

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT**

Civil Division

No. 1144 of 1998

BETWEEN

JUDY ALLEYNE

PLAINTIFF

AND

THE ATTORNEY GENERAL

DEFENDANT

Before the Honourable Madame Justice Margaret Reifer, Judge of the High Court (Ag.).

2002: April 17, 18 and 19

2005: April 22

Mr. St. Clair Howell and Mr. Keith Roberts for the Plaintiff.

Mr. Wayne Clarke and Mrs Laurie-Ann Smith Bovell for the Defendant.

JUDGMENT

-
[11] The Plaintiff Judy Alleyne has suffered a tremendous emotional assault.

She conceived and carried a baby full term, and this child died in child birth. She alleges no negligence on the part of the Defendant for this occurrence, but she attributes to the Defendant negligence in wrongfully disposing of the remains of her infant child.

The Claim

-
[2] The Plaintiff has brought this action, pursuant to the provisions of the

Crown Proceedings Act. Cap.197, against the Attorney-General of Barbados as a consequence of events occurring on or about the 14th day of June 1998. The Plaintiff's claim is for damages as a result of the negligent actions of the Defendant's servants and/or agents whilst in the course of their employment at The Queen Elizabeth Hospital.

Summary of Relevant Facts

-
[3] On the 10th day of June 1998 the Plaintiff gave birth to a female child

which, through no negligence of the Defendants, died on the 14th June

1998. Subsequent to the death of the infant, the Plaintiff proceeded with arrangements for the burial of the body. On the 22nd June 1998 the Plaintiff was contacted by officers of the Queen Elizabeth Hospital and advised to cease any further arrangements for the burial. On that same day

arrangements were made for the Plaintiff and her husband to attend at the office of the Director of the Queen Elizabeth Hospital where in the presence of the said Director, the Deputy- Director and a Social Worker from the said institution, the Plaintiff and her husband were informed of the accidental incineration of the baby's body.

[4] The Plaintiff filed suit on the 20th July 1998 and filed a Statement of Claim

on the 20th July 1999 which alleged the negligence of the Defendant's

servants and agents, paragraph 8 of which provided Particulars of

Negligence as follows:-

PARTICULARS OF NEGLIGENCE

-

- (a) Failing to provide suitably experience staff.

The Plaintiff will contend that the

Defendant's servants or agents were not sufficiently experienced in the hospital's procedure in performing the task at hand and should not have performed the task at all.

- (b) Failing to provide a safe system of work.

- (c) Failing to provide adequate supervision.

- (d) Failing to manage or control the safe

keeping of the said infant child's corpse so as to avoid the said infant child's corpse being put into the incinerator.

- (e) Failing to have any or any proper regard for

the Plaintiff's feeling of despair of not seeing the corpse of the infant child for the last time.

- (f) Exposed the Plaintiff to a foreseeable risk of

injury.

Plaintiff's Statement of Claim, but on the 16th April 2002 counsel for the Defendant filed a Pre-Trial Brief with the Court in which the Defendant accepted responsibility for the accidental incineration of the corpse of the infant child.

[6] In consequence this matter falls to be determined on a narrow issue, that of damages only, viz, if damages and if so, in what amount.

[7] Paragraph 9 of the Plaintiff's Statement of Claim filed herein on the 20th July 1999 alleges that the Plaintiff "suffered pain, injury, loss and damage" as a result of the accidental incineration of the corpse, particulars of which said pain, injury etc were stated as follows:

PARTICULARS OF INJURY

-

Shock.

Acute post-traumatic stress disorder continuing to require therapy and Counselling. Prolonged grief reaction.

The Plaintiff's Case

-

[8] The Plaintiff's case is that the sudden apprehension of the Plaintiff in being told that the baby was put in the incinerator by mistake, caused her "shock" and /or psychiatric illness namely, POST-TRAUMATIC STRESS DISORDER. The claim is therefore damages for POST-TRAUMATIC STRESS DISORDER suffered by the Plaintiff as a Secondary Victim. Counsel for the Plaintiff argued that the Plaintiff's Post-traumatic Stress Syndrome arose as

a direct result of the burning of the baby and NOT as a direct result of the death of the baby. Herein lies one the central issues of this case: whether the Plaintiff's present psychiatric condition is as a result (1) of the death of her baby or (2) the incineration of the corpse thereby denying her closure or (3) a combination of (1) and (2) above. The Plaintiff sought to persuade the Court that her present emotional/ psychiatric state was as a result of

(2) above.

The Evidence

-

[9] The Plaintiff gave evidence as to what took place on June 22nd 1998 at the office of the Director of the Queen Elizabeth Hospital, when she was informed of the inadvertent incineration of the baby's body. She said she was "shocked and surprised" at what was told her. She gave evidence that after the death of the baby she was going about her life as normal, but after being informed of the incineration:

"...I started getting headaches and going into depression. Seeing babies would bring on this state. Seeing the skirt suit (in which the baby was to be buried) the eve of the birthday and the birthday..."

[10] As a result of this she consulted with Mr. Victor Forde, who referred her to Dr. Ermine Belle. In cross-examination the Plaintiff gave evidence that as the mother of all boys she eagerly awaited the birth of her baby girl, yet she stated:

"I was sorry that my baby girl had died. I was not upset that my baby girl had died . I cried on the death of my child. I cried like any normal mother would when I

learned that my child had died... I was not grieving for my child

I had headaches after the burning. Prior to that I went about my business as normal"

[11] Evidence was given by the Plaintiff's husband Mr. Darnley Alleyne, who in response to a question from counsel for the Plaintiff as to how his wife was coping with the death of the baby answered:

"My wife was handling it okay. She went about her business in the normal way after the child's death.. Since the child burned she started having headaches. When anyone asks her about the child she would suffer headaches. If she sees any little child it would bring on headaches ... I observe that anytime you mention anything about the child she gets a headache and does not want to see me around

If anybody comes to look for her as long as they don't ask her anything about the child it is alright".

[12] Mr. Victor Forde Clinical Psychologist gave evidence for the Plaintiff stating that he had dealings with the Plaintiff in his professional capacity, having been commissioned by her attorney-at-law to investigate and report on her emotional and psychological well-being. He stated that he saw Mrs. Alleyne on two (2) separate occasions. A Report dated 15th April 2002 was prepared by him as a result of this evaluation which said Report was admitted in evidence as Exhibit JA1. His finding was that Mrs. Alleyne was "extremely severely depressed" and was suffering from POST-TRAUMATIC STRESS DISORDER". He stated:

"... Mrs. Alleyne's situation is chronic since it existed for more than (3) months. For her the death of Kelsie was

bad enough. The burning of her child, the only girl child and the girl she prayed so much for, this was devastating. Mrs. Alleyne's persistent lament was "and I didn't have a baby to bury".

He referred Mrs. Alleyne to Dr. Ermine Belle because he was of the view that she needed medication which could only be prescribed by a Psychiatrist.

[13] Senior Consultant Psychiatrist at the Mental Hospital, Dr. Ermine Belle gave evidence for the Plaintiff. She first saw Mrs. Alleyne on January 5th 2002 on the recommendation of Mr. Victor Forde and her attorney. Her diagnosis on that date was POST TRAUMATIC STRESS SYNDROME WITH DEPRESSIVE FEATURES. She stated that from the detailed history obtained on January 5th 2002, Mrs. Alleyne's main stress appeared to be related to not being able to bury her infant daughter Kelsie Jannai. When questioned about the importance of burial of a child or close relative, Dr. Belle opined that it is very important for individuals to bring closure to traumatic situations including death.

The Defence

[14] The Defendant having accepted liability for the accidental incineration of the baby based its case thereafter on the principle of binding legal precedent. Counsel for the Defendant argued that the Court is bound to follow the case of *Mervina Boyce & Ekins Boyce v The Attorney General* Supreme Court Suit No.1990 of 1998, where the Court on

similar facts ruled that the Plaintiff was only entitled to recover nominal damages in the sum of \$5,000.00. He further distinguished those cases cited by counsel for the Plaintiff on the ground that all those decisions revolve around the fact of a live body.

The Law

[15] The Plaintiff's case as earlier stated bears repetition at this point: She

alleges NERVOUS SHOCK resulting in POST-TRAUMATIC STRESS DISORDER as a SECONDARY VICTIM. In other words the Plaintiff alleges that the POST-TRAUMATIC STRESS DISORDER is as a direct result of the burning of the baby and not as a result of the DEATH of the baby. In the context of this submission and the relevant case law, "primary victim" is defined as someone directly involved in an accident caused by the defendant's negligence; whilst a "secondary victim" is someone who suffers injury consequential upon the injury or fear for injury, to a primary victim e.g. the witnessing of an accident. This argument raises the concept of REASONABLE FORESIGHT or foreseeability of injury in considering the question of remoteness of damage, once negligence has been established. [16] *Bourhill v Young* (1943) AC 92 is the fore-runner of a line of cases

known as the "mental injury or psychiatric injury cases". These cases represent the increasing recognition by the Courts, that whilst damages cannot at common law be awarded for grief and sorrow, a claim for damages for psychiatric illness can be maintained in circumstances where

injury by "shock" is sustained through the medium of the eye or the ear without direct contact":
Bourhill v Young (1943) AC 92,103,per Lord Macmillan.

[17] In *Bourhill*, Mrs. Bourhill suffered injury in consequence of being in the vicinity of a fatal motorcycle crash. Liability for her injury was not accepted by the House of Lords on the basis that she was not in danger or fear for herself, or others who were closely connected with her by way of relationship. This case has been followed and the concept further explored by a line of cases which to some extent extended and clouded the boundaries of the mental injury claims. In *McLoughlin v O'Brien* (1983), AC 410, Mrs. McLoughlin, shortly after her family had been injured in a road traffic accident, viewed their battered and bloodied bodies at the hospital. The House of Lords found in her favour in a 3:2 decision having been satisfied that she met the elements of proximity. In *Ravenscroft v Rederiakrie Bolaget Transatlantic* (1991) 3 AER3, the Plaintiff was called to the hospital where her son died after he was crushed by a shuttle

wagon. The Court held that the test of liability for psychiatric illness might occur even in the most unusual case, having regard to three elements inherent in any claim, namely the class of persons claiming and the closeness of their relationship to the victim, the proximity in space and time of such persons to the accident or its aftermath and the means by which the shock was caused, whether by sight, or by a third party. The

Plaintiff in this case was entitled to damages for psychiatric injury. This decision was however later seriously doubted in *Alcock v Chief Constable of South Yorkshire*.

[18] In *Alcock v Chief Constable of South Yorkshire* (1992) 10 AC 310,

the claimants were relatives or close friends of those who died in the Hillsborough football tragedy. In *Alcock* their Lordships as a matter of policy, declined to extend the scope of this claim to the Secondary Victims. In the *Alcock*, Lord Oliver outlined the criteria or "control mechanisms" to be applied in the case of Secondary Victims as follows:

- (i) That there must be a close tie of love and affection between the Plaintiff and the victim (relationship to the victim);
- (ii) The Plaintiff must have been present at the accident or its immediate aftermath (proximate both in time and space);
- (iii) That psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not by hearing about it from somebody else (the

means by which the shock is caused);

[19] Thus, in *Alcock v Chief Constable of South Yorkshire* their Lordships, as a matter of policy, imposed the above criteria to limit the number of

prospective claimants falling within the category of Secondary Victim. Thus, foreseeability of physical injury is sufficient to found a claim for psychiatric injury if you are a Primary Victim, but a Secondary Victim would

have to satisfy the *Alcock* "control mechanisms" listed above.

[20] *White v Chief Constable of the South Yorkshire Police and others*

(1999), AER also cited by the Plaintiff is a case exploring the principles applicable to Primary Victims. It in fact created a new category of Primary Victim, that of the rescuer. The Police Officers involved in the Hillsborough football tragedy brought an action against their employer the Chief Constable alleging psychiatric injury in the aftermath of the football stadium disaster caused by police negligence. This case is not relevant to the present facts as it explores the duty of care owed by the employer to an employee/rescuer suffering psychiatric injury in the course of the rescue, but is relevant in so far as it explores and defines the Secondary Victim in the context of these claims. It discusses the requirement in the bystander (Secondary Victim) cases that the psychiatric injury must be reasonably "foreseeable as a likely consequence of exposure to the trauma of the accident or its immediate aftermath". The dicta of Lord Griffith provides clear guidance on the law on this point. He states:

..."The Law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals. This is not to be

confused with the "eggshell skull" situation... It is a threshold test of breach of duty; before a defendant will

be held in breach of duty to a bystander he must have exposed them to a situation in which it is reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury. Or as stated in Page v Smith for the purposes of foreseeability the claimant is assumed to be a person of 'ordinary phlegm'."

[21] Counsel for the Defendant cited an Irish case of Kelly v Hennessy

(1995) 3 IR 253, in which the Irish Supreme Court set out five criteria that must be met by a Plaintiff in order to successfully recover damages for Nervous Shock which resulted in Post Traumatic Stress Disorder. These are:

1. that he or she actually suffered a recognizable

psychiatric illness;
2. that such illness was shock induced;
3. that the nervous shock was caused by

the Defendant's act or omissions;
4. that the nervous shock sustained was

by reason of actual or apprehended physical injury to the Plaintiff or to a person other than the Plaintiff;
5. that the Defendant owed him or her a duty of

care not to cause him or her a reasonably

foreseeable injury in the form of nervous shock

as opposed to personal injury in general.

[22] In this case the Plaintiff, recovered damages for Post Traumatic Stress

Disorder consequent on hearing by telephone of the aftermath of severe injuries to her husband and two daughters.

[23] A review of a cross-section of the well known cases such as *W v Essex*

County Council (2000) 2 AER 237; *Vernon v Bosley (No1)* 1997 AER 577; *White v Chief Constable of Yorkshire* (1999) 2AC 455 to name a few, shows that the law is in a state of development in this area.

What remains clear, however, from these cases is that this claim is maintainable only where there is sight of and/or anticipation of physical injury to a human being, an individual, a victim. A Secondary Victim by definition, suffers psychiatric injury because of fear for the safety of another. In each and every case there was either close physical proximity to the event, or a close temporal connection between the event and the plaintiff's perception of it (proximity in time and space) and a close

relationship between the Plaintiff and the Primary Victim. For example in *W v Essex CC*, the House of Lords defined a "secondary victim as ..." no more than the passive and unwilling witness to injury caused to others and to be compensatable in damages psychiatric injury must be foreseeable in persons of normal fortitude. Moreover there must be a sufficiently proximate relationship with the person causing harm to that other." There is no authority maintaining such a claim with respect to a corpse, to an animal or to property as actionable. *Charlesworth and Percy on Negligence*

(8th edition) makes the further point at Page 58:

"As regards communication, there is no case in which the law has compensated psychiatric illness that has been brought about solely by communication received from a third party ..."

[24] The point was made that in *McLoughlin v O'Brien* that although the plaintiff was first made aware of the tragedy by word of mouth from a third party, it was what she actually witnessed for herself that was the significant cause of suffering her kind of harm.

[25] Lord Slynn of Hadley in *W v Essex CC* (2000) 2 AER in my view clearly demonstrates why the courts must proceed cautiously in the development of this area of the law. He states at P.241 of his judgment:

"In *White's case* (1999) 1 AER ... Lord Steyn

analyzed the reason why the law draws a distinction between physical and psychiatric harm and why the law has proceeded cautiously in recognizing as valid claims for psychiatric harm. It is, for example, difficult to distinguish between acute grief and psychiatric injury and to widen the scope of recognized claims might not only provoke further claims but also impose a disproportionate liability on defendants where physical harm to the claimant would not reasonably have been foreseen".

[26] Lord Scarman at p.310 of his judgment in *Mc Loughlin v O'Brien* states:

"The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised".

[27] Lord Steyn in *White v Chief Constable*, after tracing the development of the law in this area of pure psychiatric injury, explored the difficulties and the inconsistencies created by the case law and stated:

"The law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. In my view the only

sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as *Alcock* case as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform".

The Court's Ruling

[28] If sympathy for the Plaintiff was the main criteria here this exercise would be an easy one. The Court accepts the evidence of Mr. Victor Forde and Dr. Ermine Belle that at the time of the trial of this action the Plaintiff was suffering from psychiatric illness. There is nothing to satisfy me, however, that she suffered "nervous shock" as a result of the incineration resulting in the said "Post-Traumatic Stress Disorder".

"Even though the risk of psychiatric illness is reasonably foreseeable the law gives no damage if the psychiatric injury was not induced by shock... Shock in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of

time of more gradual assaults on the nervous system": Lord Ackner in the Alcock."

[29] Charlesworth & Percy on Negligence (tenth edition) at p.60 provides

some useful illustrations of what constitutes shock induced psychiatric illness: "... The claim failed where a wife suffered psychiatric injury after a hospital doctor told her of her husband's death in an accident at work... There was no actionable shock where a wife, who was informed of her husband's death, viewed her husband's body in the mortuary to settle her disbelief about his death. Parents of a 14 year old boy who died three days after he was struck by a reversing vehicle, did not suffer shock, where they did not see the accident but were told of it soon after, went to the hospital and saw him in an ambulance and being taken into the Intensive Care Unit..."

[30] That causal link between the Plaintiff's psychiatric illness and the

defendant's negligence is deficient, as the Court finds extreme difficulty on the evidence of accepting the submission of counsel for the Plaintiff that her Post Traumatic Stress Disorder is a direct result of the burning of the baby and NOT as a result of the DEATH of the baby. The evidence in my opinion fails the threshold test of breach of duty" as is explained in White v

Chief Constable, that is they have failed to establish a "situation in which it is reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury".

[31] Even if counsel for the Plaintiff's submissions had been accepted; the facts

of this case do not fall within the "control mechanisms" or criteria developed by the cases cited above. It neither meets the "control mechanisms" of the Alcock or the five criteria of Kelly v Hennessy. In my opinion, it has failed the dual tests of Causation and Foreseeability.

[32] I am however persuaded (though not bound) by the approach taken by Mr.

Justice Sherman Moore in the case of Supreme Court Suit No.1990 of 1998 Mervina Boyce vs Attorney-General in compensating the Plaintiff for the Defendant's act, the consequence of which was to deny them the right to bury their child. I award the Plaintiff the sum of \$ 5,000.00. This award will bear interest at the rate of 8% from date of judgment. Mr. Victor Forde and Dr. Irmine Belle will have their fees of \$1500.00 each. The Plaintiff will have her costs certified fit for two counsel to be agreed or taxed.

Margaret Reifer

Judge of the High Court (Ag.)