SCFC

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2004 HCV 000134

BETWEEN	**BEVOLYN STONA-LEWIS**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**1st DEFENDANT**
AND	**DR. WINSTON DAWES**	**2nd DEFENDANT**

Mrs. Marvalyn Taylor-Wright, instructed by Taylor-Wright & Co., for the Claimant.

Ms. Stephany C. Orr & Mrs. Trudy-Ann Dixon-Frith, instructed by the Director of State Proceedings, for the Defendants.

Claim for medical negligence – Ruptured Ectopic Pregnancy- Test in Bolam v Friern Hospital Management- Defendants' expert supporting claimant's allegation of a defendant's negligence.

Heard November 18, 19 & 20, 2009 and March 31, 2010.

Coram: F. Williams, J (ag).

Introduction

1. The claimant in this case has had to undergo emergency surgery to remove her left ovary and fallopian tube. She blames the need for this emergency procedure (known, in medical terms as a salpingo-oophorectomy) on what she says is the negligence of the second defendant and/or that of the other medical personnel who attended to her during the period that she was admitted in hospital in Jamaica. The 1st defendant is sued pursuant to the provisions of the Crown Proceedings Act, the second defendant, at the material time, having been

Senior Medical Officer at the May Pen Hospital, Clarendon, where the claimant had been admitted some time before the surgery was performed.

2. She also blames the second defendant for her having to undergo two other procedures which, she says, were unnecessary: (i) a dilation and curettage; and (ii) a suction curettage. These were done, she contends, as a result of the second defendant's misdiagnosis of her medical condition.

The claimant's case

3. As it turns out, the claimant had an ectopic pregnancy. In layman's terms, this comes about when a pregnancy occurs and develops, not in the uterus, as it should, but instead, in the fallopian tube. To make matters worse, her ectopic pregnancy ruptured and bled, hence the need for emergency surgery. After surgery in the Bahamas, she was found to have had a "chronic" ectopic.

4. A Bahamian resident, the claimant first had the fact of her pregnancy confirmed in the Bahamas by Dr. Reginald Carey, a Bahamian obstetrician and gynaecologist. This occurred on or about December 16, 2000. She thereafter came to Jamaica on vacation on December 26, 2000. She was seen by the second defendant on December 27, 2000 at his private office. She complained of lower abdominal pain and, she says, light bleeding.

5. Her evidence is that she told the second defendant, Dr. Dawes, that she was pregnant; but, as we shall see when the second defendant's evidence is summarized, he vehemently denies this. This will be an important issue of fact for the court to resolve.

6. On the second defendant's instructions, she was admitted to the May Pen Hospital where she remained until January 8, 2001, when she was discharged. During that time, she had to do several blood tests and underwent an ultrasound scan. The scan was performed by Dr. Horace Charoo, to whom she had been referred by the second defendant. (Incidentally, Dr. Charoo had been the 3rd defendant in this suit, but the claimant later discontinued her action against him).

7. On December 30, 2000 the second defendant performed on her a procedure known as a dilation and curettage, the aim of which was to remove the contents of her uterus – both for that purpose of and by itself, and also to obtain a sample to send for testing to see whether the said contents were "products of conception". The result of this testing would come in the form of a histopathology (or histology) report.

8. Even after she was discharged, she continued to experience pain and discomfort. This led her, on January 9, 2001, to return to the second defendant at his private office. There, he performed a suction curettage, and, *inter alia*, gave

her 21 days' sick leave and a letter of referral to take back with her to the Bahamas. (The two curettage procedures lasted for hours, she testified).

9. On her return to the Bahamas, the claimant's continued discomfort caused her to seek medical attention from Dr. Reginald Carey. This led to her having on January 16, 2001, the emergency salpingo-oophorectomy, as her now-ruptured ectopic pregnancy had become life-threatening.

Evidence of Dr. Reginald Carey

10. With the co-operation of the Registrar of the Supreme Court, and pursuant to Rule 29.3 of the Civil Procedure Rules, this witness amplified his evidence by way of video link. This was also done pursuant to an order of Daye, J on October 11, 2006. Dr. Carey had also given a witness statement dated the 28th October, 2008.

11. Dr. Carey holds the Bachelor of Medicine, Bachelor of Surgery (MBBS) degree from the University of the West Indies, Mona, Jamaica. He is also a member of the Royal College of Obstetricians and Gynaecologists, and his practice is located in Nassau, Bahamas. He works there as a consultant in obstetrics and gynaecology at the Princess Margaret Hospital and has done so since around 1996.

12. He first saw the claimant professionally in December, 2000. Then, she complained of not having seen her monthly period for some five weeks from when it was last due. She was made to do a urine test and a blood-pregnancy test, both of which confirmed that she was pregnant. This was communicated to her. She would have been about five weeks pregnant when he saw her. And, by December 27 (when she was first seen by the second defendant), she would have been around 6½ weeks pregnant. At 6-7 weeks, the foetus is about a half inch in

length.

13. A patient with an ectopic pregnancy would normally present with a history of having missed her period. About 75% of cases would feature pain in the lower abdomen. About ¾ will have a little spotting as well. An ultrasound in such a case will show that there is no foetus in the uterus. If the ectopic is ruptured, free fluid will be seen: that is, blood in the pelvis and the abdomen. An ultrasound will give a strong indication as to whether a pregnancy is ectopic or not. Once it is suspected clinically, then the best way to explore the possibility of an ectopic pregnancy is by a laparoscopy. This involves the insertion of a scope of about 10mm in diameter near the navel. "That is the gold standard". It would provide a view of the ectopic in the tube, and any blood in the pelvis and abdominal cavity. Short of performing a laparoscopy or another surgical procedure, the ultrasound is the best way of detecting an ectopic pregnancy.

14. In about 20% of cases, it is not easy to diagnose an ectopic pregnancy. Dr. Carey's approach, from his teaching, is to assume that a woman has an ectopic pregnancy until it can be proven otherwise. A curettage is done and a specimen sent for testing to determine whether the uterus contained any products of conception.

15. He did not perform the surgery, so he cannot say why the claimant's ovary was removed. When he read the letter from the second defendant and what is contained in the histology report, they are two totally-different things. The report says that there were no products of conception removed from the claimant's uterus. Based on that report, she should not have been discharged from the hospital in Jamaica. Travelling would not by itself have worsened her condition. The difference between his diagnosis and that of the second defendant is the histology report in respect of the absence of pregnancy material.

16. That, in summary, was the case for the claimant.

Defendants' Case

Evidence of second defendant

17. The second defendant has been a medical doctor since 1971 (around 38 years). He is a consultant surgeon and was Senior Medical Officer at the May Pen Hospital since 1975. He is a general surgeon. Dr. Charoo, to whom he

referred the claimant in December of 2000, would have been a practising obstetrician and gynaecologist for some 20-plus years at that time.

18. The claimant did not tell him that she was pregnant. The dilation and curettage (D&C) and the suction curettage could not have contributed to or worsened the ruptured ectopic, as, in those procedures, only the uterine cavity (and not the abdominal cavity) was entered. When he first saw her, she was his private patient; but, later the same day, he referred her to the May Pen Hospital, upon admission to which she became a public patient. He was in charge of the medical team responsible for her care and treatment, but he would not have been seeing her daily.

19. Notwithstanding that the second defendant is a general surgeon, he does practice some obstetrics and gynaecology. This case was not outside his scope. There was a possibility of a pregnancy: that is why she was sent to do an ultrasound. The report from Dr. Charoo was querying whether the non-viable pregnancy was a molar pregnancy. A possible molar pregnancy was the working diagnosis.

20. The second defendant did not see the histology report at all. It perhaps was collected by a relative of the claimant. He first became aware of it and its contents as a result of the present litigation. His referral letter given to the

claimant when she was about to leave for the Bahamas, was not, therefore, informed by it.

Evidence of Defendants' Expert

21. The defendants sought and obtained the leave of Anderson, J on September 19, 2008, to file a medical expert's report in relation to the issues in this matter. That report is dated September 19, 2008 and was filed on October 31, 2008. The report is given by Dr. Rudolph Stevens. Dr. Stevens holds the Bachelor of Medicine, Bachelor of Surgery (MBBS) degree from the University of the West Indies, Mona, Jamaica. He is a fellow both of the Royal College of Obstetricians and Gynaecologists, London, and the American College of Obstetricians and Gynaecologists. At the time he gave his evidence he had been practising for 27 years and had been an obstetrician and gynaecologist for some 22 years. He also has been the Senior Medical Officer of the Victoria Jubilee Hospital, Kingston, since June, 2008.

22. The diagnosis of an ectopic pregnancy is a clinical one. As Senior Medical Officer of the Victoria Jubilee Hospital (VJH) and as an obstetrician and gynaecologist, he would see more cases of ectopic pregnancies than a general practitioner or a general surgeon would. His expertise and experience in this area allow him to be better able to diagnose ectopic pregnancies that do not present clinically – that is, the unusual ones. The doctors at the VJH see more than a thousand patients daily.

23. When the claimant presented at the May Pen Hospital, she was in the early stages of shock. However, she was assisted by having intra-venous fluids administered. He could not say how much fluid is needed to maintain someone in shock as that depends on the person's weight and other factors.

24. Histo-pathology reports are not usually received in a timely manner. It normally takes about 6-8 weeks to receive one. However, they can be requested outside of the public medical service. Additionally, if there is an urgent case, the request can be sent to the laboratory within the public medical service and the pathologist can be called and asked to rush the processing of it – depending on the nature of the request. That was the practice in the year 2000 all across Jamaica.

25. In this case, if the patient had told the doctor she had a possible ectopic pregnancy, that would have assisted in her diagnosis and treatment. It is not unusual in an ectopic to see something that looks like products of conception but is really a reaction to the ectopic, and what is in the uterus cannot be interpreted on its own without taking into account the rest of the report (Dr. Charoo's report).

26. There is nothing in the report that he has submitted that he has re-considered and would like to change.

27. From the records for the patient, from her history and clinical symptoms, there is nothing to suggest there could have been a miscarriage or pelvic inflammatory disease or a septic abortion.

28. The D & C would only have been necessary if there was something to evacuate from the uterus and if you were going to use the contents for diagnosis. He thought the D & C was unnecessary. However, he would allow the suction procedure as the need for and use of that would depend on what presented to the doctor at that time. He would give the doctor the benefit of the doubt where the question of the necessity for the suction procedure was concerned.

29. The D & C procedure can take three minutes, with 15 minutes' preparation time. The suction procedure is the same. Under anaesthetic, there is no pain from these procedures; and perhaps only some residual discomfort.

30. If he had received the referral letter without the benefit of the histology report, he would have presumed that what had been removed from the patient's uterus were products of conception.

31. A recovery period of six to eight weeks would be more appropriate than three months, which would be a bit long.

32. Directly addressing the question of whether or not the second defendant was negligent, he says (in his report): "...there has been a breach in the standard of medical care for Mrs. Stoma-Lewis (sic) and the breach resulted in delay in the diagnosis of a left tubal ectopic pregnancy. The course of events was neither acceptable nor reasonable. This breach is as a result of Dr. Dawes:-

1. Failure to apply his mind sufficiently to the obvious clinical condition of the patient in order to correctly diagnosed (sic) her.
2. Inattention to the clinical signs and symptoms of shock whilst the patient was on the ward.
3. Failure to act appropriately despite his diagnosis of a surgical 'acute abdomen'.
4. Not giving timely, adequate and appropriate antibiotics or reconsider his diagnosis when the patient did not recover sufficiently, having made the diagnosis of septic abortion.
5. Inappropriate use of parenteral analgesia.
6. Performance of out (sic) unnecessary procedures (D&C, suction curettage) and not having regard to the findings or outcome of these procedures.
7. Failure to perform a check haemoglobin, following transfusion and prior to discharge."

33. What he says next is also of great significance:-

> "Notwithstanding the above, it is my view that the above breach of care could not cause any serious physical damage to Mrs. Lewis and except for the economic loss from prolonged hospitalization and the cost of treatment in a foreign country, she has not suffered any significant detriment from the delay in treatment given the usual course of an ectopic pregnancy. Therefore, whether her surgery was done by Dr. Dawes within 24 hours of presentation at the May Pen Hospital or three weeks later in the Bahamas, her position in terms of damage to her reproductive tract would not be different. This is so as at the time of presentation, one can reasonably presume that her left fallopian tube had already been ruptured."

34. Dr. Stevens also made some other observations that are important to bear in mind when considering the issues in this matter. They are set out as follows:-

(i) An ectopic pregnancy "can be an enigmatic condition

of protean manifestations and can elude even the most experienced physician".

(ii) In the instant case, however, "the triad of a positive pregnancy test along with lower abdominal pains and unexplained vaginal bleeding in the first trimester of a pregnancy is pathognomonic of an ectopic pregnancy unless proven otherwise.

(iii) Where these features are present, the diagnosis of an ectopic pregnancy is a clinical one and does not need an ultrasound or any other biophysical or biochemical test.

(iv) In addition to these features, the presence of cervical excitation pain and vaginal tenderness are the classic signs that will clinch the diagnosis of this condition, clinically."

(v) The patient had a classic presentation of an ectopic pregnancy and showed haemodynamic instability.

(vi) Her admission vital signs on the ward showed evidence of a shocked ectopic pregnancy.

(vii) "The correct treatment should have been immediate emergency surgical operation either by an open procedure (laparotomy) or closed

one (laparoscopy)."

(viii) By administering analgesics instead of parenteral antibiotics, the clinical signs of the acute abdomen would be masked, causing further delay in proper diagnosis. This indicates that the doctor did not apply his mind sufficiently to the condition of the patient or have regard to her clinical course, hence the treatment given was not prudent or appropriate.

(ix) "... having done a D&C on the 29th December, 2000, and the patient discharge (sic) on the 8th January without the benefit of knowing the result of or acting on the result, despite the histopathology report was ready from the 5th January, 2001. It is unacceptable medical practice to discharge the patient without knowing the outcome of your first operation having regard to the seriousness of the diagnosis of an ectopic pregnancy and the uncertainty that had existed in the diagnoses. Had Dr. Dawes or his medical officers took (sic) the time to get the histology report they would have recognized that the initial diagnoses of molar pregnancy or septic abortion were inaccurate."

(x) The medical officers, operating as they were under the instructions of the doctor in question they have not breached the standard of care.

35. The foregoing excerpts from the expert report of Dr. Stevens have been set out in more detail than might be expected as these parts go to the heart of the issues that are joined between the parties.

36. As would have been observed from these excerpts, the expert report that has been filed by the defendants is most unusual. It is unusual in the circumstances of this case where a defence has been filed denying that the second defendant was negligent in any way. Here we have an expert report filed on behalf of the defendants, which, instead of (as might be expected) supporting the position advanced in the defence, rather, seemingly supports the position advanced by the claimant – that is, that the second defendant was indeed negligent. The only real difference, therefore, between the claimant's case and this expert medical report seems to be the conclusion reached in that report, which is to the effect that the consequences of the misdiagnosis were not that serious; and that the surgery that the claimant underwent, she would have had to have undergone in any event.

The Law

37. The case of **Bolam v Friern Hospital Management** [1957] 2 All ER, 118, is the *locus classicus* when it comes to a consideration of issues of professional negligence. The dicta of McNair, J in that case have become recognized to be the best starting point for a consideration of the test to be used in such a matter. The learned judge said: -

> "... [W]here you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent... It is sufficient if he exercised the ordinary skill of an ordinary competent man exercising that particular art".

38. For completeness, it is worth the while to also indicate what McNair, J said at page 122 of the judgment:-

> "A doctor is not guilty of negligence if he has acted in accordance with a practice that is accepted as proper by a responsible body of medical men skilled in a particular art... Putting it the other way round, a doctor

is not negligent, if he is acting in accordance with such practice merely because there is a body of expert opinion that takes a contrary view".

39. **Halsbury's Laws of England** (4th Edition), at paragraph 35 of Volume 30 puts it thus:-

"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 greater 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 a body of adverse opinion also existed among medical men".

40. The **Bolam** test is said to have been modified in the case of **Bolitho v City & Hackney Health** [1997] 4 All ER 771. It has been said that in that case, the requirement was raised somewhat to require the defendant doctor to show, not just that the treatment administered accorded with proper medical practice; but also that it was demonstrably reasonable and logical in the particular circumstances (see, e.g., **Dothlyn Holness v University College Hospital Board of Management et al**, (suit # CL 2002/C-123, delivered June 29, 2007, per Jones, J). How it was put in the headnote to the **Bolitho** case was 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. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if 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."

41. There are, of course, many other cases and authorities dealing with this area of the law. The citation of the **Bolam** and **Bolitho** cases serves to give a framework for the analysis which will follow. Other cases will be cited and quoted from as the need arises.

The Submissions

Claimant's Submissions

42. The main thrust and purport of the claimant's submissions was to the effect that : (i) there was a failure on the part of the second defendant to use due care and skill in diagnosing what was wrong with the claimant, with the result that wrong treatment was given and the appropriate treatment was not; (ii) the course of her care and treatment in the May Pen Hospital was also characterized by a nonchalance, and by a failure to recognize and treat appropriately her signs and symptoms which were a further indication of the correct diagnosis to be made; (iii) in particular, the second defendant was negligent in failing to take into account in his treatment of the claimant and the diagnosis of her complaint, the contents of a histo-pathological report from Dr. Kathleen Coard that he had requested. In general, the standard of care was way below that of competent medical men. Additionally (the claimant contends), the second defendant had no competence to treat the conditions that he suspected might have been present in the claimant as he is a general surgeon and not a specialist (obstetrician and gynaecologist). A medical practitioner who seeks to specialize in any particular

area of medicine must be judged by the standard of that specialty (citing **Sidaway v Governors of Bethlehem Royal Hospital** (1985) AC 871).

43. In summary, therefore, as would be expected, the claimant's submissions were greatly assisted by the contents of the expert report filed by the defendants. The submissions, therefore, largely reflect the contents of paragraphs 33-35 of this judgment. In the briefest of summaries, the submissions are that: the treatment administered to the claimant was not warranted by the symptoms with which she presented; she did not receive the treatment which her symptoms indicated that she required, and no or no sufficient regard was paid to the contents of the histology report of Dr. Kathleen Coard.

Defendants' Submissions

44. The defendants submissions were to the following effect: (i) There is no evidence as to the standard of care which a general surgeon/Senior Medical Officer (such as the second defendant), practising at a Type C Hospital in Jamaica would be required to provide to the claimant with her signs and symptoms: namely, a positive pregnancy test; spotting/bleeding and abdominal pain. (ii) The claimant has to prove her case at a high degree of probability having regard to the serious nature of the allegations (citing **Hornal v Neuberger Products Ltd**. [1956] 3 All ER 973; and **Whitehouse v Jordon** [1980] 1 All ER 650). (iii) There is no evidence of a breach of any duty owed by the second defendant to the claimant, given especially the recognized difficulty in detecting the chronic ectopic pregnancy with which the claimant was eventually diagnosed.

(iv) Even if there was such a breach of duty, it was not the cause of the claimant's loss of the ovary and the fallopian tube, such a loss being the usual result (especially in the case of the tube) of an ectopic pregnancy.

45. Faced, therefore, with the dilemma of (on the one hand) advancing a defence that the second defendant was not negligent, and (on the other hand) an expert report (their own) which ran counter to this position, the defendants' approach seems to be to qualify and circumscribe the opinion given in the said expert report. For example, the signs and readings relied upon by the expert to come to a particular conclusion, are treated as being equivocal, rather than conclusive. It is not (goes the submission) by the standards of the most-qualified or most-experienced member(s) of the profession by which a medical professional is to be judged; but in accordance with the standards of the ordinary competent practitioner. They have said explicitly (in their closing submissions) that they have erred in relying on the evidence of a specialist and one working at a womens'-health hospital only.

"Molar Pregnancy" & other terms

46. It may be useful, before proceeding with an analysis of the issues in this matter, to give working definitions of some of the terms that were frequently mentioned in the evidence. A molar pregnancy is one such. It is a pregnancy characterized by a mole, which is defined in the **Random House Health and**

Medicine Dictionary as: "A mass in the uterus formed by malformed embryonic or placental tissue".

A dilation and curettage (D&C) is defined in the **Concise Medical Encyclopedia**, published by the American Medical Association as: "A procedure in which the endometrium (the lining of a woman's uterus) is scraped away with a spoon-shaped instrument called a curet. A D&C may be done as a diagnostic or therapeutic procedure to treat a variety of disorders, such as excessive bleeding during menstrual periods. A D&C is also commonly performed after a woman has a miscarriage or for an abortion". (page 209). A suction curettage is defined as "A procedure in which ... the contents of the uterus are removed by suctioning" (ibid).

An acute abdomen is: "The medical term for sudden, persistent, and severe abdominal pain" (ibid, page 1).

Analysis of Issues

47. The claimant's case is founded on some three (3) broad issues: (i) the contention that the second defendant misdiagnosed the claimant's condition on her initial presentation. This also is founded partly on the contention that the claimant informed the second defendant that she was, in fact, pregnant. This is denied by the defendants. (ii) The allegation that there was negligence on the part of the defendants in the course of management and treatment of the claimant's condition and the second defendant did not vary his initial opinion on

the cause of her complaints when her symptoms indicated that he should. (iii) The contention that the second defendant's misdiagnosis of her condition led to her losing her left fallopian tube and ovary and otherwise experiencing considerable pain and suffering.

The Initial Diagnosis

48. Of cardinal importance in examining the second defendant's initial findings and differential diagnoses when he first examined the claimant on December 27, 2000, is his letter referring her to the May Pen Hospital. This letter is to be found at pages 51 to 52 of the agreed bundle of documents and bears the date of the first examination. It describes the claimant as a 30-year-old with a one-week history of belly-bottom pains, which are worse on micturition and defecation. Her last menstrual period was on November 9, 2000 and she had no bleeding at the time she presented. A mother of two children (aged 11 & 9), she was on the contraceptive known as Depo Provera for some time; and then after that was taking fertility pills. Her abdomen was tender and she was positive for cervical excitation pain. His finding was that she had an acute abdomen. He questioned whether her symptoms might have indicated a septic abortion or an ectopic pregnancy. His plan was for her to be reviewed after taking an analgesic which he prescribed for her and after she had undergone an ultrasound scan which he had recommended.

49. Dr. Carey gave evidence that he conducted a blood-pregnancy test and a urine pregnancy test, both of which confirmed that she was pregnant and that she was informed of this. The claimant contends that she specifically told the second defendant at the time of her first examination that she was in fact pregnant. This the second defendant denies.

50. Dr. Carey's evidence is also to the effect that he told her that she had a possible ectopic pregnancy. He also knew that she was about to depart for Jamaica where, he says, she is from and that she had confidence in her doctors there. Curiously, the claimant makes no mention in her evidence of being told by Dr. Carey that she had a possible ectopic pregnancy. Naturally, therefore, she did not and, indeed, could not testify to telling the second defendant of this possible diagnosis by the specialist who saw her in the Bahamas. It is clear then that the second defendant would not have had the benefit of this information to assist in focussing his investigations in his quest accurately to diagnose the claimant.

51. Further, the court also finds that the second defendant additionally did not have the benefit of the information that the claimant was tested in the Bahamas and confirmed to be pregnant. It is true that the second defendant initially suspected that the claimant was either recently or still then pregnant (that is, that she either had an ectopic pregnancy or had had a septic abortion). However, it is the court's express finding that the claimant did not tell the second defendant that she was pregnant. The court notes the other relatively-detailed notations in the

second defendant's referral letter and is of the view that, had the claimant told him these two important things, he would have noted them in the said letter.

52. With the absence of this information, the second defendant was denied the opportunity of having a complete and true picture of the immediate medical history and prior diagnosis of the claimant. So, he was handicapped in his initial assessment of her and virtually prevented from arriving at an accurate diagnosis of her condition. I recall Dr. Stevens' evidence that diagnosis of an ectopic is usually done clinically; but in my view, the knowledge of these important facts would doubtless have lent some assistance to the process of sorting through the differential diagnoses and coming to a clear picture of what was wrong with the claimant. This is especially important in light of the fact that the claimant presented with only two elements of what Dr. Stevens described as the "triad of symptoms": in the claimant's case, when she was first seen by the second defendant a third element was missing in that there was no spotting or bleeding.

53. The claimant's evidence that she did not tell the second defendant that she had been on a contraceptive and was, when he examined her, on a fertility drug, must also be rejected. Where else but from the claimant would the second defendant have gotten this information which is contained in his referral letter to the May Pen Hospital? That the claimant was also on the fertility drug, Clomid, has also been confirmed by Dr. Carey, the claimant's own doctor. The court, on this evidence, is driven to find that she did so inform the second defendant.

54. And there is yet another matter that is cause for concern as to the credibility or otherwise of the claimant: - in answer to questions as to the duration of the dilation and curettage (D&C) procedure, the claimant testified to the court that it lasted for hours. The suction curettage, she further testified, also lasted for several hours and something in the nature of a half-gallon of blood or other fluid was removed from her uterus in the first procedure. The second defendant testified, however, that for each procedure the preparation time was some 15 minutes, with the actual procedure being only about three minutes. Dr. Stevens' evidence is to sirnilar effect. It is also unlikely, he felt, that that quantity of fluid would be removed.

55. So, at the end of the day, the claimant has testified about a process that lasts only some 18 minutes as lasting for several hours. In the court's finding, it is not just that the traumatic nature of the experience made the procedures seem longer than they actually were. Along with the other matters just mentioned, this bit of evidence depicts her, in the court's view, as being possessed of the gift (such as it is) of gross exaggeration.

What we have here is a claimant who is desirous of getting pregnant (she being on a fertility drug). She is seen by a specialist obstetrician and gynaecologist and told both that she is pregnant and that the pregnancy is possibly an ectopic one. Yet, on her visit to Jamaica, she visits, not a specialist, (as she did in the

Bahamas), but a general practitioner and fails to disclose these important matters to him. Without a doubt, this non-disclosure of important information would have made the diagnosis of a condition that under normal circumstances is difficult to diagnose, doubly difficult. The court also wonders why Dr. Carey, knowing that she was leaving for Jamaica and that she possibly had an ectopic pregnancy, which would at some time in the future necessitate surgery, did not give her a letter of referral to her doctors in Jamaica to assist in guiding their diagnosis and treatment of her. However, in the circumstances of this case, it is not necessary to arrive at a conclusion on that aspect of the matter.

56. In any event, what all these discrepancies that have been disclosed on the claimant's case amount to is that the claimant, in the court's assessment, is, at best, a most unreliable witness. Her evidence on all factual matters must therefore be approached with caution.

Whether any Negligence in Treatment

57. The fulcrum of the claimant's arguments on this score is to the effect that, during the course of her treatment at the May Pen Hospital, there were various indications that the course of treatment embarked on initially, was not having its desired effect. On the claimant's case, that should have caused the second defendant and/or the other doctors involved in her care and treatment, to re-assess their course of treatment, it being apparent that the initial working diagnosis was wrong.

58. The claimant draws support for this contention mainly from the expert report of Dr. Stevens, who, after reviewing the claimant's medical records, described her, *inter alia*, as having been "in and out of shock" (see page 7 of his report). Other observations of Dr. Stevens' in his report have already been made at paragraphs 33-35 (pages 10 to 14) of this judgment. Let us proceed to look at the course of treatment.

59. It should be remembered that a part of the second defendant's plan of action in attempting correctly to diagnose the claimant when she was first examined by him, was for her to do an ultrasound. Dr. Stevens' opinion is that this is unnecessary when diagnosing an ectopic pregnancy, such a diagnosis being a clinical one.

60. It would appear, however, that Dr. Carey would disagree. I say this because Dr. Carey thought it fit to perform not one, but two ultrasound tests on the claimant. He performed the first one, it is to be remembered, when he saw her just before her visit to Jamaica. And even with that test, his diagnosis could not have been any more specific than that there was a possible ectopic pregnancy. What is perhaps more significant, however, is that, when the claimant presented to him in January 2001 and he referred her for emergency surgery, that decision was also informed by an ultrasound test. This test was done at a

time when the claimant would have had more than what Dr. Stevens referred to as the triad of symptoms and was undoubtedly suffering from a ruptured ectopic.

61. It seems, therefore, that there is no agreement between Dr. Stevens and Dr. Carey as to the assistance to be derived from an ultrasound in diagnosing an ectopic pregnancy. In the face of this disagreement, the view that I take is that it is a useful diagnostic tool in a case such as this, as evidenced by Dr. Carey's use of it on two occasions – especially on the second, when the clinical symptoms would have been far more apparent. The second defendant therefore adopted the correct course in directing that an ultrasound be done as one of the first parts of his plan of action in attempting to come to a correct diagnosis of the claimant's condition. He cannot be faulted for this – especially considering that the person to whom the claimant was referred for the ultrasound scan to be done is a practising obstetrician/gynaecologist with over 20 years' experience. It will be recalled that the claimant has discontinued her claim in negligence against him (Dr. Charoo).

Treatment at the May Pen Hospital

62. The May Pen Hospital (on the evidence of the second defendant) is a Type-C Hospital. A hospital of that type at the material time would have had only one consultant (a doctor with a post-graduate degree), and this would be a general consultant. There were eight (8) doctors working under that consultant (the second defendant) at the time. At that type of hospital a wide variety of

cases would be dealt with, such as deliveries, maternal cases, paediatrics, adult medicine; adult and paediatric surgery (including gynaecological cases, such as hysterectomies etc); and there was also an out-patient department. It also dealt with emergencies and referrals from outside doctors. A Type-A hospital, on the other hand, would have on staff, at a minimum, an obstetrician/gynaecologist; a paediatrician; a general surgeon; a urologist; and sometimes a cardiologist; and recently a psychiatrist and an anaesthetist. The Type-B hospital would fall somewhere in between those two other types – in terms of the numbers of staff employed and matters dealt with.

63. On being admitted to this hospital, the claimant was sent to do an ultrasound scan, in keeping with the second defendant's plan for her assessment and treatment. The scan (an abdominal and endo- vaginal scan) was performed by Dr. Charoo who provided a report, which is dated December 28, 2000. The contents of the report are as follows:-

> "Bladder – normal
>
> Uterus – Enlarged with what appears to
>
> be products of conception.
>
> No fetus seen.
>
> Left Ovary – Contains small cyst measuring
>
> 1.7 x 1.3 cm.
>
> Right Ovary – Contains small cyst measuring
>
> 1.2 cm in diameter. (see photos)

No other pelvic masses or fluid in the pelvis seen.

Impression: Non-viable pregnancy.

? Molar pregnancy.

Suggestion: Serial Serum Beta H.C.G., before and after evacuation of the uterus."

64. From a reading of this report, it could safely be said that it was on Dr. Charoo's suggestion that the D & C procedure was done – as a means of evacuating the uterus with a view to removing what appeared to him to have been products of conception.

65. Dr. Charoo's observation that "no other pelvic masses or fluid in the pelvis [were] seen" is also of significance, as both Dr. Carey and Dr. Stevens spoke of the presence of fluid in the abdomen as being symptomatic of a leaking or ruptured ectopic. It is safe to infer then that at this stage the claimant's chronic ectopic had not yet begun to bleed or leak. Alternatively, if it had begun to bleed or leak, the ultrasound failed to detect this.

66. His further impression was that the claimant had some kind of non-viable pregnancy and he was querying whether that non-viable pregnancy could have been a molar pregnancy.

67. So, therefore, this is the direction in which the second defendant and the medical team of which he was in charge were pointed by Dr. Charoo, who (it should be remembered) is a specialist in his field of obstetrics and gynaecology, he having performed the ultrasound scan and having perused the results. With the aid of this report, the working diagnosis of the second defendant and his team now became a molar pregnancy. Additionally, as suggested by the specialist, the second defendant proceeded to perform the D & C procedure. This was done on December 29, 2000. In these circumstances the court finds itself unable to agree with the opinion expressed by Dr. Stevens that the D & C was unnecessary.

68. The specimen taken by way of the D & C procedure was apparently given to the sister of the claimant to take to the Pathology Department of the University Hospital of the West Indies for analysis and for a report to be prepared and for it to have been returned via that route. The second defendant is adamant that the first time that he saw the report was after these proceedings commenced. The claimant contends that the report from that department was returned to the May Pen Hospital. There is no evidence, however, as to when it was returned; or as to by whom or to whom it was returned. In the absence of conclusive evidence to the contrary, the second defendant must be given the benefit of any doubt as to whether he saw the report before the patient was discharged. The court therefore finds that he did not see it and was not aware of its contents when the claimant was discharged. The arrangement by which the claimant's family members

conveyed laboratory results, although regrettable, is the reality in this case. Indeed, one notable occurrence near to the close of the trial was that the claimant's attorney-at-law produced, in cross-examining the second defendant, a laboratory report from Biomedical Labs. Ltd. This the second defendant and counsel for the defendants indicated to the court had not been disclosed to them and that they were then seeing for the first time.

69. In further relation to this point, Dr. Stevens considers that it was "unacceptable medical practice" (see paragraph 34, ante) for the claimant to have been discharged without the results of the analysis of the specimen being known. This must, however, be examined against the background of other evidence given by him, which is to the effect that these reports are usually not easily obtainable and take between six and eight weeks to be prepared. In a case of urgency the pathologist can be telephoned and asked to expedite it. In the court's view, there is no evidence that this case would have appeared at the time to have been urgent. Indeed, on Dr. Carey's evidence, where an ectopic is suspected, an ultrasound will likely give a strong indication as to whether a pregnancy is ectopic or not (see paragraph 13 of this judgment). However, when it was done, the ultrasound had failed to show that the claimant was likely to have had an ectopic pregnancy. The working diagnosis was a molar pregnancy, which would not have seemed as urgent as an ectopic. It should also be remembered that the ultimate diagnosis before the claimant's emergency surgery

was that she was suffering from a chronic ectopic – a condition which would not have manifested itself suddenly and dramatically.

70. Reference was made to the nurses' notes for 1:50 a.m. on December 30, 2000, indicating that the claimant was admitted to the Female Surgical Ward with "h/o cramping and bleeding in pregnancy since 3/52 ago. Symptoms worsened since 3/7 ago." The nursing database also indicates "Cramping and bleeding in pregnancy" as the "Patient's Description of Present Condition". This, it is argued, shows that the claimant must have informed someone at the hospital that she was pregnant. This is not an unreasonable inference to draw. However, it should be remembered that the ultrasound, which was done the day before, would have cast doubt on the existence or viability of this pregnancy – its impression being that if any pregnancy existed, it was likely a molar (and so a non-viable) one. This would also be the first time that the claimant was bringing it to the attention of medical personnel in Jamaica, as the letter from the second defendant referring her to the May Pen Hospital specifically stated: "No bleeding". (This notation, having been made on the date of her first examination, is also accepted by the court in preference to the information given in this regard in the second defendant's witness statement).

71. In relation to the course of treatment during her stay at the hospital, the court concludes that this is inconclusive and as easily supportable of the defendants' case, as it might be of the claimant's case. For the most part (and

certainly from her admission to the Female Surgical Ward on the 30th December, 2000, up to the 5th January, 2001), the notes speak to a patient in no obvious distress and with no complaints voiced. Where complaints were voiced, she was seen by the doctor on duty and medication administered. It is only towards January 6, 2001 that she started complaining of not sleeping well, of a generalized feeling of weakness and steps were taken to have her transfused with two units of blood. By the 7th January, 2001, after this was done, she began feeling considerably better and was observed around 4:05 p.m. that day: "sitting on the outside reading. Stated she is feeling much better. Not experiencing any pain presently."

72. Dr. Stevens also testified that when a D & C is done and the contents of the uterus removed, where it is a case of a molar or trophoblastic pregnancy, the contents of the uterus will oftentimes have a grape seed-like appearance, which would be absent in the case of an ectopic pregnancy. However, there is not much in the documentary or other evidence before the court, giving a clear and conclusive description of the consistency or appearance of the contents of the uterus that were removed via the D & C procedure. The only bits of evidence that could possibly be used are (i) the histopathology report prepared by Dr. Coard. In that report, the specimen is described as follows: "Gross Appearances: The specimen consists of 3 ml of fleshy tan tissue. No vesicles are identified grossly." Additionally, the second defendant testified that he did not see any grape-seed-like material when he did the D & C. However, the appearance of the material

removed is but one factor to bear in mind when trying to arrive at such a diagnosis. The report of Dr. Charoo was suggesting otherwise; and the second defendant would only be able to get conclusive proof of the type of material removed from the histopathology report. That part of Dr. Stevens' evidence by itself, therefore, does not provide very great assistance and is not conclusive of the matter.

The Standard To Be Used

73. The defendants urged the court to use as a means of judging the standard of care administered to the claimant by the second defendant and the medical team, the standard of a general surgeon practising in a Type-C hospital in Jamaica. The claimant's suggested standard, on the other hand, is that of an obstetrician and gynaecologist, onto whose field, it is said, the second defendant has trespassed (he being a general surgeon). In this regard, the claimant relies on the case of **Sidaway v Governors of Bethlehem Royal Hospital** (1985) AC 871).

74. In that case, however, it seems that the issue with which the House of Lords was concerned was (as stated by Lord Scarman, at page 877), as follows: - "Has the patient a legal right to know, and is the doctor under a legal duty to disclose, the risks inherent in the treatment which the doctor recommends?" In the **Sidaway** case it was a neurosurgeon's alleged omission to warn a patient of risks inherent in a particular type of surgery that was called into question, and

evidence was given by other neurosurgeons – that is, other persons in his field. In the instant case, however, it is obstetricians and gynaecologists who are testifying as to the actions of a general surgeon in relation to the claimant. The **Sidaway** case does not seem to be of any assistance in this regard. Additionally, neither is any of the other cases cited. Neither has the court's own researches produced a case definitively addressing this issue.

75. However, even if the court should accept the claimant's submission and use the standard of the obstetrician/gynaecologist, the court would be obliged to use this standard being fully cognizant of the observations of both obstetricians/gynaecologists who have given evidence in this matter as to the challenges that are sometimes faced in diagnosing an ectopic pregnancy: - (i) Dr. Carey observed that in about 20% of cases it is not easy to diagnose an ectopic pregnancy. (ii) Dr. Stevens' evidence is that an ectopic pregnancy: - "can be an enigmatic condition of protean manifestations and can elude even the most experienced physician".

76. If, on the other hand, the court should use the standard suggested by the defendants, then it will be seen that there is no real direct evidence on which the court might rely in judging the actions of the second defendant and the team of which he was the head, in relation to the claimant's diagnosis and treatment. Further, even if there is some way at arriving at this standard, the court, in using it, would still have to bear in mind the evidence of the two

obstetricians/gynaecologists that, in essence, diagnosing an ectopic pregnancy can be a challenge even to specialists such as they, with their high level of training and experience.

77. The court's approach on this aspect of the matter is to look to the guidance of McNair, J in the **Bolam** case. The standard to be used, therefore, is:

> "... the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent... It is sufficient if he exercised the ordinary skill of an ordinary competent man exercising that particular art".

78. In the court's view, that "special skill" or that "particular art" is that of general surgery – that is the standard. The court also finds that the treatment of the claimant's condition fell within the wide variety of matters that a general surgeon and other doctors in a Type-C hospital would normally have to contend with. This case (in the court's finding) was not one that fell outside the scope of the second defendant's competence.

79. It is also arguable that the conclusions of Dr. Carey should not be relied on too heavily, as, although coming from a highly-qualified and experienced specialist, they were arrived at without the benefit of the hospital records. His conclusions are based mostly on the clinical findings when he examined the claimant in January of 2001 and on the contents of the referral letters and the histology report. There is, for example, no basis for the statement he makes at paragraph 7 of his witness statement that:"She should not have been discharged from the hospital in Jamaica in the condition in which she attended me". He is here assuming that she was discharged in the same condition in which she attended him. There is no evidential basis for this assumption. Dr. Carey also said in his evidence that the main difference between his diagnosis and that of the second defendant was the histology report.

80. Whilst the claimant might not have received the kind of attention that she expected or even deserved, by having to wait for hours on admission and having to make her own arrangements for some of the tests to be done, that is not enough for this court to find negligence on the part of the second defendant or the rest of the medical team. As was observed in **Hunter v Hanley** (1955) SLT 213, 217:

> "The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no

> doctor of ordinary skill would be guilty of it acting with ordinary care...".

On the evidence, this court is not in a position to say that the second defendant can be said to have been guilty of such failure. The evidence also shows that, although he was, by virtue of being Senior Medical Officer, head of the medical team that attended to the claimant, it was other doctors there who dealt with her on a day-to-day basis. The second defendant came into direct contact with her perhaps only two days or so during her stay there (as he was, he said, off from work for a few days) and there is no clear evidence of exactly which doctor discharged her. It was Dr. Stevens who said that it is not impossible for a patient to be discharged without the knowledge of the doctor in charge.

81. I also accept as a correct statement of the law and adopt the following dicta from Hewak, J in **Rietze v Bruser** (No. 2) [1979] 1 WWR 31, that:

> "... where a medical practitioner uses reasonable skill and judgment in diagnosing the plaintiff's condition in consultation with the other practitioners (where the situation reasonably requires consultation), he will not be held liable for the consequences of a mistaken diagnosis".

I find that it was reasonable for the second defendant to have sought the involvement of Dr. Charoo and to have used Dr. Charoo's report and relied on his expertise for guidance in trying to arrive at a correct diagnosis. In doing so he used reasonable skill and judgment.

82. I also accept and apply the following dicta, also from Hewak, J in **Rietze v Bruser** at paragraph 46 (cited above):

> "The law differentiates between the standard of care expected and required of a general medical practitioner and that of a specialist. The standard of proficiency required of a general medical practitioner is that of an average competent medical practitioner, whereas the standard of proficiency required of a specialist or expert practitioner requires a standard of proficiency of an average specialist or expert in that field. Obviously an expert practitioner is expected to possess and demonstrate a greater degree of skill in his particular field than is a general practitioner".

83. I also accept the submission that the claimant, because of the seriousness of the allegations, is required to prove her case to a high degree of probability. As Lawson, LJ observed in **Whitehouse v Jordon** [1980] 1 All ER, 650, 659b:

> "... as Denning LJ said in **Hornal v Neuberger Products Ltd.**: 'The more serious the allegation, the higher degree of probability that is required'. In my opinion allegations of negligence against a medical practitioner should be regarded as serious..."

84. The sum total of all of this is that: (i) to accept and rely on the evidence and use the standard that is based on the evidence of the two specialists in assessing the second defendant's (and his team's) treatment of the claimant would be to hold them to a higher standard than the law requires or permits; (ii) the evidence that has been presented by the claimant does not satisfy this court, having regard to the serious nature of the allegations being made and having regard to the higher degree of probability required, that the second defendant and/or the rest of the medical personnel can be said to have been negligent in their care and treatment of the claimant; (iii) this finding is buttressed by the second defendant's seeking the assistance of Dr. Charoo, the specialist, to aid him in his effort to come to an accurate diagnosis. The court, on the evidence, cannot hold to the view that the degree of skill, care and knowledge exercised by the medical staff involved was unreasonable in the circumstances.

85. In the result, the court finds that no negligence on the part of the defendants has been proven. The claim is therefore dismissed with costs to the defendants to be taxed, if not sooner agreed.