Neutral Citation No. [2013] NICA 78 | *Ref:* **HIG8984**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **26/09/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

MARGARET HAUGHEY

-v-

NEWRY AND MOURNE HEALTH AND SOCIAL CARE TRUST

Before: Higgins LJ, Coghlin LJ and Sir John Sheil

HIGGINS LJ (giving the judgment of the court)

[1] This is an appeal from the decision of Gillen J whereby he dismissed the appellant's claim for damages for clinical negligence against the servants and agents of the respondent Health and Social Care Trust (the Trust).

[2] The appellant was born on 23 August 1958. In March 1997 she attended her general practitioner complaining of increased urinary incontinence especially when she walked or took exercise. She was referred by her general practitioner to Mr de Courcey-Wheeler, a Consultant Obstetrician and Gynaecologist at the Daisy Hill Hospital, Newry, Co Down, for which hospital the respondent is responsible. As a result of this referral the appellant underwent a Burch Colposuspension (CSP) on 2 March 1998. The purpose of this procedure is to "elevate the bladder neck by placement of sutures in the anterior vaginal wall and to suspend it from the ileopectineal ligament on the ipsilateral side" (see judgment paragraph 17). This permits surgical intervention to address the urinary incontinence. The operation was carried out by Mr de Courcey-Wheeler assisted by a then Senior Registrar Dr Dolan. On 6 March 1998 the appellant was complaining of severe back ache and on examination the right renal angle was very tender. There was no tenderness over the left renal angle. Arrangements were made for specimens to be taken.

[3] On 7 March 1998 the following entry was made in her hospital notes at 12.15pm –

> "Has had ultrasound renal tracts . . . diagnosis right hydronephrosis. Intravenous pyelogram no spillage dye on the right side . . . Discussed with Mr Sim. To return for laparotomy at 5 pm. Husband and patient fully informed? Kinking right ureter – will need to undo stitches on right side."

An intravenous Urogram report of the same date recorded –

> "The left renal tract appears entirely normal. On the right there is delay in excretion and despite a double dose of contrast only poor excretion was noted. There is a right hydronephrosis but the ureter did not fill."

Hydronephrosis is an accumulation of urine in the kidney and as the learned trial judge stated at paragraph 10 of his judgment, it was common case that these findings illustrated an obstruction in the ureter. A further operation was carried out on that same date. The operation note records –

> "Removal of right sided colposuspension sutures . . . Procedure – abdomen open to cave of retzius. Two sutures to the right ileopectineal ligament identified in normal position. Suture removed from ligament. Place of suture removed from para-urethral/vaginal tissues. [My emphasis]"

[4] This second operation was carried out by Mr Sim assisted by Dr Farrage. The appellant made good progress and was discharged on 12 March 1998. On 30 March 1998 Mr de Courcey-Wheeler wrote a discharge letter to her General Practitioner recording the history of her admission to hospital and her treatment. This stated –

> "Mrs Haughey was admitted as arranged for the above operation. It was carried out without complication. Post operatively she was complaining of pain and retention of urine due to a blockage of the suprapubic catheter. It was removed and replaced with a urethral catheter. Four days post operatively she was complaining of further pain and in addition a tender right renal angle. Emergency ultrasound and IBP showed obstruction at the right ureter. She was taken back to theatre and the colposuspension sutures on the right side were removed. The repeat IBP showed free flow and drainage from the right kidney, the ureter was unobstructed from the renal pelvis to the bladder. The elevation of the bladder neck from the colposuspension had obviously caused a kink in the ureter and hence obstruction. Now that the ureter has been unkinked she should get no further bother, however I am unsure how successful the colposuspension will now be in the treatment of her stress incontinence. Time will tell and I plan to review her in about six weeks time."

The appellant had previously undergone surgery to remove the womb and to repair the sagging front portion of the vagina in 1993.

[5] On 29 October 2002 a writ was issued on behalf of the appellant alleging trespass to the person and negligence by the respondent Trust, its servants and agents in the management, care and treatment of the appellant and in particular the management care and conduct of an operation. The particulars of negligence in the statement of claim alleged -

(a) failing to ensure that the bladder repair operation was carried out by someone

sufficiently trained and experienced in colposuspension.

(b) employing a faulty operative technique.

(c) inserting the stitches too close to the ureter.

(d) failing to assess whether adequately or at all the bladder edge and the urethra in the course of the surgery.

(e) failing to pay proper attention during the operation.

(f) failing to warn the plaintiff.

(g) failing to obtain a proper consent from the plaintiff to the operation.

(h) failing to take any or proper care of the plaintiff.

[6] The appellant called as an expert witness Mr Alan Brown FRCOG, FRCSE a retired Consultant Gynaecologist and Obstetrician with special interest in urogynaecology. The respondent called, in addition to the doctors from the Daisy Hill Hospital, Mr Robin Ashe FRCOG, DCH whose specialist field was gynaecology with an interest in urogynaecology. Prior to the commencement of the trial Gillen J, the trial judge, was given several medical articles to read. From the evidence of the two expert witnesses and the articles the learned trial judge was able to summarise the primary facts about the Burch CSP procedure. This he did between paragraphs 18 and 36 of his judgment.

[7] The appellant's case was that the failure of the ureter to drain was due to surgical error rather than a rare complication of surgery. It was alleged that the ureter had been obstructed by kinking occurring due to the stitches being inserted in too high a position. It was alleged that Mr de Courcey-Wheeler was not sufficiently experienced to carry out this surgical procedure on his own. Near the end of Mr Bentley's opening of the case the learned trial judge sought clarification of the issues to be determined. The following exchange took place (see page 161 of the transcript):

> "Judge: Are those the two net points in the case? One whether the stitches went into the bladder and two if it (sic) hadn't gone into the bladder then this obstruction wouldn't have occurred?
>
> Mr Bentley: Yes yes."

The respondent's case was that the stitches were inserted in the correct position and that the elevation of the bladder may have resulted in tethering/immobilisation through lack of elasticity due to previous surgical scarring. At paragraph 57 of his judgment the trial judge identified the issue in the case as whether Mr Brown's evidence was correct that obstruction of the ureter could not occur in the absence of misplacement of stitches. Dr Dolan gave evidence that if the stitches had been inserted in the wrong place she would have observed this. Mr Sim who conducted the second operation and removed the stitches was 'adamant' they were not in the wrong place. His evidence was consistent with the operation note set out in paragraph 3 above. Both Dr Dolan and Mr Sim gave evidence

about previous CSP operations in which they were involved in which obstruction of the ureter occurred when the stitches were inserted correctly. Mr de Courcey-Wheeler gave evidence that the stitches were inserted in the white paraurethral/vaginal facia at the level of the bladder neck clear of the bladder edge and that they did not enter the bladder tissue or the ureter. Therefore they were not the cause of the kinking.

[8] In his conclusions the trial judge accepted the evidence of Mr de Courcey-Wheeler, Dr Dolan and Mr Sim. He reminded himself that the onus was on the plaintiff to prove that the defendant was negligent. He noted the conflict in the evidence between Mr Brown and Mr Ashe. He preferred the evidence of Mr Ashe and gave his reasons for that. He concluded that there was insufficient evidence to justify a conclusion that the respondent failed to exercise reasonable care notwithstanding the outcome for the appellant. He stated that there may well have been adhesions/scarring that limited the elasticity of the tissues and which provided a pre-disposition to kinking of the ureter when the bladder was lifted. He stated that such kinking of the ureter in the absence of stitches inserted in the wrong place is a very rare occurrence but recognised that previous pelvic surgery may well predispose a patient to it. He concluded that he was satisfied that this provided a plausible explanation for the kinking on this occasion in the absence of negligence on the part of Mr de Courcey-Wheeler.

[9] Four grounds of appeal were advanced on behalf of the appellant. They are –

> "1. The Learned Trial Judge correctly rejected the application of the principle of res ipsa loquitur to this case, but then went on to discuss the situations in which the principle fails to result in a finding in the Plaintiff's favour, which allowed him to be coloured in his approach to the evidence given.
>
> 2. The Learned Trial Judge's analysis of the medical literature was incorrect in that a proper analysis of the same did not provide support for the proposition that the kinking of a ureter in the course of a colposuspension procedure can occur without incorrect and improper insertion of the sutures.
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> 3. The Learned Trial Judge failed to appreciate and find that three witnesses called by the Defendant, namely Mr Ashe, Mr Sim and Dr Dolan were not independent, objective and unbiased, and the Judge placed too much weight on their evidence.
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> 4. The Learned Trial Judge by relying too heavily on the evidence of three witnesses above as opposed to the evidence of Mr Brown, the Plaintiff's expert, allowed himself to come to an incorrect and wrong conclusion on the issue of negligence."

Mr Bentley QC and Miss Higgins appeared on behalf of the appellant. Mr Morrow QC and Mr Good appeared on behalf of the respondent. We are grateful to counsel for their helpful skeleton arguments and oral submissions before the court.

[10] In his skeleton argument and oral submissions Mr Bentley elaborated on the

grounds of appeal above. I will summarise his case based on his skeleton argument and his oral submissions. Mr Bentley accepted that this was not a case of res ipsa loquitur but submitted that the trial judge fell into a trap laid by the respondent that there was a plausible explanation for the obstruction of the ureter which did not involve misplacement of the sutures. The principles involved in res ipsa loquitur which the trial Judge set out in his judgment should not have formed part of his thought processes leading to his conclusions. The suggestion that previous surgery giving rise to fibrous tissue could have of itself resulted in kinking of the ureter was nothing more than a hypothesis. Mr Brown's expert evidence was that this was impossible. For there to be an alternative explanation for kinking of the ureter it had to be one that was reasonable, plausible and acceptable to the medical profession and ultimately the Court. Mr Bentley QC submitted that the trial judge wrongly treated all four doctors called by the respondent as expert witnesses, when Mr Ashe was the only expert witness called and the other three were merely witnesses of fact. In addition it was inappropriate for the judge to use the evidence of Dr Dolan and Dr Sim as to their previous experience of kinking in the absence of misplacement of the sutures, to corroborate the explanation put forward by Mr Ashe. There was no other independent evidence that this could occur and this approach by the trial judge caused him to reject the weight of the medical literature and the expert opinion of Mr Brown. Furthermore the evidence of Mr Ashe should not have been accepted as expert evidence as he was not truly independent in that he was a colleague of and friendly with Mr de Courcey-Wheeler in a small jurisdiction in which there were only six urogynaecologists. Mr Bentley QC accepted that the judge was correct to state that in the course of a Burch CSP kinking of the ureter was a very rare occurrence but he was incorrect to conclude that the medical literature did not provide a clear answer to its occurrence in this case. He submitted that the literature established only that previous surgery, resulting in fibrosis, might favour kinking of the ureter, which he characterised as a causa sine qua non, but that the real causa causans was the misplacement of the sutures. It was submitted that the trial judge confused these two issues and reduced the impact of the evidence of Mr Brown to a 'bald assertion' (paragraph 61). Mr Bentley QC was also critical of the judge's approach to the evidence of Mr Ashe whereby he elevated what was a proposal about the presence of adhesions or scarring in paragraph 46 of the judgment to a proposition in paragraph 63, when in reality it was no more than speculation.

[11] Mr Morrow QC, submitted that while the learned trial judge had referred to the principle of res ipsa loquitur, he had not relied upon it in arriving at his conclusions. He had stated correctly the issues in the case and that the onus of proof lay on the plaintiff (the appellant). He had understood the surgical technique involved and the plaintiff's (appellant's) case in relation to it. His conclusion that obstruction of the ureter can occur even when the sutures have been positioned correctly was consistent with the medical literature and was reinforced by the evidence of the respondent's witnesses which the trial judge was entitled to take into account. He was alert to the challenge to the independence and objectivity of the respondent's witnesses but was entitled to reach conclusions on the primary facts based on their evidence, if accepted.

[12] The appellant's case was based principally on the evidence of Mr Brown. It was his opinion that the obstruction of the ureter was caused by the insertion of the stitches at a higher level than they should have been, thus causing a kink in the ureter and thereby an obstruction. If the stitches were put in the correct place, kinking should not occur. In the course of his evidence Mr Bentley QC asked him his opinion of what happened in this

particular case and he replied (see transcript Monday 23 March 2009 page 210) –

> "Well we know that there was an obstruction of the right ureter whether by kinking or a stitch round the whole ureter and we know that as a result of one or both stitches that were removed by Dr Sim that the situation was reversed. My conclusion is therefore that the stitch or stitches on the right side were wrongly placed to include the bladder and or the ureter and in normal circumstances this complication should not occur because the colposuspension has been done tens of thousands of times across the world and we only have about 19 written articles saying that this complication has occurred."

Put this way as it was by Mr Brown, the case was analogous to an allegation of res ipsa loquitur – 'the thing speaks for itself'. In other words the only explanation for the kinking was the misplacement of the sutures. Consideration of res ipsa loquitur was useful, if applicable, in order to resolve where the burden of proof lay. However as the judge pointed out at paragraph 57 the appellant did not rely on res ipsa loquitur and he was doubtful whether it could ever apply in a complex contested medical negligence case. In the same paragraph he stated that the burden of proof was clearly on the appellant "to establish on the balance of probabilities that the failure of the right ureter to drain following the csp procedure was because of Mr de Courcey-Wheeler's failure to take reasonable care in the course of the surgery causing the plaintiff injury".

[13] No complaint is made about that assessment of the burden of proof nor could one be made. The judge then added "for completeness sake I mention that the plaintiff did not assert that the principle of res ipsa loquitur applied in this case". In paragraph 58 he referred to a passage in the judgment of Griffiths LJ in Jacobs v Great Yarmouth and Waveney Health Authority [1995] 6 Med LR 192 at page 197 in which he dealt with the application of the principle. Griffiths LJ stated that an inference that might be drawn fairly from the evidence of the plaintiff that negligence of some sort had occurred, might no longer be so drawn in light of evidence from the defendant which cast the plaintiff's evidence in a different light. In paragraph 59 he referred to the case of Delaney v Southmead Health Authority [1995] 6 Med LR 355 in which Stewart Smith LJ stated at page 359 that a case of res ipsa loquitur can be rebutted by the defendant's explanation of what happened which is inconsistent with negligence or by showing that the defendant had exercised all reasonable care. In paragraph 60 the judge stated –

> "The fact that no complete explanation can be given for this failure of the right ureter to drain after the csp does not show per se that the defendant did not take all reasonable care."

and at paragraph 61 he said –

> "Once I believed their evidence on this aspect of the case, it inevitably satisfied me that Mr Ashe was correct to say that despite normal techniques kinking can happen in rare instances."

Mr Bentley QC highlighted these passages and submitted that the references to res ipsa

loquitur led the judge into error in his approach to the evidence. It was not sufficient to rebut the plaintiff's case for the defendant to provide an explanation for what occurred without some consideration as to whether the explanation put forward was theoretically or remotely possible only, as was the situation in Radcliffe v Plymouth & Torbay Health Authority [1998] Lloyds MR 162 or due to a highly unlikely combination of circumstances as in Glass v Cambridge Health Authority [1995] 6 Med LR 91 (my emphasis).

[14] We do not think the references to res ipsa loquitur led the judge into error. They provided by analogy a helpful analysis of the state of the case at the conclusion of the evidence. In the last sentence in paragraph 57 the judge stated the real issue in the case to be 'whether or not Mr Brown's evidence is correct that the obstruction of the ureter could not occur in the absence of misplacement of the sutures'. The defendant's evidence (or 'explanation') was that it could. Whether that was only a remote or theoretical possibility or due to a highly unlikely set of circumstances would depend on the nature of the evidence given on that issue.

[15] Mr Brown's evidence was that obstruction of the ureter could not occur in the absence of misplacement of the sutures. Mr Ashe disputed this saying kinking of the ureter can happen in rare instances despite a normal CSP. Mr Ashe said that a CSP following on from previous surgery may lead to obstruction and that there were many circumstances in which the cause of uretic injury was unknown. The judge was therefore faced with two conflicting opinions. He stated that he preferred Mr Ashe's evidence and gave several reasons for doing so. He accepted the evidence of Dr Dolan and Mr Sim that they independently had previous personal experience of cases, other than the appellant's, in which obstruction occurred despite correct placement of the stitches. He considered that if the stitches had been incorrectly placed by Mr de Courcey-Wheeler that both Dr Dolan and Mr Sim, whom he considered to be doctors of integrity, would have noted that. Furthermore he accepted the evidence of Mr de Courcey-Wheeler, whom he regarded as experienced and conscientious, that the sutures were inserted in the proper place. Thus the learned trial judge concluded that the appellant had failed to satisfy him on the balance of probabilities that the obstruction of the ureter which the appellant suffered was caused by the misplacement of the sutures. That such obstruction could occur in the absence of misplaced sutures was based on the evidence of Mr Ashe, Mr de Courcey-Wheeler, Dr Dolan and Mr Sim.

[16] Mr Bentley took issue with the judge's conclusion at paragraph 66 of his judgment that the literature 'did not provide an unambiguous or clear answer to the issue in this case'. This he argued was incorrect. He submitted that a proper analysis of the various written authorities established that previous pelvic surgery may contribute to alterations in local anatomy or to a process of peri-ureteral fibrosis that may favour ureteral kinking. During the course of the trial Mr Bentley QC had closely analysed the medical literature before the trial judge. Between paragraphs 18 and 36 the judge summarised the main points set out in the literature. Mr Bentley submitted that in effect the judge had rejected the thrust of the medical literature and the opinion of Mr Brown in favour of the views expressed by Dr Dolan and Mr Sim. Mr Morrow QC conceded that on the basis of the medical literature alone a decision either way would have been open to a judge. In this instance the learned trial judge assessed the literature in the context of the oral evidence of the medical witnesses. While Mr Bentley QC may be correct that the thrust of the literature was in favour of surgical error as the cause of ureteric obstruction the learned trial judge could not

be faulted for concluding that the literature did not provide a clear and unambiguous answer to the case. In those circumstances he was quite entitled to consider the literature in the context of the other evidence in the case namely the factual experiences of the medical witnesses, whom he believed, about cases that had not been reported and commented upon in the literature. To have rejected their honest testimony in favour of non-conclusive literature would not have been a satisfactory outcome.

[17] Mr Bentley QC submitted that the trial judge should have taken into account the respective positions of Mr de Courcey-Wheeler, Dr Dolan and Mr Sim. They were each employed at the relevant time by the respondent Trust. Each of them alleged experience of ureteral kinking in the absence of surgical error. No-one was called to corroborate this evidence. In effect Mr Bentley questioned their honesty and integrity. In similar vein he questioned the independence of Mr Ashe. The basis for this was that in Northern Ireland there are only six urogynaecologists each of whom is acquainted with the others. They are members of the Ulster Gynae Urology Society of which Mr Ashe was chairman from 1998 to 2004. Mr de Courcey-Wheeler succeeded him as chairman from 2005 to 2006. Mr Ashe and Mr de Courcey-Wheeler had not worked together. They worked in different hospital and for different Trusts. However Mr Bentley QC stressed that they were employed under the same Health Service. In his submissions before the trial judge Mr Bentley QC was critical of Mr Ashe. He alleged he was not an expert of sufficient independence for a case of this nature, he was an unsatisfactory witness being unnecessarily combative, that he had adopted a closed mind to the allegations in the Statement of Claim and that he was blinded by his personal opinions relating to Mr de Courcey-Wheeler and Dr Dolan and that he failed to make a proper analysis of the case or give a proper reasoned opinion. Before this Court Mr Bentley submitted that the evidence of Mr Ashe should not have been admitted or at least should have been substantially discounted on the ground of lack of independence, a submission not made in the court below, though his evidence was challenged in cross-examination and in submissions as not being independent or sufficiently so. It was asserted that the trial judge should have dealt with the issue of independence in the context of expert witnesses upon whom the respondent relied.

[18] In his skeleton argument before this Court Mr Bentley QC raised generally the question of the engagement of expert witnesses in clinical negligence cases and the practice in this jurisdiction whereby defendants involve local experts in defence of such claims. In his skeleton argument it was stated that 'The Court may desire to deprecate, or at least pass some comment on this practice involving as it does a Consultant from this jurisdiction supporting a friend or colleague'. It was submitted that this was a breach of Article 6 ECHR. The Court was referred to Toth v Jarman [2006] EWCA Civ 1028, Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg [2001] 1 WLR 2337 and a passage in Powers, Harris & Barton on Clinical Negligence (4th Edition) at paragraph 14.9. In the course of his oral submissions before this Court Mr Bentley resiled somewhat from his general invitation to this Court to deprecate or comment on the calling of local expert witnesses in these types of cases. However he maintained that the point was valid where there were only six specialists in this field in this jurisdiction and the judge should have dealt with this issue.

[19] As a matter of general principle it is not for this Court (or any Court) to dictate to litigants which witnesses or type of witnesses they should rely on. Even if it was proper to do so, this is not a case in which it would be appropriate to do so as it largely turned on

decisions of fact and creditworthiness. The judge was well aware of the issue from the cross-examination of the witnesses and from the closing submissions. Where he accepted the honesty and integrity of the witnesses, it was not necessary for him to deal separately with the issue of independence. The judge was well aware of the earlier relationships between Mr de Courcey-Wheeler, Dr Dolan and Mr Sim. Equally he was aware of the limited number of specialists in this field in Northern Ireland. In addition Mr Ashe had signed the expert witness declaration, which is in these terms –

> "(1) I understand that my primary duty in furnishing written reports and giving evidence is to assist the Court and that this takes priority over any duties which I may owe to the party or parties by whom I have been engaged or by whom I have been paid or am liable to be paid. I confirm that I have complied and will continue to comply with this duty.
>
> (2) I have endeavoured in my reports and in my opinions to be accurate and to have covered all relevant issues concerning the matters stated, which I have been asked to address, and the opinions expressed represent my true and complete professional opinion;
>
> (3) I have endeavoured to include in my report those matters of which I have knowledge and of which I have been made aware which might adversely affect the validity of my opinion;
>
> (4) I have indicated the sources of all information that I have used;
>
> (5) I have where possible formed an independent view on matters suggested to me by others including my instructing lawyers and their client; where I have relied upon information from others, including my instructing lawyers and their client, I have so disclosed in my report.
>
> (6) I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report or opinion requires any correction or qualification;
>
> (7) I understand that:
>
> (a) My report, subject to any corrections before swearing as to its correctness, will form the evidence which I will give under oath or affirmation;
>
> (b) I may be cross-examined on my report by a cross-examiner assisted by an expert;
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> (c) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken

reasonable care in trying to meet the standard set out above.

(8) I confirm that I have not entered into any arrangement whereby the amount or payment of my fees, charges or expenses is in any way dependent upon the outcome of this case."

In clinical negligence cases the parties are entitled to call such witnesses, expert or as to fact, as they consider appropriate. The fact that Northern Ireland is a small jurisdiction, that there are limited numbers of specialists, that they may be known to one another or members of the same specialist medical society are not of themselves reasons to deprive the parties of their expert advice or evidence. In the case of expert witnesses the declaration above cannot be taken lightly. In Toth v Jarman the Court of Appeal of England and Wales held that membership of the Cases Committee of the Medical Defence Union (the MDU) would not disqualify an expert from acting as an expert witness in a case in which the MDU acted for the defendant. Equally it would be unhelpful to exclude medical witnesses as to fact like Dr Dolan and Mr Sim.

[20] Mr Bentley QC complained also that the trial judge had failed to distinguish between Mr Ashe, the respondent's expert witness and the other three doctors called by the respondent who were merely witnesses of fact. We do not consider that this complaint is borne out from a fair reading of the judgment or that, as alleged, he 'lumped all four together'. The judge identified Mr Ashe as the expert witness but relied on the other doctors as to matters of fact which they had experienced and about which they were in a position to give evidence. It was then a matter for the judge what credence and weight he attached to that evidence. To say that well qualified medical practitioners were mere witnesses of fact does not accurately reflect their position. They were certainly witnesses of fact but were giving evidence of professional matters well beyond the experience of the trial judge. There was thus a degree of expertise in the content of evidence.

[21] It appears that the Judge was afforded the opportunity to read the medical literature in advance. The witnesses were then cross-examined about the literature. Mr Bentley submitted that the trial Judge's analysis of the medical literature was incorrect and invalid. In particular he criticised the Judge's conclusion in paragraph 66 that the medical literature did not provide an unambiguous or clear answer to the issue in the case. Mr Brown's evidence was that ureteric obstruction did not occur in the absence of surgical error in the placement of the stitches. The medical literature did not bear out that 'bald assertion', as the Judge described it. The literature suggested other reasons for ureteric obstruction. In a Case Report entitled Ureteral Injuries in Conjunction with Burch Colposuspension (International Urogynecology Journal 1995) Virtanen et al reported on four cases of ureteral obstruction. They observed that this is a rare complication and that the medical literature revealed only eleven cases, but that there must be others unreported. The four reported on had not undergone previous pelvic surgery. Of the eleven previously reported cases ten had undergone some previous type of pelvic surgery. Virtanen et al commented that this showed a possible positive association of ureteral obstruction with previous pelvic surgery and "Previous pelvic surgery may contribute to alterations in local anatomy or to a process of periureteral fibrosis that may thus favour ureteral kinking". When Mr Brown was cross-examined about this article he said it was conceivable that fibrosis from previous pelvic surgery could cause kinking of the ureter. In a Case Report published in the Australian and New Zealand Journal of Obstetrics and Gynaecology 1996 Rosen et al reported on four

cases of ureteric injury at the time of colposuspension. In their summary they state that CSP is an accepted and effective technique for the correction of stress incontinence. They comment 'it is, however, associated with a number of well-recognised complications one of which is ureteric injury which 'cannot always be prevented'. In their discussion they stated that ureteric damage at the time of Burch CSP was first reported in 1982 and they comment on the rarity of this complication. They go on to state –
"We agree with the hypothesis that previous surgery causes fibrosis and scarring of the local tissues thereby increasing the potential for ureteric kinking and/or damage during colposuspension. It is also postulated that previous hysterectomy results in fibrosis around the vaginal vault and ureter and makes ureteric damage more likely."

In a review article in the International Urogynecology Journal 2000 Demirci and Petri stated that –

> "Kinking or injuries to the ureter are rare but not uncommon after colposuspension. Previous surgery causes fibrosis, scarring and even dislocation of the local tissues, thereby increasing the risk of ureteral kinking and/or damage during surgery."

Strictly speaking the Judge was correct. The literature did not provide a clear answer.

[22] Mr Bentley sought to distinguish in the literature a situation which favoured ureteral kinking (which he termed a causa sine qua non) namely previous pelvic surgery, from the real cause namely the misplacement of the sutures during the operation (which he termed the causa causans). He claimed the judge had confused these two situations. We do not consider this to be a correct analysis of the judge's judgment. At paragraph 57 he identified correctly that the burden was on the plaintiff to establish on the balance of probabilities that the failure of the right ureter to drain was because of Mr de Courcey-Wheeler's failure to take care (in effect, inserting the sutures in the wrong place) and that the issue was whether Mr Brown was correct that obstruction of the ureter could not occur in the absence of misplacement of the sutures. Dr Dolan and Mr Sim gave evidence that they had independently experienced occasions where kinking or blockage of the ureter occurred when normal techniques of stitch insertion had occurred in this operative procedure. In addition Mr Sim who removed the stitches said they were in the correct position. The learned trial judge believed these two witnesses and their evidence. Once he accepted their evidence he was satisfied that Mr Ashe was correct to say that kinking can occur in rare instances where normal techniques are applied. Their evidence provided hard examples of what Mr Bentley described as Mr Ashe's proposal. The acceptance of this evidence undermined the assertion by Mr Brown that it could not occur in the absence of misplacement of the stitches. As a result the judge was unable to accept Mr Brown's evidence on that point and the plaintiff thereby failed to prove her case on the balance of probabilities.

[23] The learned trial judge had the unique advantage of seeing and hearing the evidence of Dr Dolan and Mr Sim. This court has expressed on a number of occasions the advantage that a trial judge has by comparison with an appellate court in this regard – see the summary at paragraph 11 in McDaid v Snodgrass [2009] NICA 18. In this context it is worth also remembering the words of Lord Reid in Benmax v Austin Motor Co Ltd 1955 AC 370 when he said at page 375 –

"Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations. The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in Thomas v Thomas, and particularly the passage which I now quote:

> "I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in

question."

[24] It is in this context that this court has to consider the findings of the trial judge. At paragraph 66 he identified the issue which he had to resolve. He was satisfied that kinking of the ureter is a very rare occurrence but he had heard evidence from two surgeons, whom he believed, that they had practical experience of kinking occurring in the absence of negligent insertion of the stitches. In other words on those occasions the stiches were inserted correctly in the right place. Faced with that evidence and the medical literature, which was not unambiguous, what was the trial judge to do? Should he ignore the evidence of Dr Dolan and Mr Sim, whose honesty and integrity he accepted as well as their evidence, or prefer the evidence of the plaintiff's expert witness, who had not had the same experience as Dr Dolan and Mr Sim. Taking Mr Bentley's submission to its logical conclusion the Judge would have to rely on the evidence of Mr Brown and put to one side the evidence of Dr Dolan and Mr Sim, which evidence he found to be truthful. The illogicality of that suggestion is obvious.

[25] Inherent in Mr Bentley's submission is the suggestion that the evidence of an expert witness in a clinical negligence case should be preferred to the evidence of other medical witnesses, whose evidence was regarded as truthful, because the evidence came from a witness regarded as expert. In the field of clinical negligence expert evidence is relative. In some cases it can be conclusive but in other instances it may require to be considered in the context of the other evidence in the case. In contested clinical negligence cases the Court will have to consider expert evidence in the context of the evidence of other doctors relating to the procedure or treatment which has been complained of and which led to the proceedings. It cannot be right that the evidence of a witness called as an expert should be considered and acted on in isolation from the other evidence in the case. It has to be considered in the context of all the evidence. In some cases the evidence of the expert witness will be accepted without question in others it may be qualified or rejected. It all depends on the nature of the case and the evidence called in support of it.

[26] We have given anxious and careful consideration to the issues raised in this appeal. Our conclusion is that the learned trial judge was entitled to refer to and reject res ipsa loquitur in the manner in which he did, that his assessment of the medical literature was not incorrect and that he was entitled to rely on the evidence of Mr Ashe, Mr Sim and Dr Dolan whom he found to be witnesses of integrity and honest. Based on his findings it cannot be said that he reached the wrong conclusion. For all these reasons the appeal is dismissed.