hope that Mr. and Mrs. Powell will now take the view that there is little to be gained in seeking to take this matter any further and that with appropriate help and advice they may be able to come to terms with their loss and grief.

I would dismiss the appeal.

LORD JUSTICE MORRITT: I agree.

LORD JUSTICE SCHIEMANN: I also agree.

Order: Appeal dismissed with costs; costs be paid from legal aid fund; plaintiffs' contribution be assessed by the registrar; order nisi against Legal Aid Board; legal aid taxation of plaintiffs' costs; application for leave to appeal to the House of Lords refused.