IN THE SUPREME COURT OF BELIZE A.D. 2003

ACTION NO. 2 OF 2003

BETWEEN 1. GEORGIA MATUTE
2. JANAE MATUTE
by next friend, GEORGIA MATUTE CLAIMANTS

AND

1. RAJU MEENAVALLI
2. ATTORNEY GENERAL OF BELIZE DEFENDANTS

Mr. Fred Lumor SC, for the claimants.
Mr. Phillip Zuniga SC, for the first defendant
Andrea McSweaney for the second defendant.

AWICH J.

5.3.2010 J U D G M E N T

1. Notes: *The law of torts – negligence –professional negligence; whether a medical practioner, a gynaecologist -obstetrician, was liable for negligence; whether the doctor estimated the date of delivery with reasonable care required of a skilled specialist doctor; whether he made the arrangement required at the delivery in accordance with reasonable care of a skilled professional; and whether he carried out the caesarean delivery with reasonable care expected of a skilled professional – standard of reasonable care by a specialist doctor is that of an ordinary specialist doctor exercising and professing that specialist skill.*
Time limitation of claim against the Government, and against an individual – ss: 4 and 6 of Limitation Act, Cap. 170. Vicarious liability – whether the doctor was acting in the course of government employment;

whether time limitation of a claim based on an act outside the course of employment with the Government is different.
Damages – If liability is proved, the question of appropriate general damages.

2. This joint claim exposes a practical legal and financial problem that the Government of Belize could be faced with, arising from the administrative arrangement by which some medical doctors employed by the Government are allowed to run parallel personal private clinics of their own for their own financial benefit. The government could find itself liable to pay damages for a negligent act of a doctor not wholly acting in the course of the employment of the Government.

3. In this claim, some of the acts of Dr. Raju Meenavalli, the first defendant, complained about were partly carried out at a government hospital, and partly at a private clinic owned by Dr. Meenavalli. The claim is in negligence regarding a mishap or mistake in medical treatment and surgery which resulted in grave handicap to a baby, the second claimant suing by a next friend, her mother the first claimant. The second defendant, the Attorney General is sued as the representative of the Government, the employer of Dr. Meenavalli.

4. On 13.6.2000, Mrs. Georgia Matute, the first claimant, went to the Western Regional Hospital, Belmopan – (Belmopan Hospital), a government hospital. She was attended to by Dr. Meenavalli. He was employed by the Government as a resident gynaecologist and obstetrician. He also operated a private clinic of his own outside the hospital, at No. 7/9 Trinity Boulevard, Belmopan. The medical condition of Mrs. Matute for which she went to the hospital was pregnancy. On this first visit Dr. Meenavalli asked Mrs. Matute to attend for prenatal management at his personal clinic at No. 7/9 Trinity Boulevard, Belmopan. She attended five times. Finally Dr. Meenavalli asked Mrs. Matute to attend at the government hospital for delivery. The delivery was by caesarean section carried out by Dr. Meenavalli. In attendance were Dr. Sree, the anaesthesiologist, wife of Dr. Meenavalli, and two nurses of Belmopan Hospital. One of the questions that arises is: in the event of professional negligence, should the Government be vicariously liable to pay the entire award of damages?

5. A summary of the testimony of Mrs. Matute is the following. On her first visit on 13.6.2000, at Belmopan Hospital, she was attended to by

Dr. Raju Meenavalli. She informed Dr. Meenavalli that she was pregnant. He examined her and said that she was three months pregnant. She was surprised at that information because she had missed menstruation only in the previous month, May 2000. He told her that she was misled by minor drops of menses as usually happened. For subsequent antenatal care, Dr. Meenavalli told Mrs. Matute to attend at his own clinic at No. 7/9 Trinity Boulevard, Belmopan.

6. So for her next visit on 3.8.2000, Mrs. Matute attended at No. 7/9 Trinity Boulevard. She reminded Dr. Meenavalli that her last menstruation was on 27.4.2000. He informed her that her expected date of confinement and delivery was 2.1.2001. He also informed her that in December, he would give her a date of caesarean delivery since she had delivered by caesarean section before. It was Dr. Meenavalli who on the earlier occasion delivered Mrs. Matute's earlier baby by caesarean section.

7. Mrs. Matute was concerned about the refusal of Dr. Meenavalli to take 27.4.2000 as the date of her last menstruation, and the probability

of error in the date of confinement and delivery, she decided to seek a second opinion. She also wanted to know the sex of the baby. On 13.10.2000, she attended at La Loma Luz Hospital, Cayo District. Dr. B. Meza examined her. Ultrasound examination was also carried out. A report was prepared, it stated among others, the following: "(a) the last menstrual period was on 27th April 2000; (b) expected date of confinement is 1st February, 2001; (c) age of the fetus is 24 weeks; (d) the length and traverse position of the baby in the womb is on the right and left sides; and (e) the gender of the baby is female".

8. The third visit of Mrs. Matute to Dr. Meenavalli was on 1.11.2000, at No. 7/9 Trinity Boulevard again. She gave Dr. Meenavalli the report and photographs of the examinations at La Loma Luz Hospital. They made him angry; he said the report was nonsense. Nevertheless, he examined her. He set the date of confinement as 3rd January 2001. He signed the Medical Certificate of Confinement and wrote on the antenatal outpatient clinic card of Mrs. Matute that the pregnancy was 26 weeks old.

9. The fourth visit of Mrs. Matute at No. 7/9 Trinity Boulevard, was on 30.11.2000, when she felt uncomfortable with standing for long at work. She asked Dr. Meenavalli to certify seven days sick leave for her. He did. On that day the doctor noted on her antenatal outpatient card that the pregnancy was 34 weeks old.

10. The fifth visit of Mrs. Matute to Dr. Meenavalli was also at No.7/9 Trinity Boulevard, it was on 7.12.2000. Dr. Meenavalli examined her, and told her that the baby was ready, he could do caesarean section delivery on or before Christmas, but it was better done before the Christmas holidays because hospital staff would go away during the holidays, and the operations theatre would be closed.

11. The sixth and final visit by Mrs. Matute to Dr. Meenavalli before delivery was also at No.7/9 Trinity Boulevard. It was on 17.12.2000, two days before Mrs. Matute attended for admission at Belmopan Hospital for delivery. On that day Dr. Meenavalli noted on Mrs. Matute's outpatient card that the pregnancy was 37.3 weeks. In court he said that the pregnancy was 17.4 weeks on that day, 17.12.2000. In his report he stated that the baby was delivered at 37.6 weeks on

20.12.2000, the date of delivery. Dr. Meenavalli confirmed to Mrs. Matute on 17.12.2000, that she was to report for admission on 19.12.2000, for delivery on 20.12.2000.

12. Mrs. Matute reported to Belmopan Hospital for admission on 19.12.2000. At 8:30 am on 20.12.2000, she was taken to the operations theatre. Present were Dr. Meenavali, his wife Dr. Sree, and nurses Agi Castaneda and Hernandez of Belmopan Hospital. Mrs. Matute was put under anaesthetic, and caesarean section delivery was carried out by Dr. Meenavalli.

13. When Mrs. Matute became alert the following day, 21.12.2000, she saw her baby in an incubator. She had a tube down the mouth, and was breathing abnormally and gasping. Dr. Javier Magana, a paediatrician at Belmopan Hospital, was attending to the baby. Mrs. Matute asked him what was wrong with the baby. He was not forthcoming, although he answered that the baby had been born premature.

14. After one week Mrs. Matute and her baby were discharged. She named the baby Janae. The following day the baby developed a serious condition. Mrs. Matute took baby Janae back to the hospital at 2:00 a.m. The baby was admitted as an inpatient. Her condition did not improve. Mrs. Matute thought that the doctors at Belmopan Hospital had given up about the condition of the baby. On 2.1.2001, she took her out of the hospital.

15. Mrs. Matute then took baby Janae to Clinica Carranza, Chetumal, Quintana Roo, Mexico. The baby was admitted as an inpatient for three days, after that Mrs. Matute continued to take the baby to Clinica Carranza as an outpatient. The condition of the baby did not end or improve.

16. When the baby was about a year old, and she did not develop normally in movement and growth, Mrs. Matute took her to Dr. Javier Magana, the paediatrician at Belmopan Hospital, and inquired what was wrong with the baby. Dr. Magana told Mrs. Matute that he suspected that the baby had been, "brain damaged due to lack of

oxygen at birth", and that he did not tell Mrs. Matute earlier because he had not been sure.

17. Mrs. Matute then took baby Janae to the USA for further medical treatment. For that, she obtained a medical report from Dr. Magana, the paediatrician. The report stated that: (1) the baby was, "preterm of 36 weeks"; (2) the baby suffered, "moderate asphyxia"; (3) the baby had, "hyaline membrane disease"; (4) the baby had, "hyperbilirubinemia due to ABO conflict"; and (5) the baby had "neonatal, sepsis".

18. Mrs. Matute has obtained extensive medical treatments for her baby, in Belize, Mexico and the USA. She incurred medical treatment expenses and related expenses which added to a large sum. Baby Janae has remained under-developed and generally handicapped and incapacitated in many ways. She needs care and attention in routine things such as feeding, going to toilet and others. She will not be able to attend school. Mrs. Matute had to leave her employment as a secretary to a chief executive officer, so that she could attend to Janae.

19. Dr. Meenavalli did not deny the prenatal visits by Mrs. Matute and the examinations, and that he carried out the caesarean section delivery. He denied having said some of the things Mrs. Matute told court that he said.

20. *The Joint claim.*

The joint case for the claimants is that Dr. Meenavalli and his employer, the Government of Belize, are liable for professional negligence occasioned by Dr. Meenavalli in his duty and acts as a gynaecologist-obstetrician when he attended to Mrs. Matute during the period of her pregnancy, and during the delivery of baby Janae. They claimed the reliefs of: special damages, BZ$104,391.00; general damages for pain and suffering of both mother and baby, and for the permanent handicap of Janae, that is, for loss of amenity; interest on the sums awarded; and costs. They itemized the special damages.

21. The claimants specified the acts of negligence that they based their claim on. The first was that, Dr. Meenavalli was negligent in determining the gestation age and the date of confinement and delivery, even failing to heed the warning by Mrs. Matute that there

was error regarding the date of delivery, given 27.4.2000, as the date of her last menstruation. The claimants stated further that, Dr. Meenavalli was negligent in failing to take into consideration the second opinion of Dr. Meza and ultrasound examination results. As the consequence of the negligence, the claimants said, baby Janae was erroneously delivered premature by caesarean section, and suffered cerebral palsy which caused permanent handicap to her.

22. Secondly, the claimants said that Dr. Meenavalli was negligent in that he did not assemble the necessary professional staff at the delivery to attend to their parts, in the event their actions were required.

23. Thirdly, the claimants said that Dr. Meenavalli must have been negligent in carrying out the caesarean delivery as the result, severe asphyxia was caused in the baby during birth, and that immediate steps were not taken to reverse the condition.

24. *The joint defence.*

Dr. Meenavalli testified in his defence. He denied any negligence in his duty and acts in prenatal examinations and management of the

pregnancy of Mrs. Matute, in determining the age of the pregnancy of Mrs. Matute, that is, the gestation age, and in setting the date of confinement and delivery. He also denied any negligence in the actual caesarean section delivery. He said that he determined, "the gestation age", and set the date of confinement and delivery, "consistent with", what he found during prenatal examinations. However, Dr. Meenavalli conceded eventually in crossexamination that he made a mistake in the determination of the gestation age.

25. Regarding the caesarean delivery, he explained that he decided to do it because Mrs. Matute had a caesarean delivery before, and had, "large babies of 9+ lbs". He said that he confirmed that decision in November 2000, when he saw that Mrs. Matute's cervical was ripe, and she threatened to go into premature labour. Further, Dr. Meenavalli explained that it was obvious Mrs. Matute wanted the delivery before the christmas holidays so that she could be home for the holidays.

26. Dr. Meenavalli contended that the baby was born well, and had a good weight of 6 pounds and 4 ounces, but that, "the baby went through a

series of complications after delivery and not at the time of delivery". He contended further that, the necessary staff, an anaesthesiologist and nurses were present at the delivery, and that the baby was placed under the care of a paediatrician after the delivery as required.

27. The Attorney General depended for his substantive defence on the points of defence put forward by Dr. Meenavalli. One memorandum of defence was filed for both defendants. So the Attorney General succeeds or fails on the merit in defending the claim against him according to whether Dr. Meenavalli succeeds or fails in defending the claim against himself. Both defendants relied on the same witnesses.

28. In addition to the joint points of defence, learned Crown counsel Ms. Andrea McSweaney, raised although late at submission stage, a point of law that the claim was time-barred by s: 27 of the Limitation Act, Cap. 170, Laws of Belize. She submitted that the claimants failed to bring their claim before the expiration of one year from the date on which the cause of action accrued, the claim was time barred, it should be dismissed on that ground.

29. *The medical evidence.*

Three doctors were called as witnesses, namely Dr. Cardo Martinez Salinas, a paediatrician practising in his own practice at No. 66 Freetown Road, Belize City; Dr. Egbert Grinage, a paediatrician practising as such at Universal Health Services Hospital, Blue Marlin Boulevard, Belize City; and Dr. Javier Eduardo Miguel Magana, a paediatrician, then employed at Belmopan Hospital.

30. In addition, several medical reports were accepted as evidence, notable were: the report dated 24.10.2002, by Dr. Meenavalli, the first defendant, to the Regional Manager, Western Regional Hospital; the report dated 31.10.2002, prepared by Dr. Eroll Vanzie, the Government Director of Medical Services; the report dated 16.5.2002, prepared by Dr. Romaine Schubert, a paediatrician neurologist of the Institute for Basic Research in Development Disabilities, at No. 1050, Forest Road, New York, USA; the report dated 13.10.2000, prepared by Dr. B. Meza, of La Loma Luz Hospital, Cayo District; the report date 20.12.2000, prepared by Dr. Emanuel Voado, a neuro-surgeon at Universal Health Services Hospital, Blue Marlin Avenue, Belize City; the report dated 4.10.2002, prepared by Dr. Hector Marin Salvati of

Clinica Carranza, Chetumal Quintana Roo, Mexico; and the report dated 27.2.2002, prepared by Dr. Marco Mendez of Belize Neurology Centre, 218 Meighan Avenue, Belize City. All the reports were read and interpreted by the doctors who testified.

31. The report of Dr. Errol Vanzie was very disappointing. He held an important post, that of Director of Health Services. It was his duty to prepare and submit a responsible report about this grave mishap to the Chief Executive Officer of the Ministry of Health. The report was expected to contain sufficient scientific information and objective assessment, so that higher authorities could take a fair decision on the matter.

32. Dr. Vanzie's report was deliberately scanty. He did not mention that an important document, the chart which progressively recorded everything about the patient, went missing. He talked only about Dr. Raju's (meaning Dr. Menavalli's) report. Even so, Dr. Vanzie's report did not analyze each note made by Dr. Meenavalli on each day he attended to Mrs. Matute and on the day of delivery. Further, it did not deal with cancellations in Dr. Meenavalli's note's. Dr. Vanzie

seemed not to have looked at the reports and notes of the anaesthesiologist, the report and notes of the paediatrician, and the outpatient card issued to Mrs. Matute. He did not refer to them at all. He did not bother to invite Mrs. Matute for a fact-finding interview, and did not bother to see baby Janae. He repeated the apgar scores, 8-4-9 and the gestation age of 37.6 weeks from the report of Dr. Meenavalli, and ignored the apgar scores and gestation age in the report of Dr. Magana.

33. I am compelled to set out Dr. Vanzie's report in full so as to convey the disappointment that one gets from it. It was this:

> **"FROM:** **Director of Health Services**
>
> **TO:** **Chief Executive Officer Ministry of Health**
>
> **SUBJECT:** **JANAE MATUTE – CHILD OF MRS. GEORGIA MATUTE**
>
> **DATE:** October 31, 2002
>
> Reference your memorandum GEN/27/01/02(121) dated October 21, 2002.
>
> According to Dr. Raju's report on the case, he conducted a C-Section on Mrs. Georgia Matute on December 20, 2000 to deliver Baby Matute who according to mother's report and physical examination by Dr. Raju, the child was at 37.6 weeks gestation.
>
> The child weighed 6lbs 4 oz and had apgar score of 8-4-9. The above information is corroborated by recordings in Mrs. Matute patient docket.

Facts:

- A 37.6 weeks product is considered "of term"
- The weight of 6 lbs 4 oz and apgar of 8-4-9 confirm the viability of the product
- The c-section was indicated due to history of previous c-section and large babies (9+ lbs)

The above findings show that the pregnancy of Mrs. Matute and the delivery of Baby Matute by Dr. Raju Meenavalli was appropriate. There is no reason to suspect malpractice or negligence on the part of the attending physician. There is no information to suggest that the present health status of the child is linked to the management of the pregnancy and the delivery.

Dr. Errol Vanzie
Director of Health Services".

34. ***Determination.***

Was the claim time-barred?

The convenient starting question in the determination is, whether this claim is time-barred and should not be entertained by court. I do accept the submission of Ms. McSweaney that the joint claim of Mrs. Matute and baby Janae against the Attorney General was time barred. It ought to have been commenced before the expiration of one year from the date on which the cause of action accrued. ***Section 27 of the Limitation Act***, ***Cap 170,*** is the authority. It states as follows:

"27 (1) No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act or other law, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act or other law, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued:

Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purpose of this subsection, until the act, neglect or default has ceased.

(2) This section shall not apply to any action to which the Public Authorities Protection Act does not apply, or to any criminal proceedings".

35. Acts of Dr. Meenavalli in the course of his employment would be acts in the pursuance, or execution of a public duty of the Government to provide health services. It would be the subject of s: 27 (1) of the

Limitation Act. Claims in respect of those acts must be brought within one year of the accrual of the cause of action.

36. Mrs. Matute learnt that something was wrong with her baby on 21.12.2000, the day after the delivery; she saw that the baby was being aided to breathe, and she was told that what was wrong was that the baby had been born premature. That was cause for her to be aggrieved and bring a court claim, given what transpired during prenatal visits to Dr. Meenavalli. If that was not sufficient cause to be aggrieved, then three months later she should have been aggrieved. The poor condition of the baby was evident to anybody, Dr. Martinez Salinas testified. That would be in March 2001. The cause of action accrued that time.

37. In any case, by the most generous view, one would say that the cause of action accrued one year after the birth of baby Janae. Mrs. Matute said that was when she began to pay much attention to the condition of the baby because the baby could not do the things that a one year old would do. She went to inquire with Dr. Magana about what was wrong. He told her that the baby was, "brain damaged because of

lack of oxygen at birth". One would say with certainty, that was when Mrs. Matute fully recognized, or was made fully aware that the condition of baby Janae was not normal and that was caused at delivery. She had enough information to feel aggrieved about it. That would be in December 2001. By that generous view, the cause of action accrued in December 2001.

38. Assuming that Mrs. Matute had made a complaint to the authorities and hoped that the matter would be resolved, then she should have made her claim within a reasonable time of not receiving a reply. It seemed that departmental inquiry was made in 2002. However, the point was not raised as a factor in determining the date of accrual of the cause of action.

39. Mrs. Matute filed this claim on 2.1.2003, over one year from December 2001. The cause of action had accrued over one year before, and the claim to the extent that it was based on an act in pursuance, or execution of an Act or a public duty, had been time-barred.

40. Regrettably that rule seems hard on a person in the shoes of Mrs. Matute, but that is a statutory law; it is not for the court to question the wisdom of a statutory law, unless it is inconsistent with the Constitution.

41. That law is even harder on baby Janae. The cause of action accrued and expired before she gained capacity to act on her own. She still does not have capacity; and because of her medical condition she might never have capacity to act on her own. She has to suffer the mistake or mishap that occurred at the hospital, and the lapse of her mother and father with grave hardship. I was tempted to interpret s: 27 of the Limitation Act as not applicable to a claimant who did not have capacity to bring a court claim while time ran. I decided otherwise because of the uncertainty that decision would bring into the rule about time limitation of action.

42. I think the position of a minor such as baby Janae who is unable to bring a claim, yet time runs against her, calls for legislation to correct the injustice in the rule as it is now. In the meantime I recommend that the Government adopts a magnanimous approach and meet

meritous claims of persons who lack capacity to make a court claim even if such claims are time- barred. That a claim is time- barred does not prohibit the Government from acting magnanimously.

43. Is the entire claim time-barred? In my view ***section 27 of the Limitation Act*** does not apply to that part of the claim directed at Dr. Meenavalli when he was not acting in the course of the employment of the Government, that is, not acting in pursuance, or execution of an Act or a public duty. When he attended to Mrs. Matute and to the delivery of baby Janae, Dr. Meenavalli acted to a large extent for himself, not as an employee of the Government in the course of employment. He charged fees for his services including fees for delivery. All the antenatal consultations and examinations except the first one, took place at his own private clinic. The claim against him to the extent that he did not act in the course of employment is not time-barred.

44. Generally a claim in tort is time-barred after the expiration of six years from the date on which the cause of action accrued – see ***s: 4 of the Limitation Act***. This claim was filed over one year or over two

years after the cause of action accrued. It is well within time to the extent that it is a claim against Dr. Meenavalli in his personal capacity.

45. *Whether there was negligence – the law.*

Before I appraise the evidence I shall outline the law of negligence as it applies to a professional, in this case, a gynaeologist-obstetrician. Dr. Meenavalli is a specialist gynaecologist-obstetrician. He is a specialist doctor in the area of medicine which deals with female diseases of the reproductive organs, and a specialist doctor in the area of medicine which deals with pregnancy and the birth of babies. So Mrs. Matute was attended to by a doctor who professed the most specific skills relevant to her condition.

46. To apply the law regarding negligence, the court must in the first place, determine that a relationship exists, or has been brought about between the medical professional practitioner and the patient, such that the relationship imposes a duty of care to the patient on the medical practioner. The general rule is that once a medical practioner has accepted one as his patient, the practioner owes a duty of care to

the patient in the law of torts, irrespective of any duty in a contract that might exist between the doctor and the patient – see ***Gladwell v Steggal (1939) 5 Bing . NC. 733***.

47. The duty requires the practioner to exercise reasonable care and skill in his treatment of the patient to avoid acts or omissions which an ordinary skilled practitioner can reasonably foresee would be likely to injure the patient. In legal expression, the patient becomes the so called neighbour who the practioner ought to have in contemplation as being affected by the act of the practioner. That general statement of the concept of duty of care is derived from the formulation in the time-honoured case of ***Donaghue v Stevenson [1932] A.C. 562.*** The standard of care varies with the level of skill.

48. In this claim it was not an issue that, Dr. Meenavalli accepted Mrs. Matute whose condition was pregnancy, as a patient. In the law of torts he owed a duty of care to a standard of a specialist gynaecologist-obstetrician, a skilled professional, to guard against reasonably foreseeable injury to Mrs. Matute and the baby before birth, at birth and soon after, apart from his duty in the contractual

arrangement under which he charged Mrs. Matute fees for his services. The government hospital also accepted Mrs. Matute as a patient and so the hospital also owed her a duty to be attended to with care, but the claim against the hospital has been time-barred.

49. The standard of care expected of a person who professes a special skill in a particular task or area is higher because he possesses that special skill. So the standard of care expected of Dr. Meenavalli was that much higher, commensurate with the skill he professed. It was said a long time ago by Tindal C.J. in ***Lanphier v Phipos (1838) 8 C & P475*** that:

> *"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake , if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of care and skill".*

50. In this jurisdiction I adopted in the case of, ***Mike Williams v Atanascio Cob and Others, Supreme Court Action No. 507 of 2002,*** the statement of the law, by McNair J. in, ***Bolam v Frien Hospital Management Committee [1957] 1 WLR 582,*** regarding the standard of care by a specialist medical practioner. The Court of Appeal (Belize), in ***Civil Appeal No.9 of 2004,*** confirmed my decision applying that statement of the law, and holding that Dr. Cob was not negligent, notwithstanding that he perforated the oaesophagus of the claimant during a procedure he carried out. The Court upheld that Dr. Cob carried out the procedure according to the standard of care of an ordinary skilled professional exercising and professing the skill, and that the mishap occurred, notwithstanding that Dr. Cob exercised care at the standard expected of a skilled practitioner.

51. The celebrated statement of McNair, J. to the jury, which statement I adopted is on page 586 of the report as follows:

> *"... I must tell you what in law we mean by 'negligence'. In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act*

which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man on the street. He is the ordinary man. In one case it has been said you judge him by the conduct of the man on the top of the clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special kill 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 the clapham omnibus, because he has not this special skill. 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; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".

52. On appeal against the direction given by McNair. J, the Court of Appeal (UK) upheld the direction. The appellant who suffered fracture of the acetabula lost his claim that a doctor employed by the defendant hospital was negligent in, not using a relaxant drug prior to electro-convulsive therapy treatment, not physically securing the patient, and not warning the patient of the possibility of violent convulsion and bone fracture. The court held that the doctor acted in accordance with practices accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment, and went on to hold that the treatment and the manner adopted by the doctor were proper treatment and manner, there was no negligence.

53. So in this claim the court has to determine whether on the evidence, Dr. Meenavalli acted in the management of the pregnancy of Mrs. Matute, and in the act of delivery of the baby not in accordance with practices accepted at the time as proper by a responsible body of medical opinion. That means if he made a mistake or mistakes, the question is whether the mistake or mistakes were, in the responsible opinion of a number of doctors, not such that could be made if

reasonable care and skill were exercised, and notwithstanding that there may be some medical opinion to the contrary.

54. In a claim of negligence in medical treatment, a mishap or mistake would have occurred causing injury to the claimant. The professional is not held liable simply because the mishap or mistake occurred, but whether it occurred as the result of lack of care at the standard of an ordinary medical practitioner or of the ordinary specialist practioner of the particular skill, exercising and professing that skill.

55. The above point was well illustrated in the case of ***Whitehouse v Jordan [1981] 1W.L.R. 246,*** where the house of Lords (UK) held that the medical practitioner, a registrar, was not negligent on an allegation that in, "a trial of forcepts delivery", the doctor held the head of the baby with forcepts and negligently, "pulled too hard and too long", to ease the baby through the mother's pelvic ring where the head was wedged, and thereby caused asphyxia which in turn caused cerebral palsy. The House of Lords upheld the decision of the Court of Appeal (UK) that, on the evidence there was no error by the defendant registrar, and if the act of the registrar was an error, then it was an

error which on the evidence, a competent professional exercising and professing the skill, and acting with ordinary care of such a skilled person would have made; there was no negligence. The House of Lords approved the test as to negligence by a medically skilled person, advanced by Mc Nair J, the trial judge in the ***Bolam Case.***

56. *Whether there was negligence in this case.*

I begin appraisal of the evidence by noting that it was testified for the claimants that an important record, a chart in which, "all the information", about the pregnancy and delivery of Mrs. Matute was progressively recorded went missing after a departmental inquiry was commenced at the hospital. That was admitted in the testimony of Dr. Meenavalli. The contents of the chart have remained unknown. Given the rest of the evidence, I prefer not to take that as aiding proof of the claimants' case or the defendant's case.

57. Taking the evidence as a whole, there has been proof, and on some points admissions that, some errors occurred in attending to, and treating Mrs. Matute. The first error was in determining the age of the pregnancy – referred to as, "the gestation age", by the professional

witnesses. That led to error in the date of confinement and delivery, and the premature birth by caesarean section of baby Janae.

58. In his report dated 24.10.2002, exhibit D(RM)12, to Pearl Ellis the Regional Manager, Dr. Meenavalli stated that he estimated the gestation age on the date of delivery 20.12.2000, to be 37.6 weeks, but he also stated that the actual gestation age at birth was 36 weeks. In his testimony he said that on 17.12.2000, three days before delivery date, the gestation age was 37.4 weeks, but also said that the baby was born on 20.12.2000 at 36 weeks. He admitted anyway in his testimony that he made a mistake in determining the gestation age. For example, he said that on 7.12.2000, he had to change the age from 35.1 weeks to 36.1 weeks. He made some other similar changes in his notes and on the out patient card of Mrs. Matute.

59. The first point for determination that I deal with is the age of the pregnancy – the gestation age, and the date of delivery. Dr Magana gave the gestation age at delivery as 36 weeks. He described the baby as, "preterm of 36 weeks". He explained the method he used after the baby had been delivered, to determine the gestation age. Another

opinion was that of Dr. Meza of La Loma Luz Hospital. From his determination on 13.10.2000, that the gestation age was 24 weeks, the gestation age would be about 34 weeks at delivery on 20.12.2000. My conclusion is that the baby was born between 34 to 36 weeks. Dr. Meenavalli had indicated in his record, whether negligently or deliberately falsely two days before the date he set for delivery that, the gestation age was 37.4 weeks. So according to his record the baby would be 37.6 weeks. That was an error or a falsehood.

60. As to whether this baby was born premature, the testimony of Dr. Meenavalli was vague. He said that, "a term baby", was one born at 37 weeks. Later he said that on 17.12.2000, he examined Mrs. Matute and recorded the gestation age as 37.4 weeks. Then he admitted that in his report to the Regional Manager of the Western Regional Hospital he stated that, "a live approximately 36 weeks old female child … was born".

61. On the other hand, all the three doctors who testified were clear in their testimonies about "a term baby" or "a preterm baby". Dr. Magana and Dr. Grinage said that a term baby is one born from 37 to

40 weeks of gestation. Dr. Martinez Salinas said that a term baby is one born from 38 to 41 weeks of gestation. So according to these three doctors, baby Janae, born between 34 to 36 weeks was born premature. My conclusion is that baby Janae was delivered a preterm baby, and when Dr. Meenavalli had erroneously indicated that the baby was ready for delivery as a term baby.

62. In the beginning Dr. Meenavalli made a mistake in determining the age of the pregnancy. I believed Mrs. Matute that she told him on the first visit and repeated on the second, that her last menstruation was on 27.4.2000, but Dr. Meenavalli simply ignored it. I believed that was the reason Mrs. Matute sought a second opinion from Dr. Meza at La Loma Luz Hospital. Unfortunately when he was given the report prepared by Dr. Meza, Dr. Meenavalli was obdurate. One does not have to be a skilled professional to know that the exercise of reasonable care requires paying attention to a second opinion from another professional. Dr. Meenavalli was negligent in ignoring the second opinion.

63. Secondly, all the doctors who testified including Dr. Meenavalli, said that the date of the last menstruation period was very important in determining the gestation age and date of delivery. Dr. Salinas said it was the vital data. In my view, Dr. Meenavalli erred in ignoring the last menstruation date, and by so doing, he acted below the practice accepted by a responsible body of opinion and therefore below the standard of care by an average skilled specialist, even of a skilled general practitioner.

64. It was submitted by learned Crown counsel Ms. McSweaney that no obstetrician was called as a witness and none of the doctors called could contradict the testimony of Dr. Menavalli, the only obstetrician who testified. My conclusion is that the expert knowledge about determining the gestation age is shared by a paediatrician and even a general practitioner. The witnesses, especially Dr. Martinez Salinas, outlined much more expert knowledge than just the last date of menstruation. Dr. Meenavalli did not contest that testimony. The court asked whether even a general practitioner had such knowledge and could carry out caesarean delivery. The answer was yes. Dr. Meenavalli himself agreed that the date of the last menstruation was

important, but that he did not use it because Mrs. Matute was not sure of it. Then later in his testimony, he said that on 17.12.2000, he recorded the gestation age as 37.4 weeks because he, "intended to be correct according to her last day of period", whatever he meant by that.

65. Apart from negligent error in the determination of the gestation age, the evidence showed that Dr. Meenavalli made a deliberate decision based on the christmas holidays approaching, to carry out the delivery before the holidays. That was negligent, even reckless.

66. I was compelled, and disappointed to conclude that it was Dr. Meenavalli, not Mrs. Matute, who wanted the delivery carried out before the christmas holidays of the year 2000. In my view, that was the reason for Dr. Meenavalli altering by four weeks the gestation ages he had noted earlier.

67. The above conclusion is inferable from the following facts. On the second visit of Mrs. Matute on 3.8.2000, when christams holidays were not yet in the air, Dr. Meenavalli determined the date of delivery

to be 2.1.2000. Again on 1.11.2000, when christmas holidays were still not in the air, he noted the gestation age as a mere 26 weeks, and set the date of delivery on 3.1.2001, just two days later than the earlier date he had set on the second visit. He noted that date on an official certificate, the Medical Certificate of Expected Confinement, exhibit D(RM) 15.

68. Then came the visit of Mrs. Matute about four weeks later on 30.11.2000. Dr. Meenavalli suddenly recorded the gestation age as 34 weeks. He added 8 weeks instead of four weeks. There has been no explanation for that arithmatic inaccuracy. It is probable that he was trying to justify 20.12.2000, as the date of delivery.

69. The next visit by Mrs. Matute was five weeks later, on 7.12.2000. Dr. Meenavalli told her on that occasion that the baby was ready for delivery, he could carry out a caesarean section delivery on or before christmas, but it was better before the christmas holidays. I do not believe the testimony of Dr. Meenavalli that, it was Mrs. Matute who asked for caesarean section delivery before the christmas holidays, or that her uterus was ripe and Mrs. Matute was threatening to go into

premature labour. If Mrs. Matute requested delivery earlier than the scientific date, it would still have been the duty of Dr. Meenavalli to exercise professional care and refuse the request. This is not a case in which *volenti non fit injueria,* that is, 'no wrong is done to one who consents' applies.

70. The choice of Dr. Meenavalli to carry out delivery earlier than the 3rd January 2001, the date he had set earlier, was not made because the life or health of the mother or of the baby was at risk, or for any other genuine scientific reason. The choice was made for the convenience of Dr. Meenavalli regarding the christmas holidays. It was made without exercising reasonable care to a patient, expected of any medical practitioner, let alone a gynaecologist-obstetrician. It was reckless.

71. Further still, although all the other doctors who testified agreed that it may be a good decision to do an elective caesarean section delivery if the patient had prior caesarean delivery, they were unequivocal that the main consideration always remains the health of the mother and the baby, and that it is always better to wait until term time or as near

as possible. Dr. Meenavalli made the choice to carry out caesarean section delivery when the health of the mother or baby was not threatened, and without waiting until term time or as near as possible to term time. Again there was negligence in the decision.

72. The second ground of negligence that, Dr. Meenavalli did not assemble all the usual necessary professional staff at the delivery has also been proved, in my view. I accept that an anaesthesiologist, Dr. Sree, was present. I also accept that the two nurses present were sufficient for their part. It is, however my view that, it was necessary to have a paediatrician present at this delivery because Dr. Meenavalli knew that it was a delivery of a preterm baby and by caesarean section. Further, he had determined that the mother had larger than usual amniotic fluid. This was not a normal delivery, he had to take the necessary care to have a paediatrician available. There has been lack of care to the standard of an ordinary skilled medical practitioner in that Dr. Meenavalli did not ensure that a paediatrician was present at this delivery.

73. About the ground that something negligent happened at birth to cause asphyxia, my conclusion was that there was insufficient proof. Those who were present; Dr. Sree and the two nurses were not subpoenaed to testify about the manner Dr. Meenavalli carried out the delivery. The only evidence was in the testimony of Dr. Meenavalli. He said that at birth the baby had difficulty in breathing, "due to fluid in the airway", and that at that point he lost sight of the baby. Then he said that the child was born well. I am unable to conclude that something negligent happened at that moment. My conclusion is not based on the view expressed at the Court of Appeal stage in, ***Whitehouse v Jordan Case***, that *res ipsa loquitur* does not apply in claims based on medical negligence. With due respect, there could arise a set of facts in which *res ipsa loquitur* would apply.

74. *The medical condition of baby Janae and the cause.*

All the three doctors who testified agreed that the condition of baby Janae is that of "cerebral Palsy". It is a defect of motor power and coordination related to damage of the brain. The diagnosis in detail was the following: perinatal asphyxia, severe global developmental delay, spastic diaperesis and alternating estropia. Dr. Salinas said that

he conducted, "Denvor Development Screen Test (D.D.S.T)", on Janae to determine growth and development in the four areas of the brain namely, gross motor functions area, fine motor functions area, language functions area and social functions area. He found defect. He concluded that neurological delay in baby Janae showed at three months. All the doctor witnesses said that baby Janae suffered irreparable damage to her brain because of asphyxia at birth and that she will never be a normal child.

75. Dr. Meenavalli did not contest what the doctor witnesses said, but he contended that the baby did not suffer asphyxia because of anything he did or did not do. He also contended that he was not negligent, the baby was delivered well and conveyed to the anaesthesiologist well. He said further that, the apgar scores of 8-4-9 by him and 8-4-8 by the anaesthesiologist supported his contentions. He asserted that the baby suffered complications after birth and that was the cause of her condition.

76. I have to say straight away that in the end Dr. Meenavalli said that he got his apgar scores from the anaesthesiologist and the nurses. They

were not called as witnesses so the apgar scores of 8-4-9 and 8-4-8 are of no evidential value. Apgar score is important because it is an evaluation of the physical status of a newborn baby, by assigning numerical values of 0 to 2 to each of the vital criteria: the heart rate, respiratory effort, muscle tone, response stimulation and skin colour.

77. The scores by Dr. Magana were taken at least from seven minutes after birth, the second and third scores were five minutes and ten minutes respectively apart after the first. The usual times for taking apgar scores are at one minute, five minutes and ten minutes after delivery. Notwithstanding the late taking of apgar scores by Dr. Magana, all the doctor witnesses said the scores were consistent with asphyxia at birth and the condition of baby Janae they saw. I accept their testimonies about that.

78. *Causation*

It is my conclusion that the negligence in determining the gestation age, and later the deliberate disregarding of the scientific date of delivery, and fixing it based on convenience before christmas holidays, caused the condition of baby Janae. It caused her to be born

premature, and when Dr. Meenavalli did not prepare for premature birth during prenatal management of the pregnancy. Baby Janae's lungs were not matured enough to convey oxygen around the body, the brain was damaged because of lack of oxygen. Damage to the brain resulted in cerebral palsy.

79. The evidence was that if a premature delivery was planned, the doctor would start at an early point to ensure, "controlled environment". He would, for example, administer steroid to mature the lung muscles so as to avoid hyaline membrane disease. It was a condition found in baby Janae. It meant that blood vessels in the lungs were not matured enough, some collapsed and so oxygen and nutrients could not be conveyed sufficiently around the body, and waste could not be conveyed from and out of the body sufficiently. The brained suffered lack of oxygen and was damaged, resulting into cerebral palsy.

80. If there was trauma or distress at birth or excessive anaesthetic which caused asphyxia, then that added to asphyxia occasioned by the immature lungs.

81. I also concluded that if Dr. Meenavalli ensured that Dr. Magana was present at the delivery, his intervention might have minimized the damage to the brain of baby Janae a little more. Failure to have a paediatrician at the delivery aggravated the condition of baby Janae.

82. My decision is that Dr. Raju Meenavalli was negligent in managing the pregnancy of Mrs. Matute and in arranging for necessary staff to be present at the delivery of baby Janae. He is liable for negligence to Mrs. Georgia Matute and baby Janae. Judgment is entered for the claimants, Georgia Matute and Janae Matute against Dr. Raju Meenavalli. He will pay the costs of the claimants, to be agreed or taxed.

83. The claim against the Attorney General is dismissed. Had the claim against the Attorney General not been time-barred he would have been liable at least to the limited extent that the hospital did not ensure that all the necessary staff attended at the time of this delivery. I recommend that the Government considers some payment to baby Janae and her mother as a magnanimous gesture. Costs of the claim against the Attorney General is denied in the circumstances.

84. I have not assessed damages to be paid by Dr. Meenavalli to Mrs. Matute and baby Janae. I would like to have further written submissions about general damages. Counsel are requested to provide case law, case examples and any other materials. The written submissions are to be filed by 30.4.2010.

85. Delivered this Friday the 5th day of March 2010
At the Supreme Court
Belize City

Sam L. Awich
Judge