Judgment 16/2011

Williams & Vowles
- Royal Court (Civil Action File 1496)
- 26th May, 2011

Medical negligence claim – judgment prepared by the Deputy Bailiff and Jurats under s.16(5) of the Royal Court (Reform) Guernsey Law, 2008 – Jurats found in favour of the Defendant.

The Plaintiff brought an action alleging medical negligence following a right thyroid lobectomy which resulted in a right vocal cord palsy and problems with her voice and throat. She claimed £50,000 for pain, suffering and loss of amenity etc.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 26th day of May 2011 before Richard John Collas Esquire, Deputy Bailiff and Barbara Jean Bartie, Stephen Murray Jones and Margaret Ann Spaargaren, Jurats

Between: **SHARON WILLIAMS (NÉE HUBERT)** **Plaintiff**

-and-

RICHARD HENRY VOWLES **Defendant**

Whereas on 16th, 17th, 18th and 19th May 2011 the Court heard the action of the Plaintiff against the Defendant all in accordance with the cause attached hereto and heard thereon Advocates M G A Dunster and G S K Dawes counsel for the Plaintiff and Defendant respectively and whereas on 19th May the Court found in favour of the Defendant, THE COURT this day handed down written judgment in the terms attached hereto.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between: **SHARON WILLIAMS (NÉE HUBERT)** **Plaintiff**

-and-

RICHARD HENRY VOWLES **Defendant**

Hearing dates: 16th, 17th, 18th & 19th May 2011

Judgment handed down: 26th May 2011

Before: Richard John Collas Esq., Deputy Bailiff and

Jurats: B J Bartie, S M Jones & M A Spaargaren

Advocate for Plaintiff: **Advocate M G A Dunster**

Advocate for Defendant: **Advocate G S K Dawes**

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law 2008

The Evidence in Civil Proceedings (Guernsey & Alderney) Law, 2009

Bolam v Friern Hospital Management Committee [1957] 2 All E.R. 118

Introduction and Directions

1. The Court informed the parties on 19th May 2011, at the conclusion of a four day trial, that it had found in favour of the Defendant and reserved its reasons which were to be delivered in a written judgment. This is that judgment.

2. This judgment has been prepared in accordance with the provisions of Section 16 (5) of The Royal Court (Reform) (Guernsey) Law 2008:

> *"A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
>
> *(a) The Jurats' findings and decisions,*
> *(b) Any dissenting findings or decisions made by different Jurats,*
> *(c) The identity of the Jurats making dissenting findings or decision,*
> *(d) The Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) The application of his findings, decisions and directions of law and procedure to the facts.*
>
> *In this section "the Bailiff" means the person presiding over the proceedings."*

3. The Deputy Bailiff did not sum up to the Jurats in open Court but instead retired with them, as he is permitted to do under Section 14 (2) of the 2008 Law.

4. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats must accept his directions on the law and follow them. He directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgment about the witnesses, and which evidence is reliable, and which is not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. When it comes to the facts of this case, it is the Jurats' judgment alone that counts.

5. In this judgment, the findings of fact are the unanimous findings of the Jurats unless the judgment says otherwise.

6. The Deputy Bailiff directed the Jurats that the burden of proof is on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities; to establish something on the balance of probabilities means to prove that something is more likely so than not so.

7. The hearing in this matter is the first trial to have taken place before Jurats following the coming into force on 28th April 2011 of The Evidence in Civil Proceedings (Guernsey &

Alderney) Law, 2009. The parties produced a joint bundle for the Court containing a large number of documents, of which only a small number were relied upon by either of the parties. The Deputy Bailiff considered it necessary to direct the Jurats as to the evidential status of the documents and gave them the following directions.

8. The first category of documents is the Witness Statements prepared before the trial by witnesses who gave live evidence during the hearing. Those witnesses adopted their statements as their evidence and confirmed the contents of them under oath. The contents of their witness statements are to be treated in the same way as the oral evidence given by such witnesses on oath.

9. There are other documents that the Court was told are agreed or that contain facts which the parties have agreed. They are to be taken as agreed and the truth of what is stated is to be accepted by the Jurats without being questioned.

10. There are some other documents that were put to the witnesses and which they said they do not agree with or they interpret differently. It is for the Jurats to decide what they accept of those documents in the light of all the evidence they have heard and read.

11. Finally, there are documents to which neither party has referred. Some of them have been seen and read by the Jurats but the Jurats have not attached any weight to such documents without discussing or disclosing them to the parties.

12. The Deputy Bailiff directed that the issue for the Jurats to decide is whether the injury suffered by the Plaintiff, which is described below, was caused as a result of the Defendant failing to exercise the reasonable skill and care in all the circumstances of the particular operation he was performing; the requisite standard being that expected of a reasonably competent Ear, Nose and Throat Surgeon.

13. He also directed them that if it were appropriate to do so, they should apply what counsel described as the second limb of the test in Bolam v Friern Hospital Management Committee [1957] 2 All E.R. 118:

> *"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ..... Putting it the other way around, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view."*

Background

14. Most of the factual background to the case is not in dispute. It is set out in some detail in the pleadings, in the parties' skeleton arguments and has been explained by counsel in their speeches.

15. We will summarise the facts briefly. The Plaintiff was 41 years of age at the date of trial. On 23rd March 2007 she underwent an operation to her neck, a right thyroid lobectomy,

performed by the Defendant, who is a consultant Ear, Nose and Throat Surgeon and a partner in the Medical Specialist Group. During the operation she suffered an injury to her right Recurrent Laryngeal Nerve ('RLN').

16. When the Plaintiff first noticed a problem with her neck, she attended the Accident and Emergency Department at the Princess Elizabeth Hospital where the duty doctor, after examining her, referred her to her GP. She went to her GP on 29th September 2006. He ordered an ultrasound and referred her to the Defendant who examined her for the first time on 4th December 2006. He diagnosed a multinodular goitre on her thyroid, he arranged for a repeat ultrasound and for a fine needle aspiration to be performed. He discussed with her the possible need for surgery and the risk of RLN palsy. He gave her an explanatory leaflet to take away.

17. The Plaintiff saw the Defendant next on 22nd January 2007. He told her that the results of the fine needle aspiration were inconclusive. He did not establish whether the lump was malignant or benign. He reported that a follicular lesion of the thyroid was the likely diagnosis and that to obtain a definite diagnosis it would be necessary to perform surgery. He explained the surgical procedure to her. She was not sure what to do and wanted time to think about it.

18. The Plaintiff carried out her own research on the Internet by visiting a website mentioned in the leaflet he had given her.

19. The Plaintiff saw the Defendant again on the 5th February 2007 when she agreed to undergo surgery. The Defendant again explained the procedure he proposed to carry out and warned her there was a risk of RLN palsy, as evidenced in the Consent Form signed by the Plaintiff at page 676 of the Bundle on which he had hand-written "*scar, bleeding, recurrent laryngeal nerve palsy"* alongside *"potential serious risks"*.

20. The operation was performed by the Defendant on 23rd March 2007 at the Princess Elizabeth Hospital. His colleague and fellow Consultant Ear, Nose and Throat Surgeon, Mr Beaumont was present but did not assist in the operation. The anaesthetist was Dr Wolfe.

21. The Defendant failed to identify the RLN during the operation.

22. The Plaintiff saw the Defendant after the operation whilst she was still in hospital and she saw him later in his surgery on 5th April and on 19th April with Mr Williams. They have different recollections of what was said at those meetings and those discussions are dealt with later in this judgment.

23. The injury suffered by the Plaintiff during the operation has left her with permanent right vocal chord paraesis which causes her to be breathless at exertion; to have difficulty speaking especially towards the end of the day and when using the telephone; and to suffer vocally abusive behaviour in the form of throat clearing.

24. The further details of the injury are not of concern to the Court because, fortunately, quantum has been agreed between the parties, in a figure that has not been disclosed to the Court. The only issue is liability.

25. On 19th May the Court announced that the Jurats had found in favour of the Defendant and reserved their reasons.

The Operation - Plaintiff's Evidence

26. The operation on 23rd March lasted for 1 hour 45 minutes, ending at approximately midday. The Plaintiff said that whilst she was in the Recovery Room, she heard the Defendant enter the Room and ask whether she had spoken. She thought his voice suggested he was panicking. She later made a note of what she recalled.

27. Later, at about 7.00 pm, the Defendant visited her on the Ward. Her fiancé, now her husband, was also present. She asked the Defendant about what she had heard in the Recovery Room. He told her that during the operation he had not seen the nerve (the RLN) and he had assumed it was not in the way. After he left, the Plaintiff made a note of what he had said. Her note which is at page 56 (with a typed transcript at page 63) records that:

> "*Came to visit (Mark with me). Said he had been concerned as he could not see the nerve through op. Looked very worried. SH asked if he had come in to recovery to check speaking and he said yes. He said as he could not see the nerve he assumed it was not in the way."* ['SH' is a reference to the Plaintiff who was Sharon Hubert until she married Mark Williams.]

28. The Plaintiff attended at the Defendant's surgery on 5th April when he told her that she had a vocal nerve palsy. Her note of the meeting that she says was made immediately afterwards records that:

> *"Talking past tense about how he had been thinking about the op and whether there was anything he should have done differently."*

29. The Plaintiff said that she was shocked to be told she had a vocal chord palsy and needed to know why that had happened. She re-read the leaflets she had been given and reviewed everything before she attended with the Defendant again on 19th April. On that occasion she was accompanied by her husband, and she took along her notebook with a list of questions she wanted to ask the Defendant. She said the notebook was open in front of her and she made notes of the Defendant's replies to her questions whilst she was with him.

30. The Plaintiff's main concern involves the final note made by her of that consultation:

> "*He said two ways of surgery:-*

(1) Identify nerve first
(2) Work away from nerve area – if you can't see it, it is not in the way. "latter"."

31. The Plaintiff's evidence was that the Defendant told her he had carried out the operation on the latter basis, i.e. he had worked away from the nerve without attempting to identify it. That was contrary to what he had told her beforehand and contrary to what she had read in her research. It was not what she had consented to when agreeing to the operation.

Mr Williams' Evidence

32. Mr Williams gave evidence that he was present on two occasions when the Defendant saw the Plaintiff. The first was in the Ward on 23rd March 2007, in the evening after the operation. The second was during the consultation on 19th April. His evidence supported the evidence of the Plaintiff as to what happened, and what was said, on those occasions. He said that the Defendant never told them that he had looked for the RLN. He recalled that the Defendant said it was his fault and he was sorry. He also recalled the Defendant saying that he could have nicked the RLN and the operation did not go as he planned. The possibility of nicking the nerve was not recorded in the Plaintiff's notes of the 19th April meeting or in any of her statements.

The Defendant's evidence of meeting the Plaintiff post-operatively

33. The Defendant said that after the operation he went to see the Plaintiff in the Recovery Room in accordance with his normal practice. He denied that he was panicking. However, he accepted that as it had been a highly unusual case in view of the fact he had been unable to find the RLN, his level of anxiety would have been higher than usual.

34. He also went to see the Plaintiff on the Ward in the evening; again it was his normal practice to do so. He was open and honest and told the Plaintiff and Mr Williams that he had not been able to find the RLN.

35. The Defendant recalled the meeting with the Plaintiff and Mr Williams on 19th April. He recalled it was a long consultation lasting, he said, between half an hour and an hour. He said it was not unusual for a patient to come in with a list of questions. It would be unusual for the patient to make notes during the consultation and he did not remember the Plaintiff doing so although he would have expected to remember it as it was so unusual.

36. He denied telling the Plaintiff and Mr Williams that he set out to avoid the RLN by not looking for it. That was not what he did and he would not have told them that he followed a course of action that was different from the course he actually took. He may however have told them there were two schools of thought as to the procedure that should be followed. He believed that therein lies a grave misunderstanding on the part of the Plaintiff as to what he said.

37. He said that he was sorry for what had happened. He may also have said that it was his fault. If so, it was in the context that the Plaintiff went into the operation with a vocal chord that worked and by the end of the procedure it did not. It must be something he did that resulted in vocal chord paralysis. However, he was not admitting that it was due to any wrong doing on his part. He was merely offering an explanation openly and honestly.

38. The Defendant's recollection and explanation of what was said in these meetings was not challenged by the Plaintiff's Advocate in cross-examination.

39. The Jurats' conclusion is that the Plaintiff and her husband hold a genuine belief that the Plaintiff's notes accurately reflect their recollection of the conversation on 19 April 2007. However, the Jurats accept the Defendant's evidence that he would not have said he worked away from the nerve in preference to looking for it first. The misunderstanding is very unfortunate.

The Operation

40. The Defendant's contemporaneous operation note records that he did the following:

> "*Procedure:* *Subplatysmal flaps elevated. Strap muscles divided in midline. Inferior aspect of thyroid gland identified and dissected. Inferior thyroid veins diathermed. Right thyroid lobe reflected medially. Superior pole vessels identified, clipped, divided and tied. Right lobe thyroid gland reflected medially and dissected off trachea without clear identification initially of recurrent laryngeal nerve. Xomed nerve integrity monitor malfunction. Inferior thyroid artery clipped, divided and tied. Thyroid gland dissected off trachea. Isthmus clipped, divided and transfixed. Bipolar haemostasis. Owing to lack of positive identification of recurrent laryngeal nerve there is some concern about its integrity."*

41. In evidence he said he wears a headlight and surgical loupes which are magnifying lenses set in his glasses giving 2½ times magnification. These are not mandatory but he chooses to wear them in this type of surgery.

42. The Xomed Nerve Integrity monitor was not working. It had caused problems on other occasions and eventually had to be taken away for repair or replacement. In his evidence, Dr Wolfe said the nurses were trying to get the machine to work and maybe spent 10 minutes doing so before abandoning it.

43. The Defendant explained that he set out to look for the RLN and was striving to find it throughout the operation. This operation is the only occasion, both before and since, that he has never been able to identify the RLN.

44. He began by looking for it low down, deep in the neck and tried to follow its course upwards. He started looking for the RLN before he divided the middle thyroid vein. He said his training and technique is to try to find and isolate the RLN lower in the neck than Professor Wheeler suggests in his article "*The Technique of Thyroidectomy"* at page 173. He looked for the RLN deep in the root of the neck. He looked long and hard and could not find it there. He divided the middle thyroid vein and superior pole vessels in order to fold the gland medially and to look for the RLN in the tracheo-oesphageal groove where he could not find it. He saw no sign of the RLN so he followed what he thought was safe practice which was to isolate the inferior thyroid artery away from the gland and divide it there before continuing his dissection by which time the last point of attachment of the gland was the ligament of Berry. It seemed reasonable to divide the ligament of Berry and proceed with taking the lobe out. He could not see the RLN in any of the usual places, having looked for at least 45 minutes or closer to one hour. Once the lobe of the thyroid gland had been removed, the Defendant considered it was best to end the operation and close up the Plaintiff's neck. He considered that to carry out any further investigation would only increase the risk of damaging the RLN.

45. In cross-examination, the Defendant said it was reasonable to have divided the inferior thyroid veins because they were obvious; they were blue; and they were distinguishable from a nerve. He teased out the veins individually and thereby avoided damaging the nerve.

46. He was asked why he did not mention in the Operation Note that he had searched for the RLN for 45 or 60 minutes. His reply was that he had not expected to be cross-examined on the note. He also said that the use of the word "*initially"* was because he set out with the initial approach of looking for the RLN. He dictated the note onto a Dictaphone immediately after the operation.

47. He did not spend a longer time searching for the RLN even though he was not under time pressure because the operation had progressed to the point where he had reached the appropriate time to remove the lobe and finish.

48. Dr Martin Wolfe was the Consultant Anaesthetist in the operation. He is a colleague of the Defendant and is also a partner in the Medical Specialist Group.

49. Dr Wolfe said that the Defendant gave a level of commentary during the operation. He recalled that the operation took longer than usual and that the Defendant said several times that he could not identify the nerve with certainty. After the operation, and the following morning, Dr Wolfe said the Defendant told him he was still concerned he had not found the nerve. However, he said that the Defendant was not panicking although he was perturbed at not finding it.

50. Mr David Beaumont is another specialist ENT surgeon who is a colleague of the Defendant and partner in the MSG. He was present during the operation but was unable to recall what happened. He explained that without referring to an operation note he has no particular recollection of any operation carried out by the Defendant or indeed any of the thousands of operations he himself has performed.

51. The Jurats were surprised that Mr Beaumont had not remembered the extensive search for the RLN carried out by the Defendant. Advocate Dunster did not cross examine Mr Beaumont.

The Jurats accepted the evidence of Dr Wolfe, who confirmed that the Defendant was looking for the RLN throughout the operation.

Expert Evidence

52. The Plaintiff's expert was Mr John Lynn MS, FRCS who works principally at the BUPA Cromwell Hospital. On his notepaper he is described as a consultant Endocrine Surgeon. In evidence he described himself as a general surgeon having trained as such over 40 years ago. He has carried out a large number of thyroidectomies and is acknowledged to be one of the most experienced thyroid surgeons in the UK. Although he is now in retirement, he continues to be a very active, hard-working surgeon who carries out a wide range of procedures. In view of his age, his work has to be reviewed, and his permission to practise has to be renewed, annually. He has recently been given permission to continue for another year.

53. The Defendant's expert Mr Jean Pierre Jeannon is a Consultant ENT and Head and Neck Surgeon at Guys and St Thomas' NHS Foundation Trust.

54. Mr Lynn had produced a total of five reports and letters on the case. Mr Jeannon had produced three. The two of them met before the trial and produced a joint report dated 4 May 2011 (page 290(a) onwards in the Bundle).

55. They agreed on all the issues except for one which is summarised at point 3 on page 290(b):

> *"3. Mr Jeannon and Mr Lynn do not agree that failing to identify a recurrent laryngeal nerve on the right side in a case such as the Plaintiff's invariably equates to a breach of duty of care.*
>
> - *Mr Lynn regards failure to identify the recurrent laryngeal nerve in a case where there is no previous surgery, no extensive cancer, thyroiditis or a massive goitre represents a breach of duty of care.*
> - *Mr Jeannon disagrees with this view and states whilst it is mandatory to identify the nerve in all cases, failure to identify them does not equate in Mr Jeannon's opinion with a breach of duty of care and it is for the Court to decide if a breach of duty of care occurred on this occasion".*

56. Neither of the experts knew why it had not been possible for the Defendant to find the Plaintiff's RLN. Neither of them had ever failed to find it in a straightforward case, that is, where there has been no previous surgery, no extensive cancer, no severe thyroiditis, or massive goitre.

57. In less than one percent of patients, the laryngeal nerve is non-recurrent and at page 974 there is a photograph of a non-recurrent laryngeal nerve. It is a known potential complication which surgeons are told to look out for.

58. There was agreement that the Plaintiff had a laryngeal nerve before the operation, otherwise her voice box would not have worked, but because the nerve was never found, it is not known whether it was recurrent (i.e. it loops down under major vessels near the arm and back up again) or whether it was non-recurrent (in a lateral position entering the larynx from the side). However, in 99% of people, the nerve is recurrent and so it is more likely than not that the Plaintiff's nerve is also recurrent and it was for that reason that the experts agreed, on a balance of probabilities, that it is recurrent.

59. Mr Lynn had made a statement in his report at page 163 para 30 that:

> "*The most important rule in thyroid surgery is that no structure in the neck should be cut until the right recurrent laryngeal nerve is identified visually and if the nerve monitoring technique is working electrically as well*".

60. In his evidence he agreed it was necessary to cut the skin and the strap muscles and he said it was acceptable to cut the middle thyroid vein before identifying the RLN. However, the anatomy of the RLN in relation to the inferior thyroid vein and artery is variable and, for that reason, he was highly critical that the Defendant had cut the inferior thyroid vein before identifying the nerve. Sometimes the RLN can be encased with the vein and if that were so in this case, it could easily have been damaged.

61. He also criticised the Defendant's use of diathermy on the inferior thyroid vein which is described in his note of the operation at page 99 of the Bundle. Diathermy involves heat which can be transmitted and could have caused damage to a nerve.

62. Mr Lynn offered three possible explanations as to when the RLN was damaged but did not know which of the three was most likely:

    a) When the inferior thyroid vein was divided;
    b) When the inferior thyroid artery was divided; or
    c) When the ligament of Berry was divided.

63. Mr Lynn's criticism of cutting the ligament of Berry was based on the fact that the RLN would have been close to it. His explanation as to why the Defendant had not identified the RLN by that stage of the operation was because he had not looked for it properly.

64. Mr Lynn was criticised by Advocate Dawes in his cross-examination for making absolute statements that were inappropriate. He was also criticised for judging the Defendant by his own standards rather than by the standard of the reasonably competent ENT surgeon.

65. Mr Lynn did not attach any significance to the published literature indicating that some surgeons have been unable to find the RLN. He believed they included non-straightforward cases, such as cancers. He was adamant that if a reasonably competent ENT surgeon searched properly for the RLN he would find it, especially as the nerve had a fixed entry point and a fixed exit point. Once a part of the nerve has been identified, the surgeon can follow it,

both upwards and downwards. If the nerve has split, like the branches of a tree, he can follow it to find the main trunk and other branches.

66. Mr Jeannon agreed that every surgeon must look for the RLN. The earlier approach to the operation whereby a surgeon was told not to look for the RLN but, instead, to work away from it has now been discredited. He agreed that a surgeon must look for the nerve and he believed that the Defendant did so. He believes that the literature indicates there are instances when the RLN has not been able to be found, despite a search having taken place. In such cases, it is permissible for the operation to continue.

67. Mr Jeannon said there are many different ways of doing the operation. He considered it was permissible to have cut the inferior thyroid vein. Veins look different from nerves and the Defendant was looking out for the RLN.

68. Mr Jeannon observed that as the Defendant had progressed the operation, the lobe gradually became mobilised and once it was fully mobilised, he agreed with the Defendant's view that the procedure was finished. He personally would have carried on searching for the RLN in order to know what had happened to it so as to give the patient a prognosis, although if the Defendant had done so, it would not have altered the eventual outcome.

69. Mr Jeannon disagreed with Mr Lynn's suggestion that if the RLN had been found in a damaged state, the Defendant could have attempted to repair it by putting the ends together and suturing them. Mr Lynn had said that would do no harm if it was a simple repair and might be beneficial. Mr Jeannon thought there would have been a risk of further harm.

70. Mr Jeannon said there were two explanations for the damage the Plaintiff had suffered during the operation, it was either due to anatomical variation or technical error by the Defendant surgeon.

71. The Court heard evidence as to the number of thyroidectomies carried out by the Defendant – about 9 or 10 per annum. The experts agreed there was no mandatory minimum a surgeon must perform, although 12 would be satisfactory. In their joint report, the experts said that 12 was a satisfactory number but in his evidence, Mr Lynn said he thought 12 was a minimum. However, he agreed that the Defendant was trained and skilled in this area and that the other neck operations he performs involve similar skills, particularly in the requirement to locate and preserve the nerves, including the RLN. The experts both agreed it was satisfactory that the operation was performed in Guernsey.

72. The Defendant described his training and experience in detail. It was agreed that he is a competent surgeon. The point made by Mr Lynn was that anyone can make a mistake and fall below the required standard on occasion.

73. Overall, the Defendant's complication rates were within the band that is considered acceptable in the UK and Europe.

74. Advocate Dawes cross-examined Mr Lynn about the inconsistencies between his reports, his curriculum vitae and his personal web-site as to the figure quoted by him for the number of consultations and procedures performed.

Conclusion

75. In their decision, the Jurats accepted that the Defendant is appropriately trained and experienced to carry out a thyroidectomy. They acknowledged that his complication rates are within the limits that are regarded as acceptable and they noted that there has been no other occasion on which he has failed to identify the RLN. However, they approached their decision on the basis that they had to focus on the particular procedure he performed on the Plaintiff and the manner in which he did so in order to assess whether the Plaintiff had proved her case.

76. The Jurats concluded from the Defendant's history that he knows how to identify an RLN and understands the importance of doing so.

77. They were satisfied from the evidence that the Defendant made extensive efforts to identify the Plaintiff's RLN. Her note of the consultation on 19th April 2007 was her understanding of the explanations given by the Defendant. The Jurats believe there was a misunderstanding on the part of the Plaintiff and her husband.

78. The Jurats attached no significance to the slide produced of the presentation given by the Defendant to doctors at the Princess Elizabeth Hospital. The slide is at page 112. It describes the procedure for a Thyroidectomy by way of 5 bullet points in which "Divide Inferior Thyroid Veins" is listed above "Identify RLN". The Jurats did not consider that the slide should be interpreted as if it were a statement by the Defendant that in every operation he only looks for the RLN after he has divided the inferior thyroid veins.

79. The Jurats were satisfied that the normal approach of the Defendant in a straightforward thyroidectomy is to look low down and that he did so in this case, looking diligently for the RLN throughout the procedure as is evidenced by the fact that it took one and three quarter hours which is twice as long as usual.

80. The Jurats gave careful consideration to a passage in the cross-examination of the Defendant in which he appeared to say that he had not looked in the higher third of the area where the RLN is to be found. The evidence is inconclusive because the Defendant appears to be explaining that he did not follow the method of approaching the operation from the higher end. Elsewhere, in his evidence in chief, the Defendant stated clearly that he is aware the RLN is close to the ligament of Berry. He said that this is the stage in the operation when most surgeons' heart beat is raised which indicated to the Jurats that the Defendant was well aware of the risk of damaging the RLN at that stage. There was no evidence to show that he did not look carefully on this occasion.

81. The Jurats also gave very careful attention to the medical literature produced to the Court and to the expert witnesses' commentary on the literature. They noted, in particular, what Professor Wheeler described and the views of Mr Lynn, who they felt was too dogmatic. Mr Lynn's level of expertise was greater than that of an ordinary competent ENT Surgeon and he was not inclined to allow for this in his evidence.

82. The dilemma faced by the Defendant was what he should do in a situation where he was diligently searching for the RLN, cutting structures as he went along, in part at least, because he needed to do so in order to open up the area of search. The Jurats preferred the evidence of Mr Jeannon, who they found to be the more persuasive of the two experts, that in such a situation there is not one single course that the surgeon is compelled to follow.

83. The Jurats have every sympathy for the Plaintiff who had a full explanation from the Defendant and carefully investigated all the risks involved with the surgery before she consented. She was extremely nervous and thought long and hard about whether to give her consent. In the view of the Jurats, there has been no definitive explanation as to what went wrong nor what caused it to go wrong. However, the onus is on the Plaintiff to prove her case and she has been unable to do so. The Jurats therefore found in favour of the Defendant.

