

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2024/0026 (formerly GDAHCV2020/0208)

BETWEEN:

NICHOL SMITH
(Substituted as personal representative of the estate of Evan Smith)
Claimant

and

[1] **DOLAN KAVANAGH**
[2] **SARAH HATTON**
[3] **TED KAVANAGH**
(a minor by his father and next friend DOLAN KAVANAGH)
[4] **ROBERT KAVANAGH**
(a minor by his father and next friend DOLAN KAVANAGH)
Defendants

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Caryn Adams for the Claimant
Mr. Arley Gill for the Defendants

2024: July 17th; 30th.

RULING

[1] **ACTIE, J.:** This claim came on for trial on 12th March 2024. The court found in favour of the claimant and directed the parties to attempt a settlement on quantum, failing which damages would be assessed. The parties failed to settle, and the matter now comes on for the assessment of damages. It is necessary to give some background for the purposes of the assessment.

Background facts

- [2] The present action arises from an incident where the defendants' dog was run over by a vehicle driven by the claimant, Evan Smith, now deceased. Nichol Smith, wife of the deceased, was substituted for the purposes of these proceedings. It is the evidence that Mr. Smith operated a small business which provided maintenance and services of buildings. On 25th June 2020, Mr. Smith drove his vehicle along the Fort Jeudy Main Road transporting his workmen to a job site. Upon arriving at the job site, Mr. Smith was alerted by one of his workers that the vehicle had struck a dog. Shortly thereafter the first defendant drove to the job site and demanded to know the identity of the owner of the vehicle, and then left after a brief exchange of words.
- [3] Mr. Smith was leaving Fort Jeudy with one of his workmen to attend to another job site when he met the defendants standing in the middle of the road. The first defendant signalled Mr. Smith to stop his vehicle and directed that he was not permitted to leave until the police arrived. The first defendant then reached into Mr. Smith's vehicle through the open window and removed the keys from the ignition. Mr. Smith attempted to exit the vehicle and the first defendant slammed the door unto Mr. Smith's chest, striking him on his face and body. Mr. Smith's body was propelled backwards onto the vehicle and his head struck the vehicle. While Mr. Smith attempted to regain control of himself, the defendants approached him, and began punching him in his face, chest and head. Throughout the attack, Mr. Smith was unable to defend himself and the defendants referred to Mr. Smith as being "retarded", "stupid" and used obscenities and other derogatory phrases about him.
- [4] Mr. Smith was diagnosed with the following injuries, namely:
- (1) Laceration to the upper lip;
 - (2) Deformity of the upper lip;
 - (3) Facial contusion;
 - (4) Multiple contusions to thorax, abdomen and limbs;
 - (5) Post-concussion syndrome with associated amyotrophic lateral sclerosis;
 - (6) Acute Stress Disorder;

- (7) Fractured upper left canine and lower two-thirds of the crown missing.

Special Damages

- [5] It is trite that special damages must be pleaded, particularized and proved. The claimant claims special damages comprising the following:
- (1) Medical report of Dr. Kester Dragon: \$1,020.00;
 - (2) Medical Report of Dr. Justin La Rose: \$2,500.00;
 - (3) Dental Surgical extraction, temporary prosthesis and dental implant: \$4,450.00;
 - (4) Stamps to file claim: \$26.00; Bailiff fees for personal service: \$100.00; and Fixed Costs: \$750.00
- [6] The defendants' only dispute is the sum of \$600.00 in the invoice of Dr. La Rose. Counsel for the defendants contends that the sum is excessive. Counsel for the claimant avers that the sum represented the normal sum of home visits. The defendants failed to provide evidence to establish the normal fee for home visits, and accordingly, the amount is allowed. The claim for stamps, bailiff fees for service and fixed costs are sums allowed on default judgment, and are not allowed as the prescribed costs regime is the appropriate costs for the assessment of damages. Accordingly, the court makes an award for special damages in the sum of \$7,970.00.

General Damages

- [7] Ms. Caryn Adams, counsel for the claimant, argues general damages for pain and suffering and loss of amenities in the sum of \$65,000.00. Mr. Arley Gill for the defendants on the other hand proposes an award in the sum of \$10,000.00.
- [8] In **Livingstone v Rawyards Coal Co.**¹, Lord Blackburn, stated that:
- “... where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

¹ (1880) 5 App. Cas 25

- [9] The well-known principles which govern awards for personal injuries are laid down in **Cornilliac v St. Louis**². Consideration is given to the nature and extent of the injuries sustained, the nature and gravity of the resulting physical disability, the pain and suffering endured, the loss of amenities endured, and the extent to which the claimant's pecuniary prospects had been affected.
- [10] The claimant's injuries were particularized in the various medical reports of the court appointed experts namely:
1. The medical evidence of **Dr. Kecia Brooks Smith Lowe** dated 30th April 2021, states that Mr. Smith was examined on 25th June 2020 approximately one hour after the altercation. The findings from the examination and information given by Mr. Smith reads: "Patient's mouth was swollen, especially right upper lip with laceration underneath due to facial trauma against his teeth. Patient was assaulted by four people who hit him repeatedly and hurt him by using the car door against his chest".
 2. The medical evidence of **Dr. Kester Dragon**, Orthopaedic Surgeon, states that Mr. Smith was examined on 29th June 2020 and diagnosed his injuries as:
 - a. Laceration of 4mm to upper lip;
 - b. Facial contusion;
 - c. Multiple Contusions to thorax, abdomen and limbs.
 3. The medical evidence of **Dr. Justin La Rose**, Neurosurgeon, states that Mr. Smith was examined on 29th June 2020. He observed that Mr. Smith had a swollen upper lip and was in a post traumatic state. Mr. Smith was diagnosed with post concussion syndrome with associated Amyotrophic lateral Sclerosis and was prescribed pain and anti-inflammatory medication. The report further stated that Mr. Smith's underlying pathology is a high-risk patient for suicidal attempt which had been made worse by the physical assault and his inability to defend himself from such aggression.

² 7 WIR 491

4. The medical evidence of **Dr. Julie Du Bois**, Dental Surgeon, states that Mr Smith was examined on 3rd July 2020 and it was noted that the upper left canine was fractured and lower two thirds (2/3) of the crown was missing as a result of injury sustained on 25th June 2020. To resolve the problem required the extraction of the canine or what was left of it and replacement with a dental implant.
 5. The medical report of **Mr. Josh Hector**, Psychologist, dated 29th July 2021 described the claimant as presenting with borderline depression, moderate anxiety and moderate PTSD symptoms.
- [11] There is a dispute as to the extent of physical injuries suffered by the claimant. Dr. Lowe, the first doctor to examine the claimant, restricts Mr. Smith's injury to that of facial trauma with the swelling of the claimant's mouth and the laceration underneath his right upper lip. Although Dr. Lowe mentions that the claimant was hurt by a car door used against his chest, she records no injury thereto.
- [12] An award for pain and suffering and loss of amenities is intended to compensate the claimant for the impact of the injury on the claimant's enjoyment of life. Each case must be considered on its own facts considering the combined effect of the injuries. Mr. Smith is now deceased but not as a result of the incident as it is the evidence that he had a preexisting condition.
- [13] Both parties provided authorities to assist the court in arriving at an appropriate award. The learned Harris J. in **Randy James v Leroy Lewis et al**³, citing the well-known principle in **Wells v Wells**⁴ said:

“In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would be clearly very helpful in relating the injuries on a comparative scale. This is not a precise science, leaving much room for the trial judge's discretion.”

³ Claim No. ANUHCv2007/0403

⁴ [1998] 3 All ER 481

[14] Ms. Caryn Adams, counsel for the claimant, suggests an award of \$65,000.00 for pain and suffering and loss of amenities and psychological effects and cited the cases:

- i. **Mercedes Delplesche v Samuel Emmanuel De Roche**⁵, where the claimant suffered trauma to the head and left knee; abrasions to face; laceration to forehead, nose and lower lip; and bleeding from left nostril. She was awarded general damages in the sum of \$55,000.00 for pain, suffering and loss of amenities;
- ii. **Breanna Kerissa Modeste by her next friend and natural Tutor Valda Modeste v Orban Lambert**⁶, where the claimant was awarded general damages in the sum of \$55,000.00 for soft tissue injuries to the face and forehead as well as a diagnosis of post-traumatic stress disorder;
- iii. **Anselma Mederick v Sylvester James and Angus Andas**⁷, where the claimant suffered inter alia, headache to left side of head, blurred vision and numbness; lacerations; neck and back pain; post-traumatic brain injury syndrome; and cervical spondylosis myelopathy decompensation by trauma (MVA) causing whiplash injury and cordial concussion. The claimant was awarded general damages in the sum of \$80,000.00;
- iv. **Wadadli Cats Limited v Frances Chapman**⁸, where the claimant suffered severe bruising to the head, severe pain in the neck and arm, bruising of the inner ear and post-concussion syndrome, paraesthesia – pins and needles in her right arm, numbness over the right thumb and forefinger, cervical spondylosis and a mild degree of carpal tunnel syndrome, the court awarded general damages for pain suffering and loss of amenities of \$120,000.00;
- v. **Jacqueline Pena and Jasper de Jesus v British Virgin Islands Health Services**⁹, a case concerned with the psychiatric injury of nervous shock due to the disposal of the body of the claimants' baby.

[15] Mr. Arley Gill for the defendants suggests an award in the sum of \$10,000.00 for general damages and relies specifically on the decisions in **Royal George v AG**

⁵ SVG Claim No 41 of 2012

⁶ SLUHCv2019/0026

⁷ SLUHCv2018/0511

⁸ ANU Civil Appeal No.16 OF 2004

⁹ BVIHCv2012/0101

of **Commonwealth of Dominica**¹⁰ and **Cain Alexander v The Attorney General**¹¹ where the court made awards in the sum \$7,000.00 for assault and battery.

[16] The court finds that the injuries suffered in the cases cited by the claimant are more severe than the injuries suffered by the claimant in the case at bar. On the other hand, the claimants in the cases forcibly relied by the defendant in their claims for assault and battery did not suffer any physical injuries. The extent of physical and psychological post-traumatic stress disorder; injuries suffered by the claimant are not comparable in the circumstances.

[17] The authors of **Halsbury's Laws of England**¹² state that:

“In a claim of assault or battery the claimant is entitled to recover by way of general damages compensation for any physical or mental injury which the assault has caused, and for the associated suffering or injury to feelings; these damages are determined by the circumstances of time and place and the manner of the wrong. Consequential damages are recoverable if not too remote.”

[18] Each case must be considered on its own facts, with a view to determining a figure which reflects the combined effect of the injuries. Consideration must be given to the laceration, contusions, resulting deformity, the fractured canine of the claimant, as well as the post-concussion syndrome with associated amyotrophic lateral sclerosis. It is also the claimant's evidence that Mr. Smith had difficulty in consuming food and hot drinks for about one (1) month after the incident. It is also the evidence that Mr. Smith had a preexisting condition.

[19] The egg -shell skull principle is that the defendant must take his victim as he finds him. The text **Winfield and Jolowicz on Tort**¹³ reads:

“It is no answer to the sufferers claim for damages that he would have suffered less injury if he had not had an unusually thin skull or an unusually weak heart The plaintiff's weakness cuts both ways however his damages are likely to be less than those of a normal person suffering the

¹⁰ DOMHCV2014/0021

¹¹ SLUHCV2006/0247

¹² (2021) Vol 97A para 139

¹³ 14th ed at page 165

same injury to reflect the greater risk to which he is exposed by the normal vicissitudes of life. The same (or a similar) principle operates when the plaintiff's injury is exacerbated by a combination of his abnormality and some external force which foreseeably and naturally intervenes after the incident."

- [20] The medical evidence from Dr. Josh Hector indicates that Mr. Smith's psychological state was affected as a result of the incident. Mr Smith was assessed with clinical depression and sleep disorder which he indicated was secondary to the incident. The court, taking the medical evidence and the impact at the time of the incident prior to the claimant's demise, makes an award in the sum of \$35,000.00 for pain and suffering and loss of amenities.

Exemplary & Aggravated Damages

- [21] The claimant pleaded exemplary and aggravated damages but abandoned exemplary damages at the hearing.

- [22] In **Dale Naylor and Attorney General of Antigua and Barbuda**¹⁴, Commissioner of Police and others, Kelsick J. [Ag.] (as he then was) awarded a sum of \$10,000.00 for aggravated damages. The learned judge restated the statement of Lord Woolf M.R. in **Thompson v Commissioner of Police of Themetropolis**¹⁵:

"Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages."

- [23] Aggravated damages are awarded where there is any arbitrary, outrageous or unlawful conduct by the defendant. The court must consider the aggravating features at the time of the incident that shows that the defendant behaved in a high-handed, insulting, malicious or oppressive manner. The indignity, mental suffering, disgrace and humiliation and any attendant loss of social status and injury to reputation are also taken into consideration.

¹⁴ ANUHCv1999/0308

¹⁵ [1998] Q.B. 498, at page 514

- [24] It is the evidence that the defendants exerted some level of perceived self-righteousness by blocking the roads with their person and removing Mr. Smith's keys from the ignition of his vehicle. It is evident that there was animosity exuded by the defendants, especially in the anger of the death of their dog. The defendants were all emotional and angry at their loss. The second defendant in cross examination admits her anger and distraught as she said they had lost a family member.
- [25] It is also the evidence that Mr. Smith, due to his pre-existing condition, was unable to explain or defend himself. He would have obviously suffered indignity, disgrace and humiliation in the presence of his workers and the defendants' workers who were on the scene at the time of the incident.
- [26] The defendants boldly stated that there was no remorse for their actions and denied battering the claimant even considering the clear evidence. The lack of remorse continued at the trial when the second defendant persisted in stating that the medical referral issued by the police to Mr. Smith on scene of the incident was based on the insistence of the claimant's wife. The court does not accept the defendants' version of facts as the contemporaneous report of Dr. Lowe who examined Mr. Smith within an hour of the incident clearly supports the claimant's facial injuries.
- [27] The court finds that defendants' vicious attacks on the claimant were deliberate callous, intentional and well calculated. The removal of claimant's vehicle key from the ignition to force the Mr. Smith to remain on the scene was humiliating, especially considering that Mr. Smith was unable to defend himself, both verbally and physically. Accordingly, an award in the sum of \$20,000.00 for aggravated damages is appropriate in the circumstances.

Conclusion

- [28] In summary and for the foregoing reasons, it is ordered and directed as follows:.
- (1) Judgment is entered against the 1st and 2nd defendants.
 - (2) The 1st and 2nd defendants shall pay the claimant the following awards:

- i. Special Damages in the sum of \$7,970.00 with interest at the rate of 3% per annum from the filing of the claim until judgment and at the rate of 6% from the date of judgment until payment in full.
- ii. General damages for pain and suffering and loss of amenities in the sum of \$35,000.00 with interest at the rate of 6% from the date of judgment until payment in full.
- iii. Aggravated damages in the sum of \$20,000.00.
- iv. Costs agreed in the sum of \$ 4250.00

Agnes Actie
High Court Judge

By the Court

Registrar