[2025] JMSC Civ 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 05573

BETWEEN	**ABIGAILE BROWN (a minor who sues by her mother And next friend Affia Scott)**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Ms Katherine Minto Attorney-at-law for the Claimant

Mr Stewart Stimpson and Ms Rykel Chong instructed by the Director of State Proceedings Attorneys-at-law for the Defendant

June 12, 2025 and October 2, 2025

Personal injury - Trial – Medical negligence – Duty of care owed by medical doctors to their patients – Bolam test – Bolitho test – Res ipsa loquitor.

JUSTICE T MOTT TULLOCH-REID

BACKGROUND

1. Abigaile Brown was born on October 7, 2009, at the Falmouth Hospital in the parish of Trelawny under very difficult circumstances. Her mother and next friend, Affia Scott, seeks damages for negligence and/or breach of duty and/or breach of contract. It is Ms Scott's contention, on behalf of her daughter, that the medical team at the Falmouth Hospital are servants and/or agents of the Crown and they

breached the duty of care that they owed to the Claimant which resulted in her sustaining injury and suffering loss and damage.

2. The pleadings are contained in the Further Amended Particulars of Claim filed on July 15, 2019. The Particulars of Negligence are noted as follows:

> The medical staff of the Falmouth hospital and the prenatal clinic were negligent in that:
>
> (a) They failed to exercise reasonable care, skill and diligence in and about the care and treatment of the Claimant during delivery.
> (b) They failed to take any or any proper or effective measures whether by way of examination, test, surgery, or otherwise to ensure that the Claimant would be safe, healthy, and receive proper medical attention and care.
> (c) They failed to take any other proper or effective measures (other than ultrasound) whether by way of physical examination or otherwise, to detect early that the Claimant was lying in a breeched position and/or that the Claimant was experiencing shoulder dystocia during her delivery.
> (d) They failed to heed the evidence of obstruction during delivery, and/or to apply their mind sufficiently to the obvious clinical condition of the Claimant's mother in order to correctly diagnose the complication at an early stage.
> (e) They failed to appreciate that shoulder dystocia was an obstetric emergency and to treat it accordingly, in that they:
>
> i. failed an early stage to take proper steps to prevent injury
> ii. delayed or failed to effect the necessary and required medical treatment
> iii. failed to request or summon the urgent assistance of a specialist or consultant in that area or senior obstetrician

iv. failed to consider or to advise the Claimant's mother of the option of a caesarean section once the risks presented

v. They failed to act appropriately despite this diagnosis of shoulder dystocia

(f) They failed to employ appropriate release techniques and procedures when they discovered the shoulder dystocia and that the Claimant was not lying in a cephalic position.

(g) They failed to have a shoulder dystocia protocol and/or to have the appropriate and trained staff on hand to effect the required release procedure properly and promptly.

(h) They applied excessive and/or unnecessary and/or inappropriate degree of force to overcome the shoulder dystocia in order to deliver the Claimant's head. And, in so doing, damaged the nerves supplying the Claimant's right arm.

(i) Alternatively, they failed to realize that they were also being faced with shoulder dystocia and therefore applied traction at a time when it was inappropriate to do so.

(j) They failed to plan adequately or at all for any risk during the mother's labour and the Claimant's delivery.

(k) They failed to properly monitor the Claimant's condition, or to take any prompt step to prevent foetal distress, or to remedy any defects in their initial diagnosis and treatment.

(l) They attempted to have the Claimant delivered in a manner contrary to that which was safe in the circumstances.

(m) They failed to advise the Claimant's mother as part of her prenatal care of the risk of shoulder dystocia and to advise her of the possibility of having a cesarean section instead.

(n) They failed to refer her to a consultant after her initial visit on October 1, 2010 because of a number of factors which suggested a risk of shoulder dystocia in her pregnancy.

(o) They failed to do a glucose test on the Claimant's mother during her initial visit.

(p) They failed to warn the Claimant's mother of the risk of error or misdiagnosis in the ultrasound findings and to act accordingly.

(q) They failed to conduct other tests or physical examination to confirm that the Claimant was in fact lying in a cephalic position.

(r) In all the circumstances, failed to provide a safe system for the provision of healthcare.

3. The Claimant also relies on the doctrine of *res ipsa loquitur* in support of her claim.

4. As a result of the alleged negligence on behalf of the servants and/or agents of the Crown, the Claimant sustained serious personal injuries, suffered loss and incurred expenses. The personal injuries are also set out in the Further Amended Particulars of Claim. They are many in number – in total 37 listed injuries. I however believe that they should all be listed to show the seriousness of the claim. The injuries and loss of amenities pleaded are as follows:

(a) Deprivation of oxygen causing respiratory distress
(b) depressed neonatal reflexes
(c) gastritis

(d) neophritis
(e) damage to the nerves of the right brachial plexus
(f) moderate wasting of her deltoid, biceps, and the brachial muscles of the right upper extremity
(g) weakness of right shoulder abduction, of right elbow flexion, of right elbow extension, or right grip strength and right wrist dorsiflexion
(h) profound weakness involving muscles of the C5-6 myotome
(i) moderate weakness of the muscles involving the C7 myotome
(j) permanent weakening and loss of function of right arm
(k) mild atrophy in right shoulder musculature
(l) Pseudomeningoceles C5-6 and C6-7
(m) Post traumatic nerve root avulsion of the right C6 and C7 nerve roots
(n) loss of function of and inability to use her right arm
(o) growth of right arm and muscle development impeded
(p) limb length discrepancy
(q) right brachial plexus palsy, also known as Erb's palsy
(r) significantly reduced prospects of a happy and normal childhood
(s) restrictions in her activities of daily living for the remainder of her normal life
(t) restrictions in the scope of employment opportunities available to her
(u) PPD-54% of the upper extremity which equates to 29% of the whole person
(v) traumatic brain injury and damage as a result of deprivation of oxygen
(w) conduct disorder and neurodevelopment disorder
(x) significantly underdeveloped cognitive function with cognitive delays
(y) attention deficit hyperactive disorder (ADHD)
(z) developmental delay and emotional outbursts
(aa) depression and negation behavioral patterns
(bb) diminished self-confidence and the negative views of herself, with low self-image
(cc) anxiety

(dd) quick to give up

(ee) acting out behaviorally

(ff) failing to understand the rules, boundaries and expectations

(gg) lack of impulse control

(hh) short attention span

(ii) poor emotional regulation

(jj) inadequate social skills

(kk) difficulties with social judgment, assessment of risk, self management behaviour, emotions or interpersonal relationships; motivation in school or work

The Evidence

5. The only person who gave evidence at the trial was Ms Scott. Her evidence in chief is contained in her Witness Statement filed on February 27, 2019, Supplemental Witness Statement filed on July 26, 2019, and Further Supplemental Witness Statement filed on January 31, 2025.

6. Ms Scott's evidence is that she is the mother of Abigaile Brown who was born on October 7, 2019, at the Falmouth Hospital in the parish of Trelawny. She says she was first admitted to the hospital on October 1, 2009, for delivery and she remained there until October 6, 2009, when she was transported by ambulance to Radiology West to do an ultrasound. Based on the results of the ultrasound, she was sent home that night and told to return on October 19, 2009.

7. She said that at about 1:00 in the morning of October 7, the morning after she was discharged from the hospital, she started to feel labour pains, so she was taken back to the Falmouth Hospital. While on the way to the hospital, her water broke. When she got to the hospital a nurse attended to her and instructed her to remove her clothing because it was wet but she told the nurse she could not make it to the bathroom as the baby was coming now and so she was told to go on to the bed. When the nurse began to examine her, the baby's foot was already out. According

to Ms Scott the nurse pushed back the baby's foot inside of her so that both feet could come out at the same time and then began to try to get the baby out, but she was unsuccessful. The nurse called for Dr Kamara, but Dr Kamara did not come. Another doctor came and that doctor and the nurse both tried to get the baby out. They were successful in getting the baby's body out but could not get the head out. After 10-15 minutes, Dr Kamara was called again. This time he came and when he came, Ms Scott was put down to the edge of the bed. Dr Kamara held on to the baby's body and pulled her out.

8. When the baby was delivered, she was not crying or breathing and so she was sent to the Cornwall Regional Hospital in Montego Bay. Ms Scott remained behind at Falmouth hospital. When Ms Scott was released two days later, she went to see her daughter at the Cornwall Regional Hospital. She spoke to the doctors there. She said that when she saw Abigaile, her right arm was not moving and was just hanging from her side. She said that when Abigaile was discharged from the Cornwall Regional Hospital, she would take her back to the clinic at the hospital. She made at least 20 visits to the clinic. Abigaile had to see the physiotherapist, the neurosurgeon, the pediatrician and the orthopedic surgeon. Although Abigaile did physiotherapy at the clinic every week her right arm still hung from her side. Ms Scott reports that she did not like looking at it and when she held her baby in her arms the hand would just hang down and would not move.

9. Ms Scott said that Abigaile went to the clinic for a long time before she was discharged because the doctors said they could do nothing else for her. She was then taken to Kingston to see Dr Christopher Rose, a Consultant Orthopaedic Surgeon and Dr Randolf Cheeks, a Consultant Neurosurgeon. She reports that both doctors were of the view that Abigaile's injuries were caused because of the excessive pulling that was used to delivery her. Both doctors said that no surgery or other treatment could help Abigaile and that her injuries would affect her for the rest of her life.

10. Ms Scott then describes how the injuries have affected Abigaile and will affect her in the future. I will not get into that at this time as that is evidence that is to be considered at the stage when damages are being assessed, if the Defendant is found to be liable.

11. The Supplemental Witness Statement sets out the findings of Dr Kai Morgan, a psychologist with whom Abigaile consulted. Dr Morgan had to be consulted because Abigaile's behaviour had deteriorated over the years. She has been expelled from school and had been at home for ½ of a term. She is required, based on Dr Morgan's report, to attend a Special Needs School and those schools have high school fees.

12. The Further Supplemental Witness Statement states that Abigaile had also been assessed by MICO and this assessment was done as it was requested by her school. Abigaile is now attending another school in which she was enrolled by the Ministry of Education, and the Ministry of Education pays those school fees. She continues to receive therapy from various departments at the University Hospital of the West Indies. Ms Scott says that Abigaile lacks self-awareness, she has outbursts and is on medication. Because of her outbursts she was put into state care and was there from February 2024 to January 13, 2025. She was also taken to the Family Court and is on two years' supervision.

Cross- examination of Affia Scott

13. In cross-examination, Ms Scott admitted that even though she was in a sitting up position, she could see some of what was being done to her as she delivered Abigaile. She could have made an assessment as to what the doctors were doing by their hand movements. Despite saying this, she admitted when it was suggested to her that what happened to Abigaile during her delivery was based on what others had told her. She also admitted that at no time during the delivery did anyone say to her that Abigaile had been injured.

14. As it relates to Dr Kai Morgan's conclusions in relation to Abigaile, Ms Scott said she could not tell the court from her own personal knowledge what caused the injuries to Abigaile that Dr Morgan spoke of. She said she never went to a doctor to determine what had happened on the day that she delivered Abigaile.

Issues for Contemplation

15. The Claimant has asked the Court to determine:

    a. Whether the Defendant's servants and/or agents owed a duty of care to the Claimant; and

    b. Whether the duty of care was breached so that the Claimant suffered loss.

However, the issues must be considered in accordance with what has become known as the **Bolam Test** (as derived from the principle of law established in the decision of **Bolam v Friern Hospital Management Committee [1957] 1 WLR 582**. In the case of **Joyce Hind v Walter Craig, M.D. and University Hospital Board of Management (1982) 19 JLR 81** the Supreme Court in relying on the Bolam test held that "*a medical man 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".* The Bolam test goes further to say that A man (referring to a doctor) *s not negligent, if he is acting in accordance with such a practice (i.e. the accepted practice) merely because there was a body of opinion which would take a contrary view*."

The Bolam Test was expanded in the case of **Bolitho v City & Hackney Health [1997] 4 All ER 771** which held that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. If in the rare case it could be demonstrated that the professional opinion was not

capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible.

So, the real issues that are to be determined are:

a. Whether the staff at Falmouth Hospital, when in the process of delivering the Claimant, acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in the practice of obstetrics and gynaecology.
b. Whether the technique used to deliver the Claimant who appears to have been in breech position and with her head and shoulder stuck in the birth canal, was a reasonable and responsible technique given the situation that the doctors and the nurses who attended to the Claimant found themselves in.

Claimant's submissions on the issue of liability

16. The Claimant's submissions are contained in written submissions filed on her behalf on October 10, 2019, and June 20, 2025. In those submissions she contends that her being delivered up to her torso with her legs hanging out but her shoulder and head remaining inside her mother's vagina was an acute life-threatening obstetric emergency as she was losing oxygen every second that her delivery was delayed. She contends further that in order to release her impacted shoulder bone, the hospital staff pulled on her or applied excessive traction. As a result of how the condition was managed or addressed, that is, the staff pulling on her body to release her head and shoulder, the Claimant sustained a brachial plexus injury which she says is an injury to the nerves running from the neck region of the spinal column to the shoulder. As a result, she suffered from Erb's Palsy of her right shoulder and arm, and the limb has been rendered lifeless.

17. The medical docket is an agreed document and is in evidence. In it, there is evidence to suggest that the Claimant was without oxygen for an excessive period

of time and that when she was transported to the Cornwall Regional Hospital her colour was regarded was recorded as "*blue, pale*".

18. Ms Minto, on behalf of the Claimant, has identified certain factual and legal issues which she says the Court is to resolve at the trial. She notes them as follows:

(i) Was there an established protocol at the Falmouth Hospital for shoulder dystocia? And, has the Defendant led any evidence in respect of this?

(ii) Were the steps taken and was the protocol followed? And, has any evidence been provided to the court in this regard?

(iii) What technique was employed by the medical staff of the Falmouth Hospital to address a shoulder dystocia during delivery? And is there evidence in this regard before the court from all the relevant parties?

(iv) Has the Defendant provided evidence (whether expert or factual) to rebut the Claimant and her experts case that excessive traction was applied during the delivery process.

(v) Whether the Claimant suffered Erb's Palsy (paralysis of her right shoulder) and arm as a result of the steps taken by the hospital staff to release the shoulder dystocia?

(vi) What caused the Erb's Palsy?

(vii) Were there any other medical issues which arose from the extended period that the Claimant was denied oxygen?

(viii) Whether the Defendant was negligent as alleged and pleaded by the Claimant?

(ix) Whether the Defendant fails to exercise reasonable care, skill and diligence in and about the care and treatment of the Claimant during her delivery?

(x) Was the Second Defendant negligent? (no longer relevant as the claim was discontinued against the 2nd Defendant).

(xi) The quantum of damages payable by the Defendant to the Claimant, if liability is determined in the Claimant's favour.

19. Ms Minto relied on the **Bolam case** and in applying the principle of law to the facts in that case said that the ordinary skill that would be required in a case such as this would have been that of a doctor with a surgery specialty in obstetrics and gynaecology. In addition, because the Claimant sustained neurological and orthopaedic injuries during the delivery, those specialists would also be relevant in establishing the causal nexus between the injuries and the manner of delivery based on those experts' experience in the treatment of injuries of that nature.

20. Ms Minto relied heavily on the case of **Sanalee Francis v Southern Regional Health Authority and the Attorney General of Jamaica HCV 3772 of 2006**. In that case, it was alleged that the claimant's mother died as a result of a surgery to resolve an ectopic pregnancy. After the surgery she complained of a distended abdomen, shortness of breath and other complications. A follow-up surgery was carried out to determine the cause of the complaints and it was discovered that there had been a perforation in her small intestine and adhesions in the loops of the intestines. Her health continued to deteriorate after the second surgery, and she died a few months later as a result of multiple organ failure secondary to severe sepsis. In that case the court had to determine whether the death was caused by the negligent act or omission of the servants and their agents of the Crown. The court discussed the **Bolam case** as well as the case of **Genus v The Attorney General of Jamaica unreported decision C.L G 105 of 1996.**

21. In the **Sanalee Francis case** the issue of *res ipsa loquitor* also arose. The case of **Cassidy the Ministry of Health [1951] 1 All ER 573** was considered. That case established that a hospital owed a duty of care to give proper treatment, medical, surgical and nursing and the like. The court also found that where injury arises in the course of treatment by the staff, the *res ipsa loquitur* doctrine is available where the actual cause of the injury cannot be ascertained.

22. In the **Sanalee Francis case**, the court was of the view that there was an issue of not knowing how the perforation actually took place. But in the circumstances of that case, the court put the onus on the hospital to prove that there had been no negligence on its part or the part of anyone for whose acts or omission it was liable. The Supreme Court decided that the hospital had to show that there had been no negligence on its part or on the part of its staff but that the hospital had failed to do so and so judgment was entered in favour of the claimant. The court was of the view that the hospital had failed to discharge its duty of care which resulted in the death of the claimant's mother.

23. Ms Minto, on behalf of the Claimant, submits that even without the plea of *res ipsa loquitor* the Falmouth Hospital was under an obligation to explain how the Claimant's injury occurred during the course of delivery, as the Claimant was under the hospital's exclusive care when the injuries occurred. She says that the Defendant should satisfy the Court that there was no negligence on its part or the part of any one for whose acts or omissions it was liable which would include all the staff that participated in the delivery of the Claimant.

24. It was queried why the Claimant was discharged from the hospital post her due date without a Caesarean section being done and given the risks associated with the vaginal delivery of a baby diagnosed with macrosomia. Dr Rose commented on the risks and lists brachial plexus as one such risk due to the traction to get a large baby out. The injury the Claimant sustained was not merely a stretch injury which could repair itself. The force used by the staff assisting with the delivery was so excessive that it tore the nerve roots of the Claimant's right shoulder from her spinal cord resulting in permanent paralysis of her right shoulder. The force used was therefore unreasonable or medically inappropriate. The Claimant was not gently manoeuvred and carefully bended to release her from the vaginal passage.

25. Ms Minto asks the Court to conclude that because the Claimant sustained neurological and orthopaedic injuries during the delivery, those specialists were

able to establish the causal nexus between the injuries sustained by the Claimant, and the manner of delivery (excessive force v careful bending), based on the experience and knowledge of those experts in treating injuries of that nature.

26. Reference was made to the case of **Bolitho** in which the court took the position it has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has illogical basis. A judge, before accepting a body of opinion as being responsible, reasonable or respectable, will have to be satisfied that when the experts formed their views, they had directed their minds to the question of comparative risks and benefits and had reached a defensible conclusion on the matter. The court further held that in the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate that the opinion was reasonable. This was especially so where there were questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposed that the relative risks and benefits had been weighed by the experts in forming their opinions. However, if in rare cases, it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge was entitled to hold that the body of opinion was not reasonable or responsible. Ms Minto further relied on the court's emphasis on its opinion that it would very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert were unreasonable. This was so because the assessment of medical risks and benefits is a matter of clinical judgment which judges are not normally able to make without expert evidence. It is only where a judge could be satisfied that the body of expert opinion cannot be logically supported that that opinion should not provide the benchmark by reference to which the defendant's conduct fell to be assessed.

27. Ms Minto's submission is that the test is no longer limited to men skilled in a particular art but has been extended to include a determination as to whether the conclusion or expert opinion arrived at is logical. So, a court could not absolve a

doctor from responsibility for negligence because he puts forward evidence from a number of doctors in his field that his treatment accorded with proper medical practice. Ms Minto says that the courts are now seeing that what must be shown is that the expert's opinion on the procedure or technique utilized was demonstrably reasonable and logical. She submitted that any medical technique which involved pulling on the Claimant with excessive force so that the nerve roots of her shoulder were forcibly torn from her spinal cord causing paralysis cannot be reasonably or logically accepted as the proper standard of care to resolve shoulder dystocia during delivery.

28. The Claimant also relies on the case of **Neville Knowles, Jnr v South East Regional Health Authority [2019] JMSC Civ 3** in which it was held that courts should adopt a "common sense approach" in medical negligence cases as expert evidence was opinion evidence. The court said the facts of the case had to be examined in order to determine causation and based on that examination, make the necessary findings. The focus ought not to be solely on whether the expert had specialty in a particular field.

29. In her analysis of the cases and evidence, Ms Minto said that the use of the words "excessive force" by Dr Rose and Dr Cheeks suggests that the force used to deliver the baby was not the acceptable medical standard. She said the Defendant has not put forward any evidence to support their case that no undue force was used in delivering the baby. She says the excessive force used in delivering the Claimant was what led to her injuries, and this should result in a finding of negligence.

30. She admits that neither Dr Cheeks nor Rose are obstetricians but with respect to Dr Cheeks in particular, she said that after having practised in his discipline for over 30 years, he has the expertise to give the Court the likely cause of the type of injury the Claimant sustained. She points out that Dr Rose's opinion is that there may be some traction on the shoulders and neck of a baby who is being delivered

from its mother, but there is not usually tearing of the nerve or avulsion of the nerve from the spinal cord as the Claimant experienced.

31. In short, all the evidence on which the Claimant relies points to the fact that the Claimant had an injury to her shoulder, which left her with a disability.

32. Ms Minto reminded the Court that the Defendant has offered no evidence to explain how the Claimant became so severely injured during delivery at the Falmouth Hospital. She also addresses the Defendant's challenge to Ms Scott's evidence that she could not see, from where she sat on the delivery table, what was going on beneath her. In relation to this, she pointed out that the questions posed to Ms. Scott were framed in very general terms and failed to address the specific circumstances of this delivery. The medical docket and the Defendant's own Amended Defence confirm that, by the time Dr. Kamara arrived, the Claimant's body was protruding up to the level of the chest, with the feet and chest already outside the mother. In those circumstances, Ms Scott could reasonably have observed the "pulling" on her baby, as she described.

Defendant's submissions

33. The Defendant's submissions begin with what he describes as "trite law" - that being he who alleges must prove. Counsel for the Defendant refers to Halsbury's Laws of England Vol 11 (2015), 702 which reads as follows:

> *"The legal burden (or the burden of persuasion) is a burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case or persuading the tribunal of the correctness of a party's allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this burden is usually clear from the statements of case, it usually been incumbent upon the claimant to prove what he contends. The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not*

necessarily proving a fact in issue; The burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side."

34. The court was also asked to consider the case of **Whitehouse v Jordan [1980] 1 All ER 650** wherein Lawton LJ set out the standard of proof for a claimant in medical negligence claims. He said:

"the standard of proof which the law imposed on the infant plaintiff was that required in civil cases, namely proof on the balance of probabilities, but as Denning LJ said in ***Hornal v Neuberger Products Ltd [1956] 3 All ER 970 at 973, [1957] 1 QB 247 at 258****: 'The more serious the allegation the higher the degree of probability that is required.' In my opinion allegations of negligence against medical practitioners should be considered as serious. First, the defendant's professional reputation is under attack. A finding of negligence against him may jeopardize his career and cause him substantial financial loss over many years. Secondly, the public interest is at risk, as Denning LJ pointed out in a* ***Roe v Ministry of Health [1954] 2 All ER 131, 139****. If courts make findings of negligence on flimsy evidence or regard failure to produce an expected result as strong evidence of negligence, doctors are likely to protect themselves by what has become known as defensive medicine, that is to say, adopting procedures which are not for the benefit of the patient but safeguards against the possibility of the patient making a claim for negligence. Medical practice these days consists of the harmonious union of science with skill. Medicine has not yet got to the stage, and maybe it never will, when the adoption of a particular procedure will produce a certain result. As Denning LJ said in* ***Roe v Ministry of Health [1954] 2 All ER 131, 137*** *'it is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great*

benefits on mankind, but these benefits are attended by considerable risks… we cannot take the benefits without taking the risks.'"

35. Halsbury's Laws of England (4th Edition) Vol 30 para 5 was also prayed in aid of the Defendant's submissions. It reads as follows:

"The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greatest skill and knowledge would have prescribed different treatment, or operated in a different way; Nor is he 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, even though the body of adverse opinion also existed among medical men."

36. Counsel for the Defendant in their submissions admit that shoulder dystocia arose during the delivery, but they deny that the management of the Claimant's condition by the medical staff of the Falmouth Hospital caused her to sustain a brachial plexus injury at birth and that all reasonable care was taken to manage the condition during the delivery. They maintain that at the material time, the standard of care given to the Claimant was in accordance with the appropriate skill and care and in keeping with standard medical procedure and practice. They say that the delivery in question was not routine and found support for this statement by placing reliance on the Claimant's medical records, which was agreed. They note further that the footling breech, shoulder dystocia and delayed second stage labour which were reported in the Claimant's medical records are all recognized as high-risk situations in obstetric practice. They note that the Claimant has called no experts to explain how such a delivery ought to have been managed and say further that neither Dr Cheeks nor Dr Rose, who although are experts in their respective fields

of practice, offered any opinion on obstetric standards which they could not have done because it was not within their remit to do.

37. They further submit that the only narrative offered in support of breach of a duty of care came from Ms Scott, the Claimant's mother, who under cross-examination admitted that she did not know what happened during the labour and that her understanding of events was based solely on what she was told afterwards. They argue that there is no first-hand account of negligence, no hospital staff member was alleged to have said that there was a mistake and nothing in the contemporaneous medical reports records raises a red flag. Ms Chung and Mr Stimpson argued further that the Claimant has failed to discharge her evidential burden to establish that her injuries were caused because of a breach of duty on the part of the Defendant's servants and/or agents and summarize their arguments on the issue of liability by saying the Claimant has failed to prove negligence, there is an absence of admissible expert obstetric evidence, the psychological evidence given is speculative in nature and the *res ipsa loquitor* doctrine and the case of **Cassidy v Ministry of Health** referred to by the Claimant in her submissions were in applicable in the circumstances of this case.

38. The Defendant relies on the Court of Appeal decision of **The Attorney General for Jamaica v The South East Regional Health Authority and Tahjay Rowe [2020] JMCA Civ 56.** In that case Edwards JA at paragraph 95 of the judgment, after quoting the Bolam principle went on to say:

> *"If there is an allegation of deviation from an accepted practice, there must be evidence of what that normal or usual practice is and that the practice adopted by the doctor was one which no professional man of ordinary skill and competence would have taken, if he was exercising ordinary care. A doctor who professes to exercise a special skill or competence must exercise ordinary skill required by his specialty."*

Counsel for the Defendant argues that the Claimant has not satisfied the requirements of proving negligence in that she has merely alleged that there is a deviation from accepted practice to be employed by an obstetrician during a breech delivery, but she has failed to provide evidence and or an independent report from an obstetrician to assess the normal or usual practice and compare whether the procedure which has been employed by the medical staff at Falmouth hospital is one which no professional man of ordinary skill and competence would have taken if he was exercising ordinary duty of care. They say it is not enough to suggest that because the child has suffered harm, someone must be blamed. The law requires more. It requires evidence, not inference. Facts, not feeling.

39. The Court was also reminded that she was not permitted to fill in evidential gaps with sympathy. Nor could she speculate as to what may have occurred in the delivery room in the absence of admissible probative evidence. Reliance was placed on the **Sanalee Caase** to support this submission. It was also argued that the Claimant had not led the evidence required to establish her case. There had been no expert obstetric testimony, no one who was present at the delivery had been called, no direct witness had spoken to what occurred or to what should have occurred but did not. And so, says the Defendant, the Claimant has not discharged the burden she bears and absent that discharge, her claim must fail.

40. Counsel for the Defendant argues that the Claimant called no obstetric expert to establish the applicable standard of care during the delivery nor to show how that standard was breached. The Claimant confirmed through the evidence of her mother that she had not visited any doctor to tell her what had happened that night. Ms Scott admitted that no hospital staff informed her of any error and that the alleged brain injury which the Claimant is said to suffer from was diagnosed long after delivery with no diagnosis recorded in the contemporaneous neonatal or pediatric records. She confirmed, in cross examination, that no one at any time told her that Abigaile was injured in any way.

41. Next, the Defendant sought to show that there were limitations in the medical reports of Dr Cheeks and Dr Rose. Both lack obstetric expertise. Both stated that they could not opine on the management of labour or whether the actions of the delivering physician were medically appropriate. Neither doctor was involved in the delivery and neither spoke to any healthcare provider who was present at the delivery. Their opinions were therefore based solely on a retrospective review of incomplete medical records. The reports prepared by the doctors used a noncommittal phrasing such as "*may be consistent with brachial plexus injury due to traction*" without attributing causation to any act or omission by the delivery team. Neither expert explored whether the injury could have occurred due to known risks associated with breech or shoulder dystocia deliveries, independent of negligence. Their reports lacked a differential analysis and failed to rule out natural, non-negligent causes. The conclusions they reached were derived post hoc, with no clinical continuity or chain of reasoning tying the injury back to a specific act. This they say undermines the reliability of the doctors' conclusions as forensic evidence. And finally, Counsel submits that the prohibitive value of expert opinion is governed by the need for specificity, expertise and methodology. They again refer to the **Sanalee Francis** decision, which they say reaffirms the position that expert evidence that does not clearly establish breach and causation, particularly where outside the scope of the expert's discipline, should carry limited weight. It is their view that the reports of Dr Cheeks and Dr Rose do not prove that the Claimant's injuries were caused by the actions or omissions of hospital staff and that they do not assist the Court in determining whether there was a breach of duty or that any such breach caused harm.

42. In their discussion of the medical report prepared by Dr Evans-Gilbert, Counsel take the view that the report provides an objective, contemporaneous account of the Claimant's condition immediately following delivery. They emphasize the fact that the content of that report was not based on speculation formed years after the fact but was based on real time clinical observation from a trained pediatrician who saw the child, examined and monitored her across critical early months. They note

that when the Claimant was discharged from the hospital and from her follow-up out-patient reviews no neurological deficits, seizures or developmental delays were observed or recorded.

43. I will not at this time go into any more detail in relation to the submissions made by Counsel for the Defendant with respect to the report prepared by Dr Evans-Gilbert or Dr Kai Morgan as those are issues that are to be considered if it is found that the Defendant was negligent and liable for the injuries sustained by the Claimant during the delivery.

44. On the issue of *res ipsa loquitor* raised by the Claimant, the Defendant submits, that the court in the **Sanalee case** cautioned against the use of *res ipsa* in complex clinical cases where multiple causes are possible and expert evidence is required. They argue that the case at bar involved a complicated delivery and as such negligence could not be inferred from the outcome alone. They seek to distinguish the **Cassidy case** from the present one by noting that in the **Cassidy case** a routine procedure led to an unexplained injury while in the case at bar the delivery was not routine, but emergent. In this situation then, they say, presumption of negligence does not arise as there is no evidence that any action taken by hospital staff was outside the bounds of accepted practice. The absence of an explanation in the **Cassidy case** was telling because it occurred in a controlled and predictable setting. Here, however, the nature of the event was neither controlled nor predictable. The mere fact of injury, even a tragic one, does not by itself establish a breach.

45. Counsel submits that the Defendant's decision not to call witnesses was informed by the evidential gaps in the Claimant’s case. They say the Defendant is entitled to stand on the existing record and is not under any obligation to prove a negative, where the legal burden of proof has not shifted. No adverse inference should be drawn from the Defendant’s election. The case must be decided on the strength of the evidence and the Claimant’s evidence alone.

Analysis

Does res ipsa loquitor arise in the case at bar?

46. I agree with the Defendant's submission that the Claimant has the burden of proving negligence. She may be assisted in bearing this burden by relying on the *res ipsa loquitor* doctrine. The doctrine can however only be of assistance in circumstances when the cause of the injury is not known. Erle CJ in the case of **Scott v London and St Katherine Docks Co (1865) 159 ER 665** defines *res ipsa loquitor* in this way:

> *"Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.*

The Claimant must show that:

a. Whatever caused the damage was under the defendant or his servants management or control; and
b. that the injury was of such kind as would not have happened ordinarily had the defendant or his servants/agents not been negligent.

47. Negligence will be presumed under the doctrine of *res ipsa loquitor* where, based on what usually happens, the type of mishap that occurred would not have occurred if the defendant had not been careless. So, it is only useful in circumstances when the claimant is unable to establish how the injury occurred. As Megaw LJ said in **Lloyde v West Midlands Gas Board [1971] 2 All ER 1240, 1246**, a claimant can establish negligence using the doctrine where it is not possible for him to prove exactly what was the relevant act or omission that would have set in train the events which led to the acts which caused the claimant's injuries but it is more likely than not that the effective cause was an act or omission of the defendant or his servants or agents. This act or omission would constitute a

failure to take proper care of the claimant's safety. Notwithstanding, the claimant has to still bring sufficient evidence to call for a rebuttal from the defendant. The mere fact that the court is unable to decide precisely how an accident or incident occurred does not make the defendant liable because there must be some evidence upon which the claimant's allegation of breach of duty of care can be based.

48. In the **Sanalee case** there needed to be an explanation as to what led to the claimant's mother having a perforated intestine and adhesions in the loops of her intestines after her surgery to remove an ectopic pregnancy. The pathologist who performed the autopsy on the deceased explained to the Court at trial, that intestinal perforation was not a normal occurrence of surgical procedure to correct an ectopic pregnancy. There was mention of the **Cassidy case** in the decision.

49. In **Cassidy**, the plaintiff went to the hospital to have surgery on the middle and ring fingers of his left hand which were stiff. The surgery was performed and his fingers wrapped in the usual way for 8 to 14 days. During this time, he was in a lot of pain, of which he complained to hospital staff. Nothing was done to assist him. At the end of 14 days when the bandages were removed, 4 fingers were stiff, and his left hand was rendered useless. It was held in **Cassidy** that where the actual cause of the injury is not ascertained then *res ipsa* was available to the plaintiff. It was found that res *ipsa* was available to the plaintiff and that in those circumstances the defendant would therefore have to prove that its servants or agents were not negligent. Denning LJ in explaining *res ipsa* and applying it to the facts of Cassidy said:

> *"If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it. But he was not put to that impossible task. He says: "I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it if you can."*

Put in this situation, the defendant had to show they were not negligent. They were unable to do so, and the court found in the plaintiff's favour.

50. In the case before me, I cannot say that the cause of the Claimant's injuries is unknown. The Defendant admits that shoulder dystocia arose during delivery. Dr Evans-Gilbert in her medical report says the Claimant presented to the Cornwall Regional Hospital with Erb's Palsy. Both Dr Rose and Dr Cheeks have stated that the injuries the Claimant sustained was as a result of the "excessive pulling" on her to get her out of the birth canal. But the process does not stop there. The Claimant must prove that the Defendant's servants and/or agents were negligent in carrying out their duties. The Claimant must prove that the pulling was, as she says, excessive in the circumstances and she must do that bearing in mind the requirements as set out in **Bolam** and modified by **Bolitho** – was the pulling in accordance with what experts in the field of obstetrics considered reasonable and responsible?

Has negligence been established?

51. The Claimant questions what technique was used by the medical staff at the hospital to address the shoulder dystocia during delivery. It is my view, based on the cases relied on by both the Claimant and the Defendant, that the question ought properly to be whether the technique used to deliver the Claimant who appears to have been in breech position and with her head and shoulder stuck in the birth canal, was a reasonable and responsible technique given the situation that the doctors and the nurses who attended to the Claimant found themselves in. It is the answer to that question that will determine whether the medical personnel were negligent in carrying out their duties. The person who could properly answer that question is someone who has expertise in the field of obstetrics. Dr Cheeks and Dr Rose are able to say what the injury was and how the injury was likely to have happened, but they cannot say, and they admit that this is indeed so, what procedure the attending physician and his support staff should have used to remove the Claimant. More importantly they are not able to

say whether the technique used in the circumstances was excessive. It is what existed at the time of delivery that is important to how the doctor will treat the delivery and the extent of force he has to use to assist the mother and the baby.

52. The Claimant had the responsibility of calling an obstetrician to give evidence. It is the obstetrician who would be able to say whether the doctors and nurse who attended to Ms Scott, could have treated with the situation in a different way or whether given the circumstances, the method that was used was the most prudent – the most reasonable and responsible in the circumstances - and was carried out in accordance with a practice accepted as proper by a responsible body of medical men skilled in the field of obstetrics and gynaecology. I suspect that the practice adopted by these skilled men would be what was in the best interest of the mother and the child at the time of the delivery.

53. It would have also been useful to receive evidence from an obstetrician as to the frequency with which shoulder dystocia occurs during delivery and what the risk factors were. The obstetrician would also say what steps would typically be used to release the shoulder and what the doctor on call would have been expected to do in the event those steps were not effective.

54. It is the Claimant's responsibility to provide this evidence. She who asserts must prove and so it was incumbent on the Claimant to not only seek the expertise of an orthopaedic surgeon and a neurosurgeon, but she also needed to seek the expertise of an obstetrician. The orthopaedic surgeon and neurosurgeon can only speak to the cause, extent of the injuries the Claimant received and how the injury will affect the Claimant during the course of her life, but they are not qualified to speak to the correctness of the approach followed in the delivery.

55. The obstetrician giving evidence as expert, would have considered Ms Scott's medical records and so be in a position to indicate whether any of the risk factors identified were taken into account when Ms Scott visited the hospital for her monthly checks. This evidence would have been useful because if the doctors

knew or ought to have known that the Claimant was at risk of experiencing shoulder dystocia because of the risk factors identified, then they would have been required to take greater care in the delivery and have in place plans to deal with that eventuality should it arise during the delivery of the Claimant. There is no evidence that this was the case.

56. Also of note is the fact that the Claimant was sent home after having done an ultrasound. She said she was sent home based on the results of the ultrasound and told to return approximately one week later. It can only be deduced from this evidence that the ultrasound results showed that she was not yet ready to deliver (although I note from Dr Evans-Gilbert's report that she was already 38+ weeks into her pregnancy). When she returned to the hospital later that morning, she was already in labour and the baby was on its way out, feet first. A Caesarian Section would therefore not be possible at that time so the attempts would have to be *via* vaginal delivery. A Caesarian Section would only have been contemplated if risk factors were identified prior. Furthermore, Ms Scott in cross-examination had informed the Court that she had delivered her first child at Falmouth Hospital and had not had any issues in that delivery.

57. Dr Cheeks in his medical report dated August 22, 2019, indicated that brachial plexus injuries and Erb's palsy are recognized complications of term, breech and vaginal delivery when the shoulder is stuck in the birth canal (shoulder dystocia) and an excessive force of sideways traction is applied to the infant's neck during delivery. The injury itself is not uncommon, but Dr Cheeks said the question as to whether there was any other option available to the medical staff for delivery of the baby other than by vaginal delivery was a matter of clinical judgment in the field of obstetrics in which he had no expertise and was unable to offer an opinion. Dr Cheeks could not comment on the doctor's decision to apply forceps in order to deliver the baby as again he said that was a matter of clinical judgment in the field of obstetrics, a field in which he had no expertise. In addition, he was unable to comment on the decision as to whether the baby could have been delivered

without the application or use of some traction, as again that was a matter of clinical judgment in the field of obstetrics in which he had no expertise and was therefore not qualified to comment.

58. Dr Rose in his medical report dated May 13, 2014, indicated that brachial plexus stretch injuries in newborns occurred during difficult deliveries. The Claimant's delivery can best be so described. Dr Rose went on to say that the injury could also happen when a birth becomes complicated and quick delivery of the baby is necessary. Again, it is to be noted that both experts acknowledged that the injury would have resulted from a difficulty delivery. It means therefore that quick delivery of the baby was necessary. Dr Rose also said in his report that traction of the shoulder and neck may result in stretching of the nerve. He said that tearing of the nerve from the spinal cord was the most common type of brachial plexus stretch injury, but it was possible for that nerve to be repaired. It was not possible to repair an avulsion of the nerve from the spinal cord. The Claimant suffered an avulsion of the nerve not a tearing and that injury was irreparable.

59. I have also taken note of the fact that in the December 17, 2014 medical report, Dr Rose indicated that the likely cause of the avulsion of the nerve from the spinal cord in the Claimant's case was severe traction to the brachial plexus during delivery. He, however, noted that traction could not be applied to the brachial plexus without traction or forceful pulling being applied to the baby's head and shoulders. The question then becomes whether based on how the baby's head and shoulders were positioned in the birth canal and perhaps the mother's anatomy, what amount of force would be reasonably required to extract the baby from the canal. Only an expert in obstetrics could assist the Court in answering that question.

60. I disagree with counsel for the Defendant that the expert reports of Dr Cheeks and Dr Rose do not establish the cause of the Claimant's injuries. The reports would suggest that on a balance of probabilities the injuries she sustained were caused

by the act of pulling which the doctors and nurse did when trying to extricate her from the birth canal. However, I agree with them and part company with Ms Minto when they say that although cause was established, there was no evidence that the actions taken which caused the injury were unreasonable or irresponsible and outside the scope of what experts in the field would have done had they found themselves in a similar situation. I adopt the dicta of Lawton LJ in the **Whitehouse case** and agree that it is indeed easy to be wise after an event and condemn as negligence that which was only an unfortunate incident.

61. And yes, the experience suffered by the Claimant as she attempted to enter this world is very unfortunate indeed. I do not wish to minimize it in any way, especially since the effects on her are long-lasting and will affect her as she travels through childhood, her teenage years and adulthood. The evidence given by her mother is very detailed, but it is true, as the Defendant has submitted, that any sympathy which this Court may have for her cannot oust the evidentiary requirements that must be met if negligence is to be proved. There is no evidence that the medical staff who attended to Ms Scott on the morning in question did not act in accordance with a practice that is accepted as proper by a responsible body of medical men skilled in the art, or science of obstetrics. The medical staff cannot be found to be negligent if they acted in accordance with such practice because there is a body of expert opinion that takes a contrary view. I will venture to say that in this case the Claimant has not put forward a body of expert opinion that says the medical staff should have performed the delivery in another way. All that she has put before the Court are the opinions of two doctors who have spoken about the injuries the Claimant sustained and have sought to identify the cause. They themselves have indicated that they are not qualified to provide an expert about the manner in which the Claimant should have been delivered. In this case, causation does not equate to negligence.

62. The Claimant has unfortunately been unsuccessful in proving that the Defendant's servants and/or agents were negligent during the course of her delivery. I do not

find the Defendant liable for the injuries sustained by the Claimant during her delivery.

63. My orders are therefore as follows:

a. Judgment is granted in favour of the Defendant against the Claimant.
b. The Claimant is to pay the Defendant costs in the claim, which are to be taxed if not agreed.
c. The Defendant is to file and serve the Judgment.