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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: HCV 3772 OF 2006

BETWEEN	SANALEE FRANCIS	CLAIMANT
	(Substituted as Claimant per Court Order dated 5.1.2011)	
	(Near Relation of Joan Craig Deceased),	
AND	SOUTHERN REGIONAL HEALTH AUTHORITY	1st DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2nd DEFENDANT

Ms. Althea McBean instructed by A. McBean and Co. for the Claimant; Mr. Curtis Cochrane instructed by the Director of State Proceedings for the 1st and 2nd defendants

Wrongful death action; allegation of medical negligence; credibility of witnesses including expert; standard of care; duty of care of medical practitioner/specialist; Bolam v Friern Hospital Mgmt Committee; Damages under the Fatal Accidents Act and Law Reform (Miscellaneous Provisions) Act.

HEARD: January 13 and 14, 2011 and September 30th, 2011:

CORAM: ANDERSON J.

[1] This is a claim sounding in negligence. The Claimant is one of the three children of Joan Craig, deceased. The circumstances giving rise to this claim are as set out below.

[2] Mrs. Craig was referred to the May Pen Hospital, one of the hospitals within the Southern Regional Health Authority, after doing an ultra sound examination at the May Pen Diagnostic Imaging Centre. The examination revealed that she had an ectopic pregnancy, that is one where the foetus had commenced growing outside of the womb. As a result of the referral, there was a recommendation for an urgent gynaecological consult. On April 19, 2006, she underwent surgery for the removal of the pregnancy and after surgery complained of pains, a distended abdomen, shortness of breath and other complications which it was felt were due to the surgery.

[3] On April 22, 2006, a follow up surgery was carried out to determine the cause of these complaints. It was then discovered that there was a perforation in her small intestine and adhesions in the loops of the intestines. Her condition continued to deteriorate after the second surgery and she was transferred to the Kingston Public Hospital on April 23, 2006 suffering from multiple organ failure. She remained in the Kingston Public Hospital in the Intensive Care Unit until June 6, 2006 when she died as a result of multiple organ failure secondary to severe sepsis.

[4] The claim form was originally filed by her son Damion Myles as "Near relation". However, by order of the court dated January 5, 2011, he was substituted by his sister Sanalee Francis. The claim, as noted above, alleges that the 1st defendant (SEHRA) through staff at the May Pen Hospital were negligent in the care of the deceased as a result of which she died. Her near relations and her estate have accordingly suffered loss and damages and the claim is made under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. The 2nd defendant is sued by virtue of the Crown Proceedings Act.

[5] In the Particulars of Negligence it is stated that the defendants:

> failed to provide any reasonable care and attention or to exercise any or any reasonable skill or diligence in performing the operation to remove the ectopic pregnancy;
>
> failed to take any or any adequate measure, steps or precautions to ensure that the deceased's organs were not damaged while performing the surgery to remove the ectopic pregnancy;
>
> failed to diagnose and/or detect in a timely manner that the deceased was suffering from a perforation of the intestines after surgery was performed;
>
> failed to take any or any adequate and/or timely measures to correct the perforation in the deceased's intestines;
>
> failed to provide proper care and treatment after surgery was performed on the deceased.

[6] In addition to the above, the claimant relies upon the doctrine of res ipsa loquitur.

The persons for whose benefit the action is brought under the Fatal Accidents Act are the widower of the deceased, Noel Craig and her children Nathalee Craig, Damion Myles and Sanalee Francis.

The Evidence

[7] The deceased was a business woman, age thirty-eight (38) years, having been born on November 15, 1967. It is not disputed that she was admitted as a patient at the May Pen Hospital on or around April 19, 2006 and that on that day, she underwent surgery for the removal of an ectopic pregnancy in the right Fallopian tube. It is also not disputed that subsequent to this surgery, the deceased complained of pains, a distended abdomen and shortness of breath. On April 22, three (3) days later, further surgery was done when her condition did not improve.

[8] The evidence of Dr. Percival Duke, a witness for the defendants was by consent taken before the evidence on behalf of the Claimant in order to facilitate the doctor's need to be elsewhere on the following day when he would otherwise have been required. Most of the hard evidence in the case comes from him. From the evidence of Dr. Percival Duke who says he was a member of the surgery team which participated in (the deceased's) medical management at the hospital during the period of the deceased's stay at the institution, we learn that he regarded the removal of an ectopic pregnancy as "routine". We also learn that certainly, by the 21st April, it was clear that her recovery was not going well and that a second surgery was performed on April 22, after consultations between the Gynaecology team and the surgery team. His evidence also provides the court with the first mention of a "perforation" in the intestine, the presence of fecal content in the abdominal cavity and the need to wash the cavity out with saline.

[9] I find it curious that Dr. Duke does not say, either in his witness statement or in oral evidence in court, that he participated in the surgery on the 19th of April but couches his evidence in the words "from a review of her medical records" and "from her medical records". He does say that on the morning of April 21, 2006 "I

was part of the surgical team that reviewed the deceased and this was at the request of the Gynaecology and Obstetrics team". He said that later on the 21st April, a review of the deceased showed that the deceased continued to experience shortness of breath and the abdominal pains. She was placed on oxygen.

[10] Again on April 22 the deceased was reviewed by the general surgery team as she was still having breathing problems and her stomach was still distended. It was then that the decision was taken to take her back to surgery where "a second surgery was performed by Dr. Wasiq and myself". I find it instructive that the witness stated that he "discovered dense (d) adhesions of three loops of small bowels to the lower anterior abdominal wall with a localized and walled off collection of turbid fluid reminiscent of small bowel content". He also said that the "small bowel and the omentum were grossly inflamed and edematous" This means that they were very swollen with an excessive amount of fluid. He states in his witness statement that "there was a perforation in the mesenteric border of a section of the said small bowel". (It should be noted that a mesentery is any of several folds of the peritoneum that connect the intestines to the dorsal abdominal wall, especially such a fold that envelops the jejunum and ileum)

[10] The affected segment of inflamed small bowel was resected and a primary end to end anastasmosis (sic; should be "anastomosis") was done". No other perforation was noticed. After washing her peritoneal cavity with saline, the abdomen was closed. Even after her return to the ward the deceased was observed to be still having "significant respiratory distress". The internal medicine team was consulted who recommended that she be nebulized, given antibiotics and blood tests be repeated. Despite all of this the condition of the patient "remained the same". At 5:30 a.m. on the 23rd April 2006, she was again reviewed by the internal medicine team while she was still having respiratory distress. According to Dr. Duke, she was also reviewed by the Obstetrics & Gynaecology team. He said that "it was concluded that she was having "multiple

organ failure and septicaemia" and on the very same day she was transferred to the Intensive Care Unit at the Kingston Public Hospital.

]11] In the course of his cross examination Dr. Duke told the court that the doctor who had effected the original surgery was a Dr. Bryan and neither that doctor nor the witness was a specialist in Gynaecology. He also conceded that on the April 21st examination, there was evidence of respiratory and renal failure and signs of peritonitis. He also stated that X-rays showed free air within the peritoneal cavity and this would normally be a sign that a hollow organ had been perforated. However, he could not say whether such perforation could have existed before the first surgery. He also confirmed that after the 2nd surgery the respiratory and renal functions continued to deteriorate.

[12] Other evidence on behalf of the Claimant was the Expert Report of Dr. Ademola Odunfa. Dr. Odunfa is a registered medical practitioner and holds a Bachelor of Medicine, Bachelor of Surgery degree (MBBS) from the University of Ibadan as well as a fellowship from the post-graduate Medical College of Nigeria in anatomical pathology. He testifies to having conducted over one thousand five hundred (1,500) post mortem examinations. He said in his expert report that he had performed the post mortem on the body of Joan Craig. The post mortem report which he prepared was admitted into evidence as Exhibit 4.

[13] In his opinion, death was due to bilateral broncho-pneumonia secondary to entero-cutaneous fistula (a hole between the intestine and the skin) and abdominal sepsis. This means that there was infection in the abdominal cavity. It was his opinion that the fistula could have been caused by the intestinal perforation and the abdominal sepsis could also have been caused by the perforation. He concluded that "the cause of death, bilateral broncho-pneumonia, could have resulted from the abdominal sepsis, *which resulted from the perforated intestines.* He also volunteered that intestinal perforation is not a usual consequence of surgical operation to correct an ectopic pregnancy. He

also noted that the adhesions which he observed were a normal incident of sepsis in the abdominal cavity. He also in the course of his oral testimony gave evidence of the "turbid fluid collection" in the abdominal cavity and that the multiple organ failure would have been a result of the sepsis.

[14] In cross examination Dr. Odunfa agreed that he had not performed a post mortem on a person who had had an ectopic pregnancy. I shall comment on this concession later. In addition to the evidence of the two doctors, a copy of Ms. Craig's medical records while at the May Pen Hospital was also admitted into evidence by consent.

[15] The only other evidence which was presented to the court was the Autopsy Report of Dr. Mollings, a pathologist. This was admitted into evidence having been the subject of a notice under the Evidence Act and no objection having been received by the defendants. The report of Dr. Mollings does not in my view depart in any significant way or at all from the evidence given by Dr. Odunfa. In fact, it is useful to set out here the summary to the autopsy report of Dr. Mollings. She stated:

> "She was admitted to KPH on April 23, 2006, febrile (39.10C) oedematous abdominal wall, abdominal distension (Abd – Sepsis), Cardiogenic Shock and ARDS. Tracheotomy performed. Mrs. Craig was in critical medical condition admitted to ICU. Pseudomania aureginous (Note: This is a bacteria found in the abdomen) was isolated in trapped sputum (8/5/06) renal impairment. The laboratory results showed thrombo and severe pancytopenia. Blood transfusion was given, antibiotics, nutritionist visits with intake regulation were some of the medical support given but the medical and para-medical efforts were futile against the septic shock with DIC (diffuse intravascular coagulopathy as a final condition.
>
> The post mortem examination revealed multi-organs failure secondary to severe sepsis.

[16] Evidence was also given by the daughter of the deceased, Sanalee Francis, but this was mainly with respect to establishing damages. She said that her mother was a business woman who was in the business of

buying and selling in the May Pen and Falmouth markets. She said her mother usually earned gross around $50,000.00 per month but at Easter and Independence she could earn as much as $100,000.00 to $130,000.00 per month. She said she knew this because she had been going to the market with her mother since she was a little girl. She also said that her mother paid income tax and maintained a bank account but was unable to give any definitive information as to the sums paid or where the bank account was maintained.

Issues for Determination by the Court

[17] The issues for the court's determination are:

(a) whether the claimant has established, on a balance of probabilities, that the death of the deceased was caused by the negligent act or omission of the servants and/or agents of the 2nd defendant; and

(b) If this is established, then the question arises what is the measure of damages which the claimant has proven should be awarded under the Fatal Accidents Act and/or the Law Reform (Miscellaneous Provisions) Act.

Submissions by the Claimant's counsel.

[18] Ms. McBean submitted that the defendants' main witness, Dr. Duke, was a less than credible witness. She pointed out that although his report on Mrs. Craig, dated August 23, 2006 said she had surgery for a ruptured ectopic pregnancy, the post operation clearly stated that the pregnancy was un-ruptured. This is significant because if there had been a ruptured ectopic pregnancy there would have been severe blood loss and no such condition was recorded in the patient's case notes. In fact, his witness statement mentions that she had arrived at the hospital with a diagnosis of ectopic pregnancy but stating nothing about a ruptured pregnancy. Dr. Duke had also stated that Mrs. Craig had had a previous ectopic pregnancy in or around 2002. This, she noted, was in the context that adhesions are known to occur post-operatively. However, there is

no evidence that at the time of April 19 surgery any adhesions were identified. If they were, it seems that it would have been unfortunate that they were not mentioned.

[19] It was also submitted by Ms. McBean that the evidence of Dr. Odunfa was more credible and established the claimant's case on a balance of probabilities. Dr. Odunfa was designated an expert witness by the Court. While the court is not bound to accept the expert evidence as necessarily correct, it will pay due regard to the expertise of the expert in the skill or discipline in which he is acknowledged to be an expert. In that regard, Ms. McBean submitted that Dr. Odunfa's evidence that it was unlikely that the perforation of the small bowel pre-dated April 19, 2006 ought to be accepted. Further, the fact is that a perforation of the small intestine would definitely allow leakage of fecal matter into the abdominal cavity giving rise to immediate infection. This would account for the pain which the deceased was experiencing from the day of the first surgery. It would also account for the build-up of turbid fluid in the abdomen between April 19 and April 22 when the second surgery was performed, such turbidity being indicative of infection.

[20] She also submitted that Dr. Duke is in fact, disingenuous when he suggests that he could not say that there was no tear in the intestine before April 19, 2006. It was submitted that the opinion articulated by Dr. Odunfa that it was the perforation which led to the release of fecal matter into the abdomen giving rise to sepsis and gangrene within a very short space of time, and ultimately to multi organ-failure was justified and, on a balance of probabilities, ought to be accepted by the court.

[21] Ms. McBean also pointed to what appeared to be a conflict in the evidence of the defendant. In the medical records of Mrs. Craig which were tendered into evidence, it was stated that after the first surgery the deceased was in pain and by 3:00 p.m. on April 20, she was complaining of being unable to breathe properly and a distended abdomen. On the night of April 20, at about 9:50, she

complained about abdominal discomfort and at 5:45 a.m. the following morning she complained of weakness. The evidence of Dr. Duke, however, is that on the day following the first surgery, the patient was seen by the Gynaecology team and her vital signs and general condition were recorded as being normal.

[22] Given the evidence which she urged the Court to accept, it was her submission that the claimant had established that the defendant through its servants or agents had been negligent in treating the deceased and that liability had been proven. The hospital owed a duty of care to Joan Craig. The duty had been breached by the defendant's servants or agents who carried out the first surgery during which her intestine was negligently perforated. That perforation led to the release of fecal material into the abdominal cavity leading to sepsis and in turn to multi-organ failure from which she died.

[23] The claimant's counsel also pleaded res ipsa loquitur. Under this principle a rebuttable presumption arises. The presumption in this case is that the perforation of a person's intestines during the course of terminating an ectopic pregnancy does not normally occur unless there has been negligence on the part of the person performing the surgery. In fact, even Dr. Duke had conceded that in a routine termination of an ectopic pregnancy the patient would have been able to go home in two (2) days. In such circumstances the evidential burden is then on the defendant to rebut the presumption. This, the defendant has failed to do and the court must find for the claimant on the question of liability.

[24] With respect to damages, the claimant's counsel submitted that in so far as damages under the Fatal Accidents Act were concerned, there was evidence that the deceased spent some twenty three thousand dollars ($23,000.00) per month on her household.

Submissions of the defendants.

]25] Mr. Cochrane, counsel for the defendants, reviews the evidence and takes issue with Dr. Odunfa's conclusion that it would be unusual, in surgery on an ectopic

pregnancy, for there to occur a perforation in the intestine. He does so on the basis that the doctor was not a specialist surgeon and also had not performed surgery on one with an ectopic pregnancy. He also points out that the doctor had agreed that adhesions could have been present before the first surgery. He also observed that Dr. Odunfa had not seen the medical records for the deceased for the period when she was in the May Pen hospital. He also makes the further observation that Dr. Odunfa was an observer at the post mortem.

[26] Mr. Cochrane also reminded the court that Dr. Duke in his testimony had indicated that where there were adhesions such as he had seen at the second surgery and that, if they were pulled away from the surface to which they were sticking could lead to a tear in the intestine. He suggested that while Dr. Odunfa had concluded that the perforation arose from the first surgery, he had not done surgery on a person who had an ectopic pregnancy. On the other hand he submitted, Dr. Duke had been a member of the surgical team which had care of Mrs. Craig. It was his submission that Dr. Duke was in a better position to say what was the cause of death. Thus he said:

> "That based on the deceased's medical history she had an ectopic pregnancy in 2002. That persons having abdominal surgery is (sic) highly pre-disposed to having adhesions. He said that the deceased had "densed adhesions" meaning there must have been prior abdominal surgery".

In fact, according to Mr. Cochrane, the claimant has not demonstrated that there has been a breach of the duty of care and in fact could not do so.

Court's Reasoning and Decision

[27] Let me start by stating some facts which are not in any real dispute and I find as having been proven.

- The deceased underwent a procedure to deal with an ectopic pregnancy at the May Pen Hospital, managed by the 1st defendant on April 19, 2006.
- Apart from the ectopic pregnancy, there is nothing in the medical records of Joan Craig which indicates that there was anything else wrong with her, healthwise.

- There was a perforation in the intestines of the deceased;
- This perforation was first noticed when a second surgery was performed on April 22, 2006 as the deceased was not recovering normally
- As a result of that perforation, small bowel content of fecal matter leaked into the abdominal cavity;
- This resulted in sepsis;
- Death was caused by multi-organ failure secondary to severe sepsis.
- Sepsis would have occurred arising from the leakage of fecal matter into the abdominal cavity within a very short time.
- There was no evidence of sepsis reported at the time of the first surgery.
- A perforation of the intestine may possibly occur if there are adhesions and the intestines are forcefully pulled away from the tissue to which it is adhering but there is no evidence that this occurred. .

[28] The seminal case of **Bolam v Friern Hospital Management Committee** (1957) 2 All ER 118 is still regarded as the authoritative statement of the law of negligence in medical cases. Its principles have been applied over and over in courts in this as well as other common law jurisdictions. It will be as well to start with a restatement of those principles as articulated in the directions of McNair J to the jury.

> "[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 at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.
>
> I myself would prefer to put it this way: A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. 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, a doctor is not negligent, if he is acting in accordance with such

a practice, merely because there is a body of opinion that takes a contrary view."

[29] This statement of the law continues to guide the practice of the Courts in relation to medical negligence cases. Indeed, as I recently noted in an unreported decision **Genas v The Attorney General of Jamaica** C.L. G 105 of 1996, decision handed down October 6 2006:

> The continuing validity of this test was re-affirmed in this region, as recently 2005 in the Belizean Court of Appeal decision, **Civil Appeal No: 9 of 2004, Mike Williams v Atanscio COB, Universal Health Services Co. Ltd, Universal Specialist Hospital Co. Ltd. (doing business as Universal Health Services Medical Arts & Surgicentre**). In his judgment, the learned judge, Morrison J.A. in upholding a decision of the Court at first instance that negligence had not been established, said the following:
>
> > The learned trial judge expressly based himself on the law relating to professional negligence of medical practitioners as laid down in the well known decision of **Bolam v Friern Hospital Committee [1957] 2 All ER 118**, and subsequently approved in **Whitehouse v Jordan and another [1981] 1 All ER 267**, **Maynard v West Midlands Regional Health Authority [1985] 1 All ER 635**, **Chin Keow v The Government of Malaysia and another [1967] 1 WLR 812** and **Millen v University Hospital of The West Indies Board of Management (1986) 44 WIR 274**. He placed particular reliance on the following well known passages from the directions to the jury of McNair J in the **Bolam case** (described by Lord Edmund-Davies in **Whitehouse v Jordan** (at page 276) as "the true doctrine ..."):

[30] Morrison J.A. then quoted the words of Justice McNair's direction to the jury cited above and continued:

> "After a careful review of the authorities, the learned judge accordingly concluded that the question whether the first respondent was negligent in his treatment of the appellant "must be based on what is acceptable by the standard of such a skilled specialist exercising a specialist's ordinary skill, in the view of

responsible and competent doctors" (paragraph 25). That, if I may say so, is a conclusion which was fully justified by the authorities".

[31] In the **Genas** case above referenced, with reference to the Bolam test I also stated the following:

It was this test which Lord Scarman articulated in different words, in **Maynard v. West Midlands Regional Health Authority [1984] 1 W.L.R. 634, 639**: in the following passage.

". . . I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one *respectable* body of professional opinion to another. *Failure to exercise the ordinary skill of a doctor (in the appropriate specialty, if he be a specialist) is necessary."* (My emphasis)

[32] In the instant case, the "ordinary skill" required would be the skill of a doctor with a surgery specialty and/or a specialty in Obstetrics and Gynaecology because that was the basis upon which the deceased had been admitted into the hospital.

[33] Let me say as well, that having had the benefit of observing the witnesses and their demeanour as they gave their evidence, I have reservations about the evidence of Dr. Duke. I did not find him professional and convincing in his responses and he did not assist the defendant's case by providing some alternate theory to explain the development of the sepsis. On the other hand, I found the evidence of Dr. Odunfa logical and compelling. While Dr. Odunfa was appointed an expert, did provide an expert report and was available for cross examination upon it, Dr. Duke was not an expert witness as he had not been so designated by the court. His opinion evidence is therefore not strictly admissible

in proof of any fact. But even if it were there are compelling reasons why the evidence of Dr. Odunfa ought to be preferred.

[34] The Claimant's case is that the perforation which led to the fecal content in the abdominal cavity was inflicted during the first surgery. It is supported by the opinion evidence of the expert. Dr. Duke said adhesions were noted at the time of the second surgery. He also says that adhesions could result from previous abdominal surgery and that in moving the intestines, a tear or perforation could occur. But if Dr. Duke is correct in that opinion, the adhesions would have had to be present at the time of the first surgery and the doctors performing the surgery, knowing the potential for tearing in moving the intestines, would have needed to exercise special care. There is no note in the records of the deceased of any such observation of adhesions and there is no evidence that Dr. Duke was in attendance during the first surgery. Dr. Duke's "evidence" that the tear could have been caused by moving the intestines is at best, speculation. But if the perforation was in fact so caused, it seems to be explainable only on the basis that there had been a negligent failure to notice them and to be especially careful where adhesions were near to the situs of the surgery. On the other hand, if the adhesions did not give rise to the perforation, then the only other cause would be the surgeon's scalpel.

[35] In that regard, it should be noted that the Claimant claims in the alternative on the basis of *res ipsa loquitur*. The case of **Cassidy v Ministry of Health** [1951] 1 All ER 573 is authority for the proposition that a hospital owes a duty of care to give proper treatment, medical, surgical and nursing and the like. It was also held that where injury arises in the course of treatment by the staff, the doctrine of res ipsa is available where the actual cause of the injury is not ascertained. This is the case in the instant matter and the onus, in those circumstances, lay on the hospital to prove there had been no negligence on its part or the part of anyone for whose acts or omissions it was liable. In the Cassidy case, the plaintiff had gone into hospital with two affected fingers and came out with four

fingers affected. Denning L.J. (as he then was), delivered himself of the following dicta

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

[36] This is particularly relevant because in his evidence Dr. Duke himself had testified that the removal of an ectopic pregnancy was "a routine operation" and there was also evidence that in the normal course of events, the patient would have been out of hospital in two to three days. This patient with an un-ruptured ectopic pregnancy never made it out of hospital once she had been admitted.

[37] On the basis of **Cassidy**, it is for the hospital to show that there has been no negligence on its part or on the part of its staff. I hold that it has failed so to do. It should be noted that the submissions by the counsel for the defendants that the Claimant had had a previous ectopic pregnancy in 2002, and that she was diabetic, do not assist the defence as nothing in the evidence allows the court to draw an inference that either condition did, in fact, contribute in any way to her demise. In addition, the defence submission that the witness, Dr. Odunfa "has no competence to determine whether the treatment of the deceased at the May Pen Hospital fell short of the standard required in law", is wholly misconceived. That determination is not to be made by the witness but by the court, based on the evidence before it. Similarly, the question as to whether the expert witness had ever done surgery on an individual with an ectopic pregnancy does not assist the court. The reason for Dr. Odunfa's expert report *as a pathologist*, was to establish a cause of death. He clearly stated what the cause was. His opinion on how the perforation had occurred was based on his general knowledge of

surgical procedures and not on any specific expertise as a gynaecologist. Given that he was designated an expert by the court, his opinion evidence may be taken account of in determining the issue of liability. I accept the evidence of Dr. Odunfa as being far more credible than that of Dr. Duke. In the circumstances, I find that liability for the death of the deceased Joan Craig has been established and find for the Claimant in that regard.

Damages

[38] I turn now to the question of the damages to which the Claimant may be entitled under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. I may dispose quickly of the amount of special damages as the Claimant and the defendants have agreed special damages in the sum of $475,973.04.

Fatal Accidents Act

[39] In the seminal case on damages in wrongful death, **Cookson v Knowles** [1978] UKHL 3; [1979] A.C, in discussing the Fatal Accidents Act Lord Diplock said:

1) In the normal Fatal Accident case, the damages ought, as a general rule, to be split into two parts,

   (a) the pecuniary loss which it is estimated that the dependents have already sustained from the date of death up to the date of trial (the "pre-trial loss") and

   (b) the pecuniary loss which it is estimated they will sustain from the trial onwards; ("the future loss")

2) Interest on the pre-trial loss should be awarded for a period between the date of death and the date of trial.....;

3) For the purpose of calculating the future loss, the " dependency " used as the multiplicand should be the figure to which it is estimated the annual dependency would have amounted by the date of trial.

4) No interest should be awarded on the future loss.

5) No other allowance should be made for the prospective continuing inflation after the date of trial.

[40] In terms of the general damages, under the Fatal Accidents Act, the action enSures for the benefit of the dependents (near relations) of the deceased. It is, therefore, necessary to determine the near relations of the deceased Act and to seek to quantify their losses. According to the evidence, the near relations of the deceased are her widower Noel Craig; her son Damian Myles born February 25, 1984; daughter Sanalee Francis born October 8, 1985 and her last child, Nathalee Craig, born December 25, 1999.

[41] The evidence of Sanalee Francis is that her mother earned gross about $50,000.00 per month although at particularly busy times such as Easter and Independence, those earnings could increase to $150,000.00. From her monthly earnings she is alleged to have spent $5,000.00 on herself, $23,000.00 on household expenses including utility bills and she saved $20,000.00 per month to purchase foreign currency for use on her trips to purchase goods for her business.

[42] The calculation of damages under our Fatal Accidents Act was dealt with by Harrison J. (as he then was) in **Doris Fuller (Administratrix Estate Agana Barrett, dec'd) v The Attorney General of Jamaica**, Suit No: C.L. F152 of 1993. In that famous case, the learned judge adopted the dictum of Lord Wright in **Davies v Powell Duffryn and Associated Collieries (No: 2)** [1942] 1 All ER p 657 at page 665 where his lordship said:

> There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence subject to the elements of reasonable probabilities.

Harrison J. then said:

> "In the Jamaican context I would say that the assessment of damages under these Acts is a hard matter of dollars and cents subject to the element of future reasonable probabilities".

[43] What the Court has to decide is whether, and if so to what extent, the dependents have experienced loss. To determine the multiplier, I accept that the cases cited by the Claimant's counsel are instructive and provide authority for the Court to use a multiplier of ten (10) years. These cases are **Winston Pusey** and **Stanford Garwood** reported at Khan's Volume 4, pages 91 and 108 respectively. Given the age of the deceased (38) and what seems to have been her reasonable state of health, I believe that a multiplier of ten (10) years would be appropriate. In coming to this conclusion, I have taken into account the fact that two of the three children of Mrs. Craig are already adults but the third is a minor now aged eleven (11) years. There is evidence that in respect of this last child, the deceased was sending US$100.00 per month towards her support.

[44] The approach to quantification of damages under the Fatal Accidents Act in this jurisdiction is succinctly set out in the judgment of Carey J.A. in **Jamaica Public Service Company Ltd. v Elsada Morgan (Administratrix of the Estate of Gladstone Morgan deceased and Cecil Jackson** S.C.C.A. No: 12 of 1985. There the learned judge stated that the proper approach is for the judge:

> ".....to discover on the available evidence what proportion of his net earning a deceased workman spends exclusively on himself to maintain himself at the standard of life appropriate to his situation".

[45] The Claimant's counsel submitted that the $23,000.00 per month ($276,000.00 per year) spent on the household expenses represents the loss to the dependents. Based upon the movement of the Consumer Price Index between the date of death and at the date of trial, the dependency at trial would now be worth $480,424.22 per annum. Using an average of the two sums, counsel calculates the average annual dependency loss at $389,212.11. This approach is based upon the authority of **Dyer and Anor v Gloria Stone Executrix Estate Edward Joslyn Stone dec'd** SCCA 7/88 unreported, delivered July 9, 1990, per the judgment of Campbell J.A. The total pre-trial loss is calculated for 4.5 years at the average sum and post trial loss for 5.5 years at the dependency sum found

to be applicable at the time of trial. These figures are respectfully $1,656,954.40 and $2,532,333.20.

Law Reform (Miscellaneous Provisions) Act

[46] The first task of the Court in assessing damages under this head is to fix a multiplier. Again, given the age of the deceased and what is known of her health from the evidence, it is not unlikely that the deceased would have continued working for many more years. Claimant's counsel concedes that on the evidence before the Court, after deducting from the $50,000.00 that she was said to earn monthly the sums for household expenses, money spent on herself and what she put back into the business, the deceased only had disposable income of $2,000.00 per month. This would be the extent of the loss of the estate, subject to any award for loss of expectation of life. Using the ten (10) year multiplier she submitted that the Claimant was entitled to an award of $240,000.00.

[47] I agree that a multiplier of ten (10) years is reasonable in the circumstances. I also adopt the methodology for computation used by Harrison J. in **Doris Fuller** above, where the learned judge adopted the methodology recommended by Campbell J.A. in the Jamaican Court of Appeal in the **Dyer and Anor v Gloria Stone Executrix Estate Edward Joslyn Stone dec'd** case cited above. I take account of the fact that the youngest child is the only one below the age of majority and so I do not believe there is any need to increase the multiplier. I also accept that in determining the amount of the award under the Law Reform (Miscellaneous Provisions) Act, the court must bear in mind, as was stated in the article, "Fatal Accidents: The computation of damages in Jamaica" by Minott-Phillips (West Indian Law Journal Volume 11 No: 2 October 1991), "the factors of present payment of a lump sum and the contingencies and vicissitudes of life".

I also accept that a certain nominal or conventional sum ought to be awarded for loss of expectation of life.

[48] While I accept in principle the submissions of the Claimant in respect of damages under both Acts, I am constrained to say that although the evidence in support of the sums earned by the deceased was not challenged by the defendants, there was some concern as to the accuracy of Ms. Francis' recall and the adequacy of proof. While I do not suggest that in this case, requiring the Claimant to provide strict proof would amount to what has been called elsewhere, the "vainest pedantry", the provision of such proof in the present circumstances in Jamaica would, in my view, be quite remarkable. Critically, however, the Claimant led no evidence as to what the deceased's earning would have been at the date of death and I say, with respect, the Court cannot be expected to supply this evidence from its own knowledge.

[49] There is no evidence that the deceased paid income tax but only that the gross earnings amounted to $50,000.00 per month. There was no evidence as to the extent of the profits if any made by the deceased and it is difficult to essay some quantification of the likely impact of any tax liability upon the extent of any award made. However, **Gourley v BTC** is authority for the proposition that in awarding damages, a court must take account of the likely impact of taxation on the extent of the damages recoverable by the recipient of those damages. In the instant circumstances, I have no evidence which allows me to arrive at a figure in respect of which tax would have been exigible and in that case, I am prepared to treat with the figures advanced on the basis that there was no tax liability.

[50] With respect to the Claimant's implicit submission that there would have been an increase in the quantum of dependency between the date of death and the date of trial, I regret that no evidence has been led to that effect and I must decline the suggestion to grant such an increase.

[51] In the circumstances, I am constrained to use the figures at the date of death for the purposes of all calculations and make the following orders.

I award under the Fatal Accidents Act, for pre-trial loss, the sum $1,242,000.00 ($276,000.00 x 4.5). I also award interest on that sum from the date of death at

3% per annum. I further award as post-trial loss the sum of $1,518,000.00 ($276,000.00 x 5.5). A total of $2,760,000.00 is therefore awarded under this head. I also award special damages in the sum of $475,973.04 with interest at 3% from June 6, 2006.

Damages under the Law Reform (Miscellaneous Provisions) Act are awarded in the sum of $240,000.00 but this is to be deducted from damages under the FAA as the beneficiaries are the same.

Nominal or conventional damages for loss of expectation of life are awarded in the sum of $50,000.00.

Certainly the tests of oppressive, arbitrary or unconstitutional behaviour laid out in **Rookes v Barnard** [1964] 1 All ER 367 for the award of exemplary have not been fulfilled. With respect to aggravated damages, the authorities suggest that where an award for general damages is adequate to compensate the claimant for the tort and to signify the court's displeasure at the conduct of the defendant, there is no reason to award aggravated damages. (See also **Attorney General of Jamaica v Noel Gravesandy** [1982] 19 J.L.R. 501,

Costs are to be the Claimant's to be taxed if not agreed.

[52] With respect to aggravated damages, the authorities suggest that where an award for general damages is adequate to compensate the claimant for the tort and to signify the court's displeasure at the conduct of the defendant, there is no reason to award aggravated damages. (See **Attorney General of Jamaica v Noel Gravesandy** [1982] 19 J.L.R. 501,

[53] There is also, in any event, authority for the proposition that aggravated damages cannot be awarded for the tort of negligence or for breach of contract. In **Kralj v McGrath** [1986] 1 All ER 54, aggravated damages were held to be irrecoverable in a claim for the tort of negligence or for breach of contract. They were held to be so even though damages for mental distress are in certain circumstances recoverable in such

claims. Indeed, in **Kralj v McGrath** Woolf J, (as he then was) was willing to award some mental distress damages to the plaintiff

[54] **Kralj v McGrath** concerned liability in tort and contract for the negligent conduct of an obstetrician, Mr McGrath, during delivery of one of Mrs Kraljs two twin babies. The second of her twins was discovered to be in a transverse position - an inappropriate position for the ordinary delivery of a child. The obstetrician had therefore sought to correct this by internally rotating the child. It was this treatment which was described in expert evidence, accepted by Woolf J, as "horrific" and as "completely unacceptable": it involved the manual manipulation of the second child, without any anaesthetic having been administered to Mrs Kralj, which was an "excruciatingly painful experience".The child subsequently died from severe injuries which had been sustained during the delivery by Mr McGrath. Mrs Kralj brought an action in tort and in contract against the hospital and Mr McGrath claiming damages for negligence.

[55] It was held that aggravated damages were not recoverable as the damages payable as compensation for the tortious act may include a sum to take account of a plaintiff's injured feelings,

[56] I would also hold that the tests of oppressive, arbitrary or unconstitutional behaviour laid out in **Rookes v Barnard** [1964] 1 All ER 367 for the award of exemplary have not been fulfilled and, accordingly, no award may be made for exemplary damages.

Costs are to be the Claimant's to be taxed if not agreed.

delivered by McDonald - Bishop J on 30/9/[illegible] in CB 11. Open Court

ROY K. ANDERSON

PUISNE JUDGE