



[2018] JMSC Civ. 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 05272

BETWEEN	SOPHIA SMITH-HEATH	CLAIMANT
AND	THE SOUTHERN REGIONAL HEALTH AUTHORITY	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

IN OPEN COURT

Khadine Dixon instructed by Dixon and Associates for the Claimant

Jenielle Rose instructed by the Director of State Proceedings for the Defendants

Heard: 19th January, 2017 and 4th April, 2018

Damages – Assessment of damages – Pain and suffering – Psychiatric injury – Handicap on the labour market – Future medical and nutritional care – Claimant contracted HIV while working.

BROWN BECKFORD, J

INTRODUCTION

[1] I must thank both sides for their submissions and apologize for the delay in delivering this judgment. It is the first time that a matter such as this is being considered by the Court and the usual guidance from precedents set from similar matters were not available to the Court. This meant that more time than would usually be necessary was spent on researching the matter fully.

- [2] Nonetheless, my sincere apologies to the litigants and Counsel for the delay in presenting this decision.

BACKGROUND

- [3] The Claimant is a Psychiatric Nurse who is employed at the Black River Hospital, managed by the First Defendant in this claim. What has led to this claim is a set of unfortunate events which occurred on September 30th, 2007 while the Claimant was on duty at the female surgical ward at the Hospital. While in the course of her duties, Mrs Smith-Heath, then a ward assistant, was stuck in the buttocks with a needle that had been inserted intravenously into the arm of a mentally ill patient who was known to have Acquired Immune Deficiency Syndrome (AIDS). Thereafter, the patient, who was not restrained, jumped up and down in her bed declaring that she has AIDS.
- [4] The incident was immediately reported to a registered nurse and the supervisor who were both on duty. However, Mrs Smith-Heath was not examined by a doctor until the following day and she received no medical treatment in the form of antiretroviral drugs until October 1st, 2007. The efficacy of this treatment is confined to the first 24 hours. Following treatment with the antiretroviral drugs, Mrs Smith-Heath was tested several times for Human Immunodeficiency Virus (HIV) which yielded negative results. However, on March 10th, 2008, she tested positive for HIV.
- [5] Mrs Smith-Heath has claimed that the aforementioned events occurred as a result of the negligence of the Defendants who failed to adequately train and warn the staff of the dangers of malicious attacks against staff by patients that are mentally unstable and suffering from socially negative or incurable diseases. She further claims that she has suffered both emotional and psychological harm as a result of contracting HIV.
- [6] The Defendants have admitted liability and filed a Defence limited to quantum of damages recoverable by the Claimant. Thereafter, Judgment on Admission of

Liability was entered against the Defendants with damages to be assessed. The matter has now come up for hearing before me for assessment of damages.

THE CLAIM

[7] It is important from the outset to bear in mind what the Claimant has asked of the Court which is set out in her Further Amended Particulars of Claim as follows:

AND THE CLAIMANT CLAIMS:

Damages for mental and emotional pain and suffering and anxiety during the period the tests were being conducted upon her.

Damages for mental and emotional pain and suffering upon discovering that she had tested positive for HIV.

Damages for mental and emotional pain and suffering and anxiety during the period the test were conducted upon her husband, and continuing.

Damages for the expense that she is being, and will continue to be, put to for medication and drugs.

Damages for the expense that she is being and will continue to be, put to for following a special dietary regime as an immune-compromised HIV carrier.

Damages for the expense that she will be put to for nursing care and special assistance

Damages for Loss of Expectation of Life

Damages for Loss of Fulfilment in having to use a condom during sexual intercourse with her husband.

Damages for Loss of Conjugal relations and sexual incapacities on account of her husband's fear of having been or of being infected by her with HIV.

Damages for the breakup of her marriage on account of the strictures necessarily and reasonably placed on sexually activities therein, including having to use a condom.

AND THE CLAIMANT FURTHER CLAIMS:

Special damages to be quantified and provided on amendment at the Case Management Conference herein

Costs to be assessed, taxed or agreed

Interest on damages to the Claimant in an amount to be assessed by the Court or at the statutory rate

General consumption tax to the Claimant in an amount to be assessed or agreed as that paid and/or payable by the Claimant on reasonable attorneys-at-law fees.

ISSUES

[8] The issues for the Court's consideration are:

- a) What quantum of damages is reasonable for pain and suffering and loss of amenities;
- b) Can the Claimant recover damages for loss of expectation of life;
- c) Can the Claimant recover damages for handicap on the labour market and how should this be calculated; and
- d) Which of the heads of future expenses is recoverable and what amount is to be awarded.

MEDICAL REPORTS

[9] The primary documents relied on by the Claimant in support of her claim were the medical reports of Dr Roger Gibson, Dr Tanya Clarke, Dr Janice Simmonds-Fisher and Ms Marsha Woolery, a nutritionist, which were admitted into evidence. An exposition of these reports as it relates to the nature and effect of her status as HIV positive is a necessary background for the award that will ultimately be made.

(i) Dr Roger Gibson

[10] Dr Gibson is a consultant psychiatrist who saw Mrs Smith-Heath twice; first on the 31st January, 2011 and later on the 21st June, 2012. This was just shy of three years after her diagnosis. His report in January outlined that Mrs Smith-Heath did not present with any history of psychiatric illness. However, after contracting HIV she was depressed. Though not delusional, she stressed that her life was shortened and that she would now live a poor quality of life. He diagnosed her as having Major Depressive Disorder and Anxiety Disorder Not Otherwise Specified.

- [11] Dr Gibson noted that as a patient suffering from Major Depressive Disorder, she suffered '*prolonged period of disturbed mood*' which causes sadness. As such, she experienced '*loss of interest, sleep and appetite disturbances, feelings of guilt, thoughts of suicide, low energy and poor concentration.*' He noted that Mrs Smith-Heath had difficulties coping with the severity of her medical condition and the fact that she contracted it through no fault of her own.
- [12] Anxiety Disorder Not Otherwise Specified is characterized by serious anxiety symptoms that are not associated with a named anxiety disorder. Dr Gibson noted that Mrs Smith-Heath had several symptoms of post-traumatic stress disorder including the occurrence of a traumatic event, recurrent recollections of the incident and inability to function in the presence of HIV patients while at work. He attributes her behaviour to her HIV infection.
- [13] His analysis of her mental state took into consideration that:
- She does not have personality and developmental issues.
 - Her current medical problem is that she is presently HIV positive and is currently asymptomatic.
 - She has several psychological issues to include a history of traumatic event, diagnosis with a potentially debilitating and lethal disease, altered social relationships and ongoing exposure to ill HIV positive persons at work.
 - Her Global Assessment of Functioning was assessed at 45/100. The Global Assessment of Functioning Scale provides a rating of the overall level of an individual's social, occupational and psychological functioning.
- [14] He prescribed Mrs Smith-Heath antidepressant medication to be taken daily. He also recommended that she receive supportive psychotherapy which included participation in ongoing psychiatric consultation approximately every four to eight weeks for at least twelve months. Dr Gibson however noted that even with treatment he could not make a final prognosis as poor factors such her '*irreversible*

medical condition' and her inability to cope with her present reality contributes to the severity of her psychiatric condition.

[15] In June 2012 when she returned, Dr Gibson noted that Mrs Smith-Heath only took her prescribed antidepressants for three weeks and did not seek follow up care. He further noted that her psychological symptoms persisted. In addition to this, he noted that she was afraid of the stigma that may be attached to her once it became known that she is HIV positive. His recommendation was that Mrs Smith-Heath continue psychiatric consultation as well as revision and monitoring of her anti-depressant medication. He also suggested that she would benefit from participation in support groups for persons with HIV. Her global assessment of functioning score remained the same and Dr Gibson's overall prognosis *'remained guarded.'*

[16] At the time of giving the evidence, the Claimant's career path had shifted somewhat. She is now a Psychiatric Nurse whose duties include dealing with the mentally ill, doing group therapy and Counselling with these parties including suicide Counselling. Notably, she had not returned to Dr Gibson since taking on these duties. This would presage an improvement in her Global Assessment Functioning. It is the Claimant's evidence that she was now taking the medication prescribed by Dr Gibson which did make her feel better. The Claimant's evidence is that she has received psychiatric treatment other than from Dr Gibson. No further information was however given in that regard.

(ii) Dr Tanya Clarke

[17] Dr Clarke is a consultant physician and lecturer of internal medicine. Dr Clarke's medical report was prepared on 17th July, 2012. She outlined the circumstances leading up to Mrs Smith-Heath's infection. She reported that Mrs Smith-Heath came to see her on 11th July, 2012. This is the first record of medical treatment of the Claimant since she was confirmed in March 2008 to have contracted HIV. At that time her viral load (as detailed in lab results dated April 18, 2012) were 138ccb

cp/ml and CD4 620. She commented that physical examination of Mrs Smith-Heath was normal. However, she appeared sad. Dr Clarke determined that Mrs Smith-Heath CDC category at the time was A3. She noted that she started Mrs Smith-Heath on antiretroviral medication to *'help to prevent the sequelae associated with HIV.'* Dr Clarke also noted HIV cannot be cured and requires lifelong treatment but with the use of medication, the viral load could be suppressed. Lastly, she noted complications which Mrs Smith-Heath may be susceptible to. These include *'opportunistic infections, lipid abnormalities, HIV associated neurocognitive disorder, neurological, dermatological, gastro intestinal, respiratory, metabolic and cardiovascular complications [and] higher risk of certain cancers (e.g. cervical).'* There is no indication that the Claimant returned to her for further medical treatment.

(iii) Marsha N. Woolery

- [18] Ms Woolery is a nutritionist from whom Mrs Smith-Heath sought nutritional advice. There is no indication that this was a recommended course by any of the doctors whom she consulted. Ms Woolery provided two nutrition reports for Mrs Smith-Heath. The first report was provided when Mrs Smith-Heath was 40 years of age. It outlined that Mrs Smith-Heath consumes three meals per day and one Ensure every other day which is approximately 1500 kilocalories and 70 grams of protein. She estimated that the cost of her meals per day would amount to \$750.00 plus \$350.00 for the Ensure. She recommended however, that Mrs Smith-Heath consume 2000 kilocalories and 80-123 grams of protein per day in order to prevent weight loss and retain sufficient nutrients to assist her immune system. She noted that as the disease progressed and Mrs Smith-Heath becomes symptomatic, Mrs Smith-Heath will need to increase her kilocalories intake to between 2500 – 3000 and protein to at least 123 grams. She suggested that Ensure intake should be increased from 1 per day to 7-9 bottles per day depending on her meal intake. She also noted that parenteral nutrition would be recommended should there be gastrointestinal tract failure.

- [19] Ms Woolery took the liberty of estimating the cost of Mrs Smith-Heath's meals per year in her asymptomatic stage versus when she becomes symptomatic. In her asymptomatic stage, Ms Woolery suggested that three meals per day plus Ensure supplements would total approximately \$655,200.00 annually while in her symptomatic stage the cost would be between \$891,800.00 - \$1,146,600.00 annually. She was unable to give an estimate for parenteral nutrition as the cost varies per institution.
- [20] In addition, Ms Woolery noted that Mrs Smith-Heath will need to modify her nutritional intake during periods of nutritional complications such as anorexia, oral candidiasis, diarrhoea, xerostomia and malabsorption. She recommended that Mrs Smith-Heath maintain consultations with her every three months in her asymptomatic stage and once a month when she becomes symptomatic. She also suggested that with the right nutrition, Mrs Smith-Heath could be a productive professional with a high quality of life.
- [21] In her second nutritional report, Ms Woolery saw Mrs Smith-Heath at age 42 years. She noted that Mrs Smith-Heath's physical state was much the same as the last time she was seen. Her present kilocalorie intake had increased to 2100 and her protein intake to 76 grams. She noted that the current cost of one day's meal had increased to approximately \$1,560.00 per day and the cost of Ensure being \$360.00 per drink. Based on her diagnosis, Ms Woolery recommended that Mrs Smith-Heath consume 2500 kilocalories, 128 grams of protein and 2.0 litres of fluid per day to maintain her weight and proper nutrition intake.
- [22] Ms Woolery said that the annual cost of meals for Mrs Smith-Heath in her asymptomatic stage would be \$803,000.00 taking into account that she would need to consume *'13 servings of food from animals such as eggs, fish, cheese, milk, and goat meat; 14 servings of staples such as bammy, yam, rice, potatoes, macaroni; 5 servings of cooked or raw vegetables; 4-6 servings of fruit, fresh whole or juice form; 1-2 servings of legumes such as peas, beans and nuts; and 9 servings of fats and oils such as avocado, ackee, salad dressing, margarine.'* She

also noted that the annual cost of Ensure would be \$131,400.00. In her symptomatic stage, Ms Woolery suggested that Mrs Smith-Heath would spend \$1,197,000.00 annually on food having regard to the fact that her nutrition intake would be varied to meet her body's needs. She also noted that the amount of Ensure per day would increase to 9 and this annual cost would be \$1,182,600.00.

- [23] Like her previous nutritional report, this report noted that the cost of parenteral nutrition varied per institution and that modification of Mrs Smith-Heath nutrition would also be dependent upon whether she experiences episodes of anorexia, diarrhoea, and malabsorption. Ms Woolery still maintained that Mrs Smith-Heath should continue to see her every two to three months for monitoring with the cost of consultation being between \$4,000.00 - \$5,000.00.

(iv) Dr Janice Simmonds-Fisher

- [24] Dr Simmonds-Fisher is a medical doctor who specialises in nutrition and preventative medicine. She has training in regenerative therapies and has done Stem Cell therapies in Jamaica. She is a senior doctor at Bioregeneration Integrated Medical Centre. She prepared a medical letter dated 1st October 2014 and a medical report dated 26th February, 2015.

- [25] In her medical letter, Dr Simmonds-Fisher outlined that mobilized peripheral stem cell offers a patient the possibility of keeping the viral load '*low to negligible*.' She said that the procedure is now done in Jamaica and it is recommended that patients be involved in three treatments with a repeat in therapy in two to three years in order for it to be fully effective. The effect of this treatment relating to antiretroviral drugs was not indicated. Nor was it indicated whether the treatment is to be used in addition to or in place of the antiretrovirals.

- [26] In her medical report, Dr Simmonds-Fisher outlined that she saw Mrs Smith-Heath on the 27th January, 2015 some three years after the incident. At that time, she complained of work related pressures such as an inability to keep her energy levels up at work. Otherwise, the report noted that Mrs Smith-Heath was physically well.

Dr Simmonds-Fisher assessed her as being in category B1 of the CDC classification of HIV infections. The report detailed that Category B patients present with *'HIV infection with symptoms that are directly attributable to HIV infection (or a defect in T-cell-mediated immunity) or that are complicated by HIV infection.'*

- [27] Dr Simmonds-Fisher noted that the social and medical implications of the HIV infection will have lifelong effects on Mrs Smith-Heath. Therefore, she suggested that the hospital environs were not an ideal place of work for Mrs Smith-Heath. She recommended that in the short term her duties be reassigned to a different area and in the long term that she retires early so as to *'relieve the burden of transmission of opportunistic infections.'* She did not define the period of *'short term'* and *'long term'* in term of the number of years or age.

LAW AND ANALYSIS

- [28] We now turn to considering the various heads of damages.

A. GENERAL DAMAGES

- [29] In assessing General Damages, the Court is guided by the principles outlined in the case of **Cornilliac v St. Louis** (1965) 7 WIR 491. Wooding CJ noted that it was important for the Court to have regard to:

- (a) the nature and the extent of the injuries sustained,*
- (b) the nature and gravity of the resulting physical disability,*
- (c) the pain and suffering which had to be endured,*
- (d) the loss of amenities suffered and*
- (e) the extent to which, consequentially, the Claimant's pecuniary prospects have been materially affected.*

It is the Claimant's burden to prove these elements on a balance of probabilities.

- [30] It is trite law that the general aim of damages in tort is to restore the Claimant to his pre-incident position so far as money can do so. The precedent of past awards has been accepted as a tool to aid the determination of a reasonable monetary compensation in a given scenario. See the dicta of Campbell JA in **Beverley Dryden v Winston Layne** SCCA 44/87 delivered 12th June 1989:

“Personal injury awards should be reasonable and assessed with moderation and that as far as possible comparable injuries should be compensated by comparable awards.”

- [31] The limitation of past awards was noted by Sykes J (as he then was) in **Phillip Granston v Attorney General of Jamaica** HCV 1680 of 2003 delivered 10th August, 2009 where he said at paragraph 74 that:

“...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.”

- [32] Principles which have emanated from other jurisdictions and awards which have been given in specific cases, may be applied where there is no local precedent. Support for this position may be found in the case of **Winston Barr v Bryad Engineering Co. Ltd and Ors** SCCA Nos. 45 and 48/85 where it was noted by Wright J.A. that:

“But I think that where justice demands as I think it demands in this case, where the required guide cannot be found in awards in the same jurisdiction or in a neighbouring locality then recourse should be made to such source as will aid the Court in coming to a just and fair conclusion...”

- [33] No case which is similar in the material particulars to the one which is currently being considered has been brought to the Court’s attention. Therefore, recourse must be had to, as near as possible, similar situations firstly within this jurisdiction and then outside of this jurisdiction in considering the appropriate quantum of damages. In this regard, the use of foreign currency and the conversion of it became an issue in this case.

- [34] In relation to the foreign currency, the learned authors of **Harrisons' Assessment on Damages [cases on personal injury and fatal accident claims]** by Justice Karl S. Harrison, Marc S. Harrison and Monique S. Harrison-Beckford (2nd edition) said:

"Where the sums for expenses and claims are expressed in foreign currency they ought to be converted into Jamaican dollars at the assessment stage."

This approach was also approved by James J in the case of **Linden Palmer v Neville Walker, Michael St. John and Donald Mendes** Suit Nos. C.L.P 072/1990 & C.L.P 176/1990 delivered 20th March, 1997. In the case, James J was constrained by the nature of the Claimant's injuries to use an English case in which the award was quoted in pounds. The learned judge, in comparing the award, converted the pound at the current rate at the time of his assessment.

1. Pain and Suffering and Loss of Amenities

- [35] In considering the scope of pain and suffering the learned author of **Charlesworth on Negligence** by R. A. Percy (6th edition) had this to say at page 871:

"Obviously, damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed, including that derived from the plaintiff's necessary medical care, operation and treatment."

He went to examine the aspect of loss of amenities and enjoyment to life where he said at page 872:

"Loss of amenities and enjoyment of life: There are two ways in which loss of enjoyment can be considered that (1) from the beginning to end it is no more than mental suffering, since it is experienced in the mind and nowhere else; (2) it is loss of a personal asset, something in the nature of property and equivalent to the deprivation of a limb, which loss is independent of whether or not there is any mental suffering. The loss of property element is objective, which requires a valuation that is no way dependent on the victim's sense of loss, whilst the other element, depending as it does entirely upon mental suffering actually experienced is subjective."

- [36] The position of the learned authors was the same adopted by Sykes J (as he then was) in the case of **Kenroy Biggs v Courts Jamaica Limited and Peter**

Thompson Claim Number 2004 HCV 00054 delivered 22nd January 2010. After noting the objective and subjective components of the assessment of damages, he said at paragraph 78 that:

"It is well established that the assessment of damages has two components. There is the objective part and the subjective part (see H. W. West & Sons v Shephord [1964] A.C. 326). The objective component deals with the actual injury and the subjective part takes account of the injury on the Claimant. Additionally, there is a distinction between pain and suffering on the one hand and loss of amenities on the other (see Lord Scarman in Lim Poh Choo v Camden and Islington Health Authority [1980] A.C. 174, 189G, reaffirming what was said in H. West & Son Ltd. v. Shephord [1964] A.C. 326). Lord Scarman made the very important point, often overlooked, that pain and suffering depends on the Claimant's awareness of and capacity for suffering."

It can be seen then that not only must the nature of the injury be taken into account, but the effect it has had on this particular Claimant.

(a) *The Submissions*

(i) The Claimant

Pain and Suffering

[37] The Claimant submitted that the Court ought to have regard to the case of **Linden Palmer v Neville Walker, Michael St. John** *supra* which enunciates the principle that where there are no comparable cases within the Court's jurisdiction, then it can consider cases of a similar nature in a neighbouring locality. Counsel for the Claimant made note of the fact that there was no comparable case to that of Mrs Smith-Heath in this jurisdiction and as such asked the Court to rely on the case of **Molinari v Ministry of Defence** [1994] P.I.Q.R Q 33 and the Scottish case of **Rosemary McAuley or MacMacnus & Ors v Babcock Energy Limited** [1999] SC 569.

[38] In **Molinari** the Claimant was diagnosed with leukaemia and had to undergo several treatment regimens including chemotherapy. He was awarded £40,000.00 for damages for pain and suffering. The Claimant used an exchange rate of

\$41.281 which makes the award \$1,651,240.00 Jamaican Dollar. It was submitted that this updates to \$16,643,220.00.

[39] In **Rosemary McAuley**, the deceased's estate was awarded £50,000.00 for pain and suffering after she was diagnosed with mesothelioma and suffered post-operative progressive pain before death. It was submitted that based on the same exchange rate these damages would be equivalent to \$2,954,945.00 Jamaican dollars. This updates to \$13,659,313.80.

[40] It was submitted that Mrs Smith-Heath is entitled to damages in a sum that would be the medium between the awards made in **Molinari** and **McAuley**. The Court was asked to have regard to the fact that there is no cure for HIV and there is every possibility that this disease could progress into full blown AIDS. In light of this, there is a real possibility of Mrs Smith-Heath suffering in her symptomatic stage and as such would be more susceptible to infections and abnormalities which is resultant from her weakened immune system. Counsel submitted that the sum of \$14,500,000.00 would be reasonable as damages for pain and suffering.

Psychological Damage

[41] The Court was asked to consider the case of **Celma Pinnock v Attorney General for Jamaica** Khans Vol. 5 page 289 where the Claimant was subjected to bodily search at the airport and later detained. As a result, she suffered from severe anxiety, severe depression, loss of libido and severe phobic responses related to travel and sexual activity. The Claimant submitted that these were similar to the psychiatric damage which Mrs Smith-Heath suffered as she was diagnosed with major depressive disorder, anxiety disorder, severe emotional anguish, impairment of quality of life in her social and occupational functioning as well as loss of interest, sleep, appetite disturbances in addition to other psychological deficiencies.

[42] The Claimant in **Celma Pinnock** was awarded \$2,500,000.00. The Claimant used a CPI of 229.0 to determine that this award would update to \$11,850,548.00. As

such, the Court was asked to grant Mrs Smith-Heath a total of \$11,000,000.00 as damages for psychological damages.

Loss of Amenities

- [43] The Claimant contended that an award for loss of amenities covers the loss of the simple pleasures in life or for the change in the Claimant's enjoyment of life caused by the breach. In this regard, the Court has been asked to consider the case of **Rose v Ford** [1937] A. C. 826 in which Lord Roche noted that the Court regarded *'impaired health and vitality as not merely as a cause of pain and suffering but as a loss of a good thing in itself.'* The Claimant also pointed to the case of **White v Office of Disaster Preparedness and Emergency Management, Williams and the Attorney General** Claim Number C.L. 2000W159A delivered July 31, 2008 which mentioned the **Rose** case and noted that damages ought to be awarded for loss amenities to meet the deficiencies to the Claimant's good health and vitality.
- [44] The Claimant submitted that in Mrs Smith-Heath's case, she has suffered feelings of sadness and depression which are further accompanied by loss of interest in regular activities in which she would partake. She also suffers from poor appetite and sleep, impaired concentration, decreased libido and feelings of guilty that her illness has affected her family's life negatively including altering the nature of family relationship.
- [45] Counsel for the Claimant relied on the Bahamian case of **Knowles v Dupuch** [1999] BHS J No. 59 where the Claimant was awarded \$100,000.00 for loss of amenities. It was submitted that using an exchange rate of \$37.7902 this award would be \$3,779,020.00 Jamaican dollars. This would update to \$17,468,622.00 which it was submitted would be a fair sum for Mrs Smith-Heath as an award for loss of amenities.

(ii) The Defendant

Pain and Suffering and Loss of Amenities

- [46] In consideration of the medical reports provided, the Defendant submitted that the Court should consider the extent of Mrs Smith-Heath's impairment based on her HIV positive status. Reliance was placed on the **Guides of the Evaluation of Permanent Impairment** 6th edition 2008 written by the American Medical Association. It was noted that the last CD4 count recorded for Mrs Smith-Heath was 620 and with the use of this, the recommendation of the American Medical Association is that Mrs Smith-Heath would be suffering between 3%-15% impairment of the whole person. It was submitted that a reasonable impairment rating would be 9% for Mrs Smith-Heath as this would be the median of the range presented.
- [47] Counsel has asked the Court not to consider the disability rating in a vacuum but to consider the amount of mental and physical anguish the Claimant was made to undergo as a result of her infection. As such, she noted several aspects of Mrs Smith-Heath's evidence where distinct information was given in relation to her emotional state when she became aware of her positive status as well as her fear and worry for her husband when he was made to undergo testing, how she worried for her family and how her status would now affect them and how other persons would now view her and ultimately her fear of what would happen to her in the future.
- [48] Counsel has also asked the Court to consider the case of **Karen Reid v Harbour View Medical Centre et al** [2014] JMSC Civ. 56 where the Claimant was misdiagnosed with HIV and operated under the presumption that she was infected for two years. During this time, she harboured suicidal thoughts and was very depressed. The Court awarded her \$8,850,000.00 which Counsel updated to the \$9,488,061.80 using the CPI for August 2015. Counsel noted that the notion of being HIV positive for two years is much different than having to live with the disease for a lifetime. However, she stressed that both Claimants, in the case being relied on and the case at bar experienced significant adjustments to their lifestyle and suffered distress and mental suffering because of their diagnoses. It

is upon this basis that the Court has been asked to grant the Claimant \$9,000,000.00 for pain and suffering and loss of amenities.

Psychiatric Injury

- [49] The Court has been asked to accept that damages can be awarded for psychiatric injury. Reliance was placed on the finding of Dr Gibson who diagnosed Mrs Smith-Heath with Major Depressive Disorder and Anxiety Disorder Not Otherwise Specified. Note was also made of the fact that Mrs Smith-Heath was prescribed to take anti-depressants for 12 months which she did not take and was to have ongoing psychiatric consultations which she did not do. As a result, Counsel has asked the Court to note the settled principle in law that it is the Claimant's duty to mitigate his losses as best as possible: see **Pearl Smith v Conrad Graham and Lois Graham** (1996) 33 JLR 189.
- [50] In reaching a reasonable award for psychiatric damage, Counsel has asked the Court to examine the case of **Angeleta Brown v Petroleum Company of Jamaica and Juici Beef Limited** Claim number 2004 HCV 1061 delivered April 27, 2007. In this case the Claimant was diagnosed with Major Depression-Moderate and Post-Traumatic Stress Disorder. She had suffered burns to her face, neck and upper and lower limbs covering a significant amount of her body. She was awarded \$340,000.00 as damages for Post-Traumatic Stress. This, it was submitted, updated to \$756,656.95.
- [51] Counsel contended that Mrs Smith-Heath was not diagnosed with Post Traumatic Stress Disorder but her psychiatric injuries are nonetheless very serious. As such, the Court has been asked to award the Claimant \$600,000.00 as damages for psychiatric injury.

(b) *Evaluation of the Authorities Cited*

[52] The total being claimed for pain and suffering, loss of amenities and psychological injury is \$42,968,622.00. The following authorities were cited by the Claimant to support the figures suggested:

- **Molinari v Ministry of Defence** *supra* along with **Rosemary McAuley** were used to support the proposed figure for pain and suffering. In **Molinari**, the Claimant suffered from cancer and he had to endure “*horrendous*” treatment for three years which included chemotherapy, lumbar punctures, a series of surgical procedures and a bone marrow transplant. He was treated with a mixture of nine anti-cancer drugs and had to take antibiotics which produced terrible side effects. His award for pain and suffering and loss of amenities was £40,000.00.

In **Molinari**, the physical effects of the Claimant’s injury were much more extensive than that of Mrs Smith-Heath. Both Claimants suffer from a disease which cannot be cured; cancer in **Molinari** and HIV in the present case. These are life-long diseases which can cause and create more health complications and which require a total change in lifestyle. However, I have noted that the Claimant in **Molinari** suffered much more physical pain than Mrs Smith-Heath. Based on the medical evidence which has been presented, Mrs Smith-Heath is currently asymptomatic. In fact, she does not seem to be currently suffering from any pain or other debilitating side effects caused by the HIV virus, though there is a possibility that this may arise in the future should Mrs Smith-Heath become symptomatic or succumb to any opportunistic diseases.

I have noted that the Claimant’s methodology for updating the award in cases where foreign currency was awarded is not in keeping with the law. The award in **Molinari** properly updated would be \$75,844,796.30. I have used the current exchange rate of the pound which is \$1 pound to \$173.28980 Jamaican Dollars. The award of \$40,000.00 pounds would be

equivalent to \$6,931,592.00 which would update to the above figure when the CPI of January 2018 is used.

- **Rosemary McAuley or McManus & Ors. V Babcock Energy Limited** *supra*. In this case, the deceased was diagnosed with mesothelioma and suffered post-operative pain prior to his death. A representative claiming under his estate was awarded \$50,000.00 pounds for loss, injury and damage suffered by the deceased prior to his death.

My view of this case is the same as that in relation to **Molinari**. The pain suffered by the Claimant in this case was more extensive than that of Mrs Smith-Heath and I have noted that he succumbed to his condition. The damages in this case updates to \$43,479,859.00 when using the same exchange rate above and using the same CPI of January 2018.

- **Celma Pinnock v The Attorney General for Jamaica** *supra*- In this case, the Claimant was a business woman who was arrested and assaulted at the Norman Manley International Airport by a male officer who forcibly inserted his fingers into her vagina. As a result of the incident she suffered severe anxiety, severe depression, loss of libido and severe phobic responses related to travel and sexual activity. She was awarded damages in the sum of \$2,500,000.00 as general damages covering damages for false imprisonment, aggravated damages and psychological damages.

The Claimant's use of **Celma Pinnock** is not at all applicable to this case. Not only was Ms Pinnock not claiming an award for pain and suffering and loss of amenities, but her award, as used by Counsel, spanned several heads of damages and was not only for her psychological injury.

- **Knowles v Dupuch** *supra*- The Claimant, then a fifty-one (51) year old woman, suffered bilateral tears of the rotative cuffs after she slipped on an unstable flagstone and was projected forward in a manner which caused her injuries. She was employed as a caregiver looking after an elderly and

disabled woman. In addition to damages for economic loss in the sum of \$130,000.00, she was awarded \$100,000.00 Bahamian dollars for pain and suffering and loss of amenities.

I noted that contrary to the Mrs Smith-Heath's submission, the Claimant's award in **Knowles** of \$100,000.00 was made after consideration was had for her pain and suffering and loss of enjoyment of life. I cannot therefore use this case as a basis for awarding loss of amenities separate from pain and suffering and psychological damage as the Claimant has suggested.

The damages in **Knowles** would have actually updated to \$63,982,283.40 when the current exchange rate of \$1 Bahamian Dollar to \$127.50130 Jamaican Dollars and the CPI of January 2018 are used. In any event, being that there is a multitude of cases in our jurisdiction which deal with pain and suffering and loss of amenities award, there is no need to utilize the approach taken in the Bahamas.

[53] Counsel for the Defendants submitted that the sum of \$9,000,000.00 would be a more reasonable award for pain and suffering and loss of amenities. It was also submitted that \$600,000.00 is a reasonable sum for damages for psychological injury. The following authorities were cited by the Defendants to support their submissions:

- **Karen Reid v Harbour View Medical Centre, Ministry of Health and the Attorney General of Jamaica** *supra* was used to support the pain and suffering and loss of amenities award. In this case, the Claimant was told she had HIV when she did not. She operated under this premise for some two years before being told she was in fact a healthy person. During the two-year period, she was pregnant and had to undergo a c-section and was not allowed to breast feed her baby. She was also treated with the antiretroviral medication over this period. She became depressed and had suicidal thoughts. Her award for pain and suffering and loss of amenities

was \$8,850,000.00 which now updates to \$10,300,140.40 using the consumer price index for January 2018.

In **Karen Reid**, I find that though she had to struggle with the thought that she was HIV positive for two years as well as the fact that she was made to ensure a c-section unnecessarily, the reality is Ms. Reid did not have HIV nor does she have to grapple with severe lifestyle changes and adaptation which come with living with the disease. However, having to undergo a c-section and not being able to breast feed her baby are factors which must have played a great part in the final award.

- **Angeleta Brown v Petroleum Company of Jamaica and Juici Beef Limited** *supra* was used to support the figure for psychological injury. 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, moderate and post-traumatic stress disorder (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. She was awarded \$340,000.00 for her psychological injury.

Ms Brown was exposed to circumstances far different than Mrs Smith-Heath. Ms Brown had burns over more than 20% of her body and this caused her PTSD. Mrs Smith-Heath has contracted HIV. In **Angeleta Brown**, the nature of the underlying injury is qualitatively different and as such the experience and mental state resulting would not be anything which could be compared to Mrs Smith-Heath's case. I could not reasonably use **Angeleta Brown** case to make a determination in this case.

[54] Damages for pain and suffering and loss of amenities can be considered on two separate scales. The first, is the physical pain and suffering the Claimant is made to endure which is subsumed in the pain and suffering aspect of the award. The second is the change of life and circumstances which the Claimant is made to undergo and how this affects her enjoyment of life, her psyche (psychological wellbeing) and lifestyle. While it is useful for the purpose of analysis to look at these heads of damages separately, it must be borne in mind that they are not necessarily discrete and do intersect. It would be difficult therefore to make a separate award for each. I do not agree with the Claimant's assertions that the Court should grant her damages for pain and suffering, psychological damages and loss of amenities separately as to do so would overcompensate her for the injuries she has sustained. I am guided by the case of **United Dairy Farmers Ltd v Lloyd Goulbourne** (1984) 21 JLR 10 where it was held that a separate award of damages for physical, mental impairment in addition to pain and suffering and loss of amenities would amount to a duplication in the award. Therefore, I will make one global award for pain and suffering and loss of amenities.

(c) *Pain and Suffering Considerations*

[55] After keen evaluation of the case presented, I have noted the following as it relates specifically to the Claimant:

- In considering the evidence before me, there is little expressed about Mrs Smith-Heath's physical pain and suffering during the entire ordeal. I have noted that though she would have had her blood drawn for blood tests there is no mention of the process being physically painful. In addition, there is still no evidence provided to the Court as to whether visits to the doctor and any procedure she had to undergo were particularly painful.
- The evidence is that the Claimant is asymptomatic. As such, there are no physical ailments which she is experiencing which would cause her pain or rather if this is so, it has not been stated to the Court. I have noted that Dr

Simmonds-Fisher in classifying Mrs Smith-Heath in the B1 category of CD4 categories, expressed that Mrs Smith-Heath has recurring yeast infection which it is presumed to be uncomfortable to bear but this is not expressed in the evidence. As stated by Counsel for the Defendants, there is no medical evidence to the likely prognosis as it relates to the physical effects of her condition within any defined period of time.

- The law prescribes that the Claimant must plead and prove her case. It is not for the Court to infer information or to pluck it from thin air. It must be clearly stated so that the Court is clear on the Claimant's position right throughout her case and also so that the Defendant is put on notice. In light of this, I find as a fact that the evidence does not indicate that the physical discomfort suffered by the Claimant was extensive. Nor is there evidence from which the Court can determine or estimate the likely extent of the physical effects of her condition in the future.

(d) *Loss of Amenities Considerations*

[56] In assessing Mrs Smith-Heath's loss of amenities, the law prescribes that the Court considers the change of the Claimant's life; her inability to live the way she used to before and consider how her injury has affected her enjoyment of life. In this regard, particular attention was given to her evidence as it detailed the present circumstances of her life changes and how she has been affected by her diagnosis. It is her evidence that:

- She has lost interest in numerous activities which were generally enjoyable to her and it has also impacted her relationship with friends. Her fear has also been expressed in the medical report of Dr Gibson who mentioned that Mrs Smith-Heath has isolated herself. She herself has expressed fear of what her family and friends will think of her when they find out that she is HIV positive.

- As a result of her isolation, she no longer attends social events such as plays and Dover car racing which she has said she used to enjoy very much. In her evidence, she says that her *'social life has been affected dramatically since I am afraid to go out as I believe that people in the community know about my HIV status and I do not want to be stigmatized.'*
- In relation to her marriage, she has said that her diagnosis has *'affected our conjugal relations in that our sexual activities became less frequent and we had to start using a condom.'* She has also intimated that she fears that her husband is cheating on her. The thought of this, she says, makes her *'suicidal.'* She goes on to say that *'if my marriage fails it will be because my husband can no longer deal with the effects of living with a wife who has HIV and the eventuality of my falling very ill and dying.'* At the time of giving evidence, she indicated that her marriage had indeed ended.
- She experiences difficulty at work especially when in the presence of other HIV patients. It is also noted that she struggles with keeping up her energy at work.
- She has expressed that she now faces financial hardship. She now needs to attend upon the services of a doctor and psychiatrist regularly and this coupled with the fact that her diet has changed means that her expenses have increased significantly.
- Mrs Smith-Heath's life has been changed forever. HIV is a disease which has no cure. As such, she will now have to live with and make changes to her lifestyle. She will now have to pay particular attention to her diet so as to maintain her weight and keep her immune system nourished. She will now have to constantly seek medical care so as to pay attention to CD4 levels. She will now have to take extra care not to expose herself to certain types of infections which may have significant effects on her.

The evidence was not contradicted save for her financial situation.

(e) *Psychological Injury Considerations*

[57] From the evidence presented in Court, it is clear and I so find that Mrs Smith-Heath has suffered significant psychological dislocation. I have noted that:

- The finding of the medical report of Dr Roger Gibson dated 13th January, 2011 says that Mrs Smith-Heath suffers from “*anxiety disorder not otherwise specified*” and “*major mental depressive disorder.*” Dr Gibson has noted that Mrs Smith-Heath’s Global Assessment Functioning score is 45/100 which is cause for concern. In answering further questions put to him, Dr Gibson noted that Mrs Smith-Heath is better off than someone who scores within the 31-40 range but is worse off than someone who scores 51-60. It was hoped that overtime Mrs Smith-Heath will get better but psychiatric vigilance and Counselling will be needed for a long time.
- Much of Mrs Smith-Heath’s mental anguish has gone into how her diagnosis affected her marriage. Mrs Smith-Heath has lamented on the need to use preventative measures to protect her spouse during sexual intercourse. She has asserted that this has had a negative impact on her relationship with her husband as she is afraid to have sex with him. Her psychiatric report has also noted that she suffers from loss of libido which no doubt has impacted her marriage. I have noted that she has said that her relationship has now come to an end because of her diagnosis. With this loss also comes the loss of support she would normally get from her husband. Dr Gibson noted that the support of her husband was an important factor in her recovering from her mental conditions.
- Not only will her lifestyle change, but her way of thinking and function will need readjustment. Mrs Smith-Heath will have to accept at some point that her life is not the same. Given her mental illness diagnoses, this a significant struggle which she is now made to bear through no fault of her own. These are all considerations which she would not have had before September 30,

2007. I must acknowledge that her coping seems to have improved sufficiently for her to effectively carry out her duties as a Psychiatric Nurse. Mrs Smith-Heath's evidence is that she sometimes enjoyed her job.

- Finally, I must consider that the fear of her HIV developing into AIDS is a significant fact which the evidence shows plays on her mind. The question is whether or not such a fear is reasonable bearing in mind the state of medical science. In answering a question posed to her, Dr Clarke noted that where Mrs Smith-Heath is fully compliant with the course of antiretroviral treatment '*the viral load should be suppressed and her CD4 count should increase.*' I have noted that though Mrs Smith-Heath is on antiretroviral medication, her CD4 count has not increased at any point in time based on the blood test results available to the Court. In fact, the CD4 counts have declined. Dr Simmonds-Fisher's medical report notes that the lower the count the closer Mrs Smith-Heath gets to an AIDS diagnosis. Therefore, I believe that considering her psychological state, I must give some amount of consideration to the fact that the fear that her HIV may develop into AIDS is a reasonable fear.

(f) *Quantification of the Award*

[58] The case of **Karen Reid** was the nearest our jurisdiction got to quantifying an award for a victim of HIV. In my view, this case does not provide sufficient guidance for an award in the instant case. It delineates however a lower limit for an award in this case. There were no similar cases found in any jurisdiction therefore, I ventured to look for cases within this jurisdiction, in which the Claimants had life altering traumatic experiences. Two such cases; **Neinah Williams v Island Concrete Company Limited** [2017] JMSC Civ. 37 and **Lloyd Clarke v Corp EF Quest & Another** Claim No. 2007 HCV 01550 delivered May 2, 2008 were considered.

- [59] In **Williams**, the Claimant was involved in a motor vehicular accident in which she suffered injuries to her cervical spine. She was made to undergo painful procedures one of which involved doctors drilling holes into her brain and attaching metal weights so as to stabilize her spine. Her initial assessment estimated that she suffered between 76% - 86% disability to the whole person. This figure later fell to 55% permanent disability of the whole person. She was made to undergo severely painful physiotherapy and has still not able to walk on her own. She suffered from urinary incontinence and has no feeling in her vagina. She also suffered from painful spasms which left her dependent upon someone to care for her as she was unable to cook or move around freely. Psychologically, Ms Williams suffered from severe post-traumatic stress disorder as well as anxiety, depression and phobic avoidance behaviour. She was awarded \$35,000,000.00 for pain and suffering and loss of amenities. This award now updates to \$35,850,844.70 using the CPI for January 2018.
- [60] In **Clarke**, the Claimant was shot in the back and right elbow and suffered a severed spinal cord which left him with complete paraplegia. He spent little over a week in the hospital and after spent 42 days at Sir John Golding Rehabilitation Centre. He was found to be a dense paraplegic and suffered incontinences of urine and stool which meant that he relied completely on someone to take care of him. He had an indwelling catheter that had to remain for life and which needed to be changed every six weeks. His whole person disability was assessed at 65%. He was awarded \$26,000,000.00 as damages for pain and suffering and loss of amenities. This now updates to \$47,352,381.00 using the CPI for January 2018.
- [61] Both Ms Williams and Mr Clarke suffered significant pain and suffering from their injuries and will endure significant pain and suffering for the rest of their lives. Mrs Smith-Heath did not suffer the extent of pain as these two Claimants. In comparing their psychological state, the assessment of Mrs Smith-Heath's mental suffering was not as severe as Ms Williams or Mr Clarke and indeed on the evidence this is clear. They were both diagnosed from PTSD while Mrs Smith-Heath had some of

the symptoms of PTSD. These cases then present an upper ceiling for the award to the Claimant.

[62] I have given significant thought into what I believe would be a reasonable sum for Mrs Smith-Heath. Based on the evidence and the considerations of the authorities cited, I believe that a reasonable sum for damages for pain and suffering and loss of amenities is **\$28,000,000.00**.

2. Handicap on the Labour Market

(a) *The Submissions*

(i) The Claimant

[63] Counsel for the Claimant argued that in light of Mrs Smith-Heath's terminal illness she would have to stop working before retirement age. Though she maintains her job presently, Counsel contended that the risk of her losing her job before the estimated end is great. It was further noted that working in the hospital environment makes her more susceptible to contracting viruses and bacteria which could affect her health.

[64] The Court has been asked to consider that Mrs Smith-Heath presently provides for her husband and her minor child from her salary. Counsel submitted that the Claimant earns approximately \$31,876.24 monthly which ought to be used as the multiplicand. In relation to the multiplier, Counsel relied on the case of **Alphonso v Ramnath** (1997) 56 WIR 183 to determine that an appropriate figure would be 12. As such, a yearly multiplicand times the multiplier plus Kris Loan was used to calculate the award: $\$382,514.88 \times 12 + \$216,666.70 = \$4,806,845.26$. In conclusion, the Court has been asked to grant Mrs Smith-Heath \$4,806,845.26 as damages for Handicap on the Labour Market.

(ii) The Defendant

- [65] It was submitted that in coming to a reasonable award for damages for loss of earning capacity/handicap on the labour market, the Court should have regard for the principles outlined in the case of **Moeliker v A. Reyrolle & Co Ltd** [1977] 1 All ER 9 as applied in our jurisdiction in the case of **Gravesandy v Moore** (1986) 23 JLR 17. The principle being propounded is that there should be a real and not fanciful risk that the Claimant may lose his job in the future before the end of his working life. Where there is no risk then no award can be made under this head of damages.
- [66] Counsel contended that the Court must look at *'the length of the rest of the Claimant's working life, the nature of his skills, and the economic realities of [her] trade and location.'* She pointed to the evidence to show that Mrs Smith-Heath remained employed at the hospital where the incident occurred. She noted that no evidence is given as to whether she has remained in the same wage scale and whether the virus has affected her physical capabilities on the job. Counsel further contended that there is no expert opinion on the extent to which HIV will render Mrs Smith-Heath unable to work or force her to be unemployed before the end of her working life. In all, she found that there was significant lack of evidence in support of this area of damages.
- [67] Therefore, it was submitted that the Court should examine and make use of the approach taken in the case of **George Williams v Donald Wedderburn and Errol Thompson** Suit No. CL 1998/W121 delivered September 16, 2005. In this case, the Claimant, a painter, lost his leg in a motor vehicular accident. There was no evidence to suggest that his pre-accident earnings had been reduced. Further, there was no evidence that he was unable to work because of his injury or that it would cause him to earn less. Here, the Court acknowledged that his injury put him at a severe disability and so awarded him \$100,000.00 as damages for handicap on the labour market. This figure, it was submitted, updated to \$244,136.46 using the CPI as at August 2015.

[68] Counsel for the Defendants also pointed to the fact that in the present case, there is no evidence that Mrs Smith-Heath is made unemployable because of her HIV status. It was asked that the Court make note of the fact that her status would prevent her from working in certain areas of the labour market and may cause her to face unemployment in the future. It was submitted that a sum of \$250,000.00 is a reasonable sum to grant under this head.

(b) *Consideration for the award*

[69] If we refer to the Claimant's Particulars of Claim, it is to be noticed that no claim is made for Handicap on the Labour Market. In the case of **Bryan Green v Sergeant Cochrane and the Attorney General** [2012] JMSC Civ. 17, Campbell J noted the significance of not pleading damages for Handicap on the Labour Market and refused an award under this head where it was not pleaded. He noted that:

"The pleadings are to indicate to the Defendants what case they are to meet."

In that case it was only at the point of written submission, after several years of litigation, that the claim was made.

[70] In this case, though the Claimant has not asked for damages for loss of earning capacity, I have addressed my mind to the fact that the Defendant is not objecting to the award albeit in a sum different from that of the Claimant. I will therefore proceed to examine whether Mrs Smith-Heath is entitled to damages under this head.

[71] The law as to the entitlement for the award of damages for Handicap on the Labour Market was clearly stated in **Moeliker v A. Reyrolle and Co. Ltd** *supra* by Brown L.J. who said at page 16 that:

"Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a 'substantial' risk or is it a 'speculative' or 'fanciful' risk (see Davies v Taylor, per Lord Reid ([1972] 3 All ER 836 at 838, [1974] AC 207 at 212) and Lord Simon of Glaisdale ([1972] 3 All ER 836 at 844, [1974] AC 207 at 220)."

- [72] In the case of **Gravesandy v Moore** *supra*, Carey JA considered the extent of the risk that the Claimant ought to be exposed to and how the evidence is to be weighed. He said at page 226:

"The chance or risk must depend, in the first place, on the degree, nature or severity of the injury and the prognosis for full recovery. Where, as in the present case, the extent or the percentage disability was not known, it is impossible to begin to attempt a quantifying of risk."

- [73] The law provides that for a Claimant to lay a claim for damages for Handicap on the Labour Market, he must show that at some time before the end of his working life he will be cast into the labour market at a disadvantage. The evidence adduced in this matter is that Mrs Smith-Heath remains employed at the hospital at which the incident took place. I have noted that the case law does not distinguish between Claimants who are employed and do maintain a job at the start of trial versus those who are unemployed. However, what is to be weighed is the nature of the risk that Mrs Smith-Heath is exposed to.

- [74] I have noted that Dr Simmonds-Fisher mentioned in her medical report that Mrs Smith-Heath may need to consider early retirement but this information does not provide the Court with enough information with which to make an award based on the multiplicand/multiplier approach. What would be the suggested age of retirement? At what point during the development of her disease will she need to retire? These are all questions which the Claimant has left unanswered in her evidence.

- [75] Though there is an insufficiency of information which has been available to the Court, I have considered that Mrs Smith-Heath is working in an environment which Dr Simmonds-Fisher has highlighted is not conducive to her health. The Claimant remains employed at the said institution; one may say in an elevated capacity. This is not a private institution and as a consequence there is no reason to believe that the risk of losing her job is high. However, this field of work exposes her to common infections and diseases which may be life threatening due to her condition. As such,

there is some likelihood that the risk associated with her status as HIV may cause her to cease employment before the end of her working life.

(c) *Quantification of the Award*

[76] Where the Court is minded to grant damages for Handicap on the Labour Market, the various methods of calculations were examined by Sykes J (as he then was) in **Andrew Ebanks v Jephther McClymount** Claim Number 2004 HCV 2172 delivered March 8, 2007. He opined at paragraph 53 that:

From the cases, the principles that can be derived in order to determine which method is used are as follows. In setting out these principles I shall also address the third objective which is, the factors that determine the size of the award, particularly if the lump sum method is used:

- a. *If the Claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low (Ashcroft v Curting; Gladys Smith v The Lord Mayor);*
- b. *If the Claimant is working at the time of the trial and there is a real or serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the Claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending, of course, when this loss is seen as likely to occur. The size of the award may be influenced by time at which the risk may materialize. Admittedly, this is a deduction from what Lord Denning said in Cook v Consolidated Fisheries;*

[77] Counsel for the Defendant suggested that the Court should have consideration to the award in **George Williams** and that the award should be updated to determine Mrs Smith-Heath's compensation for loss of earning capacity. The law, on the other hand, is that an award under this head is not determined by comparison to other cases (as seen in paragraph (e) of the quote above from **Ebanks**). Counsel for the Claimant utilized the multiplicand/multiplier approach which I have declined to used.

[78] In view of the dicta in **Ebanks** above, the lump sum approach is most appropriate in the circumstances. The fact that there is no evidence to substantiate a multiplicand as well as the evidence that Mrs Smith-Heath is still working, would validate the use of the lump sum approach. In this regard, I have given

consideration to the fact that Mrs Smith-Heath would have approximately 22 years of working life left having regard to the fact at the time of the incident she was 38 years old and the age of retirement for women is 60 years old. Though there is no evidence of her income, there being no evidence that she is a certified professional, her income is likely to be on the lower end of the scale of medical professionals, at or near the minimum wage.

[79] In the circumstances, I find that an award of **\$3,000,000.00** is an appropriate sum for Loss of Earning Capacity/Handicap on the Labour Market.

3. Loss of Expectation of Life

(a) *The Submissions*

(i) The Claimant

[80] The Court has been asked to consider that Mrs Smith-Heath is suffering from an incurable disease which will reduce her life expectancy. In that regard, Counsel relied on the case of **Lim Poh Choo v Camden and Islington Health Authority** [1980] AC 174 and **Administrator General for Jamaica v Attorney General of Jamaica** Suit No. CL 2001/A073 delivered 30th May, 2005.

[81] It was submitted that the award of \$50,000.00 in the **Administrator General v Attorney General** case ought to be updated using a CPI of 229.0 to \$129,028.62 which would be an appropriate sum for loss of expectation of life.

(ii) The Defendant

[82] Counsel submitted that there was no distinction between loss of expectation of life for a living person and a dead one. Reliance was placed in the case of **Oliver and others v Ashman and another** [1961] 3 All ER 323 to propound the fact that a living person may recover damages under this head as compensation for even the constant thought of knowing that one's life will be shortened. She noted that the Mrs Smith-Heath has brought no evidence to show that her life will be shortened

by her disease. On the contrary, the evidence brought suggest that once she continues to take her medication and maintain her nutritional intake, the she should live a *'high quality of life.'* With this said, the Defendants submitted that no award should be made under this head.

(b) *Considerations for the award*

[83] The case of **Oliver and others v Ashman and another** *supra* provides for damages for loss of expectation of life to be awarded to a living individual. In particular, the award may entail considerations as to the constant pain and disappointment that the Claimant will face. The crucial piece of information that is required is what is the life expectancy of Mrs Smith-Heath now in comparison to what it was before her diagnosis. There was no evidence given in answer to this question in the evidence.

[84] The Court is therefore constrained to refuse the Claimant's claim for this award as there is no medical evidence to say that Mrs Smith-Heath's life expectancy has indeed been shortened.

B. *FUTURE CARE EXPENSES*

[85] In **Kenroy Biggs**, Sykes J (as he then was) relied on the Scottish case of **O'Briens Curator Bonis v British Steel Plc** [1991] SC 315 where the Lord President said that:

"The purpose of an award of damages for future expenditure is to place the pursuer as near as may be in the same financial position as he would have been in if the accident had not occurred..."

...The mechanism by which the capital sum is arrived at is the selection of a multiplicand as representing the estimating annual cost of the care as at the date of the proof, and a multiplier which, when applied to the multiplicand, will provide the amount which can be expected to achieve the desired result. There may be cases where, because the period is so short or the circumstances are so uncertain, this method is inappropriate and it is better to make a broad estimate of damages in the form of a lump sum."

[86] In analysing the **Kenroy Biggs** case it is noted that the Court must consider which method is more applicable based on the circumstances of the case. As such, I will

analyse the case at bar and then make a determination as to which approach is more applicable.

1. Nursing Care

[87] Counsel for the Claimant argued that the Court should consider the evidence proposed that she would need the help of a practical and registered nurse in the future. In this regard, it was suggested that the average cost to secure the assistance of a registered nurse per week is \$56,000.00 while a practical nurse would be \$20,000.00 per week. As such, using a multiplier of 20, the total cost to procure these services is \$79,040,000.00. On the other hand, the Defendant argued that this was not a reasonable award to be granted to the Claimant.

[88] In determining whether to grant this award, I have noted that there is no medical evidence in support of this contention. There is also no direct evidence as to why this particular care will be needed in the future nor is there clear evidence from which this can be inferred. In fact, the Claimant's evidence was that she was told by Dr Simmonds-Fisher and Dr Clarke that she would need private nursing care. When challenged, it was borne out that this was not noted in either report. I find there is no evidence supporting this claim.

2. Funeral Expenses

[89] In her final submission to the Court, the Claimant included the cost of funeral arrangements in the sum of \$480,000.00. No submissions were made to justify this amount nor the expense for which the award is to be made. Furthermore, there is no evidence before the Court to show that the Claimant will die from HIV. As a matter of fact, none of her medical reports even mention that her life will be shortened by virtue of her contracting HIV. Key information which is needed to make a determination as to whether the sum claimed can be awarded and is reasonable is lacking.

- [90] A fact sheet report on HIV/AIDs dated November 2017 from the World Health Organization noted that:

“There is no cure for HIV infection. However, effective antiretroviral (ARV) drugs can control the virus and help prevent transmission so that people with HIV, and those at substantial risk, can enjoy healthy, long and productive lives.

Between 2000 and 2016, new HIV infections fell by 39%, and HIV-related deaths fell by one third with 13.1 million lives saved due to ART in the same period. This achievement was the result of great efforts by national HIV programmes supported by civil society and a range of development partners.”

The findings of this fact sheet is reflected in our own society as the Ministry of Health's HIV Epidemiological Profile, 2015 shows that the number of HIV/AIDs related deaths have decreased significantly over the years. This data means that the risk of Mrs Smith-Heath succumbing to her diagnosis is low.

- [91] The Court must also consider that the Defendant must be made to bear costs which are directly relevant to the injury which he has caused. Being made to undertake Mrs Smith-Heath's funeral expenses would mean that the Defendants would be made to pay even if she met her demise for a reason unrelated to her diagnosis. In light of this, no award will be made for funeral expenses.

3. Medical Expenses

(a) *Doctors' Visits*

- [92] Counsel for the Claimant submitted that Mrs Smith-Heath will need to visit Dr Gibson and Dr Clarke for another 12 months. However, a multiplier of 12 should be applied to the annual cost to see Ms Woolery as she will need to visit her for the rest of her life. She submitted that the total cost for future medical visits should be \$295,000.00. On the other hand, the Defendants argued that the sum of \$2,000,000.00 is reasonable for medication and blood tests. For medical visits it was argued that Mrs Smith-Heath should receive \$300,000.00 for future visits to the dietician, \$400,000.00 for visits to Dr Clarke and no award for visits to the psychiatrist.

- [93] The Claimant has presented evidence to show that she will need to visit the Psychiatrist Dr Gibson, a general medical practitioner Dr Clarke and a dietician Ms Woolery. It has been established that this medical care is lifelong as such I have accepted that she will need to seek the services of these health care professionals for the rest of her life especially given her psychological needs and the importance that diet will play in her wellbeing.
- [94] The cost per session to see Dr Gibson is \$4,000.00 and he recommends that the Claimant see him on average once per month for a year. That would amount to an annual sum of **\$96,000.00**. There is no need to apply this figure to the multiplicand as Dr Gibson only recommended that Mrs Smith-Heath see him for a year.
- [95] There is no evidence as to what each consultation with Dr Tanya Clarke costs. In Mrs Smith-Heath's Particulars of Claim, she claimed a sum of \$7,500.00 for consultation and medical report while in her submissions Dr Clarke's consultation fee was calculated at \$7,000.00. In the circumstances, I find that there is no basis upon which the Court can reasonably estimate what the cost of visits to Dr Clarke would be as there is no evidence of her fees nor is there information in relation to how often Mrs Smith-Heath will need to visit her. However, given the nature of her HIV diagnosis which makes her susceptible to opportunistic diseases, it is very likely that Mrs Smith-Heath will need to attend upon the services of a general medical practitioner from time to time.
- [96] While I can appreciate that Mrs Smith-Heath's will need to pay attention to her diet, there is no medical evidence to suggest that she will need to attend upon the services of a dietician as regularly as proposed by Ms Woolery. This will be borne in mind when considering the award for Future Care Expenses.
- [97] It is most interesting the Claimant has led no evidence of the cost to buy medication or for blood tests which, on the evidence, she has undergone and will have to undergo in the future. Although it is admirable that Counsel for the Defendants took the liberty of seeking out this information and providing it to the Court, I am

constrained to reject these submissions as they are not part of the evidence before me to be considered. The Court takes judicial notice that these antiretroviral drugs are provided to HIV patients through the Ministry of Health which likely accounts for the absence of any monetary claim for medication. In any event, I have given consideration to the fact that Mrs Smith-Heath will need to complete frequent blood testing in order to monitor her CD4 levels and may need to purchase medication when the need arises given the possibility of complications noted. Therefore, I have given due consideration to this when determining the lump sum award for Future Care Expenses.

(b) *Stem Cell Treatment*

[98] Counsel for the Claimant submitted that in awarding damages for this treatment, the Court should use a multiplier of 20 and should enable Mrs Smith-Heath to get this therapy every two years. In this regard, the Court has been asked to grant USD\$233,0000.00 for stem cell treatment. On the other hand, the Defendant argued that this was not a reasonable claim so no award should be made.

[99] The Claimant's ability to claim for Stem Cell treatment is grounded in the well-known case of **Livingston v Rawyards Coal Company** (1880) 5 AC 25 where Lord Blackburn said at page 39 that:

"...it is a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the arty who has been injured...in the same position as he would have been in if he had not sustained the wrong for which he now getting his compensation or reparation."

[100] Where a Claimant wants to undertake an unusual medical procedure, the Court must consider whether this treatment is reasonable. In determining whether the course of treatment is reasonable, the Court should not look to the cost of the treatment. In the case of **Ayla Charlotte Ellison (a child and protected party by mother and litigation friend, Carla Leanne Ellison) v University Hospitals of Morecambe Bay NHS Foundation Trust** [2015] EWHC 366 (QB) Warby J rejected the Defendant's proposition that the Court ought to weigh the cost of the

procedure versus the results. What is reasonable is a matter of fact. In answering this question as to whether it is reasonable to have the treatment the Court considers that there is no evidence whether this treatment would make life easier; for example, not taking daily medication, improving the quality of life in any way or even that the extent of her life expectancy would improve versus that of using antiretroviral medication.

[101] Evidence has been presented to show that Mrs Smith-Heath could benefit from stem cell treatment which would keep her viral load low/ negligible. Though the Claimant's Attorney took the liberty of securing this information from Dr Simmonds-Fisher, there are some obvious concerns which I have with this piece of evidence.

[102] I have noted that there is no indication whether Mrs Smith-Heath is an appropriate candidate and there is no information as to the difference between stem cell treatment and the antiretroviral medication. I have also noted that Mrs Smith-Heath did not seek the services of Dr Simmonds-Fisher until 2015, some seven years after her diagnosis and after the claim was filed and then, specifically for the purpose of the claim. There is no explanation for this lapse of time nor the reason for the visit.

[103] The Claimant has failed to give the Court sufficient information about this treatment in order for the Court to make a balanced decision as to whether it is reasonable or not. There is no reason proffered to the Court as to why this treatment is preferred over other types and further, as the Defendant's pointed out, there is no information as to whether the Claimant is a viable candidate for this treatment. The Court does not know whether Mrs Smith-Heath can receive this treatment at all.

[104] I find that the Claimant has not satisfied me on a balance of probabilities that it is reasonable to have this treatment.

4. Dietary/Nutritional Care

- [105] Counsel for the Claimant has said that a multiplier of 15 is appropriate. With this figure, Counsel determined that the total sum for meals in her asymptomatic stage would be \$12,045,000.00 while the sum for nutraceuticals in this stage would be \$1,971,000.00. In her symptomatic stage, meals would cost a total of \$17,958,000.00 while cost for nutraceuticals would be \$17,739,000.00. In all, the Court has been asked to grant Mrs Smith-Heath \$49,713,000.00 for future nutritional care.
- [106] Counsel for the Defendant on the other hand suggested that there is no evidence that Mrs Smith-Heath's current diet is insufficient and as such the award should not make provisions for this. Ms Woolery recommended that Mrs Smith-Heath take nutraceuticals to supplement her diet. Counsel conceded that this need would have arisen as a result of her injury. As such, the Court should consider that Ms Woolery recommended the use of three Ensures per day at a cost of \$360.00 each. Counsel submitted that it would be reasonable to award Mrs Smith-Heath for the cost of two Ensures per day which would work out to an annual cost of \$262,800.00. When applied to the multiplier selected, the total cost for Ensures in the future would be \$4,204,800.00. With the application of her own deductions, Counsel determined that a reasonable sum for this award would be \$2,500,000.00.
- [107] Mrs Smith-Heath had relied on the expertise of Ms Woolery in order to show what her nutritional needs will be like in the future. Ms Woolery has proposed that Mrs Smith-Heath's nutritional needs will vary based on the stage of progression of the disease. As such, she has suggested what her needs will be while Mrs Smith-Heath is asymptomatic as opposed to when she becomes symptomatic.
- [108] The difficulty with this piece of evidence is that it is not supported by any medical evidence. Ms Woolery is not a medical doctor and none of the medical reports from Dr Clarke, Dr Gibson or Dr Simmonds-Fisher has specifically stated or referred Mrs Smith-Heath to a dietician or stated that she will need to change her diet significantly. The challenge that this poses for the Court is multifaceted. Firstly, because there is no such medical recommendation, it is difficult for the Court to

really appreciate the need that has arisen for Mrs Smith-Heath and whether it is reasonable.

[109] Secondly, this lack of information is coupled with the fact that Mrs Smith-Heath herself has not provided the Court with evidence of a change in diet. She has mentioned that she will need to constantly eat fish only but this is not supported by the nutritionist's report. There is absolutely no evidence of what Mrs Smith-Heath used to eat to compare with what she is now required to eat to maintain proper weight and nutrition. The Court appreciates the fact that Mrs Smith-Heath would have had a particular way of eating before her diagnosis. As such, any award under this head would have to be the difference in the cost of her diet now versus what it was before. This lack of evidence has almost tied the hands of the Court in this respect as it is hard to calculate without proper figures.

[110] Finally, as matter of completeness, I must state there is no medical evidence to suggest how Mrs Smith-Heath will progress from asymptomatic to symptomatic or when this will occur. Therefore, even if I were to able to calculate the difference in diet between these two stages as opposed to what her diet was before her diagnosis, there is no medical evidence to substantiate such an award.

[111] I have noted that Ms Woolery has suggested that Mrs Smith-Heath will need to consume one Ensure per day in her asymptomatic stage versus three to nine bottles in her symptomatic stage. As I said before, there is no medical evidence to substantiate the progression of Mrs Smith-Heath's disease. I appreciate that Ensure is not a supplement that is taken on a regular basis without need. Further, I acknowledge that Mrs Smith-Heath's diet will change and she will need to take supplements. The evidence as it relates to her need for Ensure is thus reasonable and the cost as stated is also acceptable. As such, I have taken Mrs Smith-Heath's need for careful dietary intake as part of the total future care award.

5. Transportation Costs

[112] The Claimant has made no claim for future transportation costs. However, I have noted that Counsel for the Defendant has not objected and has proposed an award \$250,000.00 as a reasonable amount having regard to the fact that Mrs Smith-Heath will need to travel to Mandeville, Montego Bay and Kingston to seek treatment. In this regard, I have taken this into account when arriving at a reasonable award for her future care expenses.

6. Quantification of the Award

[113] I have borne in mind the fact that calculating future damages is not a perfect science and the most important factor is fairness having regard to the Claimant's particular circumstances. I have considered that the Claimant will need to see her psychiatrist for another year, she will need to see a medical doctor from time to time to monitor her viral load and other medical conditions as the need arises for the rest of her life, her diet will change and she will need transportation costs to visit her doctors and to complete her blood tests.

[114] The nature and effect of the Claimant's HIV diagnosis makes it likely that the need will arise for future for medical care. The inability to quantify or ascertain reliable estimates of costs means that the lump sum approach is preferable to the multiplier/multiplicand approach in determining the reasonable sum for future care expenses. In the circumstances, I find that a sum of **\$8,000,000.00** is a reasonable award under this head of damages.

C. *SPECIAL DAMAGES*

[115] Special damages have been agreed in the sum of 170,700.00.

ORDERS

[116] The Court hereby orders:

1. General damages in the sum of:

- Pain and Suffering and Loss of Amenities **\$28,000,000.00**
 - Handicap on the Labour Market **\$ 3,000,000.00**
2. Special Damages in the sum of: **\$ 170,700.00**
 3. Future Expense Damages in the sum of: **\$ 8,000,000.00**
 4. Interest on Damages for Pain and Suffering and Loss of Amenities from the 3rd August, 2010 to the 4th April, 2018 at a rate of 3% per annum;
 5. Interest on Special Damages from the 30th September, 2007 to the 4th April, 2018 at a rate of 3% per annum;
 6. No interest on Future Expense Damages or Damages for Handicap on the Labour Market; and
 7. Cost to the Claimant to be taxed if not agreed.