NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 109 OF 2002

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN:	**ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT/APPELLANT**
AND:	**TANYA CLARKE (NÉE TYRELL)**	**PLAINTIFF/RESPONDENT**

Susan Reid-Jones and **Nicola Brown** instructed by the Director of State Proceedings for the Appellant.

Michèle Champagnie and **Kwame Gordon** instructed by Myers, Fletcher and Gordon for the Respondent.

5th, 6th, 7th October & 20th December, 2004

FORTE, P.

I have read in draft the judgment of Cooke J.A. and agree with the reasons and conclusion therein. In particular I agree with the suggested awards. I too regret that in the absence of the required evidence in respect to "in vitro fertilization" no award can be made in that regard. There was a complete lack of such evidence where on the face of it the evidence was easily available. In those circumstances, as adumbrated by Cooke J.A., there is no basis for such an award. The nature of the case, makes that a regrettable fact.

WALKER, J.A

I agree.

COOKE, J. A.

This is indeed a tragic case. It evokes the deepest feeling of sympathy for the respondent. At nineteen years of age, experiencing pain, she sought medical attention. This was on the 1st June 1995. That same day her ovaries were removed. This was a palpably negligent operation – for the respondent was suffering from ovarian cysts. The respondent became engaged some four weeks after her ovaries were removed. She subsequently got married and has since lived in the United States of America.

In the ensuing suit, liability was admitted and the matter proceeded to the assessment of damages. The defendants were the two doctors involved in that needless medical procedure and the appellant, who was joined as the hospital, in which the operation took place was owned and operated by the Government of Jamaica. On the 26th August 2002 the court handed down its award as follows:

> "1. General Damages in the sum of J$4,125,000.00 with interest thereon at 3% per annum from the 6th of September 2000 to 26th of August, 2002;
>
> 2. Special Damages in the sum of J$64,103.00 and US$28,414.00 with interest thereon at the rate of 6% per annum from the 1st of June 1995 to the 26th of August 2002;
>
> 3. The sum of US$139,469.00 for future medical expenses;

4. Costs to the Plaintiff to be agreed or taxed."

The grounds of appeal were:

> "1. The award for future medical expenses was excessive and erroneous because there was no expert medical evidence before the Court supporting either:
>
> (a) multiplier of 16; or
> (b) the majority of the items used in calculating the multiplicand.
>
> 2. The award of US$28,414.00 was an excessive and erroneous estimate of the special damages which the Plaintiff/Respondent was entitled to, as she was only able to prove to the court a total expenditure of US$803.70 and J$10,000.00."

Before embarking on a discussion on the merits of this appeal I will refer to some authorities which have dealt with the issue of the assessment of special damages. Thereafter I will endeavour to set out considerations which should attend this issue. As the appellant has placed great reliance on ***Lawford Murphy v Luther Mills*** **(1976) 14 JLR 119**, I will begin there. In this case our Court of Appeal accepted as correct the principle enunciated by Lord Goddard, C. J. in ***Bonham-Carter v Hyde Park Hotel Ltd.*** (1948) 64 TLR 177 at 178 that:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

In ***Ratcliffe v Evans* (1892) 2 QB 524**, Bowen, L. J. who delivered the judgment of the English Court of Appeal said at p. 532:

> "As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

In ***Desmond Walters v Carlene Mitchell* (1992) 29 JLR 173** at 174, Wolfe, J. A. (Acting), as he then was, in delivering the judgment of the court said at p. 176 C:

> "Without attempting to lay down any general principles as to what is strict proof, to expect a sidewalk or push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L. J. referred to as "the vainest pedantry".

In ***Grant v Motilal Moonan Ltd. and Another*** (1988) 43 WIR 372, a motor vehicle crashed into a house occupied by the plaintiff. She sued for negligence and claimed $22,044.00 for special damages in respect of the loss of a television set, a three-piece living room set, a buffet, a sewing machine, a refrigerator, foodstuff, clothing, glasses, kitchen cupboard and sundry items. At the trial she was unable to produce receipts as to the purchases of the various items. Further, there was no evidence of any valuation as to those items. Before the Master the defendants prevailed. The Master took the view that although the fact of loss was shown there was an absence of evidence of the

amount of the loss. An *ex gratia* payment of $6,000.00 was awarded to be paid by the defendants. On appeal by the plaintiff the Trinidad Court of Appeal overturned the decision of the Master and awarded the full sum claimed. Two passages will be excerpted – the first is at p. 375f-376c:

> "For the respondents it was submitted that the essential issue in the case was whether the quality of the evidence was such as to satisfy the undoubted rule with respect to a claim for special damage. The evidence adduced had to be reliable and must be on an ascertainable basis. The attorney for the respondents stated that he was prepared to accept that diminution in value was an area that was easier for verification than a case where a claim was made for the loss of household articles. Nevertheless, he contended that the evidence called by the appellant was lacking in particularity and certainty. In this connection he drew attention to the non-production of receipts by the appellant and the lack of evidence from a valuator. It was immaterial, he claimed, whether or not the evidence of the appellant had been challenged. In any event, there was a sufficient challenge to it when the appellant was questioned about the availability of receipts and a valuation by a valuator. He concluded that the evidence was so unreliable that the master was right to dismiss the claim and that the instant matter fell within ***Bonham-Carter v Hyde Park Hotel Ltd.*** Reference was also made to ***Chaplin v Hicks*** [1911] 2 KB 786 and ***Ashcroft v Curtin*** [1971] 3 All ER 1208.
>
> For my part, I do not consider ***Chaplin's*** case and ***Ashcroft's*** case of particular materiality for determination of the issue at hand. We are not here concerned with future loss of opportunity (*Chaplin's* case) or loss of earnings (*Ashcroft's* case).
>
> It should be noted, first of all, that the master did not disbelieve the appellant as to the nature of her loss. It seems clear from her reasons that she believed the

> appellant as to the proof of the extent of her loss but that she considered that the appellant was wanting in the proper proof of its cost. It is not correct to say, as the master did, that no evidence of any kind of the special damage was called. Such evidence was in fact called and was not really challenged. What was explored in cross-examination was the probative value of the evidence called in aid of the special damage which the appellant had allegedly incurred. I quite agree that, since the burden of proof is on the injured party, a defendant is not under any compulsion to call evidence in rebuttal. However, for reasons to which I shall come in a moment it should be noted that no evidence in rebuttal was called here. I would add that it would seem also that neither of the respondents (more particularly the first) availed himself of any opportunity to verify the nature of the damage that was done, either on the day in question or subsequently. If either had sought so to do and had in fact done so, one would have expected the appellant's story, at least with regard to the amount of her loss, to have met with more positive interrogation in cross-examination."

The other is at p. 378 j:

> "In my view, the master erred. The appellant had called prima facie evidence of her replacement costs the fact of which, as I said, was unchallenged. At this stage I must pose the question whether in this country it is unreasonable, in a case of this kind, for a person to be unable to produce bills for clothing, groceries, watches, kitchen utensils, furniture and/or other electrical appliances and/or for that matter to remember the time of their purchase. To my mind, the answer is clearly in the negative and to expect or to insist upon this is to resort to 'the vainest pedantry'."

In ***Central Soya of Jamaica Ltd. v Junior Freeman*** (1985) 22 JLR 152 at 158G, Rowe, P. in delivering the judgment of the court, said:

> "In casual work cases it is always difficult for legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages the court has to use its own experience in these matters to arrive at what is proved on the evidence."

In ***Ashcroft v Curtin*** [1971] 3 All ER 1208, the plaintiff was a precision engineer who had established his own successful one-man business which was converted into a limited company in which he and his family held all the shares. He suffered severe injuries in a motorcar accident due to the negligence of the defendant. The plaintiff claimed damages for financial loss due to his inability (as a result of his injuries) to effectively manage his business. The trial judge made an award, in this regard, of £10,500. On appeal this sum was reduced to £2,500. The accounts of the company were rudimentary and unreliable. Although there was the probability of some loss, it was "quite impossible to quantify it". In this case Edmund-Davies, L. J. who delivered the judgment of the Court of Appeal had this to say at p. 1213 g - h:

> "My greatest difficulty is in quantifying the loss. Counsel for the defendant submits that the task cannot be performed and that the failure should result in a 'nil' award on this aspect of the case. Having rejected the accounts as 'largely unreliable' the learned judge is said to have plucked out of the air the figure of £1,500 as representing the company's annual profitability loss. Counsel says that it cannot be justified and that the consequent award of £10,500 cannot stand. No figure, so it is argued, can replace it.
>
> That is a conclusion to which I have been frankly loth to arrive, for it does not seem to me to meet the justice of the case."

Edmund-Davies, L. J. observed that in ***Bonham-Carter v Hyde Park Hotel Ltd.*** (*supra*), Lord Goddard, C. J. found it possible to arrive at a conclusion despite the extremely unsatisfactory evidence as to damages (1214 b). Then he said at 1214 d:

> "So approaching the matter the unsatisfactory conclusion to which I have felt myself driven is that while the probability is that some loss of profitability resulted from the plaintiff's accident, it is quite impossible to quantify it. But I personally regard it as improbable that the loss would be anything in the region of £10,500."

In conclusion, the Lord Justice said at 1214 h:

> "Doing the best I can, and fully realizing that I am rendering myself liable to be attacked for simply 'plucking a figure from the air' I think the proper compensation under this head is £2,500."

From the authorities reviewed, I extract the following considerations:-

1) Special damages must be strictly proved: ***Murphy v Mills; Bonham-Carter v Hyde Park Hotel Ltd.***; (supra)

2) The court should be very wary to relax this principle: ***Ratcliffe v Evans***; (supra)

3) What amounts to strict proof is to be determined by the court in the particular circumstances of each case: ***Walters v Mitchell; Grant v Motilal Moonan Ltd. and Another***; (supra)

4) In the consideration of 3) *supra*, there is the concept of reasonableness.

    a) What is reasonable to ask of the plaintiff in strict proof in the particular

circumstances: ***Walters v Mitchell; Grant v Motilal Moonan Ltd. and Another***; (supra) and

b) What is reasonable as an award as determined by the experience of the court: ***Central Soya of Jamaica Ltd. v Junior Freeman.*** See also ***Hepburn Harris v Carlton Walker*** SCCA No. 40/90 (unreported) to which there will be reference subsequently.

5) Although not usually specifically stated, the court strives to reach a conclusion which is in harmony with the justice of the situation. See specifically ***Ashcroft v Curtin; Bonham-Carter v Hyde Park Hotel Ltd.*** (supra)

The Award of US$28,414.00 as Special Damages

The award of US$10,875.00 for visits to gynaecologists

I will now reproduce the passage from the judgment of the learned trial judge which deals with this aspect of the case.

> **"Doctors' visit** - The plaintiff's evidence is that her insurance covered two visits per year. In addition to those two visits she would attend on her doctors approximately nine times per year. Of the two visits covered by the insurers, the insurance company would pay 80% of the cost. In respect of the other nine visits, the expenses were entirely for the account of the plaintiff. She paid a sum of US$375 for each visit. It is noteworthy that these visits are unsupported by any documentary evidence. Of the nine doctors that she should have seen, not only were there no supporting evidence, but we were only given the names of two of those doctors. Crown Counsel vigorously attacked the lack of specificity, and rehearsed before the court the admonitions of Hercules J.A. in **Murphy v Lawson** 14 J.L.R. 119 that 'it is not enough for a plaintiff to write down particulars, and so to speak, throw them at the head

> of the Court,' saying: 'This is what I have lost; I ask you to give me these damages. They have to prove it.'
>
> This is moreso, when the plaintiff is seeking to prove damages incurred in a highly developed jurisdiction with a well-known history of personal injuries litigation.
>
> Proof should not be hard to come by. The plaintiff was unable to achieve any greater precision in relation to the number of her visits than to say 'approximately' and 'or about'. The plaintiff is awarded damages for six visits to the gynaecologist (inclusive of visits paid substantially by the insurers) per year, except in 1998 when her evidence is she made 'about five visits'. A total of twenty nine (29) visits at $375 per visit, to produce the sum of US$10,875."

The attack by Crown Counsel in the court below, that there was no strict proof, was renewed in a similar vein in this court. The respondent submitted that:

> "In so far as the learned Judge's decision is based upon oral evidence from the Respondent and the doctors who were called on behalf of the Respondent it is submitted that the learned Judge was entitled to accept that evidence as true, credible and reasonable once he believed the witnesses. It is submitted that there was no requirement for the cost of the Respondent's medical expenses to be proved by documentary evidence."

In support, the cases of ***Grant v Motilal Moonan Ltd. and Another*** and ***Hepburn Harris v Carlton Walker*** (supra) were cited. As to the latter, the following passage of that judgment was highlighted.

> "Evidence in support of these earnings came from the oral testimony of the appellant, unsupported by even

> a tittle of documentary evidence. What was a trial judge required to do? Accept the appellant's assertion that he operated a minibus on a maximum capacity basis, six days each week between Kingston and Montego Bay, unencumbered with the responsibility of conveying low-fare school-children? Should he accept that this vehicle would not be subject to mechanical break-downs or other operational problems? If the appellant was to be believed he kept no books of account, paid no income tax and could produce no financial record from which a reliable earning pattern could be inferred.
>
> Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned. Courts have experience in measuring the immeasurable, to borrow a phrase from Carberry J. A. in C.A. 65/81 – **United Dairy Farmers Ltd. et al v Lloyd Goulbourne** (27/1/84) but when they have so acted their determinations ought not to be unreasonably attacked. We were told in argument that the appellant gave inconsistent evidence as to the volume of his earnings from the operation of the minibus. At the prevailing fare-rate structure the appellant could scarcely justify a gross of $1,900.00 per day. Having regard to all the factors which could depress this optimum figure, we are of the view that the learned trial judge acted reasonably by adopting a gross take of $1,000.00 per day with expenses set at $200.00 per day, giving a net daily intake of $800.00."

Further, it was argued that there was no challenge to the evidence of the plaintiff as to the quantum. As to this, the appellant could not but agree, but reminded the court that the burden of proof was on the plaintiff and that the sum of US$375 per visit was not reasonable. I will not concern myself with the

amount of visits to the gynaecologist since the frequency of those visits appears to be acceptable to the appellant. It is the sum of US$375.00 which is in issue.

It is clear that there was no strict proof in that there was no documentary support of the cost of US$375.00 per visit. Further, there was no evidence from the doctors who were called on behalf of the respondent to in any way support the claim of US$375.00 per visit. I find the absence of evidentiary material more than a little surprising in view of the fact that the plaintiff and her legal advisers would have long known of the date of the trial. The writ and original statement of claim were filed on the 8th September 2000. The trial commenced on the 20th September 2001. This is unlike the position of "a sidewalk or push cart vendor". It is impossible to imagine any insuperable difficulty which would preclude the plaintiff from obtaining some record of her payment. The learned trial judge appeared to have recognized this. In the passage previously excerpted he said:-

> "This is moreso, when the plaintiff is seeking to prove damages incurred in a highly developed jurisdiction with a well-known history of personal injuries litigation."

In this case it was not unreasonable to demand of the plaintiff more than her mere assertion. The learned judge's observations in the excerpted passage do not appear to be in harmony with his conclusion.

The respondent relies on the court below accepting "that evidence as true, credible and reasonable" (i.e. the evidence of the respondent). However, I am at a loss as to determining the criteria which were employed in the assessment of either credibility or reasonableness. What if the respondent had

said US$400.00 or for that matter, US$500.00 per visit? Would that have been true, credible and reasonable? Here is a situation where the court could not utilize its experience, without more, in the adjudication of whether or not the assertion of the plaintiff in this regard was acceptable. The court was a stranger as to medical costs in the United States of America. This is a different situation from the cases of ***Desmond Walters v Carlene Mitchell,*** (supra) ***Grant v Motilal Moonan Ltd. and Another,*** (supra) ***Hepburn Harris v Carlton Walker*** **and** ***Central Soya of Jamaica Ltd. v Junior Freeman*** (supra). In these cases the experience of the court could be employed. Judges live in their society and are not oblivious to the realities therein. *En passant*, a rough conversion of US$375.00 into our currency is in excess of J$20,000.00. While accepting that medical fees in the United States of America would significantly exceed those in Jamaica, the sum of J$20,000.00 does appear to be astronomical. I accept that the plaintiff has the burden of proof. I regard the non-challenge to the sum as only a consideration as to whether the burden of proof has been discharged. A court is not obliged to accept unchallenged *prima facie* evidence in all circumstances.

Having decided that the court below was in error in accepting the sum of US$375.00 per visit, I am now faced with the most difficult question as to what should have been awarded. I do not accept the appellant's contention that in the absence of strict proof there should be no award. Justice demands that there should be an award. There had to be visits to gynaecologists. I too

expect criticism for "plucking a figure from the air". I may even be regarded as heartless. I would make an award of US$180.00 per visit. For twenty-nine visits the award is US$5,220.00.

Ultrasound - The learned trial judge accepted that the plaintiff paid US$116.00 per occasion for "about five times per year", and an award of US$2,900.00 was made for the five-year period. My view as to this award is similar to those expressed in respect of the award for medical visits. Here again the appellant submits there should be no award. Justice demands otherwise. I would award US$50.00 per visit. The award here will be US$1,250.00.

Pap smear - Here, for the thirteen tests allowed by the learned trial judge at US$116.00, I would award thirteen visits at US$50.00 per visit. This award will be US$650.00.

Medication - It has been agreed that the sum awarded should have been US$1,803.84. The award in the court below was US$10,020.00.

Tampons - It has been agreed that the sum of $2,011.00 is not subject to debate as the acceptable amount that had been spent in the purchase of tampons.

The total award in respect of special damages will be US$10,934.84.

Future Medical Expenses

The learned trial judge arrived at the multiplicand by determining what was the average yearly expenditure. I do not differ from this approach. On my calculation this yearly figure would be US$2,187.17. A multiplier of 16 years was

used. The appellant challenged the number of years used as being excessive. A period of 10 –12 years was suggested.

(a) It was argued that there was no evidence as to how long the respondent was likely to continue to suffer; and

(b) The multiplier should have been based on the period that the respondent would not have been menopausal but for the removal of her ovaries. (The removal of the ovaries had resulted in premature menopause.)

There is no merit in this contention. In a medical report received into evidence, Dr. Mary Sloper who is in family practice at the Nuttall Medical Centre and who has been in practice since 1975 said:

> "Mrs. Clarke must take the hormone replacement therapy despite its side effects. Without it she will suffer oestrogen deficiency and this has a multitude of effects: osteoporosis and a subsequent likelihood of fractures which can be fatal, coronary artery disease, strokes, early dementia or other mental effects, early loss of teeth, possible colonic cancer, changes in skin, genitalia, hair and breasts, in general early senility.
>
> Taking the HRT entails lifelong medical care in order to obtain prescriptions and for surveillance for the risks of hormone replacement therapy. These include deep vein thrombosis and pulmonary embolism, endometrial cancer (this possibility has already been mentioned to her by a doctor in the USA as a possible cause of her irregular bleeding) and breast cancer. These are in addition to the side effects mentioned above."

Based on this evidence, the limitation suggested by the appellant is rejected. The respondent had to have lifelong medical care. The multiplier of 16

years is not out of line with the decisions of cases in our jurisdiction. The award in respect of this aspect is US$34,994.72.

Psychiatric and Counselling Sessions

The court below awarded a sum of US$10,200.00. This was based on the evidence of Dr. Frank Knight who has been a specialist in psychiatry for a number of years. He saw the respondent on 18th September 2001 – two days before the trial began. Based on his clinical analysis of her condition he said in evidence as the record reveals that:

> "Saw Ms. Tanya Clarke on 18th September 2001. Know of case in Court. She gave me a background. Took a history from her about original mental condition. She gave me a history of what happened in hospital. Also got from her own emotional reaction and effect of operation on mental/physical relationship.
>
> Noted Mrs. Clarke's apparent obsession with the idea (sic) getting an egg – significance of that she believe that if she could get a fertilized egg into her uterus, everything would be thereafter fine. And I ask Mrs. Clarke specifically about some of her subjective feelings.
>
> I was searching for evidence in her account that would suggest major depression. I then did a mental status examination and my clinical impression is that Mrs. Clarke has an adjustment disorder with depressed mood. On the background of an unresolved grief reaction and in my opinion, the disorder is a direct result of the surgical removal of both her ovaries, leading to menopause. In my opinion, there is an element of something near psychotic thinking and by that I am referring to Mrs. Clarke's almost obsessional preoccupation with getting a fertilized egg into her uterus. I think that

> this kind of preoccupation puts the subject in danger of a psychotic paranoid disorder."

His recommendation was that he would see her twice per week for sessions of one hour's duration for two months. Thereafter, it would be once per week for a year if necessary. This would be sixty-eight visits.

Dr. Knight in his evidence said that the cost of these sessions in the United States of America was between US$100.00-200.00 per session. The court below settled on the figure of US$150.00 per hour. There is no complaint as to the necessity of these visits. It was argued that it was not established before the judge that Dr. Knight was familiar with the cost of counselling services in the United States. It was therefore submitted that no award should have been made for the cost of counselling services. I do not agree. I would expect someone in his capacity to be aware of counselling costs in the United States. He has been full-time on the academic staff at the University Department of Psychiatry and since 1992 he has been part-time at the University and a full-time consultant at Bellevue Hospital. There is no reason to disturb the award of US$150.00 per session. The award of US$10,200.00 is upheld.

The Award of US$20,000.00 for an Attempt at *in vitro* Fertilization

I will now deal with the evidence relevant to this award. The respondent said "it is one hundred percent important for me to have a child". She further said "I have had discussions with health care providers about having children. If I could get a donor to give me an egg, they could have it

transplanted for $20,000 ($US) I was told". Dr. Knight's evidence in this regard was:

> "I got the impression that Mrs. Clarke thought that having eggs implanted it would put an end to her bleeding.
>
> In vitro fertilization means – since Mrs. Clarke mentions stopping constant bleeding the only thing that could do that is implanting actual ovarian tissues – but my understanding from the gynaecologist that is even not experimental in human beings.
>
> The in vitro fertilization process is a possibility/option, an accepted treatment. She would need hormonal treatment to support pregnancy – greater amount of hormone to carry the pregnancy. If for example woman five months pregnant had ovaries removed, the pregnancy would fail. It would be worth her while to try the in vitro process.
>
> Once an egg from donor is obtained, sperm from donor is obtained. A sperm is introduced into the ova into several ovum – in lab condition. When the egg, i.e. the cells, begins to multiply, the developed egg is introduced into the uterus. The specialist would be a gynaecologist – specialist in in vitro. A day or two of hospitalization would be required.
>
> No idea what the gynaecologist would have charged."

He also said:

> "It is possible that bearing a child may not resolve some of the difficulties she is encountering".

Dr. Sloper had this to say:-

> "Pregnancy by in vitro fertilization would be difficult but not impossible. If she succeed, (sic) I think her condition could improve. Chances of success are low – for the need to produce ideal hormone environment

> but would involve an egg. He would donate the egg and she would carry it."

The appellant contends that there should be no award for *in vitro* fertilization. A passage of the judgment in the court below was put forward as supporting this contention. The passage read:

> "(VII) **In Vitro-Fertilization** – In vitro-fertilization, the plaintiff's evidence is that the cost of the procedure, i.e. 'getting an egg', as she put it would be US$20,000. Mr. Goffe has said that she should be allowed four attempts. That he says were the number of attempts granted the plaintiff in the case of ***Biles.*** There is clear evidence from both doctors who testified that there is a possibility of success of the plaintiff conceiving. Crown Counsel has argued that the Court did not have the benefit of hearing from a gynaecologist as to the cost of this procedure and the likelihood of success in respect of this particular plaintiff. The equivalent of J$3.4M is being claimed for this procedure yet, other than the plaintiff's bald assertion, there is nothing to support the efficacy of the sum claimed. Dr. Knight in answer to Crown Counsel concedes that having a child may not improve her state. The spectre of the plaintiff not accepting the child as being hers is raised on the evidence of Dr. Sloper. The patient has testified that she has made some 41 visits to the gynaecologist office, yet not one word is forthcoming from any of the doctors seen as to whether the plaintiff is a likely candidate and what are the risks attendant on this procedure. The sum of US$20,000 for attempt at in vitro-fertilization is awarded."

It was submitted that the learned trial judge's review of the evidence did not suggest that he was about to make any award. He had adverted to a number of factors which dictated otherwise. He did not give any reason(s) why, despite those factors which militated against making the award he nevertheless

so did. There is merit in this submission. *In vitro* fertilization is a specialized field. There is no evidence from any such specialist to give the necessary assistance to the court. When Dr. Sloper said "chances of success are low" I understand her to be offering a general opinion as to the overall success rate of this specialized type of procedure. It was incumbent on the plaintiff to provide to the court evidence which pertained to her suitability, bearing in mind her present condition, for the reception of an egg. There was none. Dr. Knight's evidence is not helpful in this regard. When he gave his view that "it would be worth her while to try the *in vitro* process" he was not speaking as a gynaecologist, but rather as a psychiatrist and the anticipation of the salutary effect which having a child might have on her well-being. It is not that I wish to deny this young married woman the joy of having a child. It is not that I do not accept that having a child might lead to an improvement in her mental well-being. However, it is with great regret that I cannot find a basis on which to uphold this award. There is just no evidential support – either in respect of feasibility or cost. In the last resort there is nothing to which justice can attach itself.

I would not disturb the orders as to the payment of interest.

In conclusion, I would make the following award:-

Special damages	-	US$10,934.84
Future Medical Expenses	-	US$45,194.72

In view of the fact that the appellant has succeeded in reducing the damages in the areas of special damages and future medical expenses, it is appropriate that there should be an apportionment of costs. Accordingly, the appellant is awarded one-third and the respondent two-thirds of the taxed or agreed costs both here and in the court below.