Citation: 2017 MBPC 1

THE PROVINCIAL COURT OF MANITOBA

BETWEEN

Her Majesty the Queen	)	Sharyl Thomas and Debbie Buors
	)	for the Crown
	)	
- and –	)	
	)	
	)	
Andrea Giesbrecht	)	Greg Brodsky, Q.C. and
	)	Matthew Gould
	)	for the Accused
	)	
	)	
	)	Judgment delivered: February 6, 2017.
	)	

Murray P. Thompson, P.J.

Introduction

Note- there is an order of non-publication banning publication in any document or the broadcasting or transmission in any way, of the names or identities of the accused's two living children.
***Warning:** some of the content of this judgment is graphic in nature and may not be suitable for all audiences.*

[1] Andrea Giesbrecht is charged with six counts of "concealing the dead body of a child". Section 243 of the *Criminal Code of Canada* states:

> **243** Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[2] The Information alleges that these offences were committed between March 7, 2014 and October 20, 2014.

[3] On October 20, 2014, employees cleaning out a U-Haul storage locker called the Winnipeg Police Service. The remains of six full or near full term fetuses were discovered in varying stages of decomposition, in a storage locker rented by the accused since March 7, 2014.

[4] Subsequent autopsies concluded that no determination as to cause of death could be made. As well, primarily due to the advanced state of decomposition, none of the pathologists could determine that these infants were born alive.

[5] Defence counsel acknowledged that because the Crown cannot prove that the children proceeded in a living state from the body of the mother, no homicide charges were available in this case.

[6] The accused elected trial in Provincial Court and called no evidence, putting the Crown to the proof of the elements of the offences.

Matters not in dispute

[7] Defence counsel agreed that jurisdiction was not disputed; all events took place in the City of Winnipeg in the Province of Manitoba, and agreed that Andrea Giesbrecht was the lessee of the rental storage locker where the fetuses were found.

Matters at issue

[8] At issue is whether the Crown has proven, beyond a reasonable doubt, the elements essential to each of the charges. It is important to bear in mind that the Crown did not make a similar fact application and therefore each count must be proven independently of the other, with particular attention to the viability of each fetus.

Relevant law on section 243 of the *Criminal Code*:

[9] The Defence argues that since the Crown cannot prove that the infants were born alive, they cannot prove the charges.

[10] The Crown's written brief succinctly summarizes the law, I adopt the following from their brief:

> The Supreme Court of Canada in the decision of *R. v. Levkovic* considered section 243 of the Criminal Code. The circumstances in that case were that a superintendent of an apartment building cleaned a recently vacated apartment and discovered the remains of a human fetus. As in this case, due to decomposition it was impossible to determine whether the baby was born alive or still-born. The issue before the court was whether section 243 violated section 7 of the Charter for vagueness. The Supreme Court of Canada found that it did not, but restricted the pre-birth application of s. 243 to the delivery of a child that would likely have been born alive. This was defined as "a *child that has reached the stage of development where, but for some external event or circumstances, it would likely have been born alive."*
>
> At paragraph 60 and 61, the Supreme Court of Canada said the following:
>
> > In order to facilitate the investigation of homicides, s.243 must therefore apply to children that were either born alive or were likely to be born alive and thus capable of satisfying the *Criminal Code* definition of a human being in s. 223(1). As the trial judge reasoned at para. 156:
> >
> > ….allowing persons to conduct themselves as though pregnancy terminated in still-birth, and to say so if challenged, all without reliable government certification, amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it. Unchecked and unreviewable disposal of a still-born child effectively defeats the state's ability to verify that death preceded live birth.

> The Supreme Court of Canada makes it clear the goal of section 243 is to facilitate the investigation of possible homicides. *R. v. Levkovic*, 2013 SCC 25 (Tab 2 Casebook of the Crown)

[11] Important principles that come from the *Levkovic* decision as they apply to this case include:

a) That the child must have been likely to have been born alive;

b) That is, it had reached a stage of development where, but for some external event or circumstance, it would likely have been born alive;

c) Miscarriages, which are failed pregnancies (typically defined by the gestational age being 20 weeks or less or where the fetus weighs 500 grams or less), as well as aborted fetuses, are not captured by section 243 of the *Criminal Code*; and

d) Still births, which are developed fetuses (typically defined as more than 20 weeks gestational age or weighing more than 500 grams), are captured in section 243.

[12] Although I have used the term "typically defined" in the above two paragraphs, it is important to understand that neither Parliament nor the Courts have defined a fixed threshold of gestational age in section 243.

[13] In *Levkovic*, Justice Fish reviewed relevant jurisprudence on the scope of this offence dating back over 150 years in the old English case of *R. v. Berriman* (1854), 6 Cox C.C' 388 (Eng. Assizes). Ms. Berriman was charged with concealing the birth of her child and was linked by police to the "half calcined" bones of a baby with a gestational age of seven to nine months. As Justice Fish wrote:

> [51] *Berriman* suggests that an unborn child of at least seven months is more likely than not to be born alive. By setting seven months as a guideline — rather

> than a bright line — the court in that case recognized that a child's chance of being born alive will generally increase along the gestational spectrum but is not necessarily predictable based on the gestational age of the fetus alone.
>
> [52] I would in any case hesitate to import into s. 243 a fixed threshold based on gestational age that Parliament has so far chosen to omit.
>
> [53] In my view, s. 243 is informed by *Berriman*.
>
> [54] However, where Erle J. found it sufficient in *Berriman* that the fetus "*might* have been born alive", I would adopt a *likelihood* requirement instead. I agree with the Court of Appeal that, for the purposes of s. 243, a fetus becomes a child when the fetus "has reached a stage in its development when, but for some external event or other circumstances, it would *likely* have been born alive" (para. 115 (emphasis added)).
>
> [55] This "likelihood" standard best comports with the late term focus of s. 243 and thus affords greater certainty in its application.
>
> [56] To support a conviction under s. 243, it must be shown that the "remains" disposed of were the remains of a child. In cases involving death before birth, the burden is therefore on the Crown to prove that the fetus would likely have been born alive.

[14] The following additional principles can be gleaned from the Supreme Court's decision in *Levkovic*:

e) Expert evidence can be relied on to establish as a matter of fact that the disposed-of remains were those of a fetus that was likely to have been born alive; and

f) A conviction would only lie where the Crown proves the fetus, to the knowledge of the accused, would likely have been born alive.

[15] While this last element of the test appears to be in conflict with the inclusion of still-born children, it is not. This tension is balanced by the requirement that the

Crown prove through direct evidence or circumstantial evidence, the accused's awareness that the fetus had reached a stage of gestational development, even if still-born, that made it likely to have been born alive. Any doubt in this regard would require an acquittal.

[16] This balance captures a subset of pre-birth fetuses enabling the state to meet the intended purpose of this law, to facilitate the investigation of possible homicides, while at the same time sufficiently limiting enforcement discretion and providing citizens with fair notice of the type of conduct that risks criminal sanction.

Relevant law as to the meaning of "in any manner disposes of" the dead body of a child:

[17] At my request, counsel provided written briefs on this legal issue. After reviewing those briefs including a number cases, I note the following:

[18] Disposal is not defined in the *Criminal Code*.

[19] The actual phrase utilized in section 243 is "in any manner disposes of".

[20] Section 12 of the *Interpretation Act* directs that "Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[21] A purposive approach is consistent with statutory interpretation. The Supreme Court of Canada in *Levkovic* (Supra) has determined that the goal of section 243 is to facilitate the investigation of possible homicides.

[22] In *Levkovic* the Supreme Court of Canada quoted the trial judge with approval:

As the trial judge reasoned at para. 156:

> . . . allowing persons to conduct themselves as though pregnancy terminated in still-birth, and to say so if challenged, all without reliable government certification, amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it. Unchecked and unreviewable disposal of a still-born child effectively defeats the state's ability to verify that death preceded live birth.

[23] The clear goal of section 243 is to facilitate the investigation of possible homicides.

[24] Thus a "fair, large and liberal" interpretation of the statute, keeping in mind the purpose at play, includes giving broad definition to the words "in any manner disposes of" in section 243.

[25] The trial judge in *Levkovic* (Supra) also defined disposal; here is what he wrote at paragraph 120:

> The conduct of disposal ("disposes of"), on plain meaning and common dictionary definitions, is understood to be an act of getting rid of, throwing away, discarding or destroying...

[26] The definition of disposal includes destroying.

[27] Placing a dead child's body in such a way that it will decompose meets that definition.

Relevant law on time as an essential element of an offence:

[28] Counsel for the Defence take the position that the Crown has not proven an essential element of the case; the time period in the charges. Defence counsel argue that most, if not all of the fetuses, were disposed of prior to March 7th, 2014, the start of the offence dates alleged in the Information. Further, they submit it is

impossible that six near or full term fetuses could have been disposed of within the seven and one-half month time frame alleged in the Information.

[29] Is the time period alleged an essential element of the offence?

[30] *R. v. B. (G.),* [1990] 2 SCR 30 is the leading case as to whether the time of an offence is an essential element of the offence. Essentially, it is a contextual test, based on fairness to the accused.

[31] The first question that must be asked is whether time is an essential element of the offence or crucial to the Defence. Worded another way, did the accused have sufficient notice of the offence with which she was charged? The "golden rule" is that the accused must be reasonably informed of the transaction alleged against her, thus giving her the possibility of a full defence and fair trial.

[32] In this case, as in *B. (G.),* there was no formal attack on the Information and no motion to quash for insufficiency. As well, much of the evidence led by the Crown in this case was disclosed in advance, in document form, including the accused's medical records and expert witness reports.

[33] Even though the Crown was faced with only circumstantial evidence as to when each of the six infants was delivered, and despite being of the view that the date of birth of each child need not be proven, as concealment was a continuous and ongoing transaction, evidence called by the Crown during the trial went back two decades in time.

[34] The trial of this matter took place intermittently, as more time was required than was originally scheduled. At no time during those breaks, each lasting several weeks, did the Defence raise issues of trial fairness or suggest that they were being taken by surprise. No adjournment or other remedy was sought.

[35] The time period is an essential element of the offence, in circumstances where an alibi defence was or could have been raised. Alibi was never raised and would not make sense on these facts.

[36] With respect, I cannot see that the Defence team would have been taken by surprise in the preparation of their case or that there was prejudice to the accused. I am satisfied that the time period alleged in 2014 is not an essential element of the offence.

Relevant law on sufficiency of Information and Indictments as an essential element of an offence:

[37] The Defence points out that the Information does not identify each of the six fetuses and therefore the Crown has not proven its case.

[38] A six count Information was laid not long after the discovery of the bodies in the storage locker and before the investigation was complete. As the investigation progressed, and as more details became known from the autopsy results and DNA testing, it would appear that the Crown paid insufficient attention to updating the Information.

[39] Each of the six counts are identical and use the following language:

> That Andrea Giesbrecht between the 7th day of March in the year 2014 and the 20th day in October in the year 2014 at the City of Winnipeg, in the Province of Manitoba did dispose of the dead body of a child with intent to conceal the fact that an UNKNOWN person had been delivered of it, by UNKNOWN MEANS contrary to section 243 of the *Criminal Code of Canada*.

[40] None of the counts identify which of the six bodies is being referred to, despite descriptors used in the autopsies to identify them. Section 581(3) of the *Code* requires the Court to identify the transaction referred to, but the absence or

insufficiency of details does not vitiate the count. Absence of details is usually remedied by a request for further particulars.

[41] Disclosure before trial and evidence at trial can and did help to particularize the offences. (see *R. v. Robinson* Ontario C.A. 53 O.R. (3d) 448 [2001].)

[42] I am unable to identify prejudice to the accused.

[43] Section 243 does not require the Crown to prove parentage, i.e. who was the mother that delivered the body of the child, and in any event, that information was not clear to the Crown prior to the DNA results.

[44] Nor does section 243 impose a requirement on the Crown to prove by what means the child was delivered.

[45] If the Crown has failed to make out one or more of the counts in the Information, it makes no practical difference on which count a not guilty verdict is entered.

[46] The reasons in this decision will make it clear on a fetus by fetus basis, as numbered and described by the autopsies, which verdict relates to which fetus. The fact that each count of the Information is identically worded does not make the Court's task impossible or prejudice the accused in any way.

[47] I am satisfied that the Information as worded, provided sufficient information to apprise the accused of the offences charged and did not impair the accused's ability to make full answer and defence.

What are the essential elements the Crown must prove?

[48] Accordingly, after analyzing the case law, I am satisfied that the Crown must prove the following:

That Andrea Giesbrecht:

1. Did dispose of the dead body of a child;

2. With intent to conceal the fact that an unknown person had been delivered of it;

3. The child was at a gestational stage of development where it was likely to have been born alive; and

4. To the knowledge of the accused, the child would likely have been born alive.

[49] The Crown must prove these essential elements on each count, independent of the others, and bears the burden of proof beyond a reasonable doubt.

Has the Crown met the test? (Analysis)

Element One –Did she dispose of the dead body of a child?

[50] Expert evidence from the autopsies established without doubt, that these were human remains; dead bodies of children.

[51] The Defence contends that Giesbrecht did not dispose of the bodies. Rather, they argue that she stored, kept and saved them, pointing to the fact that they were placed in a rented storage locker.

[52] The Crown argues that the accused was not keeping the bodies, rather she was concealing them in a storage locker and, in any event, one cannot keep human remains which decompose. The terms of the standard storage locker contract, signed by the accused, prohibited the storage of human remains.

[53] More determinative to the Court than the contractual arrangement regarding the storage locker, is the context and the manner in which the remains were kept. That evidence was detailed in the autopsy reports (Exhibit 5), which identified six unknown bodies, as well as in the police book of photographs (Exhibit 1)

[54] Save and except the contents of the two blue Rubber Maid tote bins and three large (5 gallon) plastic pails stacked in one corner, nothing else was found in the mostly empty locker.

Unknown Body # 1:

[55] Unknown body #1, a male infant, which appeared to be fully developed with a gestational age of 38-42 weeks, was located inside a white plastic kitchen-sized garbage bag knotted at the top, within a knapsack, placed inside a duffle bag. The contents of which, including the placenta, were placed inside a blue Rubber Maid tote bin and sealed with its lid. The tote bin also contained a cloth bag containing one pair of size 4 children's "Scooby Doo" underwear, a pair of socks, some children's toys, trinkets and some other miscellaneous items.

Unknown Body # 2:

[56] Unknown body #2, a male infant of gestational age of 35-39 weeks, was located wrapped in a children's patterned towel, wrapped in a second towel, located inside a white plastic kitchen-sized garbage bag knotted at the top, inside a loose plastic black garbage bag, inside a black canvas duffle bag that had been placed inside the other Rubber Made tote bin that was sealed by its lid. Also located in the duffle bag were a stack of receipts, an infant sized long-sleeved shirt, infant–sized socks and a woman's blouse. The body of unknown #2 was badly decomposed with marked tissue disintegration and loss.

Unknown Body # 3:

[57] The remains of unknown body #3, a male infant of gestational age of 35-39 weeks, were located wrapped in towels, inside a white plastic kitchen-sized garbage bag knotted at the top, located inside a maroon coloured gym bag that had been placed inside the same Rubber Made tote bin that unknown body #2 had been found in, which we know, was sealed by its lid. Soiled and decomposing clothing

were located in the Maroon bag, as were maggots. All that remained of unknown body #3 were skeletal remains.

Unknown Body # 4:

[58] Unknown body #4, a female infant of gestational age 36-40 weeks, was located inside a white plastic shopping bag, which was wrapped inside a brown bath towel, placed inside a plastic kitchen-sized garbage bag knotted at the top, which was wrapped in a child's cartoon towel and then placed inside a beige garbage bag. All of these items were contained in a yellow 5 gallon pail, sealed with a lid. While most of the body tissue was intact, decomposition of tissue and particularly of the organs had taken place.

Unknown Body # 5:

[59] The remains of unknown body #5, a male infant of gestational age of 34-37 weeks, were located encased within a disc of concrete-like material inside a plastic 5 gallon pail, sealed with its lid. The pail had to be cut open to gain access to its contents. The concrete-like disc containing the human remains likewise had to be cut open. While the remains had largely liquefied, an impression of the body remained in the hardened disc.

Unknown body # 6:

[60] The remains of unknown body #6, a male infant of gestational age of 35-38 weeks, were encased at the bottom of a plastic pail which was filled with a large of amount of white, hardened, detergent like powder. The body was decomposed with significant desiccation, leaving it hard and mummified. A white plastic shopping bag was located at the very bottom of the pail which contained the placenta.

[61] When Giesbrecht defaulted on payment, staff at the storage locker began taking inventory of the contents to prepare the items for auction. A strong smell

emanated from the tote bin when it was opened and it appeared to contain human remains. Police were called and thus began their investigation.

[62] I find that each of these bodies were not stored for purposes of preservation, rather the only reasonable and logical inference to be made from the manner in which they were packaged, whether they were bagged, sealed, encased in cement or powder, was that it was done in an effort to contain the smell of human decomposition and decay, thereby concealing their existence. As they were decomposing, they were being disposed of. The act of disposal and concealment was ongoing until discovery.

[63] If I am wrong in law that time is not an essential element of the offence, the accused in failing to pay rent on the storage locker per the terms of the lease, triggered termination of the contract, thereby abandoning and forfeiting the contents of the storage locker, including the bodies. This is the opposite act of keeping, saving or storing. Effectively, it meant she disposed of the bodies as of October 20th, 2014, which is within the dates captured in the Information.

[64] I am satisfied that the Crown has established the first element of the offence; that the accused did "dispose of the dead body of a child", with regard to each of the six bodies.

Element Two-With intent to conceal the fact that its mother had been delivered of it;

Parentage:

The Crown correctly points out that proof of parentage is not an essential element of the offence. Nonetheless, a determination of parentage is significant in relation to assessing the remaining essential elements of each offence.

[65] In what appears to be a legislative oversight in the *Criminal Code*, section 243 under which Giesbrecht is charged, is not one of the designated sections that

allows for a DNA warrant to issue, thereby compelling the accused to provide a blood sample.

[66] Innovative police work by Sergeant Kelly McCartney of the Winnipeg Police Service, sourced another way to secure DNA believed to have come from the accused.

[67] During the execution of a search warrant of Giesbrecht's home, Sergeant McCartney located a soiled sanitary napkin discarded in the master bedroom closet.

[68] Evidence adduced to the Court during the trial included that no other female lived in the home, the closet was in Giesbrecht's bedroom and that DNA was extracted from the sanitary napkin for comparison with DNA taken from a blood sample voluntarily provided by her husband.

[69] Those samples were sent for DNA analysis and a comparative analysis was conducted by Christina Crossman, a Forensic Specialist with National Forensic Services in an effort to establish relatedness to the fetal remains. Instead of testing a direct match, she was testing a specific biological relationship.

[70] She analysed the DNA sample from Mr. Giesbrecht, together with DNA from the sanitary napkin believed to have been used by the accused and compared them with DNA extracted from each of the six fetuses in an effort to determine relatedness.

[71] Ms. Crossman testified that in the case of a parent and child, the child inherits half its DNA from its mother and half its DNA from its father. A relatedness interpretation first requires evidence of DNA matching this pattern. If the evidence is consistent, then a calculation is done to determine the strength of that evidence; a likelihood ratio.

[72] She explained that the likelihood ratio compares two different probabilities. The first is the probability of seeing the evidence if the first hypothesis is correct; that these two people are the parents of the child. The other hypothesis would be that someone other than the two people being tested, are the parents.

[73] In comparing these two different hypotheses, any number that is greater than one supports the first hypothesis, and any number less than one supports the second hypothesis.

[74] We also know from Ms. Crossman's testimony that a likelihood ratio of greater than 10,000 indicates very strong evidence to support parentage.

[75] The test results were as follows:

Baby #1 (male)

It was 76 billion times more likely that Baby #1 was a biological child of the known donors.

Baby #2 (male)

It was 16 trillion times more likely that Baby #2 was a biological child of the known donors.

Baby #3 (male)

It was 590 times more likely that Baby #3 was a biological child of the known donors:

The explanation for the lower likelihood ratio is found in Ms. Crossman's testimony where she explained that the DNA sample was only available from bone powder. Recall that only skeletal remains existed of this fetus. The sample obtained was degraded DNA, not a full profile which would have contained fifteen different locations on the DNA, rather this sample only contained three out of fifteen. She testified that a likelihood ratio between 100 and 1,000 indicated

moderately strong evidence to support parentage. A second conclusion could be that the Mr. Giesbrecht was not the biological father of Baby #3.

Baby #4 (female)

It was 230 billion times more likely that Baby #4 was a biological child of the known donors.

Baby #5 (male)

It was 76 billion times more likely that Baby #5 was a biological child of the known donors.

Baby #6 (male)

It was 1.5 trillion times more likely that Baby #6 was a biological child of the known donors.

[76] I accept the expert testimony of Ms. Crossman. Her expertise was unchallenged by the Defence.

[77] I find that the DNA test results conclusively establish that Mr. Giesbrecht, the known sample provider, together with the donor of DNA from the sanitary napkin are the parents of five of the six children.

[78] The DNA evidence to establish parentage of Baby #3, the fetus with degraded skeletal DNA, is moderately strong, with a second possible conclusion being that Mr. Giesbrecht is not the father.

[79] The evidence established that the sanitary napkin was found in Giesbrecht's master bedroom closet.

[80] By his own estimate, Mr. Giesbrecht recalled that he and his wife resided together at that home for between seven to eleven years. When asked, he testified that he did not have a sexual partner other than his wife between 1999 and 2014.

[81] His testimony as well as the testimony of their oldest son, established that no other female stayed in that home for any period of time.

[82] The only logical and rational inference to be made is that the DNA found on the sanitary napkin came from Andrea Giesbrecht and I make that finding of fact.

[83] Based on that fact, together with the DNA evidence before the Court, I conclude that Andrea Giesbrecht is the mother and make the inescapable finding that she was the person that was delivered of each of these six near or full term fetuses.

Evidence of intent to conceal the fact that the mother had been delivered of them:

[84] What evidence is there that Giesbrecht intended to conceal the fact she delivered these six babies?

[85] Her husband, who met Giesbrecht when she was 17 or 18 years old, married her, lived with and co-parented their two children together until her arrest in 2014, testified he never knew she was pregnant with the six children found in her storage locker.

[86] Her Maid of Honour from her wedding in 1999, who continued to be her close friend, was not told or aware of the fact that Giesbrecht had pregnancies other than the two children she birthed and parented.

[87] No one involved in Giesbrecht's life; not her close friends, friends in the community or her family knew about these six pregnancies.

[88] In addition to my earlier finding that the bodies were sealed in the manner that they were in the storage locker for purposes of concealment, concealment by Giesbrecht is further illustrated by the fact she used her maiden name to rent the locker, rather than her married name, provided an incorrect address on the rental

agreement and declined her close friend's offer to help move the contents from another storage locker into the storage locker where the bodies were found.

[89] Evidence of Giesbrecht's medical records at trial, demonstrated she had the necessary knowledge to give birth to two children in hospital and obtain medical treatment for spontaneous miscarriage and therapeutic abortions. Those same records show an absence of medical care or treatment for these six pregnancies.

[90] It is clear not only that Giesbrecht concealed each of these six pregnancies, but her actions of secrecy and concealment after each child was delivered are only consistent with an intention to conceal the fact that she was delivered of each of these children.

[91] I am satisfied with regard to each of the six bodies, that the Crown has established the second element of the offence; that the accused had "the intent to conceal the fact that its mother had been delivered of it".

Element Three-The child was likely to have been born alive;

[92] The Crown summarized the expert opinion evidence called at trial to establish viability of each fetus. I adopt the Crown's summary of that evidence and reproduce a portion of their written brief :

> 30. You have heard the evidence of Dr. Rivera and Pollanen. The state of decomposition made it impossible to determine if there was life after birth with respect to any of the children. The three factors that would be considered for this determination is (Testimony Dr. Rivera Vol. 10, p. 21 line 22 through p. 22 line 2):
>
> (a) whether there was evidence the infant had breathed;
>
> (b) whether there was evidence the infant had been fed;

(c) whether there was evidence that the infant survived for some period of time such that you would see some changes to the umbilical cord that it had started to dry and was in the process of falling off.

31. Dr. Rivera stated that the optimal time for making the determination if the infant had breathed is within a day as there are other processes that can come into play and interfere with that determination (p. 22 line 3 through p. 23 line 21).

32. Dr. Narvey and Dr. Naugler were called as experts in this trial. Dr. Narvey was called as an expert in Neonatology and Dr. Naugler as an expert in Obstetrics. Both had reviewed the autopsy reports in relation to the six children.

33. Dr. Narvey testified based on the autopsies all six children were near or full-term, late third trimester pregnancies (Vol. 4, p. 8 lines 6-14). The seminal points of his testimony are as follows:

(a) a stillbirth in Canada refers to any pregnancy over 20 weeks- below 20 weeks is referred to as a spontaneous abortion (or miscarriage) (p. 6 lines 14-21);

(b) the standard of viability of fetuses in Manitoba is 23 weeks (p. 6 lines 31 through p. 7 line 3);

(c) The RH status of Giesbrecht would preclude babies born with RH disease (p. 13 lines 21-36).

(d) Significant genetic abnormalities of the fetus generally tend to result in first term spontaneous abortions (p. 16 lines 5-16);

(e) Genetic conditions of the fetus such as a heart defect or abnormality of the lungs generally result in fetal death in the second trimester (20-27 weeks). Congenital infections such as chicken pox, rubella or herpes lead to spontaneous abortions or early second term stillbirth (p. 16 lines 16-26);

(f) Based on Giesbrecht's lab results, any child she had after February 10, 1994 could not have been congenital rubella as Giesbrecht had the antibody in her blood (p. 17 lines 10-16) (also see Medical Records Tab 5 p. 27);

(g) That one of the children was a female rules out an x-linked lethal condition propagating in the family (p. 20 lines 2-31);

(h) Dr. Narvey provided statistics based on a 40 year Norwegian study of recurrent stillbirth. He testified about the reliability of that study and that the conclusion of that study is that the overall risk of having a stillbirth after you had had a stillbirth was 4 to 5 times higher than a mother that had never had a stillbirth (p. 26-28);

(i) Dr. Narvey then testified that a study conducted by Lamont did a metaanalysis of the articles pertaining to recurrent stillbirth and the reported literature on same. He testified that where fetal development had proceeded to a gestational age between 34-42 weeks the likelihood of stillbirth is only four times higher than the general population that has never had a stillbirth (p. 28 lines 1-16). Further, the study pinpointed the actual risk of recurrent stillbirth at 2.5 percent or, flipping that number around, a 97.5 percent chance of a live birth the next time around (p. 29 lines 22 through 31);

(j) At page 30 Dr. Narvey said ....*but what I would say is given my testimony thus far and given what I've stated about probabilities, I believe at least some, if not all of these children would have been born alive...*

34. It is important to note that his evidence is not whether the children were likely to have been born alive. Rather his evidence is, that at least some of the children were actually born alive.

35. Dr. Naugler testified that based on the autopsy reports in this case (Vol. 4, p. 97 lines 7-15) that it was highly likely that all six children were born alive. Her evidence is as follows:

(a) She analyzed all potential fatal birth defects and gave a corollary review of the autopsy reports in this case to determine if there was any birth defect that could have caused six stillbirths. Her conclusion after that analysis was there was not. (p. 77 line 25 through p. 78 line 31);

(b) Dr. Naugler's reviewed the medical records of Giesbrecht to determine if she had sought treatment for maternal medical complications that could compromise a fetus (high blood pressure, diabetes). Dr. Naugler testified that the medical records are absent any such treatment;

(c) Dr. Naugler provided statistics for stillbirths in Winnipeg and the Province of Manitoba. She indicated in terms of the general population, the overall rate of stillbirth is 5.5 per thousand, or in other words, there are 994.5 live births per thousand. Accordingly, she testified using this statistic in order for six stillbirths to happen sequentially that odds are 1.5 in 100 trillion cases (p. 92 lines 28-31);

(d) However she further narrowed the odds when looking at the cases before the court to include a review of the autopsy reports and the medical

records of Ms Giesbrecht and concluded the statistical chance of 6 still births was one in 500 trillion (p. 93 lines 1-31).

36. Dr. Pollanen, a Forensic Pathologist, provided the medical aspects and Dr. Gruspier, a Forensic Anthropologist, provided the anthropological aspects of a peer review that was done with respect to the autopsies. They concluded the following gestational age based on the measurement of the femur of each infant (testimony of Dr. Michael Pollanen, Vol. 11 and Exhibit 5 tab 7):

(a) **Unknown one** (autopsy number 14M811)

(i) Gestational age 38-42 weeks.

(b) **Unknown two** (autopsy number 14M814)

(ii) Gestational age 35-39 weeks.

(c) **Unknown three** (autopsy number 14M815)

(iii) Gestational age 35-38 weeks.

(d) **Unknown four** (autopsy number 14M816)

(iv) Gestational age 36-40 weeks.

(e) **Unknown five** (autopsy number 14M817)

(v) Gestational age 34-37 weeks.

(f) **Unknown six** (autopsy number 14M818)

(vi) Gestational age 35-38 weeks.

37. They further confirmed the findings of Dr. Rivera that there were no obvious congenital anomalies or injuries with respect to Unknown one, four and six.

38. In addition, Dr. Pollanen said the following (p. 14 line 16-19):

Q. And based on the gestational age, is it possible then -- will you say that it's likely that these babies could have been born alive?

A. Yes.

> 39. The medical evidence both statistically and with respect to each child is that they were likely born alive. This is opinion of three renowned experts based on probabilities, gestational age and the absence of injury or other anomaly (where decomposition did not preclude this analysis). The opinion of Dr. Narvey and Naugler is additionally based on the medical records of the mother and the absence of treatment for any medical issue that could have comprised the fetus but would have similarly compromised the mother. The expert opinion is unequivocal all of these children were likely born alive.

[93] I accept the expert evidence of Dr. Narvey, Dr. Naugler, Dr. Pollanen and Dr. Gruspier. Their expertise was unchallenged by the Defence. Their evidence was consistent with each of the other experts who testified. I find as a fact that each of these children were likely to have been born alive.

Element Four-To the knowledge of the accused, the child would likely have been born alive.

[94] The position of the Crown is that circumstantial evidence in this case leads to the conclusion that Andrea Giesbrecht would have been aware that each child was likely to have been born alive.

[95] The context of Giesbrecht's life experience as well of the physical evidence is essential to an understanding of the Crown's position.

[96] Giesbrecht had two natural births to the two children whom she parented and raised with her husband. The first was born in late 1997 and the second in 2002.

[97] Her co-worker from Pioneer Grain testified that back in 1997 Giesbrecht was aware of her pregnancy.

[98] Her medical records (Exhibit 9) established that when accessing therapeutic abortions, she was aware when she was pregnant and she knew the timing of her menstrual cycle.

[99] A number of items were found with the dead bodies concealed in the storage locker. They included children's toys, children's and infant's clothing and blankets; all suggestive of at least one small child being present in her household.

[100] Dates on documents found with some of the bodies postdate the date Giesbrecht gave birth to her first born in 1997 and others were found to be dated after 2002 the birth of her second child. These documents were dated during a time after which she would have experienced and recognized pregnancy, delivery and birth.

[101] The fact is her medical records show she did not seek medical treatment during these six pregnancies. There is no evidence of complications in these pregnancies. Dr. Naugler reviewed Giesbrecht's medical records and eliminated all known causes of stillbirth.

[102] Add to this evidence that Giesbrecht was experienced in delivery and birth, her acts of disposal and concealment of the six bodies are post-offence conduct demonstrating a consciousness of guilt.

[103] All of her actions lead to one conclusion, that Giesbrecht was aware that these children were likely to have been born alive and she wished to conceal the fact of their birth.

[104] There is no evidence of injury to any of the fetuses. I accept the expert evidence of Dr. Naugler that a self-induced abortion at the advanced gestational ages of these fetuses would have caused life threatening medical consequences to Giesbrecht which would have required urgent medical care. The accused's complete medical records (Exhibit 9) show no such treatment.

[105] I am satisfied that the only logical and rational conclusion to be drawn from this evidence is that Giesbrecht would have been aware that each child was likely to have been born alive.

Conclusion and Verdicts

[106] In conclusion the evidence at trial established that Andrea Giesbrecht was the mother of and delivered six near or full term children. The remains of those children were disposed of in a storage locker. The evidence leaves no doubt that she concealed her pregnancies and the resulting delivery of each of the six children. Expert evidence established that each of the six children were at a gestational age of development where they were likely to have been born alive. The evidence also established that to the knowledge of Giesbrecht, each child would likely have been born alive.

[107] I am satisfied beyond a reasonable doubt that the Crown has proven the essential elements of each the offences. I find the accused guilty on all six counts.

"ORIGINAL SIGNED BY:"

Murray P. Thompson, P.J.