

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA**

SUPREME COURT CIVIL APPEAL NO 5/2017

BETWEEN	BARBARA WRIGHT	APPELLANT
AND	THE UNIVERSITY HOSPITAL BOARD OF MANAGEMENT	RESPONDENT

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the appellant

Matthew A Royal instructed by Myers, Fletcher & Gordon for the respondent

8 November 2023 and 16 October 2026

Civil procedure – Assessment of damages – Personal injury – General damages for psychological injury and pain and suffering – Whether award for general damages inordinately low – Adequacy of evidential basis for award of general damages

EDWARDS JA

[1] I have read, in draft, the judgment of Brown JA. I agree with his reasoning and conclusion and have nothing further to add.

SIMMONS JA

[2] I, too, have read the draft judgment of Brown JA and agree with his reasoning and conclusion.

BROWN JA

[3] In this appeal, Barbara Wright ('the appellant') challenged the decision of Jackson-Haisley J ('the learned judge'), made on 7 December 2016, awarding her \$4,000,000.00 in general damages, for pain and suffering and psychological injury, arising from admitted negligent transfusion while the appellant was an inpatient at the

respondent's hospital, the University Hospital of the West Indies ('UHWI'). The learned judge also awarded special damages and damages for future medical expenses. The latter awards were not challenged. Before assessing the merits of the appeal, it is necessary to set out the background to the claim upon which the learned judge assessed the damages.

Background

[4] On 4 March 2006, the appellant was admitted to the UHWI as an emergency admission with severe thrombocytopaenia. She was subsequently diagnosed with immune thrombocytopaenia ('ITP'). ITP is a bleeding disorder caused by low blood platelets. Platelets are necessary for normal blood clotting. As part of the UHWI's management of the appellant's ITP, the appellant was required to undergo a blood transfusion. The transfusion was conducted the following day (5 March 2006) by the UHWI's nursing staff. That transfusion resulted in a mismatch with the appellant's blood group as she was given blood intended for another patient with the identical first and last names.

[5] The night after being transfused with the incorrect blood group, the appellant experienced what she described as intolerable pain throughout her body, high temperature and depersonalization (a psychiatric state where the patient does not believe he/she is real – Dictionary of Medicine 2nd edition). The appellant's pain and suffering continued for several days, accompanied by sleepless nights. Two days after the transfusion (7 March 2006) the haematology service became aware of the nursing staff's error. The next day (8 March 2006), the appellant was informed of the transfusion blunder during a meeting with the medical team.

[6] The appellant remained an inpatient at the UHWI until 10 April 2006, when she was discharged as her platelet count had increased. However, the appellant remained an outpatient of the UHWI as ITP was notorious for having a relapsing and remitting course. The appellant's last visit to the haematology outpatient clinic was 21 November 2014. Between her discharge and last clinic visit, the appellant was readmitted to the UHWI (on 2 May 2006) for reasons related to her ITP condition but unrelated to the incompatible transfusion and discharged on 22 May 2006. During that time the

appellant underwent a medical procedure (on 12 May 2006) as part of the continuing treatment of her ITP condition.

[7] While she remained an outpatient of the UHWI, the appellant, on 19 August 2011, filed a claim form and particulars of claim seeking damages against the respondent for the negligent transfusion of the incorrect blood group by the UHWI's nursing staff. The appellant alleged that she suffered "excruciating pain, reduction of her platelet count and trauma amongst other injuries", because of that negligence.

Summary of the decision below

[8] The learned judge gave a written decision, unreported, with neutral citation [2016] JMSC Civ 214. In determining the quantum of the award appropriate for general damages in the instant case, the learned judge relied on several cases, including those proffered by the appellant and the respondent. The learned judge considered general damages under the heads of pain and suffering and loss of amenities, in which she included physical and psychological injury.

[9] The learned judge first adverted to the time-honoured principles in assessing damages. Firstly, relying on **Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25 ('**Livingstone v Rawyards**'), she reminded herself that the purpose of an assessment of damages is to arrive at that sum that will put the injured party, so far as money can do it, in the same position she would have been in if she had not suffered the injury. Secondly, to determine the appropriate quantum of damages, regard must be had to both the subjective and objective components of the case before her: **Phillip Granston v Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No HCV 1680 of 2003, judgment delivered 10 August 2009 ('**Granston v The AG**'). Thirdly, following the learning in **Granston v The AG**, the learned judge directed herself to consider awards made in previously decided cases, featuring similar injuries, as well as injuries sustained by the individual before her. Fourthly, the quantification of an award of damages is not an exact science, as she was called upon to calculate the incalculable and measure the immeasurable, according to the pronouncements in **Angeleta Brown v Petroleum Company**

Limited and Juici Beef Limited (unreported), Supreme Court, Jamaica, Claim No 2004 HCV 1061, judgment delivered 27 April 2007 (**'Brown v PCL'**).

[10] The learned judge then moved to a consideration of the evidence, identifying the main area of factual dispute to be whether the injuries complained of emanated from the incompatible transfusion or the appellant's pre-existing condition (ITP). Against that background, the learned judge made the following findings of fact. Firstly, as was partially alluded to at para. [4] above, on admission at the UHWI, the appellant was suffering from severe ITP. The appellant's ITP was later confirmed by clinical diagnosis, together with menorrhagia (very heavy bleeding during menstruation – Dictionary of Medicine 2nd ed), contrary to the appellant's assertion that she became aware of the condition after the transfusion. Secondly, the appellant suffered high temperature, intolerable pain throughout her body, depersonalization and sleeplessness commencing from the night following the transfusion and lasting for about five days, rejecting the respondent's witness that the appellant suffered no discomfort. Thirdly, on a balance of probabilities, the appellant's complaints resulted from the wrong blood transfusion. That conclusion had two bases: (a) the proximity of the complaints to the transfusion and (b) the coterminous discovery of the wrong transfusion with the steps taken to avoid injury coming a few days post transfusion. Fourthly, the appellant did not suffer any long-term physical effects from the mismatched transfusion, such as abdominal swelling, low blood platelets, and hypertension. Fifthly, the learned judge preferred the respondent's evidence that the complaint of temporary blindness was not the result of the erroneous transfusion, but a possible side effect of the steroids used to treat the appellant's ITP condition. Lastly, other claims for physical injury, weight gain and reduced sex drive, were rejected for want of supporting evidence, in addition to not having been pleaded.

[11] Leaving aside the physical injuries, the learned judge next considered the claim that the appellant suffered from post-traumatic stress disorder ('PTSD') and major depressive disorder ('MDD') arising from the negligent transfusion. In the learned judge's appreciation, the issue on which the appellant and respondent crossed swords was the extent of the PTSD. In this assessment, the learned judge had the benefit of

the expert opinions of two consultant psychiatrists, one from either side of the litigation divide.

[12] Dr Terrence Bernard ('Dr Bernard'), whose evidence was called on behalf of the appellant, saw the appellant twice; he had face to face interviews with her on 9 May 2011 and 19 June 2015. Those interviews were preceded by a telephone conversation on 14 April 2011. In Dr Bernard's professional opinion, the appellant was suffering from moderate to severe PTSD and MDD. Dr Bernard gave the appellant a Global Assessment Functioning rating of 60 that he said would result in moderate difficulty in social and occupational functioning. His recommendation was that the appellant receive talk and medication therapy for between three and five years.

[13] Dr Aggrey Irons, whose evidence was tendered on behalf of the respondent, also examined the appellant twice; both times in 2014, 18 June and 9 July. Dr Irons expressed the opinion that the appellant was suffering from moderate resolving PTSD that was directly related to her experiences at the UHWI. Dr Irons concluded that the appellant's condition was amenable to treatment with supportive psycho and cognitive therapy.

[14] The learned judge gave more weight to the medical evidence presented by Dr Bernard than that of Dr Irons. The preference of Dr Bernard's evidence was a consequence of the proximity of Dr Bernard's first examination of the appellant (9 May 2011) to the incident (5 March 2006). In the learned judge's reasoning, the advantage of causal proximity enabled Dr Bernard to assess the appellant more effectively. Therefore, the learned judge found that the appellant suffered from both PTSD, a matter on which both consultant psychiatrists agreed, and MDD, which found no expression in the evidence of Dr Irons. The learned judge also accepted that the level at which the appellant presented for both PTSD and MDD was moderate to severe level.

[15] The learned judge went on to determine how the appellant should be compensated for the harm she had suffered. To that end, **Joan Morgan and Cecil Lawrence v Ministry of Health, University Hospital of the West Indies and The Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim

No HCV 00341, judgment delivered 19 December 2007 (**'Morgan and Lawrence v The AG'**) relied on by the appellant, resonated with the learned judge. In that case, the first claimant ('Ms Morgan') was misdiagnosed with HIV. Following the misdiagnosis, Ms Morgan suffered from anxiety, depression and PTSD, among other conditions. The learned judge considered that the appellant's complaints were similar to at least three of the nine consequences reported by Ms Morgan's doctors. The learned judge also found that the appellant's psychological injury spanned a longer period, based on Dr Bernard's finding that even up to the time of writing his witness statement in July 2015, the appellant needed future treatment. The learned judge took into her consideration **Caroline Janet Morgan v Gwent Health Authority** (unreported), Court of Appeal, England & Wales, Docket Number 87/1235, judgment delivered 8 December 1987 (**'Morgan v G H Authority'**), on which the appellant also relied. The learned judge found **Morgan v G H Authority** to be similar to the instant case, since the claimant in that case was also transfused with the wrong blood group.

[16] Also falling for the learned judge's consideration was **Vanura Lee v Petroleum Co of Ja Ltd and Juici Beef Limited** (unreported), Supreme Court, Jamaica, Suit No 2003/HCV1517, judgment delivered 16 December 2004 (**'Lee v Petroleum'**), cited by the respondent. In that case, the claimant was also diagnosed with PTSD and MDD, among other conditions, consequent on injuries she sustained from a fire at her place of work. **Brown v PCL**, referred to at para. [7] was further considered for its award in circumstances where that claimant suffered from moderate to major depression and PTSD. Additionally, the learned judge took account of **Lavern Anderson v Marksman Limited and Kaiser Bauxite Company and Jamaica Bauxite Mining Limited t/a Kaiser Bauxite Co Ltd** [2012] JMSC Civil 59 (**'Anderson v Marksman'**). In that case, the claimant suffered from significant problems in memory and concentration, as well as marked depression in her emotional state. Those conditions contributed to neurological and neurophysical insults and accompanying PTSD.

[17] The learned judge found that the appellant's case was distinguishable from the preceding decided cases in two notable respects. Firstly, whereas the appellant had indicated that much of her worries stemmed from the uncertainty regarding the full

extent of the injury caused, the claimants in the preceding cases were fully aware of the extent of their injuries. Secondly, the appellant suffered from PTSD for a much longer period, approximately nine years, than the claimants in those cases.

[18] In arriving at the award, the learned judge's survey of decided cases also included the following. First, **Natoya Swaby and Andrew Green v Southern Regional Health Authority** [2012] JMSC Civ 151 ('**Swaby v SRH Authority**'). In that case, the claimant's diagnosis of PTSD and mild to moderate depression was a consequence of the loss of her day-old baby's body. The body of the baby was never shown to her and remained unaccounted for. Second, **Karen Reid v Harbour View Medical Centre, Ministry of Health and the Attorney General of Jamaica** [2014] JMSC Civ 56 ('**Reid v The AG**'), where the claimant was misdiagnosed with HIV and remained misdiagnosed for two years. As a consequence of that misdiagnosis, the claimant had to take anti-retroviral drugs for the period of the misdiagnosis. The upshot of the error in diagnosis was the entertainment of suicidal thoughts and a fall into depression. Third, **Ryan Henry v Kingston Container Terminal Services Limited** [2015] JMSC Civ 154 ('**Henry v KCTS Ltd.**'). There, the claimant suffered physical injuries during a workplace accident. He was assessed as having chronic PTSD, depression and anxiety, although he failed a malingering test.

[19] Although guidance was obtained from all the decided cases, of all the cases canvassed, as was intimated at para. [13] above, the learned judge found **Morgan and Lawrence v The AG** to be most similar to the present case, with a notable caveat; the psychological injuries in that case were twice as severe as the ones in the case at bar. Against that background, the learned judge made an award of \$3,500,000.00 for psychological injury. The learned judge also awarded an additional sum of \$500,000.00 to account for the further pain and suffering that the appellant experienced in consequence of the transfusion. The total award for general damages was therefore \$4,000,000.00, as was said at para. [3] above.

The appeal

[20] The appellant filed a notice and grounds of appeal on 19 January 2017. The following are the grounds of appeal:

"i. The Learned Judge erred in law and/or misdirected herself and/or wrongly exercised her discretion and/or acted on a wrong principle of law when she concluded that the amount of \$4,000,000.00 should be awarded for the injuries suffered by the Claimant; the measure of damages was inordinately low/or grossly inadequate as to make it an entirely erroneous estimate of the damages to which the Claimant is entitled and should be increased to reflect sums awarded for such injuries.

ii. The Learned Judge erred in law and/or misdirected herself and/or wrongly exercised her discretion when she failed to apply awards of damages in cases that depict the same injuries as she is expected to do as a matter of law and even gave an amount far less than the sums submitted by the Claimant's Attorney-at-Law with the assistance of cases she submitted as being relevant.

iii. The Learned Judge erred in law and/or misdirected herself and/or wrongly exercised her discretion when she failed to take into account the illness of major depressive disorder which was not even present in the case she relied on to assist her in determining the award."

The issue

[21] The overarching issue which arises from the grounds of appeal is this: was the sum awarded to the appellant an entirely erroneous estimate of the damages to which she was entitled as a result of the learned judge's failure to apply comparable cases or otherwise act on correct principles of law?

Appellant's submissions

[22] It is appropriate to commence with the following observation. Although the appellant filed three grounds of appeal, her counsel, Mrs Senior-Smith, did not compartmentalise her submissions under those grounds, neither in her written nor oral submissions. In her oral submissions, Mrs Senior-Smith announced that the appellant found no fault with the learned judge's findings of fact or the way those facts were weighed. Mrs Senior-Smith's chief complaint was that, given the learned

judge's findings, in applying **Morgan and Lawrence v The AG**, the learned judge did not properly consider the distinguishing features between the cases. In short, the learned judge did not properly apply that case to the appellant's case.

[23] To that end, Mrs Senior-Smith provided the following list of the appellant's injuries:

- I. Intolerable pain and suffering for five days.
- II. Depersonalisation.
- III. Sleeplessness.
- IV. PTSD, manifesting in phobic anxiety, panic attack, loss of appetite, feeling as if she is damaged goods.
- V. Global Assessment of Functioning rating of approximately 60%.
- VI. Depression.
- VII. Increased appetite
- VIII. Recognised suffering for nine years.

[24] The list above accords with the findings of the learned judge, save for item VII. That the appellant suffered increased appetite because she received the mismatched blood has to be rejected for two reasons. First, the learned judge explicitly rejected the allegation that the appellant experienced weight gain as a consequence of the negligent transfusion. While increased appetite is not the only causative factor in weight gain, it has no other contextual relevance in this case. Furthermore, and as was said above, Mrs Senior-Smith did not take issue with the learned judge's findings of fact. Second, "increased appetite" conflicts with "loss of appetite" which manifested as a symptom of the appellant's accepted PTSD.

[25] With that said, I return to Mrs Senior-Smith's submissions. Mrs Senior-Smith compared the appellant's injuries with those found in **Morgan and Lawrence v The AG**, in particular the injuries of the first claimant, Ms Morgan. This was contrasted with what the learned judge said at para. [42] of her judgement. In the preceding paragraphs, beginning at paras. [33]-[34], the learned judge: (a) reviewed the

evidence of psychological injury and found as a fact that the appellant suffered both PTSD and MDD, at the level of moderate to severe for both; (b) recounted the appellant's resultant global assessment of functioning – social and occupational, which would present in occasional panic attacks, few friends and conflict with peers (para [35]); and (c) adumbrated the injuries in **Morgan and Lawrence v The AG** – (i) frequent flashbacks with phobic behaviour, (ii) anxiety and depression specific to the alleged misdiagnosis, (iii) PTSD specific to being informed that she was HIV positive, (iv) in need of psychotherapy and pharmacotherapy, (v) severe anxiety, (vi) depressive symptoms (vii) severe self-doubt, (viii) preoccupation with flashbacks and fear of dying and consistent preoccupation with the health of unborn children and (ix) severe PTSD (para. [36]).

[26] At para. [37] the learned judge found three similarities between the appellant's case and the injuries sustained by Ms Morgan in **Morgan and Lawrence v The AG**. The learned judge did not set out those similarities. For ease of reference, accuracy and comparison, the findings consistent with Ms Morgan's severe PTSD and poor prognosis, as recorded on page 4 of the judgment, are extracted below:

- "1. Several [sic] anxiety with literal hand wringing during interview
2. Phobic avoidance responses to health care issues including pregnancy, hospitals, blood tests.
3. Depressive symptoms including tearfulness, appetite disturbances and insomnia.
4. Severe self doubt [sic] and lack of trust in what is frequently referred to as 'the system'.
5. Consistent preoccupation with flashbacks and vivid [sic] regarding fear of death and dying.
6. Consistent pre-occupation with the health of unborn children."

From the list above, both the appellant and Ms Morgan shared symptoms of phobia (phobic avoidance and phobic anxiety), depressive symptoms (insomnia) and appetite disturbance.

[27] The similarities between the present case and **Morgan and Lawrence v The AG** notwithstanding, the learned judge remained unpersuaded by Mrs Senior-Smith's submission that the appellant's injuries were more serious than those of Ms Morgan for the reasons advanced: weight gain, abdominal swelling and aches and pain. Thereafter, the learned judge distinguished **Morgan v GH Authority** on three bases. One, the distance of the discovery of the negligent transfusion (two years), as opposed to the proximity of the discovery in this case (two days), with the corollary that no antidote was given to that claimant, causing a rise in the level of antibodies in her blood. Two, the presence of symptoms four years after the event. Three, the prolongation of that claimant's anxiety for the duration of her unmarried life.

[28] Therefore, beyond underlining the propriety of making an award for anxiety, for which the appellant would be compensated in any event, the learned judge did not find **Morgan v GH Authority** of assistance. The learned judge's rejection of **Morgan v GH Authority** had two bases. The first basis was that reliance on cases from outside this jurisdiction for the purpose of assessment of damages was not to be countenanced unless there was no local precedent. In the learned judge's reasoning, while the injury giving rise to the claim was without precedent in this jurisdiction, psychological injury arising from other causes of action was well-known. So, in seeking to compare like cases with this case, the learned judge considered several local cases.

[29] Finally, I come to para. [42] of the learned judge's judgment on which Mrs Senior-Smith commented. Here the learned judge found the appellant's case distinguishable from the surveyed cases on two planks. The first of those planks was the awareness of the extent of the injuries. While the claimants in the decided cases were fully aware of the extent of their injuries, arising as the injuries did from accidents, the appellant harboured uncertainty concerning the full impact of the negligent transfusion. The second distinguishing plank was the "much longer" duration of the appellant's suffering from PTSD (nine years). In Mrs Senior-Smith's submission, relying on **Morgan v GH Authority**, the nature of the anxiety should have constituted the grave distinction between the appellant's case and the cases referred to by the learned judge.

[30] Mrs Senior-Smith's secondary challenge was that little regard was given to Dr Bernard's additional diagnosis of MDD. MDD, together with the appellant's weight gain, abdominal swelling, and aches and pain underlined the severity of the appellant's mental injury, in Mrs Senior-Smith's submission.

Respondent's submissions

[31] Mr Royal, for the respondent, expectedly, sought to support the award of the learned judge. Mr Royal referred to the several authorities canvassed by the learned judge and submitted that, based on the learned judge's appraisal of those cases, the learned judge addressed her mind to the full range of awards for PTSD and MDD. In Mr Royal's submission, the range of awards, updated as at the date of judgment (7 December 2016) was between \$775,821.19 and \$9,728,370.79. The learned judge's award therefore fell within the range of awards, Mr Royal concluded.

[32] Mr Royal submitted that the learned judge, in arriving at the quantum in this case, made the appropriate adjustments in awards made in previous cases, in light of her findings of fact, namely the differing levels of severity of the psychiatric injuries.

[33] Counsel asserted that the English authority, **Morgan v GH Authority**, on which the appellant relied, was entirely inapposite for guidance as to the quantum of award for the instant case, owing to its peculiar facts. He also asserted that both cases were only comparable to the extent that negligent blood transfusions were the genesis of the claimant's and appellant's psychiatric injuries. Counsel submitted that the court opined in **Morgan v GH Authority** that the claimant's psychiatric injury left her anxious about a number of things including her choice of potential husband. He also submitted that the hospital's error was not discovered until years later, and no antidote had been applied. It is on that basis that learned counsel contended that the appellant was not similarly situated, since the appellant did not suffer a similar level of anxiety.

[34] Mr Royal also made submissions on the differences between the appellant's case and **Morgan and Lawrence v The AG**. In the interest of brevity, I will return to those submissions in the ensuing discussion.

Discussion

[35] It is settled law that this court will be slow to interfere with the award of damages and then, only within established parameters. The pronouncement of Lord Justice Greer, in **Flint v Lovell [1934] All ER Rep 200**, at page 202, is apt:

“...To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled...”

It is clear then that the two bases for interfering with the learned judge’s decision on damages are that the award was: (a) predicated on a wrong principle of law and (b) either exceptionally high or trivially low, moving this court to conclude it was a wholly incorrect assessment of the damages.

[36] It is altogether unnecessary to recite the plethora of authorities on the point. A reference to paras. [74]-[76] of the judgment of F Williams JA in **The Attorney General v Peter Badoo [2020] JMCA Civ 10**, will suffice. According to the learned judge of appeal:

“[74] An appropriate consideration with which to commence this discussion is to be found in the dictum of Phillips JA, in the case of **Jamalco (Clarendon Alumina Works) v Lunette Dennie [2014] JMCA Civ 29**. At paragraph [60] of that case, the learned judge of appeal distilled from the discussion the principle that:

‘(1) The Court of Appeal is hesitant to interfere with an award of damages made in the lower court and will only do so in specific circumstances.’

[75] That principle is also reflected in **Stephen Clarke v Olga James-Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 119/2007, judgment delivered 16 May 2008 (cited by the appellant). Harrison JA, at page 8 of the judgment, made the following observation: ‘We commence with the presumption that the decision on quantum made by the trial judge is a correct one. For the Appellate Court to vary the assessment of the

trial judge it must be satisfied that the judge made a 'wholly erroneous estimate of the damage'. This means that the damage has varied too widely from the maximum or minimum figures awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases with the necessary adjustments, having regard to inflation and any special features of the injury or other assessable factors of the particular case, is directed at achieving this uniformity.'

[76] Thus, to justify any interference with the quantum of damages awarded below, it must be demonstrated that there has been a completely wrong sum or erroneous estimate of damages having regard to awards in cases of a similar nature."

[37] Regarding assessment of general damages, the learned authors of Harrison's Assessment of Damages [Cases on Personal Injury and Fatal Accident Claims], 2nd Edition 2011, at page 4, advise:

"In making an assessment for general damages, consideration should be given to such factors as the physical injury itself – pain and suffering – past, present and future and the effect of the injury upon the capacity of the injured person to enjoy life..."

Harrison JA (as he then was) stated in **Dacres and Dacres v Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 103/2000, judgment delivered 11 April 2003 ('**Dacres v Reid**'), that:

"The extent of the loss suffered by an injured party includes the physical injury which is clearly discernable, the objective element and the pain and suffering, the subjective element, the latter being more attributable to the awareness of the injury: (**West v Shepherd** [1963] 2 All E.R. 625). Both elements are usually present and are factors which a court must consider in assessing an award for general damages."

[38] The learned judge's findings show that she began her evaluation by examining the purpose of an assessment of damages and the avenues utilized to determine a suitable quantum of damages in the instant case. Ultimately, she examined and

applied the fundamental principles expressed in **West v Shepherd** and applied in **Dacres v Reid**. Although the learned judge did not refer to those cases, their essence formed the bedrock of **Livingstone v Rawyards** and **Granston v The AG**, the cases which she applied to the case at bar.

[39] In keeping with the established guidelines for the appraisal of general damages, the learned judge delved into comparable cases proffered by both counsel for the appellant and the respondent, among other decided cases. This principle was emphasised in **Beverley Dryden v Winston Layne** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 44/1987, judgment delivered 12 June 1989, to which the learned judge also referred. At page 2, Campbell JA stated:

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

[40] It is against this background that the submissions of Mrs Senior-Smith must be considered. In essence, hopefully without oversimplification, the appellant’s complaint appears to be that the learned judge fell into error in her application of the principle of comparing like cases with the instant case. So that, the learned judge erroneously applied **Morgan and Lawrence v The AG**, and paid scant regard to **Morgan v GH Authority**, making it abundantly clear, as Mr Royal submitted, that the real issue is dissatisfaction with the component of the award for psychological harm.

[41] In her quest to demonstrate that the appellant’s psychological injuries surpassed the first claimant’s (‘Miss Morgan’) in **Morgan and Lawrence v The AG**, Mrs Senior-Smith argued that the mismatched transfusion may have a lasting effect on the appellant. However, this submission is, respectfully, untenable. Its untenability lies in the fact that it is bereft of support from the medical evidence. Dr Bernard recommended that the appellant receive talk and medication therapy for between three and five years post his last face-to-face interview with her on 19 June 2015. Dr Bernard’s recommendation was consistent with the assessment of Dr Irons that the appellant’s PTSD was resolving and amenable to treatment with supportive psychotherapy and cognitive therapy. It is palpable that neither consultant psychiatrist

gave the appellant's psychological condition the indefinite character asserted in Mrs Senior-Smith's submissions. Similarly, Mrs Senior-Smith did not seek to anchor the claimed uncertainty of future physical repercussion, by showing a causal link to the medical negligence, arising on the medical evidence that was before the learned judge. That characterization was, with all due deference, a vain attempt to distinguish **Morgan and Lawrence v The AG** and, in the same breath, align the consequences of the negligent transfusion of the appellant with those of the unfortunate victim in **Morgan v GH Authority**. And with that said, I advert my attention to the latter case.

[42] Mrs Senior-Smith submitted, as she did before the learned judge, that **Morgan v GH Authority** represents a touchstone for determining the quantum of general damages in this case. Sympathy for the reliance on that case evaporates as the analysis proceeds beyond the similar tragedy which gave rise to the claim for medical negligence. That is, both the appellant and the claimant in **Morgan v GH Authority** were negligently transfused with the incorrect blood group. One could also add that liability was not contested in either case. Beyond that, the cases are dissimilar.

[43] The distinctive features of **Morgan v GH Authority** are best understood against the background of a synopsis of its facts. The claimant in that case had group A rhesus negative blood (Rh-negative). In December 1978 she was negligently transfused with group A Rh-positive blood. Both groups are incompatible. The incompatibility caused a sensitivity to the rhesus antigen. Sensitivity to rhesus antigen in a woman has the potential for dire consequences during pregnancy, depending on the putative father's blood group. In 1980, the claimant suffered an aborted pregnancy. The presence of higher levels of antibodies in her blood than explainable by a first pregnancy was detected. Subsequent investigations revealed the 1978 negligent transfusion.

[44] Two consequences flowed from the knowledge that the claimant in **Morgan v GH Authority** received the incompatible transfusion. Firstly, it contributed to the breakup of the claimant's engagement to a man who fell outside of that small group of men (17%) with whom the claimant could procreate with certainty that there would be no ill effects such as the baby being still born or afflicted with birth defects.

Secondly, a consequence of her “rhesus negative problem”, the psychological and emotional injury arising from the anxieties associated with finding and procreating with a partner among the 17% compatible male population, the 59% chance of having a child who is Rh-positive along with the associated complications and the pregnancy itself.

[45] From that outline of the facts, the notable distinguishing features of **Morgan v GH Authority** from the appellant’s case may now be stated. Firstly, the error in transfusion in that case was not discovered until approximately two years later, with the result that no antidote was given to the claimant until after the discovery. That fact is to be contrasted with the two days’ time lag between transfusion and haematology’s discovery of the error in the present case and the steps taken to avoid injury to the appellant. Secondly, on the one hand, the anxiety the claimant suffered, in that case, because of the negligent transfusion was expected to continue for the remainder of her unmarried life, however long that might be. On the other hand, the appellant’s psychological injury was expected to be resolved over the course of three to five years. In the face of those differences, it is unarguable that **Morgan v GH Authority** is not all fours with this case.

[46] It is therefore demonstrable, as Mr Royal argued, that the learned judge did not err in refusing to follow **Morgan v GH Authority** or be guided by it in determining the quantum of damages. Separate from being distinguishable on its facts, following **Morgan v GH Authority**, in the circumstances of this case, would have been contrary to authority. An assessment court is required to make comparisons with previous awards in this jurisdiction, unless there is an absence of any local guide: **Winston Barr v Bryad Engineering Co Ltd & Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 45 & 48/1985, judgment delivered 29 July 1988. The rationale for this is of some antiquity. Simply put, the reason is that the value of awards varies across jurisdictions. Lord Morris of Borth-y-Gest in **Sing (infant) v Toong Fong Omnibus Co Ltd** [1964] 3 All ER 925, at pages 1382-1383 opined:

“... as far as regard should be had to the range of awards in other comparable cases, such cases should as a rule be

those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions existed.”

[47] Similarly, the case of **Aziz Ahamad Ltd v Raghubar** (1967) 12 WIR 352 articulated the practice of relying on past awards made in the same or neighbouring jurisdiction. The Trinidad and Tobago Court of Appeal, per Wooding CJ, opined on page 357, that:

“...we ought consciously to set about establishing and following trends of our own. But until we do, we should pay heed to take such guidance as we can from awards elsewhere, making such adjustments as may be appropriate having regard to our own prevailing conditions. Secondly, in looking at past case[s] it is essential to remember that they serve no more than as a guide. They, so to speak, provide a general standard or judicial consensus, but are nevertheless referable to their own particular facts...past decisions are helpful only when and because they establish a discernible trend.”

[48] That takes me to the case on which the learned judge placed greatest reliance **Morgan and Lawrence v The AG**. Mrs Senior-Smith did not take issue with the learned judge’s decision to rely on that case, essentially agreeing that it was applicable to this case. Rather, Mrs Senior-Smith contended that the learned judge erred in applying that case. On the one hand, the learned judge found three similarities between the appellant’s case and **Morgan and Lawrence v The AG** (see para. [26] above). On the other hand, the learned judge found the psychological injuries sustained by Ms Morgan to be twice as severe as those suffered by the appellant.

[49] It was in the categorisation of the severity of Ms Morgan’s injuries as twice that of the appellant that Mrs Senior-Smith stood poles apart from the learned judge. In Mrs Senior-Smith’s appreciation, the appellant’s “injuries were far more extensive”. That assertion was broken down as follows: (a) duration of mental injury before assessment, nine years in the case of the appellant and four years in Ms Morgan’s case, (b) the severity of the appellant’s mental injury is distinguishable by the MDD, “Weight Gain and Abdominal Swelling, and Aches and Pains”, (c) while Ms Morgan could be certain that there was no lasting biological effect of the negligent transfusion,

the appellant “has not been reassured that the wrong blood transfusion would never have a negative impact on her body”. This level of severity (anxiety) warranted seeking guidance from **Morgan v GH Authority** in arriving at the appropriate quantum of damages in the appellant’s case, the submission ran.

[50] The premises upon which the claim for the appellant’s greater severity of injury must be held to the searchlight of scrutiny. Firstly, the longer duration of the appellant’s suffering for PTSD did not escape the learned judge’s consideration (see para. [42] of the judgment). Secondly, and admittedly, the learned judge did not also say that the appellant suffered from MDD for the same period, as the medical evidence disclosed. In fairness to the learned judge, she found as a fact that the appellant suffered both PTSD and MDD at the same level of severity (moderate to severe) (see para. [34] of the judgment). However, it is unclear what weight, if any, the learned judge gave to MDD. It would have put the matter beyond doubt had the learned judge mentioned MDD when she was distinguishing the decided cases from this case.

[51] Thirdly, MDD aside, the weight gain, abdominal swelling and aches and pains cannot be used to support Mrs Senior-Smith’s contention that the appellant’s injuries were twice greater in severity than Ms Morgan’s. I will take weight gain first. I have already shown that the learned judge did not find as a fact that the appellant experienced weight gain because she was negligently transfused with the incorrect blood type (see para. [24] above). The same may be said for the abdominal swelling. At para. [29] of her judgment, the learned judge explicitly rejected abdominal swelling as a causal effect of the mismatched blood transfusion. Finally, the learned judge appropriately took into consideration the appellant’s aches and pains when dealing with the physical consequences of the negligent transfusion.

[52] Fourthly, the nature of anxiety as a factor for assessment. In her oral submissions, Mrs Senior-Smith classified anxiety as the grave distinction between this case and **Morgan and Lawrence v The AG**. The learned judge was alive to anxiety as a consideration. At para. [42] of her judgment she said, “... the [c]laimant herein has indicated that much of her worries stem from the uncertainty regarding the full

extent of the injury caused". It is clear, therefore, that the case presented for the appellant before the learned judge made anxiety the centrepiece of her mental injury.

[53] As it was in the court below, so it appeared in the written submissions filed for this court by Mrs Senior-Smith. In those submissions, Mrs Senior-Smith quoted passages from the judgments in **Morgan v GH Authority** which exemplified the English Court of Appeal's emphasis on anxiety as the commanding factor in their decision to increase the award of damages from £8,000.00 to £20,000.00. I am constrained to recite the quotations, appearing at paras. 19 and 20 of the submissions.

[54] First, Sir John Donaldson MR, at page 8 of the judgment, "[w]hat we are concerned with is the anxiety which this lady has suffered and will continue to suffer". Sir John Donaldson MR went on to speak of the anxieties touching and concerning possible pregnancy then said, at pages 10-11, "[i]t seems to me that these are very serious matters indeed from the point of view of the plaintiff which have been visited on her entirely by the negligent blood transfusion". Second, Glidewell LJ, was of the same mind. At page 12, he said, "I also agree that a major factor which must be reflected in the proper damages in this case is the anxiety which the plaintiff will have for the rest of her unmarried life ...". Third, at page 14, underlining the court's unanimity, were Sir Denys Buckley's pronouncements:

"The true degree of anxiety to which the plaintiff has been subjected as the result of the mistransfusion which is the basis of the claim is not in my judgment capable of being made the subject of any statistical, mathematical considerations, even of a fairly generalised character.

One is left to form an assessment of the gravity of the misfortune which has resulted from the mistransfusion and of the psychological problems and emotional problems which are likely to result in this particular case by forming an assessment which really has to be to a great extent a matter of impression."

[55] **Morgan v GH Authority** is, therefore, a sound basis for the proposition that anxiety is a relevant factor in the assessment of damages for psychological injury. In an appropriate case, depending on the victim's prognosis and the other attendant circumstances of the case, anxiety may well be the governing factor in the

determination of the quantum of damages. However, before anxiety can become the fulcrum upon which the quantum of damages turns, there must be established a causal link between the purported anxiety and the harm giving rise to the claim. For example, as in **Morgan v GH Authority**, the harm ought to have resulted in a sequela with the potential to precipitate the apprehended effect, and, therefore, anxiety concerning its manifestation.

[56] Applying the above test of causation to the assertion in Mrs Senior-Smith's submission that the appellant "cannot be sure ... as she has not been reassured that the wrong blood transfusion would never have a negative impact on her body", the assertion founders for want of evidence. Firstly, the learned judge did not find as a fact that the mismatched transfusion resulted in any lasting physical effect upon the appellant. Secondly, the appellant was diagnosed with resolving psychological injury. Consequently, as a matter of evidence, there was no sequela to ground the uncertainty the appellant harboured concerning possible future physical consequences. In the absence of that solid evidentiary foundation, without meaning to show a lack of compassion, a purported uncertainty in this regard transcends the borders of reality and descends into the fanciful. Furthermore, as I tried to show above (between paras. [39]-[43]), **Morgan v GH Authority** is distinguishable from this case.

[57] In any event, the learned judge demonstrated that she was alive to anxiety as a relevant consideration. Not only was the learned judge seized of that fact, but she was also cognizant of the appellant's reliance on anxiety. Neither did it escape the learned judge that anxiety played the major role that it did in **Morgan v GH Authority**.

[58] That said, is the contention that the learned judge misapplied **Morgan and Lawrence v The AG** tenable? Perhaps it is best to commence with the most glaring of omissions: the failure to index the award in **Morgan and Lawrence v The AG**. Nowhere in the learned judge's judgment is there any evidence that her mind was directed to updating the award of \$3,500,000.00 made to Miss Morgan on 19 December 2007. Accordingly, it is an unfortunate coincidence that the identical award was made to the appellant for psychological injury. It is an accepted principle in the

assessment of damages that stale awards are to be increased to take account of movements in inflation since the awards were made. That is achieved by the application of the consumer price index ('CPI'), published by the Statistical Institute of Jamaica. An assessment judge, such as the learned judge, is therefore required to index the award in a previously decided case as part of the comparative analysis.

[59] Mr Royal readily accepted the absence of evidence of indexation of the award in **Morgan and Lawrence v The AG**. In his submission, the indexed award, at the date of delivery of the learned judge's judgment was \$7,080,907.53, using the CPI for December 2016 and December 2007. Notwithstanding the absence of indexation, Mr Royal pointed out differences between this case and **Morgan and Lawrence v The AG** and argued that those distinctions justified a reduction in the award to the appellant. The dissimilarities Mr Royal highlighted were: (a) the appellant's injuries reflected with moderate difficulty in social engagement, which is to be contrasted with Ms Morgan's severe impairment; (b) whereas with Ms Morgan psychotherapy had proven ineffective, the appellant's case was moderate to resolving, with a positive prognosis; and (c) both the appellant's consultant psychiatrists prescribed time-bound future treatment, while Ms Morgan's prognosis was poor, relative to her uncertainty of her health status for an indefinite period of time.

[60] It is palpable that there were both similarities and dissimilarities between this case and **Morgan and Lawrence v The AG**. In following the law laid down in **Sing v Toong Fong Omnibus Co Ltd** and applied in **Dryden v Layne**, it may not be always possible to find decided cases that are exactly on point with the case being assessed. The injunction is that comparable injuries should be compensated by comparable awards is necessarily circumscribed by the modifying phrase, "so far as possible". That language recognizes that the assessment of damages is not a matter of science that lends itself to precise mathematical analogies and actuarial forecasts. For comparative analysis, cases ought to be, broadly or generally, alike. That is, there is comparability on the essential facts, even if not at a granular level. If a trend in the awards for particular injury is observed, then the court's task is to strive for uniformity in making the award in the case before it. In any event, the assessment court, in determining the quantum, must bear in mind, in addition to other acceptable guides,

that awards ought to be fair, reasonable and assessed with moderation. Differences in the facts are accounted for by the appropriate adjustments, whether upwards or downwards, in keeping with the principles previously discussed. In arriving at the quantum of damages, it ought to be borne in mind that in making an award of money for non-pecuniary losses, money constitutes “a substitute for that which is generally more important than money: it is the best that a court can do” (see McGregor on Damages 18th ed at para 1-021).

[61] There was a consensus of views at the Bar, as the learned judge found, that **Morgan and Lawrence v The AG**, was comparable with this case, notwithstanding the differing emphases. Broadly, there was not much to separate **Morgan and Lawrence v The AG** from this case, in the diagnoses: both suffered from PTSD and depression (described in that case as “depressive symptoms” and MDD in this case). The cases differ in the level of severity experienced. In that case, the PTSD was assessed as severe, while in this case it was described as moderate to severe, in Dr Bernard’s report, which the learned judge preferred. There was no weighting of the depressive symptoms in **Morgan and Lawrence v The AG**, but in this case, Dr Bernard adjudged it to be moderate to severe. Relying on the scales employed by the consultant psychiatrists, the PTSD suffered by the appellant fell below the level of severity in **Morgan and Lawrence v The AG**. That is, I understand Dr Bernard’s use of the rating ‘moderate to severe’ to mean, at the top of a graded scale for moderate but encroaching on the lower rung of the graded scale of severity.

[62] Beyond that broad, general point of comparison, the following points may be noted. Firstly, on the one hand, Ms Morgan’s anxiety was described as severe. On the other hand, Dr Bernard, in explaining the appellant’s global assessment of functioning, recorded the appellant suffering from occasional anxiety attacks. Secondly, both Ms Morgan and the appellant had phobic responses. Ms Morgan had phobic avoidance responses to health issues. Correspondingly, the appellant had phobic anxiety regarding doctors and hospitals. Thirdly, both suffered from flashbacks in one way or another. Ms Morgan exhibited a consistent preoccupation with flashbacks together with a “vivid [sic] regarding fear of death and dying”. In this case, the appellant had nightmares and flashbacks concerning the revelation that she was transfused with the

wrong blood. Fourthly, both Ms Morgan and the appellant suffered a deficit in social and/or occupational functioning. In the opinion of Ms Morgan's consultant psychiatrist, this finding was invasive and occupied Ms Morgan's thinking to the exclusion of appropriately performing daily routines. However, there was no global assessment of Ms Morgan's functioning. In respect of the appellant, Dr Bernard's global assessment of functioning was 60, explained as moderate difficulty in social and occupational functioning.

[63] When the two cases are viewed from that comparative perspective, there is much force in Mrs Senior-Smith's submission that **Morgan and Lawrence v The AG** was not properly applied to this case. When the learned judge's omission to index the award in that case is made good, the updated award in **Morgan and Lawrence v The AG**, as at the date of judgment, was \$7,086,130.00. Following that indexation, the learned judge should have gone on to consider whether the award to the appellant should be adjusted upwards or downwards, to make allowance for material factual differences between the cases. In fairness to the learned judge, although there was no overt indexation of Ms Morgan's award, the tone of the judgment suggested that the learned judge started from a higher figure and worked her way down to the eventual award. This much is readily gleaned from her finding that Ms Morgan's injuries dwarfed those suffered by the appellant; a finding which is unsupported by the foregoing comparative analysis.

[64] So then, accepting that this case is comparable to **Morgan and Lawrence v The AG** in the main essentials, fairness would demand that the appellant receives a similar award in general damages. Should the award be adjusted? Without intending to parse the individual injuries, the following observations appear to be indisputable. First, Ms Morgan's greater severity in PTSD may be counterbalanced by the appellant's moderate to severe MDD and longer period of suffering (nine years). Second, Ms Morgan's self-doubt and distrust of 'the system' may find its counterweight in the appellant's depersonalization. Third, Ms Morgan's consistent preoccupation with death and the fear of dying is peculiar to her, having been told she had the precursor to a terminal disease and, should, in the circumstances of this case, be discounted. Against the background of the preceding discussion and taking both cases in the round, a fair

and reasonable quantum of damages for the psychological injury the appellant suffered should be \$7,100,000.00, rounded up.

Conclusion

[65] The preceding discussion left undisturbed the learned judge's award of \$500,000.00 for the appellant's physical suffering and depersonalization in the immediate aftermath of the negligent transfusion. Taking that figure into account, the appellant should have been awarded the sum of \$7,600,000.00 for pain and suffering and loss of amenities. That is, just shy of twice the sum the learned judge awarded (\$4,000,000.00). Therefore, the complaint that the measure of damages was either inordinately low or grossly inadequate is irresistible. As I tried to show, the low quantum of damages awarded by the learned judge was a function of the comparative error with **Morgan and Lawrence v The AG**, perhaps compounded by the failure to index the award in that case; and thereafter demonstrating how and why the awards should be different. In short, in the judgment of this court, the award made to the appellant by the learned judge was an entirely erroneous estimate of the damages to which the appellant was entitled. Accordingly, and in keeping with the principle articulated by Greer LJ in **Flint v Lovell**, the learned judge should be reversed on the question of the quantum of damages.

[66] The estimate of the damages to which the appellant was entitled, based on the comparative analysis of **Morgan and Lawrence v The AG**, fell below the \$10,000,000.00 floated by Mrs Senior-Smith as reasonable compensation, relying on **Morgan v GH Authority**. However, the latter case was not only distinguishable from this case but resort to it would have been inappropriate, in the circumstances of this case, for the reasons already stated. The learned judge was therefore correct in refusing to follow **Morgan v GH Authority** as a guide for estimating the damages to which the claimant was entitled. In the assessment of damages, the object is never to provide the injured party with a windfall but with that sum of money which will restore that party to the position she would have been in, had she not suffered the wrong that gave rise to the claim (see **Livingstone v Rawyards**).

[67] In light of the above, I would, therefore, make the following orders:

1. The appeal is allowed.
2. The order for general damages is set aside.
Substituted therefor is the following: general damages awarded to the appellant in the sum of \$7,600,000.00 with interest at the rate of 3% from 31 August 2011 to 7 December 2016.
3. The order for special damages is affirmed.
4. The order for future medical expenses is affirmed.
5. Costs to the appellant, here and in the court below, to be taxed if not agreed.

Apology

[68] We unreservedly apologise for the delay in delivering this judgment.

EDWARDS JA

ORDER

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