



2023 JMSC Civ 224

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 01122

BETWEEN	ANNISSIA MARSHALL	CLAIMANT
AND	NORTH EAST REGIONAL HEALTH AUTHORITY SAINT ANN'S BAY HOSPITAL	1 ST DEFENDANT
AND	THE ATTORNEY GENERAL	2 ND DEFENDANT

Mr Raymond Samuels instructed by Samuels and Samuels Attorneys-at-law for the Claimant

Mr Louis Jean Hacker and Mr Jenoure Simpson instructed by the Director of State Proceedings Attorney-at-law for the Defendants

June 5-6, 2023, July 24-25, 2023 and November 20, 2023

Assessment of Damages – application to strike out aspects of Witness Statement because reference to opinions of doctors who are not appointed experts – application to appoint expert witnesses during the course of the assessment of damages – Handicap on the Labour Market – Future Medical Expenses.

JUSTICE T MOTT TULLOCH-REID

Introduction

1. This matter has been long before the Court. In fact, it was already tried and determined, went on appeal and then came back to this Court for another hearing.

Since the appeal several applications have been made by the Claimant and although this was so, even on the day of the Assessment of Damages, applications were still being made. At some point, everything must come to an end and here endeth the claim of Annissa Marshall v the North East Regional Authority Saint Ann's Bay Hospital and the Attorney General. The matter has traversed the Court since 2006 and finally 17 years later, it is now at an end.

2. The Claimant seeks to recover damages for her pain and suffering and loss of amenities. She has also claimed special damages.

Background of claim in the Courts

3. The trial had first come up before the Honourable Mr Justice David Fraser (as he then was). He made orders in favour of the Defendants and the claim was dismissed. The Claimant successfully appealed his decision. The decision of Fraser J was overturned, the Defendants were found to be liable and the matter sent back to this Court for damages to be assessed. Details of the claim as it made its way through the first trial and appeal can be read in the judgment of Phillips JA in **Annissia Marshall v North East Regional Health Authority St Ann's Bay Hospital and Attorney General [2015] JMCA Civ 56**.
4. When the matter came back for damages to be assessed, the issue of liability no longer being a live one, the Claimant applied to amend her Particulars of Claim. The amendment was allowed and particulars of assault, particulars of injuries and psychological trauma which were not previously pleaded, made their way into the amended document. This opened the door for the Defendants to file an Amended Defence which appeared to raise the issue of liability again. I will not consider that issue in these proceedings as the Court of Appeal has already given a ruling on it. The Court of Appeal has said that the Claimant did not consent to the second procedure being done. It does not matter that in the 1st Defendant's mind the second surgery would have saved her life. What is important is that she did not consent and since she did not consent to the surgery, then the Defendants are

liable. My role in all of this is to determine what amount should be awarded to the Claimant because of the actions of the doctor(s) who operated on her without her consent and which caused her to suffer loss and damage. In order to make this determination, I must be able to separate the damage which resulted to the Claimant as a result of the second surgery as it is only that damage which the Defendants are liable for.

Application to appoint expert witnesses

5. While the Claimant was in the process of giving her evidence, Mr Samuels asked for an opportunity to make an oral application for experts to be appointed. The application became necessary as counsel for the Defendants had raised an objection to the Claimant's use of and reference to medical reports which had been prepared by persons who had not been appointed experts by the Court. This Court had on a prior occasion, expressed a view that the opinions of the doctors as set out in their medical reports could not be relied on unless they were appointed expert witnesses. On September 27, 2022, when the matter came up for a hearing before me, the Claimant had made an oral application to appoint experts. In my written reasons dated October 10, 2022, at paragraph 19, I indicated that an oral application could not be made as no evidence as to the qualifications of the doctors to be appointed experts was before me.

6. CPR 32.13 sets out what the expert's report must contain. In addition to the qualifications and the certification, Part 32.13(3) sets out that the written instructions to the expert must be provided. Must is mandatory. The qualifications contained in the report are only useful if it is evidence. It can only be evidence if it is exhibited to the affidavit that supports the application or is contained therein. This suggests that the application should be in writing. In fact, CPR 11.6 says that the general rule is that the application must be in writing. Oral applications are only allowed if a rule or practice direction allows it, or the court dispenses with the requirement.

7. Since the Court of Appeal's decision, this matter has had the benefit of the court's attention on many occasions. There is no reason the application to appoint expert witnesses could not have been made. Even in October 2022 when the Claimant was prompted by this Court to make the application none was made. It would in my view be prejudicial to the Defendants to allow the Claimant the opportunity to do so *via* an adjournment when the matter had already begun, and the Claimant was in the process of giving her evidence. This is a prejudice to the Defendants that cannot be cured with a cost order. In the circumstances, the Claimant was not permitted to make an oral application to appoint expert witnesses during the course of the Assessment of Damages hearing and the Claimant's application for an adjournment to enable her to make a written application to appoint expert witnesses was refused.

8. Mr Samuels also submitted that the matter cannot go on unless the judgment has been entered. It is a judgment in his client's favour. The judgment was delivered approximately 8 years ago and no attempt was made by him to have the judgment entered yet, at this stage, he is raising the issue. CPR 42.8 provides that a judgment takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date. In any event, there is nothing to preclude the judgment from being entered today to fix that defect, if indeed one exists.

Claimant's evidence

9. On the oral application of the Defendant's attorney-at-law, certain parts of the Claimant's witness statement were struck out. That being done, the Claimant's Witness Statements, with the relevant sections struck out were allowed to stand as the Claimant's examination in chief. There were several objections raised by Mr Hacker with respect to documentary evidence which the Claimant tried to have admitted into evidence in support of her position, on the basis that the receipts were not related to the second surgery. In some instances, Mr Hacker's objections had merit, as it was for the Claimant to prove to this Court that the receipts and the reports

on which she relied came about because of the second surgery which was inflicted upon her without her consent, and which is the subject of this claim.

10. The Claimant's evidence is that on June 26, 2004, she felt abdominal pains to her lower abdomen and consulted a private medical practitioner. The pains continued and so she went to the Port Maria Public Hospital ("PMPH") on June 27, 2004. She was not treated at the PMPH and so with worsening pains, she returned there on June 28, 2004. On her third visit to the PMPH she requested an abdominal and pelvic ultrasound. This was done. The scans revealed that her endometrium was normal but that she had a hemorrhagic left ovarian cyst. She was therefore referred to the St Ann's Bay Hospital ("SABH") for treatment by the gynaecological team there. She was admitted to the hospital on June 29, 2004, and consented to have the ovarian cyst surgically removed. This was done on July 1, 2004.

11. Mrs Marshall says that on July 11, 2004, she was discharged from the SABH but her pains had not abated so she returned there on July 12 2004 and was readmitted. On July 14, 2004, she consented to an ultrasound examination being done. The ultrasound revealed the endometrial stripe was within normal limits and there was fluid filled dilated loops of bowel with free fluid within the abdomen. There was no evidence of an interloop collection.

12. On July 15 2004, without her consent, doctors at the SABH did a second surgery on Mrs Marshall. She woke up from the anesthesia to find a colostomy bag attached to the left side of her lower abdomen and was informed by the doctor that she had undergone an operation for abdominal obstruction and a colostomy bag was necessary in the circumstances. She was assured that the colostomy bag would be removed shortly. Mrs Marshall was discharged from the hospital on July 29, 2004.

13. She made several visits to the SABH to have the colostomy bag removed but it never was. Based on the evidence, her last visit was in December 2004. When her efforts to have the colonic operation reversed and the colostomy bag removed at the SABH

were unsuccessful, she sought help from private medical practitioners. They, however, informed her that the operation to reverse the procedure would have to be done in the United States.

14. At the time of the operation and the insertion of the colostomy bag she had been married for eight years but had not yet had any children.
15. Mrs Marshall says that during the period in which she wore the colostomy bag, she was greatly embarrassed, as the bag produced an unwelcome odour. Her husband lost interest in her sexually and withdrew from her bed. She in turn developed a low libido. She suffered severe pain and discomfort and was extremely depressed and was referred for psychiatric consultation. As a result of wearing the colostomy bag she was traumatized by the constant feeling of unwellness, the knowledge of not enjoying proper social hygiene and the knowledge of this being known to those with whom she had to maintain social contact from time to time.
16. The Claimant is afraid she will never become pregnant and her dreams of establishing her own perfect home with children have faded. She is of the view that the surgical procedure which was done on July 15, 2004, was unnecessary as the ultrasound did not indicate any condition which required surgical operation. She is upset that a surgical operation was done on her, which was in her opinion a serious one done without her consent. She is of the view that the surgical procedure which was carried out had serious risk of complication of damage to the colon and yet it was carried out on her without her being informed of the various complications of risk.
17. The Claimant's evidence is that she did not give the hospital her consent for the surgery to be done on her. The consent form which she signed had no relevance to the surgery which was performed on her. The form made no reference to any specific diagnosis for which surgery was done and there was nothing on the form to say that she had consented to any surgery being done on her body. She was not informed of any diagnosis or treatment which followed.

18. Her evidence as contained in the Witness Statement filed on May 13, 2020, set out the acts of assault which were infringed on her in much the same way as they were set out in the Amended Particulars of Claim filed on May 20, 2019. Her evidence is that her large bowels were cut off and carried away without her consent, that portions of her colon were cut off and carried away and an attachment device to facilitate the artificial collection of faeces was attached to her. The attachment of the colostomy bag required further surgical intervention to the exterior of her abdomen. Her appendix was also removed and carried away without her consent. The surgical procedure lasted for approximately 4 hours and led to her losing blood which had to be replaced by a blood transfusion. This act of transfusing blood into her body, she says, was anathema to her religion as she worships as a Jehovah's Witness. During the time she wore the colostomy bag she had constant seepage of faeces on to her body and clothing as well as a constant attending bad odour which caused her to experience pain and suffering. All these acts together were acts constituting an assault on her body, health and well-being.

19. She said she was treated by Dr Franklin Ottey, Dr Denton Barnes and Dr Leighton Logan for her injuries. She said that for upwards of three years she suffered social and emotional discomfort from the inconvenience of wearing the colostomy bag and she also suffered the disintegration of her family life and social acceptance in her community and the public places where of necessity she was forced to socialize.

20. In amplification, Mr Samuel sought to obtain from the Claimant the three-year period for which she wore the colostomy bag. The Claimant informed the Court that she wore the bag from July 15 2004 to August 8 2007. She said she purchased the colostomy bags from the SABH, PMPH and A&E Pharmacy. She also made purchases from a private individual named Heather Hurley. Ms Hurley has since migrated, and she has not been able to get in touch with her. On my questioning, the Claimant informed the Court that she paid about \$250 each for a colostomy bag. When she made the purchases from the A&E Pharmacy she paid \$350 each. The receipts issued by Ms Hartley were not allowed into evidence as there was an objection from the Defendants

with respect to all the documents that were attached to the Notice of Intention filed by the Claimant and Ms Harlley did not attend Court for the purpose of addressing the objection raised by the Defendants.

21. Mrs Marshall's evidence is that she went to the Mobay Hope Hospital to see a doctor to see if he could reverse the procedure which caused her to be wearing the colostomy bag. She also consulted with Dr Neville Graham and Dr Ndunka for the same purpose.
22. Mrs Marshall had to utilize the services of chartered taxi service in order to make her various doctors' appointments because the colostomy bag had a foul odour. She said the stench would come from the side of the bag when it was squeezed or if it filled up or if she passed gas the part of the bag that attaches to her skin would come off and the scent would escape from the bag. She said that because she sometimes had to use Desitin on her skin, the top of the colostomy did not always stick well and that would cause it to detach from her skin and the scent from the bag to escape. Mrs Marshall's evidence is that on average she used 2 colostomy bags per day depending on the consistency of her faeces, which depended on what she ate.

Transportation expenses

23. Mrs Marshall's evidence is that she would be transported by private taxi operated by Mr Kidd, Mr Stewart or Mr George Bridgette and on each occasion that she traveled she would pay approximately \$1,500 for the round trip. Mr Kidd charged her \$2,000 or \$2,500 and her costs to be transported to Kingston to see Dr Thomas amounted to \$3,500 per round trip. Receipts showing proof of payment for her transportation expense were admitted into evidence as Exhibits 82A – 82E and the agreed transportation costs of **\$11,000** (Exhibits 71A -71F).
24. The Claimant eventually went to the United States of America to have the operation done. She had to pay airfare to travel to and from the United States. Her evidence is that she had to travel from the Montego Bay airport to New York City and she thinks she paid \$24,336 for that ticket which she purchased from Trafalgar Travel. Mr Hacker

objected to the receipt being admitted into evidence as he said the Witness Statement did not specify the date of the ticket as was stated by the witness in her oral evidence and he did not know what the purpose of the ticket was for. Mr Hacker's objection was overruled, and the receipt admitted into evidence as exhibit 83A. That receipt and another one dated January 14, 2008, were both admitted into evidence on the basis that the Witness Statement had laid the foundation for the travel expense and the Claimant was just proving how she had arrived at the sum claimed which the Witness Statement referred to. In fact, the witness in her oral evidence indicated the date of the ticket for the purpose of identifying it and said that she had to incur that cost to travel to New York to have the procedure to remove the colostomy bag done and for follow up treatment. The expense incurred as set out in her Witness Statement is different from the sums alluded to in her oral evidence. The Court will consider the sum stated in her oral evidence as the correct amount.

Cross Examination

25. In cross examination Mrs Marshall did not agree that the colon and the appendix had nothing to do with her sexual reproductive system. She also did not agree with Mr Hacker that the surgery that led to the removal of a part of her colon and appendix did not affect her sexual reproductive system. She did not agree in cross examination that when she went back to the SABH in October 2004 the operating theatre was unavailable and that on December 29, 2004, she was ill and was therefore unable to do the surgery.

26. Mrs Marshall was shown Exhibit 73L which was the receipt dated December 29, 2004, from the SABH. The receipt had the endorsement "Adm/GS" noted on it. Mrs Marshall's evidence is that she went to SABH on December 29, 2004 but not for surgery. Mrs Marshall agreed that "Adm" meant admission but disagreed that "GS" meant "general surgery". She disagreed that the entire acronym "Adm/GS" stood for "general surgery admission". She disagreed with Mr Hacker that when the procedure was being done, she felt no pain as she was asleep. She did indicate to me that while she was doing the Hartmann's procedure and when the colostomy bag was being

attached, she was asleep. She agreed with Mr Hacker that she was not a medical doctor and that she did not know the steps that were required to perform the Hartmann's procedure. She also did not know how the Hartmann's procedure was performed on her.

Evidence Dr Denton Barnes

27. Dr Barnes, at the insistence of Mr Hacker, took the stand on day 2 of the Assessment of Damages. After he was sworn and was asked whether he had any professional memberships, Mr Hacker objected on the basis that Mr Samuels was trying to illicit Dr Barnes' qualifications to subvert this Court's previous ruling on the issue concerning the appointment of expert witnesses. Mr Hacker argued that Dr Barnes was not certified an expert, and he was not an ordinary witness because he had no witness statement. He was merely in attendance at Court to satisfy the requirements under Section 31E of the Evidence Act.

28. I inquired of Mr Hacker why he insisted on Dr Barnes attending the hearing if he was going to object to him giving evidence. Dr Barnes had two medical reports before the Court, one in which he gave an opinion based on what he saw from a medical report prepared by another doctor (Dr Titus) and the other which he prepared from his own examination of the Claimant. Mr Hacker responded by saying that the documents which Dr Barnes prepared were prepared for the purpose of giving an opinion to the Court which would guide the Court in assessing damages. Mr Samuels responded by saying that based on the Notice of Intention to Object he brought Dr Barnes in to acknowledge a document and have it tendered into evidence. If the document was admitted into evidence, it was then for the Court to decide what weight was to be put on its content.

29. The question as to whether Dr Barnes should be allowed to give oral evidence is answered by CPR 29.11(2). The Court cannot give permission at trial for a party to give oral evidence unless, the party asking for permission has a good reason

for not previously seeking relief under Rule 26.8. Mr Samuels said no application for relief from sanctions was filed because it was his belief that the doctors would be allowed to rely on their medical reports since doctors just identify the reports made and the content of the reports become their evidence. Mr Hacker has indicated that in order for relief from sanctions to be granted Mr Samuels would have needed an application supported by an affidavit. That is true but that is not what I am to be satisfied of today. I must satisfy myself that the reason given by Mr Samuels for not asking for relief previously is a good one. In this matter, the Defendants have objected to almost every single document the Claimant intends to rely on. There are several receipts that the Claimant intended to rely on and the Defendants have objected to the majority of them. This is their right. However, the Court must consider whether in circumstances where almost every document is objected to whether there should be witness statements from all the makers who would appear. In a situation where the witness is being called not so much for the purpose of being cross-examined on their evidence but for the purpose of identifying the document they produced, I did not think that was necessary and as such Dr Barnes was permitted to identify his documents. Once he was able to do so, the documents were admitted into evidence and the Court would then determine how to treat with their content at the appropriate time.

30. Dr Barnes identified both his reports and they were admitted into evidence as Exhibits 78A and 78B. Dr Barnes confirmed, after an objection raised by Mr Hacker was overruled, that the Claimant paid for the medical reports and receipts were issued. He could not remember the amount on the receipts as he said that they had been prepared over seven years ago by his secretary. He said receipts issued by his office were only valid if they bore his office stamp. He was allowed to refresh his memory by consulting his notes to verify the costs and indicated that one receipt was for \$175,000 and the other was for payment made in the amount of \$150,000.

Dr Leighton Logan

31. Dr Logan was also called to give evidence. He took the stand but was unable to identify the document he prepared, and it was therefore not allowed into evidence.

Medical Reports

32. As it relates to the medical report prepared by Dr Clive Thomas, no notice of intention to object to the document was given by the Defendants. Dr Clive Thomas' medical report dated 28 September 2005 was admitted into evidence as Exhibit 2. In it Dr Thomas reports that a laparotomy was performed on the Claimant for bowel obstruction on July 15 2004 with sigmoid colectomy, end colostomy and Hartmann procedure performed. Histology of the specimen revealed endometriosis with mural fibrosis and stricture formation. The histology of the appendix revealed acute suppurative appendicitis with endometriosis. The Claimant was placed on Depo-provera 150mg monthly for nine months for treatment of her endometriosis. Her colostomy was found to be functioning adequately but because of problems with the colostomy, care and social implications, Dr Thomas advised the Claimant that he would close the colostomy using stapled anastomosis techniques. He did not perform the surgery and Mrs Marshall's evidence did not say why she did not utilize his services. The cross-examination did not test the reason she opted to travel overseas instead of doing the procedure in Jamaica.

33. Dr Franklin Ottey also prepared the medical reports. They were admitted into evidence as Exhibits 6A and 6B and are dated November 8, 2005 and October 21 2016 respectively. Dr Ottey is a consultant psychiatrist who is now deceased and was deceased at the date of the assessment of damages hearing. At the Case Management Conference, orders were made permitting the Claimant, pursuant to section 31 E of the Evidence Act, to rely on the medical reports of Dr Ottey.

34. Dr Ottey reported that the Claimant informed him that it had been very difficult for her to keep wearing the colostomy bag as it sometimes gave up an offensive odour which made her reluctant to socialize. She was able to keep her job because her coworkers

were understanding and supportive, and while her husband had also been supportive, her marriage had been adversely affected as it was difficult to have sexual intercourse while wearing the colostomy bag and she had fears that her husband did not find her attractive anymore. She had concerns about the fact that she had not yet had children and felt depressed when she considered that she had been well before the operation and now had to be wearing a colostomy bag at her young age. She was also upset about not being able to wear her normal clothes, had frequent headaches, was unable to concentrate well and had difficulty sleeping.

35. Dr Ottey reported that the Claimant appeared to be very preoccupied by the fact that she was wearing the colostomy bag and seemed clinically depressed. In his opinion she was suffering from an adjustment disorder with depressed mood. It was his opinion that the stresses which caused the disorder were related to the wearing of the colostomy bag for a long period of time. He assessed her as functioning at 70% of her full overall psychological functioning.

36. In the October 21, 2016, report Dr Ottey reported that the Claimant said that since he had examined her in 2005, she had continued to feel very upset and depressed about the surgical operations which had been performed on her in 2004. She was also upset about the fact that the doctors had not discussed things with her before doing the surgery and wondered what they might have done which they did not tell her about. The colostomy which she had was closed by a surgeon in New York in August 2007.

37. Mrs Marshall reported to Dr Ottey that since the colostomy had been closed sexual intercourse with her husband had improved but that the surgical scars still affected him. Her husband was devastated and frustrated at not being able to have children after all these years and he felt irritable and depressed, and it led to tensions and arguments between them. They have even contemplated divorce. Dr Ottey indicated that the Claimant reported that she had not been sleeping well, sometimes lost her appetite and became tearful when she considered her inability to become pregnant and the deterioration of her marriage. He assessed her as being clinically depressed

and mildly anxious and offered his opinion that she was suffering from a chronic adjustment disorder with anxiety and depressed mood. He assessed her as functioning at 65% of her full overall psychological functioning.

Claimant's submissions

38. In summary, the Claimant's claim against the Defendants is in relation to the following:

- a. physical assault on her person when a surgery was done on her without her permission.
- b. assault on her system of religious beliefs when she was transfused with blood against her wishes, she being a Jehovah's witness.
- c. the removal of a part of the Claimant's colon and her appendix when it was unnecessary to do so and more importantly without her consent.
- d. the fact that the Claimant had to wear a colostomy bag for upwards of three years.
- e. the fact that the Claimant who was a young woman of only 28 years of age at the time, suffered being somewhat of a social outcast because of the stench which came from the colostomy bag which she wore.
- f. the fact that the Claimant suffered loss of consortium with her husband because she wore a colostomy bag which had an odour.
- g. the Claimant's inability to have children which she desires/desired to do.

39. With respect to the medical reports prepared by Dr Franklin Ottey and Dr Denton Barnes, Mr Samuels submits that the information contained in the documents are to be accepted by the Court although neither doctor has been appointed an expert witness and they have both given their opinion on the Claimant's medical status. He argued that the general rule is that a witness is only permitted to give evidence from his own personal knowledge and is not permitted to draw inferences from the facts which are in his personal knowledge. There are, however, exceptions to the general rule. In support of this position, Mr Samuels argued that a properly qualified expert can state his or her opinion on a matter falling within his or her

area of expertise, if it is expertise that the court does not possess. In addition, evidence is admissible from witnesses who have acquired by study or practice the necessary expertise on the subject on which they speak. This has been the position that the courts have taken from as far back as the mid-16th century as was expressed by Saunders J in the case of **Buckle v Rice (1554) Plowd 118, 124** where he said:

“...if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an Honourable and commendable thing in our law. For thereby it appears that we despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.”

40. Mr Samuels went on further to say that the qualification to give expert evidence is really just a matter of competence and that the Court should investigate the credentials of the witness before permitting him to give expert evidence. Expertise, he said, is gained by substantial relevant experience and that in and of itself should render an expert witness competent and give his evidence considerable weight. In that regard, based on the qualifications of Dr Thomas, Dr Ottey and Dr Barnes, they should be treated as experts and the opinions contained in the reports they prepared should be given considerable weight. According to Mr Samuels all three doctors have determined issues within their fields of expertise, they are men of science who are entitled to give evidence within their own science and their role is to assist the Court and as such are entitled to give opinion evidence to which the court is to attach considerable weight.

41. Mr. Samuels also argued that the Defendants have had the reports in their possession and would therefore not be prejudiced if the opinions of the doctors whose medical reports the Claimant wishes to rely on are taken into account by the Court.

42. A court must be careful in how it treats with the opinions of persons not appointed expert witnesses. An expert witness has a duty to the court to help it impartially on the matters relevant to his or her expertise. The expert's duty to the court overrides any obligation he or she may have to the person by whom he or she is instructed or paid. The certification of the expert is aimed at preserving the expert's obligation to the court. There is an expectation that the expert's opinion will be unbiased. While the Court may consider the facts as contained in the medical reports prepared by Dr Thomas, Dr Ottey and Dr Barnes, the Court will have to be careful as to the opinion that is contained therein. Dr Barnes came to Court, he gave evidence, his medical reports were admitted into evidence, but he is not a Court appointed expert and his opinion will not be countenanced. Mr Samuels had ample opportunity to apply for Dr Barnes to be appointed an expert witness. He did not make use of any of those opportunities. He cannot now have the benefit of relying on the opinion set out in Dr Barnes' medical reports simply because he is, according to Mr Samuels, an experienced surgeon. The Defendants would have prepared their case on the basis that Dr Barnes is not an expert. To allow the opinion in at this point in time would be prejudicial and Mr Samuels' attempt to go outside of orders I had made previously on the very same issue, amounts to an abuse of the process of the Court and will not be tolerated.

43. One of the injuries which the Claimant claims is adjustment disorder with depressed mood with an assessment of her mental impairment as being 70. This assessment was given by Dr Ottey who explained that the rating meant that Mrs Marshall was functioning at 70% of her full overall psychological functioning in November 2005, when he first saw her. Eleven years later, in 2016, Mrs Marshall seemed to have suffered a decline as she was at that time assessed as functioning at 65% of her full overall psychological functioning and was diagnosed as suffering from Chronic Adjustment Disorder with anxiety and depressed mood. I do not know at what level Mrs Marshall is now functioning. It would have been good to have received an updated medical report which spoke to that especially since 7 years have passed since she was last seen by a psychiatrist. Of note though is

the fact that, despite her psychiatric disability, Mrs Marshall is now working as a psychiatric nursing aide. I find that fact to be most interesting.

The Defendant's submissions

44. Never have I seen a more valiantly fought assessment of damages. There was an objection on almost every issue which arose. It is therefore no surprise then that the Defendants are of the view that the Claimant is only entitled to nominal damages in the amount of \$500,000 for her pain and suffering and loss of amenities. Mr Hacker takes this view on several bases. The first and perhaps most important basis is the fact that doctors Ottey, Barnes, Logan and Purcell were not appointed expert witnesses and as such the content of the medical reports they prepared cannot be relied on. To that end, there is no medical evidence to support the Claimant's claim and she cannot therefore benefit from an award of damages outside of a nominal amount.
45. Mr Hacker relies on CPR 26.8 and its interpretation as set out in the case of **HB Ramsay and Associates Ltd and ors v Jamaica Redevelopment Foundation Inc and anor [2013] JMCA Civ 1** where Brooks JA (as he then was) made it clear that an application for relief from sanctions should be made promptly. In this case, argued Mr Hacker, no application for relief from sanctions has been made and no witness statements have been filed with respect to any of the doctors and they are not permitted to give *viva voce* evidence as the Claimant would have to prove to the Court at trial that there was a good reason for not previously seeking relief. The ruling is buttressed by the decision of Dunbar-Green JA in **O'Neil Carter and anor v Trevor Smith and ors [2020] JMCA Civ 24**.
46. Mr Hacker submits that the content of the medical reports comprises hearsay and opinions and the doctors are not witnesses of fact. Nothing said in the medical reports should be considered truthful and to accept the content of the medical

reports would be an abuse of the Court's process. There are no medical reports which prove the injuries sustained by the Claimant and the resulting effect on her life as a result of a surgery which took place without her consent.

47. In considering nominal damages, Mr Hacker argued that the Court should not consider the blood transfusion given to the Claimant who is a Jehovah's witness as this was raised as a constitutional issue previously and rejected by Justice Henry-McKenzie when the Claimant attempted to amend the Particulars of Claim. The Claimant's evidence concerning how the Hartmann's Procedure was performed and resulting trauma are not to be considered as she is not a medical expert and is unable to speak to those issues. Further, the only thing the Court should take into account is that there was an assault by surgery which left the Claimant wearing a colostomy bag.

48. It was also argued that the Claimant failed to mitigate her loss when she took her time in having the colostomy bag removed and only got around to doing this after approximately 4 years had passed. This wait period was unreasonable. In addition, she need not have travelled overseas to have got it done but could have attended to it right here in Jamaica. The Claimant's assertion that the surgery caused her not to be able to have children is to be rejected and lastly the surgery was meant to save her life and should be so considered by the Court in assessing damages.

Analysis

49. It is clear to me that the Claimant has suffered significant pain and suffering and loss of amenities because of the assault that was inflicted on her by servants and/or agents of the Crown. For this, she must be compensated, and her compensation is to, as far as possible, put her back into the position she would have been in, had she not been assaulted (see Lord Blackburn in the case of **Livingstone v Raymonds Local Coal Co Ltd [1880] AC 25, 39**). I do not agree with Mr Hacker that only nominal damages should be awarded.

50. Mr Samuels has relied on the case of **Fletcher v Auto Car Transporters Ltd [1968] 1 All ER 726, 751** to set out how the award for damages should be contemplated. He relies on the decision of Salmon LJ who had this to say:

"To my mind the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in the circumstances."

51. In summary the Claimant's injuries as pleaded are as follows:

- a. Laparotomy without her consent
- b. Damage to the colon in particular the Sigmoid end
- c. Attachment of the colostomy bag without her consent
- d. Clinical depression
- e. Preoccupation with the condition brought on by wearing a colostomy bag
- f. Adjustment disorder with depressed mood
- g. Psychological damage with a disability rating of 35%.

Issues

52. I will start where Mr Hacker ended. It does not matter whether the surgery was lifesaving or not. The Defendants' servants and/or agents performed a surgery on the Claimant without her consent and that amounted to an assault. This was stated by the Court of Appeal and despite the Defendants' numerous attempts to justify the surgery, the answer remains the same. An assault was perpetuated on the Claimant and as a result she suffered injuries, sustained loss and damage and incurred expense. The amount of damages that is to be awarded to the Claimant because of the assault is the only matter that is before this Court.

53. There is no evidence before this Court that because of surgery the Claimant is unable to have children. In fact, there is no evidence that the Claimant is unable to have children and as such that will not be taken into account in coming to my decision. I will however consider the fact that the Claimant was transfused with blood against her religious convictions. Justice Henry-McKenzie (Ag) (as she then was), in her oral judgment made it clear that the blood transfusion was a part of the assault and allowed the Claimant to amend her Particulars of Claim to include it as one of the particulars of assault (see paragraph 35 **Annissa Marshall v North East Regional Health Authority Saint Ann's Bay Hospital and anor 2019 JMSC Civ 105**). What the learned judge did not allow was a claim for constitutional redress for that assault. This, she said, would amount to a new claim and should not be allowed at that point in time as the Claimant would have known prior to the expiration of the limitation period that the transfusion of blood would have impinged on her constitutional rights and should therefore have made the claim before the limitation period had expired.

54. The issues left for contemplation are:

- a. Whether the Claimant failed to mitigate her losses.
- b. What amount should be awarded to the Claimant for her pain and suffering and loss of amenities.

55. The medical reports before the Court are the medical reports of Dr Deborah Weir, which is an agreed document, the medical reports prepared by Dr Ottey and Dr Thomas. Dr Thomas' medical report is merely substantiating the detail in the medical records. Also, before the Court, is the Agreed Bundle of Documents which contains the Claimant's medical records when she was a patient at the St Ann's Bay Hospital. Mr Hacker made a lot of noise about the fact that the Claimant could not speak to the Hartmann's procedure as she was not an expert and so that evidence should be left out. The medical records which are the agreed set of documents, speak to the fact that the Laparotomy, Sigmoid colectomy, Hartmann's procedure as well as an appendectomy were performed on the Claimant. After the

surgery the colostomy bag was fitted, and the records went as far as in some instances to indicate the consistency of the stool that was in it. So, there is sufficient evidence before the Court from the agreed documents which speaks to the surgeries performed and the resulting assault. It is the Claimant who can best speak to how the surgery impacted her and she has given that evidence.

56. That being said, I am of the view that the Claimant's evidence, together with the content of the medical records which are agreed documents and Dr Ottey's medical evidence, are sufficient to give an indication as to what was done to the Claimant and the effect it had on her. It is for this reason that I am of the view that nominal damages would not be reasonable in the circumstances.

The case law

57. Mr Samuels relied on the case of **Mary Hibbert v Reginald Parchment Khan's Vol 5 page 191**. In that case, the 22-year-old plaintiff sustained a gunshot wound to the abdomen. She had to do a surgery which resulted in her wearing a colostomy bag for approximately 5 months, during which time she suffered pain, discomfort and embarrassment. She was awarded the sum of \$900,000 which updates to approximately \$6.3M.

58. Mr Samuels has quite rightly distinguished between the two cases. His submission is that Mary Hibbert's surgery was done with her consent. This was not so for the Claimant at bar. In addition, Mary Hibbert only wore the colostomy bag for 5 months, Mrs Marshall wore her bag for a period of over 3 years. There is no evidence that Mary Hibbert suffered loss of consortium with her partner, had psychiatric injuries or had any experiences which Mrs Marshall outlined in her evidence. He concluded that Mrs Marshall's injuries were more serious than Mary Hibbert's and as such should lead to a substantially higher award.

59. Mr Samuels has also put forward cases relating to psychological injuries. The case of **Celma Pinnock v Attorney General of Jamaica reported at Khan's Vol**

5 page 289 was relied on. Mr Hacker also relied on this case on behalf of the Defendants. In that case a businesswoman was strip searched at the Norman Manley International Airport. A male official inserted his fingers forcibly into her vagina. She claimed for false imprisonment, assault and battery and aggravated and exemplary damages. As a result of the assault, Ms Pinnock suffered severe anxiety, severe depression, loss of libido and severe phobic responses to sexual activity and to travel. The award of \$2.5M updates to \$17.9M. In **Julian Levy v Swire, Rochester, Robinson and the Attorney General of Jamaica reported at Khan's Vol 5 page 266** the plaintiff was raped and bugged by the 1st Defendant. She also made a claim for assault and battery and exemplary and aggravated damages. She sustained laceration to the walls of her rectum, bleeding of the rectum, pain, suffering, humiliation and mental anguish. She was suicidal. She was diagnosed as suffering from reactive depression, severe anxiety and severe phobic avoidance responses to policemen, police station and travelling in the dark. She had frequent flashbacks, had marked decreased libido and fear of sexual encounters. She was diagnosed as having classic severe post-traumatic stress disorder. Her award of \$5M updates to \$31.6M.

60. Mr Samuels is of the view that the sum of \$40M would be reasonable compensation under the head of General Damages (Pain and Suffering and Loss of Amenities). I do not agree with him and the sum he has suggested, based on the cases he has relied on, will have to be discounted to take into account the fact that Mrs Marshall's assault and the resulting impact were not as severe as the plaintiffs' in the cases on which he has relied.

61. The Defendants' rely on the case of **Sharon Greenwood-Henry v The Attorney General for Jamaica G-116 of 1999 decision of Sykes J as he then was on October 26, 2005**. The claimant in that case was held at the Norman Manley International Airport on suspicion of transporting drugs. She was assaulted in that she was x-rayed and given laxatives. She was stripped and searched by a female officer who inserted her fingers into her vagina. She also had her blood drawn on

more than one occasions. No drugs were found on or in her. Mrs Greenwood-Henry was also diagnosed as having post-traumatic stress disorder resulting from depression and anxiety. She was awarded the sum of \$1,100,000 which updates to \$4,049,584.49. I find this case to be on the lower end of the scale and bear in mind that an award for aggravated damages was made separately to Mrs Greenwood-Henry for the humiliation and embarrassment that she suffered.

62. I note however that unlike Mrs Marshall, there is no evidence of how the assault impacted Mrs Greenwood-Henry's daily living. I also note that she did not suffer the indignity of transporting her stool around in a bag attached to her body for upwards of three years. I am therefore of the view that in this instance, Mrs Marshall's suffering was greater than Mrs Greenwood-Henry's.

63. I am of the view that the sum that should be awarded to the Claimant for her pain and suffering and loss of amenities is \$10M. I rely on the **Mary Hibbert case** to support my position. A gunshot injury is more serious than the surgery which Mrs Marshall underwent. A gunshot victim not only has to contend with the gunshot injury but must also contend with the surgery to repair the injury. Mrs Marshall did not sustain a gunshot injury. I note however that Mary Hibbert only wore the colostomy bag for 5 months, whereas Mrs Marshall wore it for over 3 years and suffered the embarrassment of being so costumed for a longer period of time than did Mary Hibbert.

64. I do note that Mrs Marshall had psychiatric injuries which Mary Hibbert did not have. I therefore relied on the psychiatric cases which Mr Samuels put forward to guide me. The cases which Mr Samuels relies on which include the assault and psychological injury are in my view more serious than Mrs Marshall's. Mrs Marshall did not suffer from seizures nor did not suffer the indignity of being strip searched in a filthy airport bathroom or have her vagina invaded by the fingers of an overzealous airport official, nor was she raped and buggered and taken advantage of because she was a "simple mentally subnormal woman with the mental age of

a teenager.” It is clear then that the awards in the **Celma Pinnock** and **Julian Levy** cases would have to be discounted.

Future Medical Care and Handicap on the Labour Market

65. Mr Samuels is also of the view that an award should be made under the head of Handicap on the Labour Market on the basis that the Claimant suffers from a depressed mood which has left her 35% deficient. He has recommended an award of \$5M under this head of damages. I have not seen any evidence which would suggest to me that Mrs Marshall is not able to function in her employment or any other employment she may obtain in the future. She told Dr Ottey when she saw him that she was able to keep her job because her coworkers were understanding and supportive. I see no evidence to suggest that she would not be able to compete against colleagues who are equally qualified especially now that she no longer wears a colostomy bag. In fact, she is now gainfully employed and there is no evidence that as a result of her injuries she was ever unemployed. No award will be made for Handicap on the Labour Market.

66. The same conclusion must be arrived at for the submissions made with respect to Future Medical Care. There was no claim made on behalf of the Claimant in the Amended Particulars of Claim under that head of damages. While Future Medical Care is a type of General Damages, it must be pleaded if it is to be claimed and an award given. CPR 8.9 provides that a claimant has a duty to set out his case. It reads as follows:

“(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

(2) Such statement must be as short as practicable.

There are consequences for not carrying out the duty of setting out his case. These are set out in CPR8.9A which provides that:

" the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which further have been set out there, unless the court gives permission."

Future Medical Care was not pleaded. I have given no permission for the document to be amended to include that item of General Damages and as such no award will be made under this head of General Damages.

Special Damages

67. The age-old principle is that special damages must be specifically pleaded and proven unless of course they have been agreed. The parties agreed the sum of \$188,138.64 as special damages.

Transportation Costs

68. **Travel to New York:** The Claimant gave notice of her intention to rely on receipts issued by Trafalgar Travel for her travel to New York in 2007 and 2008 to have the Hartmann's procedure reversed. The Defendants had objected to the receipts being admitted into evidence by way of Notice of Intention to Object filed on June 10, 2021. The maker of the receipts was not present in Court. It is clear that the Hartmann's procedure was reversed overseas. The Claimant had to travel overseas to do the procedure as based on her evidence, which I accept, she was not able to get it done in Jamaica and more particularly at the SABH. She has given oral evidence that the cost of her plane tickets amounted to **\$48,606**. I note that the sum stated in the Witness Statement differs from the sum given in *viva voce* evidence. *Viva voce* evidence trumps the evidence set out in the Witness Statement. The evidence is that the Claimant had to travel to New York and then on another occasion she went for a "check-up." Both trips seem reasonable to me and the amount spent for the airfare also is reasonable in my opinion. I will allow the sum stated in the *viva voce* evidence.

69. Receipts for transportation costs incurred for travel by taxi to the various medical facilities was objected to by the Defendants in their Notice of Intention to Object. The makers of the receipts were not present at the trial to give evidence concerning the issuance of the receipts. However, Mrs Marshall's evidence is that she had to travel by taxi to seek medical attention. This was necessary because travelling by public transport was uncomfortable for her and for the other public passengers. The stench of the stool in the colostomy bag made travelling by public transportation less than ideal. She says she was transported by Mr Stewart, Mr Bridgette and Mr Kidd and each would charge her within the region of \$1,500 to \$2,500 depending on who transported her and what her destination was. Her Witness Statement tells the dates on which she travelled. She said she travelled for various reasons including to purchase medication, to consult with medical doctors about her condition. Her total transportation costs claimed over a one-year period is **\$46,000**. I am of the view that the sum is reasonable in the circumstances and consider that Mrs Marshall wore the colostomy bag for more than 3 years but claimed for one year. I note that the sum of \$11,000 was agreed for transportation costs. The agreed sum has already been accounted for in agreed Special Damages and will therefore be deducted from the \$46,000 awarded for taxi services rendered. Total transportation costs awarded is \$83,606.

Medical expenses

70. Costs incurred for visits to Dr Nduka and Dr Thomas are not allowed. The sums were objected to and neither doctor appeared to give evidence to indicate what the payment they received was for. The cost incurred by Dr Barnes for preparing a medical report which was admitted into evidence as he came to Court and identified the document, will be allowed. The sum amounts to **\$150,000** and is Exhibit 79. The sum was incurred. However, I am not of the view that the Defendants should pay it. The Claimant did not have the benefit of the medical report, payment for which the sum represents because her attorneys-at-law did not make the necessary applications which would allow it to be put before the Court. In my opinion, it is her attorneys-at-law who should bear that expense. The sum

claimed for attendance to the PMPH will not be allowed as it is clear on the Claimant's evidence that the sum had not been incurred because of the 2nd surgery. She went to PMPH because of the abdominal pain from the ovarian cysts. The Claimant purchased colostomy bags from the PMPH in the amount of **\$750**. That sum will be allowed. The sum of **\$6,470** paid for antibiotics and pain medication as well as the **\$10,000** paid for the ill-fated surgery are also allowed.

71. Total receipts agreed for colostomy bag in the amounts of \$2,400 which was agreed and \$750 which was allowed. However, the Claimant's evidence which came from my questioning is that she wore colostomy bags for 3 years and one month. She wore 2 colostomy bags per day on average and they cost an average of \$250 per bag. The total award for colostomy bags is \$560,100 which is less \$2,400 (Exhibits 74A and 74B) which was agreed.

Loss of Income

72. There is a claim for loss of income. However, there is no evidence as to why there was loss of income. She continued to work. There is no evidence before me that the Claimant did not or could not work during the time that she wore the colostomy bag. She has brought no evidence that she worked as a taxi driver. As a result, I will make no award under this head.

Costs

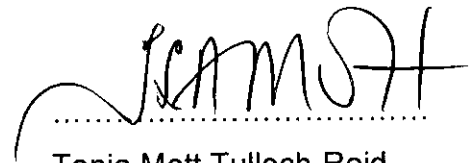
73. Costs of this matter will be costs in the claim. The costs are to be taxed if they cannot be agreed between the parties.

Interest

74. Interest will be awarded on General Damages and Special Damages from the date on which the matter came back to the Supreme Court for damages to be assessed, which is from November 6, 2015 to November 20, 2023. There was some delay on the part of the Claimant in readying the matter for assessment of damages and the Defendants should not be asked to pay the price of that delay in interest.

75. My orders are as follows:

- a. Damages are assessed in favour of the Claimant against the Defendants who are to pay the Claimant General Damages for her Pain and Suffering and Loss of Amenities in the amount of \$10M plus interest at 3% per annum from November 6, 2015 to November 20, 2023, Special Damages in the amount of \$848,314.60 plus interest at 3% per annum from November 6, 2015 to November 20, 2023 and costs in the claim which are to be taxed, if not agreed.
- b. The Claimant's attorneys-at-law are to file and serve the Judgment.

A handwritten signature in black ink, appearing to read 'TAMTR', written over a horizontal dotted line.

Tania Mott Tulloch-Reid
Puisne Judge