

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

A.D. 2010

CLAIM NO. ANUHCV2007/0185

BETWEEN:

EVERAL GREEN

Claimant

And

ATTORNEY GENERAL

DRA DELISLE NARINO MIRTHA

Defendants

Appearances:

Mr Steadroy C.O. Benjamin for the Claimant

Mrs Carla Brookes-Harris for the Defendant

2010: January 28

2011: February 04

JUDGMENT

- [1] **THOMAS J:** By way of a Claim Form, filed on April 02, 2007 the Claimant, Everal Green, seeks damages for personal injuries and loss suffered as a result of the treatment of the Claimant by the Second Defendant one of the doctors under the First- Defendant's Eye-Care Program in or about the month of November, 2005 at the All Saints Village in the Parish of Saint Paul's, Antigua and

Barbuda working then under the direction and control of the Minister of Health and the Ministry of Health and in the performance or purported performance of his function and duties.¹

- [2] In his Statement of Claim, the Claimant contends that pursuant to its responsibility to, *inter alia*, provide professional, efficient and competent medical services to national and lawful residents of Antigua and Barbuda, Government of Antigua and Barbuda entered into arrangement with statutory bodies and/or countries such as Cuba. According to the Claimant, a Medical Eye-Care Programme was arranged between the Government of Antigua and Barbuda and the Government of Cuba. Further, Dr Delisle Narino Mirtha, a medical practitioner practising in Antigua and Barbuda was part of the said programme.
- [3] The Claimant also contends that in these circumstances it was the duty of the First Defendant to ensure that all national and lawful residents who are eligible and selected were provided with and exposed to professional, competent, adequate and correct eye care services both in Cuba and in follow-up eye care treatment in Antigua and Barbuda. It is further pleaded that the First Defendant also had a duty to ensure that the doctors chosen to perform eye operations on nationals and lawful residents of Antigua and Barbuda whilst in Cuba were skillful, professional and competent in the performance of their functions.
- [4] At paragraphs 5 to 9 of his said Statement of Claim the Claimant pleads matters in relation to assurances and oral representations by the [Minister of Health] in relation to the said programme, the Claimant acting on the said assurances and oral representations submission to screening and selection to go to Cuba to undergo cataract surgery of the right eye; the belief by the Claimant that the surgery would lead to better vision from the right eye; the absence of any agreement by the Claimant to undergo any medical procedure which would or may result in the loss of the right eye or the loss of vision in the said eye; and the assurance that the operation would be performed with skill and utmost professionalism and that the appropriate inter-ocular lens would be placed in the right position in the said right eye thereby enhancing his vision therein and therefrom.

¹ In the Claim Form filed on April 02, 2007 the Minister of Health, John Maginley was named as the First Defendant, however by Order of the learned Master Mathurin dated 28th June, 2007 the First Defendant was removed as a party to the matter.

- [5] The Claimant avers that on November 30, 2005 an eye surgery was performed on him by Cuban doctors to remove a cataract from his right eye. He also says that immediately after regaining consciousness he felt excruciating pain and discomfort; and the actions he took in order to have corrective measures taken.
- [6] At paragraphs 17 to 24 the Claimant details the events after his return to Antigua, return to Cuba (twice) and eventual return to Antigua. These include the Claimants' attendance at the All Saints Clinic where he was treated by the Second Defendant; further treatment in Cuba in January, 2006 and March, 2006 and his eventual return to Antigua in April, 2006.
- [7] It is the Claimant's contention that the First and Second Defendants owed him a duty of care but that each of them breached that duty. And further that his treatment was unskillful and was done negligently as a consequence of which the Claimant suffered and still suffers excruciating pain, injury, loss and damage. The particulars of the negligence are also pleaded; together with the particulars of injuries and special damage and a claim for damages, aggravated damages, exemplary damages and costs.

Defence

- [8] In the defence it is contended that the Second Defendant is registered as an ophthalmologist and has been working at the All Saints Health Clinic from July 26, 2005 with the Eye-Care Programme arranged between the Governments of Antigua and Barbuda and Cuba.
- [9] At paragraphs 3 and 4 of the said Defence the Defendants plead the procedure in conducting screening tests in order to determine their suitability for travel to Cuba for the purpose of diagnosis for the following eye ailments: Strabismus, Cataracts, Ptosis and Pterignum. It is further pleaded that the selected patients would with their consent be flown to Cuba for diagnosis and with further consent surgery where necessary.
- [10] The specific circumstances of the Claimant are detailed at paragraphs 6 to 8. Included are: the Claimant's travel to travel to Cuba following examination and screening on October 30, 2005 by Dr Iris Estela Montes de Oca and the Second Defendant; the Claimant's travel to Cuba and his diagnosis on November 18, 2005 with senile cataract OD and the recommendation of surgery to

extract the cataract and the implanting of an intraocular lens; tests were conducted of the Claimant which were within normal limits but his personal pathological history indicated an addiction to marijuana and arterial hypertension; with his consent, the Claimant was operated on on November 30, 2005 at the Juan Bruno Zayas Clinical Surgical Hospital of Santiago de Cuba and the following procedure executed: Extracapsular extraction of crystalline lens (Blumenthal Technique) was made with an anterior chamber intraocular lens implant OD motivated by a rupture of the posterior chamber leakage of the vitreous humour and mechanical vitrectomy.”

- [11] At paragraph 12 the Defendants repeat the Claimant's contention that on December 19, 2005 the Claimant explained to the Second Defendant of intense ocular pain and was diagnosed as suffering from hyphema and ocular hypertension following which he returned to Cuba for further treatment. The Defendant however deny that the Claimant was given a course of medical treatment which was clinically unsound, bad and injurious to the Claimant's health. Also denied by the Defendants is the Claimants' pleading relating to negligence and in particular the particulars of negligence enumerated at paragraph 22 of the Statement of Claim.

THE EVIDENCE

- [12] Everal Green

In his witness statement Everal Green, the Claimant details his status in Antigua and Barbuda as a lawful resident and the broadcasts by the then Minister of Health in or about November 2005 concerning the Eye-Care Programme with the Government of Cuba and the manner in which it would operate. He says further that “all nationals and lawful residents of Antigua and Barbuda to include myself relied heavily on assurances and oral representations made by the Minister of Health.”

- [13] The Claimant also outlines what he considers to be duties of the Minister of Health and the Government of Antigua and Barbuda. And specifically he says that the Minister had a duty to ensure that the doctors chosen to perform eye operations in Cuba were skillful, professional and competent in performance of their functions.

- [14] At paragraphs 11 to 28 Green addresses the following: his submission to the Eye Screening Process arranged by the Government of Antigua and Barbuda with the Government of Cuba; his selection to go to Cuba for eye surgery; being led to believe that the removal of cataract would lead to better vision in the right eye; his non-agreement to a medical procedure which would or may result in the loss of vision in his right eye; his assurances regarding the eye operation and that the appropriate inter-ocular lens would be placed in the right position in his right eye; the events after the eye operation on November 30, 2005, the absence of informed consent executed by him; the events following the said operation; the duty of care owed to him by the government and Dr Delisle Nario Mirtha, *inter alia*, in the service of the Government of Antigua and Barbuda; the nature of the treatment being unskillful and done negligently; his general physical condition, his visits to various ophthalmologists; and the pain suffered and continues to suffer.
- [15] In cross examination by learned counsel for the Defendants Mrs Carla Brooks Harris, Mr Green testified that he told his attorney by word as to what he heard on the radio news regarding an eye program and he went on to testify that Mr Maginly spoke about the eye program which has good doctors. And further that anyone who went to Cuba would be treated by competent doctors.
- [16] It is also Mr Green's testimony that before going to Cuba, Dr Mirtha conducted the eye screening which he attended with his wife. According to the witness, Dr Mirtha told him that he had cataracts in both eyes. He added that Dr Mirtha never told him that it will be the Cuban doctors in Cuba will decide and will have the final say. Mr Green said further that Dr Mirtha told him that the cataract will have to be removed.
- [17] With respect to the eye operation Mr Green said that before it occurred he received treatment and tablets in the couple of week prior. He said that during this time the eye was tested and during this time he spoke with the doctors who told him that they were going to operate on the eye. Green went on to testify that he did not ask the doctors any questions, the doctors did not explain the benefits and he did agree to remove the cataract.
- [18] On the matter of the visits which attend the cataract removal, Green was pointed to paragraph 3 of Mr Walwyn's report in which the doctor said he explained these matters to Green and he was to

return when he was ready for the procedure. This was doubted by Mr Green and according to him Dr Walwyn "tell lie".

[19] In reference to paragraph 19 of Mr Green's witness statement in which he mentions above pain immediately after the operation he gave the following testimony:

"I feel pain up to now. After the operation in November 30, 2005 I told the doctors about the pain and they gave me an injection. On December 01 I told them about the pain I was having. They inject me in the eye and gave me tablets."

[20] With respect to paragraph 21 of his witness statement in which he said that the treatment which he received was incorrect, unprofessional and unskillful, Green gave the following further testimony in this connection:

"When they cut the eye they gave me an injection. When I lay down and they inject me in the eye I hear one doctor say 'NO NO' NO'. They gave me an injection and they put me on a bus and then I went back to the hospital. It was the same day they operated on me. They gave me another injection. I stayed at the hospital until December 12, 2005. I got tablets and I start to bleed. The doctor put something in my throat. I do not have high blood pressure. I only had an eye problem.

I left Cuba on December 15, 2005. I had pain everyday. I came back home on December 19, 2005. I did not see any doctor. I went back to the Cuban doctor here Dr Mirtha. They told me I had to go back to Cuba. I went back twice after the operation, three times in all. On December 01, 2006 I went in emergency. I did not see any doctor in Antigua besides the Cuban doctor. On January 01, 2006 they told me I had a problem."

[21] Continuing his testimony on his situation Mr Green testified that the doctors started to operate on his but he could not walk out. He also said that he called his wife. He said further that he did not object to the treatment because of what is said about Cuban doctors.

[22] On the matter of injections in his right arm Mr Green testified that this was done on several occasions by a Cuban doctor whose name he does not know. According to Mr Green, he received nearly one hundred injections which led to bleeding. It is also his evidence that he could not use his arm and this was said to the doctors, but he did not tell them that it was nerve damage.

[23] When questioned on his smoking, Mr Green said that "they" told me stop smoke and that he stopped smoking in October 2005. According to him, they know I am a Rasta and 'Rastas do smoke.

[24] Mr Green also testified about his visits to Dr Walwyn and Dr Edwards. With respect to the Dr Walwyn visit he said that the doctor was told about the injections and the damage to his nerve. He also testified that Dr Walwyn did not tell him about glaucoma in his right eye. And with respect to the visit to Dr Edwards, Green's evidence is that the doctor was also told about the injection but he did not offer any treatment for that complaint but he went on to say that the doctor did treat him with eye drops.

Dr Alvin Edwards

[25] In the witness summary of Dr Alvin Edwards it is indicated that he is one of the doctors who examined the Claimant and treated him "from the date of the operation to present."

[26] It is also indicated that he will give evidence concerning the nature and extent of the injuries suffered by the Claimant; the resulting disability, the need for future procedures; the likelihood that the Claimant may have to undergo enucleation and replacement with prosthetic eye; the effect of such injuries may have on the Claimant's future.

[27] The further indication is that Dr Edwards will give evidence relating to his report and the reports of other ophthalmologists being Dr Ian C. Walwyn and Dr Kevin A. Highland.

[28] In his evidence in chief, Dr Edwards gave his qualifications as a registered medical practitioner in Antigua and Barbuda and as an ophthalmologist and in practice for twenty five years both on Antigua and Barbuda and St Kitts and Nevis.

[29] It is Dr Edwards testimony that Everal Green is his patient who came to see him on October 03, 2006 at which time he complained of a painful right arm and a painful right eye from which he could not see. According to Dr Edwards, Green told him of his visits to Cuba and the All Saints Health Clinic and told him in layman terms what had happened.

- [30] Dr Edwards testified that upon his examination of Green he had no light perception in his right eye which meant that he had lost the eye. And his left eye was down to counting fingers.
- [31] With respect to the right eye the artificial lens was not in the right place as it had moved from its position against the cornea which could have damaged the cornea. He said further that the intraocular pressures were 70mmHg in the right eye and 19 mmHg in the left eye. According to the doctor, the pressure was out of control in the right eye and the back of that eye could not be seen.
- [32] In giving testimony about the artificial lens, Dr Edwards said that it was the correct lens and it was correctly placed, but it was not in the correct position when he saw Green. In further testimony Dr Edwards said that the movement could have been caused by several things. One was endophthalmitis, an infection in the eye which could lead to implications. Another was injections to the eye which could have induced infection. A third was bleeding which could have forced the lens forward. And a fourth was that the lens and the pupil can go against the cornea.
- [33] In reference to the Medical History Summary appearing at pages 10 and 11 of Core Bundle 2 (a) Dr Edwards said that this depends on the procedure. According to him there is tremendous infection in the eye. And continuing his testimony Dr Edwards said that sometimes there may be blood behind the retina which would force everything forward. He went on to say that an infection can cause the problem. He also added that it is possible for the lens to be displaced by the infections.
- [34] On the matter of the pain experienced by Mr. Green, Dr Edwards said that this could be caused by the cataract surgery for which there are medical treatments such as eye drops. Such eye drops were prescribed for Mr Green but he still complained of pain. The doctor went on to testify that the eye can be removed which would relieve the pain.
- [35] Finally, it is Dr Edward's testimony that Green had a procedure and had endophthalmatis which was not picked up fast enough. He said further that the infection could have been caused by poor surgical technique and added that Green did not complain about being struck in the eye.

- [36] In cross-examination by Mrs Carla Brooks-Harris, Dr Edwards said that he thought that the lens was put in the right position and complications may have developed at the time of surgery and after. He added that he could not say that the operation was not done with skill.
- [37] Concerning the pain in the right arm complained of by Mr Green, Dr Edwards said that Green made him aware of the pain in the arm and the difficulty in using it after the injections were administered. Such pain, according to Dr Edwards, could have precipitated the pain; but could not say that the injections caused the pain.
- [38] On being referred to Dr Highland's Report, Dr Edwards said that the lens should have been removed and the complications dealt with. With respect to the injections to the eye, Dr Edwards testified that it would depend on when this was done which he did not know.
- [39] On the question of marijuana affecting the cataract surgery Dr Edwards testified that he was not aware of this phenomenon. He added that the clothing mechanism is checked to ensure that it is place.

ISSUES

- [40] The issues for determination are:
1. Whether the First Defendant, being the Government of Antigua and Barbuda, owed a duty of care to the Claimant and if so, the extent of the duty of care.
 2. Whether the First Defendant or the Second Defendant lacked in breach of their duty of care.
 3. Whether the Cuban doctors executed reasonable care and skill during the performance of the surgery.
 4. Whether the Claimants injuries were due to the negligent acts of the Cuban doctors in Cuba and Cuban doctor in Antigua.

ISSUE NO 1

- [41] Whether the first Defendant, being the Government of Antigua and Barbuda, owed a duty of care to the Claimant; and if so, the extent of such duty of care.

[42] **The General Law**

The tort of negligence has been defined as the breach of a legal duty to take care which results in damage, undesired by the defendant to the claimant. It is stated further that the tort has three elements: 1. The defendant must owe a duty of care; 2. The defendant must be in breach of that duty, and 3. damage must have been caused to the claimant by the defendant's breach and such damages must not be too remote.

[43] **Duty of Care**

Submissions on behalf of the Claimant

The following submissions were made on behalf of the Claimant by Mr Steadroy Benjamin: (a) During the travel it was never put to the Claimant that the Government of Antigua and Barbuda through the Minister of Health did not introduce the Eye-Care Programme to residents and nationals of this State; nor was it contradicted that the Eye Screening Process organized by the government was done at the Multi-purpose Centre Parry Bay and that the screening by Cuban doctors. (b) Further it was never disputed that the Claimant traveled to Cuba on several occasions free of cost on flights arranged by the Government of Antigua and Barbuda and Cuba to facilitate, the treatment of the Claimant in Cuba and his follow-up visit to Cuba for treatment to alleviate the pain he experienced as a consequence of his operation. (c) it is submitted that the Court will have no difficulty in finding that the Government in those circumstances did have a duty of care to the Claimant to ensure that once the said Claimant would be provided with skilful, professional and competent medical treatment.

[44] Mrs Carla Brookes-Harris for the Defendants submits that based on the Claimant's contention that he placed reliance on statements and/or representations by the Minister of Health submits that based on **Hedley Byrne v Heller**² it was held that a duty to take care in making statements could arise in certain circumstances where there exists a special relationship. It is further submitted that the said case of **Hedley Byrne v Heller** also establishes that the following requirements must be

² [1964] AC 465

established in order to ground liability: (1) The Claimant must rely on the defendant's skill and judgment or his ability to make careful inquiry; (2) The defendant knew or might reasonably to have known that the Claimant was relying on him; and (3) It was reasonable in the circumstances for the Claimant to rely on the defendant.

[45] A further submission on behalf of the Defendants is that notwithstanding the Claimant's assertion as to statements made by the Minister of Health, the Claimant has failed to adduce any positive evidence that the Minister did in fact make such statements on representations as claimed. Further that the Claimant has failed to lead any evidence as to the extent of the government's involvement in the Eye-Care Programme. The submission continues: "None of the alleged statements were adduced in evidence to allow the court to test the accuracy of what was actually said by the Minister or the duty imposed on the Minister. It is therefore submitted that in the absence of the Minister's statements and or representations the Court should not in the circumstances impose a duty of care on the Government of Antigua and Barbuda."

[46] Relying on **Caparo Industries PLC v Dickman**³, learned counsel for the Defendants submits further that it was unreasonable to the Minister's statements. This is inferred by the fact that, according to Mrs Brookes-Harris the Claimant on cross-examination expressly stated that during the process of medical treatment on his eye, he at no time dealt with any government official from Antigua and Barbuda, all dealings being with Cuban doctors.

[47] Finally, in relation to the First Defendant learned counsel for the Defendants asks the Court to consider certain factors as stated in **James Mc Naughton Paper Group Ltd v Hicks Anderson & Co**⁴ in determining whether a duty of care exists in this case. They are:

- (i) The purpose for which the statement was made; was it made specifically to inform the advisee, or for the direct benefit of someone else?
- (ii) The purpose for which the statement was communicated; was it for information only, or was it intended to be acted upon?

³ [1990] 2 WLR 358

⁴ [1991] 1 ALL ER 134

- (iii) The relationship between the advisor, the recipient of the advice and any third parties; was the advisee independent and able to make his own decisions?
- (iv) The size of the class to which the recipient of the advice belongs; it is sometimes easier from a member of a large class to establish liability than it is for an individual;
- (v) The knowledge and experience of the advisee; did the advisor know that the advisee would rely on the information without taking independent advice; and did the advisee actually rely on the statement?

Analysis

[48] Generally speaking, a duty of care arises where one individual or group undertakes an activity which would reasonably harm another – physically, mentally or economically. But where an individual has not created a situation which may cause harm no duty of care arises.

[49] The question then becomes whether the Minister of Health did make statements and or representations concerning the Eye-Care Programme involving the Governments of Antigua and Barbuda and Cuba. Learned counsel for the Defendants has submitted that there is no evidence before the Court that this is so. But while this may be correct in terms of direct evidence the same is not true in terms of circumstantial evidence.

[50] The matter of Eye-Care Programme cannot be in doubt as the Defendants in their defence plead the following at paragraph 2:

“The second-named Defendant is registered as an ophthalmologist and has been working at the All Saints Health Clinic from July 26, 2005 with the Eye-Care Programme arranged between Antigua and Barbuda Government and the Cuban Government.”

[51] An immediate observation is that the time from which the Second Defendant was “working”, being July 2005, coincides with the period which the Claimant contends the Minister of Health made the requests in relation to the Eye-Care Programme.

[52] But beyond the foregoing, the question which arises is what are the circumstances in which the Claimant became involved in the Eye Care Programme? And it is not in dispute that the Claimant attended the screening at the All Saints Health Centre where he was examined by the Second

Defendant. It is also not in dispute that the Claimant made three trips to Cuba in connection with his right eye.

[53] A related question is why the Claimant after seeing Dr Walwyn in September 2003 and diagnosed with cataract and told to return when he was ready for the procedure, in fact never returned for the procedure. In fact he returned to Dr Walwyn in May 2006 after the operation in Cuba which was free as opposed to Dr Walwyn's services which as the evidence shows are not free.

[54] It is therefore the determination of the Court that assurances and or representations were made by the Minister of Health on behalf of the Government of Antigua and Barbuda in connection with the Eye-Care Programme. This in turn gave rise to a duty of care.

Scope of the duty of care

[55] It is common ground that the Programme described above involved two sovereign governments. However, the evidence as to the nature and scope⁵ of the duty is sparse. But it is reasonable to infer from the undisputed facts that the government of Antigua and Barbuda was responsible for the screening of potential patients who were screened at the All Saints Health Centre. And the Government was also responsible for the arrangements relating to the transport of the selectees to the airport and hence to Cuba.

[56] On the other hand, the Government of Cuba was responsible for the collection of the selectees at the airport, and accommodation while in Cuba and the medical treatment.

[57] Therefore, it cannot be that the Government of Antigua's duty of care extends to Cuba where the eye treatments are administered. It must be that the duty of care relates to ensuring by way of the arrangement that the treatment is administered by doctors who are skillful, professional and competent in the performance of their functions.

⁵ See In Clerk & Lindsell on Torts (15th ed at para 10-30 it is noted that: "The existence of a duty to be careful, the standard of care which has to be shown and how far that duty extends are distinct questions."

[58] By definition a free programme would not have appealed to the Claimant alone, so that if the Government of Antigua and Barbuda's duty of care extended beyond its territory, apart from certain other legal principles involved, the situation would simply be impossible. In any event there is nothing in the evidence that the doctors in Cuba who gave treatment to residents and nationals of Antigua and Barbuda, including the Claimant, are agents or employees of the Government of Antigua and Barbuda with respect to the Eye-Care Programme.

[59] In like manner in the case of Dr Delisle Narino Mirtha, in the first place the Defendants' pleadings suggest that he was employed at the clinic to do the screening. And there is no evidence to suggest that his actions extended beyond whatever he did in Antigua and Barbuda as a doctor so as to define his duty of care. This is conceded by Mrs Brookes-Harris since the rule is that a medical doctor owes a duty of care to his patient even where the service may be gratuitous.⁶

ISSUE NO 2

Whether the First-Defendant or the Second Defendant acted in breach of their duty of care breach.

[60] In CLERK AND LINDSELL ON TORTS at paragraph 10-29 the learning is this

"The concept of duty is logically determined by that of duty. There are three possible ways of regarding it. If duty is formulated simply as a duty to behave carefully, then breach of it is behaving carelessly. On this view, foreseeability of damage to the plaintiff and of the kind of damage, causation and the extent of the damage actually sustained pertain to remoteness. If the national duty is formulated as a duty to behave carefully *vis-à-vis* a particular kind of person and kind of damage, then breach would cover careless behavior plus foreseeability plus foreseeability of that kind of damage to that kind of plaintiff. Causation and the extent of damage would then be relegated to remoteness. Again, if duty is formulated as a duty not to inflict carelessly a particular kind of damage on a particular kind of person then breach would cover all the above except the extent of damage, which alone would fall under remoteness."

[61] Further, Volume 34 of HALSBURY'S LAWS OF ENGLAND at paragraph 10 the matter of the standard of care is addressed thus:

⁶ See: *Bolam v Friern Hospital Management Committee* [1957] 2 ALL ER 118; *Goode v Nash* [1979] 21 S.A.S.R. 419

"It is a question of fact whether the defendant has failed to show reasonable care in the particular circumstances. The law lays down the general rules which determine the standard of care which has to be attached, and it is for the court to apply the legal standard to its findings of fact so as to decide whether the defendant has attained that standard. The legal standard is not that the defendant himself but that of a person of ordinary prudence or a person using ordinary care and skill. It is no defence that a person acted to the best of his own judgment if his best is below that of a reasonable man."

Government of Antigua and Barbuda

[62] Based on the learning the test applicable is whether what the government did falls within what a reasonable government would do to act carefully given the special medical circumstances of the Claimant.

[63] But what did the government do? It has been noted that the Claimant said the following at paragraphs 11 to 15 of his witness statement:

"11. Acting on the assurances and oral representations made by the Minister on his own behalf and also on behalf of the government of Antigua and Barbuda I submitted myself to the Eye Screening Process arranged by the government of Antigua and Barbuda with the government of Cuba.

12. After undergoing the Eye Screening Process I was selected as a patient to undergo Cataract surgery of the right eye in Cuba.

13. At all material times I understood and was led to believe that the operation to my right eye would result in the removal of the cataract in my right eye which would lead to my having better vision from the said right eye.

14. I never agreed to a medical procedure which would or may result in the loss of my eye or the loss of vision in my right eye.

15. In addition thereto I was assured that the operation would be performed with skill and utmost professionalism and that the appropriate inter-ocular lens would be placed in the right position in my right eye thereby enhancing my vision herein and therefrom."

[64] Much of the above was confirmed in cross-examination by the Claimant. He said that he went to Cuba in November 2005; and the actual date of departure was arranged by Dr Mirtha. His further evidence is that in Cuba "they sent a bus for us and I went to the hospital. The operation was on November 30 2005.

[65] In their Defence the Defendants plead the following:

- “6. Following examination and screening on October 30, 2005 by Dr Iris and the Second named Defendant the Claimant was selected to travel to Cuba for diagnosis and appropriate medical treatment. At all material times the Claimant was accompanied by his wife and in her presence he consented to travel to Cuba.
7. The Claimant travelled to Cuba on November 18, 2005 and was diagnosed with senile cataract OD and surgery was recommended for extraction of the cataract with an implant of an intraocular lens. Tests undertaken of the Claimant were within moral limits but, his personal pathological history indicated an addiction to marijuana and arterial hypertension.
8. On November 30, 2005 the Claimant was with his consent operated on at the Juan Bruno Zayas Clinical Surgical Hospital de Cuba..
10. The Defendants aver that the operation/medical procedure was performed with skill, professionalism and care by the doctors at the Juan Bruno Zagas Clinical Surgical Hospital of Santiago de Cuba, but state that the doctors were not acting as agents nor servants of the Defendants or any of them.”

[66] Based on the pleadings and the evidence the following are not disputed: 1. There was a screening process in place in Antigua in connection with the Eye Care Programme. 2. In the case of the Claimant he was screened by Dr Iris and Dr Mirtha. 3. Following the screening the Claimant was selected as a patient to undergo cataract surgery. 4. Dr Mirtha arranged the Claimant's date of departure which was November 18, 2005. 5. The Claimant's evidence is that he was assured that the operation would be performed with skill and utmost professionalism. 6. The operation was performed at the Juan Bruno Zayas Clinical Surgical Hospital.

[67] The question must now be asked again whether the actions of the Government of Antigua and Barbuda, given the scope of its duty of care, would be reasonable and careful in the context of the Claimant. The Court determines that the answer must be in the affirmative as there is no evidence of anything being done carelessly. Rather, all the actions within the scope of the Government's actions were well planned within a reasonable time frame.

[68] It is therefore the conclusion of the Court that the Government of Antigua and Barbuda, as represented by the Attorney General in these proceedings, is not in breach of its duty of care.

Second Defendant

- [69] The evidence is that Dr Delisle Narino Mirtha's action with respect to the Claimant are confined to the screening, the Claimants' departure, after care and the Claimant's return to Cuba on two other occasion for further treatment of the right eye.
- [70] However, the Second Defendants' actions are governed or measured by his duty of care cast upon a doctor. The entire law in this regard is well summarized by Mr Steadroy Benjamin, learned counsel for the Claimant, in his closing submissions.

"A doctor's duty which arises from the relationship of doctor and patient and which extends to examination, diagnosis, advise and treatment, obliges him to take all due care necessary for the health of the patient. It is what has become known as the **Bolam Test**; whether or not the doctor has exercised that relevant care necessary is measured by the standard of the ordinary skilled man exercising and professing to have that special skill. He need not possess the highest expert skill but it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art: (per McNain J in **Bolan v Friern Hospital Management Committee** (1957) 2 ALL ER 118). Thus if his acts or omissions fall below that standard of the reasonably competent practitioner he will be adjudged to have been negligent.

It is well settled law that the **Bolam Test** is applicable to all aspects of a medical practitioner's work: **Sidaway v Bethlem Royal Hospital Governors and others [1985] 1 AER. 643**. The learned trial judge was guided by the following statement of the Ontario Court of Appeal in **Tacknuk**: "The obligation of a surgeon to his patient cannot and does not stop with the successful completion of the operation itself. **A continuing duty rests upon the surgeon to provide adequate post-operative care or to give adequate advice and direction as to such care.** The extent of that duty will vary widely. It is now clear that the standard of care is a matter for the Court and not for medical experts although their view will be taken into consideration in setting the appropriate standard. The degree of care the surgeon must provide and the extent of the advice he must give will depend on a long list of variables. They must include **the gravity of the operation, the age and general health of the patient, the particular problems of the patient, the nature of the post-operative medication and treatment required, the degree of isolation of the patient, the availability and proximity of medical care and hospital facilities and the degree of risk to which the patient is susceptible either from post-operative complications or subsequent and treatment.**"

- [71] In his witness statement the Claimant reflects the Second Defendants involvement with him in Antigua after the surgery in Cuba. Relevant are paragraphs 23 to 28:

- "23. During the month of December, 2005 I attended the All Saints Clinic where I was treated by Dra Delisle Narino Mirtha and had intramuscular injections injected into my right eye by the said doctor, a course of medical treatment which was clinically unsound, bad and injurious to my health; at the trial I will refer to the letter of Dr Alvin Edwards, Ophthalmologist dated the 12th October, 2006 for its full terms and effects.
24. My condition worsened and after advice by Dra Delisle Narino Mirtha who made arrangements with the government's servants and/or agents who acted at all times under the direction and control of the said Minister of Health and on his behalf and also on behalf of the Government of Antigua and Barbuda I was flown out to Cuba on 1st January, 2006 for further management and treatment of my condition.
25. My condition worsened whilst I was in Cuba and I was forced to return to Antigua in February, 2006; but soon thereafter, again, because of the further worsening condition of my right eye I returned to Cuba in March, 2006 and finally returned to Antigua in April, 2006.
27. I aver that the government and Dra Delisha Narino Mirtha, inter alia, in the service of the Government of Antigua and Barbuda owed me a duty of care but that they and each of them breached that duty to me.
28. I state that my treatment was unskillful and was done negligently as a consequence of which I suffered and still suffers excruciating pain, injury, loss and damage."

[72] In addition in the particulars of negligence, paragraph 28 (h) states: "Failing to ensure that Dra Delisle Narino Mirtha was skilful in the proper application of injections to my right arm."

[73] As noted above, a doctor's duty of care applies to all aspects of his or her work so that Dr Mirtha is no exception. In this regard the evidence is that this doctor's involvement with the Claimant begins with the screening programme in October 2005 and ends with the follow-up medical services up to March 2006.

[74] The Claimant's selection for an eye operation is confirmed in Cuba where he is diagnosed with cataract. The Claimant is seen by the Second Defendant on December 19 and 28, 2005 and based on the Claimant's complaint of ocular pain he is returned to Cuba for further treatment. After the Claimant's return to Antigua in February, 2006 he is seen by the Second Defendant on March 22, 2006 and he is returned to Cuba on the following day in order that further medical treatment may be administered.

- [75] In terms of medical treatment administered by Dr Mirtha, the Medical History⁷ Summary reveals the following:

“19/12/05

Seen by Dr Mirtha Delisle Narino, demonstrating ophthalmologic symptoms that seem to indicate that the patient suffered an ocular trauma, presenting intense ocular pain, ocular hypertension, noting remains of fresh blood, therefore begins treatment with IM and IV acetazolamide and ibuprofen, she also suggested that the patient be transferred to Cuba.

28/12/05

Seen by Dr Mirtha Delisle Narino who attends to patient's ocular pain and prescribes treatment with IV and IM Acetazolamide. The doctor reports improvement in the patient and prescribes maintenance with 4% pilocarpine and she advises transfer to Cuba.

On 22/03/06 he returns to be seen by Dr Mirtha Delisle Narino, presenting pain again and hyphema with rubeosis of the iris and he is transferred to Cuba because in his country the necessary conditions for his case follow-up are not present.”

- [76] Added to the foregoing in Dr Alvin G. Edwards Report dated 12th October, 2006 the following is stated in relation to the Claimant: “He returned from Cuba in February and was followed in the All Saints Clinic and received several injections in his right eye which seemed to worsen his condition.”
- [77] The immediate comment on the extract from Dr Edwards' Report is that it is dated 12th October 2006 (having seen the Claimant on 3rd October, 2006) so that he could not have made the observations on his own. Further, there is no mention in the said summary of “several injections” received by the Claimant at the All Saints Clinic.
- [78] It has been noted that the test as to whether a doctor has rendered the care is measured by the standard of the ordinary skilled man exercising and professing to have that special skill.

⁷ Core Bundle 2 (a) at pages 10 - 12

[79] As against this test and the evidence, it is the conclusion of the Court that the Second Defendant's actions does not fall below the standard of the ordinary skilled man exercising a skill. This must be seen in the context of after care as especially the ocular pain of which the Claimant complained.

[80] The evidence shows that following the release of the Claimant from the Juan Bruno Zayas Clinical Surgical Hospital in Cuba on December 8, 2005, he was seen by the Second Defendant on December 19, 2005 at which time Claimant was treated for his pain and it was suggested that he be transferred to Cuba. Similarly, on December 28, 2005 when the Claimant was seen by the Second Defendant there was improvement in his condition, she prescribes other medicine and advises that the Claimant be transferred to Cuba.

[81] The pattern is repeated on March 22, 2006 when the Second Defendant saw the Claimant complaining of pain and hyphema with rubeosis of the iris was also diagnosed; whereupon he was transferred to Cuba on the following day.

[82] As noted before it is a question of fact whether a defendant has failed to show reasonable care in the particular circumstance. The present circumstance is confined to that of after care following surgery in Cuba.

[83] In all circumstances it is the conclusion of the Court that it has not been shown that the Second Defendant was careless or failed to take reasonable care of the Claimant.

ISSUES 3 & 4

3. Whether the Cuban doctors exercised reasonable care and skill during the performance of the surgery.

4. Whether the Claimants injuries were due to the negligent acts of the Cuban doctors in Cuba and the Cuban doctor in Antigua.

[84] For four basic reasons the Court will not adjudicate upon these issues. The first is that, apart from the Second Defendant, no Cuban doctor is party to these proceedings. Second it is common ground that the surgery was performed at the Juan Bruno Zayas Clinical Surgical Hospital of Santiago de Cuba by Cuban doctors. Third, apart from the Evaluation by the Committee of

Cataract specialists at the Ramon Pando Ferrer Institute of Ophthalmology of Cuba and the Medical History Summary⁸ there is no direct medical evidence as to what was done at the time of the surgery. And fourth, it has already been determined that the Second Defendant was not in breach of her duty of care.

Costs

[85] In the circumstances of this case there will be no order as to costs.

Apology

It is common ground that after this judgment and others had been reserved a number of other matters which touch and concern governance and/or the national interest of Antigua and Barbuda and in the Commonwealth of Dominica arose and as such were given priority. Further, this judge was transferred to another jurisdiction, where a single judge presides, with effect from 1st September 2010 with the foreseeable consequences. This accounts for the delay. Despite the foregoing a deep and sincere apology is tendered for the delay.

ORDER

[86] **IT IS HEREBY ORDERED AND DECLARED AS FOLLOWS;**

1. The First Defendant owed a duty of care to the Claimant but that duty of care is limited to actions in Antigua and Barbuda and there is no evidence that the doctors who rendered medical service in Cuba to nationals and lawful residents of Antigua and Barbuda including the Claimant are agents or employees of the First Defendant with respect to the Eye-care Programme.

⁸ See Core Bundle 2 (a) at pages 4-14

2. Neither the First Defendant nor the Second Defendant was in breach of their duty of care as there is no evidence goes to show that they acted carelessly or unreasonably.

3. The Court will not adjudicate upon Issues 3 & 4 because apart from the Second Defendant no Cuban doctors is a party to these proceedings; the surgery performed on the Claimant was performed by Cuban doctors at the Juan Bruno Zayas Clinical Surgical Hospital of Santiago de Cuba; apart from the Evaluation by the Committee of Cataracts Specialists at the Ramon Pando Ferrer Institute of Ophthalmology of Cuba and the Medical Summary, there is no direct medical evidence as to what was done at the time of the surgery; and it has actually been determined that the Second Defendant was not in breach of her duty of care.

4. There is no order as to costs.



Errol L. Thomas
High Court Judge