[2018] JMSC Civ. 53

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 00898

BETWEEN	**SHIELNILE DARLINGTON**	**CLAIMANT**
AND	**SAINT ANN'S BAY HOSPITAL**	**1ST DEFENDANT**
AND	**NORTH EAST REGIONAL HEALTH AUTHORITY**	**2ND DEFENDANT**
AND	**THE ATTORNEY GENERAL'S DEPARTMENT**	**3RD DEFENDANT**

IN OPEN COURT

Mrs. Denise Senior-Smith and Ms. Olivia Derrett instructed by Oswest Senior Smith and Co. for the Claimant

Mrs. Donia Fuller-Barrett and Ms. Kimberley Morris instructed by the Director of State Proceedings for the Defendants

Heard: 3rd-4th October, 2017 and 25th January 2018

Medical Negligence - Whether the Defendants failed to ensure the safe delivery of the Claimant's baby - Whether the treatment of the Claimant and her baby fell below the standard expected of a reasonably competent hospital staff

STEPHANE JACKSON-HAISLEY, J

BACKGROUND

[1] The Claimant, Shielnile Darlington was 22 years of age when she lost her child, a child who could have been classified as a bouncing baby boy, had he survived. He weighed two ounces short of 9lbs. He was born on June 17, 2008 a few days

past his expected date of delivery at the St Ann's Bay Hospital in the parish of St. Ann. During his delivery it was observed that the umbilical cord was wrapped tightly around his neck. When he was delivered at 2:10am on June 17, 2008 he was observed to be extremely "limb". Resuscitative measures were carried out but proved to be unsuccessful. The baby's death resulted from asphyxiation. The account however, did not begin there. It began on Friday, June 13, 2008 when the then pregnant Claimant, having passed her due date reported to the St. Ann's Bay Hospital at about 7:15am and was admitted to the maternity ward at approximately 8am.

THE CLAIMANT'S CASE

[2] It is the Claimant's case that after she was admitted on Friday, June 13, 2008, she was subjected to several tests. Further, that the nurses advised her that after the tests results came in they would decide whether or not a Caesarean section would be requested. She indicated that on the following day she was examined by a Doctor after which he advised her that she would more than likely have to do a Caesarean section but she would have to wait until Monday when the tests results were ready so that a final determination could be made.

[3] On Monday, June 16, the Claimant was still awaiting the birth of her baby. At about 7pm that day she was taken to the delivery room where she was prepared to give birth naturally. She said she began to push and she recalled that the nurses said that they saw the baby's head at around 11pm. She indicated that she continued to push but nothing further happened. She was in labour and in pain and it was not until 2am that the nurses called Dr. Wolfe so that he could make a decision as to whether or not she should be taken to the operating theatre.

[4] According to the Claimant by the time Dr. Wolfe arrived and did certain procedures, it was by then too late. The baby came out at about 2:10am and Dr. Wolfe advised her that the umbilical cord was tied too tightly around the baby's neck and the baby had started to urinate and defecate and some of it went down

his throat. It was then that Dr. Wolfe told her the news that no mother would ever want to hear, that her baby had died.

[5] It is no small wonder that she expressed that after the death of her baby she remembered that she was distraught . To use her words, she had to "split herself in two and separate the me that was scared and frightened and devastated to go throughout the days". She was referred to a Dr. Denton Barnes for an assessment after which she saw Dr.Terrence Bernard, a psychiatrist who examined her and prepared a report containing his findings.

[6] According to her, it was really hard to have to recount to people what happened especially because people would have seen her pregnant and then they did not see a baby afterwards. She indicated that she will never forget the day her baby died, that she usually calculates his date of birth and that when she sees little boys she would think to herself that her baby would be that age if he had lived. She also expressed that she imagines what he would look like and what he would be capable of doing.

[7] On February 23, 2010 the Claimant filed a Claim Form accompanied by Particulars of Claim against the Defendants with the Saint Ann's Bay Hospital as the 1st Defendant, the North East Regional Health Authority as the 2nd Defendant and the Attorney General's Department as the 3rd Defendant. The Claim Form and Particulars of Claim were amended twice resulting in a 2nd Further Amended Claim Form and Particulars of Claim.

[8] The Claimant seeks Damages for Negligence in that whilst she was a maternity patient with the 1st Defendant, she lost her child due to the negligence of the 1st Defendant, its servants and/or agents in failing to use reasonable care and skill in the treatment and advice of the Claimant and her baby. The Particulars of Negligence pleaded are as follows:

I. Failed to "properly" carry out proper and adequate pre-natal care to ensure the safe delivery of the Claimant's baby;

II. Failed to conduct radiographic tests to ascertain the health of the baby since the Claimant had passed her overdue date;

III. Failed to carry out steps to ascertain the health of the baby during the period she was in the hospital;

IV. Failed to observe or act upon, monitor or investigate properly the status of the foetus or at all the steady, serious and obvious deterioration in the condition of the Claimant's baby whilst the Claimant was in their care.

V. By reason of these matters, the Claimant's baby underwent pain and suffering which she would otherwise not have endured, her illness was greatly aggravated and the consequences thereof were prolonged and she suffered loss and damage. Further the Claimant suffered severe emotional trauma, stress and anxiety. severe emotional trauma, stress and anxiety.

[9] The Claimant also seeks Special Damages in the sum of $176,000.00 which reflects expenses incurred consequent upon the death of her child.

[10] At trial the Claimant's witness statement dated August 2, 2017 was allowed to stand as her evidence in chief save for portions which were struck out on the ground that they were in breach of the rule against hearsay. She was subject to cross-examination during which she insisted that the baby's weight was 9lbs and further indicated that she would be surprised to learn that he weighed less than 9lbs. She admitted that tests were done to her and the baby four or five times throughout each day except for the urine test which was only done once and that the tests included blood pressure tests and examination of the baby's heartbeat.

THE MEDICAL EVIDENCE

[11] The Claimant's medical docket was tendered into evidence by the Claimant however it was also relied on by the Defendant. The docket contains a chronology of the treatment administered to the Claimant from her admission on June 13, 2008 to her discharge on June 18, 2008. I have summarized some of the notes made on June 17th 2008 leading up to the delivery.

17/6/08

- *At 1am Dr Khan reviewed the patient*

- *At 1:50am it was noted that there was poor maternal effort, the foetus appear big there was no progress, fetal heart rate was at 110 beats per minute and Dr. Khan was informed.*

- *At 2:00am Dr. Wolfe arrived, reviewed the Claimant, an episiotomy was given after which the Claimant delivered a large male "neonate" with the assistance of forcepts.*

- *At 2:15 am the apgar score was noted a 1-0 0/10 and the weight 4.14kg*

- *At 2:15am paediatrician intern and resident present were resuscitating the neonate but same was unsuccessful.*

THE DEFENCE'S CASE

[12] The Defence's case is contained in the Amended Defence filed on June 2, 2007, the medical docket, and in the evidence of Dr. Locksley Wolfe, Doctor of Medicine and Gynaecology and Obstetrics and in his "Report on Perinatal Death".

[13] The Defendants deny the Particulars of Negligence pleaded and dispute the claim. They aver that they did not fail or refuse to properly and effectively treat the Claimant, nor did they cause the death of the Claimant's baby. Further, that the medical records reveal that at all material times both the Claimant and her baby were afforded all reasonable care in the circumstances and treated with the requisite skill and care required. They alleged further that despite this treatment, which included numerous tests to ascertain the health and status of the baby, when delivered, the baby came out in an occipito-posterior position with its umbilical cord wrapped tightly around its neck, despite previously being in a cephalic position due to no fault of the Defendants.

[14] The Defendants made no admission in respect of the Claimant's assertion that she has suffered severe emotional trauma. They simply contend that she is not entitled to the reliefs claimed.

[15] Dr. Locksley Wolfe was the only witness relied on by the Defendants. At the time he treated the Claimant he was a resident gynaecologist at the St Ann's Bay Hospital and the senior obstetrician on duty. Dr. Wolfe in his evidence paints a picture of what took place from the Claimant first presented at the Hospital to the time when she was discharged. According to him, upon the Claimant's admission to the Hospital investigations were done to determine whether the baby was macrosomic. He explained that a macrosomic baby is one whose weight ranges between 9lbs and 91/2 lbs. He went on to say that non stress tests were administered to ascertain the baby's heartbeat and that blood tests were done on the Claimant to determine whether she had gestational diabetes. He explained that the presence of gestational diabetes would mean that the baby would be bigger than normal and so the results would determine the appropriate mode of delivery.

[16] According to Dr. Wolfe, the results of the ultrasound revealed that the baby weighed 8lbs 14 ounces and was therefore not macrosomic so this favoured vaginal delivery. Further, that from all indications the baby was in a cephalic position, meaning that the foetus was positioned with its head set to enter the pelvis first which is the best position for vaginal delivery. Further, that the Claimant's tests results did not support a finding of gestational diabetes therefore it was discussed with the Claimant that vaginal delivery was appropriate. Based on the test results, a Caesarean section would not have been recommended.

[17] He outlined the steps taken leading up to delivery. He indicated that several non-stress tests were done throughout the days leading up to the delivery to find out the baby's heart rate and none of them revealed any signs of distress. The results of the non-stress and other tests being favourable, Dr. Wolfe indicated that he ordered that labour be induced. He went on to say that labour was induced at 10:10am on June 16, 2008 . At 1:45pm when the Claimant was reviewed she was observed to be in early labour, her cervix being only 80% effaced and dilated to about 2cm. She was again reviewed at 7:45pm and found to be dilated to about 5cm. An artificial breaking of her head water was done by

breaking the membrane. Other non stress test done showed no contraindication. An hour later she was again reviewed and found to be fully dilated and it was observed that the baby was descending.

[18] He pointed out that at 10:28pm she was again reviewed by the Doctor on duty and it was found that labour was still progressing. Further, that at 10:45pm the cervix was dilated to 9cm and a small caput was observed and indications were that the birth passage was adequate and there was no need to do a Caesarian section. Further, that at 1:05am he was consulted as the Claimant was pushing since 12:50am without delivery. He said that this did not indicate that vaginal delivery could not still be effected as it is not uncommon for women to be in active labour for several hours prior to delivering. Further, that he ordered that she be allowed to try for another half an hour and if she did not deliver he should be called. He was called at 1:50am and he arrived at 2am.

[19] Dr. Wolfe further indicated that upon his arrival he observed that the Claimant was fully dilated and that the baby's head was visible together with a caput. Further, that he performed an episiotomy to amplify the birth passage and used outlet forceps to effect the delivery and that complications stemmed from the fact that the umbilical cord was tightly wrapped around the baby's neck and he came out limp. He indicated further that he immediately summoned the paediatric team who performed resuscitative measures which were unsuccessful.

[20] Dr. Wolfe gave further evidence through amplification that they do not conduct radiographic tests because of the danger to the foetus, but instead they do ultra sounds. He explained that when non-stress tests are done, a strip comes out of the machine and that is kept in the docket and becomes a part of the record. The non-stress tests would indicate whether or not the baby is under stress. He referred to the Claimant's medical docket and pointed out that the non-stress tests revealed no sign of distress.

[21] During cross-examination Dr. Wolfe indicated that he was the senior resident on duty at the time. He spoke to his years of experience in the field of Obstetrics. He

said it is not a common occurrence for babies to be born with the umbilical cord tied around their necks. He did not agree with the suggestion put to him that statistics show that thirty percent of babies are born with the umbilical cord tied around their necks and further expressed that based on his experience it is much less than that. He was asked whether this was something he would normally have to look out for in the delivery room and he said it was not, because it is so rare. He was asked if he would agree that as an obstetrician he would have been trained in delivering a foetus so as to ensure that he manages and mitigates any risk of strangulation from the umbilical cord and he replied that it depends. He was asked if he could say that the Claimant elected to have vaginal delivery and he replied "no". He agreed that at 7:45pm the baby was doing well and that there was no evidence that the baby was in distress and that labour was progressing satisfactorily. He agreed that he had asked that the Claimant be put on a machine but there is no indication that this was ever done as at the time he made the request the machine was occupied.

[22] He pointed out that when the ultra sound was done a record was made of not only the weight but also the fact that the baby was in a cephalic position and that once labour has commenced the baby no longer moves around, it just descends. He agreed that the occurrence of the umbilical cord being tied around the baby's neck would result from movement of the baby. He agreed that his role was to ensure that there is a safe delivery. When it was suggested to him that part of ensuring a safe delivery was to ensure that the umbilical cord did not pose a danger to the baby he did not agree but rather, pointed out that only when the head comes out it is possible to check.

[23] It was suggested to him that there is no evidence in the notes or docket or his report to show that the baby's head or neck was checked when the baby was delivered or extracted. He did not agree with this. However, when asked to show where the note was he could not. He was asked if it is standard procedure that upon seeing the cord around the baby's neck it is removed before completing the extraction. He explained that if the cord is loose you can remove it but if it is tight

you would have to clamp it. He was asked if there was any notation of clamping the cord and he responded that the only way to remove the cord is to clamp it. However, he agreed that there is no notation of that in the records or his witness statement but he insisted that it was done. It was suggested to him that he did not clamp the cord and he responded that that is the only way he could have extracted the baby. Counsel further suggested that even if he clamped the cord he failed to remove the umbilical cord from the baby's neck at the time of delivery when the baby had emerged and this resulted in the baby's death through strangulation. He said it is standard operating procedure that when observations are made that the cord is wrapped around the baby's neck you do not pull out the baby but rather remove the cord first. He was reminded that he had said that the baby was born with the cord around his neck. It was suggested to him that he did not clamp and remove the umbilical cord and that, had he done this, the baby would not have died. He denied these suggestions and repeated that the cord was clamped and removed and the delivery effected.

[24] It was suggested to him that save and except for the foetal heart rate test and the measurement of the foetus, the foetus was not otherwise monitored between 11:45pm and 2am however he disagreed and pointed out that the nurses were always doing their checks. It was also suggested to him that he, the medical staff and the Hospital failed to observe, from the ultra sound done, and up to the time of delivery, that the umbilical cord was wrapped around the baby's neck and he disagreed. It was further suggested that they failed to ensure that the baby was not strangled and he said everything was done and that the Claimant was properly monitored.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[25] Counsel appearing on behalf of the Claimant submitted that there is sufficient evidence on which the Court can find that the Defendants were negligent. Firstly, she submitted that insufficient tests were carried out in that only an ultra sound was done as opposed to radiographic testing and that that demonstrates a lack

of proper monitoring. Further, that the fact that Dr. Wolfe had only seen the Claimant once prior to delivery and that was at 8:45pm the evening before delivery, also lends support to the fact that there was lack of proper monitoring.

[26] Counsel for the Claimant also pointed out that up to the time that Dr. Wolfe came to the delivery room there was no evidence that the baby was in distress nor is there any evidence that the baby had already been strangled as his agpar score was not zero. She submitted further that this strengthens the Claimant's case that it was because of Dr. Wolfe's negligence during the delivery process that the baby died and that the clear evidence is that it would have made a difference if the delivery process was not carried out in the way it was. Further, that this is especially so in light of Dr. Wolfe's evidence that the fact that the umbilical cord is wrapped around the baby's neck does not mean the baby must die. She further submitted that what would have been required of Dr. Wolfe was the management and mitigation of the risk of strangulation and pointed out that the only movement that could have caused the tightening of the cord around the baby's neck would have been the removal of the baby with the forceps and the failure to take the necessary steps to properly remove the umbilical cord. Further, that although he gave evidence that clamping of the cord was essential to removing it, he did not observe this.

[27] Counsel further argued that his failure to properly clamp and remove the umbilical cord is evident in his failure to mention this act of clamping the umbilical cord prior to his evidence during cross-examination. Further, that the Defendants have brought no evidence of this clamping, simply the bald assertion that it was done. Further, that the pleadings, the medical docket, the perinatal report and Dr. Wolfe's witness statement are all devoid of any reference to the umbilical cord being removed before the baby was completely extracted from the vagina and of any reference to the umbilical cord being clamped prior to its removal. She contended further, that the Defendants had ample opportunity to include this evidence and that there was even a further opportunity during amplification, but yet Dr. Wolfe failed to make mention of clamping the umbilical cord or removing

it. She highlighted that there is an inconsistency in terms of what he said he did as at first he spoke about the baby coming out with the cord tied tightly around his neck and when he was pressed further he said it was not around the baby's neck as he had removed it. Further, that the clamping of the umbilical cord and its removal were critical steps that should have been taken to ensure the safe delivery of the baby.

[28] Counsel for the Claimant also pointed out that the following evidence given by the Claimant was not challenged:

> *"When Dr. Wolfe arrived he slit my vagina. The nurse pushed on my belly and Dr. Wolfe pulled the baby. The baby came out about 2:10am."*

[29] Counsel asked that the Court accept that this is in fact how the delivery unfolded and find that the failure to mention the umbilical cord being clamped and the cord being removed at the critical point suggests that this was not in fact done and that even the medical docket supports the Claimant's position as in it there is an indication that an extremely flat male infant was delivered with the cord around his neck.

[30] She directed the Court's attention to the case **Bolam v Friern Hospital Management Committee** [1957] 1 W.L.R 582. where it was held that a doctor who acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique. She asked the court to find that the Defendants failed to act in accordance with accepted medical practice and were in fact negligent.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[31] Counsel for the Defendant submitted that the case as pleaded does not amount to a cause of action. This she said is evident in "Part V" of the Claimant's Particulars of Negligence. Although this "Part" speaks to injury to the Claimant's

baby, there has been no claim brought on behalf of the baby and this could not be done in any event as there is no recovery that can be had by a foetus. Reliance was placed on the case **Paula Whyte v The Attorney General and South East Regional Health Authority** [2012] JMSC Civ. 85, a decision of my brother Sykes J in which he found that the pleaded case did not indicate the damage suffered by the Claimant and that Ms. Whyte was the only Claimant as no claim was brought by the child although he was born alive.

[32] In response to submissions of counsel for the Claimant she submitted that the Claimant's case ought to fail as the evidence presented by the Claimant is self defeating. She pointed out that the nature of the Claimant's pleadings limited how the Defendant could respond. Further, that the Defence and the witness statements were filed in response to the Claim and that there was nothing in the Particulars of Claim that indicated what was the basis of the negligent action that the Claimant was attributing to the Defendants. Further, that the case that the Claimant has presented was not foreshadowed in the pleadings as it was never mentioned that the Defendant had failed to cut the umbilical cord and to clamp it.

[33] She submitted further that the evidence does not support a finding that the Defendant failed to ensure the safe delivery of the Claimant's baby. Further, that In fact, the evidence is to the contrary as the medical docket reflects that non-stress tests were done about 28 times throughout the delivery process and therefore it cannot be said that no tests were done to ascertain the health and status of the baby.

[34] She also highlighted the fact that an ultra sound was done and if there was anything abnormal the ultra sound would have picked that up and contended that the Court should find that the ultra sound was sufficient, especially in light of Dr. Wolfe's evidence that radiographic tests are contraindicated in pregnancy.

[35] Counsel for the Defendants also pointed out that the Claimant has failed to present any evidence to support what would have been proper prenatal care and that in the absence of any evidence on the Claimant's case to show that there

was a failure to observe standard, proper medical procedure the Court should accept that what the Defendants did was sufficient. Further, that in the absence of any evidence to show that something else could have been done to prevent the strangulation, the Court should find that Dr. Wolfe appreciated the risks and his response was to clamp and remove the umbilical cord.

THE LAW

[36] There is no issue as to the fact that the Defendants owed the Claimant a duty of care. There is also no issue as to the fact that the Claimant's baby died during delivery due to asphyxiation. The issues surround whether the death was a consequence of the negligence of the agents and or servants of the Defendants. The **Bolam** case is the locus classicus on medical negligence and the test for the standard of care. His Lordship McNair J in giving directions to the jury indicated at page 587 of the judgment the following:

> *" I myself would prefer to put it this way, that he 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. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."*

[37] This excerpt from this case has been cited and relied on in several Jamaican cases dealing with medical negligence. Among them is the **Paula Whyte** case (supra) in which Sykes J after an examination of the **Bolam** case pointed out:

> *"Miss Whyte would have to prove that the health care team did not act in accordance with accepted medical practice for the treatment of high-risk pregnant mothers and not merely that she could have been treated in another way. It has to be shown that the actions of the health care team fell below the standard expected of ordinary skilled persons professing to have the skill to manage high-risk pregnant mothers. Miss Whyte cannot*

succeed by showing that the Spanish Town Hospital staff were not the highest qualified experts in the field. From what Dr Mair has said the defendants have shown that what was done fell within the ordinary skill and competence of health professionals caring for pregnant high-risk mothers. On the facts, therefore, Miss Whyte's claim fails."

[38] An examination of these cases makes it evident that in order to establish medical negligence on the part of the Defendants, the Claimant is required to prove that the actions of the health team fell below the standard expected of ordinary skilled persons.

ISSUES

[39] The main issue for my determination is whether the Claimant has established on a balance of probabilities that the death of her baby resulted from the negligent acts or omissions of the servants and/or agents of the Defendants. In determining this issue several other issues arise which are as follows:

1. Did the Defendants fail to carry out proper and adequate pre-natal care to ensure the safe delivery of the Claimant's baby?

2. Did the Defendants fail to conduct radiographic tests to ascertain the health of the Claimant's baby since the Claimant had passed her overdue date?

3. Did the Defendants fail to take steps to ascertain the health of the Claimant's baby during the period the Claimant was in the hospital?

4. Did the Defendants fail to observe or act upon, monitor or investigate properly the Claimant's baby whilst the Claimant was in their care?

[40] Counsel for the Defendants has also raised an issue with respect to the Claimant's pleadings. I therefore have to consider whether the Claimant's pleadings, in particular Part V, amounts to a cause of action. I will deal with this issue first.

DISCUSSION

The Pleading Issue

[41] According to counsel for the Defendants the Claimant's pleadings are defective. Having examined the pleadings it is clear that only "Part V" of the "Particulars of Negligence" speaks to pain and suffering endured by the baby. However, all the other particulars relate to the Claimant herself. The Claimant's case is primarily based on the emotional trauma, stress and anxiety suffered by her consequent upon the death of her baby. This case is to be distinguished from the **Paula Whyte** case as in that case the damage suffered by the Claimant was not pleaded. In this case the Claimant has made it clear that she has suffered from what could be classified as post traumatic stress disorder. However, since there is no claim on behalf of the baby, then there is no basis on which this Court can take into account any pain and suffering endured by the Claimant's baby so that aspect of the pleadings is of no value.

Did the Defendants fail to carry out proper and adequate pre-natal care to ensure the safe delivery of the Claimant's baby?

[42] The Claimant has alleged that the Defendants failed to "properly" carry out proper and adequate prenatal care to ensure the safe delivery of her baby. Taking into account the law as enunciated in the **Bolam** case, in order to establish negligence on the part of the Defendants, the Claimant would have to lead evidence to show that the pre-natal care rendered to the Claimant fell below the standard expected for rendering proper and adequate pre-natal care.

[43] The evidence of the Claimant is to the effect that several tests were conducted on her to include an ultra sound, listening to the baby's heart, diabetes tests as well as regular blood pressure monitoring. Her account as to the tests carried out supported the Defendant's account that the Claimant and her baby were subject to several tests. The results of these tests were all favourable. Tests to ascertain the weight of the baby showed that the baby had not reached a weight that would

require that a Caesarian-section be done. The baby's heartbeat was normal as reflected by the non-stress tests. Although the results of the ultra sound were not available immediately when they became available they did not reveal any area of concern. The evidence led demonstrated that several tests were conducted to ascertain the health of not only the Claimant but also her baby. This evidence has not been contested. There was no evidence led to show that either the hospital, its agents and/or servants Dr. Wolfe acted below the standard of practice recognised as proper by a competent body of professional opinion in respect of how pre-natal care ought to be carried out.

Did the Defendants fail to conduct radiographic tests to ascertain the health of the baby since the Claimant had passed her overdue date?

[44] The Claimant has averred that the Defendants failed to conduct proper radiographic tests to ascertain the health of the baby since the baby had passed its "overdue date". However, there is no evidence led on behalf of the Claimant to show that a radiographic test at this stage was necessary to ascertain the health of the baby. In fact, the only evidence led on this issue emanates from the Defendants' case through Dr. Wolfe who testified that a radiographic test at this stage would pose a danger to the foetus. In order for the Claimant to establish negligence on this issue she would have to establish that radiographic tests are accepted as necessary to ascertain the health of the baby and also that conducting it would not pose a danger to the baby. However, the evidence does not support this, in fact the evidence is contrary to this. In any event, there is no evidence that any tests would have revealed that the umbilical cord was tied around the baby's neck. The Claimant has failed to establish negligence on this issue.

Did the Defendants fail to take steps to ascertain the health of the baby during the period she was in the hospital and did the Defendants fail to observe or act upon, monitor or investigate properly the Claimant's baby whilst the Claimant was in their care?

[45] These two issues will be dealt with simultaneously. The Claimant has averred that the Defendants failed to take steps to ascertain the health of the baby during the period she was in the hospital and that they failed to observe or act upon, monitor or investigate properly the Claimant's baby whilst the Claimant was in their care. The medical docket is a part of the evidence and reflects all that was done in relation to the Claimant and her baby. It shows that several tests to include non-stress tests in respect of the baby were done throughout. The results of all these tests reflected that all was well with the baby. There was no issue taken with he notes contained in the docket, in fact it was the Claimant who tendered this as part of her case. During the cross-examination of Dr Wolfe he indicated that labour was progressing as expected and that all tests in relation to the baby revealed that the baby was doing as expected. In fact, it is also the Claimant's case that there was nothing wrong with the baby prior to the time he was delivered and that the negligent acts took place during the actual delivery.

[46] The Claimant has also raised the issue of the failure of the agents and/or servants of the Defendant to put the Claimant on a machine after Dr. Wolfe had recommended that that be done. The evidence from Dr Wolfe is that the machine was unavailable. Although this evidence reflects a failure to carry through the recommendations of Dr. Wolfe it would have been helpful if there was some further evidence to demonstrate what this machine was meant to do and the effect of the Claimant not having had the benefit of being put on it. Consequently, there is no evidence to show that had she been put on this machine the outcome would have been different or that the failure to do this resulted in the death of the baby. Without that evidence the Claimant is hard pressed to show that this failure is what caused or contributed to the death of the baby.

[47] The undisputed evidence is that the Claimant's baby died because the umbilical cord was tied too tightly around his neck. Dr. Wolfe gave evidence that the fact that an umbilical cord is tied tightly around a baby's neck doesn't mean that the baby will die. According to Dr. Wolfe there are steps that can be taken to mitigate harm to the baby and to prevent strangulation and all necessary steps were taken. It is also the evidence of Dr. Wolfe that the necessary step is to remove the umbilical cord from the baby neck through the act of clamping the umbilical cord. According to the Claimant, the Defendant's agents and or servants did not take these steps.

[48] It is the Claimant's case that Dr. Wolfe was negligent during the delivery of the Claimant's baby as he did not clamp the cord and he did not remove the umbilical cord prior to delivering the baby. According to the Claimant it can be inferred that Dr. Wolfe did not do this from the failure to mention this very important detail in the detailed medical docket, the perinatal report, the Defence, the witness statement or his evidence-in-chief. It is therefore my task to determine whether there is sufficient evidence either by inferences or otherwise to say that Dr. Wolfe and his team did not in fact clamp and remove the umbilical cord. The only medical evidence presented in this case and on this point is the evidence of Dr. Wolfe. It may well be that his evidence is self serving however the Claimant has brought no evidence to contradict him. The case has to be determined on the available evidence. Although the Claimant gave evidence, she made no mention of whether or not she made any observations with respect to the umbilical cord, or that it was neither clamped or removed. The truth is that the first time that this became an issue was during the cross-examination of Dr. Wolfe. I take into account that there is no mention of this by Dr. Wolfe prior to this, although there is detailed evidence of all the steps taken during the delivery process, this was not mentioned. Dr Wolfe however he insists that he did this.

[49] I bear in mind that it was never alleged by the Claimant in her pleadings or witness statement that Dr. Wolfe failed to do this. In fact, on an examination of the pleadings the Claimant's case seemed to have been based on the failure to

perform a Caesarian section in light of the baby's alleged weight. I therefore I do not find his failure to mention it fatal as he would have been responding to the case he had to meet. I therefore accept him as a witness of truth and find as a fact that he did in fact clamp the umbilical cord and thereafter removed it.

CONCLUSION

[50] It is the Claimant who has brought this case and so the burden rests on the Claimant to prove the case as he who alleges must prove. The Claimant's case is devoid of any evidence, medical or otherwise to demonstrate that the Defendants fell below the standard to be expected in a case of this nature. The law requires proof that the care rendered to the Claimant by the Defendant fell below that of a reasonably competent hospital staff offering health care to pregnant women.

[51] In all the circumstances and on an examination of all the evidence presented in this case, I am of the view that the Claimant has not established that the care she received fell below that of the reasonably competent hospital staff offering health care during the delivery of a baby. The Claimant has therefore failed to satisfy me on a balance of probabilities that the death of her baby resulted from the negligence or omission of the Defendants' servants and/or agents. Judgment is for the Defendants with cost to be agreed or taxed.

EX GRATIA PAYMENT

[52] The Claimant has lost her child. I have no doubt that she has suffered emotionally and will continue to suffer as a result of that. The medical evidence supports this. There was insufficient evidence presented to satisfy me on a balance of probabilities of the negligence of the Defendants. However, there still remains some questions as to the circumstances leading up to the baby's death, the answers to which might have been different had she provided her own medical evidence. The facts and circumstances are such that I would urge the 3rd Defendant to consider granting an ex-gratia payment to the Claimant.