

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

VIRGIN ISLANDS

CLAIM NO. BVIHCV2012/0101

BETWEEN:

JACQUELINE PENA
JASPER de JESUS

Claimants/Applicants

AND

BRITISH VIRGIN ISLANDS HEALTH SERVICES AUTHORITY

Defendant/Respondent

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mr. Paul Webster QC with Miss Jameyla Fahie and Rhonda Brown of O'Neal Webster for
the Claimant

Mr. Terrance Neale with Miss Sonya Smith of McW. Todman & Co. for the Defendant

.....
2012: December 17

2013: May 22
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RULING

[1] **TABOR, M (Ag.):** This is an application for assessment of damages.

[2] By Claim Form with Statement of Claim filed on 13th April, 2012 the claimant claims against the defendant British Virgin Islands Health Services Authority for (i) damages for negligence and/or breach of statutory duty and/or conversion; (ii) special damages in the

- sum of \$4,085.00 to date; (iii) aggravated damages; (iv) exemplary damages; (v) further or other relief and (vi) costs.
- [3] On 24th September, 2012 at a case management conference, the court at the suggestion of the defendant made an order that judgment on admissions be entered for the claimants with damages to be assessed since the issue of liability was not disputed in the defence. The assessment of damages hearing was convened on 17th December, 2012.

Background Facts

- [4] The background facts are generally not in dispute except for the manner in which the body of the baby was disposed. Since both learned Counsel have presented accounts in their submissions which are largely in congruence, I will gratefully adopt them and for completeness will present an overview.
- [5] The claimants, Miss Jacqueline Pena and Mr. Jasper de Jesus, were the mother and father of a female child born at the Peebles Hospital in Road Town, Tortola on 9th September, 2011. The death of their baby occurred within two hours of birth of natural causes. With respect to the death, no allegation of negligence has been made against the defendant.
- [6] The British Virgin Islands Health Services Authority is a statutory body responsible for the management and operation of public health care services in the British Virgin Islands, including the management and operation of the Peebles Hospital where the claimants' baby was born.
- [7] Following the baby's death the claimants gave their consent for a post mortem examination to be conducted to determine the cause of death of the baby. The baby's body was then placed in the morgue at the Hospital to await the post mortem examination.
- [8] Post mortem examinations in the British Virgin Islands are conducted by a visiting pathologist since there is no resident pathologist on the island. When the overseas pathologist visited the island on 12th October, 2012 to perform the post mortem examination, the defendant discovered that the baby's body was missing from the morgue. The claimants were not immediately informed of this development since the defendant was conducting internal investigations to ascertain the whereabouts of the baby's body.
- [9] The claimants were advised subsequently that the body of their baby was disposed of in error. The reason for the error resulting from the fact that there were two dead babies at the morgue and authority was given to the defendant by the mother of one of the babies to dispose of the body in a manner that it saw fit. The defendant, however, disposed of the daughter of the claimants for which no authority was given.
- [10] On 16th October, 2011 the claimants were invited to a meeting at the Hospital which was attended by members of the Hospital's Board and members of staff. It was during this meeting that the claimants were informed that their baby's body had been missing from the morgue since 12th October, 2011. It was at this meeting as well that the claimants were told by the Hospital that their baby's body was cremated in error and that an investigation

- into the matter was being undertaken. The claimants requested the ashes from the cremation but were informed by the Hospital that the ashes had been thrown away.
- [11] Learned Counsel for the claimants has urged the court to reject the defendant's allegation of cremation and instead accept the claimants' contention that their baby's body was incinerated at the public garbage dump in Tortola.
- [12] On 13th April, 2012 the claimants brought the present action against the defendants seeking damages for the injuries they allegedly suffered as a result of the wrongful disposal of their baby's body.
- [13] The defendant filed a defence in the matter on 15th May, 2012 in which it admitted that its servants and/or agents had been negligent in the disposal of the claimants' baby's body because no authority had been given to them to dispose of the same.
- [14] In support of the assessment of damages the claimants filed the following evidence:
- (a) The witness statement of Jasper de Jesus filed on 10th December, 2012;
 - (b) The witness statement of Jacqueline Pena filed on 10th December, 2012;
 - (c) The unfiled psychological report of Dr. Mc Ananey dated 11th December, 2011 and
 - (d) The filed psychological report of Dr. Mc Ananey dated 12th December, 2012.

Issues to be determined

- [15] The issues to be determined by the court on the assessment of damages are as follows:
- (i) Whether the claimants have suffered any loss as a result of the defendant's wrongful disposal of their baby's body; and
 - (ii) Assuming that the claimants have suffered loss what is the appropriate measure of damages that the court should award them to compensate them for their loss.

Claimants' Submissions

- [16] In his submissions learned Queen's Counsel Mr. Paul Webster paid some attention to the disposal of the body since this is really the fundamental issue of the matter. He noted that the disposal of the body lies within the peculiar knowledge of the Hospital. The latter informed the claimants, without giving any details, that their daughter's body was cremated in error and that they were investigating the matter. When the claimants asked for the ashes from the cremation they were told that it was thrown away. Learned Queen's Counsel has therefore invited the court to reject the Hospital's allegation of cremation and accept the claimants' case that the body was incinerated.

[17] Learned Counsel then submitted that even if the court does not make the actual finding of incineration, the important point to note is that the claimants believed, on reasonable grounds, that the body was incinerated and this contributed significantly to their extreme depression. Learned Counsel also noted that in the absence of the post mortem examination the cause of death will never be determined. As a consequence, the claimants would have lost the chance to show whether the Hospital should be held responsible for the death of their baby as well as the wrongful disposal of the body.

[18] With respect to the medical evidence, learned Queen's Counsel submitted that the claimants were examined by Dr. Ronald W. Mc Ananey, a clinical psychologist who has been practising in the British Virgin Islands for over 20 years. Dr. Mc Ananey treated the claimants in 25 sessions between 22nd October, 2011 and 25th January, 2012 prior to the commencement of the claim in April, 2012 and again in November, 2012 for a follow-up report. Learned Counsel also submitted that pursuant to the court's direction for the assessment of damages on 24th September, 2012, the claimants made themselves available for psychological examination by the defendant's medical expert but the defendant never pursued this offer and as a consequence the court only has before it the medical evidence of Dr. Mc Ananey.

[19] In his evidence Dr. Mc Ananey has outlined the injuries suffered by the claimants as follows:

Jacqueline Pena (First Claimant)

- (i) Post-traumatic stress disorder;
- (ii) Adjustment disorder with mixed anxiety;
- (iii) Complicated grief and intense grief;
- (iv) Loss of sleep;
- (v) Disturbed sleep patten accompanied by nightmares and headaches; and
- (vi) Severe depression accompanied by suicidal thoughts.

Jasper De Jesus (Second Claimant)

- (i) Post-traumatic stress disorder;
- (ii) Adjustment disorder with depressed mood;
- (iii) Complicated and intense grief;
- (iv) Loss of sleep and appetite;
- (v) Auditory and visual fantasies; and
- (vi) Inability to concentrate and follow through on tasks.

[20] With respect to the first claimant, Dr. Mc Ananey has noted the impact on her of the death of her daughter and the knowledge of the incineration of the body. He opined that the death was difficult for her, but that her feelings of loss and despair intensified upon learning that her daughter's body was missing. This situation was aggravated by the likely incineration of her daughter's body causing her more hurt and anger and feelings that her baby was treated like trash. Dr. Mc Ananey further noted that the first claimant was overwhelmed with sadness as a result of the manner in which the baby's body was

disposed of and that that situation is compounded by her inability to bury her child and achieve some closure. Coupled with that, Dr. Mc Ananey indicated that the first claimant experiences anxiety about becoming pregnant again due to the lack of information on the cause of her daughter's death as no autopsy was done.

- [21] In the case of the second claimant, Dr. Mc Ananey has indicated that he has a cardiac mal-function which is controlled by medication, but since learning of the baby's incineration he has been experiencing physical discomfort in his chest. The second claimant is described by Dr. Mc Ananey as one who internalizes his feelings in an attempt to cope with the situation and minimize upsetting the first claimant. However, Dr. Mc Ananey noted that this could intensify his depression and increase the risk for cardiac complications. Like the first claimant, the second claimant also has concerns about having another baby since there was no autopsy to identify the cause of his daughter's death. It is also noted that the second claimant is plagued with worry about his future and the relationship with the first claimant as a result of the incident.
- [22] In his Second Report on 11th December, 2012, Dr. Mc Ananey noted that a financial settlement will not settle the emotional turmoil that the claimants continue to experience. He opined that what they need is answers to why and how the traumatic event i.e., the disposal of the body occurred; information on the steps taken by the defendant to reprimand the staff members responsible; and information on the procedures established to prevent a recurrence. Learned Queen's Counsel has submitted that the defendant's belated and undated apology letter to the claimants has not addressed the issues that Dr. Mc Ananey believes would assist the claimants in dealing with their emotional turmoil. He noted that the letter only indicated that adjustments to policies have been made without giving any details as to the adjustments and any new procedures that have been implemented.
- [23] Learned Queen's Counsel further submitted that Dr. Mc Ananey has confirmed in his Second Report that the claimants continue to experience the symptoms of Post-Traumatic Stress Disorder (PTSD) and will require continued treatment. It is noted that according to the medical evidence the claimants have suffered grief at the unexpected loss of their baby. Moreover, it is suggested that this grief was intensified and complicated by a combination of factors, namely; not receiving the baby's body; not being able to bury the body or at least have the ashes; and discovering that their baby's body was incinerated in a garbage incinerator.
- [24] It is the view of Dr. Mc Ananey that the combination of these factors led to the claimants suffering the symptoms of PTSD. During cross-examination learned Counsel for the defendant postulated that the main grief suffered by the claimants arose from the death of their baby and not the disposal of the body. However, Dr. Mc Ananey has maintained that the disposal of the body was a horrific and traumatic event that impacted the claimants' emotional condition, but that their condition could not be attributed to any one event. He believes that the claimants condition was caused by the death of their baby followed by information that the body was "cremated" which then changed to being "incinerated", and the resulting lost opportunity of a burial. The point was underscored by Dr. Mc Ananey that the initial grief resulted from the death of the baby, but that the normal grief that a parent

would experience from the loss of a child is in this case complicated by the disposal of the body. The latter i.e., the disposal of the body, in the opinion of Dr. Mc Ananey could trigger PTSD and that the incineration of the body would be horrific enough to do that. While learned Counsel for the defendant continued to explore the issue as to whether the traumatic experience was the incineration or the lack of burial, Dr. Mc Ananey maintained that the two cannot be separated.

- [25] Learned Queen's Counsel has submitted that the defendant is responsible for, with the exception of the death of the child, all of the circumstances that flowed from that event that have impacted the claimants. Learned Counsel has noted that the callous disposal of the body and the resulting emotional trauma that this has caused for the claimants make them fully responsible for the injuries suffered by the claimants. Learned Counsel further noted that the provision of a true apology, with answers to the important issues, could have gone a long way in mitigating the claimants' injuries.
- [26] On the issue of the defendant's liability for damages, learned Counsel has submitted that the Hospital owed the claimants a duty of care in the handling of their baby's body; the Hospital was negligent in disposing of the body; that the incineration of the body intensified and complicated their grief causing them to suffer injuries in the form of PTSD; the injuries that they suffered were foreseeable by the Hospital; and the Hospital is responsible for the injuries that the claimants suffered, and are suffering and there is no room for apportionment of the damages.
- [27] With respect to the issue of the extent of the defendant's liability, learned Counsel has submitted that based on the "egg-shell skull" principle that a defendant must take his victim as he finds him and is liable for all the damages that he suffers subject to the rules on foreseeability, even if he has a pre-existing condition that increased the level of damages suffered. This is trite law that is applicable to a tortfeasor. Learned Counsel has noted that in the instant case the claimants were going through the normal grieving process on the loss of their daughter, but that their grief was aggravated and intensified, when they were told that the body was "accidentally cremated" and then possibly incinerated at the garbage dump. As a consequence of this development, learned Counsel in support of Dr. Mc Ananey's contention that the claimants were suffering from PTSD has cited the case of **McLoughlin v O'Brian and others [1982] 2 All ER 298** where Lord Wilberforce stated:

"Although we continue to use the hallowed expression 'nervous shock', English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognizable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesized by the courts in situations where claims for negligence are made".

Learned Counsel also cited the learned authors of *Clerk & Lindsell on Torts* (17th Edition, Sweet & Maxwell, 1995) where in discussing the "Egg-shell Skull" Rule it is noted:

"Nervous shock cases are also consistent with this principle. The rule is that if injury from nervous shock is reasonably foreseeable to an ordinarily strong-nerved person situated in the position of the plaintiff, the defendant is liable for the full extent of the shock. Hypersensitivity to shock may prevent there being any initial liability; but once that is established by showing that even a strong-nerved person would have suffered some shock, the defendant is liable for the full extent of the shock actually suffered by the plaintiff, for he has to take his victim *talem qualem*".

[28] It is the submission of learned Counsel that these principles apply in the instant case. He noted that there is no evidence that the claimants are hypersensitive and in fact the first claimant has admitted in cross-examination that she is emotionally strong. He further noted that the claimants were experiencing the normal grief associated with the death of their baby, but with the wrongful disposal of the body they experienced as a result intense trauma and grief (PTSD) that the defendant is fully responsible for.

[29] Learned Counsel has cited the following cases in which the issue of PTSD was dealt with:

- (i) **AB and others v Leeds Teaching Hospital NHS Trust and another [2004] EWHC 644 (QB);**
- (ii) **Walters v North Glamorgan NHS Trust [2002] EWHC 321; and**
- (iii) **Farrell v Avon Health Authority [2001] All ER (D) 17.**

The common thread running through all these cases was the incidence of psychiatric injury suffered by the claimant as a result of some traumatic and horrific experience. While the principle is now well-established that a person who suffers psychiatric injury can obtain damages from a defendant where it can be shown that the injury was reasonably foreseeable, as these cases confirm, however, the award of damages will vary depending on the magnitude of the psychiatric injury.

[30] With respect to the extent of the injury suffered by the claimants in the instant case, Dr. Mc Ananey has classified the level of the psychological injury suffered as major Post-traumatic Stress Disorder. Learned Counsel has submitted that while the defendant contends that the claimants have suffered only minor psychological injury, they have provided no evidence to support this contention. Learned Counsel has noted, therefore, that since the defendant declined the opportunity to have its own expert examine the claimants, the court should accept the unbiased and undisputed findings of Dr. Mc Ananey.

[31] In determining the quantum of an award for damages, consideration should be given ideally to similar decided cases from our jurisdiction or other jurisdictions that share our common law tradition. In updating an award from outside our jurisdiction that has been used as a

precedent, learned Counsel has submitted that this is done using the Consumer Price Index (CPI) of the British Virgin Islands and that the courts have accepted this method as demonstrated in the case of **Lincoln Jones v Rodney Simmonds (BVIHC 2007/0194)**. Another method employed in the determination of the quantum of an award is the Judicial Studies Board Guidelines (JSBG). The JSBG provides guidelines for the assessment of general damages in personal injury cases. In employing the JSBG, learned Counsel indicated that in the case of **Christopher Simmons v Derek Castle [2012] EWCA Civ. 1039** the UK courts noted that they will implement a 10% increase in damages for personal injuries as of 1 April, 2013. As a consequence, learned Counsel has submitted that a similar increase should be reflected in an award in damages to the claimants. On the question of the conversion of the awards, learned Counsel opposes the contention of the defendant that one pound sterling should be treated as one dollar US and submitted instead that a conversion should be done from pounds sterling to US dollars by using the appropriate exchange rate of 1.5989.

- [32] With respect to the quantum of award in the instant case, learned Counsel has submitted that using the foregoing conversion method and based on an examination of the JSBG and recent developments in the area, that an award of damages for psychiatric injury of the nature suffered by the claimants are capable of ranging from a low of US\$54,777.37 to a high of \$88,610.44 per claimant.
- [33] In his final submission, learned Queen's Counsel has indicated that an award of \$50,000.00 for general damages to each claimant for pain and suffering and loss of amenities would be appropriate. The total award sought by the claimants would therefore amount to \$104,085.00 i.e., \$100,000.00 for general damages and \$4,085.00 for special damages.

Defendant's Submissions

- [34] Learned Counsel Mr. Terrance Neale has submitted that in order for the claimants to establish the tort of negligence it is necessary for them to prove the following elements:
- (i) The existence in law of a duty of care i.e., one in which the law attributes liability to carelessness;
 - (ii) Careless behavior on the part of the defendant i.e., that he failed to measure up to the standard and scope set by law;
 - (iii) A causal connection between the defendant's careless conduct and the damage suffered; and
 - (iv) Foreseeability that such conduct would have inflicted on the claimants the particular kind of damage of which they complain.

Learned Counsel has conceded that the defendant had a duty of care to the claimants in its capacity as the administrator of the Peebles Hospital and that this duty of care was breached with the disposal of the claimants' baby's body without the necessary authority. In that regard, the claimants would have satisfied the first two elements of the tort of negligence.

Learned Counsel submitted, however, that in order for the claimants' claim to succeed, they must still be able to establish on a balance of probabilities that the most likely cause of their injuries suffered was as a result of the defendant's negligence or breach of duty or that of its servants or agents. Learned Counsel noted though that if they fail to establish that the defendant caused the harm that resulted in their injury, or some part of it, their action will fail.

- [35] In turning to the expert evidence of Dr. Mc Ananey, learned Counsel challenged the independence and suitability of Dr. Mc Ananey as an expert witness for two reasons. Firstly, while at the end of his Second Report Dr. Mc Ananey stated that he was aware of the duty of an expert to the court pursuant to Rules 32.3 and 32.4 of the Civil Procedure Rules and that he has complied with that duty; in cross-examination Dr. Mc Ananey could not state exactly what were the requirements of Rules 32.3 and 32.4 but only that he "scanned it". Dr. Mc Ananey only confirmed that he was aware that his report was supposed to be an independent product to assist the court when that question was put to him directly. Secondly, and perhaps even more importantly according to learned Counsel, Dr. Mc Ananey did not disclose the fact that he was acting in the matter on a contingency basis and would thus have an interest in the favourable outcome of the proceedings. This disclosure only came to light when the first claimant during cross-examination in responding to a question on the payment of fees to Dr. Mc Ananey, indicated that it was agreed that these could be settled upon the determination of the case. In light of these circumstances, learned Counsel has submitted that it is not possible for Dr. Mc Ananey to be regarded as an independent expert and his evidence should therefore be treated with a great degree of skepticism.
- [36] Learned Counsel further submitted that Dr. Mc Ananey is not qualified to act as an expert witness in the matter since contrary to Rule 32.4 his evidence cannot be "*seen to be, the independent product of the expert uninfluenced as to form and content by the demands of the litigation*". Learned Counsel is of that view because, inter alia, Dr. Mc Ananey's recommendation in his Second Report that, "*The current litigation proceedings have delayed Ms. Pena's ability to improve her coping skills with the tragic and traumatic demise of her child. It is therefore recommended that an attempt should be made to expedite the legal proceedings*" indicate a somewhat personal interest of Dr. Mc Ananey to have the claim settled as quickly as possible to facilitate his payment in keeping with his contingency arrangement with the claimants.
- [37] Learned Counsel has taken serious issue with the contention of Dr. Mc Ananey that the claimants have experienced a high level of stress and anxiety related to the birth and death of their child and that that situation has been further complicated by the knowledge that the baby's body was missing and mistakenly incinerated. Learned Counsel is of the view that the main cause of the claimants' trauma was the birth and death of their child and not the subsequent wrongful disposal of the body. It is noted in that regard, that while the wrongful disposal of the body may have added to their grief, it could not be the main source of that grief and could not by itself merit a claim for damages.
- [38] Learned Counsel has submitted, based on paragraph 11 of the Statement of Claim, that the claimants have attempted to attribute the main cause of their depressed state and intense grief on the inability to bury their baby in accordance with their customs and religious beliefs. While it is expected that a reasonable person, especially if religious, would experience some

grief from being unable to bury a loved one; I disagree with learned Counsel with respect to his contention that the claimants are attributing their intense grief to their inability to bury their child. Paragraph 11 of the Statement of Claim simply states:

"Further or alternatively the wrongful disposal of the child's body has deprived the Claimant's permanently and irretrievably of the right to take possession of the body and to bury the same in accordance with their religious beliefs and practices, and to determine the cause of death of the baby by the intended post-mortem examination. Further, they have lost the benefit of the autopsy results to guide them and their medical advisors in any decision to have another child".

Further, while learned Counsel has submitted that the symptoms of depression and grief experienced by the claimants are more consistent with the loss of their baby than the wrongful disposal of the body, he also noted that the claimants have not been able to identify any matter which would cause them exceptional as distinct from the usual grief which one experiences at an unfortunate occurrence such as the wrongful disposal of a baby's body. This is clearly a contradictory position. I should point out as well that learned Counsel has indicated that the wrongful disposal of the body may have added to the claimants' grief which is in agreement with the position advanced by Dr. Mc Ananey.

[39] Learned counsel has posited that most of the matters which the claimants have identified as causing them anxiety and distress with respect to the wrongful disposal of the baby's body have now been resolved. In that regard he has noted some of the matters such as (a) an explanation of what happened to the baby's body; (b) an apology by the Hospital for the wrongful disposal of the baby's body; (c) concerns about being penalized for reporting the missing baby's body and not having their work permits renewed and being required to leave the BVI; (d) anxiety about becoming pregnant again; and (e) physical discomfort in the chest of Mr. de Jesus. Learned Counsel has further posited that these matters were in any event too remote for a causal connection to be made with the defendant's negligence. While I agree that information on some of these matters have been obtained or can be obtained by the claimants, in particular those matters raised at (b) (c) (d) and (e), I am not convinced that with respect to (a) that the claimants have been provided with an honest and adequate enough explanation.

[40] With respect to the measure of damages, learned Counsel has suggested that if the court is of the view that the claimants' loss was reasonably foreseeable by the defendant, then in the determination of the quantum of damages cognizance should be taken of similar decided cases. Counsel has noted, however, that given the unusual nature of the instant case there are not many cases on point. Notwithstanding that fact, though, learned Counsel like Counsel for the claimants has cited the following three cases:

- (i) **AB and others v Leeds Teaching Hospital NHS Trust and another [2004] EWHC 644 (QB);**
- (ii) **Walters v North Glamorgan NHS Trust [2002] EWHC 321; and**
- (iii) **Farrell v Avon Health Authority [2001] All ER (D) 17.**

In the **AB and others v Leeds Teaching Hospital NHS Trust** case, three claimants sued the defendant for damages for psychiatric injury as a result of the removal of organs from deceased babies without the consent of the parents. Two of these claims failed because the court held that it was not reasonably foreseeable that the claimants would suffer injury. Learned Counsel in relying on the judgment in this case, has argued that the evidence in the instant case has suggested that any psychological injury suffered by the claimants was as a result of the death of their daughter and not the wrongful disposal of her body and that any injuries arising from the latter were not reasonably foreseeable.

- [41] With respect to the issue of exemplary and aggravated damages, learned Counsel again relying on the **AB and others v Leeds Teaching Hospital NHS Trust** case, noted that the court in that case rejected the claim of all three claimants for exemplary and aggravated damages. The learned Judge held that "*In my judgment as in all cases of personal injury, the insult and gravity of the harm is reflected in the damages awarded for the consequential injury sustained. It is not an additional factor added over and above the seriousness of the injury*". Learned Counsel has submitted that similarly the claimants claim for exemplary and aggravated damages in the instant case should also fail because there is no evidence of any arbitrary, outrageous or unlawful conduct by the defendant but only an unfortunate error. Moreover, Counsel has urged the court to adopt the reasoning in the **AB and others v Leeds Teaching Hospital NHS Trust** case where it was held as I indicated earlier, that in personal injury cases the insult and gravity of the harm and the consequential injury sustained is taken into account in the general damages awarded.
- [42] On the issue of updating the value of an award, it would appear that both learned Counsel are not in agreement as to the methodology that should be used. Learned Counsel Mr. Neale has submitted that the claimants method of using the Retail Price Index (RPI) of the United Kingdom and also applying an exchange rate of 1.5989 to convert from pound sterling to United States dollars is misconceived. He also noted that since 2003 the United Kingdom Government has shown a preference to set inflation targets on the Consumer Price Index (CPI) rather than the RPI. I should note though, that learned Counsel has misrepresented the position of the claimants since they have stated in their submissions that they are using the 2010 British Virgin Islands CPI to update the award and not the RPI of the United Kingdom. However, as someone trained in economics, I would just like to note that there is usually only a 1% difference between the value derived from using the CPI as opposed to the RPI and generally the CPI is lower than the RPI. This difference is as a result of the formula effect, since the calculation of the CPI and RPI is based on somewhat different formulae (for example the CPI exclude mortgage interest payments while the RPI includes them).
- [43] Learned Counsel has also objected to the use of the exchange rate to convert pounds sterling to US dollars. As Counsel has correctly noted the purchasing power of money within different countries varies depending on the cost of living in the particular country. In an ideal situation where the Purchasing Power Parity (PPP) principle is applied, and the exchange rate between countries is adjusted in order for the exchange rate to be equal to each currency's purchasing power, then an amount of money would have the same purchasing power in different countries. In the absence of this implicit foreign exchange rate, it would be

inappropriate in comparing similar cases to say that because an award of US\$50,000 was given in an American case then a similar case in Antigua would warrant the same quantum but in EC\$50,000. This is the point that is being underscored by Joseph-Olivetti J in **Lester Anderson v Pengor Limited BVIHCV 2011/102** when she noted "*In my judgment we cannot simply convert EC\$ to US\$ without more as one would have regard to the prevailing social and economic situation in the countries which are being sought to be treated as comparable*". Barring the use of the PPP technique to determine the value of goods and services in different countries, the easiest and simplest way of making value comparisons between countries is to use the exchange rate between countries to make the conversion.

- [44] In the updating of awards Learned Counsel has submitted that the method relied on by the UK courts is the JSBG for Assessment of General Damages in Personal Injury Cases. Counsel for the claimants has also suggested that the JSBG be used so both Counsel are in agreement on this point. Learned Counsel for the defendant further submitted that the amounts of the awards for various injuries are published every two years to reflect the changes in the value of sterling. He noted that in the 2012 publication of the JSBG the recommended level of damages for Post-traumatic Stress Disorder (PTSD) are as follows:

	Minimum	Maximum
"Severe post-traumatic stress disorder	£42,500	£71,000
Moderately severe post-traumatic stress disorder	£16,600	£42,500
Moderate post-traumatic stress disorder	£5,875	£16,600
Minor post-traumatic stress disorder	£2,800	£5,875

- (a) **Severe Post-traumatic Stress** – Such cases will involve permanent effects which prevent the injured person from working at all or at least from functioning at anything approaching the pre-trauma level. All aspects of the life of the injured person will be badly affected.
- (b) **Moderately Severe Post-traumatic Stress** – This category is distinct from (a) above because of the better prognosis which will be for some recovery with professional help. However, the effects are likely to cause significant disability for the foreseeable future. While there are awards which support both extremes of this bracket, the majority are between £21,000 and £27,000.
- (c) **Moderate** – In these cases the injured person will have largely recovered and any continuing effects will not be grossly disabling.
- (d) **Less Severe** – In these cases virtually full recovery will have been made within one or two years and only minor symptoms will persist over any longer period".

- [45] Based on the cases that was cited, learned Counsel has submitted that the condition of the claimants should be considered as minor post-traumatic stress disorder and attract

damages of between £2,150 and £4,500 in keeping with the JSBG, with the caveat that any award should be subject to the necessary reduction to reflect the fact that the injury suffered by the claimants stemmed from the death of their baby and not the wrongful disposal of the body. Learned Counsel believes that this submission is supported by the fact that the claimants condition improved despite not following Dr. Mc Ananey's recommendation that they undergo individual and couple psychotherapeutic counseling for a period of 6-12 months. Learned Counsel has again reiterated that the fact that Dr. Mc Ananey is being paid by the claimants on a contingency basis impugned his credibility as an expert witness, and his conclusion that the claimants PTSD should be regarded as severe should be questioned.

[46] With respect to the claimants' claim of \$4,085.00 for special damages composed of \$1,425.00 for psychological consultation fees for Dr. Mc Ananey and \$2,660.00 for future consultation fees, learned Counsel has submitted that no receipts have been produced by the claimants to support their claim. Counsel has also noted that the claim for future psychological consultation cannot be justified since the claimants did not visit Dr. Mc Ananey, and it is questionable whether further consultation is required given the fact that 12 months has elapsed without them receiving any treatment and there is no evidence they have been adversely affected as a result.

[47] In his final submission, learned Counsel reiterated the main contention of his case that the main cause of the claimants' psychological injuries was the death of their baby and not the wrongful disposal of the body. Consequently, he has suggested that there should be an apportionment of any award of general and special damages. In terms of this apportionment, learned Counsel has proposed that there should be at least a 50% reduction in any damages to reflect the fact that two factors contributed to the claimants' psychological condition. He noted further, that because the loss of a baby's body cannot realistically be compared to the loss of a baby, a fair apportionment of damage in the instant case should be 85% for the loss of the baby and 15% for the wrongful disposal of the body.

Analysis and Conclusion

[48] The circumstances which gave rise to this action are indeed unfortunate and sad. Had it not been for the wrongful disposal of the baby's body it is very unlikely that this matter would have come before the court. The wrongful disposal of the baby's body by the defendant is therefore the crux of the matter, since the claimants contend that they have suffered psychiatric injury as a result of the defendant's action. The issue of psychiatric injury, nervous shock or whatever term one may wish to use to describe the situation where a person becomes physically affected from the impact of external events on the mind, has now become an established area of English jurisprudence.

[49] In the case at bar the claimants claim that they have suffered PTSD as a result of the wrongful disposal of their baby's body by the defendant. This diagnosis was confirmed by Dr. Mc Ananey, a Clinical Psychologist, who has been working in the BVI for over 20 years. Dr. Mc Ananey was treated by the court as an expert witness and while learned Counsel for the defendant has challenged the credibility of Dr. Mc Ananey because he examined the claimants on a contingency payment basis, I have no reason to question the integrity and

professionalism of Dr. Mc Ananey. As a consequence, I am not convinced that the evidence of Dr. Mc Ananey should be wholly disregarded or jettisoned by the court. It certainly would have been useful for the court to have all ideas contend, however, this was not to be since the defendant did not avail themselves of the opportunity to provide their own expert witness.

- [50] Learned Counsel for the defendant has conceded that the defendant had a duty of care to the claimants and that that duty of care was breached when the defendant disposed of their baby's body without the necessary authority from the claimants. With these two elements of the tort of negligence established, the court must now be satisfied that the claimants suffered harm as a result of the defendant's wrongful disposal of the baby's body and then whether the injury was a reasonably foreseeable consequence of the defendant's action.
- [51] On the issue as to whether the claimants suffered any harm as a result of the defendant's disposal of the body, learned Counsel for the defendant has argued quite forcefully that the depression and trauma experienced by the claimants are more consistent with the death of the baby rather than the wrongful disposal of the body. However, Dr. Mc Ananey has provided an explanation which in my view is more consistent with reason and common sense. He has postulated that it was the combination of both events which led to the claimants suffering the symptoms of PTSD. During a very incisive cross-examination, Dr. Mc Ananey noted that going through the grieving process of a love one can cause symptoms of PTSD but that you would not normally use PTSD to characterize that process, since you would need to look at the circumstances before you can apply a diagnosis of PTSD. In this case he has opined that first there was the loss of the child and then not being able to cope with the horrific manner in which the body was disposed of could trigger the PTSD.
- [52] In comparing the nature and extent of the injuries suffered by the claimants in the case at bar and that of the claimants in the cases that were cited by Counsel on both sides, one could say that that of the claimants in the case at bar were more significant. Coupled with that, is the fact that in the case at bar the claimants would have a more difficult time in bringing closure to the issue because the opportunity of obtaining their baby's body was denied to them forever. In my view, this prospect could be rather overwhelming, particularly if one held certain religious beliefs about the treatment that should be accorded to a human corpse.
- [53] At this juncture a summary of the cases relied on by both Counsel would be instructive. In the **AB and others v Leeds Teaching Hospital NHS Trust** case, the defendant removed organs from deceased babies and released the bodies to the parents for burial without informing them that the organs were retained. There were three claimants in this case but two of the claims were dismissed because the injury was not reasonably foreseeable. With respect to the successful claimant Mrs. Shorter, she gave birth to a stillborn baby in 1992 but was only informed in 2001 about the retention of her baby's organ. As a consequence, she suffered psychiatric injuries which the court held was reasonably foreseeable. In the **Walters v North Glamorgan NHS Trust** case, the claimant suffered psychiatric injury following the death of her 10 months old son. The child developed acute hepatitis that was not properly treated and she was with her son throughout the last 36 hours of his life

witnessing his deterioration and also participating in the decision to turn off his life support machine, which cause her to suffer pathological grief reaction. The court held that she suffered a moderately severe psychiatric injury and she was awarded damages. In the **Farrell v Avon Health Authority** case, a father who visited the hospital to see his newborn baby was told that the baby had died. The claimant was given a dead baby by the nurses which he cuddled. After about 20 minutes the nurses returned and took away the baby and informed him that there was a mistake and his baby was still alive. The claimant was then allowed to visit his son and stayed only 5 minutes since he was very upset. The claimant brought an action for damages for PTSD as a result of being given the wrong baby. The court held that the claimant's PTSD was caused by the incident and awarded damages.

- [54] The point I wish to note from the foregoing successful cases involving PTSD, is that the court found that the psychiatric injuries suffered by the claimants were reasonably foreseeable. As a comparison, therefore, there is no doubt in my mind that the psychiatric injury suffered by the claimants in the case at bar was reasonably foreseeable. In discussing the issue of reasonable foreseeability in the case **McLoughlin v O'Brian and others [1982] 2 All ER 298** Lord Wilberforce stated:

"But, these discounts accepted, there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation on the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest family ties, of parent and child, or husband and wife, and the ordinary bystander. Existing law recognizes the claims of the first; it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life or that the defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class it is clearly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinized. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident".

Clearly, Lord Wilberforce comment is quite instructive and lends support to the case at bar both in terms of its admissibility and the issue of the reasonable foreseeability that the claimants could have suffered harm.

- [55] With respect to the issue of the claim for specific damages, it is well settled that special damages must be pleaded and proved. Learned Counsel for the defendant has submitted that no receipts or fee notes for treatment has been produced by the claimants to support the claim for payment of special damages. The claimants have in fact produced a receipt for psychotherapeutic couple counseling for \$1,425.00 and this will be granted. However, Dr.

Mc Ananey had recommended future psychotherapeutic couple counseling which the claimants have not commenced as yet. The cost for this counseling is \$2,660.00, but I agree with the submission of learned Counsel for the defendant that it would not be justified to grant this, especially since 12 months have elapsed and no attempt has been made by the claimants to initiate this counseling.

[56] I will now turn to the issue of general damages. The claimants have claimed general damages in the sum of \$100,000.00 to be divided equally between them. However, learned Counsel for the defendant has suggested that the case of **AB and others v Leeds Teaching Hospital NHS Trust and another** is relevant to the issue of the quantum of damages and on the basis of this authority has suggested damages of \$2,500.00 for the first claimant and none for the second claimant. Learned Counsel also suggested that any award should be reduced by 50%, since the first claimant equated the news of the loss of her baby "as though I lost my baby twice" and this would reflect the fact that two matters contributed to the claimants psychological condition. Learned Counsel submitted, further, that the loss of the baby's body cannot be equated to the loss of the baby and that a fair apportionment of damages should be 85% for the loss of the baby and 15% for the wrongful disposal of the body. I should state, however, that I am not convinced by Counsel that such a mathematical formula should be employed in the determination of the award of damages in the instant case.

[57] With respect to the quantum of damages, apart from utilizing the JSBG as a yardstick, both learned Counsel have relied on several cases. However, the case that I believe come closest to the case at bar and can serve as a benchmark is **Walters v North Glamorgan NHS Trust**. Learned Counsel for the defendant has submitted, though, that **Walters v North Glamorgan NHS Trust** can be distinguished from the instant case in that the psychiatric injury of the claimant in **Walters** was due to the death of her son and her making the decision to turn off his life support machine; while in the instant case the claimants psychiatric injury derived not from the wrongful disposal of their baby's body but from the death of their child. While I would agree with learned Counsel for the defendant that both cases can be distinguished to some extent, that extent in my view is not major and relates only to the source of the psychiatric injury. In **Walters** it was clear that the Hospital was negligent in the treatment of the baby thus resulting in its death, while in the instant case the Hospital was negligent in the disposal of the baby's body. The claimants in both cases suffered psychiatric injuries. In the case of **Walters**, the injury was described as "moderately severe psychiatric injury" while in the instant case Dr. Mc Ananey described the claimants' injury as "major post-traumatic stress disorder". Learned Counsel for the claimants has submitted that their injuries are more severe than the claimant in **Walters** and that any award for general damages should be adjusted upwards. While I do not agree with this submission, I will concede that an award for general damages to the claimants in the instant case should fall within the bracket of "Moderately Severe Post-Traumatic Stress Disorder" as outlined in the JSBG.

[58] In the 2012 JSBG the range for the bracket of "Moderately Severe Post-Traumatic Stress Disorder" is £16,600 to £42,500. Based on my foregoing reasoning, I will award each of the claimants £23,000 for general damages. Using the exchange rate of 1.5989 to convert from pounds sterling to US dollars, the award for general damages would then equate to

US\$36,774.70 for each claimant. The global figure for general damages would therefore amount to US\$73,549.40.

[59] In conclusion, therefore, the order of the court is as follows:

- (i) Special Damages in the sum of \$1,425.00 with interest of 2% from 31st January, 2012 to the date of this judgment on 22nd May, 2013.
- (ii) General Damages of \$73,549.40 with interest of 5% per annum from the date the claim was served on 13th April, 2012 to the date of this judgment on 22nd May, 2013.
- (iii) Costs to the claimants will be prescribed costs under CPR 65.5 (3) Appendix B as amended and Appendix C.

[60] The court is grateful to learned Counsel on each side for their helpful submissions.

Charlesworth Tabor
Master (Ag.)