



[2022] JMSC Civ 202

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2021CV00231**

|                |   |                  |
|----------------|---|------------------|
| <b>BETWEEN</b> | <b>CHARMAINE MANNING-ALLEN</b>                  | <b>CLAIMANT</b>  |
| <b>AND</b>     | <b>CALEDONIA MEDICAL LABORATORY<br/>LIMITED</b> | <b>DEFENDANT</b> |

**IN OPEN COURT**

**Mr. Andre Earle instructed by Earle & Wilson for the Claimant**

**Mrs. Symone Mayhew instructed by Mayhewlaw for the Defendant**

**Heard: October 5<sup>th</sup>, 2022 and November 25<sup>th</sup>, 2022**

**ASSESSMENT OF DAMAGES – Claimant diagnosed as HIV Positive – Claimant re-diagnosed as HIV Negative – Medical negligence – Claimant suffering from Post-Traumatic Stress Disorder – Major Depressive Disorder – Adjustment Disorder - Expert Evidence – Relevant Guidelines – American Medical Association – California Schedule - Damages**

**T. HUTCHINSON SHELLY, J**

**BACKGROUND**

[1] This matter concerns an assessment of damages against the Defendant arising out of the misdiagnosis of HIV which occurred on or about the 27<sup>th</sup> day of December, 2019. The facts in brief are that on that day, the Claimant visited the

Defendant's branch located at 5 Fernleigh Avenue, May Pen, in the parish of Clarendon, in furtherance of a request by her life insurance provider. The purpose of this visit was to conduct a blood test with the intention of obtaining life insurance coverage. The request from the provider also involved the screening of the Claimant's blood for the presence of the Human Immunodeficiency Virus ("HIV"). On or about January 27, 2020, the Claimant was informed by her family physician, Dr. Lucien Jones, that the HIV test performed on her blood sample on December 27, 2019 was positive.

**[2]** The history of the Claimant's visits to the different medical facilities for further HIV tests is germane to the assessment process and in this regard the chronology is useful and is set out as follows:

- Rapid HIV test conducted at Old Harbour Medical facility in St. Catherine on the 27<sup>th</sup> day of January, 2020 – **Negative**
- Rapid HIV test conducted at May Pen in Clarendon on the 29<sup>th</sup> day of January, 2020 – **Negative**
- Retest of initially taken blood sample at Caledonia Medical Laboratory Limited in St. Andrew on the 31<sup>st</sup> day of January, 2020 – **Positive**
- Regular HIV test from a newly taken sample at Caledonia Medical Laboratory Limited in St. Andrew on the 31<sup>st</sup> day of January, 2020 – **Negative**

**[3]** By way of a Claim Form and Particulars of Claim filed on January 22, 2021, Mrs. Charmaine Manning-Allen instituted proceedings against the Defendant. The Defendant filed and served an Acknowledgment of Service dated January 28, 2021 and a Defence limited to Quantum dated March 8, 2021. The Claimant filed a Request for Judgment on Admission on February 10, 2021. Judgment on Admission was entered for the Claimant against the Defendant with damages to be assessed and costs to be agreed or taxed on February 16, 2022. The Claimant has approached this Court for damages to be assessed.

**[4]** In her Particulars of Claim, filed on January 22, 2021, the Claimant seeks damages for negligence as a result of Post-Traumatic Stress Disorder (PTSD), pursuant to an incorrect diagnosis by the medical professionals at Caledonia Medical Laboratory Limited. She particularized her injuries, as follows:

- i. Post-Traumatic Stress Disorder
- ii. Major Depressive Disorder
- iii. Severe anxiety
- iv. Frequent flashbacks with phobic behavior
- v. Nightmares
- vi. Suicidal ideations
- vii. Emotional /Nervous shock
- viii. Insomnia
- ix. Headaches
- x. Impairment:

- a) Severe confusion brought on by contradictory blood test results
- b) Severe emotional and marital distress connected to feeling of infidelity on the part of her husband
- c) Prolonged Dysfunction
- d) Anhedonia
- e) Consistently fearful of reliving having been told she is HIV positive.

## **ISSUE**

Whether the medical evidence can be reconciled in relation to the Claimant's claim for psychological injury;

Where there is conflict in the evidence of the Medical Doctors which narrative (evidence) should the Court accept;

- Whether the Claimant's PTSD is in partial remission?
- Whether the Claimant still suffers from PTSD?

## EVIDENCE

[5] At the hearing on October 5, 2022, the Claimant was sworn and her witness statement filed July 22, 2022 was allowed to stand as her evidence- in- chief. Her evidence in brief was as follows;

- Upon being advised that she was HIV positive, the Claimant recalled that she was traumatized and burst into tears. She also fell to the floor kicking and screaming. She was informed by the Doctor that the virus was at an advanced stage and immediately thought she was going to die. Her doctor instructed her to return to the Defendant lab for a viral load testing to be conducted.
- Mrs Manning-Allen recalled that on her way home she became involved in an argument with her husband who was driving as she blamed him for her 'condition'. She described her state of mind as being one in which she entertained thoughts of grabbing the steering wheel from him in order to cause a crash as she wanted to die.
- As outlined above, Mrs Manning-Allen underwent a number of other tests, she described her feelings at the time of the testing as varying between being doubtful of the negative results and feeling hopeless and devastated. She also recounted feeling ashamed at what she perceived as a dismissive manner in which she was spoken to by the lab technician who conducted these tests.
- On the 31st of January 2020, her first sample was retested at the head office of the defendant lab and again yielded a positive result. A fresh blood sample was then taken from her as well as her husband and both were negative for HIV.
- Mrs Manning- Allen outlined that in the time since she was informed of this positive result her life has significantly changed. In recounting the effect on

her marriage she stated that she actually asked her husband for a divorce because it was her belief that their relationship was crumbling.

- She described her emotions as spanning the range of pain, tearful episodes, loss of sexual appetite, headaches, loss of appetite and suicidal thoughts. It is already established on the record that she subsequently sought out medical attention from a psychiatrist.
- In describing the impact on her family life, Mrs Manning-Allen stated that she was unable to assist her daughter to prepare for her PEP exams. She stated that she was also impacted professionally, as in her interactions with her students, she was unable to give 100%. In viva voce evidence, she expanded on these challenges and stated that it was in recognition of this difference that she opted to apply for her vacation leave.
- She also outlined that in respect of her responsibilities at church, she asked to be replaced in her position of Assistant Sunday School Superintendent and Assistant Treasurer as her interest and output were being affected.
- In cross-examination, she agreed that she had never been the subject of any complaint or disciplinary action at the school and she also stated that she had never been the subject of any complaints by parents of her students.

## **MEDICAL EVIDENCE**

[6] Two medical doctors gave evidence in this case. Their reports were permitted to stand as their evidence- in- chief.

### **Dr. Geoffrey Walcott**

[7] Dr. Geoffrey Walcott examined the Claimant on two separate occasions. His findings from the first consultation dated July 27, 2022 were:

#### **Diagnosis**

- Claimant experienced symptoms which meets the criteria for Post-Traumatic Stress Disorder characterized by the re-experiencing of an event that pose significant threat to life or integrity through flashbacks or nightmares
- The persistence of a hyper-arousal state
- The Claimant experienced symptoms which meets the criteria for Major Depressive Disorder (MDD) which is characterized by persistent feelings of sadness accompanied by anhedonia, disturbance in sleep and appetite.
- Suicidal ideations

### **Impairment**

- Whole person disability score of 30% - 48% in accordance with California schedule for rating permanent disability 2005.

**[8]** The Claimant was recently reassessed by Dr. Walcott on July 25, 2022 and the findings were as follows:

- The Claimant is still suffering from Post-Traumatic Stress Disorder
- The Claimant no longer meets the criteria for a Major Depressive Disorder. It is in full remission.
- Claimant now has a whole person disability of 24%.

**[9]** Under cross examination, Dr. Walcott was challenged as to his utilization of the California Schedule (CS) viz-a-viz the American Medical Association guidelines ("AMA"). His assessment in the whole person disability of the Claimant was based on the California schedule for rating permanent disability and not the AMA guidelines. He sought to clarify that the California schedule is guided by the AMA. He admitted to Counsel for the Defendant that the rating system between the California schedule and AMA guidelines may not be precise but they should correlate.

**[10]** He agreed that he did not use the AMA guidelines when coming up with the disability ratings of Mrs. Charmaine Manning-Allen but stated in re-examination

that this was for consistency as he had always used the California schedule in his reports. Under further cross-examination by Counsel Mayhew K.C., Dr. Walcott stated that he had used the 2005 edition of the California schedule as a guide in his report but the latest edition is 2013.

**[11]** It was suggested to Dr. Walcott that the World Health Organization (WHO) has outlawed the use of the California schedule and he indicated that he was not aware of this. In respect of this suggestion, no evidence to this effect was presented on the part of the Defendant when Dr. Sewell provided his account. He commented on the reliability of the California Schedule by stating that the literature suggests that there is often criticism of this testing tool on the basis that it over-emphasizes impairment and the AMA guidelines are more accepted and predominantly used in this jurisdiction in respect of impairment.

**[12]** Dr Walcott was asked to comment on the finding of Dr Sewell that the Claimant was in partial remission of PTSD as she did not display two (2) of the nine (9) DSM-V required as outlined below;

- a. Criterion A – the presence of a stressor
- b. Criterion B – Intrusion symptoms
- c. Criterion C – Avoidance
- d. Criterion D – Negative alterations in cognition and mood.
- e. Criterion E – Alterations in arousal and reactivity
- f. Criterion F – Duration of greater than a month.
- g. Criterion G – Functional significance
- h. Criterion H – Exclusion of other possible causes

**[13]** In his response, Dr. Walcott did not take issue with the nine (9) factors stated in the report. He disagreed however that the Claimant did not display the symptoms outlined at Criterion D. He asked that the mental status examination conducted on the Claimant be carefully reviewed, as in that exercise, Dr. Sewell had recorded

that the Claimant had displayed emotional distress. He emphasized that this was sufficient to satisfy this criterion. In addressing all the symptoms that the patient should display, Dr. Walcott stated that for a diagnosis of full PTSD, it was sufficient for the Claimant to display the following symptoms; the first being the re-experiencing of the traumatic event, hyper-arousal/anxiety and avoidance/psychological distress when reminded of the event. He stated that added to this, the individual would have to suffer emotional distress or dysfunction and in this case, emotional distress had been identified. He also indicated that the absence of dysfunction did not mean that there was no PTSD.

**[14]** In cross examination, he was asked if he agreed that the reason for difference in his diagnosis of the Claimant between 2020 when he first saw her and 2022 was as a result of the progression of her condition from when he first saw her. In responding he initially stated, not entirely, but then changed this response to 'partially.' He explained that from his assessment, a treatment and management plan was created which included pharmaceutical agents, psychological intervention and lifestyle changes such as physical activity which has been shown to be as effective as medication.

**[15]** He agreed with the suggestion that one of the differences between himself and Dr. Sewell was that in 2020, he diagnosed the Claimant with major depressive disorder (MDD), whereas in 2021, Dr Sewell diagnosed her with adjustment disorder (AD) with depressed mood. He agreed that for the diagnosis of major depressive disorder, the patient must experience five (5) symptoms of those listed, two (2) of which are loss of pleasure i.e. anhedonia and sadness for longer than two (2) weeks. He outlined the five (5) symptoms noted as sadness lasting longer than two (2) weeks, anhedonia, disturbance in sleep, disturbance in appetite and suicidal thoughts/tendencies.

**[16]** Dr. Walcott also agreed that when Dr. Sewell saw the Claimant in May 2021, he did not find that she met the criteria for MDD. It was suggested to him that an assessment of adjustment disorder occurs when a patient did not meet five (5)



criteria and he indicated that this was not necessarily the case as both were associated with suicidality and both have degrees of severity.

[17] In explaining the difference, he stated that AD is solely caused by a specific event and usually resolves within six (6) months of the event. For MDD, he stated that while it can have significant traumatic event, this is a contributing factor and an individual can have other issues like biological susceptibility, poor psychological coping methods and other social stressors. The main difference is while AD resolves, with MDD, there is a high probability of a recurrence over time and for each event, the probability of another event increases.

[18] Dr. Walcott was asked to comment on the finding of Dr. Sewell on this point and conceded that as presented to Dr Sewell at the time, based on the history outlined, the Claimant did not meet the requirement for MDD.

### **Dr. Clayton Sewell**

[19] Dr. Clayton Sewell, a Consultant in Forensic Psychiatry, is the Medical Expert for the Defendant. His findings on May 10, 2021 are as follows:

#### **Diagnosis**

- The Claimant was diagnosed as suffering from PTSD in partial remission and Adjustment Disorder with Depressed Mood with mild to moderate impact on her emotional and physical functioning. The report also noted Mental Impairment which was stated as mild to moderate indicating some impairment in social or occupational functioning.

#### **Impairment**

- The Claimant's level of disability indicates that mentally she is functioning in the region of sixty (60%) percent of normal (whole person) levels. This presents as a ten (10%) residual Mental and Behavioural Disorder in accordance with the AMA guidelines.

## **Recommendation**

- Successful continuation of therapy should result in the return of the Claimant's premorbid level of functioning over a period of twelve (12) months.

- [20]** There are marginal differences between the opinions of Dr. Walcott and Dr. Sewell. The disagreement between the two doctors really hinge on whether or not the Claimant's PTSD is in partial remission as posited by Dr. Clayton Sewell, the Medical Expert for the Defendant or whether she still suffers from PTSD in a fulsome sense, as postulated by Dr. Geoffrey Walcott.
- [21]** In response to questions posed by the Defendant's Counsel, Dr. Sewell indicated that in her screening, the Claimant indicated having specific symptoms and on detailed clinical evaluation on the 10<sup>th</sup> of May 2021, no social/occupational dysfunction was reported and no negative alterations in cognitions or mood, related to her traumatic experience was described.
- [22]** He also noted that in respect of the nine (9) required criteria for a diagnosis of PTSD, he assessed the Claimant as having partial PTSD due to the absence of significant functional impairment or negative alterations. He opined that she likely met the full criteria in the past and has recovered enough that at the time of his evaluation, she no longer did so. He explained that this is not unusual, given the length of time that has elapsed since her first evaluation and the nature of PTSD.
- [23]** In explaining the disability rating, Dr. Sewell stated that it is based on the functional impairment of the individual and does not necessarily relate to whether the patient meets the full or partial criteria. He reported that in the Claimant's case, there were mild to moderate symptoms despite the fact she reported that she was functioning well and was having meaningful interpersonal relationships. This represents a ten (10%) percent mental and behavioural disorder impairment using the AMA guide.

- [24]** In respect of his finding of AD, Dr. Sewell noted that this typically means having emotional or behavioural symptoms within three (3) months of a specific stressor. He expounded on this explanation by stating that the presence of depressive symptoms such as sad mood, tearfulness etc. meets the depressed mood specifier. He posited that although the Claimant reported feeling sad and tearful after being told she was HIV positive, she had some improvement in her mood and symptoms two (2) days later when told she was in fact negative. Based on his assessment of her, he concluded that the five (5) symptoms for the two (2) weeks minimum criteria for the diagnosis of MDD was never met.
- [25]** Dr. Sewell maintained that the presence of emotional distress does not in and of itself meet the full criteria for PTSD. He opined that although the Claimant had symptoms in relation to her experience, she did not have functional impairment nor the negative cognitions or thoughts related to being told that she was HIV positive to make the diagnosis of PTSD and all criteria have to be met for the diagnosis to be made of full PTSD.
- [26]** In cross examination, he stated that on comparison of the CS and AMA, the findings usually suggest that the difference is significant, certainly greater than 1 %. Where the impairment method was developed, there have been challenges re: the level of impairment and compensation associated with it. So he would say that there is a significant difference between the two.
- [27]** He was asked if he agreed that when he saw the Claimant in May 2021, she was 40% impaired in WPI and responded that when he saw her, her global assessment reflected a 40% reduction in WP which equates to 10% in AMA. It was suggested to him that his assessment of 40%, a year later is not significantly different from the findings of Dr. Walcott and he did not agree. He expanded on this response by stating that because the 30 to 48% is the CS, the difference in GAF is 10% as Dr. Walcott scored her on GAF as maximum of 50 and he did so at 60 which equates to 10% on AMA but 30 to 48% on CS. Dr. Sewell continued that the 40% indicated by him is in relation to the GAF and cannot compare that to the California rating.

[28] When challenged that he had not stated this difference in his report, Dr. Sewell responded that when Counsel referred to his statement in the report of 40% WPI, it is the same thing as 40% GAF. He then sought to clarify this position by stating that the terms WP and GAF are interchangeable and equivalent and it was his preference to refer to it that way.

## **SUBMISSIONS ON BEHALF OF THE CLAIMANT**

[29] On behalf of the Claimant, Mr Earle K.C., submitted that there was overwhelming evidence in support of the contention that the Claimant had suffered a severe psychiatric injury. He submitted that the Court should accept the evidence of Dr. George Walcott as he was aware of all the symptoms of the Claimant, having performed psychiatric evaluations on her shortly after the incident. King's Counsel urged the Court to reject the evidence of Dr. Clayton Sewell on the basis that he had not paid specific attention to the Claimant's emotional distress.

## **QUANTUM**

[30] Counsel for the Claimant placed reliance on the case, ***Joan Morgan & Cecil Lawrence v Ministry of Health, UHWI and the Attorney General of Jamaica*** delivered on 19 December 2007 and reported in **Khan's Volume 6 at page 220**, as being very useful in guiding the Court on how to treat with psychological injury. Counsel further submitted that it is applicable having regard to the fact that it is an authority from this jurisdiction in which the particular injury was psychiatric and resulted from a Human Immunodeficiency Virus (HIV) misdiagnosis.

[31] In the case of ***Joan Morgan (supra)***, Ms. Morgan was advised by the University Hospital that she had tested positive for HIV. She became nervous, fretful and entertained suicidal thoughts. Her blood pressure soared and she had to retrieve medication for stress. Dr. Aggrey Irons diagnosed Ms. Morgan as suffering from moderately severe Post-Traumatic Stress Disorder (PTSD) directly and consistently related to the misinformation regarding her HIV status. On December 19, 2007, the Court assessed her general damages and awarded the sum of Three

Million Five Hundred Thousand Dollars (\$3,500,000.00) with interest at a rate of 6%.

[32] Counsel highlighted that in ***Joan Morgan's case (supra)***, Ms. Morgan suffered from frequent flashbacks with phobic behaviour, anxiety and depression specific to alleged misdiagnosis of (PTSD) specific to being informed that she was HIV positive, in need of Psychotherapy and pharmacotherapy, severe anxiety, depressive symptoms, severe self-doubt, preoccupation with flashbacks and fear of dying and severe PTSD. He submitted that in the case at bar, Mrs. Manning-Allen sustained injuries which mirror that of ***Joan Morgan*** as they include:

- Frequent flashbacks with phobic behavior
- Anxiety and depression specific to the misdiagnosis
- PTSD specific to being informed that she was HIV positive
- In need of psychotherapy and pharmacotherapy
- Depressive symptoms
- Nightmares having to re-experience the event that poses a threat to life and integrity.

[33] Counsel argued that there are however two (2) differences as Mrs. Manning-Allen had suicidal ideations while Ms. Morgan had a fear of death. In that regard, he submitted firstly that the suicidal ideations are patently worse. In respect of the other difference, he acknowledged that unlike Ms. Morgan, Mrs. Manning-Allen was not in a state of consistent preoccupation with the health of her unborn child.

[34] Reliance was also placed on the case of ***Karen Reid v Harbour Medical Centre, Ministry of Health and the Attorney General's Department [2014] JMSC Civ.56***, in which the Claimant sued for damages for negligence arising out of a misdiagnosis by the nursing staff at the Harbour View Medical Centre. She was misdiagnosed as having HIV and remained misdiagnosed for two (2) years. During that time, her HIV status was in the public domain, her relationship with her child's father came to an abrupt end as he had denied paternity of their child, she had to

take anti-retroviral drugs for over two years and also had to undergo C-section which left a scar. She battled suicidal thoughts and was found to have PTSD and depression. Damages for pain and suffering and loss of amenities in April 2014 were assessed at \$8,850,000.00 which updates to \$13,275,000.00.

[35] Counsel conceded that a misdiagnosis for a longer period would result in a more severe impact in that there will be prolonged suffering, pain and agitation. He acknowledged that the misdiagnosis in **Joan Morgan's case** (*supra*) lasted for fifteen (15) days and in the **Karen Reid's case** (*supra*), it lasted for two (2) years. The Court in **Karen Reid** (*supra*) saw it fit to increase the award made in **Joan Morgan's case** to adequately compensate for the length of time in which Ms. Reid suffered. In the present case, although the period of misdiagnosis is shorter, being a total of five (5) days, King's Counsel argued that the situation in respect of Mrs. Manning-Allen was just as egregious as she had been misdiagnosed twice by the Defendants.

[36] He submitted that Mrs. Manning-Allen case is a peculiar one in that she is a married woman and a mother of three (3) children. The Defendant's negligence negatively impacted her marriage, the relationship with her children and her sanctity. Counsel postulated that it would be strange to dismiss Mrs. Manning-Allen's misdiagnosis and psychiatric injuries as not severe. He also submitted that while it is vital to note whilst there have been some improvements to Mrs. Manning-Allen's psychiatric injuries, she has been recently diagnosed by Dr. Geoffrey Walcott as having an increased risk of future episodes compared to the general population.

[37] In concluding his submissions, King's Counsel posited that applying the principles and damages assessed in the above-mentioned authorities, an appropriate award for General Damages is Fourteen Million Dollars (\$14,000,000.00)

## **SUBMISSIONS ON BEHALF OF THE DEFENDANT**

- [38] The Defendant's Counsel, Mrs. Mayhew K.C., agreed that the decision of ***Joan Morgan & Cecil Lawrence v Ministry of Health, UHWI and the Attorney General of Jamaica 2005 HCV 00341*** ("Joan Morgan") is the local locus classicus for the award for psychological damages in Jamaica particularly arising from the misdiagnosis of HIV.
- [39] Counsel acknowledged that in assessing the damages, the Court utilized the United Kingdom Judicial College Guidelines for the Assessment of General Damages in Personal Injury formerly known as the Judicial Studies Board Guidelines ("the Judicial Guidelines") and determined that the Claimant fell into the category of Moderately Severe PTSD. General damages were assessed in the sum of \$3,500,000.00 and was awarded in December 2007. This figure now updates to \$9,607,382.55.
- [40] King's Counsel reviewed a number of authorities which followed the ***Joan Morgan*** case. She observed that this decision was heavily relied on in ***Karen Reid v Harbour View Medical Centre and the Ministry of Health and the Attorney General's Department [2014] JMSC Civ.56*** ("Karen Reid"). She also highlighted that the ***Karen Reid*** decision was in turn heavily relied on in ***John Henry v South East Regional Health Authority et al [2019] JMSC Civ 268*** ("John Henry"), wherein Mr. Henry like Karen Reid was misdiagnosed with HIV and remained misdiagnosed for two (2) years.
- [41] During that time, he had to undergo treatment by way of injections and rectal examinations. His sexual life floundered with the ending of his relationship with his spouse as he stopped having sex after his diagnosis. He was ridiculed and scorned by everyone who knew him. As a result of the misdiagnosis, he became depressed and developed PTSD. He also had flashbacks, sleep problems and easy irritability. He was awarded the sum of \$8,500,000.00 in November 2019 which updates to \$10,103,104.70.
- [42] Mrs. Mayhew K.C. submitted that in the ***Joan Morgan*** line of cases, the Court fell into error as in assessing the correct award, the Court looked at the stressor and

not the response. She also made referenced to the decision of **Jamaica Pre Mix v Shawn Hennie** where Phillips J.A in examining the lower Court's reliance on the JSB Guidelines stated;

*'in light of the stark difference in social, economic and industrial conditions between England and Jamaica, this would not be an appropriate practice. As difficult as it may be in rare and peculiar cases, judges in our courts have to strive to arrive at our best estimate of appropriate levels of compensation for personal injuries in Jamaica. Where we seek assistance from awards in other jurisdictions, it is best that we search for and rely on awards made in countries which are similar to us in social, economic and industrial conditions. Such an approach would avoid the difficulty of determining what level of discount would be required to be applied to an award made in a country with dissimilar conditions, in order for it to reflect our reality'.*

- [43] King's Counsel highlighted that in the **Joan Morgan** decision the Court explicitly outlined its reliance on the Judicial Guidelines. She argued that in view of the dicta in **Jamaica Pre-Mix supra**, the award in **Joan Morgan** and the cases that applied it, must be considered unreliable and caution must be exercised by a Court in using these awards as a guide to the assessment of damages.
- [44] She submitted further that although the Courts in **Karen Reid** and **John Henry** applied the approach in **Joan Morgan**, the awards were discounted. She asserted that on a proper review of those awards, one immediately appreciates the more severe and significant symptoms and effect on amenities in both cases when compared to the instant case.
- [45] King's Counsel contended that unlike the current Claimant, **Karen Reid** and **John Henry** were both misdiagnosed for a period of two (2) years and were being treated over this period for a disease that they did not have. She observed that in those circumstances, there was evidence of significant and long term effects on the amenities of these Claimants.
- [46] Mayhew K.C. submitted further that even though the case at bar is similar to **Joan Morgan**, it is not analogous as **Joan Morgan** suffered more severe psychological injuries. **Joan Morgan** was diagnosed as suffering from moderately severe PTSD. Counsel argued that her injuries were twice as severe as the instant Claimant in



that Ms. Morgan was misdiagnosed for a longer period of time, while the Claimant was only misdiagnosed for five (5) days.

[47] King's Counsel also made reference to a number of decisions in which the Courts did not strictly follow the **Joan Morgan** approach in assessing the damages payable. I have outlined the cases below as helpfully summarised in Counsel's submissions on this point;

- **Natoya Swaby & Andrew Green v Southern Regional Health Authority [2012] JMSC Civ.151**, the Claimant was found to be suffering from PTSD consequent upon the loss of her day-old baby, whose body was never shown to her and remained unaccounted for. She was diagnosed with PTSD and mild to moderate depression. An award of \$3,861,686.64 was made in October 2012 in reliance on the Joan Morgan's case which was discounted by 30% to accurately reflect a suitable award. This figures updates to \$6,535,571.73.
- **Barbara Wright v University Hospital Board of Management [2016] JMSC Civ 214**, the Claimant due to the negligence, was transfused with blood of a type different from her own. As a result, she suffered from depersonalization, PTSD and Major Depressive disorder (among other physical injuries). Her mental injuries spanned some nine (9) years before assessment. Though reliance was placed on Joan Morgan decision, the Court made an award in December 2016 for \$3,500,000.00 for psychological injuries which updates to \$4,745,303.87.
- **Sharon Greenwood-Henry v The Attorney General of Jamaica Claim No 1999CLG116**, the Claimant was pulled from a departure line at the Norman Manley International Airport and searched. She was also subjected to a cavity search of her vagina by a female Police Officer. She was X-rayed and given laxatives but was subsequently released the following day, after being detained for fifteen (15) hours, when no drugs were found in her. The incident led to her suffering severe Post-Traumatic Stress Disorder (PTSD).

She had to see the psychiatrist for insomnia, appetite disturbance and public avoidance behaviours specific to the incident. She also suffered from severe depression, severe anxiety, severe phobic responses relating to travel and sexual activity, loss of libido and psychological bowel and bladder disturbance. In October 2005, she was awarded \$1,100,000.00 for assault and battery, \$500,000.00 of which was for PTSD. That sum of \$500,000.00 updates to \$1,699,445.98.

- **Angeleta Brown V Petroleum Company Limited and Juici Beef Limited Claim No 2004 HCV.** In this case, the Claimant was injured when a liquid petroleum gas cylinder exploded causing her severe burns all over her body. Her cosmetic disfigurement was 100% for her legs and she had permanent unsightly scars. She became depressed and was seen by Dr. Wendel Abel who concluded that she was suffering from major depression and moderate PTSD. The degree of disfigurement to her nostrils and upper and lower limbs had affected her body image and was a source of emotional distress. For PTSD, she was awarded \$340,000.00 in April 2007 which updates to \$1,058,832.49.
- **Ryan Henry v Kingston Container Terminal Services Limited [2015] JMSC Civ.154**, in which the Claimant after suffering physical injuries during a workplace accident, was assessed as having chronic PTSD, complicated by depression and anxiety (although having failed a malingering test). An award of \$1,182,926.00 in July 2015 was made under the heading, PTSD which now updates to \$1,668,333.57.

[48] King's Counsel argued that on a review of these cases, the facts in **Natoya Swaby** are more akin to the instant case. She cautioned however that the Court had to be careful in strictly adopting that decision as the **Joan Morgan** decision was applied in arriving at an award for Ms. Swaby.

[49] Counsel submitted further that while it is acknowledged that the circumstances surrounding the cause of the development of the psychological injuries are different, the focus should be on the injuries sustained and not the circumstances surrounding how they were sustained. She placed reliance on the case of ***Peter Badoo v Detective Sergeant Ralph Grant et al*** [2017] JMSC Civ 59, where the Court stated at paragraph 64:

*though the circumstances giving rise to psychological damages are different, the results are similar.*

[50] Mayhew K.C also relied on an extract from **Munkman** and asked the Court to note that the learned authors did not list the circumstances surrounding the incident as a factor which should be taken into account in valuing psychiatric injuries. The relevant factors were illustrated as follows:

- a) the injured person's ability to cope with life and work;
- b) the effect on the injured person's relationships with family, friends and those with whom they come in contact;
- c) the extent to which treatment would be successful;
- d) future vulnerability;
- e) prognosis and
- f) whether medical help has been sought.

[51] In concluding her submissions, King's Counsel argued that the award for PTSD should be in line with the traditional cases involving psychiatric injuries which do not follow the approach in ***Joan Morgan***. She opined that those authorities are more instructive of the appropriate levels of an award for PTSD and/or Major Depression whatever the circumstances giving rise to the psychological injuries.

## **ANALYSIS**

[52] The aim of an assessment of damages is to arrive at a figure that will provide adequate compensation to the Claimant for the damage, loss or injury suffered as was enunciated by Lord Blackburn in ***Livingstone v Rawyards Coal Co.*** [1880

**Appeal CAS.25]** As such, it is trite law that the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as “**nearly as possible**” puts the Claimant in the same position she would have been in if she had not sustained the wrong” (per Lord Blackburn in *Livingstone supra*)

[53] In the claim which was filed, the Claimant sought awards for Special Damages, General Damages and Future Medical Care. At the end of the evidence presented, the Court was informed that Special Damages had been agreed in the sum of \$324,650. This sum represents the cost incurred for medication as well as medical reports. For Future Medical Care, the parties were able to agree on an award in the sum of \$1,230,000 to cover the anticipated expenses of medication, psychiatric review services and psychological interventions. Consequent on these awards being agreed, the sole question remaining is the appropriate quantum for the award of general damages.

### **General Damages**

[54] It is the Claimant’s case that as a result of the misdiagnosis on the part of the Defendant, she suffered from PTSD and MDD. There is no disagreement as to whether she suffered from PTSD, the dispute between the Parties is in relation to the degree/severity or gravity of the PTSD. Specifically, whether she is still suffering from full PTSD or there been an improvement in her condition since the diagnosis, with the result that her condition is now accurately described as partial PTSD. In examining this issue, the Court also has to determine the actual level of impairment that this Claimant has suffered.

[55] In the course of my analysis, I took careful note of Dr. Sewell’s concession that it was likely that at the time that the Claimant was initially seen by Dr. Walcott, the diagnosis of full PTSD and MDD was justified. The question which must be considered then is whether the Claimant’s condition had improved at the time of

her examination by Dr. Sewell in May 10, 2021 and was unlikely to be what Dr. Walcott reported in 2022.

**[56]** With the Claimant's interaction with Dr. Walcott being closer in time to the incident, I am satisfied that the observations made by him in 2020 were based on her having satisfied the requisite criteria for this diagnosis. In respect of his second assessment of the Claimant on July 25, 2022 and how it compares to the assessment provided by Dr. Sewell, the Court takes careful note of the agreed position of the doctors that the diagnosis of PTSD is arrived at using the nine (9) factors outlined at the DSM-V for assessing this psychiatric injury.

**[57]** In my review of the assessment provided by Dr Walcott, it is clear that although he placed emphasis on the presence of emotional distress, coupled with avoidance, hyper-arousal and re-experiencing trauma, he disagreed with the view that dysfunction is required for a diagnosis of PTSD to be made. The importance of this assertion is seen on a comparison of same with the Claimant's evidence. In her account, Mrs. Manning-Allen outlined that although she felt dissatisfied by her output at work and at church she was still carrying out her functions. She was not replaced in either of the positions she held at church and her offer to step down from these offices was refused. Her professional life was a similar situation as she had not been the subject of any complaints from students or parents. Neither had she been the subject of any disciplinary proceedings.

**[58]** This portion of her evidence was quite revealing as it clearly showed that in spite of the negative impact that this situation likely had on her, Mrs. Manning-Allen was still able to function and meet the required standards and output of these positions. In her interaction with Dr. Sewell, the Claimant's ability to function was again highlighted as he observed that although she displayed an emotional response in relating the history of her circumstances to him, no social or occupational dysfunction was reported.

**[59]** It was Dr. Walcott's evidence that on his review of Dr. Sewell's report, the Claimant clearly satisfied Criterion B, C and E. Additionally, the emotional distress noted in

her mental status examination would have been sufficient to satisfy Criterion D. The significant differences between the experts is that Dr. Sewell did not believe that the Claimant displayed any signs of Criterion D and he insisted, contrary to the pronouncements of Dr. Walcott, that dysfunction (Criterion G) was required in order for a diagnosis of Full PTSD to be made. In my analysis of this point of contention, I took careful note of the fact that when asked to comment on Dr. Sewell's report where he outlined the nine (9) criteria required for this diagnosis, Dr. Walcott did not take issue with the list or the statement that preceded it that 'the diagnosis required the patient to meet all the criteria listed'.

**[60]** In expanding on his response, Dr. Walcott sought to qualify that the requirement was for either emotional distress or dysfunction to be present. He also insisted that dysfunction was not required for this diagnosis. I found this observation to be rather curious given the fact that these criteria were not listed in the alternative on the DSM-V but were separate items for which a patient would be screened.

**[61]** In the course of cross examination, Dr. Walcott confirmed that he had prescribed a course of medication, psychological intervention and lifestyle changes to manage the Claimant's circumstances. He agreed that in respect of his other diagnosis of MDD, the progression of her condition was partially responsible for the difference of his diagnosis of her between 2020 and 2022. It was the evidence of the Claimant that she had utilized the prescription provided and the history provided by her to Dr. Sewell outlined that her religious beliefs and love for her children were a major source of encouragement and perhaps even a coping mechanism for her in the period since the misdiagnosis.

**[62]** It is evident that in the intervening period, there were factors which positively impacted the extent of the Claimant's injury and this has not been disputed in respect of the MDD. In respect of his initial diagnosis of her with this injury, Dr. Walcott conceded that in his follow-up assessment, she no longer satisfied the criteria for same. He did not take issue with the assessment of AD, but insisted that the correct diagnosis would have been MDD in full remission.

- [63] In respect of her PTSD, I believe that there was like improvement and this is seen in her interaction with Dr. Sewell where she showed partial insight into her situation and was aware of her exaggerated response to the diagnosis. I also believe that she recognized the need for management of her mood and anxiety. In respect of changes/improvements where this injury is concerned, I took special note of the concession of Dr. Walcott where he stated that the nature of PTSD is that it waxes and wanes and may recur. I am satisfied that these changes positively affected her ability to perform her duties at work and church without complaint and that she was able to function even if she may not have felt 100%. It is in those circumstances that I found a sufficient basis to prefer the view of Dr. Sewell that there was no significant functional impairment and as such the Claimant would no longer qualify as being in full PTSD.
- [64] It is well established that a Claimant who has suffered from PTSD and other psychological or psychiatric injuries can be awarded damages, the quantum of which is dependent on the magnitude of the injury. At paragraph 32 of this judgment, the Court made reference to the injuries suffered by **Joan Morgan**. A review of the reported injuries of the Claimant in the case at bar revealed a number of similarities in their reported symptoms and loss of amenities. A significant difference however was that whereas **Joan Morgan's** PTSD was reported as severe, no similar statement was found in respect of Mrs. Manning-Allen and the Court has already stated that it accepts that her situation had improved.
- [65] A comparison of Mrs. Manning-Allen's circumstances with that of **Karen Reid** and **John Hardy supra**, disclosed that although there were some similarities in terms of the nature of their illness and symptoms of depression and anxiety, the differences in their loss of amenities were stark. Both individuals remained misdiagnosed for two (2) years, Ms. Reid suffered an unnecessary surgical process which resulted in a scar, both of them suffered a negative impact on their relationship, their misdiagnosis was circulated in the public sphere and they were using medication for a disease that they did not have.

[66] In the course of my examination of the cases above, I carefully considered the contention of Counsel for the Defendant that the awards in **Joan Morgan** and the other HIV related cases was influenced by the Courts considering the stressor and not the response. In analyzing this submission, I took note of the dicta of Sykes J (as he then was) in **Phillip Granston v The AG 2003HCV 01680**, which was cited in the **Karen Reid** decision, and observed where he stated at page 24 as follows;

*“...in assessing damages there is a subjective and an objective component. The subjective aspect is the specific effect on the particular claimant. The objective element focuses on similar injuries in the past. The goal of looking at past awards is to make sure that awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases’*

[67] Applying the principles enunciated by the learned Judge to the matter before me, I am unable to agree with the submission of Kings Counsel on this point as although his Lordship confirmed the need to consider the response or as he termed it, ‘the specific effect on the particular claimant’, he made it clear that the court would be entitled to consider similar injuries in the past, a category which I believe includes cases in which the stressor was the same. In my consideration of this issue, I carefully reviewed the decision in the **Jamaica Pre-Mix** case *supra*. While the Court expressly disapproved of adopting the JSB guidelines in the calculation of the appropriate awards, there was no similar statement in respect of the **Joan Morgan** line of cases in which this approach had been utilized, a fact acknowledged by Counsel for the Defendant. In the absence of a clear direction that these authorities should no longer be considered by a Court, these decisions remain relevant and applicable.

[68] Having arrived at this conclusion, I then went on to consider the non-HIV related PTSD cases. While the circumstances in the **Natoya Swaby** case were somewhat similar, and the **Barbara Wright** decision was comparable to a lesser extent, I noted that the other decisions involved situations in which the PTSD was



secondary to other injuries inflicted on the Claimant. This was the case in the **Sharon Greenwood-Henry** case where she experienced a physical assault upon her person through the cavity search and forcible administering of laxative. The **Angeleta Brown** and **Ryan Henry** cases resulted from accidents/circumstances in which they were fully aware of the extent of their physical injuries. In the instant case, the traumatizing experience of the misdiagnosis left the Claimant with much uncertainty regarding the full extent of the injury caused and resulted in psychiatric trauma which impacted all other aspects of her life.

[69] In the extract from **Munkman**, which was cited by Counsel for the Defendant, after reviewing the factors to be taken into account in reviewing psychiatric damage generally, the learned writers specifically addressed the category of post-traumatic stress disorder. They noted that these types of injuries were specifically described as follows:

*Cases within this category are exclusively those where there is a specific diagnosis of a reactive psychiatric disorder in which characteristic symptoms are displayed after a psychologically distressing event which was outside the range of normal human experience and which would be markedly distressing to almost anyone (emphasis added).*

[70] The writers of the text then went on to address the respect categories within which individual situations could be placed and I have outlined the relevant categories:

*Moderately severe – This category is distinct from (a) above<sup>1</sup> because of the better prognosis which will be for some recovery with professional help. However, the effects are still likely to cause disability for the foreseeable future.*

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<sup>1</sup> Severe p. 231 (a) Munkman

*Moderate - In these cases, the injured persons will have largely recovered and any continuing effects will not be grossly disabling.*

- [71] In addition to acknowledging the significance of the response and cause of this injury, the extract provides useful guidance on how to assess the severity of the injury and determine of the quantum of damages to be awarded. It is clear from the reports provided by the Doctors, that although Mrs. Manning-Allen had experienced full PTSD at the time of the incident and was still experiencing same at the time of her initial evaluation, she had seen some improvement and could properly be described as falling within the category of moderately severe. In determining the appropriate quantum of damages given her classification, I remind myself of the principle enunciated by Campbell J. in **Beverly Dryden v Winston Layne SCCA 44/87** (unreported) delivered 12<sup>th</sup> June 1989 that personal injury awards should be reasonable and assessed with moderation.
- [72] Counsel for the Defendant submitted that an award of \$3,500,000.00 is appropriate when one considers the awards in other cases. I agree that the personal circumstances of this Claimant and her loss of amenities does not appear to be as severe as that suffered by the Claimants in **Karen Reid** and **John Henry**.
- [73] I am persuaded however that her situation would be more akin to that of **Joan Morgan** as opposed to **Natoya Swaby**, given the similarities identified, the exception being that Ms. Morgan was misdiagnosed for a longer period. Unlike Ms. Morgan, this Claimant was actually assessed as to the level of whole person impairment that she has suffered. In considering the impact of this assessment on the prospective award, I gave careful thought to the differences between the experts on this point. These differences as explored above resulted from the different guidelines which had been used to arrive at their respective findings.
- [74] While there were questions raised by each expert, whether in their reports or viva voce evidence as to the reliability of the guideline used by the other, the central issue as identified by this Court was whether their positions had been arrived at based on their final assessment of the Claimant. In this regard, I have already

indicated that I preferred the conclusion of Dr. Sewell that she had shown some improvement and showed no indication of at least two of the required criteria for full PTSD. In those circumstances, I am satisfied that any resulting impairment would be significantly reduced. As such, I accept that the correct assessment of Mrs. Manning-Allen's disability is 10% whole person impairment.

**[75]** Accordingly, it is my decision that taking into account the differences identified with the **Joan Morgan** case, the Claimant's classification and level of impairment, the appropriate award is nine million dollars (\$9,000,000.00).

### **Conclusion**

**[76]** Damages are assessed as follows:

- (a) General Damages awarded to the Claimant in the sum of \$9,000,000.00 with interest at a rate of 3% from January 25<sup>th</sup>, 2021 to November 18<sup>th</sup>, 2022;
- (b) Special Damages awarded to the Claimant in the sum of \$324,650.00 with interest at a rate of 3% from 27<sup>th</sup> December 2019 to November 18<sup>th</sup> 2022;
- (c) Future Medical Expenses awarded to the Claimant in the sum of \$1,230,000.00; and
- (d) Costs awarded to the Claimant in the agreed sum of \$1,280,000.