[2022] JMSC Civ 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2015 HCV 01602

BETWEEN **ROBERT JOSEPH** **CLAIMANT**

AND **ISSOUFOU MOUTARY** **DEFENDANT**

IN OPEN COURT

Ms Shantel Jarrett instructed by Messrs. Zavia Mayne & Company for the Claimant

Mr John Graham Q.C. and Mesdames Peta-Gaye Manderson and Kristina Graham instructed by Messrs. John G. Graham & Company for the Defendant

Heard: May 24, June 10 and June 24, 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

Damages – Tenderness to the right lower abdomen – Indication of bacterial infection – Localized free air outside the bowel – A sentinel loop of bowel – Perforation of the sigmoid colon resulting from prior colonoscopy – Quantum of damages

A. NEMBHARD J

INTRODUCTION

[1] This matter concerns a Claim in negligence which is brought by the Claimant, Mr Robert Joseph, against the Defendant, Dr Issoufou Moutary. 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 negligence might be ascribed to the Defendant, Dr Issoufou Moutary, in respect of his post-procedure care of the Claimant, Mr Robert Joseph.

[2] By way of a Claim Form, which was filed on 13 March 2015, Mr Joseph alleges that, on 12 June 2014, as a result of the negligent performance of a colonoscopy that was conducted by Dr Moutary, he sustained, inter alia, a perforated colon, as a consequence of which he sustained loss, damage and incurred expense.

The genesis of the Claim

[3] The Claim was filed against the background that, in or around June 2014, Mr Joseph consulted Dr Moutary with respect to a colonoscopy. That procedure was to be performed by Dr Moutary, a Physician, specializing in gastrointestinal endoscopy.

[4] On 12 June 2014, Dr Moutary performed the colonoscopy procedure on Mr Joseph. The colonoscopy procedure was performed at the office of Dr Moutary, situate at 5 Perry Street, Montego Bay, in the parish of St. James. Mr Joseph was discharged from Dr Moutary's office on the same day.

[5] On 13 June 2014, Mr Joseph began to experience pain in his lower abdomen and back as well as vomiting and diarrhoea.

[6] On 14 June 2014, Mr Joseph's pain and discomfiture worsened. Mr Joseph contacted Dr Moutary by telephone and communicated his symptoms to him. Mr

Joseph was advised to attend at the office of Dr Moutary, which he did on the same day.

[7] While at the office of Dr Moutary, Mr Joseph was administered painkillers and Gravol and was referred to Radiology West, for the purpose of undergoing an x-ray.

[8] Following the x-ray, Mr Joseph's pain and discomfort progressively worsened.

[9] As a result of his continued pain and discomfiture, Mr Joseph sought and obtained a second opinion from Dr Jeffrey M. East. Mr Joseph was subsequently referred for a CT scan, which revealed that the symptoms that he was experiencing were as a result of a perforation of the colon.

[10] On 15 June 2014, Mr Joseph was admitted to the Montego Bay Hospital & Urology Centre, in the parish of St. James. There, he underwent surgery to repair the perforated colon.

[11] On 20 June 2014, Mr Joseph was discharged from the Montego Bay Hospital & Urology Centre.

[12] On 6 September 2014, Mr Joseph again began to experience excruciating pain and discomfort to his lower abdomen. As a consequence, Mr Joseph had to undergo a second surgery.

THE ISSUES

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

(i) Whether Dr Moutary owed a duty of care to Mr Joseph;

(ii) Whether Dr Moutary breached the duty of care owed to Mr Joseph;

(iii) Whether Dr Moutary's breach of the duty of care caused or materially contributed to the injuries sustained by Mr Joseph;

(iv) Whether Mr Joseph is entitled to recover Damages for pain, suffering, loss and damage incurred, as a consequence of Dr Moutary's breach of the duty of care and, if so: -

(a) What is the basis on which the Court is to assess the quantum of Damages to be awarded to him? and

(b) What is the quantum of Damages to be awarded him?

THE LAW

The claim in negligence

[14] 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

[15] 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.[1]

The burden and standard of proof

[16] 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.[2] This principle was enunciated by Lord Griffiths in **Ng Chun Pi and Ng Wang King v Lee Chuen Tat and Another**.[3] 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."*

[17] In **Miller v Minister of Pensions**,[4] 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: -

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[1] See – **Clerk & Lindsell on Torts**, 20th 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

[2] **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**, unreported, Suit No. CL1991/M036, judgment delivered on 21 July 2005

[3] Privy Council Appeal No. 1/1988, judgment delivered on 24 May 1988

[4] [1947] 2 All ER 372, at pages 373-374

"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

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

[19] Lord Bridge, in **Caparo Industries plc v Dickham**,[6] 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."

[20] 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."

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

[6] [1990] 1 All ER 568, at page 572

Breach of the duty of care

[21] 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.

[22] The vital decision of **Bolam v Friern Hospital Management Committee**[7] 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 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."* [8]

[23] In **Hunter v Hanley**,[9] 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

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

[8] 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

[9] 1955 SC 200, at page 205

been proved to be guilty of such failure of which no doctor of ordinary skill would be guilty, if acting with ordinary care.

Causation

[24] In an action for medical negligence the ordinary rules of causation apply. A claimant is required to prove that the defendant's breach of the duty of care 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.[10] 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 injury suffered. Even if a claimant has successfully established medical negligence, the issue of causation must still be determined.[11]

The 'but for' test

[25] 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.

[26] In **Clements v Clements**,[12] 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*

[10] 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

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

[12] [2012] 2 S.C.R., at paragraphs 8-10

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

[27] 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.

[28] In **McGhee v National Coal Board**,[13] 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

[13] [1972] 3 All ER 1008

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.

[29] 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 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."* [14]

Remoteness of damage

[30] 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.

[31] In this regard, in **Roe v Ministry of Health and Others. Woolley v Same**,[15] 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 Perter). 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."*

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14 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

15 (supra), at page 138 A-C

ANALYSIS AND FINDINGS

Whether Dr Moutary owed a duty of care to Mr Joseph

[32] In the present instance, the Court must first determine whether Dr Moutary owed a duty of care to Mr Joseph. In order to prove his case, Mr Joseph must prove that: -

(i) Dr Moutary owed him a duty of care;

(ii) Dr Moutary breached that duty of care; and

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

[33] 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.

[34] In light of the principles established by the authorities and in the circumstances of this case, the issue of whether Dr Moutary owed Mr Joseph a duty of care is not a complex one. The Court finds that Dr Moutary owed a duty of care to Mr Joseph to diagnose, advise and treat him with the ordinary skill required of his speciality.

Whether Dr Moutary breached the duty of care owed to Mr Joseph

[35] 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.

[36] In the present instance, Dr Moutary represents himself as a Physician specializing in gastrointestinal endoscopy. He professes to have some years of experience in this field. As a consequence, Dr Moutary is required to exercise the ordinary skill required of his specialty. He is not, however, required to possess the highest expert skill.

[37] In order to determine whether Dr Moutary is in breach of the duty care that he owed to Mr Joseph, there are two (2) issues that must be resolved. The Court must determine whether negligence may be ascribed to Dr Moutary, firstly, in respect of his performance of the colonoscopy procedure; and secondly, in respect of his post-procedure care of Mr Joseph.

[38] Learned Counsel Ms Shantel Jarrett contends, on Mr Joseph's behalf, that the perforation of his sigmoid colon was as a result of the failure of Dr Moutary to act with reasonable care and skill, in his performance of the colonoscopy procedure.

[39] Conversely, Learned Queen's Counsel, Mr John Graham, asserts, on behalf of Dr Moutary, that, for Mr Joseph to say that, by virtue of the fact of the perforation of his sigmoid colon, the Court should conclude that, by way of the doctrine of res ipsa loquitur, or, at the very minimal, the evidence that was elicited in cross examination, there was negligence on the part of Dr Moutary, would be to invite the Court into error.

[40] Mr Graham QC asserts that perforation of the colon is one of the known complications of a colonoscopy; that perforations may result without there being negligence on the part of the medical practitioner who performs such a colonoscopy procedure; and that the removal of the polyps and in particular that which was removed from Mr Joseph's sigmoid colon, would result in trauma to the colon, which, in turn, could lead to perforation.

[41] Additionally, Mr Graham QC submits, as the Court understands him, that Dr East does not say in his expert report that the presence of the perforation of the anti-mesenteric aspect of Mr Joseph's mid-sigmoid colon, was as a result of negligence on the part of Dr Moutary.

[42] Finally, Mr Graham QC maintains, the fact that a perforation of the colon wall rarely happens does not mean that on each occasion that it does occur that it must have been as a result of negligence on the part of the medical practitioner.

Whether Dr Moutary acted negligently in the performance of the colonoscopy procedure

[43] The Court readily accepts the submissions of Mr Graham QC, in this regard. The Court accepts that, the fact of the perforation of the anti-mesenteric aspect of Mr Joseph's mid-sigmoid colon, without more, is not indicative of negligence on the part of Dr Moutary, in his performance of the colonoscopy procedure.

[44] The Court accepts that colonoscopic perforation is a rare complication which is associated with a high rate of morbidity and mortality. The Court also accepts that the most common symptom of perforation of the colon is described as being abdominal pain and tenderness within several hours after the completion of the performance of the colonoscopy procedure.

[45] The Court also accepts that the fact that colonoscopic perforation occurs rarely is not indicative that, by virtue of the fact of the perforation of the anti-mesenteric aspect of Mr Joseph's sigmoid colon, Dr Moutary acted negligently.

The findings on the performance of the colonoscopy procedure

[46] The unchallenged evidence of Dr Moutary indicates that his findings on the performance of the colonoscopy procedure were that there was a sessile polyp of

approximately 6-8 mm in the distal ascending colon near hepatic flexure which was removed with the hot snare. There was another sessile polyp approximately 5-6 mm in the transverse colon-hepatic flexure which was also removed with the hot snare. A 4-5 mm sessile polyp was also seen at the junction of the sigmoid and descending colon. In the sigmoid, there was a flat 5 mm sessile polypoidal lesion and another 4 mm sessile polyp in the rectum. All polyps were removed and retrieved for histology.[16]

[47] From this evidence, which has neither been challenged nor contradicted by Mr Joseph, the Court finds, as a fact, that there was a flat 5 mm sessile polypoidal lesion in Mr Joseph's sigmoid colon, which was removed by Dr Moutary.

The expert medical evidence of Dr Jeffrey M. East

[48] An examination of the expert medical evidence of Dr Jeffrey M. East, Consultant General Surgeon and Clinical Epidemiologist, for the purpose of this analysis, is also instructive.

[49] The medical report of Dr East, dated 24 January 2015, reveals that Mr Joseph suffered the following: -

(i) Temperature of 99.2F;
(ii) Tenderness to the right lower abdomen;
(iii) White cell count was 14x10 9/L with a neutrophil leucocytosis (an indication of bacterial infection);
(iv) Plain abdominal x-rays showed what looked like localized free air (meaning air was outside the bowel, where it is not supposed to be);
(v) A sentinel loop of bowel (a common response to localized inflammation in the abdomen) in the left lower quadrant;

[16]See – The Colonoscopy Report, dated 12 June 2014, under the hand of Dr I. Moutary, which was received in evidence as exhibit 18

(vi) A clinical diagnosis of perforation of the sigmoid colon resulting from the prior colonoscopy;

(vii) The diagnosis of colon perforation was confirmed by CT scan.

[50] On 15 June 2014, Mr Joseph's condition deteriorated. Dr East performed a laparotomy, a surgical entry into the abdominal cavity. A 0.75 cm perforation was found in the anti-mesenteric aspect of his mid-sigmoid colon, the side opposite the blood supply to the colon and a common site of colonoscopic perforation, with generalized fecal peritonitis. The perforation was excised, the colon closed transversely in two (2) layers, an omental patch, a pad of fat from the abdominal cavity, was applied to the repair and the peritoneal cavity copiously lavaged. Abdominal fascia was closed and skin left open (a commonly used strategy to reduce the risk of wound infection in cases of peritonitis).

[51] Postoperatively, Mr Joseph developed a respiratory tract infection (pneumonia) and suffered a prolonged ileus (bowel paralysis, a common complication of peritonitis). The laparotomy skin wound was closed and Mr Joseph was discharged from hospital to continue post-discharge deep-vein-thrombosis prophylaxis at home.

[52] Mr Joseph made steady progress in his recovery but had to be readmitted in hospital on 6 September 2014, with symptoms and signs that turned out to be due to adhesive small bowel obstruction (a complication of the previous peritonitis and laparotomy) for which he required a second laparotomy.

[53] At the second laparotomy, the adhesions were lysed (incised) and Mr Joseph had a gradual and uncomplicated recovery.

[54] The following evidence of Dr East bears repeating: -

> *"**A 0.75 cm perforation was found in the anti-mesenteric aspect of his mid-sigmoid colon**, the side opposite the blood supply to the colon and a common site of colonoscopic perforation, with generalized fecal peritonitis. The perforation was excised, the colon closed transversely in two (2) layers, an omental patch, a pad of fat from the abdominal cavity, was applied to the repair and the peritoneal cavity copiously lavaged. Abdominal fascia was closed and skin left open (a commonly used strategy to reduce the risk of wound infection in cases of peritonitis)."* **[Emphasis added]**

[55] When the Court juxtaposes the evidence of Dr Moutary, in relation to the location and removal of the flat 5 mm sessile polypoidal lesion which was found in Mr Joseph's sigmoid colon, with that of Dr East, in relation to the location of the perforation, which was found in the anti-mesenteric aspect of the mid-sigmoid colon, the Court finds that Mr Joseph has not established, on a preponderance of the evidence, that Dr Moutary acted negligently, in his performance of the colonoscopy procedure.

Whether Dr Moutary acted negligently in his post-procedure care of Mr Joseph

The expert medical evidence of Dr Mills

[56] Ms Jarrett submits, on behalf of Mr Joseph, that the Court ought to reject the evidence of Dr Mills as it is both unreasonable and unreliable, having regard to all the circumstances.

[57] To buttress that submission, Ms Jarrett referred the Court to the authority of **Jereta Bowniafair v James Monroe**.[17] At paragraph 30, D.O. McIntosh J had the following to say: -

[17] [2012] JMSC Civ 124

> *"What other practitioners would have done, had they been in the position of the Defendant, is a material consideration. However, the fact that there exists a body of medical opinion supporting the conduct of the Defendant does not bar a judge from making a finding that the Defendant was negligent in his conduct. This is so as a judge is not bound to accept the evidence of an expert witness unless satisfied that the body of opinion being relied on is both reasonable and responsible. Although it will be a rare case in which a judge can properly reach the conclusion that the genuine opinion of a competent medical expert is unreasonable this does not alter the fact that professional opinion must be capable of withstanding logical analysis."*

[58] Ms Jarrett submitted further that the expert medical evidence of Dr East is sufficient evidence, on the basis of which the Court can make a determination as to whether Dr Moutary was negligent in his treatment of Mr Joseph. Ms Jarrett asserts that the Court ought properly to reject the evidence of Dr Mills, as being both unreasonable and unreliable, and to accept the evidence of Dr East, in this regard.

[59] The Court accepts the submissions advanced by Ms Jarrett in this regard. The Court finds that the evidence of Dr Mills is both unreasonable and unreliable and is incapable of withstanding logical analysis.

[60] In his report dated 1 September 2016, Dr Mills is quoted as follows: -

> *"**I have been asked to comment on whether Dr Moutary acted with reasonable skill, care and in an acceptable manner and I find that in the documents provided and with no further information he did act in this manner**. The patient presented for a screening colonoscopy which there was sufficient indication to perform. Reasonable consent was obtained. The procedure of colonoscopy as outlined revealed colonic polyps which were removed using standard endoscopic techniques. The patient was recovered and discharged. The patient returned with a possible complication and was sent for an appropriate investigation which was reportedly normal by an expert in the*

field. ***The events occurring after this x-ray are not clear but as presented I see no unreasonable action on the part of the physician Dr Moutary****."* **[Emphasis added]**

[61] It is clear from a reading of Dr Mills' report that he conducted no independent investigation of or made no independent enquiry into or assessment of the circumstances of Dr Moutary's care of Mr Joseph. It is equally clear that Dr Mills' opinion is informed by the information that was provided him, either by Dr Moutary himself or by someone acting for and on his behalf. For that reason, the Court finds that his evidence is both unreasonable and unreliable. It is also instructive that, in respect of the x-ray image that was provided to Dr Mills, he states that that image is not suitable for his personal comment. Regrettably, Dr Mills does not indicate what informs his view in this regard.

The patient progression notes

[62] In this regard, Ms Jarrett submits that, despite the assertions made by Dr Moutary, that he intended to admit Mr Joseph for observation and for a CT-scan to be done, his notes do not reveal that a CT-scan or any further treatment formed part of any plan and/or intention on his part. Nor do Dr Moutary's notes reveal that he had begun or intended to treat Mr Joseph, using non-operative or conservative treatment.

[63] Ms Jarrett complains that Dr Moutary did not give Mr Joseph intravenous fluids; that Dr Moutary did not recommend absolute bowel rest; and that Dr Moutary did not recommend and/or prescribe intravenous administration of broad spectrum antibiotics. None of these treatment options, Ms Jarrett contends, was provided to Mr Joseph.

[64] Ms Jarrett maintains that, based on the symptoms exhibited by Mr Joseph, Dr Moutary had a responsibility to make a diagnosis and to refer the former

promptly, for further treatment. It is further submitted that Dr Moutary failed to act with immediacy in his treatment of Mr Joseph.

[65] Finally, Ms Jarrett asserts that Dr Moutary was negligent in the post-procedure care of Mr Joseph; that Dr Moutary is in breach of the duty of care that he owes to Mr Joseph; and that Dr Moutary's actions fell below the standard of care required of clinicians within his area of speciality.

[66] Again, the Court accepts the submissions advanced by Ms Jarrett in this regard and finds that Dr Moutary was negligent in his post-procedure care of Mr Joseph.

[67] In his patient progression notes, Dr Moutary indicates that, on 14 June 2014, at 12:20 p.m., Mr Joseph complained of abdominal pain and of experiencing this pain since 13 June 2014, which worsened on the morning of 14 June 2014. Dr Moutary notes that there was no nausea or vomiting, that Mr Joseph was able to pass his stool and that his abdomen was soft and tender. Dr Moutary further indicates that there was diffused abdominal tenderness, with tenderness more in the pelvic area. There was no rebound tenderness.

[68] According to the patient progression notes, at this point, Dr Moutary is seeking to rule out perforated viscus, which is a reference to the lining of the bowels. It therefore means that, at this point, at the very least, Dr Moutary has addressed his mind to the possibility of a perforation of the lining of the bowels, to the extent that he seeks to rule it out.

[69] The patient progression notes reveal further, that, on 14 June 2014, at 2:30 p.m., the x-ray results are returned to Dr Moutary, which provide no evidence of perforation. That notwithstanding, Mr Joseph experiences another episode of severe abdominal pain, at which time, the notes indicate that Dr Moutary administered painkillers and Gravol to Mr Joseph.

[70] Again, Dr Moutary's patient progression notes indicate that he has addressed his mind to two (2) possible diagnoses; urolithiasis or stone(s) in the urinary tract; and perforated viscus and an intention on his part to rule out one (1) of these diagnoses.

[71] What the patient progression notes do not indicate however, is the next level of investigation that Dr Moutary intended to conduct, with a view to making a diagnosis in respect of the worsening symptoms with which Mr Joseph was presenting. This, in the context of the acute worsening of Mr Joseph's symptoms in the face of an x-ray result which provided no evidence of perforation.

[72] The Court finds alarming, the unmistakeable absence of an identified course of action, on the part of Dr Moutary, in respect of the next level of investigation to be conducted by him, in the face of the progressive worsening of the symptoms with which Mr Joseph presented, subsequent to the colonoscopy procedure.

[73] In the result, the Court finds that Dr Moutary failed to act with immediacy in his treatment of Mr Joseph, as part of his post-procedure care; that Dr Moutary's actions fell below the standard of care required of clinicians within this area of speciality; and that Dr Moutary breached the duty of care which he owed to Mr Joseph.

Whether Dr Moutary's breach of the duty of care caused or materially contributed to the injuries sustained by Mr Joseph

[74] The third and final element of the tort requires Mr Joseph to prove that Dr Moutary's breach of the duty of care caused, or, at the very least, materially contributed to, the damage or loss sustained by him. Where that breach of duty is proved, the burden of proof remains on Mr Joseph to establish that causal link between the damage sustained by him and the conduct of Dr Moutary.

[75] The Court finds that Dr Moutary's negligence in his treatment of Mr Joseph, as part of his post-procedure care, materially contributed to the injury, pain, loss and damage suffered by Mr Joseph; and that the injury, pain, loss and damage suffered by Mr Joseph were reasonably foreseeable.

Findings of fact

[76] In the result, the Court finds, on a preponderance of the evidence, that the following are facts: -

(i) That in or around June 2014, Mr Joseph consulted Dr Moutary in respect of a colonoscopy procedure;

(ii) That on 12 June 2014, Mr Joseph attended the office of Dr Moutary, located at 5 Perry Street, Montego Bay, in the parish of Saint James, where the colonoscopy procedure was performed on Mr Joseph;

(iii) That the colonoscopy procedure, as well as a polypectomy, were performed by Dr Moutary;

(iv) That Mr Joseph was discharged from Dr Moutary's care on the same day, 12 June 2014;

(v) That on 13 June 2014, Mr Joseph began to experience pain in his lower abdomen and presented with vomiting and diarrhoea;

(vi) That by 14 June 2014, Mr Joseph's pain and discomfort had worsened;

(vii) That on 14 June 2014, Mr Joseph returned to the office of Dr Moutary, who contacted Radiology West and requested that an abdominal x-ray be carried out on Mr Joseph;

(viii) That, while Mr Joseph was at the office of Dr Moutary, he [Dr Moutary] administered painkillers and Gravol, to Mr Joseph;

(ix) That, following the x-ray, Mr Joseph began to experience excruciating pain and discomfort anew;

(x) That Dr Moutary carried out no further tests or assessments of Mr Joseph, nor was any additional medication prescribed for or administered to Mr Joseph;

(xi) That Mr Joseph sought and obtained a second opinion from Dr Jeffery East;

(xii) That Dr East referred Mr Joseph to the Mobay Hope Medical Centre to undergo a CT scan;

(xiii) That, after completing the CT scan, Mr Joseph returned to Dr East's office where he was advised that the CT scan confirmed that the symptoms he was experiencing were as a result of a perforation of his colon;

(xiv) That Mr Joseph suffered a 0.75 cm perforation in the anti-mesenteric aspect of his mid-sigmoid colon, the side opposite the blood supply to the colon and a common site of colonoscopic perforation, with generalized fecal peritonitis;

(xv) That the perforation was excised, the colon closed transversely in two (2) layers, an omental patch, a pad of fat from the abdominal cavity, was applied to the repair and the peritoneal cavity copiously lavaged. Abdominal fascia was closed and skin left open;

(xvi) That following that diagnosis, Dr East scheduled an emergency surgery for 15 June 2014;

(xvii) That, on 15 June 2014, Mr Joseph was admitted to the Montego Bay Hospital and Urology Centre for the reparative surgery to repair his perforated colon;

(xviii) That this surgical procedure was performed by Dr East;

(xix) That on 20 June 2014, Mr Joseph was discharged from hospital and continued to receive treatment, inclusive of physical therapy;

(xx) That over the succeeding two (2) months, Mr Joseph continued his recovery at his home, and continued to take his prescribed medication;

(xxi) That on 6 September 2014, Mr Joseph again began to experience excruciating pain and discomfort to his lower abdomen. As a result, he was rushed to the Montego Bay Hospital and Urology Centre where he was readmitted;

(xxii) That Mr Joseph had to undergo another surgical procedure to his colon which was performed by Dr East as well as Dr Dwayne Hall;

(xxiii) That Mr Joseph was unable to work fulltime until 12 January 2015;

(xxiv) That Mr Joseph was unable to effectively operate his business, Jamaica Prime Foods Limited, which included three (3) restaurants and a catering company;

(xxv) That Mr Joseph had difficulty enjoying the pastimes to which he was accustomed and his social life suffered greatly;

(xxvi) That during his recovery period, Mr Joseph struggled to care for himself and had difficulty carrying out his usual household activities, requiring him to pay for household assistance for a period of seven (7) months;

(xxvii) That Dr Moutary was negligent in his post-procedure care of Mr Joseph;

(xxviii) That Dr Moutary failed to act with immediacy in his treatment of Mr Joseph as part of his post-procedure care;

(xxix) That Dr Moutary's actions fell below the standard of care required of clinicians within this area of speciality;

(xxx) That Dr Moutary breached the duty of care which he owed to Mr Joseph;

(xxxi) That Dr Moutary's negligence in his treatment of Mr Joseph, as part of his post-procedure care, materially contributed to the injury, pain, loss and damage suffered by Mr Joseph; and

(xxxii) That the injuries sustained by Mr Joseph were reasonably foreseeable.

Whether Mr Joseph is entitled to recover Damages for pain, suffering, loss and damage incurred, as a consequence of Dr Moutary's breach of the duty of care

Assessment of Damages

The approach

[77] Generally speaking,[18] 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.[19] The important consideration in making an award of General Damages is the need to arrive at a figure which will compensate the claimant for the injuries he sustained.

[78] 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.

[79] In **Beverley Dryden v Winston Layne**,[20] 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."*

[18] There are, of course, exceptions, such as cases involving failed sterilization.

[19] See – Clerk & Lindsell on Torts, 20th Edition, Chapter 28

[20] SCCA No 44/87, judgment delivered on 12 June 1989

[80] In the case of **Singh (an infant) v Toong Fong Omnibus Co Ltd**,[21] 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

[81] Mr Joseph is awarded Special Damages in the sum of Nine Hundred and Thirty-Six Thousand Nine Hundred and Forty-One Dollars and Twenty-Four Cents ($936,941.24).

[82] Additionally, in respect of the claim for travelling expenses, the Court makes an award in the sum of Fifteen Thousand Dollars ($15,000.00).

[83] Accordingly, the Court makes a total award of Special Damages in the sum of Nine Hundred and Fifty-One Thousand Nine Hundred and Forty-One Dollars and Twenty-Four Cents ($951,941.24), with interest thereon at the rate of three percent (3%) per annum, from 12 June 2014 to the date of judgment.

[84] The Court makes no award for loss of income or for household assistance for the reason that Mr Joseph has not provided the Court with an evidential basis on which such an award might be computed.

[21] [1964] 3 All ER 925, at page 927

General Damages

[85] Mr Joseph relies on the authority of **Jereta Bowniafair v James Monroe**,[22] in which the claimant suffered the following injuries: -

(a) Severe abdominal pain and distension of the abdomen (swelling of the abdomen outward);
(b) Tenderness of the abdomen;
(c) Nausea;
(d) Vomiting;
(e) Diarrhoea;
(f) Four-inch scar over the right lower abdomen;
(g) Tenderness in the left loin;
(h) Chills and rigors;
(i) Unnecessary appendectomy;
(j) Increased urinary frequency; and
(k) Cramping and epigastric pains.

[86] The claimant was awarded General Damages in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00), in September 2012, which updates to Three Million Eight Hundred and Ninety-Five Thousand Three Hundred and Forty-Eight Dollars and Eighty-Four Cents ($3,895,348.84).

[87] Mr Joseph also relies on the authority of **Mary Hibbert v Reginald Parchment**.[23] There the claimant sustained a gunshot wound to the abdomen. She was admitted to hospital and underwent emergency surgery which involved repair of the small bowel and a loop colostomy. The claimant was discharged from hospital and had to attend another hospital about a week later, at which time the

[22] supra

[23] Suit No. C.L. 1986/H129, unreported, judgment delivered on 6 May 1999

colostomy was closed. Following that closure, the claimant developed a faecal fistula and was transferred to the hospital she had previously attended, where the closure was repeated. The claimant had to wear the colostomy for five (5) months and experienced pain, discomfort and embarrassment.

[88] The claimant was awarded General Damages in the sum of Nine Hundred Thousand Dollars ($900,000.00), in May 1999. That award updates to Three Million Four Hundred and Ten Thousand Nine Hundred and Nine Dollars and Nine Cents ($3,410,909.09).

[89] It is submitted that case of **Mary Hibbert** bears striking similarities to the instant case. Both cases touch and concern injuries to the intestine which required corrective surgery on two (2) separate occasions. It is submitted that Mr Joseph experienced pain and discomfort for a period of seven (7) months while Ms Hibbert suffered for a period of five (5) months.

[90] In those circumstances, the Court is being asked to make an award of General Damages in the sum of Four Million Dollars ($4,000,000.00).

[91] The Court takes into consideration the injuries sustained by Mr Joseph, as indicated in the medical evidence of Dr East as well as his pain and suffering and the period of seven (7) months for which he continued to experience pain. The Court will make an award of General Damages in the sum of Three Million Five Hundred Thousand Dollars ($3,500,000.00), with interest thereon at the rate of three percent (3%) per annum, from 13 March 2015 to the date of judgment.

DISPOSITION

[92] It is hereby ordered as follows: -

(1) Judgment is entered in favour of the Claimant, Robert Joseph, against the Defendant, Issoufou Moutary, on the issue of liability;

(2) Special Damages are assessed and awarded to the Claimant against the Defendant in the sum of Nine Hundred and Fifty-One Thousand Nine Hundred and Forty-One Dollars and Twenty-Four Cents ($951,941.24), with interest thereon at the rate of three percent (3%) per annum, from 12 June 2014 to the date hereof;

(3) General Damages are assessed and awarded to the Claimant against the Defendant in the sum of Three Million Five Hundred Thousand Dollars ($3,500,000.00), with interest thereon at the rate of three percent (3%) per annum, from 17 April 2015 to the date hereof;

(4) Costs are awarded to the Claimant against the Defendant and are to be taxed if not sooner agreed;

(5) The Defendant is granted a stay of execution of these Orders for a period of Twenty-One (21) days from the date hereof; and

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