



In the Supreme Court of Judicature of Jamaica

Claim No. HCV 00341 of 2005

<i>Between</i>	<i>Joan Morgan</i>	<i>1st Claimant</i>
<i>And</i>	<i>Cecil Lawrence</i>	<i>2nd Claimant</i>
<i>And</i>	<i>Ministry of Health</i>	<i>1st Defendant</i>
<i>And</i>	<i>University Hospital of the West Indies</i>	<i>2nd Defendant</i>
<i>And</i>	<i>The Attorney General of Jamaica</i>	<i>3rd Defendant</i>

Mrs. S. Gordon - Townsend and Mr. C. Townsend for the Claimants.

*Mrs. Amina Maknoon and Miss Lisa White instructed by the
Director of State Proceedings for the Defendants.*

*Heard: 10th May, 2007,
27th June, 2007
& December 19, 2007*

Marsh J.

Upon the matter coming for hearing at Case Management on the 1st day of September 2006, it was ordered, inter alia, that there be judgment for the Claimants on an admission against the 3rd Defendant with damages to be assessed.

When this matter came before this Court on the 10th day of May, 2007 the sole issue to be considered was the quantum of damages to be awarded to the Claimants as against the 3rd Defendant, the Attorney General of Jamaica.

The Claimants Joan Morgan and Cecil Lawrence live together at the relevant time as common law spouses. The first Claimant is a teacher and the second Claimant is a police man.

In September of 2002, the first Claimant Joan Morgan went to the University Hospital of the West Indies and donated blood for a friend who needed the commodity.

In February 2003, she was asked, by letter, to return to the University Hospital to have her blood rechecked as something had been detected in the blood. She was fearful and did not return to the University Hospital. After she became pregnant for the 2nd Claimant Cecil Lawrence, Joan Morgan first Claimant, returned to the hospital to have her blood rechecked. Her blood was taken to be tested.

On the 10th April, 2003 the first Claimant received a telephone call from Dr. Brady-West of the University Hospital of the West Indies asking her to return with her spouse to the hospital on Monday April 14, 2003.

Both Claimants did as requested and went to the Haematology Department of the hospital and spoke to a Dr. Wharfe. She told them to sit down. She informed the first Claimant that she had tested positively for HIV.

Dr. Wharfe took blood from the second Claimant for testing, as it was also required in those situations, to test the blood of the spouse as well. The Claimants were sent by Dr. Wharfe to CHARES, where counselling was offered. The first Claimant Joan Morgan became nervous and fretful and

entertained suicidal thoughts. Her blood pressure soared and she received medication for stress. She became withdrawn from her seven years old son and her sex life plummeted as she was "affected by every advance made by Cecil."

The result of the tests done on the blood of Cecil Lawrence were negative for the HIV. Further tests were done at a laboratory in Kingston on the blood of each Claimant.

On the 29th April, 2003, Dr. Wharfe informed Joan Morgan by telephone that the results came back and were negative. Several requests were made of Joan Morgan to have her return to give more blood, but she refused to go.

As directed by the Court, Joan Morgan went with Cecil Lawrence to see Dr. Aggrey Irons', a psychiatrist, on several dates between May 28, 2003 and January 7, 2004. *Medical Reports were obtained from Dr. Irons'.*

Cecil Lawrence stated that from the day he learnt that Joan Morgan had tested positive for HIV, he "felt like taking his life". Sex life with Joan Morgan went downhill, as he now has a phobia for sex. Every advance he makes to Joan Morgan is met with withdrawal from her.

Dr. Aggrey Iron furnished two reports each related to assessments made by him on the mental status of each of the two Claimants Joan Morgan and Cecil Lawrence. In his report dated April 5, 2004, his examination of Joan Morgan revealed:

1. Several anxiety with literal hand wringing during interview
2. Phobic avoidance responses to health care issues including pregnancy, hospitals, blood tests.
3. Depressive symptoms including tearfulness, appetite disturbances and insomnia.
4. Severe self doubt and lack of trust in what is frequently referred to as 'the system.'
5. Consistent preoccupation with flashbacks and vivid regarding fear of death and dying.
6. Consistent pre-occupation with the health of unborn children.

Dr. Irons' opined that his findings were very invasive and occupied her thinking to the exclusion of her appropriately performing her daily routines. These are consistent with a diagnosis of Severe Post Traumatic Stress Disorder, directly and consistently related to the misinformation regarding her HIV Status. He described Joan Morgan's prognosis as 'poor' because for an indefinite time she will be unsure of her health status although the passage of time will assure her if she did not develop symptoms or signs of infections.

Dr. Irons' evaluation of Cecil Lawrence indicated that he showed signs of Post Traumatic Stress Disorder. Ongoing psycho-therapy has been recommended for Claimant's jointly and separately. The damage to them psychologically has yet to be quantified.

Pursuant to Rule 32.8 of the Civil Procedure Rules, written questions were posed to Dr. Irons'. He last saw the Claimants in August, 2004 for

'follow up.' No formal arrangements existed for regular visits nor have the Claimants sought or obtained such help since the date of the previous report.

Mrs. Gordon-Townsend for the Claimants submitted that the injuries sustained in the instant case are not physical but mental in nature. Each Claimant suffered mental trauma of different degrees. The incorrect diagnosis made of and communicated to the first Claimant equated to a death sentence. She went to therapy sessions and failed to resolve difficulties she was having. Dr. Irons' report indicated his diagnosis that the first Claimant was suffering from Post Traumatic Stress disorder, among other consequences of the misinformation related to her of her HIV status.

With regards to the second Claimant Cecil Lawrence, he was devastated for her and for himself. They had been partners for about fourteen to fifteen years. He was tested as well, because of this misdiagnosis of the first Claimant. He felt like talking his own life. Dr. Irons' diagnosed that the second claimant was also suffering from Post Traumatic Stress Disorder as well, though of a lesser degree than the first Claimant. Continuing psychotherapy is required to prevent their relationship from crumbling. Skillful intervention needs to be put in place.

Mrs. Gordon Townsend referred this Court to the following authorities, as guides in arriving at a suitable award in this case.

Suit C.L. 1994 L226 Levy v. Swire et al Khan's Vol. 5 p. 266

The award for Pain, Suffering and Loss of Amenities in this case on 27th July, 1998 was \$5,000,000.00. Here, the Claimant, a "simple mentally subnormal woman", was savagely raped and buggered by Policemen at a Police Station to which she had gone to seek shelter after missing a bus – the last one for the night to her distant destination.

Mrs. Gordon Townsend submitted that the Post Traumatic Stress Disorder suffered in this case is similar to that suffered by the first Claimant in the instant case. Joan Morgan's trauma is continuing and she needs continuous therapy. This case *Levy v. Swire et al* (supra) represents the upper end of the award. The award, rendered in today's money would be equal to \$9,338,874.00.

Suit No. CL 1993 P. 1888

Celma Pinnock v. Attorney General of Jamaica Khan's Vol. 5 p. 289.

This Claimant was assaulted when she was stripped and searched at the airport and a male official inserted his two fingers in her vagina (forcibly). (The Claimant had sued for False Imprisonment, Assault and Battery, Aggravated and exemplary damages).

The matter was heard before Clarke J and a Jury. The personal injuries that she suffered were-

- (i) severe anxiety
- (ii) severe depression
- (iii) loss of libido
- (iv) severe phobic responses related to travel and sexual activity

The amount awarded by the Jury in July 1998 was Two and a half million dollars (\$2,500,000.00). In today's money that would be equal to a sum of Five Million Two Hundred and Sixty Seven Thousand Nine Hundred and Eighty dollars (\$5,267,980.00).

In the circumstances, using these cases as guides, the appropriate award for the first Claimant Joan Morgan would be in the region of Six million (\$6,000,000.00) and Six and a half million dollars (\$6,500,000.00).

The amount which should form an appropriate award to the second Claimant Cecil Lawrence would be in the region of Two Million dollars (\$2,000,000) and Two and a half million dollars (\$2,500,000.00).

Mrs. Maknoon for the Defendants made oral and written submissions. She admitted that for that period that the first Claimant was under the impression that she was HIV positive, this would have had serious impact on her psychologically and on the second Claimant as well. However, this Court should scrutinize the extent to which the Claimants have been affected by the actions of the third Defendant on April 14, 2004.

The second Claimant was never misdiagnosed.

This Court, Mrs. Maknoon further submitted should look for guidance in the **Judicial Studies Board Guidelines to damages for Personal Injury Case.**

Psychiatric Damages Page 10 –

“The factors to be taken into account in valuing claims of this nature are as follows.

- (i) the injured person's ability to cope with life and work
- (ii) the effect on the injured person's relationships with family and friends and those with whom he or she comes in contact
- (iii) the extent to which treatment would be successful
- (iv) future vulnerability
- (v) prognosis
- (vi) whether medical help has been sought

B. Post Traumatic Stress Disorder

The cases which are exclusively those where there is a “specific diagnosis of a reactive psychiatric disorder in which characteristic symptoms are displayed following a psychologically distressing event which was outside the range of normal human experience and which would be markedly distressing to almost anyone.....”

At its most severe, the range of awards suggested here is £30,000 - £50,000. These relate to cases where the permanent effects of the injuries

prevent the injured person from working or functioning at anything near the pre-trauma level.

'Moderately severe' – has a tariff of £13,000 - £27,500.00. This is where there is better prognosis that there will be some recovery with professional help. However, the effects are still likely to cause significant disability for the foreseeable future.

'Moderate' – the injured person will have largely recovered and any continuing effects will not be grossly disabling. The tariff here is £4000 - £10,000.00.

'Minor' – a virtually full recovery will have been made within one or two years and only minor symptoms will persist over a longer period.

Mrs. Maknoon candidly admitted that these guidelines referred to awards in Sterling and that she was unaware of any comparable cases which have occurred in Jamaica.

She submitted that the Claimants were able to perform their various job functions and as there was no evidence to the contrary, it is fair to conclude that the misdiagnosis did not affect their ability to do their work. There was no real evidence of psychiatric damage.

The Claimants had failed to follow Dr. Irons' advice for them to have additional psychotherapy for another year. The state of the Claimants' relationship at the date 20/11/2006 being on shaky ground was self inflicted

and could be avoided. They could have mitigated their loss and taken Dr. Irons' advice.

It is further submitted that the Court should assess damages on the basis that although there was an initial anxiety and strain caused by the misdiagnosis, this has not had any lasting adverse effect on the Claimant's relationship.

The Claimants' visits of the psychiatrist have been arranged by their Attorney with a view to litigation.

All Dr. Irons' reports were written from the point of view of assessments, not with a view of curing the Claimants. Further, it was argued that none of the cases relied upon by the Claimants' attorney was able to provide guidance to this Court, there being none of them that related to psychiatric injuries simpliciter. They may merely serve as comparisons.

The *Julian Levy* case is considerably different from the present one and cannot be used as a comparison. There, the Claimant had been raped and buggered by three Policemen in a Police Station. The damages were awarded for Pain, Suffering and Loss of amenities and not limited to psychiatric damage. There was also aggravated damages pleaded. No separate award was made for this and the heinous nature of the assault undergone by the Claimant would have been reflected in this award. The award then was \$5,000,000.00 which in today's value is equal to \$9,321,717.25.

The court should follow the guidelines from the **Judicial Studies Board** (*supra*). The case of *JPS Co. v. Barr et al (1988) 25 JLR 326* is authority for the direction that one should discount awards in English pounds by 30% to bring it in line with the Jamaica economy.

It is therefore submitted that were the Court to take into considerations the Guidelines as earlier stated, where the diagnosis is Post Traumatic Stress Disorder, the appropriate award in local currency should be

(i)	Severe	-	\$2,527,650.46
(ii)	Moderately severe – high end award		\$2,317,012.92
(iii)	Moderate	-	\$800,422.65

The appropriate award to the first Claimant would therefore be \$889,422.65 JD, her case being moderate.

The 2nd Claimant should only be awarded for very minor psychiatric damage which the Judicial Studies Board Guidelines set within a range of £750 - £3000.00. One thousand English pounds calculated up to March 2007 “equates with \$84,255.02 Jamaican dollars.” Therefore an award of \$85,000 would be an appropriate award for General Damages for the 2nd Claimant.

Special damages have been agreed at \$32,401.84 and \$100 U.S. Dollars. This Court is constrained to remember and to be guided by the principle extracted from the often cited judgment of Romer L.J. in *Rushton v. National Coal Board (2) (1953) 1 Q. B. 495 at p. 502*, where he said

"..... the Court in effect is being asked to measure the immeasurable ... But the principle has been adopted (and it is the only principle which can be adopted) of trying to compensate a man in the plight in which the plaintiff finds himself by awarding what may fairly be described as notional or theoretical compensation to take the place of that which is not possible, namely, actual compensation. In the application of that principle the court should plainly, so far as possible, apply it with some degree of uniformity. One can only say 'so far as possible', apply it with some degree of uniformity. One can only say 'so far as possible', because nothing in the nature of any rigid classification can be achieved when one is dealing, not with fact, but with theory; and the only way, so far as I can see, in which one can achieve anything approaching a uniform standard, is by considering cases which have come before courts in the past and seeing what amounts were awarded in circumstances, so far as may be comparable with the case which the court has to decide."

I am conscious of the need to 'pay heed' to cases determined in this jurisdiction or in a jurisdiction of a neighbouring locality where there exists similar social economic and industrial conditions exist.

However, where as in the facts of the instant case, it appears that there is no reported case resembling it, in this jurisdiction, it is necessary to consider and extract such guidance as is possible from awards elsewhere making suitable adjustments, having regards to local conditions.

See Wooding C.J. in *Aziz Ahamad Ltd. v. Raghbir* (1967) 12 W.I.R. 352 at page 357 –

There is little case law in Jamaica which provides guidance to a Court where the injury complained of is of a psychiatric nature, simpliciter. Where

the Claimant has suffered psychiatric injury, there normally has also been some accompanying physical injury.

It is for this reason that the cases proffered by the Claimants' Counsel, are decidedly unhelpful. In the *Julian Levy* case, the psychiatric injury was the direct result of so degrading and deplorable a set of physical assaults on the person of the Claimant that the Court was obliged to make an award which took into consideration the enormity of the physical attacks, the circumstances and the resultant psychiatric damage.

The *Celma Pinnock* case involved a humiliating strip search in which, it is alleged the Claimant was forced to suffer the indignity of a male official inserting two fingers into her vagina. Her resultant psychiatric injuries were

- (i) severe anxiety
- (ii) severe depression
- (iii) loss of libido and
- (iv) severe phobic responses related to travel and sexual activity

Besides, this was an assessment done by a Judge and Jury, quite unusual in this jurisdiction.

There seems to be no case in point, factually; this being a case where the first Claimant was misdiagnosed as having tested positive for HIV, the precursor to the dreaded disease of AIDS. This misdiagnosis was communicated to her and she was diagnosed as suffering from Post Traumatic

Stress Disorder by Dr. Irons', a Consultant Psychiatrist. Further, Dr. Irons' findings refer to first Claimant as suffering from worsening phobic anxiety and Sexual Anhedonia. He further indicated that although she ostensibly maintained a relationship, she lives in constant fear of sexual contact because her flashbacks and vivid memories of her spouse's response to the previous trauma.

He prescribes that 'skillful intervention to be put in place to head off an irretrievable break up as the relationship was on 'shaky ground.' Long term therapy is urgently needed for both the individual and the couple, if the relationship is to be spared. There is no guarantee as to what the outcome will be as the prognosis worsens with the passage of time.

Dr. Irons' was asked by Defendants' Attorney at Law, in her written questions to him, "With respect to Paragraph 4 of your recent report, would couple therapy at an earlier date have improved the chances of saving the relationship?" His answer was 'This would have been a reasonable expectation, were it affordable.'

This suggests to me, that the therapy referred to in paragraph 4, of which the doctor speaks, is an expensive proposition.

It is because of the Claimants not embarking on the suggested therapy that the submission was made by Mrs. Maknoon for the Defendants, that the Claimants were remiss in not taking Dr. Irons' advice by making regular visits to a qualified person. Had they done this, there would be no permanent

damage caused and they would be back to the position they were in before the misdiagnosis.

I do not agree that Mrs. Maknoon's submission is a conclusion that could be arrived at from anything said in Dr. Irons' report or his answers to Counsel's written questions.

Proceeding as I am obliged to do, to find guidance outside of the region, I seek guidance from the **Guidelines for Assessment of Damages in Personal Injury Cases (Guidance Studies Board of England)** relied upon by Mrs. Maknoon for the Defendants. I am asked to treat the psychiatric injury diagnosed of the first Claimant as falling in that category of diagnosed Post Traumatic Stress Disorder as "very minor" with a suggested award of \$85,000.00. Using the said guidelines, I would define the diagnosis of the first Claimant as qualifying for a description of 'moderately severe' and would be found somewhere beyond the mid range between £13,000 to £27,500.00, the amount being £25,000.00 which would be equivalent to \$3,650,000.00 in Jamaican dollars.

It should be borne in mind that the Guidelines referred to supra, were set out in the year 2000, as Mrs. Gordon-Townsend was quick to point out. This would mean that the range referred to in the guidelines would definitely not be the same. A current award, should take into consideration the difference in the value of currency since then.

Taking all this into consideration, I am obliged to look at the range of the awards from **Traumatic Stress Disorder Injuries** with 2007 spectacles. Miss Maknoon had also referred this Court to the case *JPS Co. Ltd. v. Barr (1988) 25 J.L.R. 326* and submitted that this case is authority for the proposition that one should discount awards in English pounds by 30% "to bring it in line with the Jamaican economy."

It appears that Counsel was referring to the position taken by Downer J.A. in the case, where he opined at page 46 "Accepting the trial judge's starting figure of £115,000.00 and bearing in mind the English and Jamaican economies, I would scale that down by 30% for contingencies It is recognized practice that there is a discounting for immediacy of payment."

In the circumstances, I would make an award in the sum of £25,000. In Jamaican currency, this would equate to approximately \$3,650,000.00. Taking into consideration that the range suggested by the Guidelines (*supra*) date back some seven years, I will, considering a small discount for immediacy of payment, make an award of Three Million Five Hundred Thousand dollars (\$3,500,000.00) for the first Claimant for General Damages.

With regards to the second Claimant his diagnosis by Dr. Irons' is very patently less severe than that of his spouse the first Claimant. His diagnosis was that he showed signs of Post Traumatic Stress Disorder. The damage to

him psychologically is yet to be quantified. He showed 'severe anxiety and phobic accordance regarding medical visits.'

I place his injury in the class of 'minor', using the guidelines headings. The range here is £2000 to £4,000. In today's currency (Jamaican) this approximates to about \$584,000.00. Taking into consideration the fact that the Guidelines were laid down some seven years ago and factoring into this the change in the value of the currency between then and now, I will make no discounting and make an award for General Damages in the amount of \$584,000.00.

Special damages have been agreed for Claimants at Thirty Two Thousand Four Hundred and one dollars and Eighty Four cents (Jamaican) and One Hundred dollars U.S. (US \$100).

The awards made are therefore as hereunder:-

1. **Special Damages;**

Special damages agreed for the Claimants in the sum of Thirty Two Thousand, Four Hundred and One dollars and Eighty Four cents (\$32,401.84) and One Hundred U.S. Dollars (U.S. \$100) with interest thereon of six percent (6%) per annum from the 14th day of April, 2003 to the date hereof.

2. **General Damages:**

1st Claimant Joan Morgan

Pain, Suffering and loss of amenities – Three Million Five Hundred Thousand dollars (\$3,500,000) with interest thereon of six percent (6%) per annum from the date of the service of the Claim Form, 6th day of February 2005 to the date hereof.

3. **Second Claimant Cecil Lawrence**

Five Hundred and Eighty Four Thousand Dollars (\$584,000) with interest thereon of six percent (6%) per annum from the date of the service of the claim form, 6th day of February, 2005 until the date hereof.

4. **Costs for the Claimants are to be agreed or taxed.**