



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. 2016 HCV 04924**

<b>BETWEEN</b>	<b>JOAN THOMPSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JAMAICA HEALTH SECURITY NETWORK LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CLINTON SEWELL</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

**Lord Anthony Gifford Q.C., Mr Hugh Thompson and Ms Maria Brady instructed by  
Gifford, Thompson & Shields for the Claimant**

**Mr Lawrence Haynes and Ms Rochelle Haynes for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Heard: November 24 and 25, 2021 and February 3, 2022**

**Negligence – Medical negligence – The duty of care owed by a medical practitioner  
to a patient – Breach of the duty of care – Causation – Foreseeability of damage –  
Remoteness of damage – Whether the defendants are liable for psychiatric injury**

**Damages – Psychiatric injury – Post Traumatic Stress Disorder – Mild to moderate  
difficulty functioning physically and emotionally – Quantum of damages**

## **A. NEMBHARD J**

### **INTRODUCTION**

- [1] This matter concerns a Claim in negligence which is brought by the Claimant, Ms Joan Thompson, against the 1<sup>st</sup> Defendant, Jamaica Health Security Network Limited and the 2<sup>nd</sup> Defendant, Dr Clinton Sewell. The Claim raises the issue of the duty of care that is owed by a medical practitioner to his patients and the circumstances in which a medical practitioner might be held liable for a breach of that duty of care. The Claim specifically raises the issue of whether the 2<sup>nd</sup> Defendant, Dr Clinton Sewell, might be held liable for the psychiatric damage suffered by the Claimant, Ms Joan Thompson, as a direct result of an error that he made during the performance of a medical procedure.
- [2] By way of a Claim Form, which was filed on 17 November 2016, Ms Thompson alleges that, on 6 April 2016, as a result of the negligent performance of a colonoscopy that was conducted by Dr Clinton Sewell, the servant and/or agent of Jamaica Health Security Network Limited, she experienced pain, mental suffering, loss and damage.

#### **The genesis of the Claim**

- [3] The Claim was filed against the background that, on 6 April 2016, Ms Thompson made arrangements with Jamaica Health Security Network Limited to undergo a colonoscopy. That procedure was to be performed by Dr Clinton Sewell, the Managing Director of Jamaica Health Security Network Limited and a Consultant Physician, specializing in gastrointestinal endoscopy.
- [4] Ms Thompson was administered an anaesthetic prior to the commencement of the colonoscopy. At the conclusion of that procedure, Dr Clinton Sewell indicated to Ms Thompson that a biopsy would have to be done on tissue that he had discovered. The results, he indicated, would become available thereafter.

**[5]** As it turns out, on 22 April 2016, Dr Clinton Sewell revealed to Ms Thompson that, during the performance of the colonoscopy, the colonoscope had been inserted into her vagina instead of her rectum. Dr Sewell offered to perform the colonoscopy, once again, at no additional cost to Ms Thompson.

## **THE ISSUES**

**[6]** The Claim raises several issues for the Court's determination. The central issues may be distilled in the following way: -

- (i) Whether Dr Clinton Sewell owed a duty of care to Ms Thompson;
- (ii) Whether Dr Clinton Sewell is in breach of the duty of care owed to Ms Thompson;
- (iii) Whether Dr Clinton Sewell's breach of the duty of care caused the injuries sustained by Ms Thompson;
- (iv) Whether Jamaica Health Security Network Limited is liable for the injuries sustained by Ms Thompson, as a consequence of the actions of Dr Clinton Sewell;
- (v) Whether Ms Thompson is entitled to recover Damages for pain, mental suffering, loss and damage incurred, as a consequence of Dr Clinton Sewell's performance of the colonoscopy and, if so: -
  - (a) What is the basis on which the Court is to assess the quantum of Damages to be awarded to her? and
  - (b) What is the quantum of Damages to be awarded her?

## **THE LAW**

### **The claim in negligence**

- [7] It is well established by the authorities that, in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty.

### **Medical negligence**

- [8] A medical practitioner owes a duty in tort to his patient irrespective of any contract between them. Once a person has been accepted as a patient, the medical practitioner owes a duty to exercise reasonable care and skill in diagnosing, advising and treating the patient. Any negligent error in carrying out treatment, or, omission to provide adequate treatment, will be actionable, if it causes injury to the patient. To amount to medical negligence, any alleged error in diagnosing and/or treatment must be shown to be derived from a failure to attain the required degree of skill and competence of a reasonable medical practitioner. This question falls to be answered in the light of the medical practitioner's specialty and the post that he holds.<sup>1</sup>

### **The burden and standard of proof**

- [9] It is equally well settled that, where a claimant alleges that he has suffered damage resulting from a defendant's negligence, a burden of proof is cast on him to prove his case on a balance of probabilities.<sup>2</sup> This principle was enunciated by Lord

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<sup>1</sup> See – **Clerk & Lindsell on Torts**, 20<sup>th</sup> Edition, Sweet & Maxwell, 2010, page 639, at paragraphs 10-44 and page 651, at paragraph 10-63 and Halsbury's Laws of England/Medical Professions (Volume 74 (2019), at paragraph 23

<sup>2</sup> **Kimola Merritt (suing by her mother and Next Friend Charm Jackson) and the said Charm Jackson v Dr. Ian Rodriguez and The Attorney General of Jamaica**, unreported, Suit No. CL1991/M036, judgment delivered on 21 July 2005

Griffiths in **Ng Chun Pi and Ng Wang King v Lee Chuen Tat and Another**.<sup>3</sup> He stated at pages 3 and 4: -

*“The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant might have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred...*

*...it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.”*

[10] In **Miller v Minister of Pensions**,<sup>4</sup> Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, had the following to say: -

*“That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged but if the probabilities are equal it is not.”*

### **The duty of care**

[11] To establish a duty of care, there must be foreseeable damage, consequent upon the defendant’s negligent act.<sup>5</sup> There must also exist sufficient proximate relationship between the parties, making it fair and reasonable to assign liability to the defendant.

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<sup>3</sup> Privy Council Appeal No. 1/1988, judgment delivered on 24 May 1988

<sup>4</sup> [1947] 2 All ER 372, at pages 373-374

<sup>5</sup> **Roe v Ministry of Health and Others. Woolley v Same** [1954] 2 All ER 138 B-C

[12] Lord Bridge, in **Caparo Industries plc v Dickham**,<sup>6</sup> spoke to the test in the duty of care, sufficient to ascribe negligence, in this way: -

*“In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships, there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, also falling within the ambit of the test of negligence.”*

[13] At pages 573 and 574, Lord Bridge went on to say: -

*“What emerges, is that, in addition to the foreseeability of damage, [the] necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.”*

### **Breach of the duty of care**

[14] A medical practitioner is in breach of the duty of care owed to a patient if his conduct falls below the standard of care required of an ordinary skilled man exercising and professing to have that special skill. The standard of care demanded of medical practitioners is that required of any professional person.

[15] The vital decision of **Bolam v Friern Hospital Management Committee**<sup>7</sup> makes it clear that, in determining whether a defendant has fallen below the required standard of care, great regard must be shown to responsible medical opinion and to the fact that reasonable doctors may differ. There, McNair J outlined the test for

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<sup>6</sup> [1990] 1 All ER 568, at page 572

<sup>7</sup> [1957] 2 All ER 118, at page 121, paragraphs C-F

determining whether the conduct of a skilled professional falls below the required standard of care. He stated, in part, as follows: -

*“...where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”<sup>8</sup>*

[16] In **Hunter v Hanley**,<sup>9</sup> Lord President Clyde opined that, where the conduct of a medical practitioner is concerned, establishing a breach of duty is not as clear cut as in a normal action based in negligence. The true test, for establishing negligence in diagnosis or treatment on the part of the doctor, is, whether he has been proved to be guilty of such failure of which no doctor of ordinary skill would be guilty, if acting with ordinary care.

### **Causation**

[17] In an action for medical negligence the ordinary rules of causation apply. A claimant is required to prove that the defendant’s breach of duty caused, or, at the very least, materially contributed to the damage or loss sustained by him. A claimant must establish, on a balance of probabilities, a causal link between his injury and the defendant’s negligent act.<sup>10</sup> Where a breach of a duty of care is proved or admitted, the burden still lies on the claimant to prove that the defendant’s breach caused the

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<sup>8</sup> This test was approved by the Court of Appeal in **The Attorney General of Jamaica and The South East Regional Health Authority v Tahjay Rowe (A Minor, suing by Tasha Howell his Mother and Next Friend [2020] JMCA Civ 56**, at paragraph [95], per Edwards JA

<sup>9</sup> 1955 SC 200, at page 205

<sup>10</sup> See – **Kimola Merritt (suing by her mother and Next Friend Charm Jackson) and the said Charm Jackson v Dr Ian Rodriquez and the Attorney General of Jamaica**, supra, at page 9, per M. McIntosh J

injury suffered. Even if a claimant has successfully established medical negligence, the issue of causation must still be determined.<sup>11</sup>

*The 'but for' test*

[18] The test often employed by the court to determine whether there is a causal connection between the damage sustained by a claimant and a defendant's conduct is the 'but for' test. That is to say that the damage would not have occurred but for the defendant's negligent conduct.

[19] In **Clements v Clements**,<sup>12</sup> McLachlin CJ provided a comprehensive analysis of the nature and application of the 'but for' test. He is quoted, in part, as follows: -

*"The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.*

*The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, per Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311.*

*A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the*

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<sup>11</sup> **Bolitho (Administratrix of the estate of Bolitho (deceased) v City and Hackney Health Authority** [1997] 4 All ER 771, at page 776 e-f

<sup>12</sup> [2012] 2 S.C.R., at paragraphs 8-10



*injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss."*

**[20]** In actions for medical negligence, causation may be difficult to prove. This is so especially in cases where there are several possible causes of a claimant's injury. In this context, what can be gleaned from the authorities is that, if there are several possible causes of a claimant's injury, only one of which involves the defendant's negligence, the claimant's action will fail if he cannot positively prove that the defendant's negligence caused or materially contributed to his injury.

**[21]** In **McGhee v National Coal Board**,<sup>13</sup> the court had to grapple with the dilemma of there being two (2) possible causes of the claimant's injury. There, the claimant, who was employed to clean out brick kilns, contracted dermatitis from the accumulation of coal dust on his skin. There were no shower facilities provided by the defendant at work and, as a result, the claimant would cycle home each day covered with dust. It was determined that the defendant was negligent in failing to provide proper shower facilities. It was, however, unclear whether the dermatitis was caused by the absence of the shower facilities or by the unavoidable levels of ambient brick dust during the work day.

**[22]** The House of Lords held that the defendant's breach of duty to provide shower facilities had materially increased the risk of injury to the claimant and came to a finding that the defendant's breach of duty had materially contributed to the claimant's injury. Lord Reid stated as follows: -

*"It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose*

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<sup>13</sup> [1972] 3 All ER 1008

*from the fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.”<sup>14</sup>*

### **Remoteness of damage**

**[23]** A defendant is only liable for the consequences of his negligent conduct which are foreseeable. He will not be liable for consequences which are too remote. In this regard, in **Roe v Ministry of Health and Others. Woolley v Same**,<sup>15</sup> Lord Denning posited as follows:-

*“The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see Hay (or Bourhill) v Young and Woods v Duncan ([1946] AC 426, per Lord Russell of Killowen, and ibid, 437 per Lord Porter). The second question is whether the neglect of duty was a “cause” of the injury in the proper sense of that term; and causation, as well as duty, often depends on what you should foresee.”*

## **THE SUBMISSIONS**

### **The Claimant’s submissions**

**[24]** Lord Anthony Gifford Q.C. advanced fulsome and comprehensive submissions on Ms Thompson’s behalf. The gist of those submissions is captured below: -

- a. That it was an implied term of the contract between Ms Thompson and Jamaica Health Security Network Limited that

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<sup>14</sup> The damage which is reasonably foreseeable must be of the same kind and type as that which actually occurred and, in this regard, each case turns on its own particular set of facts. See – **Overseas Tankship (U.K.) Ltd. v Morts Dock & Engineering Co., Ltd.** [1961] 1 All ER 404

<sup>15</sup> (supra), at page 138 A-C

the colonoscopy procedure would be performed with the skill and care that is reasonably expected of a medical practitioner who has been performing colonoscopies for over twenty-seven (27) years;

- b. That Dr Clinton Sewell is liable for breach of that implied term;
- c. That Dr Clinton Sewell owed a duty of care to Ms Thompson to exercise the skill and care that would reasonably be expected of a medical practitioner of an equal level of skill and experience, in the manner in which he performed the colonoscopy; that Dr Sewell is to be held to the standard of care of a medical practitioner who possesses his particular experience in the field of gastroenterology and who has performed colonoscopies for over twenty-seven (27) years;
- d. That Dr Clinton Sewell failed to exercise the requisite skill and care of a medical practitioner with an equal amount of experience and skill when he made the error that he did and when he failed to appreciate that an error had been made;
- e. That during the procedure, while Ms Thompson was unconscious, she began to feel a throbbing pain in her lower abdomen which caused her to regain consciousness and to cry out. That the pain continued subsequent to the procedure;
- f. That a reasonably competent medical practitioner with over twenty-seven (27) years of experience would have avoided the error made by Dr Clinton Sewell and would have ensured that the probe was inserted inside the anus and not the vagina;
- g. That a reasonably competent medical practitioner would have recognized that he was not in the anus but in the vagina, upon seeing the mass discovered by Dr Clinton Sewell;

- h. That Dr Clinton Sewell is liable in tort for medical negligence;
- i. That Ms Thompson falls within the class of persons who would be entitled to an award of damages for psychiatric injuries; that it was reasonably foreseeable that she would be mentally distressed by the news that a 'competent' medical practitioner failed to conduct the colonoscopy correctly, by placing the probe inside the wrong orifice of her body; and that it was reasonably foreseeable that Ms Thompson would suffer mental distress from being made to believe that there was a mass on her colon that required a biopsy which, in turn, led her to believe that she had cancer;
- j. That Ms Thompson experienced emotional distress shortly after being seen by Dr Clinton Sewell and shortly after being informed by him that there was a mass on her colon and that a biopsy was necessary;
- k. That during the three (3) weeks following the colonoscopy procedure, Ms Thompson experienced severe anxiety and fear that she had cancer;
- l. That, having been informed by Dr Clinton Sewell that the colonoscope had been inserted inside her vagina and not her anus, Ms Thompson was shocked and horrified and was left in a state of disbelief;
- m. That Ms Thompson was even more affected by the fact of Dr Clinton Sewell's error which caused her to suffer sleepless nights, to have nightmares, distressing memories, flashbacks, loss of appetite, weight loss, fear of having intimate relations with her partner, low energy, feelings of humiliation and shame

and subsequently to be diagnosed with Post Traumatic Stress Disorder (“PTSD”);

- n. That the sole cause of Ms Thompson’s PTSD and mental anguish was as a result of the error made by Dr Clinton Sewell during the performance of the colonoscopy;
- o. That Ms Thompson suffered distress from Dr Clinton Sewell’s failure to apologize for his gross negligence and the mental anguish it had caused; and
- p. That Ms Thompson continues to suffer from the consequences of a significant traumatic life event which has had a negative impact on her emotional state and which requires psychotherapy.

#### **The Defendants’ submissions**

**[25]** Learned Counsel Mr Lawrence Haynes, in his concise and equally comprehensive submissions advanced on behalf of the Defendants, maintains: -

- a. That Dr Clinton Sewell made an error during his performance of the colonoscopy but that that error, by itself, was not sufficiently traumatic under the guidelines of the American Psychiatric Stress Disorder, to be considered a stressor event;
- b. That mental distress by itself is not sufficient to ground a cause of action in negligence;
- c. That a cause of action does not arise in negligence as Ms Thompson cannot establish direct damage as a consequence of the error; that the error was discovered within a relatively short period of time; that there was no physical damage to Ms Thompson’s cervix or to her other organs; and that she was sedated throughout the procedure;

- d. That Dr Clinton Sewell never diagnosed Ms Thompson with cancer;
- e. That Ms Thompson was fearful of receiving a diagnosis of cancer and that her fear of the disease preceded the colonoscopy procedure; That Ms Thompson's fear arose primarily from her experience and the subsequent trauma, of seeing her mother die from cancer and not from her encounter with Dr Clinton Sewell;
- f. That, on the evidence presented, there was nothing that would have alerted the Defendants to Ms Thompson's particular vulnerability, over and above that of a normal patient with ordinary fortitude;
- g. That there is similarly no evidence to suggest that Ms Thompson was not treated with the appropriate care both before and after the colonoscopy was performed; and
- h. That, in the alternative, Ms Thompson's case falls within the category of a minor injury; that she would have made a full recovery, in a short period of time, had she abided by the treatment regime prescribed by Dr E. Anthony Allen.

## **ANALYSIS AND FINDINGS**

### **Whether Dr Clinton Sewell owed a duty of care to Ms Thompson**

**[26]** In the present instance, the Court must first determine whether Dr Clinton Sewell owed a duty of care to Ms Thompson. In order to prove her case, Ms Thompson must prove that: -

- (i) Dr Clinton Sewell owed her a duty of care;
- (ii) Dr Clinton Sewell breached that duty of care; and

(iii) She suffered harm that was reasonably foreseeable, as a consequence of that breach.

**[27]** The authorities establish that a medical practitioner owes a duty of care to his patients to diagnose, advise and treat them with reasonable care and skill. This duty of care is owed by a medical practitioner to his patients, irrespective of the existence of any contract between them. It is equally well established that a medical practitioner who professes to exercise a special skill or competence must exercise the ordinary skill required of his speciality.

**[28]** In light of the principles established by the authorities and in the circumstances of this case, the issue of whether Dr Clinton Sewell owed Ms Thompson a duty of care is not a complex one. The Court finds that Dr Sewell owed a duty of care to Ms Thompson to diagnose, advise and treat her with the ordinary skill required of his speciality.

**Whether Dr Clinton Sewell is in breach of the duty of care owed to Ms Thompson**

**[29]** The law is equally well settled that a medical practitioner is in breach of the duty of care owed to a patient if his conduct falls below the standard of care required of an ordinary skilled man exercising and professing to have his special skill.

**[30]** Dr Clinton Sewell is a Consultant Physician specializing in gastrointestinal endoscopy. He professes to have some twenty-seven (27) years of experience in this field. As a consequence, Dr Sewell is required to exercise the ordinary skill required of his specialty. He is not required to possess the highest expert skill.

**[31]** Dr Clinton Sewell admits that he made an error during his performance of the colonoscopy that was conducted on the person of Ms Thompson. He accepts that he made an error when he inserted the colonoscope into her vagina instead of her

rectum. In light of Dr Sewell's admission, the Court has no difficulty finding that this conduct fell below the standard of care required of a Consultant Physician, specializing in gastrointestinal endoscopy, with some twenty-seven (27) years of experience in that field.

[32] As a result, the Court is constrained to find that Dr Sewell is in breach of the duty of care owed to Ms Thompson, to conduct the colonoscopy procedure with the reasonable care and skill of an ordinary skilled man exercising and professing to have his special skill.

**Whether Dr Clinton Sewell's breach of the duty of care caused the injuries sustained by Ms Thompson**

[33] The third and final element of the tort requires Ms Thompson to prove that Dr Clinton Sewell's breach of the duty of care caused, or, at the very least, materially contributed to, the damage or loss sustained by her. Where that breach of duty is proved or admitted, the burden of proof remains on Ms Thompson to establish that causal link between the damage sustained by her and the conduct of Dr Clinton Sewell.

*Whether Ms Thompson experienced pain both during and after the colonoscopy procedure*

[34] Ms Thompson avers that she suffered pain both during and after the colonoscopy procedure. She maintains that, as a consequence of Dr Clinton Sewell's error, she developed PTSD.

[35] Conversely, the Defendants are unable to agree that the error made by Dr Clinton Sewell caused Ms Thompson's injuries. They maintain that, in light of her family history, Ms Thompson had a fear of being diagnosed with cancer and that that fear predated the colonoscopy procedure. Alternatively, the Defendants contend that



Ms Thompson's injuries are minor and that she would have made a full recovery, in a short period of time, had she abided by the treatment regime prescribed by Dr E. Anthony Allen.

**[36]** The Court accepts the evidence of Dr Clinton Sewell in this regard. Dr Sewell's evidence was that Ms Thompson was administered 5mg of Dormicum, which causes sedation and 40mg of Ketamine, a powerful pain reducing agent. The Court accepts his evidence that both drugs were administered intravenously, prior to the start of the colonoscopy procedure and that the combination of the drugs administered caused Ms Thompson to fall asleep.<sup>16</sup> The Court further accepts the evidence of Dr Sewell that, during a normal vaginal examination, without anaesthesia and where a biopsy is done, a patient is expected to experience momentarily mild discomfort. The Court also accepts Dr Sewell's evidence that, under sedation, Ms Thompson would not have experienced any pain, that the simple entry of the vagina would not have caused pain, that the biopsy itself would not have caused pain and further, that Ms Thompson did not complain of any pain.

**[37]** Regrettably, the Court is unable to accept Ms Thompson's evidence that she experienced pain both during and after the colonoscopy procedure. The Court is strengthened in this position by Ms Thompson's own evidence that she was examined by another doctor, subsequent to the colonoscopy procedure that was performed by Dr Clinton Sewell, who found that there was no damage to her cervix or to her other organs.

*Whether Dr Clinton Sewell misdiagnosed Ms Thompson as having cancer*

**[38]** When the alleged breach of duty is that a wrong diagnosis was made, the mistaken diagnosis is of itself no evidence of negligence.<sup>17</sup> It must be established

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<sup>16</sup> See – The Witness Statement of Clinton Sewell, dated 3 August 2021 and filed on 4 August 2021, at paragraph 3 and which was permitted to stand as part of the evidence-in-chief of the witness

<sup>17</sup> See – **Hunter v Hanley** (supra)

that the practitioner either omitted to carry out an examination or test which the symptoms indicated as necessary, or, which the patient's history should have prompted, or, that he reached a conclusion at which no reasonably competent doctor would have arrived.

**[39]** In this regard, the Court has carefully considered the evidence of Dr E. Anthony Allen and Dr Clayton Sewell. Both gentlemen state in their respective medical reports, that, prior to the colonoscopy procedure, Ms Thompson had no history of any previous psychiatric symptoms. Dr Allen observed that her mood was depressed and that she displayed a moderate anxiety level. Dr Allen diagnosed Ms Thompson with PTSD and concluded that she developed the disorder, as a result of the error made during the colonoscopy procedure.

**[40]** Dr Clayton Sewell, in his thorough and very detailed medical report, observed that, while Ms Thompson appeared to have some anxiety personality traits that have impacted her health seeking behaviour, they do not sufficiently predispose her to the development of PTSD. Dr Clayton Sewell indicated that Ms Thompson's response to the diagnosis likely reflects a fear that she held prior to the misdiagnosis.<sup>18</sup>

**[41]** Dr Clayton Sewell diagnosed Ms Thompson with PTSD in partial remission with mild to moderate impact on her emotional and physical functioning. He concluded that her experience on 6 April 2016 and the suggestion that she had cancer was a direct contributor to the development of her condition and that her experience served as a stressor, resulting in her developing psychopathology.<sup>19</sup>

**[42]** The Court finds that there is no evidence to suggest that Dr Clinton Sewell either diagnosed or misdiagnosed Ms Thompson as having cancer. The Court finds that,

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<sup>18</sup> See – The Expert's Report of Dr Clayton Sewell Re: Joan Thompson, dated 30 September 2021, at page 10

<sup>19</sup> See – The Expert's Report of Dr Clayton Sewell Re: Joan Thompson, dated 30 September 2021, at pages 3 and 10, respectively

if there were a diagnosis at all, that diagnosis would be that there was an anomaly that appeared to be healthy, normal tissue. The evidence of Dr Clinton Sewell in this regard, bears repeating. It reads as follows: -

*“There was an anomaly that looked like healthy, normal tissue. Tumours have abnormal appearing overlaying tissue. I had a biopsy to find out what it was. The biopsy would tell me what tissue it was. So that we could have an explanation for what we were seeing. The tissue did not suggest cancer at all. I thought it was a congenital anomaly. It was a moment of confusion at that time.”*

**[43]** This evidence of Dr Clinton Sewell has not been contradicted.

**[44]** The Court accepts the medical evidence of Dr Clayton Sewell that Ms Thompson developed PTSD as a result of her experience on 6 April 2016. Accordingly, the Court finds that Dr Clinton Sewell’s breach of the duty of care that he owed to Ms Thompson caused, or, at the very least, materially contributed to her developing PTSD.

### **Remoteness of damage**

**[45]** Having established the causal link between the breach of the duty of care owed to her and the injuries she sustained, Ms Thompson must now prove that the injuries were not too remote. If Dr Clinton Sewell could not reasonably have foreseen the damage claimed by Ms Thompson, then the damage is too remote.

### *Psychiatric injury*

**[46]** A defendant owes a duty of care to a claimant if he can reasonably foresee that his conduct will expose the claimant to the risk of personal injury, whether physical or

psychiatric, even though physical injury does not in fact occur.<sup>20</sup> The authorities are pellucid that damages are not awarded for emotional reactions, such as grief, sorrow, anxiety or distress.<sup>21</sup>

[47] In a claim relating to psychiatric damage only, the law makes a distinction between two categories of victims, namely, primary and secondary victims. Primary victims are those who were immediately or directly involved in the incident and were well within the range of foreseeable physical injury. The primary victim may recover damages for an unforeseeable psychiatric illness, as long as some sort of physical or psychiatric injury was reasonably foreseeable. Secondary victims are those who witness the death of or injury to another person. As well as having to establish that psychiatric injury was a reasonably foreseeable consequence of the act or omission, the secondary victim must satisfy the 'control mechanism' criteria laid down by the House of Lords in **Alcock v Chief Constable of South Yorkshire**.<sup>22</sup>

[48] Furthermore, a defendant who owes a duty of care will only be liable for damages for psychiatric injury if his conduct resulted in a recognized psychiatric injury.<sup>23</sup>

[49] In all the circumstances of this case, the Court finds that it was reasonably foreseeable that the insertion of the colonoscope in the vagina instead of the rectum, during the colonoscopy procedure, could have caused Ms Thompson

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<sup>20</sup> See – **Page v Smith** [1996] A.C. 155 – The House of Lords concluded that there is not a separate test for the duty of care for physical and psychiatric illnesses. A defendant will owe a duty of care whenever it is foreseeable that a person would suffer any personal harm, including both physical and psychiatric harm. On the remoteness of damage, the House applied its previous approach, based on the principle that a defendant must take his victim as he finds him, to psychiatric harm. They confirmed that it did not matter that the exact type of psychiatric harm was not reasonably foreseeable. Instead, the claimant only needs to show that it was reasonably foreseeable that he would suffer some form of personal harm.

<sup>21</sup> See – **Alcock and Others v Chief Constable of South Yorkshire Police** [1992] 1 A.C. 310

<sup>22</sup> (supra)

<sup>23</sup> See – **White and Others v Chief Constable of the South Yorkshire Police and Others** [1999] 1 All ER 1 and **Page v Smith** (supra)

physical or psychiatric injury. The Court finds that Ms Thompson's experience on 6 April 2016 and, in particular, the error made by Dr Clinton Sewell during his performance of the colonoscopy procedure, caused her psychiatric injury. The Court finds that Ms Thompson suffered PTSD with mild to moderate impact on her emotional and physical functioning. The Court finds further that Ms Thompson's experience on 6 April 2016 was a direct contributor to the development of her condition and that her experience served as a stressor, resulting in her developing psychopathology.

**[50]** In the result, the Court finds that Dr Clinton Sewell is liable in negligence.

**Whether Jamaica Health Security Network Limited is liable for the injuries sustained by Ms Thompson, as a consequence of the actions of Dr Clinton Sewell**

**[51]** The Court also finds that Jamaica Health Security Network Limited is vicariously liable for the actions of Dr Clinton Sewell, its Managing Director and the medical practitioner employed to it.

**Findings of fact**

**[52]** The Court makes the following findings of fact: -

- (i) That on 6 April 2016, Ms Thompson attended at Jamaica Health Security Network Limited to undergo a colonoscopy procedure;
- (ii) That that colonoscopy procedure was performed by Dr Clinton Sewell;
- (iii) That, prior to the performance of the colonoscopy procedure, Ms Thompson was administered 5mg of Dormicum, which causes sedation and 40mg of Ketamine, a powerful pain reducing agent; that

both drugs were administered intravenously, prior to the start of the procedure and that the combination of the drugs administered caused Ms Thompson to fall asleep; that, under sedation, Ms Thompson would not have experienced any pain, that the simple entry of the vagina would not have caused pain, that the biopsy itself would not have caused pain and further, that Ms Thompson did not experience any pain, either during or after the colonoscopy procedure nor did she complain of any pain;

- (iv) That Dr Clinton Sewell made an error during his performance of the colonoscopy procedure by inserting the colonoscope in the vagina instead of the rectum;
- (v) That Dr Clinton Sewell owed a duty of care to Ms Thompson to diagnose, advise and treat her with the reasonable care and skill of an ordinary skilled man exercising and professing to have his special skill;
- (vi) That Dr Clinton Sewell breached the duty of care that he owed to Ms Thompson;
- (vii) That it was reasonably foreseeable that the insertion of the colonoscope in the vagina instead of the rectum, during the colonoscopy procedure, could have caused Ms Thompson physical and/or psychiatric injury;
- (viii) That Ms Thompson's experience on 6 April 2016 and, in particular, the error made by Dr Clinton Sewell during his performance of the colonoscopy procedure, caused her psychiatric damage;
- (ix) That Ms Thompson suffered PTSD with mild to moderate impact on her emotional and physical functioning;

- (x) That Ms Thompson's experience on 6 April 2016 was a direct contributor to the development of her condition and that her experience served as a stressor, resulting in her developing psychopathology;
- (xi) That Dr Clinton Sewell did not diagnose or misdiagnose Ms Thompson as having cancer; that, if there were a diagnosis at all, that diagnosis would be that there was an anomaly that appeared to be healthy, normal tissue;
- (xii) That Dr Clinton Sewell is liable in negligence; and
- (xiii) That Jamaica Health Security Network Limited is vicariously liable for the actions of Dr Clinton Sewell, its Managing Director and the medical practitioner employed to it.

**Whether Ms Thompson is entitled to recover Damages for pain, mental suffering, loss and damage incurred, as a consequence of Dr Clinton Sewell's performance of the colonoscopy**

### **Assessment of Damages**

#### **The approach**

**[53]** Generally speaking,<sup>24</sup> no special principles govern awards of Damages in claims for medical negligence. The general principles relating to the measure of Damages in claims for personal injuries apply.<sup>25</sup> The important consideration in making an

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<sup>24</sup> There are, of course, exceptions, such as cases involving failed sterilization.

<sup>25</sup> See – Clerk & Lindsell on Torts, 20<sup>th</sup> Edition, Chapter 28

award of General Damages is the need to arrive at a figure which will compensate the claimant for the injuries he sustained.

**[54]** There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum, judges are not entitled to simply “pluck a figure from the air”. Consistent awards are necessary to inspire and maintain confidence in the system of justice and litigants as well as the public are entitled to know the reasons for the decisions of the court. Regard must be had to comparable cases in which complainants have suffered similar injuries.

**[55]** In **Beverley Dryden v Winston Layne**,<sup>26</sup> Campbell JA said:

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

**[56]** In the case of **Singh (an infant) v Toong Fong Omnibus Co Ltd**,<sup>27</sup> Lord Morris of Borth-y-Gest said: -

*“...As far as possible it is desirable that two litigants whose claims correspond should both receive similar treatment, just as it is desirable that they should both receive fair treatment. Those whom they sue are no less entitled.”*

## **The award**

### **Special Damages**

**[57]** Special Damages have been agreed by the parties in the sum of One Hundred and Eighteen Thousand Three Hundred and Forty-Nine Dollars (\$118,349.00). The

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<sup>26</sup> SCCA No 44/87, judgment delivered on 12 June 1989

<sup>27</sup> [1964] 3 All ER 925, at page 927



Court will make an award of Special Damages in that sum, with interest thereon, at the rate of three percent (3%) per annum, from 6 April 2016 to 3 February 2022.

### **General Damages**

**[58]** The Court accepts that Ms Thompson is entitled to an award of General Damages for the injuries that she sustained as a result of the breach of the duty owed to her by Dr Clinton Sewell. In this regard, the text, Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, to which the Court was referred by Mr Haynes, is most instructive. There, the learned authors state that, in respect of PTSD, cases within this category are exclusively those where there is a specific diagnosis of a reactive psychiatric disorder following an event which creates psychological trauma in response to actual or threatened death, serious injury or sexual violation. The guidelines have been compiled by reference to cases which variously reflect the criteria established in the 4<sup>th</sup> and 5<sup>th</sup> editions of Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR and DSM-5).

**[59]** Where there is a diagnosis of mild to moderate PTSD, the cases establish a range, in respect of awards that have been made in cases where a virtually full recovery will have been made within one (1) to two (2) years and only minor symptoms will persist over any longer period. The sums awarded range from Three Thousand Three Hundred and Seventy Pounds (£3,370), at the lower end of the range, to Six Thousand Nine Hundred and Eighty Pounds (£6,980), at the upper end of the range.

**[60]** In light of the medical evidence in this case, the Court will begin its assessment of General Damages within the range stated above and with the sum of Four Thousand Pounds (£4,000). Using the Government of Jamaica weighted average exchange rate, as at 3 February 2022, of Two Hundred and Ten Dollars and Eight Cents (\$210.08), that sum converts to Eight Hundred and Forty Thousand Three Hundred and Twenty Jamaican Dollars (JMD\$840,320.00). The Court is of the

view that that sum should be discounted by thirty percent (30%), to reflect Ms Thompson's failure to mitigate her loss.

**[61]** In the final analysis, the Court makes an award of General Damages in the sum of Six Hundred Thousand Dollars (\$600,000.00), with interest thereon at the rate of three percent (3%) per annum, from 25 November 2016, the date of service of the Claim Form and Particulars of Claim filed in this matter, to 3 February 2022.

### **DISPOSITION**

**[62]** It is hereby ordered as follows: -

- (1) Judgment for the Claimant against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the issue of liability;
- (2) Special Damages are awarded to the Claimant against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the sum of One Hundred and Eighteen Thousand Three Hundred and Forty-Nine Dollars (\$118,349.00), as agreed by the parties, with interest thereon at the rate of three percent (3%) per annum from 6 April 2016, to the date hereof;
- (3) General Damages are assessed and awarded to the Claimant against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the sum of Six Hundred Thousand Dollars (\$600,000.00), with interest thereon at the rate of three percent (3%) per annum from 25 November 2016, to the date hereof;
- (4) The issue of costs is reserved and the parties are at liberty to file and serve Written Submissions and Authorities on the issue of whether any costs awarded in respect of this matter are to be awarded in accordance with the Judicature (Parish Court) Act. The Written Submissions and Authorities are to be filed and served no later than 18 February 2022; and

(5) The Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.