[2012]JMSC Civ151

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 3218

BETWEEN	**NATOYA SWABY**	**1ST CLAIMANT**
A N D	**ANDREW GREEN**	**2ND CLAIMANT**
A N D	**SOUTHERN REGIONAL HEALTH AUTHORITY**	**1ST DEFENDANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Saverna Chambers & Ewan Thompson, instructed by Saverna Chambers, for the Claimants.

Nigel Gayle & Cheryl-Lee Bolton, instructed by Director of State Proceedings for the Defendants.

Assessment of Damages – Judgment on admission – Damages for Post Traumatic stress disorder – Inability to properly account for loss of baby – Circumstances surrounding knowledge of loss of baby – Whether damages recoverable for psychological injury- Assessing damages where particulars pleaded do not support liability

Heard:1st December,2011, 24th May,2012 and 12th October,2012

CORAM: ANDERSON, K., J.

[1] This Claim seeks to enable the Claimants to recover damages arising from the death of their baby – Amelia, who allegedly died on 5th February, 2009, at the Mandeville Regional Hospital, which falls under the administrative control of the Southern Regional Health

Authority. The Mandeville regional hospital is a government owned and operated health facility. I state here that the baby allegedly died, because to date, it seems clear that neither the relevant health authorities, nor the Claimants, know as a matter of certainty, what happened to that baby.

[2] It was the First Claimant's evidence at the assessment of damages hearing which was held as regards this matter, that she was admitted to the maternity ward of the Mandeville regional hospital, on 2nd February, 2009 and at about 12:00p.m on that day, she gave birth to two baby girls – Ameka & Amelia. The father of these baby girls is the Second Claimant. After birth, both babies were taken by the nurses to Mandeville Regional Hospital's nursery where they were placed in incubators. The First Claimant was, after having delivered the babies, transferred to that hospital's post-natal ward. The First Claimant visited the babies daily and spent time with them in the nursery, on each day. On 5th February, 2009 however, it is apparent that something went terribly wrong as regards the health status of Amelia, as she had apparently died on that date, at about 5:50a.m, but no one from the hospital, or elsewhere for that matter, communicated to either of Amelia's parents, about her untimely and clearly unexpected (at least insofar as Amelia's parents were concerned), death. To date, the body of the deceased – Amelia, has not been handed over to either of her parents and in fact, it appears to this Court that what has unfortunately occurred insofar as Amelia is concerned, is that although hospital staff had, as of 5th February, 2009 and subsequent thereto, communicated with the First Claimant and told her that Amelia is deceased and that she died on February

5, 2009, the truth is that, in the absence of either of, or preferably both of the parents having seen the body of the deceased baby, or without the parents having been able to properly lay Amelia, 'to rest,' there can be no closure for the Claimants insofar as Amelia's death is concerned. In fact, the Claimants may very well still be left wondering and/or questioning whether or not Amelia has in fact died. The answer to that question though, need not be answered by this Court for present purposes. The reason for this is set out at paragraph 3 below.

[3] The Claimants instituted their Claim by means of filing a Claim Form and Particulars of Claim, on 22nd June, 2009, seeking damages, solely on their own behalf; such damages being General Damages and Special Damages – in the sum of $150,000.00 for Attorney's costs. They have claimed damages for: (a) Loss of their baby and/or her body; and (b) Loss of the opportunity to retrieve their baby's body and to have an interment in their family plot; and (c) Damages for their pain and suffering and mental distress. The Claim is founded on the tort of negligence.

[4] The Defendants did not file a Defence in respect of this Claim, until 12th April, 2010, this having been well outside of the forty-two (42) day limit after service on a party of the Claim Form and Particulars of Claim, within which a Defence must be filed, unless either of the parties can agree to an extension of time, or the Court, in exercise of its discretion, grants an extension of time for the filing of the Defence. In respect of this matter, the Defendants filed an

Acknowledgment of Service on 24th June, 2009 and indicated therein, that they had received the Claimant's Claim Form and Particulars of Claim on 2nd June, 2009. As a result of the Defendant's failure to obtain or perhaps even to have sought the Claimant's permission for an extension of time within which to have filed a Defence, until 12th April, 2010, as regards the late filing by that date of their Defence and also the failure to obtain or even seek the Court's approval of an extension of time for the filing of their Defence, the Claimants therefore, as they must, in order to obtain a Default Judgment as against the State, applied to this Court for a Default Judgment to be entered against the Defendants. Arising from that Application having been made, Judgment was entered in favour of the Claimants as against the Defendants. Nonetheless, the Defendant's Defence as filed on 12th April, 2010, out of time, was permitted by this Court to stand. It was then also Ordered that this matter proceed to an assessment of damages on a date to be fixed by the Registrar. That ends a brief summary of how/why it was that this Claim came before me for hearing, in respect of an assessment of damages. Thus, my task is, at this stage, only to assess damages and that is what these reasons pertain to.

[5] It was initially unclear to me as to whether the Judgment obtained as against the Defendants on the 12th day of April, 2010, was to be treated as a Default Judgment, or as a Judgment on admission. Certainly it was a Default Judgment that had been applied for, but yet, even though Judgment was granted by this Court, on that application, nonetheless, the defence was permitted to stand.

This would suggest that it was a Judgment on admission that was entered against the Defendants, this having arisen as a consequence of various admissions made in the Defendants' Defence. Thus, the defence was allowed to stand, even though Judgment was entered in the Claimants' favour on an application for Default Judgment.

[6] In an effort to clarify this situation, I had called the parties back to Court and explained that clarification of the same was required. Following on that, a Judgment on admission was entered by this Court, in the Claimants' favour, as against the Defendants. As such, at the assessment of damages hearings, this Court was properly able to take into account, cross-examination evidence and also, the defence's closing submissions. This Court would not properly have been able to do that if there had in fact been a Default Judgment entered against the Defendants . See the distinction in that regard , as was emphasized by the Jamaican Court of Appeal, in the case: Rexford Blagrove v Metropolitan Management and Hutchinson – SCCA No. 111/2005 .

[7] In assessing damages herein, it is undoubtedly the law, that the purpose of damages insofar as the law of tort is concerned, is to place the successful party in the position that he would have been in, insofar as compensation to be paid to the successful party by the party that committed the wrong is concerned; as if that wrong had not in fact occurred. Insofar as the law of tort is concerned and thus, by extension, the law relating to the tort of negligence, damages can be recovered by a party, solely for emotional distress caused, even

wherein the same has not arisen either from any physical injury to a party that seeks to claim redress, or from any economic loss to such a party. For many years, the term used to describe the type of 'damage' to a person that would be recoverable as such, was 'nervous shock.' This has been stated by the learned authors – **Winfield and Jolowicz on Tort, 14th Edition (1994), at page 119**. The learned authors after having so stated, go on to state on the same page of that text, that this terminology has the advantage of serving as a reminder that this head of liability requires something in the nature of a traumatic response to an event. The learned authors also state on that same page that – **'The sensations of fear or mental distress or grief suffered as a result of negligence do not themselves give rise to a cause of action and this was held to be so even where the victims of a disaster were trapped, fully conscious, for some time, before they suffered a swift death from asphyxia' – Hicks v Chief Constable of South Yorkshire – (1992) 2 ALL E.R. 65. Continuing the extract from Winfield and Jolowicz on Tort, 14th Edition at page 119 – 'Where a Claim alleged negligence in the conduct of a police disciplinary investigation, the submission that actionable damage had occurred in the form of anxiety and vexation was described in the House of Lords as unsustainable – Calveley v Chief Constable of Merseyside (1989) A.C. 1228. Where, however, there is some other tangible injury, damages may be awarded for mental distress, usually as part of general damages for pain and suffering, or in the case of intentional torts, as aggravated damages. Putting those cases aside, what is required is some**

'recognizable psychiatric illness.' Hinz v Berry (1970) 2 Q.B. 40, at page 42 and Alcock v Chief Constable of South Yorkshire [1992] 1 A.C. 310, at pages 399 and 406.

There can be but little doubt, as case law so reflects, that post-traumatic stress disorder has been deemed as being a recognized psychiatric illness and in fact there is a precedent from this Court which makes it clear that damages for the same, in a case not involving physical injury negligently caused to anyone, nor negligence causing economic loss is recoverable**. See :- Joan Morgan and Cecil Lawrence v Ministry of Health, University Hospital of the West Indies and the Attorney General for Jamaica – Claim No. 2005 HCV00341**. Nonetheless, Courts in England - from which the vast majority of the guiding case law on this subject emanates, no doubt fearful of the wide-ranging liability and also, the greater possibility of there being fraudulent claims which might be associated with these types of cases, that being nervous shock cases, have remained reluctant to apply the ordinary principles of liability without qualification. As Ld. MacMillan had recognized from quite some time ago: '...**in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and those elements may give rise to debate as to the precise scope of legal liability…' Bourhill v Young (1943) A.C. 92, at page 103. In Dulieu v White (1901) 2 K.B. 669, it was held that psychiatric injury was actionable only if it arose from the plaintiff's reasonably sustained fear for his own safety.** However, in a majority Judgment of the Court of Appeal of England, in the case – **Hambrook v Stokes Bros. (1925) 1. K.B. 141,** this narrow test was

rejected. The **Hambrook case** was one in which a mother suffered psychiatric injury from an apprehension of injury to her children from whom she had just parted. In the **Hambrook case**, the Court of Appeal (England) rejected the **Dulieu v White** limitation, because it would favour a plaintiff who thought only of her own safety and deny a remedy to a mother who, like Mrs. Hambrook, was, 'courageous and devoted to her child.' However, it was made clear in the Hambrook case, that liability would only arise if the injury resulted from what the victim saw or realized by her own unaided senses, and not from what someone else told her – **See at page 152 of the Court of Appeal Judgment in that case, per Bankes, J. and at page 159, per Atkin, L.J.** This latter – mentioned point will be of great relevance for the purposes of this Court's Judgment as to damages, particularly insofar as the Second Claimant herein is concerned. This however is addressed in this Judgment in far more detail, below.

[8] The law in this area has been settled ever since the Judgment of the House of Lords was rendered in **Alcock v Chief Constable of South Yorkshire (1992) 1 A.C. 310. In the Alcock case, the ten (10) appellants had suffered psychiatric trauma as a result of the disaster in 1989 at the Hillsborough stadium, Sheffield, in which, as a result of the admitted negligence of the Defendants, some ninety-five (95) people were crushed to death and over four hundred (400) were physically injured. None of the appellants had suffered any physical injury, nor been in any danger. Indeed, most of them were not at the stadium, though they saw part of the events on television. All of the plaintiffs whose**

appeals were before the House, failed. From the House of Lord's Judgment in the Alcock case, there still exists limitations on the range of situations giving rise to a recognized psychiatric illness, which can give rise to liability. Those limitations are to be exercised by reference to three (3) elements, these being:-

(i) the class of persons whose claims should be recognized; and

(ii) the proximity of such persons to the negligent act or acts about which legal complaint is made; and

(iii) the means by which the psychiatric disorder was caused.

As regards the first of these limitations, the test to be applied is one of reasonable foreseeability, subject to the qualification that a sufficiently close relationship of affection will readily be presumed in the case of close relatives and the claims of remoter relatives will be scrutinized with care. In the case at hand, this particular limitation is easily overcome by both Claimants, bearing in mind that they are both parents of the child who went missing from the Mandeville Regional Hospital on or about 5th February, 2009. It clearly must be reasonably foreseeable that psychiatric trauma could/would likely have been caused to the parents of the child, based on the particular circumstances of this particular case. The second limitation is that

there must be sufficient proximity of time and place to the event leading to the psychiatric trauma. The extent of such proximity has been taken as extending only to 'immediate aftermath.' On this point, see: **McCloughlin v O'Brian (1983) 1 A.C. 410.** The House of Lords in the Alcock case expressly approved of the earlier House of Lords' Judgment in the **McCloughlin case**. However, in the **Alcock case** the **McCloughlin case** was distinguished, because in **Alcock**, the interval between the accidents and the sight of the bodies by the plaintiffs was longer than nine (9) hours, whereas in **McCloughlin**, the period of time would have been approximately two (2) hours. In the case at hand, the distress and emotional trauma and consequential alleged psychiatric disorder, were caused to both Claimants once they were made aware that their baby's body could not be found. Thus, proximity in terms of time, does not appear to be an issue in this case, this unlike as were the situations dealt with by the House of Lords in the **McCloughlin** and **Alcock** cases. The third limitation is the means by which the psychiatric disorder (as alleged), is caused. The **Alcock case** and the **McCloughlin case** before it, both concerned trauma to a party or parties caused by the viewing by that party or those parties, of the death of a loved one or of loved ones or the learning of such person or persons death, by means of one's own unaided perceptions. The case at hand however is not of a similar fact pattern in terms of the circumstances which gave rise to the alleged emotional trauma/psychiatric disorder in respect of the 2nd Claimant. The law as laid down in the Alcock case was that although there does not have to be direct perception of the accident by sight or hearing – this insofar as 'immediate aftermath' cases can properly

allow for a Claim to be made, nonetheless, it is important to note that notification by third parties, such as, for example, newspaper or broadcast reports may not suffice. These are, as this Court understands it though, merely examples of, third parties that may have conveyed the relevant information. Newspapers and broadcast reports are by no means to be considered as constituting an exhaustive list in this regard. It is to be noted though, that the House of Lords in the Alcock case, did not altogether rule out the possibility of liability where the psychiatric illness was induced by contemporaneous television transmission of the accident. The fact pattern in the Alcock case, was that the television transmission showed the developing chaos in the stadium but did not show the suffering of identifiable individuals and therefore, lacked the immediacy necessary to found a claim. Thus, from this, it can clearly be recognized that the liability limitation of the means by which the trauma was caused, is properly to be considered as essentially, a sub-element of the proximity limitation. That is certainly how the Court approached its application of the liability limitations in the Alcock case. This is why in the Alcock case, the House of Lords concluded that a television transmission which did not show the suffering of identifiable individuals, did not have the immediacy or proximity necessary to found a Claim.

[9] In the present case, there can be no doubt that the First Claimant has overcome, by her evidence as given at the assessment of damages hearing, all of the limitations as set out in the Alcock case. The First Claimant had been in the same hospital along with

her baby, after having given birth to that baby at that hospital. She was informed after having given birth, that her baby was being taken to the nursery, whilst she was transferred to the post-natal ward. She would have had no reason to have ever believed or expected that her baby would have gone missing from the hospital. She recognized that the baby was missing from the nursery, on her own, as she had each day prior to 5th February, 2009, been visiting her baby in that nursery. It was when she then made enquiries in an effort to ascertain the whereabouts of her baby, that she was informed that her baby was dead, but even at that time, she was, as this Court infers from the evidence as given by the First Claimant, not apparently informed that the whereabouts of her baby was then unknown even to hospital authorities. To this date, the baby's whereabouts are still unknown to anyone of whom this Court is aware, much less, either of the Claimants. The fact pattern as regards the means by which the Second Claimant became aware of this traumatic 'event' is however different from that, insofar as the Second Claimant is concerned. This is because the Second Claimant was informed by the First Claimant, by means of a telephone call allegedly made to him, according to his evidence-in-chief as per his witness statement, on 5th February, 2009, that their baby had died. He then went about the process of seeking to make funeral arrangements for the baby and in that regard, he was desirous of retrieving the baby's body for that purpose and also, was then desirous of moving towards bringing closure to the entire unfortunate and tragic occurrence. The baby's body however, could not be found at the morgue and the Chief Executive Officer of the

hospital, Ms. Elliott could provide no information and did not provide any information as to the whereabouts of the baby's body. It was, according to the Second Claimant, this failure to provide information as to the whereabouts of the baby-whether the baby was then dead or alive, which caused him to become, 'distressed and disturbed' (Paragraph 10 of Second Claimant's witness statement). Thus, the Second Claimant after having had several meetings with the Chief Executive Officer of the hospital, then, it seems, accepted that his baby's body could not be found and that the baby's whereabouts remained unknown. Was this circumstance, sufficiently proximate, as to permit liability to arise and thus to properly enable this Court to award damages to the Second Claimant? From the case law that has been referred to above, I do not think so. I do not think so because, firstly, the Second Claimant did not became aware of the disappearance of his baby by his own direct perceptions, but rather, no doubt, by a combination of his having been informed of same both by the First Claimant and by the Chief Executive Officer of the Mandeville Regional Hospital. The situation in this regard, is different from that of the First Claimant. Secondly, it would not have been until quite some time had elapsed subsequent to his having been informed by the First Claimant, that their baby was dead – this being a death which to date, has not yet properly been confirmed by anyone, that the Second Claimant became aware that his baby's body could not be found. It was his learning of this that, allegedly, according to his own version of events, as per his evidence-in-chief, resulted in his having become, 'distressed and disturbed.' This is to my mind, is not proximate enough in order to enable liability to exist. This would even

be so, if this Court were to accept, as per the opinion evidence as proffered to this Court during the assessment of damages hearings, as hearsay evidence from Doctor Aggrey Irons, that the Second Claimant is, as a consequence of what happened to his baby, just as is the First Claimant, suffering from, 'chronic, severe, post-traumatic stress disorder,' this undoubtedly being, according to all of the relevant legal authorities on the point, a recognized psychiatric illness. It is to be noted that whether the Second Claimant is in fact suffering from such a recognized psychiatric illness, has been placed in serious dispute during the assessment of damages hearings, because, consultant psychiatrist – Dr Oo, also examined the Second Claimant and gave viva voce evidence in Court regarding same. He concluded, in respect of the Second Claimant, that he neither suffers from depression, nor post-traumatic stress disorder. I have however, made no finding of fact in this regard, since to my mind, as a matter of law, for the reasons already given, even if the Second Claimant does in fact suffer from a recognized psychiatric illness, nonetheless, on the basis of the lack of sufficient proximity even based on that which has been admitted to by the Defendants in their Defence, the Defendants clearly cannot properly be held liable for any psychiatric injury as may have been suffered by the Second Claimant as a consequence of the Defendants' actions or inactions.

[10] This matter is now one in which there exists a Judgment on admission against the Defendants. Can this Court, in such circumstances, Judgment having been entered against the Defendants in favour of both Claimants, refuse to award any

damages to either of the Claimants, on the basis that from a legal standpoint, the evidence as provided to this Court at the assessment of damages hearing herein and the nature of the Claimants' Claims and the Defendants' defence as pleaded, particularly insofar as the extent of the Defendants' admission is concerned, are collectively such that any 'damage' or 'loss' caused to either of those Claimants, is not legally recoverable as a matter of law? This Court is of the considered opinion that it cannot be unmindful of the law as to liability for the purpose of assessing damages herein, this even where Judgment is entered against a Defendant whether by way of a default, or even if arising by some admission. This is because, in either such scenario, this Court must always be guided by the law and must always ensure that, in assessing damages for the tort of negligence, it concludes in terms thereof, on an award which constitutes compensation to the Claimant for the loss suffered by that Claimant, so as to put that Claimant in the same position as if the 'wrong' had not occurred. Thus, if there has been no 'wrong' in terms of liability, then even though there exists either a Judgment on default or on admission, must it not always be appropriate for this Court, on an assessment of damages hearing, to appropriately compensate each Claimant who has been awarded Judgment, no more than such a Claimant should properly be compensated for such?

[11] In the case at hand, as there exists a Judgment on admission, the Second Claimant is, even based on the Judgment on admission which has been awarded in his favour, entitled to no more than nominal damages. In the circumstances, this Court will award to the

Second Claimant, the sum of $20,000 as nominal damages in respect of which, as it is nominal, as distinct from general or special damages, no interest thereon, can properly be awarded by this Court. Thus, the Second Claimant will be entitled to obtain from the Defendants, no more than the sum of $20,000 – which is nominal damages, as distinct from compensation. If the Judgment against the Defendants as obtained by the Second Claimant had been a Default Judgment, as distinct from a Judgment on admission, then the Second Claimant would, if such had been the case, have been awarded absolutely no sum whatsoever, as damages – this because, on the Second Claimant's claim as pleaded and proven, that Claimant, in this case, would have established absolutely no liability whatsoever. Whilst it is not that this situation has changed because the Judgment existing in the Second Claimant's favour, is now a Judgment on admission as distinct from a Default Judgment. In such circumstances, the Second Claimant should consider himself fortunate that, for reasons which appear to me to be more strategic in terms of the practical consequences of a Default Judgment on an assessment of damages hearing, rather than for reasons which constitute a real admission to any liability in this case, there has been a Judgment on admission entered by this Court against the Defendants. In those circumstances, whilst this Court will award nominal damages to the Second Claimant, it can, as a matter of justice, do no more than that, insofar as he is concerned. Practically though, insofar as the First Claimant's Claim and her circumstances are concerned, the situation both in law and in fact, is materially different for her, than it is for the Second Claimant and thus, will be

approached differently by this Court, insofar as the assessment of damages for her is concerned.

[12] Insofar as the First Claimant is concerned, the main relevant portions of her evidence as to how she came to the realization that her baby had gone missing, as given in her witness statement, has been set out above in this Judgment. On amplification of her witness statement, it was adduced into evidence by the Claimant that she is still receiving medical treatment from one Dr. Garvey. In her witness statement which is dated 13th September, 2010, at paragraph 20, the First Claimant stated that she has visited Dr. Lincoln Little of Santa Cruz in the parish of St. Elizabeth, as a result of her inability to sleep, headaches and shortness of breath, which have been affecting her on a regular basis since the occurrence of the relevant incident. Additionally, in her witness statement, the First Claimant has recorded that the whole incident has caused her much hurt, sadness and distress and that at times, she is unable to sleep at nights because of the overwhelming pressure which the relevant incident has caused her. She also has stated therein, that the failure of the hospital to provide her with real answers as to the reason why the baby's body is missing from the morgue has left her with serious doubts as to whether her child is really dead. She has, she contends, been deeply distressed and disturbed as a consequence of this incident and has sought medical help, including help from a psychiatrist, arising from the occurrence of same. In addition, she has also made in her witness statement, an important point, this being that even if her baby is dead, she has been deprived of the

right to have her baby's body buried at a proper funeral and in the family's plot, whereby she could then have lasting memories of her.

[13] What is clear to this Court, is that this is not a Claim for compensation vis-à-vis the loss of the Claimants' baby – who may very well have died, but no one – not even the hospital where that baby had remained for at least a few days after her birth, can confirm this, nor even so much as give any indication to the Claimants as to that baby's exact whereabouts. This would, no doubt, likely be the reason why a Claim for negligence of the hospital, resulting in the death of that baby, has not yet arisen in respect of that baby, whose whereabouts are presently unknown. Of course though, once that presumption has arisen, then a Claim for the death of that baby can properly be pursued by the Claimants or either of them, under and pursuant to the provisions of the **Fatal Accidents and/or the Law Reform (Miscellaneous Provisions) Act**. Time in terms of the limitation period for the institution of a Claim under the Fatal Accidents Act would only begin to run in that regard, once the baby is either specifically known to the Claimants or either of them, as being dead, or a presumption of death has, in law , arisen. Neither such is applicable at present. Thus, the Claim is for damages for emotional distress which has been negligently caused by servants or agents of the Crown, as distinct from a Claim for damages for loss of a baby due to negligence of the relevant hospital.

[14] There were four medical reports which were admitted into evidence during the assessment of damages hearing which was held

before me. However, only two of those reports were prepared by anyone who provided viva voce testimony to this Court, this being Dr. Oo, who is a psychiatrist presently employed by the government of Jamaica. He provided to this Court, two reports related to his medical assessments, as a psychiatrist, of the respective Claimants for the purposes of this Judgment. Since no general or special damages will be awarded to the Second claimant, this doctor's mental assessment of the Second Claimant will not be considered any further by this Court. There are three of those medical reports however, which pertain solely to Natoya Swaby and those three reports have been prepared by three different doctors, two of whom are psychiatrists, namely: Dr. Oo and Dr. Aggrey Irons. The third report was prepared by a doctor – Dr. Lincoln Little, whose office address is in Santa Cruz, St. Elizabeth and who has not in his report, suggested that he specializes in practicing any particular aspect of medical expertise. Dr. Little saw the First Claimant on one day, that being 2nd July, 2009 and after having taken instructions from her, diagnosed her as suffering from depression and stress induced bronchial asthma. The cause of this and the symptoms of the First Claimant as she recounted to Dr. Little, will not be referred to by this Court and have not been taken into account for the purposes of the rendering of this Judgment, as I consider such to be hearsay evidence which cannot be accepted by this Court as proving the truth of its contents. See **English Exporters London Ltd. v Eldonwall Ltd. (1973) Ch. 415.** Dr. Little's diagnosis of the First Claimant's medical condition as at the date when he examined her however, is altogether a different matter, since although the entirety of Dr. Little's medical report was

adduced as hearsay evidence at the assessment of damages hearing, the same is admissible as hearsay evidence which goes to prove the truth of its contents. Thus, although Dr. Little's assessment of the First Claimant was based on that what he was told by the First Claimant, that assessment adduced as hearsay evidence, is first-hand hearsay, as distinct from that which formed the basis of that assessment, which would be the instructions as given to Dr. Little by the First Claimant. I am of the view that those instructions would be second-hand hearsay evidence and should not be taken into account by this Court. The same approach will be taken by this Court in relation to the instructions given by the First Claimant to the other doctors who had attended to her. Finally, as regards Dr. Little's report, he stated therein, that the First Claimant was treated with anti-depressants. In Dr. Aggrey Irons' medical report, he has stated that he first saw the First Claimant on 8th September 2010 and that after having taken instructions from her, which he recounted in his report, he diagnosed her as suffering from chronic, severe post-traumatic stress disorder and suggested in his conclusion, that the, '**lack of closure will have long lasting effects on both parents and their family. They will require ongoing social and psychological support for at least the next three years.'** (Emphasis mine) Dr. Irons has stated in his report, that he has been a consultant psychiatrist for the past thirty (30) years and has been a registered medical practitioner for thirty-five (35) years. Dr. Irons' report, it should be noted, is dated 23rd September, 2010. Dr. Irons therefore has considerable experience in the psychiatric field and his assessment which is somewhat supported by Dr. Little's assessment,

albeit that Dr. Little does not appear to have ever undergone any specialized medical training in psychiatry, cannot and will not be disregarded by this Court. Both Dr. Little's and Dr. Irons' reports were admitted as evidence of the truth of their contents, pursuant to the statutorily provided for, exception to the hearsay rule. I consider such evidence to be of some value, insofar as the assessment of damages is concerned and in my view the medical diagnoses as made by the doctors therein are overall, highly supportive of the First Claimant's unchallenged evidence as to her emotional distress. Nonetheless, I have also given careful consideration to Dr. Oo's testimony as provided from the witness stand, in relation to his examination of the First Claimant. Dr. Oo has testified to his having conducted his medical examination of the First Claimant over, 'a prolonged period of time.' He too has concluded that Natoya Swaby suffers from post-traumatic stress disorder, but disagrees with Dr. Irons' assessment that the First Claimant's post-traumatic stress disorder was either severe or chronic.

[15] Insofar as the First Claimant in this particular Claim is concerned, there is no dispute amongst the doctors qualified to make the respective psychiatric assessment of her, that she was, at the time when they respectively conducted such psychiatric assessments of her, suffering from post-traumatic stress disorder. What is the difference in the assessments as made by Doctors Oo and Irons in that regard, is that whilst Dr. Irons has characterized the extent of the First Claimant's post-traumatic stress disorder as being severe or chronic, Dr. Oo has characterized the First Claimant as suffering from

mild to moderate depression. This Court will accept the opinion as proffered to it by Dr. Oo in this regard, since it does indeed seem likely that if her mental injury in the form of post-traumatic stress disorder, arising from the loss of her baby's body, was in fact severe or chronic, then the same would have necessitated, at the very least, a recommendation from Dr. Irons – this being the doctor who assessed her as suffering from a chronic or severe form of post-traumatic stress disorder, that she be treated in a hospital, as soon as was thereafter possible. Dr. Oo informed this Court that if a person is diagnosed by a psychiatrist as suffering from either chronic or severe post-traumatic stress disorder, then that psychiatrist would ordinarily recommend that such person receive treatment for the same in a hospital, rather than treat such person solely as an out-patient. This Court however, has not been made aware that any such recommendation that she be treated in a hospital as an in-patient, has ever been made by Dr. Irons in relation to the Claimant. In those circumstances and also taking into consideration that Dr. Irons never appeared at Court and gave viva voce testimony and thus, this Court was neither able to ask him any questions, nor able to assess his overall credibility based on the manner in which he would given his evidence to this Court, Dr. Oo's testimony and medical (psychiatric) conclusions in relation to the First Claimant are preferred to those as provided by Dr. Irons in his written report which was admitted as hearsay evidence.

[16] Thus, the quantum of damages must now be assessed. Only one item of special damages is being claimed for, this being

Attorney's fees, in the sum of $150,000.00. This sum ought to be sought to be recovered by the First Claimant, along with other sums that may have had to be incurred as legal fees and out-of-pocket legal expenses, as costs to be taxed on a party and party basis, as is the ordinary course.

[17] The case of Joan Morgan and Cecil Lawrence v Ministry of Health, University Hospital of the West Indies and the Attorney General of Jamaica, as has been reported in Khan's – Volume 6, at page 220, is the only one from Jamaica, which, according to counsel for the Claimants relates to the type of situation which has come before this Court in the matter at hand. Whilst the Joan Morgan Judgment is of great assistance to this Court, it is to be noted that it is not, 'on all fours', with the case now at hand, insofar as in that case, amongst other symptoms and experiences which this Court accepts as being the same as either are now or were applicable to the First Claimant herein, the Claimant in the **Morgan & Lawrence** case, in this Court's view, based on the symptoms as noted by the Court as having been taken into account in that case, for the purpose of assessing damages, suffered more serious and severe psychiatric injuries than has the First Claimant herein. This is not however, by any means to suggest that the psychiatric injuries as caused to the First Claimant herein, are negligible in nature. They are certainly not, but the damages awarded in the Morgan and Lawrence case, will, after having been indexed, have to be reduced to more accurately reflect a suitable award of damages to the First Claimant based on the nature of the psychiatric injuries of the First Claimant in the matter

now at hand. This Court will reduce such sum by 30%, in that context. The sum which was awarded by this Court to the First Claimant in the Morgan and Lawrence case, was $3,500,000.00. The Morgan and Lawrence case, it should be noted, was one in which the Claimants successfully sued in negligence, seeking damages for emotional distress, when the First Claimant was misdiagnosed as having been HIV positive. That sum of $3,500,000.00 was awarded to the First Claimant in December of 2007. The CPI at that month and year was: 116. 8. The latest CPI is for August, 2012. As at that month, the CPI was 184. 1. Thus, when indexed, the award made to the First Claimant in the Morgan and Lawrence case is $5,516,695.20 as at this month. Reducing that sum by 30%, the figure that this Court determines as being the sum which should be awarded to the First Claimant herein as general damages, is $3,861,686.64.

[18] In the circumstances therefore, my Orders are as follows:-

(i) The First Claimant is awarded general damages in the sum of $3,861,686.64 as against the Defendants with interest thereon to be at the rate of 6% from the date of service upon the Defendants' Attorneys, that being the Office of the Director of State Proceedings, of the Claim Form and Particulars of Claim, this being: - 22nd June, 2009, until the date of this Judgment.

(ii) Costs of the Claim are awarded to the First Claimant, as against the Defendants.

(iii) As regards the Second Claimant's Claim against the Defendants, the Second Claimant is awarded nominal damages in the sum of $20,000.00 and each party shall bear their own costs.

(iv) The Claimants shall file and serve this order.