

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2018/0040

BETWEEN:

**TAMARA PIERRE
LYSANDER NEVILLE PIERRE**

Claimants

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Alvin St. Clair for the Claimants

Mr. Seryozha Cenac for the Defendant

2020: October 28;
2021: March 15;
April 29, 30; (written submissions)
2022: January 20.

JUDGMENT

Background

- [1] **CENAC-PHULGENCE J:** This is an unusual medical negligence claim. Unlike many others, the alleged medical negligence has not resulted in a cost to life but a gift of life. The claimants, Mrs. Tamara Pierre (“Mrs. Pierre”) and Mr. Lysander Pierre (“Mr. Pierre”) (“together referred to as “the Pierres”) filed a claim against the Attorney General (“the AG”) of Saint Lucia alleging that the AG is vicariously liable for the negligence of its servants or agents, who were employees of the Victoria Hospital at the material time, in carrying out their contractual and professional duties owed to the Pierres.

- [2] On 11th September 2016, Mrs. Pierre who was pregnant with her third child attended the Victoria Hospital as her delivery was imminent and she had had complications with her two previous pregnancies. On being examined, Mrs. Pierre was advised that an emergency Caesarian section (“C-section”) had to be performed as her unborn child was suffering fetal distress.
- [3] The Pierres’ case is that Mrs. Pierre, during the examination, indicated to Dr. Wilson, the examining doctor, that she wished to have a Bilateral Tubal Ligation (“BTL”). She also relayed this desire to another doctor, Dr. King, who also came in to attend to her. Dr King instructed that she be prepared for surgery and given a consent form as she was eligible for a BTL. Mrs. Pierre completed and signed the consent form. They aver that Dr. King instructed Dr. Maria Lopez (“Dr. Lopez”), the consultant obstetrician/gynecologist who operated on Mrs. Pierre, that she desired to have a BTL. The Pierres aver that it was agreed that the BTL would have been performed by Dr. Lopez.
- [4] Mrs. Pierre remained at the hospital for three days and was discharged on 14th September 2016 with the C-section having been successfully performed. The Pierres left the hospital under the impression that a BTL had also been performed successfully. As a result, the Pierres believed that Mrs. Pierre could not conceive and so they engaged in unprotected sexual intercourse, which they would not have, had they known that a BTL had not been performed.
- [5] In July 2017, the Pierre’s had reason to believe that Mrs. Pierre may have been pregnant based on certain symptoms she was experiencing. To the Pierres’ dismay, this was confirmed by ultrasound on 7th August 2017. The Pierres communicated this to personnel at the Victoria Hospital and allege that Dr. Lopez disclosed that she did not perform the BTL in the event that the baby she delivered, who had ingested meconium,¹ did not survive and the Pierres wanted to have another child.

¹The dark green substance forming the first feces of a newborn infant.

- [6] The Pierres allege the defendant was negligent in that they (i) failed to perform the BTL as agreed; (ii) failed to inform the Pierres that the BTL was not performed and (iii) allowed the Pierres to appreciate that the BTL had been performed causing them not to take any precautions whatsoever.
- [7] The Pierres allege that because of the negligence of the defendant, through its servants or agents, they are now saddled with the psychological, emotional and financial burden of caring for a child to the age of eighteen years, as well as having to endure psychological, emotional, mental and physical suffering associated with the complications of pregnancy, which Mrs. Pierre had experienced before.
- [8] They allege that they have suffered loss and damage consequent upon the negligence and claim special damages, general damages for the expenses occasioned by the pregnancy and the rearing of a child to the age of 18 years, interest and costs.
- [9] The defendant avers that Mrs. Pierre was admitted to the Victoria Hospital on 11th September 2016 with a due date of 23rd September 2016. On Dr. Lopez's clinical assessment of her in the Labour Room, it was determined that Mrs. Pierre would undergo an emergency C-section on account of the diagnosis of fetal distress, which presented a real risk to the health and viability of the fetus. Mrs. Pierre was at that point prepared for 'theatre' also referred to as the Operating Room.
- [10] Contrary to the Pierre's allegations, the defendant avers that Dr. Lopez did not have any direct contact with Mrs. Pierre following the initial assessment in the Labour Room and as such did not receive any indication from Mrs. Pierre that she desired a BTL. They aver that Mrs. Pierre requested this from Dr. Wilson, the intern on the ward, whilst she was being prepared for theatre. They aver that this request did not constitute the required pre-operative consultation prior to performing a BTL.

- [11] In their reply, the Pierres say that Mrs. Pierre communicated to Dr. King and Dr. Wilson that she wanted the BTL done. They say further that the request for the BTL is visibly apparent on the informed consent form, which was signed by Mrs. Pierre and an agent of the defendant. The Pierres aver that the defendant's allegation that Dr. Lopez was not informed or was not aware that the BTL was to be done highlights carelessness and incompetence on her part, as this indicates that as the operating surgeon, she never consulted the consent form prior to performing the C-section. The Pierres also aver that there was nothing in any of the records to indicate that the BTL was not done.
- [12] The defendant further avers that since a BTL is irreversible, unless it is specifically requested before the expected date of delivery, it is not a procedure that is recommended or conducted spontaneously and more so during an emergency. They aver that the operating surgeon would have to be satisfied that the patient along with her spouse (if any), understood and accepted the consequences of the procedure and all related matters.
- [13] There being no communication between Dr. Lopez and Mrs. Pierre about the BTL, the defendant avers that there could have been no agreement between them for the conduct of the BTL and as such Dr. Lopez did not assume responsibility for performing it. Dr. Lopez was under no legal obligation to perform a BTL and therefore there was no breach of duty. There was, therefore, no corresponding duty to inform Mrs. Pierre that it had not been done.
- [14] Notwithstanding, the defendant avers that Mrs. Pierre was informed that the BTL had not been conducted when she received (i) her post-operative C-section review, which did not include discussions on the BTL procedure or other post-operative treatment following a BTL; and (ii) her Admission & Discharge Sheet, which recorded only one (1) patient procedure being done, a C-section. With this, the Pierres were put on enquiry that the BTL had not been done. In their reply, the Pierres deny that they were informed that the BTL was not done.

- [15] The defendant denies that it caused the Pierres to believe that the BTL had been done. The defendant avers that the Pierres negligently assumed that the BTL had been done and allege the following particulars of negligence: (a) that Mrs. Pierre failed to communicate her intention to have a BTL in advance of her admission on 11th September 2016; (b) she failed to enquire into whether the BTL had in fact been done and was successful; (c) she failed to take notice of the absence of a BTL being recorded on any of her medical documents and to enquire about such absence; (d) she either failed to have her six week post-operation review with her private doctor or failed to mention to her private doctor that a BTL had been done; and (e) she failed to take the necessary precautions pending confirmation of the success of the elected BTL procedure. These particulars of negligence are all denied by the Pierres in their reply.
- [16] It is averred that, had Mrs. Pierre not acted negligently as alleged, it would have probably come to her attention prior to conception that the BTL had not been done and she would have been in a position to pursue corrective or alternative procedures.
- [17] The defendant denies that Dr. Lopez ever communicated to Mrs. Pierre that she had elected on her own not to perform the BTL. They say that Mrs. Pierre misunderstood what was communicated to her. All that had happened was that Dr. Lopez explained to Mrs. Pierre what had transpired on 11th September 2016. However, there was no explanation of what the misunderstanding was.
- [18] The defendant denies that the Pierres suffered any psychological, emotional or financial distress or that the servants or agents of the defendant acted in breach of contract or breach of duty to the Pierres as alleged or at all. However, if the Court was to make such a finding, the defendant avers that the loss and damage alleged are not recoverable as claimed. The defendant avers that the Pierres are not entitled to the relief which they claim and ask that the claim be dismissed with costs.
- [19] Further or in the alternative, the defendant avers that to the extent that the Pierres have suffered any loss or damage it was caused or contributed to by the Pierres' negligence.

- [20] The trial of this claim commenced on 28th October 2020 and was adjourned to a date to be decided in order to facilitate the taking of the evidence of the last witness for the defendant, Dr. Maria Lopez, who by the time of trial had returned to her home country, Cuba. The matter was listed for status hearing on 21st January 2021 at which time counsel for the defendant indicated firstly, that they needed some more time to arrange for Dr. Lopez to give evidence and was liaising with the Ministry of External Affairs in that regard; and secondly, to allow them to make a submission to Cabinet on the matter of settlement of the claim. On 15th March 2021, at a further status hearing, counsel for the defendant advised the Court that its submission to Cabinet had not been accepted and that efforts to get Dr. Lopez to give evidence had still not been successful. At this point, the Court gave directions for the filing of closing arguments.

Issues

- [21] The following issues have been identified for the Court's determination:
- (a) Whether the defendant, through its servants or agents at the Victoria Hospital, owed a duty of care to the Pierres?
 - (b) Whether the defendant, through its servants or agents, breached that duty of care in contract and/or tort by (i) failing to perform a BTL on Mrs. Pierre and (ii) failing to advise her that the BTL had not been performed?
 - (c) If so, whether the claimants are entitled to damages and if so, what measure of damages?

Issue A – Whether the defendant through its servants or agents at the Victoria Hospital owed a duty of care to the Pierres?

The Law – Tort Duty of Care

- [22] Generally, the law imposes a duty of care on a health care provider or practitioner where it is reasonably foreseeable that the actions or omissions of the health care provider or practitioner would cause harm to patients.

[23] In **Gemya Norville v The Attorney General**², the court cited Lord Browne-Wilkinson in **Wilsher v Essex Area Health Authority**,³ where he stated:

“...a health authority which so conducts its hospital that it fails to provide doctors of sufficient skill and experience to give the treatment offered at the hospital may be directly liable in negligence to the patient.”⁴

[24] In **X (minors) v Bedfordshire County Council**⁵, Lord Browne-Wilkinson had this to say:

“The position can be illustrated by reference to the hospital cases. It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital (I express no view as to the extent of that duty). They are liable for the negligent acts of a member of the hospital staff which constitute a breach of that duty, whether or not the member of the staff is himself in breach of a separate duty of care owed by him to the plaintiff”.⁶

[25] Thus, it is a well-established principle that hospitals and those conducting hospitals are under a duty of care to their patients and may be liable in negligence for breach of that duty.

[26] In the case of **R v Bateman**,⁷ this was the Court’s assessment of the duty of care owed by a medical practitioner:

“If a person holds himself out as possessing special skill and knowledge, and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. ... The law requires a fair and reasonable standard of care and competence. ...”

² SLUHCV2004/0362 (See paragraphs 62-69.)

³ (1986) 3 AER 801.

⁴At paragraph 64

⁵ (1995) 2 AC 633

⁶ At page 740

⁷(1925) 94 L.J.K.B. 791 at 794; [1925] All ER Rep 45 at 48-49.

Standard of Care

- [27] In the case of **Bolam v Friern Hospital Management Committee**⁸, the *locus classicus* as to the requisite standard of care and skill to be discharged by medical practitioners in exercise of their duties, McNair J stated the standard of care thus:

“But where 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... 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 well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art... 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.”

Standard and Burden of Proof

- [28] The general rule in civil cases is that the party who asserts must prove. The Pierres therefore bear the legal burden of proving the elements of the cause of action of medical negligence against the defendant, being that (i) a duty of care was owed by the defendant to them; (ii) the defendant breached such duty in that the defendant, by its servants or agents, failed to carry out the BTL or failed to inform them that the BTL was not done; (iii) the fact that Mrs. Pierre became pregnant was a foreseeable result of the breach of duty; and (iv) the loss suffered as a consequence. The defendant correctly states that the required standard of proof to be met by the claimants is on a balance of probabilities.

The Law – Contract

Breach of Duty

- [29] The claimants in this case have also alleged breach of contract against the defendant. A patient who is to undergo a surgical procedure enters into a contract for the provision of surgical services. What comprises the contract? The written informed consent form furnishes proof of the existence of a contract between the Victoria Hospital, through its servants and agents, and the patient. That form stated two procedures for which Mrs. Pierre consented, a C-section and a BTL. It is an implied term of that contract that the servants or agents of Victoria Hospital will exercise such professional skills, competence

⁸ (1957) 1 WLR 582.

and judgment as a reasonable health practitioner of his/her branch of the profession possesses and will treat the patient with the care that may reasonably be expected from such a practitioner.

[30] A health practitioner who fails to perform in accordance with an express or implied term of the contract commits a breach of contract. Hence, failure to perform the agreed services or to measure up to the standard of reasonable care would amount to a breach of contract.

[31] Therefore, it is clear that a health practitioner can incur liability based either on breach of contract or tort if he/she fails to exercise reasonable care and/or apply reasonable skill in dealing with a patient.

[32] The defendant avers in its defence that Mr. Pierre is not an appropriate party to this claim as at all material times, there was no legal relationship existing between him and the defendant. In reply, the Pierres say that Mr. Pierre is the husband of Mrs. Pierre and someone that the servants or agents of the defendant would reasonably have had in their contemplation in carrying out their obligations with respect to the duties which they undertook in relation to Mrs. Pierre. They maintain that a duty was owed to Mr. Pierre to carry out their contractual and professional duties competently.

[33] Although raised on the pleadings, this was not pursued in the written submissions. I will very briefly address the matter. It is the case that there is no evidence that Mr. Pierre signed the consent form or was part of the discussion and therefore cannot be said to have been a party to the contract between the Victoria Hospital and his wife. There could be no alleged breach of contract in relation to him.

[34] However, the claim is also grounded in tort, alleging a breach of the duty owed by the defendant, through its servants or agents, to Mrs. Pierre. I agree with the claimants that it would have been reasonably foreseeable that a decision not to perform the BTL and further not to advise Mrs. Pierre or both Mr. and Mrs. Pierre of this, could result in harm and unwanted results to them as a couple. Mrs. Pierre's evidence was clear that she and

Mr. Pierre shared the financial responsibilities for their family so any unlikely or unexpected outcomes of a failure to perform the BTL would fall at both their feet and not just that of Mrs. Pierre. I therefore find that Mr. Pierre is a proper party to this claim.

Issue B – Whether the defendant through its servants or agents breached that duty of care in contract and/or tort by (i) failing to perform the BTL on Mrs. Pierre and (ii) failing to advise her that the BTL had not been performed?

- [35] The Pierres' main contention is in relation to the failure of the hospital by its servants or agents to inform them that the BTL, which Mrs. Pierre had requested, had not been performed. The defendant does not deny that it has a duty of care to Mrs. Pierre but says that there was no breach of their duty as the Discharge Sheet adequately communicated to Mrs. Pierre that only one procedure was done, the C-section.

The Evidence

- [36] Only Mrs. Pierre gave evidence on behalf of the claimants. Mrs. Pierre lives with her husband Mr. Pierre and their four children, Taville, Tasia, Tamayia and Tanyia. Mrs. Pierre's evidence is that after being examined by two nurses who had taken vitals for both her and the baby, Dr. Alton Wilson ("Dr. Wilson") came in and questioned her about her previous deliveries and informed her that she would have to undergo an emergency C-section due to fetal distress, possibly because the umbilical cord was around the baby's neck. She says at that moment she told Dr. Wilson that she wanted a BTL done. She says she informed him that she had discussed this with her private doctor, Dr. Marius and she had been told that she had to make the request on her admission to the hospital.
- [37] She says a Dr. King then came in and spoke to her and asked the nurses to prepare her for surgery. She says she was handed a consent form which she read and after signing and answering all the questions asked by Dr. Wilson, she was taken to the operating room. She says on entering the operating room, she told the nurse there that she was to have a BTL.
- [38] From Mrs. Pierre's evidence it took a while for her discharge from hospital to be sorted out and she became frustrated. When she finally received her discharge form and the baby's

card, she says she placed them in her bag and left the hospital. Around 26th October 2016, Mrs. Pierre followed up with her private doctor and advised him that she had had the BTL done, which she says he noted on her records.

[39] Around July 2017, Mrs. Pierre said she started feeling very ill and the symptoms resembled pregnancy but given that she had had the BTL, Mr. Pierre thought that quite unlikely. Mrs. Pierre's worst fears were confirmed when she took a pregnancy test, and it was positive. Their fears were further confirmed by an ultrasound a few days later, revealing that she was eight weeks pregnant.

[40] The Pierres met with the hospital administration and Mrs. Pierre says that at a meeting convened to discuss the matter, Dr. Lopez was given an opportunity to explain why the BTL had not been performed which basically was that she had decided not to perform the BTL in the event the baby dies, and Mrs. Pierre wished to have more children.

[41] Mrs. Pierre says she recalls being given a document when she was discharged from the hospital, and she placed it in her bag. She says she never looked at it so she is unable to say whether it stated that the BTL had not been done. However, she was certain she was never told that the BTL was not done, and she left hospital thinking that it had. Mrs. Pierre gave birth to her fourth child Tanyia on 7th March 2018.

[42] Dr. Paulcus Lendor ("Dr. Lendor") was the other witness for the claimants. He was Mrs. Pierre's attending physician in 2017 after the last pregnancy which is the focus of this claim.

[43] Dr. Lendor was not appointed by the Court as an expert. His evidence though consisted in the main of a review of the medical records pertaining to Mrs. Pierre's admission in September 2016 and the witness statements of other witnesses. I will only refer to the aspects of his report which I consider are his opinion on the procedure to be adopted and his review of the medical records for Mrs. Pierre as the comments on other witnesses' evidence is inadmissible. Dr. Lendor says that the receiving nurse in the Operating Room

would be aware of the request for the BTL as it is standard procedure for receiving nurses to review the patient's records and to verify that there is no error as relates to the patient, the consent form is signed, and the patient is aware of what procedure would be done for her. It is also his view that if the BTL is not performed, the patient should be informed as soon as she is in stable condition to understand the information being provided and the justification for its omission.

- [44] Dr. Lendor also suggests that the consultant surgeon, if not involved in the counselling and signing of the consent form, has the responsibility to review the consent form to ensure that it is completed adequately and signed as this is the document which provides authorization to proceed with the procedure.

- [45] Dr. Lucilla Charles ("Dr. Charles") is employed at the Victoria Hospital as head of the Obstetrics and Gynaecology Department and was one of the two witnesses who presented evidence on behalf of the defendant. She says she was not involved in Mrs. Pierre's case but was familiar with the claim and had reviewed the medical notes in relation to Mrs. Pierre.

- [46] Dr. Charles says that a BTL is generally performed during a C-section when the request has been made and the patient has received thorough counselling of a BTL's permanent implications prior to admission. Generally, it would not be performed if the request is made by the patient on the spur of the moment. Dr. Charles says good practice is that the patient should have made the request for a BTL predating her admission where sufficient time has been allowed for the patient to reflect and discuss with relevant parties, such as her partner. Dr. Charles says that a surgeon is within his/her rights not to perform a procedure based on what occurs during surgery.

- [47] A signed consent form is obtained prior to any procedure. The procedure will be documented in the patient's notes, and it will also be reflected on the patient's discharge sheet. Dr. Charles, however, noted that on Mrs. Pierre's discharge sheet only one procedure, a C-section, was documented.

- [48] Prior to discharge, the surgeon should inform the patient about the operation's success or failure, and this should typically be done the following day when the patient is alert and fully recovered. Her understanding is that Dr. Lopez was called out to perform an emergency C-section and was not aware that the patient had requested a BTL.
- [49] Dr. Charles in cross-examination provided very important evidence. The point at which the informed consent form is signed would depend on whether the C-section was elective (scheduled date) or emergency. Dr. Charles' evidence suggests that in the latter case, the form would be signed in the Labour Room. It would not be signed in the Operating Room. She confirmed that in Mrs. Pierre's case, the form was signed in the Labour Room. Dr. Charles confirmed that Dr. Wilson was the one who prepared and signed the consent form and there was nothing to suggest that Dr. Lopez was present when the form was prepared. She also could not say that Dr. Lopez participated in preparation of the form.
- [50] Dr. Charles spoke to the procedure once the patient is taken into the Operating Room. The consent form is taken in with the patient notes, she said. The patient is typically asked whether she signed the consent form, and it is then placed in her file. Dr. Charles confirmed that whilst this is being done, the surgeon is not typically there. Asked whether the surgeon typically consults the consent form, Dr. Charles said that consent signing was the responsibility of the junior doctors. She agreed that the process was a team effort.
- [51] Asked whose job it was to convey to the surgeon the contents of the consent form, Dr. Charles' response was that *'the surgeon makes the call and would know what has to be done. If there is anything else, the house officer would inform the surgeon and the surgeon would consult with the patient.'* This may appear to be slightly different to Dr. Lendor's evidence which seems to suggest in no uncertain terms that it is the responsibility of the surgeon if he/she is not involved in the consent process to verify the contents of the consent form with the patient and not just leave it to the house officer.
- [52] Dr. Charles confirmed that the consent form listed two procedures to be performed. Asked whether she would agree that given that the consent form was signed, not only was a

- request for a BTL made but that counselling was actually done, Dr. Charles responded that the consent form was signed by the intern and that normally it is house officers who consent the patient, effectively not answering the question asked.
- [53] Dr. Charles said she did not find it unusual that the BTL had not been performed as the baby in this case was significantly unwell, the consultant was not informed about the BTL and given the urgency, the consultant surgeon simply performed the C-section.
- [54] Dr. Charles did agree that the consent form was clear. When asked whether, if Dr. Lopez had looked at the consent form, she would have known that she had to do two procedures, Dr. Charles responded that generally, in an emergency C-section it is not typical that the surgeon goes through the form, but she did admit that had Dr. Lopez gone through the form she would have known that she had to do two procedures.
- [55] She was asked whether she agreed that given the consent form and Dr. Lopez' position that she was unaware of the request for the BTL that someone did not do what they ought to have done. Dr. Charles expressed the view that Dr. Lopez did what she had to but then went on to say that there was some miscommunication so that the surgeon was not told that the patient had made the request for the BTL effectively not providing a very direct answer to the question.
- [56] Like Dr. Wilson, Dr. Charles agreed that the consent form was the only document signed by Mrs. Pierre and that this and all other medical records are prepared by medical staff of the hospital and not by Mrs. Pierre.
- [57] The other witness for the defendant was Dr. Wilson. In September 2016, Dr. Wilson was an intern at Victoria Hospital. On 11th September 2016, he saw Mrs. Pierre and made an assessment of term gestation with an unsatisfactory NST⁹ signifying that there was fetal distress. He says an emergency C-section was necessary and he informed his Senior

⁹NST-Non-stress test.

House Officer, Dr. King. He says Dr. King instructed him to consent Mrs. Pierre which he did. Dr. Wilson could not speak to what transpired after Mrs. Pierre was taken into the Operating Room as he was not present.

[58] Dr. Wilson's evidence on cross-examination is very important as relates to the informed consent form. He confirmed that what was stated in that form had been discussed with Mrs. Pierre and she agreed and understood everything in the form. He explained that at the time of this incident, being an intern, he would have to inform his senior house officer, Dr. King of his conclusions which she then discussed with the patient as to what would happen and then he would get instructions to consent the patient. He confirmed that the two procedures listed on the consent form were discussed between the house officer, Dr. King and the patient. Dr. Wilson said after he consented the patient, the senior doctors took over. He also confirmed that he explained to Mrs. Pierre what was going to be the result when the procedures on the consent form were performed.

[59] In particular, he was directed by counsel for the claimants to the term secondary infertility under serious risks and he explained that this referred to when something is done to make the patient not fertile. He confirmed to counsel that that procedure would have been the BTL. When Dr. Charles was asked in cross-examination about why the term 'secondary infertility' was used on the informed consent form, she said that the form was signed by the intern which is the 'lowest level of doctor' and so she could not say what he meant exactly but she surmised that it was because of the BTL which was to have been done. This supports what Dr. Wilson said.

[60] Dr. Wilson also confirmed that the consent form was the only form signed by the patient and that the consent form referred to two procedures and that this form had been prepared by the medical personnel and not the patient. Dr. Wilson also confirmed that when he reviewed Mrs. Pierre's patient notes he did not see anywhere it said that the BTL had not been done. Dr. Wilson could not speak to what happens to the consent form when the patient gets into the Operating Room.

The Informed Consent Form¹⁰

[61] According to Dr. Charles, the Informed Consent Form means that the procedure(s) listed are being carried out with the permission of a patient who has been told the benefits of the procedure and has a clear understanding of the procedures to be undertaken. It involves sitting with the patient to discuss the procedures which will be done, the benefits, the risks and any other procedures which may be required.

[62] The Informed Consent Form in this case read in part:

"I, Tamara Jules Pierre, hereby consent to undergo the procedure of
Emergency LSCS (illegible) fetal distress
BTL as requested by patient

I am satisfied that the patient had the requisite capacity to consent to this procedure. I have explained the procedure to the patient. In particular, I have explained:

The intended benefits: for safe delivery of infant

Serious or frequently occurring risks: ...bleeding, puncture to other internal organs, infection, secondary infertility.

Any additional or alternative procedures which may become necessary on the basis of findings during the procedure:

■ blood transfusion ■ additional procedure(s)

.....hysterectomy

if complications.....

I have also discussed the benefits and risks of any alternative treatments (including no treatment) and any particular concerns of this patient.

I also certify that no guarantee or assurance has been made as to the results that may be obtained."

This Informed Consent Form is signed by Dr. Alton Wilson, Intern. The form is also signed by Mrs. Pierre.

¹⁰ Page 27 of the Trial Bundle.

Analysis

[63] An analysis of the evidence reveals that Mrs. Pierre was consented for two procedures. That is not disputed by the defendant at all. In fact, the evidence is clear, in my view, that Mrs. Pierre's desire to have a BTL was discussed with Dr. King and Dr. Wilson at least. Dr. Wilson clearly said in his evidence that he was asked to consent Mrs. Pierre by Dr. King, which he did. It is certainly clear from Mrs. Pierre's evidence in cross-examination that she had interactions with both Dr. Wilson and Dr. King. Dr. King did not give evidence but there is a signed consent form properly accounted for and that evidence is uncontroverted. It was unclear whether at any point in Mrs. Pierre's discussion or interactions with Dr. Wilson or Dr. King, Dr. Lopez was present as the Court did not have the benefit of Dr. Lopez's evidence for reasons already outlined. Whether Dr. Lopez was present at the discussions is to my mind irrelevant. The undisputed fact is that Mrs. Pierre was consented, hence a signed Informed Consent Form.

[64] Despite this clear evidence of a signed Informed Consent Form, which constitutes a contract for the performance of two surgical procedures clearly outlined thereon, the defendant questions whether Mrs. Pierre consented to a BTL on the basis of their allegation that there was no prior oral discussion about a BTL.

[65] In cross examination, this was Mrs. Pierre's evidence when asked whether she was consented for her C-section:

"I was given the form by Dr. Wilson ... Dr. Wilson read it to me and I was told to read and make sure I understand. I was given the form after I asked for the BTL."

[66] Mrs. Pierre said she understood the form. She said Dr. King asked her whether she wanted cut and burn and she said yes. That was referring to the BTL procedure. Counsel for the defendant took Mrs. Pierre to the 'Operating Theatre Record Of Nursing Care' form which he said showed the only operation to be done as LSCS (C-section).¹¹ Counsel also

¹¹ Page 77 of the TB.

referred to the “Anaesthetic Record”¹² and “Surgeon’s Record Of Operation(s)”¹³ where he pointed out that only one procedure was stated, that is LSCS, being C-section. Whilst this is the case, it is not conclusive of anything. The fact that the C-section is the only procedure stated on these documents does not take away from the fact that Mrs. Pierre was consented for two procedures – LSCS and BTL. As to why the BTL disappeared from the records after Mrs. Pierre entered the Operating Room, is certainly not a question which Mrs. Pierre could answer. It must also be remembered that both Dr. Wilson and Dr. Charles confirmed that the only form which Mrs. Pierre signed was the consent form and all other records/forms were prepared by hospital personnel.

- [67] The defendant in closing submissions contends that the evidence was that it is standard practice that a BTL is not usually performed on the spur of the moment at the request of a patient and that the patient is advised to discuss same with her partner and to receive counselling and further that a patient who requests a BTL whilst in pain of childbirth is thought not to possess the state of mind to give informed consent for a procedure which is permanent in nature.
- [68] The defendant referred to the case of **Government v LM and others**¹⁴ where the claim on behalf of three women was that BTL had been performed without their consent at the same time as caesarian sections whilst they were in labour and the High Court held, and the Supreme Court on appeal upheld their finding, that the Government had failed to discharge the onus on it to prove that the women had given their informed consent to the procedures. I am of the view that this case is very different to the instant case.
- [69] The defendant acknowledges correctly, that in this case, the situation is different. Mrs. Pierre is not alleging that she did not consent to the BTL procedure, but the defendant contends that the principle of obtaining informed consent from a patient prior to conducting a medical procedure remains the same and the BTL was properly not done in accordance

¹² Page 96 of the TB.

¹³ Page 103 of the TB.

¹⁴[2015] 1 LRC 794.

with established medical procedure at the hospital. The defendant also contends that under cross examination Mrs. Pierre admitted that there was no record that her husband, Mr. Pierre consented to a BTL being done.

[70] These contentions do not find support in the evidence as firstly, Mrs. Pierre indicated that she and her husband had agreed that they did not want any more children and had discussed the issue of wanting a BTL with her private physician, which suggests that they had given thought to the matter and made their decision even before going to the hospital and not 'during the pain of childbirth.'

[71] Secondly, there was no evidence led by the defendant that it is a policy of hospital that consent of a spouse or partner must be obtained before a BTL can be performed. From Dr. Charles' evidence, this was advisable but nowhere was it established that a spouse or partner's consent was mandatory and should have been documented.

[72] Thirdly, when Mrs. Pierre indicated that she wished to have BTL, the evidence does not suggest that she was not competent to have had the discussion about the BTL. In fact, Dr. Wilson's evidence is that he did discuss the benefit and risks of the procedure with her and that she understood everything that was discussed. She also says she signed the form after answering all Dr. Wilson's questions and reading the consent form and that she understood the form.

[73] Importantly, it is not the defendant's case, in any event, that the BTL was not performed because the consent was invalid because the requisite procedure for obtaining consent had not been followed, but rather that Dr. Lopez was not aware that a BTL had been requested. Further, rightfully, if the proper procedure for obtaining consent had not been followed and therefore the BTL could not have properly been performed, the logical course would have been to advise Mrs. Pierre of this immediately upon her request and to omit it from the signed consent form; not to discuss the BTL with her and include it on the Informed Consent Form, which she read and signed and which would reasonably give her the impression that she had been consented for and would be receiving the BTL.

- [74] The defendant also refers to Mrs. Pierre's responses regarding informed consent. I note however, that the questions posed to Mrs. Pierre in cross examination related to what she had been told by her private physician which I think has no bearing on informed consent as relates to the procedures which were to have been performed on her admission to the Victoria Hospital on 11th September 2016. There is no evidence to suggest as indicated above that Mrs. Pierre was not properly consented. The question of whether informed consent was obtained would be relevant as it relates to the servants/agents of Victoria Hospital, the persons who were to have carried out the procedures and not in relation to the private physician who played no part in the events of 11th September 2016 at the Victoria Hospital.
- [75] The defendant suggests that based on the evidence, Mrs. Pierre did not give informed consent to the BTL procedure. I cannot agree with that in light of the evidence of Dr. Wilson and Mrs. Pierre herself. If it is the case that certain procedures were not followed as regards obtaining Mrs. Pierre's consent to the BTL, then that should have been the reason for not conducting the BTL. However, the defendant's defence alleged that the consultant surgeon, Dr. Lopez did not know that Mrs. Pierre had been consented for a BTL.
- [76] The defendant suggests that Mrs. Pierre was emotional and worried at the time she requested the BTL. They submit that Mrs. Pierre is not to be believed when she said in cross examination that she was not emotional and not worried. The defendant submits that it is improbable that a mother would be indifferent to the mortality of her unborn child having been informed that her child was in distress. The spontaneity of the request is indicative they say of the level of stress, anxiety, and emotional state of Mrs. Pierre.
- [77] I cannot accept the defendant's submissions. Mrs. Pierre's testimony was not simply that she was not worried. When asked whether when she learnt the baby was in distress, she was anxious, Mrs. Pierre said she was not afraid. She said she was honestly not highly stressed or afraid and then she said she knew who was going into the operating room with her referring to her dependence of God. I cannot see how the defendant chooses to use

this against Mrs. Pierre. I do not think that Mrs. Pierre was being untruthful about her state of mind at the time. She would have known, having had two prior difficult pregnancies, that being worried would not have been good for her or her baby. I think the defendant completely misinterpreted Mrs. Pierre's evidence. I also think that the questions as to whether Mrs. Pierre sought counsel from her pastor about having a BTL are irrelevant to informed consent. Informed consent has to do with whether the patient understands the nature of the procedure, its implications and risks and has sufficiently thought about the procedure and is comfortable consenting to have it done.

[78] I can find no evidence to support the contention that Mrs. Pierre did not give informed consent. Her consent was obtained at a time when she was not yet in the Operating Room. She was being prepared for emergency surgery, was fully aware of what was happening, had contemplated the procedure before she got to the hospital and had been told that she needed to request it at the time of her admission, and most importantly, she signed an informed consent form.

[79] Even if, as the defendant contends there was no informed consent, which I have found is not the case, the patient signed a form anticipating that she was consenting to two procedures. Therefore, if it was not done because there was an issue or concern with the manner in which the consent had been obtained, it was incumbent on hospital personnel to so inform Mrs. Pierre. There was no evidence that any such information or concern was communicated to Mrs. Pierre.

[80] Then we look at what transpired in the Operating Room. The consent form was transferred with Mrs. Pierre to the Operating Room. According to Dr. Charles, the surgeon would have known what the diagnosis was and what procedure was to be performed and so would not normally consult the form. Dr. Lendor on the other hand suggests that if the surgeon is not the one who consented the patient, he/she should verify the consent. I think that this is a sensible approach. Even if I accept Dr. Charles' evidence on this matter, there is still a lacuna and Dr. Charles alluded to this in cross-examination when she says that if there is

anything additional, it is for the house officer to inform the surgeon and there is no evidence that the house officer, Dr. King so advised the surgeon, Dr. Lopez.

- [81] How does the surgeon know if there is another procedure is to be done? Dr. Charles' simple answer was that it is for the house officer to inform. But to my mind, it must be either that the surgeon consults some document, be it the consent form, the patient notes, or some other medical document or that he or she is briefed by someone else, be it the junior doctors, the nurses, the house officer, or other person. By whatever the method or means, the surgeon has a responsibility to ensure that he or she knows what procedure the patient was consented for and for 'putting him or herself in the know'.
- [82] I therefore find that Mrs. Pierre consented for a BTL to be performed but that the BTL was never performed which is a breach of the contract contained in the Informed Consent Form. If, as the defendant contends, Dr. Lopez did not know that the BTL was to be performed, I find that Dr. Lopez failed to ensure that she verified what the patient had been consented for prior to the conduct of the surgery and Dr. King failed to inform Dr. Lopez of the BTL procedure for which Mrs. Pierre had been consented, which in both instances amounts to negligence.
- [83] We are aware that in the world of medicine there are no absolutes and that whilst a patient may consent to a procedure, such procedure may for clinical reasons not be performed. In such a case, there is an obligation on the medical practitioner to advise the patient after the surgery that such procedure was not done and the reason therefor. In either case whether it is that Dr. Lopez did not know that the BTL was to be performed or she for whatever reason decided not to perform it, she or other attending physicians were under a duty to advise Mrs. Pierre that the procedure had not been performed. Equally, if a procedure had been performed which was necessary during the surgery but which had not been stated on the consent form, the medical practitioner would have been obligated to advise the patient of this when discussing the outcome of the surgery.

- [84] In relation to the Discharge Sheet, which the defendant argues clearly showed that the only procedure done was a C-section and therefore it was Mrs. Pierre's responsibility to check the Sheet once she was discharged or to ask whether the procedure had been performed, this is not supported by their own witnesses who speak to what should have transpired.
- [85] The Admission Summary Sheet is also referred to as the Discharge Sheet. On that sheet under the heading 'Operations/Procedures (with dates)' it is stated: "LSCS-D 11-9-2016". The discharge medication and follow up instructions with private doctor in six weeks is also noted.
- [86] Dr Lendor states in his report: "...although no mention of a BTL was made on the discharge form, we as care providers need to understand that in our environment, certain abbreviations and terminologies used on the discharge summary may not provide sufficient information and clarification to the layman ... **nonetheless the BTL was a significant omission and should have been communicated to the patient.**" This should happen except where there is a communication barrier."
- [87] The most compelling evidence of Dr. Charles was in relation to what ought to have obtained post-surgery. The following was the exchange:
- "Q. For whatever reason one of the procedures is not performed would you agree that that failure ought to have been communicated to the patient?
- A. Yes, I agree.
- Q. Given the fact that the documents are not prepared by the patient, the patient should have been informed by word of mouth?
- A. I agree.
- Q. You will agree that nowhere in the medical records is there any statement that the BTL was not done?
- A. To my knowledge it was not stated."

[88] The defendant suggests that given that Mr. Pierre was a registered nurse he ought to have understood the significance of the Discharge Sheet. They venture to say that Mr. Pierre is not a lay person, and he would have been able to understand the jargon. However, this submission is flawed because (i) the duty to advise the patient that a procedure to which he/she consented was not done exists regardless of who the patient is or who his/her relatives are; and (ii) there is no evidence that at the time of discharge anything was explained to Mrs. Pierre regarding what procedures had been done. Mrs. Pierre explained that she took the documents and put them in her bag as she was eager to go home. That is quite understandable. There was no duty on the part of the Pierres to check the discharge sheet to see what was done and the fact that they did not so check or ask questions is typical of patients even ones who may have a little more knowledge than the average person, and does not in any way rise to negligence on the Pierres' part. I therefore reject the submission by the defendant that the Pierres were negligent or contributorily negligent in any way.

[89] There is no doubt in my mind that the defendant through its servants or agents breached their duty of care to Mrs. Pierre by failing to perform the BTL as she had been consented for and further by failing to advise her that, for whatever reason, the procedure was not performed. The defendant speaks to a duty to advise patients on procedures undertaken but fails to speak to the equally important duty to also advise of procedures agreed to but not undertaken. I therefore find that the defendant, by its servants or agents, was negligent.

Issue C – Whether the claimants are entitled to damages and if so, what measure of damages are they entitled to?

Special damages

[90] Having found that the defendant, through its servants or agents, did breach their duty of care to the Pierres, the question is what damages are they entitled to? The Pierres claimed \$534.55 in special damages. The receipts produced in support of this sum amounts to \$484.55 and not \$534.55. Though they spoke of medical expenses continuing to be incurred, there was no evidence provided to support any other expenses. This is therefore

the easy part. Special damages of \$484.55 having been proven and this amount is awarded.

General damages

- [91] The Pierres have claimed general damages, being damages occasioned by the pregnancy and the cost of rearing a child to the age of 18 years and this is the more difficult discussion.
- [92] Over the years, courts in various jurisdictions have dealt with various cases in which the issue of what damages may be awarded and how such damages are to be quantified has been considered. The philosophical question is really whether the birth of a child can ever constitute damage recoverable in law. As Lord Slynn said in **McFarlane et al v Tayside Health Board (Scotland)**¹⁵ in 1999, *‘the law is still developing and there is no universal and clear approach.’*
- [93] Lord Millett who gave a dissenting judgment in **McFarlane** summarized the state of the jurisprudence on this matter as follows:¹⁶
- “...Judges in different jurisdictions have described the claim as ‘morally offensive’, ‘demeaning of the value of human life’, ‘simply grotesque’, ‘on the face of it ridiculous’, and ‘preposterous’. But few of the appellate decisions have been unanimous. Many of them contain powerful and persuasive dissenting judgments. Every argument propounded by the one side has been forcibly refuted by the other, often in the same case. The diversity of reasoning and force with which the opposing arguments have been advanced and rebutted attest to the difficulty of the problem.”
- [94] The claimants have relied on the 2003 Australian case of **Cattanach et al v Melchoir et al**.¹⁷ The defendant places reliance on the 1999 English case of **McFarlane et al v Tayside Health Board (Scotland)**. Below is a discussion of the court’s positions in the two cases.

¹⁵[1999] UKHL 50; [1999] 4 All ER 961.

¹⁶ At page 1000-1001 j-a of *McFarlane*.

¹⁷[2003] HCA 38.

- [95] The facts in **McFarlane** were that Mr. McFarlane and his wife had four children. In order to limit the size of their family, Mr. McFarlane agreed to have a vasectomy. Six months after the operation, he was advised that his sperm count was negative, and he did not need to use contraceptive precautions during sexual intercourse. Mr. and Mrs. McFarlane relied on this advice, but Mrs. McFarlane became pregnant and gave birth to a healthy baby girl. The McFarlanes brought proceedings in negligence seeking damages for the costs of rearing the child and for pain and distress suffered by Mrs. McFarlane in carrying and giving birth to the child. Both claims were dismissed as being irrecoverable in principle. That decision having been reversed, the Health Board appealed.
- [96] The House of Lords by a majority allowed the appeal in part and held that, in this case, where medical negligence had resulted in an unwanted pregnancy and the birth of a healthy child, the parents were not entitled to recover damages for the costs of rearing the child but the mother was entitled to recover damages for pain and distress suffered during the pregnancy and in giving birth and for financial loss associated with the pregnancy.
- [97] Such an unwanted pregnancy was a plainly foreseeable consequence of a vasectomy failing but the father nevertheless being told that his sperm count was low and contraceptive measures were unnecessary. The object of the vasectomy was to prevent such a pregnancy and therefore the mother was entitled to claim damages in respect of the physical effects of the pregnancy and the birth. However, the majority of the court was of the view that damages for the costs of bringing up a healthy child were irrecoverable since it was not fair, just or reasonable to impose liability for such economic losses on a doctor or his employer. Lord Steyn was of the view that it was morally unacceptable to allow such a claim having regard to the principle of distributive justice which focused on the just distribution of burdens and losses among members of a society.
- [98] In **McFarlane**, the court took time to examine the trend of decisions in England and Scotland and how courts of other countries have dealt with this difficult and often emotive matter. The court looked at English cases. I have set out some of these below.

- [99] In **Udale v Bloomsbury Area Health Authority**¹⁸ a woman who had approached the hospital for sterilization was awarded damages not only for pain and suffering on account of pregnancy which she developed as a result of the failed sterilization, but also damages for disturbance of the family finances, including the cost of layette and increased accommodation for the family. The court, however, did not allow damages for future cost of the child's upbringing up to the age of 16 years on public policy considerations. The court held that public policy required that the child should not learn that the court had declared its life to be a mistake and that the joy of having a child and the pleasure derived in rearing a child have to be set off against the cost in upbringing the child.
- [100] In **Emeh v Kensington and Chelsea and Westminster Area Health Authority**,¹⁹ the doctrine of public policy was not followed and the court held that there is no rule of public policy which precludes recovery of damages for pain and suffering and for maintaining a child.
- [101] In **Thanke v Maurice**,²⁰ a vasectomy was performed for a husband who was told subsequent to the operation that use of contraception was not necessary. However, a child was born to him. The claim in this case was brought in contract and tort. The trial judge awarded damages in respect of the expenses of the birth and the mother's loss of wages but refused damages for the pain and distress of labour, holding that these were offset by the joy occasioned by the birth. He, however, awarded damages in an agreed sum for the child's upkeep to his seventeenth birthday. The Court of Appeal held that damages should be awarded for pain and suffering in tort rather than contract. The joy of having a child could be set off against the trouble and care in the upbringing of a child but not against pre-natal pain and distress. For the latter, damages should be awarded.

¹⁸[1983] 2 All ER 522.

¹⁹[1984] 2 All ER 1044.

²⁰[1984] 2 All ER 513.

- [102] In **Allen v Bloomsbury Health Authority**,²¹ damages were awarded in the case of negligence in the termination of a pregnancy and it was held that damages would include general damages for economic loss, being the financial expenses for the unwanted child in order to feed, clothe and care for and possibly educate the child till he becomes an adult. Therefore, general damages including the cost of maintaining the child until 18 years was allowed.
- [103] The House of Lords concluded that in both England and Scotland there was a trend towards allowing damages both for pain and distress of an unplanned pregnancy and birth and for the cost of rearing the child born.
- [104] The approach of the courts in the United States was also considered. In **Szekeres v. Robinson**²² the Supreme Court of Nevada refused to award damages for the birth of an unwanted child even though the birth was partially attributable to the negligent conduct of the doctor attempting to prevent the childbirth. The court was of the view that one could not recover in tort for such an event because the constituent element of a negligence tort, namely damages, was not present. The court however left open the possibility of a claim in contract.
- [105] In **Johnson v. University Hospitals of Cleveland**²³ it was held that the parents could recover only the damages for the cost of the pregnancy, but not the expense of rearing an unwanted child. The basis of the judgment appears to be the public policy that the birth of a normal, healthy child cannot be treated as an injury to the parents.
- [106] In **Public Health Trust v. Brown**,²⁴ the claim was filed by a woman alleging that the sterilisation operation performed upon her was negligently done which resulted in pregnancy for a child which she never wanted. The Supreme Court of Florida refused a claim for the cost of rearing the child and was of the opinion that *"it was a matter of*

²¹[1993] 1 All ER 651.

²²(1986) 715 P 2d 1076.

²³(1989) 540NE 2d 1370 (Ohio).

²⁴(1980) 388 So 2d 1084.

universally-shared emotion and sentiment that the tangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved."

[107] However, the Supreme Court of New Mexico in **Lovelace Medical Center v. Mendez**²⁵ allowed damages in the form of reasonable expenses to raise the child to majority as it was of the opinion that the prime motivation for sterilisation was to conserve family resources and since it was a failed sterilisation case, attributable to the negligent failure of Lovelace Medical Center, the petitioner was entitled to damages.

[108] Next the court considered the approach in the Commonwealth. The court referred to the case of **Administrator, Natal v Edouard**²⁶ from South Africa, a claim for breach of contract where a sterilization of the wife did not succeed. It was held that where the sterilization was performed for socio-economic reasons, that the father could recover for the cost of maintaining the child but he could not recover in contract for the pain and suffering of his wife.

[109] The court referred to cases in New Zealand and Canada where the court refused damages for the costs of rearing a child. In the New Zealand case, the court was of the view that the cost of rearing a child did not arise directly or indirectly from the faulty procedure adopted.

[110] Following from this comparative analysis of the various approaches taken by courts far and wide, Lord Slynn in **McFarlane** concluded:

"The doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family. Whereas I have no doubt that the physical aspects of the pregnancy and birth, including of course solatium for consequential suffering by the mother immediately following the birth, I consider that it is not fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child. The doctor does not assume responsibility for those economic losses. If a

²⁵(1991) 805 P 2d 603.

²⁶1990 (3) SA 581.

client wants to be able to recover such costs he or she must do so by an appropriate contract.”

- [111] Lord Steyn for his part thought that it was legitimate in the present case to take into account considerations of distributive justice. He indicated that that did not mean that he would decide the case on grounds of public policy. On the contrary, he said he would avoid those quick sands. Lord Steyn continued:

“Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor...”

- [112] Lord Hope in relation to the claim for loss, injury and damage suffered by Ms. McFarlane said:

“The physical consequences to the woman of pregnancy and childbirth are, of course, processes. In normal circumstances they would not be considered as a harm to her or as being due to injury. But the law will respect the right of men and women to take steps to limit the size of their family. Any objection to the claim on moral or religious grounds must be rejected, as this is an area of family life in which freedom of choice may properly be exercised. The processes of sterilization are readily available in our hospitals to those who wish to make use of them. It seems to me that there is no reason in principle why the law should not give damages where the conception was due to the surgeon’s negligence or to negligence on the part of those responsible for the tests in the laboratory.”²⁷

Then he said:

“The relief and joy which follow a successful delivery and all the pleasure which a child gives to the mother in so many ways during the process of upbringing are, of course, incalculable. But I know of no principle which requires that such consequences must be taken into account in the assessment of damages where a person has previously endured pain and suffering. The fact is that pregnancy and childbirth involve changes to the body which may cause, in varying degrees, discomfort, inconvenience, distress and pain. Solatium is due for the pain and suffering which was experienced during that period. And the fact that these consequences flow naturally from the negligently caused conception which has preceded them does not remove from them the proper scope of an award of damages.”

²⁷pg 981 f-g.

- [113] On the issue of the costs of rearing the child, Lord Hope thought that the corrective justice approach which provides a remedy in damages whenever it can be demonstrated that there has been a concurrence of *damnum* and *injuria* could not be reconciled with the fact that the loss claimed here was pure economic loss, given the requirements which must be satisfied if damages for loss of this kind are to be recoverable. There must be a relationship of proximity, and the attachment of liability for the harm must be just, fair and reasonable.
- [114] Lord Hope also did not place undue emphasis on the fact that the parents as in the case of the Pierres chose to keep the child. The law he said is not so harsh as to drive parents, in the very difficult situation in which the parents found themselves to the alternatives of abortion or placing the child for adoption, which they would have found unacceptable. Nevertheless, the parents were now bringing up a child within the family. He acknowledged that there were benefits in this arrangement as well as costs. In the short term there is pleasure which a child gives in return for the love and care which she receives during infancy. In the longer term there is the mutual relationship of support and affection which will continue well beyond the ending of the period of her childhood.
- [115] Lord Hope said that in his opinion it would not be fair, just or reasonable, in any assessment of the loss caused by the birth of the child, to leave these benefits out of account as otherwise the parents would be paid too much. He was of the view that they would be relieved of the cost of rearing the child and would not be giving back to the wrongdoer for the benefits. He observed that the value which is to be attached to these benefits is incalculable. He was of the view that the costs can be calculated but the benefits, which in fairness, must be set against them, cannot. This resulted in Lord Hope finding that the logical conclusion, as a matter of law, is that the costs of the parents meeting their obligations to the child during her childhood are not recoverable as damages.
- [116] He went on to say that it cannot be established that, overall and in the long run, these costs will exceed the value of the benefits. This he held was economic loss of a kind which

falls outside of the ambit of the duty of care which was owed to the parents by persons who carried out the procedures in the hospital and in the laboratory.

[117] Lord Clyde was of the view that the solution to the maintenance claim should be looked at by considering the basic idea which lies behind a claim for damages in delict, that is the idea of restitution-*“to as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong.”*²⁸

[118] Lord Clyde was of the view that allowing such a claim for maintenance would mean that the parents have the enjoyment of a child, unintended but now not unwanted, free of any cost to themselves and maintained at the expense of the defendant. The following were his thoughts:

“It can be argued that the result is to be justified by treating the existence of the child as a windfall which simply has to be disregarded. Alternatively, it can be argued that the benefit of the child is something which either cannot in principle be taken into account or even cannot be evaluated, and accordingly the defenders should be held liable for the whole loss suffered by the pursuers without any deduction. That may seem to be a slightly more attractive proposition than the view that the benefit should altogether outweigh the loss. But that the pursuers end up with an addition to their family, originally unintended but now, although unexpected, welcome, and are enabled to have a child maintained while in their custody free of any cost does not seem to accord with the idea of restitution or with an award of damages which does justice between both parties.

“The situation in the present case is a peculiar one. Without surrendering the child, the pursuers cannot realistically be returned to the same position as they would have been in had they not sustained the alleged wrong. But it cannot reasonably be claimed that they should have surrendered the child, as by adoption or, far less, by abortion, so as to achieve some kind of approximation to the previous situation, even if such courses were available or practicable. There is no issue here of mitigation of damages. But while it is perfectly reasonable for the pursuers to have accepted the addition to their family, it does not seem to me reasonable that they should in effect be relived of the financial obligations of caring for their child. That seems to me to be going beyond what should constitute a reasonable restitution for the wrong done.”

²⁸See Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

[119] Lord Clyde was of the view that the restitution which the law requires is reasonable restitution. This was a claim for economic loss following allegedly negligent advice. His view was that even if a sufficient causal connection exists, the cost of maintaining the child goes far beyond any liability which in the circumstances of the case, the defenders could reasonably have thought they were undertaking. Furthermore, reasonableness includes a consideration of the proportionality between the wrongdoing and the loss suffered thereby. The cost of maintaining a child may vary substantially in different circumstances. Lord Clyde thought that the quantification admits of the possibility of very significant differences in the level of the award, and he found it difficult to accept in the context of such a claim that there would be a reasonable relationship between the fault and the claim such as to accord with the idea of restitution. Lord Clyde pointed to the recognition in American jurisprudence of the point that the expense of rearing a child would be wholly disproportionate to the doctor's culpability which lends support to the rule of limited damages, and he was of the view that this provides the proper measure of restitution in the circumstances of the case before the court.

[120] Lord Millet who delivered the dissenting decision was of the view that the same arguments which led the majority to disallow the claim for the cost of maintaining the child up to 18 years should prevent the claimants from recovering or pain and distress of pregnancy and delivery. However, he went on to say that he did not think that the McFarlanes should be sent away empty-handed. He said:

“The rejection of their claim to measure their loss by the consequences of Catherine's conception and birth does not lead to the conclusion that they have suffered none. They have suffered both injury and loss. They have lost the freedom to limit the size of their family. They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect. They are entitled to general damages to reflect the true nature of the wrong done to them. This should be a conventional sum which should be left to the trial judge to assess, but which I would not expect to exceed £5,000 in a straightforward case like the present.”

[121] In **Cattanach**, the Melchoirs already had two daughters when Mrs. Melchoir decided to undergo voluntary sterilisation by means of tubal ligation in 1992. Mrs. Melchoir had undergone an appendectomy at the age of 15 and had been told that, as a result of a

blood clot discovered in her right ovary, both the right ovary and ovarian tube had been removed. She told this to her gynaecologist, Dr. Cattnach, who performed the sterilisation and accordingly placed a Filshie clip on the left fallopian tube only. The right fallopian tube could not be seen on an ultrasound done prior to surgery, consistent with Mrs. Melchior's understanding that the right ovary and tube had been removed in her youth. However, the right tube was in fact intact, and Mrs. Melchior subsequently became pregnant and gave birth to a healthy son, Jordan. Mrs. and Mr. Melchior then sued Dr. Cattnach for the negligent advice and performance of the sterilisation and claimed damages for the pain and suffering associated with childbirth and the costs of raising Jordan until the age of 18. Mr. Melchior also claimed for loss of consortium.

[122] Holmes J in the Supreme Court of Queensland allowed recovery for all three heads of damage on the basis that Dr. Cattnach should have warned Mrs. Melchior that her right ovary might be intact, that if it were, she stood a much higher risk of conceiving, and that there was a procedure she could undergo to confirm whether the tube had been removed. Holmes J treated the costs of child-raising as pure economic loss. The decision was upheld by a majority of the Queensland Court of Appeal. All three judges of the Court of Appeal agreed with Holmes J that this was a claim for pure economic loss, and the majority found that the Melchoirs were entitled to succeed. On appeal to the High Court by Dr. Cattnach the issue was whether the parents could recover damages for the cost of raising their son, an issue they had to decide for the first time.

[123] The majority of the High Court found that the costs of raising the child were recoverable. Within the majority, three of the judges found though that the cost of child-rearing was not one for pure economic loss but rather flowed logically from the injury sustained by Mrs. Melchoir as a result of Dr. Cattnach's negligence. It was thought that it defied logic to allow the recovery of damages for medical expenses and for pain and suffering of childbirth but not the costs of raising the child. Justices McHugh and Gummow stated that the damage claimed was not the child or the parent-child relationship, but rather the burden of the legal and moral responsibilities arising from parenthood. Justice

Kirby stated that the injury was constituted by the economic harm rather than the birth of the child.

[124] Justices McHugh and Gummow were of the view that:

“The unplanned child is not the harm for which recompense is sought in this action; it is the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention. The expression "wrongful birth" used in various authorities to which the Court was referred is misleading and directs attention away from the appropriate frame of legal discourse. What was wrongful in this case was not the birth of a third child to Mr. and Mrs. Melchior but the negligence of Dr. Cattnach.”

[125] The judges, in relation to the notion expressed in **McFarlane** that the benefit of child must be taken into account in awarding damages for the cost of raising him/her, thought that:

“...it is an error to think that awarding damages for the cost of raising a child inevitably requires the courts to balance the "monetary value of the child" against the cost of maintaining the child. In assessing damages, it is impermissible in principle to balance the benefits to one legal interest against the loss occasioned to a separate legal interest. The benefits received from the birth of a child are not legally relevant to the head of damage that compensates for the cost of maintaining the child. A different case would be presented if the mother claimed damages for "loss of enjoyment of life" as the result of raising the child. If such a head of damage were allowable, it would be correct to set off against the claim all the benefits derived from having the child. But **the head of damages that is relevant in the present case is the financial damage that the parents will suffer as the result of their legal responsibility to raise the child. The benefits to be enjoyed as a result of having the child are not related to that head of damage.** The coal miner, forced to retire because of injury, does not get less damages for loss of earning capacity because he is now free to sit in the sun each day reading his favourite newspaper. Likewise, the award of damages to the parents for their future financial expenditure is not to be reduced by the enjoyment that they will or may obtain from the birth of the child.

Logically, those persons like Lord Millett who would deny the cost of maintaining the child because of what they see as the immeasurable benefits gained from the birth of the child must deny the right of action itself. If the immeasurability of those benefits denies damages for the cost of maintaining the child, there must also be denied recovery for the hospital and medical costs of the birth and for the attendant pain and suffering associated with the birth. Yet, illogically as it seems to us, those

persons permit the action and allow damages to be recovered in respect of these two heads of damage.”²⁹

Evidence in relation to damages

- [126] It is fair to say that despite their claim, the Pierres have loved and cared for Tanyia as a part of their family. It is a very difficult claim. Despite the use of the words or phrases ‘unwanted/unexpected pregnancy’, ‘saddled with the financial burden of caring for a child’, it is very clear that Mrs. Pierre was, by no means, saying that her child is unwanted. Yes, the pregnancy was unwanted. She did not want or plan to have another pregnancy and being faced with just that was an emotional and painful time for her. It is no secret that having an additional child means additional costs no matter the socio-economic situation of the parents. The fact that Mrs. Pierre describes herself and her husband as being saddled with financial burden does not equate to them not wanting their child. The question is whether the Pierres can be awarded the damages, which they claim.
- [127] There is no issue with damages being awarded to the claimants in relation to the pain and suffering associated with the pregnancy and the emotional and psychological stress that they had to endure. In fact, the defendant concedes that this is the only damages which the Court ought to award. They submit that case law on the quantum of damages awarded under this head is lacking but that a fair award should be within the range of EC\$10,000.00-\$15,000.00. The claimants submit that the award should be EC\$40,000.00 taking into account that the award in **McFarlane** for this head was £10,000.00.
- [128] Mrs. Pierre’s evidence is that the months ahead were emotionally painful as she was not ready for another baby. She had to cope with taking care of one baby and two other children who were still heavily dependent on her. In addition to all their normal expenses they now had the additional expense of another child whom they did not plan for.

²⁹At para 90.

[129] Mrs. Pierre describes the impact of this pregnancy on her. In her evidence this what she says:

“Words cannot explain the day to day frustration, stress, pain that I suffered while this child was growing in me. ...embarrassment due to comments that were made due to the pregnancy, the tears that came with these feelings...”³⁰

[130] She says during this period she relied on God's word and prayer for some consolation. Mrs. Pierre says she only visited the doctor five months into the pregnancy after her supervisor at work noticed that she had never asked for time off to go to the doctor. She speaks of breaking down and crying at work and having to go home because she could not function at work.

[131] Mrs. Pierre gave birth to Tanyia on 7th March 2018 via C-section. She also had a BTL successfully performed. Mrs. Pierre says as result of the negligence of the defendant, she had to go through nine months of psychological, mental, and emotional stress in addition to pain and suffering associated with pregnancy, giving birth and recovery.

[132] Based on the evidence and taking into account the fact that McFarlane was decided in 1999, some twenty-two years ago, I think a fair award for pain and suffering and emotional and psychological stress associated with the unplanned pregnancy would be EC\$40,000.00.

[133] The more difficult question for this Court is which approach should be adopted in deciding whether the cost of rearing Tanyia is recoverable by the Pierres. Should it be the **McFarlane** approach which is in keeping with the vast majority of decisions in many countries or should it be that espoused in **Cattanach** which represents a departure from what had hitherto been accepted in England as the most recent consideration of the issue?

[134] Of course, the claimants, in submissions, urge this Court to consider **Cattanach** as representing the correct approach. The defendant, in submissions, urges that **Cattanach**

³⁰Para 21 of Witness Statement, page 37 of Trial Bundle.

cannot be preferred to **McFarlane** as the latter explored all the relevant decisions from across common law jurisdictions and came to a reasoned outcome.

- [135] Mrs. Pierre says that she and Mr. Pierre are now saddled with the financial burden of caring for a fourth child. She says she and Mr. Pierre decided to have the BTL done, knowing that it was irreversible and had contemplated a life with no more than three children since they were already caring for a fourth child, Mr. Pierre's son from a previous relationship.
- [136] Mrs. Pierre, in her evidence, says that of the first eighteen months of Tanyia's life, they had to pay \$1,072.00 monthly, the breakdown being \$172.00 for clothing, \$500.00 for food from 6-18 months and \$400.00 for babysitting. She produces credit card statements, bank documents and receipts to show the added expenses as a result of the birth of Tanyia. However, whilst I am sure that there were added expenses brought about by Tanyia's birth, it is difficult to assess what the added expenses are from the credit card statements and bank documents as they do not refer to any specific items.
- [137] Attached to Mrs. Pierre's evidence is a statement prepared by her and her husband showing what they have termed 'projected expenditure up to 18 years' for Tanyia which amounts to \$247,750.00. The basis for the figures is not provided and the figures are produced as estimated costs.
- [138] The claimants in their submissions state that the cost of maintaining Tanyia should be dealt with in similar fashion to maintenance for minors in ancillary relief proceedings. Counsel, Mr. St. Clair, speaks to a practice in this jurisdiction of a sum of \$400.00 to \$750.00 monthly being the contribution expected from one party in matrimonial cases excluding medical, dental and educational expenses. He therefore suggests that a monthly figure of \$1,200.00 should be used. This counsel contends would alleviate any concerns about the speculative nature of this exercise as the suggested figure conforms to figures used in matrimonial matters with regard to maintenance of children. He therefore calculates the figure due to the Pierres as \$259,200.00 $((\$1,200 \times 12) \times 18)$.

- [139] I am not aware of any practice of such amounts being awarded for maintenance in matrimonial cases as the amount awarded ultimately rests on the means of the parties. In some instances, maintenance orders range from \$300.00 to \$1,500.00 depending on the income of the party against whom the order is being made.
- [140] The defendant on the other hand is of the view that damages for rearing of a child is not permissible primarily due to the inability to quantify the benefit and loss to a parent which accompanies the birth of a healthy child, the principles of distributive justice and the finding that the liability of a doctor does not extend past the birth of the child.
- [141] The case of **Cattanach** was last applied by the Australian High Court in 2010.³¹ It was not followed by the Irish High Court in 2007. **McFarlane** was last applied by the UK Court of Appeal Civil Division in 2018.³²
- [142] In 2001, in the case of **Parkinson v St. James and Seacroft University Hospital NHS Trust**,³³ a surgeon employed by the defendant health authority performed a sterilisation operation on the claimant, P, the mother of four children. The operation was performed negligently, and P subsequently conceived a fifth child. The child was born with behavioural problems, possibly caused by an Autistic Spectrum Disorder. P sought damages for the costs of his upbringing in proceedings brought by her in respect of the negligently-performed sterilisation. On the determination of a preliminary issue, the judge held that P could recover damages for the costs of providing the special needs and care attributable to the child's disability, but not for the basic costs of his maintenance.
- [143] On appeal, the Court of Appeal held that where a child's significant disabilities flowed foreseeably from an unwanted conception resulting from a negligently-performed sterilisation, damages were recoverable for the costs of providing for the child's special

³¹Tabet (by her tutor Ghassan Sheiban) v Gett [2010] 3 LRC 287.

³²ARB v IVF Hammersmith (R, third party) [2018] EWCA Civ 2803.

³³[2001] 3 All ER 97.

needs and care attributable to those disabilities, but not for the ordinary costs of his upbringing. The Court held further that an award of compensation which was limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable. If principles of distributive justice were called in aid, ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it was limited to the extra expenses associated with the child's disability. In contrast, they thought it would not be fair, just and reasonable to award compensation which went further than the extra expenses associated with bringing up a child with a significant disability. What constituted a significant disability would have to be decided by judges, if necessary, on a case by case basis.

[144] In 2002, the UK Court of Appeal sought to distinguish the case of **McFarlane** in **Rees v Darlington Memorial Hospital NHS Trust**³⁴ by saying that it did not apply in the circumstances of that case where the parent was disabled. The Court of Appeal held that in this case the disabled parent was entitled to recover as damages those extra costs of bringing up the child that were attributable to her disability.

[145] However, the House of Lords considered the decision in **McFarlane** and reversed that decision in 2003.³⁵ The House of Lords was of the view that the previous decision that parents could not recover as damages the cost of bringing up a healthy and normal child born as a result of medical negligence was not to be departed from. The majority felt the legal policy decisions underpinning the previous decision, which were an unwillingness to regard a child as a financial liability and nothing else; a recognition that the rewards which parenthood, even if 'unwanted', might, or might not, bring could not be quantified; and a sense that to award potentially large sums of money to parents of a normal healthy child against the National Health Service would offend the community's sense of how public funds should be allocated, equally applied to **Rees**.

³⁴[2002] 2 All ER 177.

³⁵[2003] 4 All ER 987.

- [146] The House of Lords in **Rees** however took the position that the parent of a child born following a negligently performed vasectomy or sterilization, or negligent advice on the effect of such a procedure was the victim of a legal wrong. The court thought that in all such cases there should be a conventional award of £15,000 to mark the injury and loss, added to the award for pregnancy and birth. This award would not be compensatory but would afford some measure of recognition of the wrong done.
- [147] Having assessed the cases, I am of the view that the decision in **Cattanach** that maintenance costs for the child flowed from the claim for the pain and suffering and therefore was not a claim for pure economic loss is rather attractive. The maintenance costs would be recoverable on a simple application of legal principle. There would be no need to look at public policy which is as Lord Steyn treading into quick sands or even social policy which seemed to have featured in some of the judgments in **McFarlane**. The defendant has pointed out that **McFarlane** still is good law, not having been reversed by the Privy Council. However, **McFarlane** is a House of Lords decision which whilst highly persuasive is not binding on this Court.
- [148] The **Cattanach** approach does not look at the birth of a child as the actionable damage but rather that that birth which is a consequence of the negligence leads to additional costs for a parent which they had sought in the first place to avoid. The additional cost is what is the damage not the child. Lord Millett in **McFarlane** said that assigning a monetary value to the child's existence was as difficult and unrealistic as it was distasteful. I cannot see what is distasteful about this claim. It is not ascribing a monetary value to a child's life or existence but rather recognizing the injury caused by having a parent to have to incur additional costs which they would not have had to were it not for the negligence of the defendant. I agree that it is a difficult exercise because the cost of maintaining a child comes with many variables, whether the child is healthy or not.
- [149] I agree that there cannot be a consideration of the costs of maintaining a child without considering the benefit to be derived from having the child. I agree that the benefit is not something to which a monetary value can be attached. How does one go about calculating

this? However, the fact that the birth of a child is a blessing does not detract from the fact that there are costs associated with that child's upbringing which were not contemplated because the BTL in this case was to have been performed. It is accepted that assessing the cost of maintaining the child which could lead to great disparities in awards. Here too the variables are many, the income of the parents, the choices of the parents in caring for the child, for example, private school as opposed to public school which was used as a basis for the award in **Benarr v Kettering Health Authority**.³⁶ It is not just a simple mathematical calculation as counsel for the claimants wishes the Court to accept.

[150] Having said this, it is clear to me that the result of the defendant's negligence is that the claimants suffered a wrong which while not calculable for the reasons stated in the discussion above, they must be compensated for. In the circumstances, I am minded to adopt the approach taken in **Rees** and of Lord Millet in his dissenting judgment in **McFarlane** and award a nominal conventional sum in recognition of the wrong suffered by the claimants on account of the defendant's negligence. I am persuaded that this approach may be what is just in a jurisdiction like ours where parents do not enjoy any state benefits for their child at various stages of their lives as in some of the metropolitan jurisdictions. The only benefit known to be received by a mother on the birth of her baby is a \$600.00 payment from the National Insurance Corporation known as a maternity benefit.

[151] As I have said before, having a child comes with costs and while I do not subscribe to the view that the claimants should be awarded the cost of maintaining their child to the age of 18 years, I am persuaded that some award ought to be made. I therefore award the sum of \$140,000.00 as a conventional award to the claimants, consequent upon the birth of their child, Tanyia which came about as a direct result of the negligence of the defendant. This conventional sum would comprise damages for pain and suffering, emotional and psychological distress as a result of the pregnancy and the additional costs associated with having to raise an additional child. I think it must be stated that any such award does not equate to the value of the child as there is no monetary sum which could be adequate

³⁶(1988) 138 NLJ 179.

for that purpose. The Pierres should not be made to feel guilty for pursuing this claim. They felt wronged and sought to gain recompense for that wrong which is a course open to them.

- [152] This case has been a difficult one. I cannot overlook the fact that no matter who the claimant may have been, an additional child not planned for, comes with financial consequences. Costs of maintaining a child must be foreseeable damage where there has been negligence in a sterilisation procedure, be it performed badly or as in this case, not performed at all.

Conclusion

- [153] Judgment is therefore entered for the claimants as follows:
- (a) Special damages in the sum of \$484.55.
 - (b) General damages in the sum of \$140,000.00.
 - (c) Interest on the sum of \$140,484.55 at the rate of 6% per annum from the date of judgment to the date of payment.
 - (d) Prescribed costs to the claimants pursuant to CPR 65.5.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar