COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/01742

BETWEEN

LASHONDA POITIER

Plaintiff

AND

(1) THE MEDI CENTRE LTD

First Defendant

(2) DR. CHRISTOPHER BASDEN

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Crystal D. Rolle of Ducille Chambers for the Plaintiff
Ms. Julika Thompson for the Defendants

Hearing Dates: 28 September, 29 September 2016, 20 March 2017, 12 June 2017, 11 October 2017, 2 November 2017, 31 October 2018

Tort – Medical Negligence – Breach of duty – Standard of care – Damages – Special and general damages – Costs - Costs discretionary- Reasonable Costs

The Plaintiff, a patient of the Defendants, alleged that the Second Defendant breached the duty of care which he owed to her having performed a Dilation, Cutterage and Suction procedure ("D & C") on her when she was pregnant. She alleged that the Second Defendant (i) failed to conduct an ultrasound prior to treating her; (ii) failed to do blood testing on her before treatment; (iii) failed to properly diagnose her and treated her in error; (iv) failed to abide by accepted medical standards and (v) breached her trust and confidence and allowed her to agonize in pain on his advice that the pain was normal. The Plaintiff alleged that if the Second Defendant had done an ultrasound on her, he would have discovered that she had an ectopic pregnancy.

She alleged that, as a result of his failure to properly examine her, she suffered with excruciating pain for over a week. She lost consciousness and fell to her floor. He was

then taken to Doctors Hospital where she was rushed to surgery because of her life-threatening condition.

The Second Defendant alleged that he never performed a D & C but did a thorough gynaecological examination on the Plaintiff who disobeyed his order and did not return for a follow-up check at which time he might have properly diagnosed her.

HELD: finding that the Second Defendant breached the duty of care owed to the Plaintiff and was therefore negligent; general and special damages with interest and costs were awarded to the Plaintiff:

1. On a balance of probabilities, I preferred the evidence of the Plaintiff and her witnesses to that of the Defendants and their expert witness. I found that the Second Defendant performed a D & C without properly diagnosing the Plaintiff. At the very least, if he had done an ultrasound, he would have discovered that the Plaintiff had an ectopic pregnancy.

2. The applicable law for testing whether the actions of a medical practitioner are negligent is whether or not the practitioner has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. The test is applicable to all aspects of a medical practitioner's work including post-operative care. **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118; **Bolitho v City and Hackney Health Authority** [1997] 4 All ER 771 and **Sidaway v Bethlem Royal Hospital Governors and others** [1985] 1 All ER 643 applied.

3. In finding that the Second Defendant was negligent and the First Defendant is vicariously liable for his negligence, the Court awards damages to the Plaintiff. General Damages for pain and suffering were assessed at $50,000 and special damages in the amount of $1,024.00. The Plaintiff was also awarded interest and costs.

JUDGMENT

Charles J:

Introduction

[1] This is a claim in negligence against the First Defendant ("The Medi Centre") and the Second Defendant ("Dr. Basden") (collectively "the Defendants") for damages (aggravated, special and general) together with interest and costs allegedly caused by the negligence of Dr. Basden who is and was at all material times, the servant and/or agent of The Medi Centre and thus, vicariously liable for the negligence of Dr. Basden.

[2] On 31 October 2018, I gave a lengthy oral judgment in this matter. I ruled in Ms. Poitier's favour finding that Dr. Basden was negligent and The Medi Centre was vicariously liable for his negligence. I assessed general damages for pain and suffering in the sum of $50,000 and special damages in the amount of $1, 024.00 with interest. Counsel had agreed that $30,000 represents reasonable costs and I so order. I had promised a written judgment but was unable to do so in a timely manner because of a damaged computer. I therefore apologize most sincerely for the inordinate delay. For purposes of any appeal, time will run from the date of this written judgment.

Background facts

[3] Most of what I now state reflects the uncontroverted and unchallenged evidence of the parties. To the extent that there is any departure from the agreed facts, then what is expressed must be taken as positive findings of facts made by me.

[4] On 28 May 2015, Ms. Poitier attended the office of The Medi Centre located on Prince Charles Drive for a medical check-up. The attending doctor was Dr. Basden. She filled out the routine admission form and executed her method of payment (Colina Imperial Insurance) for the visit. She was then invited by one of the medical personnel to give a urine sample. The giving of a urine sample was routinely done on previous occasions that Ms. Poitier had visited the office of The

Medi Centre. She had been a patient of Dr. Basden for approximately 9 years prior to this visit.

[5] Dr. Basden then invited Ms. Poitier to a “check-up” room. He asked her questions about the purpose for her visit and condition. Without doing any medical check-up on Ms. Poitier, Dr. Basden left the room to conduct a pregnancy test on the urine sample which she had previously given to the medical personnel. The pregnancy test was positive.

[6] Without conducting any further test or examination, for example an ultrasound or blood test, Dr. Basden performed a Dilation, Cutterage and Suction procedure (“D & C”) on Ms. Poitier after advising her that it was the better option to the pill procedure. The cost of the D & C was $500.00. He requested cash. She did not have $500.00 in cash on her so she left and went to an ATM. She returned with the money. She entered his offices through a back door and, in the privacy of his office, he performed the D & C. No one else was present during the procedure.

[7] During and after the D & C, Ms. Poitier suffered excruciating pain and discomfort but Dr. Basden assured her that it was normal. He prescribed Motrin, Doxycycline and Femiane (a birth control pill). Ms. Poitier relied on Dr. Basden’s expertise and even though she was in excruciating pain, she did not seek any further or alternative medical treatment. He did not advise her to return for a follow-up check -up.

[8] About a week later, on 5 June 2015, Ms. Poitier’s significant other, Mr. Ryan Knowles (“Mr. Knowles”) found her unconscious on their bathroom floor. She was taken to Doctors Hospital in that unconscious state. Without delay, Doctors Hospital conducted a series of tests on her including an ultrasound which revealed a ruptured ectopic pregnancy. The same night, she was rushed into surgery which was conducted by Dr. Julian Stewart (“Dr. Stewart”). The post-operative diagnosis revealed that there was blood in her abdomen from a ruptured right fallopian tube. Ms. Poitier lost some 400 mls. of blood, She became anaemic. She was treated

by the operating procedures of mini-laparotomy/right partial salpingectomy. A right tubal incision of the distal ampulla end of the right fallopian tube was required in order to stop the bleeding. Ms. Poitier's right tubal ampulla and mid tubal segment had to be removed. She spent two days at Doctors Hospital and was discharged on 7 June 2015 at 1:35 p.m. After the operation, she was seen by Dr. Stewart on two subsequent occasions.

[9] After her discharge, Ms. Poitier and Mr. Knowles met with Dr. Basden. Dr. Basden apologized for what had happened to Ms. Poitier and what he had done. He refunded the $500.00 which Ms. Poitier had paid to him for the D & C.

[10] Ms. Poitier commenced counselling sessions with Ms. Cherrylee Pinder, a counsellor of 19 years. The prognosis opined by Ms. Pinder was "*she [Ms. Poitier] is young with a desire to have more children. Her possibility of not be able to do so will impact her. Likewise, possible alternative methods of conception will present their own challenges*."

[11] On 8 July 2016, Ms. Poitier gave birth to a baby girl at Princess Margaret Hospital ("PMH"): Exhibit CB2. She failed to mention this in her witness statement which was sworn to in July 2016. She also did not reveal this in her oral testimony before the Court on 28 September 2016.

[12] On 30 October 2015, Ms. Poitier instituted this action claiming, among other things, damages as a result of the breach of duty and negligence of the Defendants. At paragraph 38 of her Statement of Claim, she particularized the negligence.

[13] At paragraph 42, Ms. Poitier pleaded that Dr. Basden is liable for the injuries and loss to her and that The Medi Centre is vicariously liable for the negligence of Dr. Basden. At paragraph 43, she pleaded that, by reason of the negligence of the Defendants, she, an unmarried woman, sustained pain and injuries, loss of a vital structure of her reproductive organ and damage. At paragraph 44, she particularized the injuries which she allegedly suffered.

[14] On 8 June 2016, with leave of the Court, the Defendants filed their Defence. The Medi Centre admitted that Dr. Basden is their servant and/or agent. At paragraph 5, the Defendants denied that Dr. Basden performed a D & C on Ms. Poitier on 28 May 2015 with the intention to cause an illegal abortion or at all.

[15] At paragraph 6 of their Defence, the Defendants averred that Ms. Poitier committed an illegal abortion on herself by means unknown and never fully disclosed to the Defendants; the abortifacient used or whether this was done by herself or with the assistance of person(s) unknown.

[16] It is plain from the evidence that Dr. Basden confused Ms. Poitier with another patient who has a similar name and who was the patient of another doctor who previously worked at The Medi Centre.

[17] Dr. Basden alleged that, in concert with standard medical practice and procedure, he conducted a full gynaecological clinical examination on Ms. Poitier and determined the following:

(i) Ms. Poitier was in fact spotting (i.e. bleeding lightly) and

(ii) Upon examination of her cervix, it was determined that her womb was normal-sized and did not contain a foetus or any remnants of a partially aborted foetus.

[18] In a nutshell, the Defendants denied the allegations of Ms. Poitier and put her to strict proof of her assertions.

The trial

[19] The trial was lengthy as cross-examination was painfully extensive. Ms. Poitier testified and called three witnesses including an expert, Dr. Stewart.

[20] Ms. Poitier is a Woman Marine in the Royal Bahamas Defence Force. She was born on 8 November 1990. On 28 May 2015, Ms. Poitier testified that she was experiencing stomach pain so she wanted to know what was causing it. She attended the office of The Medi Centre located on Prince Charles for a medical

check-up. The attending doctor was Dr. Basden. She knows him as she had been a patient of his for the past 9 to 10 years. She used his services for everything, be it the flu or gynaecological matters.

[21] As she had done on previous occasions, Ms. Poitier filled out the routine admission form and executed her method of payment (Colina Imperial Insurance) for the visit. She was then invited by one of the medical personnel to give a urine sample. The giving of the urine sample was routine in that, on previous occasions, she was asked to do the same.

[22] Ms. Poitier was then taken to the "check-up" room. She waited for Dr. Basden. Upon his arrival, he asked her questions about her condition and the purpose of her visit. He then left the room and related to her that he would conduct a pregnancy test on the urine sample which she had previously given to the medical personnel. The pregnancy test was positive.

[23] Ms. Poitier said that Dr. Basden returned to the room and said "*congratulations, you are pregnant*". She said that she was perplexed. Her facial expression caused Dr. Basden to remark *"you're not happy…well you can undergo a D & C procedure or a pill procedure.*" She testified that Dr. Basden recommended the D & C because he said that it was less bleeding and it required less "*down time*."

[24] She testified that Dr. Basden said that he could perform the D & C right away for $500.00 but she will have to pay the cash directly to him since her insurance did not cover that procedure. She left and retrieved $500.00 from a nearby ATM. She said that before she left, Dr. Basden inserted something into her vagina which made the area anaesthetized. He told her that it was a "prep" for the D & C.

[25] She returned to The Medi Centre and was directed to the back of the Centre to a secluded office where she met Dr. Basden. Ms. Poitier said that she accepted Dr. Basden's advice to have the D & C because she trusted his medical expertise. She said that prior to the check-up she was unaware that she was pregnant. She said that the procedure was long and extremely painful. She felt as Dr. Basden used a

utensil to roughly scrape, drag down and cut into her abdomen. She told him that she was in a lot of pain and he replied "*hush, I'm almost done*." She said that after the D & C, she was in unbearable pain. She could hardly walk and/or stand up straight. Dr. Basden prescribed Motrin, Doxycycline and Femiane and told her that the pain was normal. She said that she reposed trust and confidence in his medical expertise and, as such, she did not seek further and/or alternative medical attention. She asserted that Dr. Basden did not advise her to come back for any follow-up or check-up visits. He only instructed her to take the medications. Following the procedure, she remained at home suffering and agonizing from incessant sharp pains in her abdomen.

[26] On 5 June 2015, she staggered to the bathroom and collapsed on the floor. When she woke up, she was sitting in a wheel chair at Doctors Hospital. Mr. Knowles was at her side. She informed the doctors that she had sharp pains in "*my abdomen and shoulders shooting all over my body*" and that she recently underwent a D & C which was performed by Dr. Basden at The Medi Centre.

[27] She asserted that, at Doctors Hospital, a series of tests were conducted on her including an ultrasound which revealed a ruptured ectopic pregnancy and a baby inside of her right fallopian tube. Ms. Poitier said that she was frantic because she thought she would die. Later that night, Dr. Stewart performed a corrective surgical procedure. The post-operative diagnosis revealed that there was a severe rupture of her right fallopian tube and she was bleeding internally which caused the black out and pains.

[28] She spent two days at Doctors Hospital and was discharged on 7 June 2015 at 1:35 p.m. After the operation, she was seen by Dr. Stewart on two subsequent occasions.

[29] Ms. Poitier said that following her release, she made contact with Dr. Basden who said "*I am sorry…we all make mistakes."* He refunded the $500.00 which she had previously paid for the D & C.

[30] Ms. Poitier further stated that, as a result of the negligence of Dr. Basden, she suffered from depression, anxiety and post-traumatic stress disorder ("PTSD"). Consequently, she had to engage the services of a Counsellor, Ms. Cherrylee Pinder. Ms. Poitier said that she also suffers from mental anguish knowing that Mr. Knowles is aware that she has lost one of her fallopian tubes which, she said, reduces her chances of getting pregnant by 50%. She also suffered loss of earnings and she was unable to work for a month. She also claims damages for loss of amenity.

[31] Ms. Poitier was extensively cross-examined by learned Counsel Ms. Thompson. She stated that she has a daughter who is about seven. Whilst at The Medi Centre, she told the nurse that the date of her last menstrual period was April. She said that her menstrual cycle had been irregular and because of its irregularity, she did not think that she was pregnant. She also stated that, during that period, she was taking birth control pills.

[32] Ms. Poitier testified that she was shocked when Dr. Basden told her she was pregnant. She refuted the allegation that she had phoned Dr. Basden that morning and relayed to him that she had taken something to bring her period down and that she also conducted a pregnancy test which showed a positive pregnancy result even after bleeding for two weeks.

[33] Under further cross-examination, Ms. Poitier stated that, after the surgery at Doctors Hospital, she spoke with Dr. Basden who returned the $500.00 and offered her some more money but she did not return to his office.

[34] With leave of the Court, learned Counsel Ms. Rolle asked four additional questions namely: whether Dr. Basden ever stated why or what was the cause of the abdominal pain? Ms. Poitier said "*no, he didn't. He never examined me. He just took the pregnancy test*." She further stated that she did not undergo an ultrasound at The Medi Centre. No blood test was taken and it was Dr. Basden who initiated

the talk about D & C. According to Ms. Poitier, she did not even know that he performs D & C or any form of abortion at his office.

[35] The next witness to testify was Mr. Knowles. He stated that, on 28 May 2015, he accompanied his significant other, Ms. Poitier to The Medi Centre located on Prince Charles Drive, Nassau for a medical check-up. She was seen by Dr. Basden. Sometime later, Ms. Poitier came from the back and said that she needed to get some funds. They went to an ATM and then returned to The Medi Centre. Upon their return, they went to the back. Ms. Poitier went in a room with Dr. Basden. She was there for some time. When she returned she was visibly in a lot of pain and expressed to him that she was experiencing extreme discomfort and sharp pains in her abdomen.

[36] Mr. Knowles stated that, the following day, Ms. Poitier stayed at home where she remained in bed and in agony from excruciating pain for a little over a week as a result of whatever procedure Dr. Basden performed on her. He said that he cared for her whilst she was at home because she was in too much pain and discomfort. He said that Dr. Basden prescribed Motrin and Doxycycline for the pain.

[37] Mr. Knowles further testified that, on 5 June 2015, Ms. Poitier complained of excruciating pain in her lower abdomen, following which she collapsed on the bathroom floor. She appeared to have lost consciousness because when he called out to her, she did not respond and her eyes were closed. He lifted her to his vehicle and took her to Doctors Hospital.

[38] He stated that she underwent emergency corrective surgery in order to correct the wrongdoings/negligence of Dr. Basden. She lost her right fallopian tube which is a major reproductive organ. He said that after a brief discourse with medical personnel at Doctors Hospital, he contacted Dr. Basden and advised him that he was negligent and that he had caused injury to Ms. Poitier.

[39] Mr. Knowles confirmed that Ms. Poitier was admitted and remained at Doctors Hospital for two days while she underwent a rushed surgery. He said that following

the incident, Dr. Basden wanted to settle the matter. He made several offers to settle out of court. He said that Dr. Basden said that he was sorry and returned the sum of $500.00 which Ms. Poitier had paid him for the D & C.

[40] Under cross-examination, Mr. Knowles confirmed that he is an EMT with the Royal Bahamas Defence Force and he has basic medical training in combat medic, field medic in Houston, Texas. He stated that he accompanied Ms. Poitier to The Medi Centre because she was having stomach pains. He said that he did not go with her to the triage area because the pain was not that severe. She could have walked to the back. He said that when she came back, she said that she needed to go to the ATM for $500.00 to do a D & C because she was pregnant.

[41] Mr. Knowles said that at no time did he advise Ms. Poitier to call Dr. Basden because the doctor told her the pain will subside. Ms. Poitier arrived at Doctors Hospital in an unconscious state.

[42] Ms. Poitier called Ms. Cherrylee PInder ("Ms. Pinder") as her next witness. She is a Counsellor. On 1 July 2015, she met with Ms. Poitier for an initial assessment following an incident which took place on 5 June 2015. During the assessment, she acknowledged that Ms. Poitier appeared to be depressed. She evaluated her on several other occasions in order to properly treat her. She stated that, at the request of Murrio Ducille's Chambers, she prepared a psychological report: Exhibit CP 1.

[43] Ms. Pinder was also cross-examined. She said that she saw Ms. Poitier on three occasions. Based on the three visits, Ms. Pinder diagnosed that Ms. Poitier was suffering from mild depression, PTSD features.

[44] The final witness to testify on behalf of Ms. Poitier was Dr. Stewart. I shall deal with his evidence under the sub-head: expert medical evidence.

[45] The first witness for the Defendants to take the stand was Dr. Basden himself. He is a licensed Medical Practitioner registered to practice general medicine in The

Bahamas. He completed medical training in 1990 at the University of the West Indies and commenced Internship in 1991 at PMH. After his internship, he worked in the Department of Obstetrics and Gynaecology where he began special training. In 1996, he opted to pursue General Practice Medicine and left PMH at that point.

[46] Dr. Basden has been a medical practitioner for 26 years. He is presently employed at The Medi Centre. He partly owns that medical facility. The Medi Centre offers the following medical services namely: (1) General Medical Services; (2) Psychiatric Services; (3) Dental Services; (4) Obstetrics/Gynaecology; (5) X-rays/Ultrasound/Mammography; (6) Laboratory Services and (7) Pharmacy.

[47] Dr. Basden said that Ms. Poitier had been his patient from 2008. She was not always an insured patient. Prior to her enrollment in the Royal Bahamas Defence Force, her visits were paid in cash. Ms. Poitier also erroneously listed herself as having no dependents. He said that on the fateful day of 28 May 2015, he was certain that she telephoned prior to her visit. During that short conversation, she briefed him on what her circumstances were. He said that Ms. Poitier did not say that she was experiencing pain. He invited her to come to The Medi Centre. She decided to use her insurance for the visit. Ms. Poitier indicated to the receptionist and triage that she was experiencing abdominal pain. He testified that her recorded information pertaining to her last menstrual cycle was vague. She said it was April 2015.

[48] Dr. Basden said that she entered the examination room and he enquired the specifics of her problem. Her specific words to him were that she had taken some pills/medication about two weeks ago to bring down her period. She did that because she knew she was pregnant and she did not wish to be. Her main concern was that the pregnancy tests were still positive despite having taken the pills and seeing her period. She felt that she might still be or have remains of the pregnancy in her. She requested his assistance.

[49] Dr. Basden testified that once she told him that, he checked the triage notes and observed that she did not indicate that she was pregnant or that she knew she was pregnant. In addition, he said that she never said that she was in pain or her main reason for seeking medical services. He asserted that a pregnancy test was done from her urine specimen. It was positive.

[50] Dr. Basden next testified that he went on to explain to Ms. Poitier what the likely possible clinical scenarios were with continued bleeding and a positive pregnancy. He told her that it was highly unlikely that she had a viable pregnancy and that she was miscarrying or had completely miscarried. He said that Ms. Poitier said that she was not interested in being pregnant and at no time did he say that he would assist her with her desire.

[51] At paragraph 40 of his witness statement, Dr. Basden said " I gave her an option of an examination and the removal of any product of conception from the vagina/cervical if it was obvious that she was having a miscarriage, if after the examination it was felt that (1) the pregnancy is viable; (2) despite my efforts products of conception still remain in the uterine cavity or (3) the possibility of an extra uterine pregnancy, then management would have changed requiring further evaluation and likely referral."

[52] At paragraph 41, he said that "she was insistent on being examined, I gave her a cash price which she accepted, left the clinic and returned with the funds."

[53] Dr. Basden averred that, alone in the exam room, he conducted a thorough clinical gynaecological exam and general head to toe exam which were all normal. Specifically, her abdomen was soft with no significant tenderness either general or specific. External vaginal examination was normal in appearance. Internal exam with the aid of a speculum revealed moderate blood in the vagina but no clots and no products of conception. The cervical was closed and no products of conception were seen in the cervical.

[54] He said that he performed bimanual examination which revealed a normal-sized uterus, no Adnexal Mass Palpable and no significant Adnexal tenderness. She did not complain of any significant tenderness. He added that most pelvis exams are associated with a low level of discomfort. He said that, on the basis of the examination, there was no need for any immediate instrumentation. No D & C was performed.

[55] At paragraph 48, Dr. Basden said:

> "**My assessment at that time based on my findings was that 1) she was clinically stable; 2) a possible complete abortion 3) in view of her positive pregnancy that follow up was required to repeat the pregnancy test and to ensure that all bleeding comes to an end and there is no pain."**

[56] Dr. Basden said that Ms. Poitier was expected to return for follow-up within 3-5 days or sooner, if necessary, and to this end, he gave her his mobile number which she always had. He next asserted that being so mildly symptomatic it was not suspected or contemplated that she had an ectopic pregnancy. Had she contacted him as she usually did, he would have conducted additional testing to rule out other issues including but not limited to an ectopic pregnancy. She was given a prescription for analgesics/antibiotics as a precaution/preventative measure.

[57] Dr. Basden stated that his contact with Ms. Poitier ended. He received a text/call from her requesting to see him. She never indicated what had happened until she came to the office. It was the first time that he saw Mr. Knowles. Dr. Basden said that Ms. Poitier explained that she had an ectopic pregnancy and ended up at Doctors Hospital. At that point, Mr. Knowles added that she collapsed and had to be taken to the hospital. He said that he offered the $500.00 back to Ms. Poitier which she accepted. However, Mr. Knowles spoke about additional monies and he told him that he will have to get back to him.

[58] Under intense cross-examination, Dr. Basden stated that he holds himself out as providing obstetrical and gynaecological services at The Medi Centre and while his focus is general practice, he works in obstetrics and gynaecology. He is not a specialist in that field but according to him, he is quite knowledgeable. He said that

when he saw Ms. Poitier, she presented to him that she had mild abdominal discomfort and vaginal bleeding for about two weeks. She also told him that she had a positive pregnancy test.

[59] Under cross-examination, it was suggested that he was telling an untruth when he said that Ms. Poitier told him that she was pregnant. He said that he was not lying.

[60] Dr. Basden admitted that a HCG blood test confirms pregnancy and it is more accurate than a urine pregnancy test. He admitted that he did not conduct an ultrasound scan of any kind or a vaginal scan. Dr. Basden said that he examined Ms. Poitier but he did not do an ultrasound scan or a blood test. The only test he performed was a pregnancy test on her urine. Dr. Basden said that his final diagnosis of Ms. Poitier was that she had a complete miscarriage. It was not flatulence. He was shown a medical report of 28 May 2015 where he diagnosed her with flatulence. He said that it was a preliminary assessment but not a final diagnosis. There is no record of a final diagnosis.

[61] Dr. Basden said that he did not breach medical standard by failing to keep proper records. He said that “we don’t record everything on a patient.” He said that he was hindered in doing an ultrasound on the day in question because Ms. Poitier wanted privacy. Ordinarily, he would not do ultrasound. Someone else will have to do it at which point, her condition would have been known.

[62] Dr. Basden agreed that, in hindsight, he should have done an ultrasound. However, he does not agree that by not doing one, he fell below acceptable medical standards. He said that he did a complete gynaecological examination on Ms. Poitier. He checked her adnexal cervix and there was no foetus in it. He refuted the suggestion that he advised Ms. Poitier of the pill method and the D & C procedure.

[63] Dr. Basden was questioned by Ms. Rolle and he said (at pages 81- 82 of the transcript of proceedings on 28 September 2016):

“Q: Dr. Basden, you then told Ms. Poitier that the D & C required less down time and you could do it right away; isn’t that true?

A: I informed Ms. Poitier that based on her history and circumstances, once I would have examined her if there was evidence that she was miscarrying, then he will be in a position to assist her.

Q: So, you were talking about the D & C?

A: That can vary from cleaning the vagina, removing from the cervix or from the uterus.

Q: So, cleaning of the vagina, just for the record, we are talking about a D & C?

A: Yes

Q: I put it to you that that is when you told Ms. Poitier that you can do a D & C today but it will cost her $500 in cash; isn’t that true?

A: Yes

Q: Ms. Poitier paid via insurance when she came in The Medi Centre, didn’t she?

A: Correct

Q: And so upon your advice of the D & C, Ms. Poitier told you she didn’t have any cash on her, she had to go and get the money; isn’t that true?

A: I don’t recall whether she told me that.

Q: Do you recall her leaving at that stage or coming back?

A: I do recall her coming back, yes.

Q: I put it to you that she left at that stage to go and get the $500.00 for you; what do you have to say to that?

A: That is probably correct.

Q: I put it to you that you prep her where you inserted something in her vagina that made the area go numb, what do you have to say about that?

A: That is incorrect…..

Q: So, Dr. Basden, if Ms. Poitier paid you for the initial visit, what was the $500.00 for?

A: The $500.00 was for whatever procedure I was offering to do for her because she wanted total privacy and she did not want the information going anywhere. She did not want anyone to know what her circumstances were?

Q: You said that, at paragraph 44 of your witness statement, you said: "I conducted a thorough clinical gynaecological exam and general head to toe exam which was (sic) all normal. She didn't want anybody to know that, Dr. Basden?

A: That exam was done when she got back, not before. No one would have known that….

Q: The insurance, what did she use the insurance for?

A: She used the insurance for her initial visit.

Q: And the $500 for the D & C?

A: The $500.00 would have been for any procedure, initial procedure to have done." [Emphasis added]

[64] Throughout his testimony, Dr. Basden maintained that he was paid $500.00 for a procedure. When questioned about the medical name for the procedure which he performed on Ms. Poitier, Dr. Basden had this to say:

> **"…Therefore, the procedure would have been basically to facilitate that process. That is what normally happens when a person is going through a miscarriage process. That is what we normally do. We clear the vagina, we clear the cervix and we clear the uterus, if necessary."**[Emphasis added]

[65] Dr. Basden was then asked:

"Q: What is the medical term for that procedure?

A: That procedure would basically be, well, it wouldn't be a D & C. It would be more of C & D because the D refers to dilatation. In

that case, the dilatation would not be necessary. But generally speaking, it is referred to as a D & C.

……

……

Q: Dr. Basden, after conducting this procedure which you have identified as D & C, what did you prescribe Ms. Poitier?

A: Excuse me. I did not conduct a D & C.

Q: Very well. What did you prescribe?

A: She was prescribed, I prescribed analgesics and antibiotics and birth control."

[66] Upon further cross-examination, Dr. Basden said that he has dealt with ectopic pregnancies before and he diagnosed them in various stages because they come in many different presentations. It could be detected if there is more pain, bleeding, positive pregnancy test and by ultrasound. He agreed that an ectopic pregnancy is time sensitive. He maintained that he never told Ms. Poitier that the pain she was experiencing was normal and if it worsens, she could double up on the painkillers.

[67] On re-examination, Dr. Basden said because Ms. Poitier insisted on a certain level of privacy, he put a diagnosis of flatulence on the medical record of the insurance claim form. He insisted that he did not do a D & C and that he told her, in view of the positive pregnancy test, to return in 3-5 days' time for a follow-up visit.

Expert medical evidence

Dr. Julian Stewart

[68] Both parties called their own expert witness. Ms. Poitier called Dr. Stewart; deemed an expert in obstetrics and gynaecology. He said that, following a referral by the Emergency Room at Doctors Hospital on 5 June 2015, where she was presumptively diagnosed with an ectopic pregnancy, associated with pelvic pains, vaginal bleeding and a fainting spell, he examined the patient. He said that Ms.

Poitier informed him that she underwent painful D & C procedure following an early pregnancy confirmation. Following the D & C, the pain got progressively worse and she suffered a fainting spell at her residence. Thereafter, she sought emergency medical consultation at Doctors Hospital.

[69] Dr. Stewart further stated that based on the patient's medical history, he conducted a vaginal ultra sound and physical examination of Ms. Poitier which revealed that she was suffering from an ectopic pregnancy, He obtained her consent and he performed an immediate Minilaparotomy procedure which confirmed the pre-operative diagnosis of an ectopic pregnancy. The procedure also revealed that there was blood in Ms. Poitier's abdomen from a bleeding right tubal pregnancy.

[70] Dr. Stewart testified that a right tubal excision of the distal (ampulla) end of the fallopian tube was required to create adequate hemostasis. Ms. Poitier was treated surgically whereby she had an uncomplicated surgery. He made contemporaneous notes of his examination and treatment which are exhibited – Exhibit DJS1.

[71] Under cross-examination, Dr. Stewart said that because there is a high level of ectopic pregnancies in The Bahamas, a prudent person in the field would make sure that this is not an ectopic pregnancy. A prudent medical practitioner would routinely do an ultrasound and the blood test.

[72] He was asked the following question:

> **Q: "In your opinion, is the urine pregnancy test and physical examination, does (sic) that suffice for a prudent medical practitioner to diagnose an ectopic pregnancy?**
>
> **A: <u>Part of the ruling, as I said, is if a person has positive pregnancy tests and you see nothing in the uterus, you think of ectopic pregnancy.</u>** [Emphasis added]
>
> Q: So you wouldn't take the position that you would wait until the patient comes back to do the ultrasound or to do further testing on that patient; you would deal with that patient right there and then.

A: My professor always told me that there's no [such] thing as an ectopic watch. When you think of it, it's highly likely you have to do something about it.

Q: So you're familiar with the phrase that goes: Assume that a woman has an ectopic pregnancy until it can be proven otherwise?

A: Yes. Once you think about it, you assume it's there.

Q: So it would be a fair inference to say that ectopic pregnancies are very sensitive in terms of treatment.

A: Yes, yes."

[73] Dr. Stewart was asked whether Ms. Poitier's condition when she came to the hospital was life-threatening and he answered in the affirmative. He also stated that D &C does not come into the management of ectopic pregnancy.

[74] Learned Counsel Ms. Rolle continued her examination in chief of Dr. Stewart by asking the following questions:

"Q: Is it a proper medical treatment of the ectopic pregnancy if you were only to do a full clinical gynaecological examination of the vagina and abdomen?

A: The gynaecological exam is only part of your evaluation. It's not a full part of a history, the physical examination.

Q: So it wouldn't treat an ectopic pregnancy by itself?

A: It wouldn't treat it, but it may pick up some of the symptoms. You pick up like the motion tenderness, and, sometimes, it you're unlucky, the person has an ectopic pregnancy, you examine them and it ruptures because you have examined them. The patient which (sic) was healthy and you have to go straight to surgery, but, you know, an examination is just part of the process."

[75] Under cross-examination, Dr. Stewart stated that Ms. Poitier was 5 ½ weeks pregnant which was detected by an ultrasound scan. When asked whether a D & C procedure could induce a rupture or cause the embryo to rupture based on the location of the baby, Dr. Stewart answered "*may or may not. It depends on how*

the procedure is done. You can do a D & C without affecting the adnexa at all. Just purely focus on the uterus and you do the procedure vaginally and never touch the adnexa, the tubes or anything. Yeah."

[76] Dr. Stewart testified, under cross-examination, that a patient's history is extremely important…if you don't have a full history, you might not come to the right conclusion at the right time or in time.

Dr. Lorne Charles

[77] Dr. Charles is an obstetrician and a gynaecologist. He is a consultant at PMH, the Walk-in Clinic and Doctors Hospital. He was also deemed an expert in his field. He gave testimony on behalf of Dr. Basden. He swore a witness statement on 15 September 2016. He acknowledged that the contents are true and correct.

[78] Dr. Charles stated that on 1 September 2016, he spoke with Dr. Basden with respect to providing an expert report in this matter. On 5 September 2016, he received a number of documents from learned Counsel Ms. Thompson including (i) Witness Statement of Dr. Stewart; (ii) Witness Statement of Dr. Basden; (iii) Witness Statement of Ms. Poitier; (iv) Witness Statement of Mr. Knowles and (v) medical notes of the visit to The Medi Centre.

[79] After he reviewed the documents, he prepared a contemporaneous report discussing the medical management of Ms. Poitier and gave an analysis and expert opinion in the context of the current accepted standard of care. His medical opinion is exhibited as Exhibit DLC 1.

[80] Dr. Charles stated that a D & C procedure is confined to the uterine cavity and does not encroach upon the tubal ectopic pregnancy. In his opinion, the D & C procedure did not cause or contribute to the rupture of the ectopic pregnancy. He also opined that, based on the typical natural progression of an ectopic pregnancy, it is within the scope of possibility that on 28 May 2015, there would have been minimal or no direct clinical evidence of an ectopic pregnancy and over the 9-day

interval through 5 June 2015, the ectopic pregnancy would have progressed or grown to the point where it could no longer be contained within the fallopian tube culminating in severe pain and rupture. He said that contact with Dr. Basden during the 9-day interval with the complaint of persistent or worsening pain would have likely have raised the index of suspicion of an ectopic pregnancy and could have resulted in earlier investigation by ultrasound and referral to a tertiary institution by Dr. Basden. He said that it is not clear why Ms. Poitier did not contact Dr. Basden during this interval.

[81] Dr. Charles analyzed the summary given by Dr. Basden. He said that Dr. Basden's physical examination findings of Ms. Poitier were negative and were not indicative of the presence of an ectopic pregnancy. He asserted as follows:

> **"However, notwithstanding these negative physical findings, the history of a failed attempt at termination of pregnancy, <u>in the absence of a prior ultrasound establishing the status and location of that pregnancy or in the absence of an account of having directly observed the expulsion of products of conception, constitutes an indication for further evaluation which should include but is not limited to an obstetric ultrasound scan. The purpose of this further evaluation is to facilitate a decisive and more accurate assessment of the status of the pregnancy i.e. its gestational age, location and viability</u>.**
>
> **I note that an expectant approach was adopted, where the patient was given direct phone access to Dr. Basden and was instructed to return in 3-5 days for follow up at the Medi Centre for reassessment which <u>may</u> have included an ultrasound…."**

[82] Dr. Charles never examined Ms. Poitier. According to him, his report was based on considerations of all of the documents he was given.

[83] Under cross-examination, he stated:

> **"If the D & C was, in fact, performed and it yielded products of conception, then it's equivocal that the baby was in the womb and it was not ectopic; if it was discovered in the vagina, a regular vagina exam, that would also be evidence that the pregnancy was located in the womb. It's not an ectopic. In the absence of that, yes, there is an obligation to locate the pregnancy. So, the assessment isn't complete until the pregnancy is located."**

[84] Dr. Charles was asked the following:

> "Q: Do you agree, more or less, that an ultrasound should have been done in Ms. Poitier's case?
>
> A: **I agree that an ultrasound ought to have been done.** [Emphasis added]
>
> Q: So, in your opinion then, should Dr. Basden have conducted an ultrasound to basically rule out ectopic pregnancy.
>
> A: **Okay. I do have that in my report. And what I stated was that, yes, an ultrasound must have been done, had to have been done; and I also took note of the conservative approach. And I –based on the evidence that was presented to me of negative finding on the day of presentation, I saw that there was a described intention to re-assess in 3 to 5 days."**

[85] Under cross-examination, Dr. Charles opined that Dr. Basden followed medically accepted standards. He did not consider what Dr. Basden did or did not do to be negligent. He may not have done the same things that Dr. Basden did but, according to him, it does not mean that the variance of outside of the accepted.

[86] Dr. Charles agreed that it is very important to accurately record a patient's notes or a patient's record. He also agreed that early detection of an ectopic pregnancy has benefits to the patient and that a ruptured pregnancy is life-threatening.

[87] This is a summary of the expert medical evidence adduced at the trial.

Factual findings

[88] This is a civil case wherein the burden of proof is on a balance of probabilities. It is not in dispute that Ms. Poitier's evidence is diametrically opposed to that of Dr. Basden as to what occurred on 28 May 2015 in The Medi Centre. Undoubtedly, the issue of credibility is at the heart of their evidence. Having had the opportunity of seeing, hearing and observing the demeanour of the witnesses who testified before me, I found the evidence adduced by Ms. Poitier to be more persuasive than the evidence of Dr. Basden.

[89] Although Ms. Poitier told an untruth about having one daughter when in fact, she has two; one born about a year after the unfortunate event, I believed that she did that so as to enhance her claim for damages. That being said, I still found her to be an intelligent, sincere and candid witness as to the events of 28 May 2015 at The Medi Centre. I accepted her evidence that she was surprised when Dr. Basden informed her that she was pregnant especially since she was using birth control pills. Undeniably, she wanted to abort the pregnancy. I accepted her evidence that Dr. Basden informed her of the two methods of achieving the result which Ms. Poitier wanted. She opted for a D & C because it involved less bleeding and less "down time." In addition, he could do it right away.

[90] Having opted for the D & C, he was paid cash of $500.00. He gave her his mobile number so that she could enter through the back door, far from preying eyes.

[91] There is no dispute that Dr. Basden received cash of $500.00 from Ms. Poitier. In fact, he admitted that he returned the cash when she confronted him after the surgery. Dr. Basden said that he returned the $500.00 because he did not do the procedure causing learned Counsel Ms. Rolle to inquire that if she did not return, whether he would have kept the money.

[92] Dr. Basden's account of what he did or failed to do on the "fateful" day (as he puts it) just did not add up. He was questioned on numerous occasions to state what procedure he did. He stayed far away from using the words "D & C" but he found himself in a tangled web, unable to weave his way out. This is how he attempted to explain the procedure which he did:

> **"That procedure would basically be, well, it wouldn't be a D & C. It would be more a C & D because the D refers to dilatation. In that case, the dilatation would not be necessary. But generally speaking, it is referred to as a D & C."**

[93] His evidence, taken at its highest, is that Ms. Poitier spoke to him via telephone and he told her to come in. She paid for a routine check-up by using Colina Insurance. Her urine results showed that she was pregnant. She was not excited about her pregnancy. She left and returned with $500.00 cash which she paid him.

He did a complete gynaecological examination. Is that not covered by Colina Insurance? And does it cost $500.00 for such examination and if so, why was she paying twice? In my opinion, Dr. Basden was an incredible and evasive witness. Her version of events is supported by Mr. Knowles and to a certain extent, the medical and psychological assessment.

[94] At the end of the day, it is plain that Dr. Basden performed a D & C on a pregnant patient. To make matters worse, he even prescribed Femiane, a birth control pill to a pregnant woman. I also found as a fact that he did not advise her to return for a follow-up as there is no record of it on Ms. Poitier's record. He gave her his number not to call her but for her to enter through the back door. The court also takes judicial notice of the practice in this country that if a patient has to return for a follow-up, the date and time are normally given to the patient before he or she leaves the facility.

[95] With respect to the medical evidence, I preferred the evidence of Dr. Stewart to that of Dr. Charles as the former was in a better position having seen and attended to Ms. Poitier. Having said that, both doctors opined that an ultrasound ought to have been done particularly when the pregnancy test is positive and internal examination revealed no product of conception; in other words, no baby in the womb. Both doctors opined that it is also very important to keep proper and detailed record of a patient.

The issues

[96] It is not disputed that the Defendants owed a duty of care to Ms. Poitier. The key issue, therefore, as agreed by Counsel, is whether Dr. Basden and by extension, The Medi Centre, breached the duty of care owed to Ms. Poitier.

[97] In answering this question, the Court is called upon to determine whether the Defendants were negligent. Ms. Poitier alleged that they were negligent in that they:

a) breached the duty of care owed to Ms. Poitier;

b) failed to abide by Accepted Medical Standards;

c) failed to examine Ms. Poitier prior to issuing treatment to ascertain her state and the treatment required;

d) failed to conduct an Ultrasound prior to treating Ms. Poitier;

e) failed to execute a proper biopsy and forward to a lab for testing before conducting a D & C;

f) failed to do any form of blood testing on Ms. Poitier before treatment;

g) treated Ms. Poitier in the absence of appropriate pre-examination;

h) failed to properly diagnose Ms. Poitier and treated her in error and;

i) breached the trust and confidence and allowed Ms. Poitier to agonize in pain on Dr. Basden's advice that the pain was normal.

The law

[98] Nearly 86 years ago, Lord McMillan, in the celebrated case of **Donoghue v Stevenson** [1932] AC 562, 619, in dealing with an action against a manufacturer of drinks had the vision to proclaim that "**the categories of negligence are never closed."** Today, it is said that the tort of negligence protects interest in physical and mental health, reputation, property interest, economic relationship and public rights: **Clerk & Lindsell on Torts** (19th Ed.) para. 8:01.

[99] In the tort of negligence, liability is based on the conduct of the defendant and has three elements or requirements namely:

1. The existence of a duty of care situation (i.e. one which the law attaches liability to carelessness). There has to be a recognition by law that the careless infliction of the kind of damage complained of on the class of person to which the plaintiff belongs by the class of person to which the defendant belongs is actionable;

2. Breach of the duty of care by the defendant, i.e. he failed to measure up to the standard set by law; and

3. A casual connection between the defendant's careless conduct and the damage.

Existence of a duty of care

[100] In general, a duty of care will be owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care the plaintiff will be harmed: see **Clerk & Lindsell on Torts (9th Ed)**, at paras. 8:05 et seq.

[101] In the present case, Ms. Poitier went to a medical facility for a check-up since she was having pain. She was found to be pregnant. She wanted to abort the pregnancy. Whether of nor it is legal is not a matter for this Court to consider. Dr. Basden charged her $500.00 for the D & C procedure despite his reluctance to utter those words. In my opinion, this is one of the circumstances in which it has been held that a duty of care exists as it is foreseeable that harm can resuly from careless conduct on the part of the doctor.

[102] In this regard, it is said that a physician "…owes a duty of care to the patient to use diligence, care, knowledge and skill in administering the treatment. No contractual relationship 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." In **Cephas Marshall v F.H.H. Emergency Medical Associates et al**, Suit No. 1023/2002 [unreported], Cornelius J said:

> **"By the very existence of doctor and patient relationship, a medical doctor has a duty to use reasonable care and skill in examination, diagnosis and treatment of his patient."**

[103] The learned judge relied on the cases of **Gladwell v Steggall** [1839] 5 Bing 12 ER 1283 and **Sidaway v Board of Governors of the Bethelm Royal Hospital** [1985] AC 871, 892 per Lord Diplock.

[104] Having extrapolated the applicable legal principles, learned Counsel Ms.

Thompson who appeared for the Defendants did not dispute that the Defendants owed a duty of care to Ms. Poitier.

Breach of the duty of care/ Burden of proof

[105] A defendant will be regarded as having breached his duty of care is his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In **Blyth v Birmingham Water Works** [1856] 11 Exch. 781 at 784, Anderson B said:

> **"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."**

[106] Negligence, as defined by Anderson B. over 150 years ago, is in ordinary or general language but the standard required by law with respect to medical doctors, has developed over the century. There is now a myriad of cases which set out the test that the Court must apply in determining whether a medical practitioner breached his duty of care and was negligent. The *locus classicus* is **Bolam v Friern Hospital Management Committee** [1957] 2 All E.R. 118. At pages 121-122. McNair J laid down the following test:

> **"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established 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 acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way round, 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."**

[107] The **Bolam** test has become the applicable test over time but in **Bolitho v City and Hackney Health Authority** [1997] 3 W.L.R. 1151, [1998] A.C. 232 (H.L.), Lord Brown-Wilkinson added the following to the **Bolam** test. He said that a doctor does not escape negligence simply because a body of medical experts was of the

opinion that his treatment on diagnoses accorded with sound medical practice: the court has to satisfy itself that the body of medical opinion had a logical basis.

[108] Learned Counsel Ms. Thompson submitted that the **Bolam** test has been heavily criticized because the alleged negligent practice is heavily dependent on expert evidence for either side which may be in conflict.

[109] She next submitted that the **Bolam** test is the test frequently considered in medical negligence cases but it is not definitive as subsequent cases have called into question the idea that an acceptable standard of care is judged by doctors commenting on practice standards and that it may be part of the role of the Court.

[110] Ms. Thompson relied on **Bolitho** where a two-year old boy, diagnosed with intermittent croup, was not intubated by a paediatric registrar and subsequently suffered hypoxic brain injury from a respiratory arrest and died. The House of Lords held that "a defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter". So there was a need to decide if the hypothetical decision not to intubate the young boy would have been a breach of duty. The **Bolam** test says that an action cannot be a breach of duty if it conforms to a reasonable body of professional opinion. The professional opinion relied upon cannot be unreasonable or illogical. If the opinion were illogical, then the action would still be a breach of duty. Only in "a rare case" would the courts find that the body of opinion is unreasonable.

[111] Ms. Thompson submitted that, in the present case, the ectopic pregnancy is one that cannot survive outside of the womb. If I understood Counsel correctly, she suggested that the baby would have died anyway. I agree but the complications which ensue with emergency surgery could have been avoided if the ectopic pregnancy was detected on 25 May 2015 if Dr. Basden had done an ultrasound.

Discussion, analysis and findings

[112] Ms. Poitier bears the burden to prove her allegation that Dr. Basden was negligent in her treatment. Accordingly, she must tender plausible evidence that the treatment or action of Dr. Basden fell below the standard of care of an ordinary competent obstetrician and gynaecologist (which he held out to be) in the same circumstances and that his negligence caused her damage. In **Halsbury's Laws of England, 4th edn re-issue,** Vol. 30 para 35, the learned authors stated:

> **"A person who holds himself out … ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Whether or not he is a registered medical practitioner, such a person who is consulted by a patient owes him certain duties, namely a duty of care in deciding what treatment to give, and a duty of care in his administration of that treatment."**

[113] Having accepted that Dr. Basden owed a duty of care to Ms. Poitier, the next part of the negligence equation is the standard of care appropriate or required in the particular situation. At para. 8:50 in **Clerk & Lindsell (17th ed)**, the learned authors put it this way:

> **"A patient alleging negligence against a medical practitioner has … to prove (1) that his mishap results from error and (2) that the error is one that a reasonably skilled and careful practitioner would not have made. It is therefore crucial to establish how the mishap occurred and that he should have expert evidence that any error made was a negligent error."**

[114] Also, at para. 3:130 in the treatise, **Medical Negligence** by Michael Jones, the learned author pointed out that "*Medical evidence is invariably a vital element in an action for medical negligence, but the importance attached to expert opinion should not obscure the underlying basis for a finding that the defendant has been negligent, or not (as the case may be). This is that, in the light of the expert evidence, the defendant has taken an unjustified risk….In other words, expert opinion about the defendant's conduct (whether favourable or unfavourable) should itself be measured against the general principles applied to the question of breach of duty*."

[115] In discharging her burden of proof, Ms. Poitier adduced her evidence, along with

that of Mr. Knowles and Ms. Pinder and her expert witness, Dr. Stewart. Learned Counsel Ms. Rolle who appeared for Ms. Poitier submitted that Dr. Basden breached the duty of care owed to her in that he failed to exercise the reasonable care and skill of a prudent medical practitioner in diagnosing what was wrong with her and in rendering the appropriate treatment in the circumstances. Learned Counsel next submitted that Dr. Basden was negligent in failing to properly examine, diagnose, treat and advise Ms. Poitier and also, for performing an unnecessary D & C procedure in the absence of an ultrasound or blood testing.

[116] On the other hand, learned Counsel Ms. Thompson argued that Ms. Poitier did not follow Dr. Basden's instructions in that he instructed her to return in 3 -5 days for a follow-up. Learned Counsel submitted that if this measure was strictly adhered to, Dr. Basden may have done a more detailed evaluation of Ms. Poitier. She also submitted that errors of judgment do not automatically amount to a breach of duty. They only do in cases where a doctor has not acted with a level of care that can be expected from a reasonably competent professional.

[117] It is a fact that I preferred the evidence of Ms. Poitier and her witnesses to that of Dr. Basden and his witness. In my opinion, had there been a notation in his report that Ms. Poitier was to return to The Medi Centre for follow-up in 3 – 5 days, I might have given some credence to this aspect of the evidence. But his report is silent. Much was made of Ms. Poitier not telephoning Dr. Basden since she was experiencing excruciating pain and she had his mobile number. Ms. Poitier stated and I accepted, that Dr. Basden said that the pain was normal and if it continues, to "double-up" on the quantity. I cannot fault her for not telephoning him as she relied on his expertise,

[118] Now, to the evidence adduced by the experts. The case of **Whitehouse v Jordon** [1981] 1 All E.R. 287 establishes that a mistake in diagnosis on treatment is not necessarily negligent and whether it amounts to negligence will depend on whether the doctor committing the error acted as a reasonable and competent medical practitioner in the circumstances.

[119] It is safe to say that the expert witnesses, Dr. Stewart and Dr. Charles did not come to the same conclusion on whether Dr. Basden's actions met the acceptable medical standards. In this regard, I am guided by the dicta of Bingham LJ in **Eckersley v Binnie** [1988] 18 Con LR 1. See also **Deonarine v Ramlal** [2007] T & T CA, per Mendoca JA at paras 30-41. Bby ingham LJ in **Eckersley** said:

> **"In resolving conflicts of expert evidence the judge remains the judge. He is not obligated to accept evidence simply because it comes from an illustrious source: he can take account of demonstrated partisanship and lack of objectivity. But save where an expert is guilty of deliberate attempt to mislead (as happened very rarely), a coherent reasoned opinion expressed by a suitable qualified expert shall be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason."**

[120] Having considered the expert evidence, I preferred the evidence of Dr. Stewart. Dr. Stewart attended to Ms. Poitier. He performed the surgery when she was rushed to Doctors Hospital. On the other hand, as competent and learned in medicine as Dr. Charles is, he never saw the patient was merely relied on witness statements. Dr. Stewart stated that because of the high level of ectopic pregnancies in The Bahamas, a prudent doctor, having a positive pregnancy test and nothing in the uterus, would make sure that this is not an ectopic pregnancy. He continued:

> **"A prudent medical practitioner would routinely do an ultrasound and the blood test.**"

[121] In fairness to Dr. Charles, he agreed that an ultrasound should have been done in Ms. Poitier's case. In the same breath, he opined that Dr. Basden followed medically accepted standards because there was an intention to re-assess in 3 – 5 days. This Court found that the account given by Dr. Basden is not supported by any medical records which he ought to have written down. Dr. Charles agreed that it is extremely important to keep accurate records of patients.

[122] One thing is clear. Both expert witnesses agree that since the pregnancy test was positive and the thorough gynaecological examination revealed that there was no abnormality, in those circumstances, they would have done an ultrasound.

[123] I agree with learned Counsel Ms. Rolle that the failure of Dr. Basden to do the most basic test – an ultrasound or a blood test – in light of what he was presented with, satisfies the **Bolam** test. At page 121 D-E, McNair J amplified the text in this fashion:

> **"But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising a professing to have that special skill. A man need not possess the highest expert skill, if he exercises the ordinary skill of an ordinary competent man exercising that particular art."**

[124] This formulation has been approved by the Privy Council in **Chin Keow v Government of Malaysia** [1967] 1 WLR 813 and by the House of Lords in **Maynard v West Midlands RHA** [1984] 1 WLR 634 and **Sidaway** [supra]. In the latter case of **Sidaway**, a majority of the House accepted that the so-called **Bolam** test was applicable to all aspects of the work of a medical man including diagnosis and treatment. Lord Diplock said at p. 893 D-E:

> **"In English jurisprudence the doctor's relationship with his patient which gives rise to the normal duty of care to exercise his skill and judgment to improve the patient's health in any particular respect in which a doctor is called upon to exercise his skill and judgment in the improvement of the physical or mental condition of the patient for which his services either as a general practitioner or specialist have been engaged. This general duty is not subject to dissection into a number of component parts to which different criteria of what satisfy the duty of care apply, such as diagnosis, treatment advice…."**

[125] The cogency of the test propounded by the above passages was approved by Lord Browne- Wilkinson in **Bolitho**. So, I do not agree with learned Counsel Ms. Thompson that the **Bolitho** test differs from the **Bolam** test. Lord Browne-Wilkinson merely added that a doctor does not escape negligence simply because a body of medical experts was of the opinion that his treatment on diagnoses accorded with sound medical practice: the court has to satisfy itself that the body of medical opinion had a logical basis.

[126] As earlier intimated, Ms. Poitier has adduced plausible evidence that Dr. Basden did not act in accordance with the practice acceptable by a body of medical opinion in failing to diagnose her and he treated her in error. Dr. Basden performed a D & C on Ms. Poitier knowing full well that she was pregnant. In fact, he wrongly diagnosed her as having a miscarriage. In my opinion, if Dr. Basden had properly examined and diagnosed Ms. Poitier on 28 May 2015, he would have discovered that she had an ectopic pregnancy as there was no foetus in her uterus. Notwithstanding, Dr. Basden negligently treated Ms. Poitier by doing a D & C causing unnecessary pain and suffering. To make matters worse, he prescribed medication, like femaine to a pregnant woman. That could never be accepted medical practice as Dr. Stewart testified.

[127] All things considered, Dr. Basden breached the duty of care which he owed to Ms. Poitier.

Other issues raised by Defendants

[128] The Defendants raised the defences of contributory negligence and volenti non-fit injuria. The short answer is that these defences were not pleaded and as such, it is too late in the day to raise them.

Damages

Assessment of Damages

[129] The next issue which arises for consideration is the quantum of damages suffered by Ms. Poitier as a result of the negligence of the Defendants. The assessment of damages for injuries sustained as a result of an accident falls under two heads: general and special damages.

[130] The objective of the courts in assessing compensation for a victim was stated by Lord Blackburn in **Livingstone v Rawyards Coal Company** (1880) 5 App. Cas. 25 at 30, (an appeal from the House of Lords from Scotland) as follows:

> **"I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should 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 for which he is now getting his compensation or reparation."

[131] The leading West Indian authority on assessment of damages is **Cornilliac v St. Louis (1965) 7 W.I.R. 491**. In that case it was stated that the factors which ought to be borne in mind in assessing general damages are: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured; (iv) the loss of amenities suffered and (v) the extent to which, consequently the injured person's pecuniary prospects have been materially affected.

[132] In **Cornilliac**, at 494 G-H, Sir Hugh Wooding CJ cautioned that it is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But, it is critical to keep these heads firmly in mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.

[133] In **Alphonso and Others v Deodat Ramnath** [1997] 56 W.I.R. 183, the Court of Appeal of the Eastern Caribbean, appropriately referred to the exercise of assessment as the judge's discretionary quantification upon the application of the principles. There are instances in which a court has disclosed amounts awarded under one or several heads. In **Cornilliac**, for example, the sum that was awarded for loss of pecuniary prospects was quantified because of the extent to which the parties differed on that head.

[134] The practice is to grant a global sum for general damages for pain and suffering and loss of amenities. These are considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability.

[135] A conventional sum for general damages is arrived at based on comparable awards in similar jurisdictions where the socio-economic conditions are similar.

English awards and practice are looked at as guides in particular, the UK practice text of Kemp and Kemp on Damages. This principle received judicial buttressing in the Bahamian case of **Matuszowicz v Parker** [1987] BHS J. No. 80 (1985, No. 827). English awards ought not to be slavishly followed in The Bahamas.

[136] Above all, the award must be fair and reasonable. In **H West & Sons Ltd v Shephard** [1964] AC 326, Lord Pearce explained that "*The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum*."

[137] The Court is also mindful that damages are awarded to an individual and not to an average person of a certain class on an actuarial calculation. Since the defendant must take the plaintiff as he finds him and must compensate him so as to put him in as good a position, as he was prior to the tort, there must be taken into account and assessed the contingencies and chances for better or for worse inherent in the plaintiff at the time of the tort and the contingencies affecting him as an individual.

General Damages

Pain, suffering and loss of amenities

[138] I turn now to general damages for pain, suffering and loss of amenities. In **Wells v Wells** [1998] 3 All ER 481 at 507, H.L., Lord Hope of Craighead observed that:

> **"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages."**

[139] It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment.

[140] In terms of loss of amenities, it is authoritatively settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account. Amongst the loss of the amenities of life, there are to be considered: the injured person's inability to engage in indoor and outdoor games, his dependence, to a greater or lesser extent, on the assistance of others in his daily life, the inability to cope by looking after, caring for and rendering the accustomed services to a dependent; his sexual impotence and his inability to lead the life he wants to lead and was able to lead before the injuries. In this regard, the age of the injured person must be taken into account, since an elderly person or a very young child will not suffer the same loss as a young adult: **Gray v Mid Herts Group Hospital Management Committee,** the Times, March 30, 1974.

[141] It is unchallenged that Ms. Poitier suffered pain in varying degrees as a result of Dr. Basden wrongly treating her by performing a D & C which was totally uncalled for. It is also unchallenged that she suffered a loss of blood to the extent that she became anaemic. Ms. Poitier also suffered dizziness upon standing for about two weeks. There is also no question that she suffered excruciating pain which hindered her from performing her daily chores. Mr. Knowles said that he had to care for her since she was agonizing with pain.

[142] There is evidence from Ms. Pinder that Ms. Poitier suffered from mild depression with PTSD features.

[143] The medical evidence suggests that with proper examination and medical treatment, Ms. Poitier could have undergone a less evasive and more viable treatment of her condition and in all likelihood completely recover from her ectopic pregnancy. As she stated, she was afraid that she would die as a result of the ectopic pregnancy which was life-threatening. Both experts attested to that. There is also medical evidence particularly from Dr. Stewart that during the first month,

she was unable to jog, run and basically perform her normal chores. He also stated that her recover was uneventful. In other words, she recovered well.

[144] It was submitted on behalf of Ms. Poitier that she suffered aggravated damages in that she had suffered the loss of an intangible part of the female reproductive organ and her chances of giving birth have been significantly reduced by Dr. Basden's negligence. It is a fact that Ms. Poitier has not severely been impacted by the loss of her right fallopian tube as she gave birth to another child during these court proceedings which she did not even reveal to the Court. I can only surmise that this was done so that her award of damages would be enhanced.

[145] It is safe to say that Ms. Poitier has recovered well.

[146] Ms. Poitier alleged that an award of $350,000 for pain, suffering and loss of amenities is reasonable in the circumstances but she has produced no case to bolster her allegation. As earlier stated, a conventional sum for general damages is arrived at based on comparable awards in similar jurisdictions where the socio-economic conditions are similar.

[147] For example, in **Olga Forbes V Marion Smith** [2007/CLE/gen/1388], the plaintiff suffered the following injuries namely (i) cervical strain; (ii) lumbar strain; (iii) soft tissue Injury to the right Mandible (jaw) and fracture in the mesio-buccal root of the lower right second molar tooth; (iv) Injury to the right eye; (v) right carpal tunnel syndrome requiring surgery; (vi) shoulder impingement syndrome with hypertrophy bursa, acromial spur, partial thickness rotator cuff tendon tear of supraspinatus portion and small anterior labral tear; (vii) moderate post- traumatic stress disorder. She was awarded $65,000.00 for pain, suffering and loss of amenities.

[148] In **Grand Bahama Construction Co. v Kemp** [1997] BHS J. No. 7, the respondent was severely injured in a road traffic collision. He was 53 years old. The injuries which he suffered included (i) fractures of his pelvis, the right acetabulum and ilium; (ii) three broken ribs on the right side with abrasions along them and two others; (iii) internal injuries to the bladder and lungs; (iv)extensive hemorrhaging, and (v)

a deep punctured wound in his right leg. He spent three days in a hospital in Freeport and was then transferred by air ambulance to a Miami Hospital where he spent ten days in an intensive care unit. His total period of hospitalization was one month during most of which time his condition was considered to be critical. He underwent surgical repair to his pelvis and hip fractures and achieved good healing as well. He was awarded $150,000 for pain, suffering and loss of amenities. On appeal, the general damages were reduced to $75,000.

[149] In **Matuszowicz v Parker** [supra], the plaintiff suffered a severe injury to his right arm. His forearm was crushed and amputated partially a little above the elbow. In his report, Dr. Sethi stated that “It [forearm] was only hanging by a little piece of skin laterally. Elbow joint was completely disarticulated. Distal one third of the humerus was crushed. Mr. Matuszowicz, who was 30 years old at the date of the accident, was awarded $80,000 for pain, suffering and loss of amenity.

[150] In my opinion, none of these cases are exactly on point but they provided a useful guide.

[151] I am reminded that the only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords “with the general run of assessments made over the years in comparable cases: **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ. It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the “conventional” sum. Salmon LJ pertinently had observed in **Fletcher v Autocar and Transporters Ltd** [1968] 2 Q.B. 363 at 364 that “*the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the*

circumstances." The award of damages is not meant to be a windfall but fair and reasonable compensation for the injuries suffered.

[152] It is always a difficult task for a judge especially when plaintiffs seek to embellish their real pain and suffering so as to receive a higher award and defendants seek to reduce that claim.

[153] However, the Court is guided by legal principles and judicial authorities. Learned Counsel Ms. Thompson suggested an award of $9,525.00 to be reasonable. I am of the considered view that an award of $50,000 for pain, suffering and loss of amenities represents fair and reasonable compensation for the injuries sustained by Ms. Poitier.

[154] I make no award for aggravated damages as, despite the loss of a fallopian tube, she is not materially affected as she has already conceived and given birth. Her claim for aggravated damages for loss of an intangible part of a female reproductive organ falls away. As Dr. Charles puts it, "you have two fallopian tubes. If you lose one, there is no problem in getting pregnant", as indeed we saw in the case of Ms. Poitier. It is not the same as losing an eye.

Special Damages

[155] Special damages are quantified damages of which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved. This was the view of Lord Diplock in **Ilkew v Samuels** [1963] 2 All E.R. 879, [1963] 1 WLR 991 where he said:

> **"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized…it is plain law…that one can recover in an action only special damage which has been pleaded, and of course, proved."**

[156] In **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440]**,** Sir Michael Barnett, CJ at [43] stated as follows:

"It is settled law that special damages must be pleaded and proven. The Court of Appeal in *Lubin v Major [No. 6 of 1990]* said:

> **43. "From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite in oath the same facts, or give evidence in an affidavit without any supporting credible evidence aliunde, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted, even though the particular damage in the sense of a loss having been incurred appears reasonably improbable and or the money value attributed to the said loss or damage appears unlikely and or unreasonable viewed in the context of the susceptibility of human beings in general to overestimate and exaggerate loss, damage, and suffering without any intention whatsoever of being deliberately dishonest…."**

[157] Unquestionably, it is for Ms. Poitier to prove her damage. It is not enough to write down particulars, and, so to speak, throw them at the court and say "I am entitled to this."

[158] Ms. Poitier claims the amount of $3, 023.75 as special damages which has been reduced to $1,024.00. This is not seriously challenged so the Court makes an award of $1.024.00 representing special damages.

Interest and costs

[159] In addition, Ms. Poitier claims interest and costs. She claims 6.25 % interest on the special damages of $1,024.00 from the date of judgment to the date of payment. I so order. For general damages, I will award interest at the rate of 5% from the date of the issuance of the Writ of Summons to the date of the judgment.

[160] The parties have agreed that reasonable costs for the successful party are $30,000. I so order that the Defendants pay to Ms. Poitier, costs of $30,000.

Dated this 11th day of February, A.D., 2019

Indra H. Charles
Justice