

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

GRENADA

CLAIM NO. GDAHCV2013/0179

BETWEEN:

FERRON FRANCIS

Claimant

and

[1] **SEBASTIAN BAIN**
[2] **VANELLA BAIN**
[3] **JAMAL THOMAS**
[4] **CARVEL TELESFORD**

Defendants

Before:

The Hon. Mr. Justice Raulston L.A. Glasgow

High Court Judge

Appearances:

Mr. Alban John with him Ms. Vern Ashby for the Claimant
Ms. Jasmin Redhead for the first Defendant

2021: November 18;
2022: January 3.

JUDGMENT

[1] **GLASGOW, J.:** On or about 16th April 2011, the claimant, Ferron Francis, (Mr. Francis) and the third and fourth defendants, Jamal Thomas (Mr. Thomas) and Carvel Telesford, (Mr. Telesford) were involved in a fracas at a bar known as Bain's Disco in Perdmontemps in the parish of Saint David, Grenada. Bain's Disco is a bar and nightclub which at the material time was owned and/or operated by the first defendant, Sebastian Bain together with his late wife, the

second defendant, Vanella Bain (together called “the Bains”). During that fracas at Bain’s Disco, Mr. Francis suffered injuries. He seeks damages for assault and personal injuries, among other relief against the Bains.

[2] On 12th June 2013, Mr. Francis obtained judgement in default of defence against Mr. Thomas and Mr. Telesford. At trial, the court was informed that the second defendant, Vanella Bain (Mrs. Bain), who was the wife of Mr. Bain, passed away prior to the commencement of the trial. Therefore, at trial, Mr. Francis only proceeded with his claim against Mr. Bain for breach of duty of care.

[3] In respect of witnesses, Mr. Francis’ expert witness, Dr. Kester Dragon, was called and his evidence was tendered. However, Mr. Bain elected not to cross-examine Dr. Dragon. Mr. Bain informed the court that he intended to call the third defendant, Mr. Thomas, to testify on his behalf concerning the fight between him and Mr. Francis. However, the court limited Mr. Thomas’ evidence in accordance with its powers under CPR 39.2, since the facts in relation to the fight are not largely disputed and the issues before the court are whether Mr. Francis was owed a duty of care by Mr. Bain and whether that duty was breached.

Mr. Francis’ case

[4] On the night of 15th April 2011, Mr. Francis, a tiler by profession, went to Bain’s Disco at Perdmontemps. Mr. Francis was 29 years old at the time of the incident. Sometime between 11:30pm and 12:30 am, Mr. Thomas and Mr. Telesford entered the bar and suddenly attacked Mr. Francis with a cutlass, chopping him on his left arm and throwing him over a balcony outside Bain’s Disco. Further, Mr. Francis avers that Mr. Thomas and Mr. Telesford pursued him and delivered several more chops to various parts of his body whilst he was on the ground.

[5] Mr. Francis pleads that the assault upon him was reasonably foreseeable by Mr. Bain and the late Mrs. Bain. Further, Mr. Francis pleads that the Bains as owners and occupiers of Bain’s Disco owed him a duty of care to ensure that

at all times he was protected and kept safe from the assault and injuries that were inflicted on him by Mr. Thomas and Mr. Telesford.

[6] Additionally, Mr. Francis pleads that the Bains failed to discharge that duty. The particulars of those breaches are:

- (1) By virtue of the activities staged at the club and of the selling of alcoholic beverages therein, the Bains knew or ought to have known of the potential for violent behaviours among patrons. They breached their duty of care when they failed to have in place any system of security at the entrance to and inside the club;
- (2) Failing to have in place a system of search and confiscation of weapons from patrons prior to and after entry into the club;
- (3) Having regard to the history of violence at the club, the Bains ought to have foreseen the sort of attack that was launched and the injuries that were inflicted on him. The Bains were required to take preventative measures against it;
- (4) Failing to take any measure whatsoever to prevent the kind of violent attack and resulting injuries suffered by him while a patron at the club; and
- (5) Failing to come to his rescue while he was being attacked.

[7] In the premises, Mr. Francis pleads that by virtue of the above, he suffered loss and damage. Mr. Francis claims special damages in the sum of \$6,751.50 together with general damages for assault and battery, an injunction against the Bains from disposing of the property which comprises Bain's Disco, interest, and costs.

Mr. Bain's case

[8] In response to Mr. Francis' case, Mr. Bain filed a defence denying the allegations set out in the statement of claim, including the allegations with respect to breach of duty of care. Mr. Bain admits that he is co-owner/operator of a bar and nightclub known as Bain's Disco. However, he avers that at the material time only the bar was being operated and not the nightclub. Mr. Bain further pleads that:

- (1) The third and fourth defendants, Mr. Thomas and Mr. Telesford, were not patrons;
- (2) It would be unreasonable to expect Mrs. Bain to come to Mr. Francis' assistance during the fight, given her gender, age and health condition.
- (3) Kenrick Gilchrist was fatally stabbed while a patron of the club, but denies that the person who stabbed Mr. Gilchrist was a patron of the club.
- (4) He duly exercised his duty of care to protect Mr. Francis from reasonable and foreseeable harm while on his property.
- (5) Whenever the club is in operation, the Commissioner of Police will be written to and two police officers would be engaged to provide security for patrons of the club.
- (6) On that particular night, the nightclub was not in operation. The bar alone was open. There were between 15 and 20 people at the establishment on that particular night. Some were at the bar while others watched television.
- (7) Bain's Disco has been in operation for almost 30 years. Only persons eighteen years and older are permitted on the premises and served alcohol.

- (8) Save the incident involving the stabbing of Kenrick Gilchrist, there is no history of violence during that thirty year period. The incident resulting in the stabbing of Mr. Gilchrist had nothing to do with the bar selling alcoholic drinks or activities therein.
- (9) Mr. Francis is a regular patron of the bar and has a history of being confrontational with other patrons of the bar. The incident between Mr. Francis and Mr. Thomas emanates from a prior confrontation between the parties at a football match which was separate and apart from their presence at the bar that night.
- (10) It is unreasonable to expect them to have a system of search of patrons at a regular bar, where there is no entrance fee or cover charge as occurs on the nights that the nightclub is open.
- (11) Further, Mr. Francis is a regular patron at the bar and was therefore very familiar with the workings of the bar as a patron. If there was any foreseeable risk that particular night, Mr. Francis voluntarily assumed that risk when he came into the bar, consumed alcohol and remained there being fully aware that there was no system of search in place.

Dr. Kester Dragon's expert report

[9] Dr. Kester Dragon, who is a specialist orthopaedic surgeon and traumatologist, was not subject to cross-examination at trial and therefore his evidence was not challenged or contradicted. Dr. Dragon examined Mr. Francis on 30th May 2011 and compiled two reports dated 6th June 2011 and 2nd August 2011 outlining the injuries sustained by Mr. Francis.

[10] In the report dated 6th June 2011, Dr. Dragon made the following observations:

- (1) Wounds to left fronto-parietal region of scalp; right side of forehead, nasal bridge and anterior aspect of the distal thigh in the supra-patellar region.

- (2) Mr. Francis was unable to actively extend his right knee;
- (3) X-rays of his skull showed a fracture of the left parietal bone;
- (4) X-rays of his right knee revealed an intra-articular fracture of the femoral condyle

[11] In the report dated 2nd August 2011, Dr. Dragon gave further evidence of the nature of the injuries suffered by Mr. Francis. Dr. Dragon states:

- (1) The injury to the distal thigh was grievous, having completely severed the rectus femoris muscle and affected the distal femur.
- (2) It is his opinion that the injury to the rectus femoris muscle would cause limitation of full extension of his knee in the future.
- (3) Further, he is of the opinion that moderate force would have been used to achieve those fractures that Mr. Francis sustained.

Discussion and Analysis

Whether Mr. Bain owed Mr. Francis a duty of care.

[12] Under the common law, an occupier of a property owes invitees or visitors a duty to exercise reasonable care to prevent foreseeable harm or unusual danger to the invitee or visitor. This common law principle was applied by the House of Lords in **London Graving Dock Co. Ltd v Horton**¹. In that case Lord Porter at page 5 of the judgment explained:

“I accept the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved.”

[13] Lord Porter went further to elucidate at pages 5-6 that:

“I am content to accept the statement of Singleton LJ, that the rule of law, as stated by Willes J in Indermaur v Dames, ends with the words damage from unusual danger, which he knows or ought to know. The duty, however, is not to prevent damage, but to use reasonable care to prevent it, and it has to be determined what is reasonable care.”
(Underlining supplied)

¹ [1951] 2 All ER 1

[14] **London Graving Dock Co. Ltd v Horton** suggests that Bains as owners and occupiers of Bain's Disco owed Mr. Francis a duty to exercise reasonable care to prevent unusual danger which they knew or ought to have known. The question then arises whether the Bains discharged that duty of care.

[15] On this duty of care point, counsel for the claimant, Mr. Alban John, relies on the case of **Everett and Another v Comojo (UK) Ltd**². Mr. John submits that Smith LJ in that case opines that the risk may be low in a respectable members-only establishment, but much higher in a nightclub open to the public. The common law duty of care requires the occupier to take such care in all the circumstances of the case as is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted to be there. Mr. John further submits that there was at all times a duty of care on the Bains to ensure Mr. Francis' safety.

[16] Mr. John referred paras. 31-32 of **Everett** of the judgment where Smith LJ observed that:

"Proximity of the relationship. I consider that the relationship between the management of a nightclub and its guests is of sufficient proximity to justify the existence of a duty of care. The management is in control of the premises. It can regulate who enters, who is refused entry and who is to be removed after entry. The guest comes to the nightclub to relax and enjoy himself and for that prospect relies on the competence and prudence of its management. He expects and is entitled to expect that there will be no violence and that he will not be unsafe. Further, the management of the nightclub is in business and wants the guest to come to spend his money; there is an economic relationship between the two. In my judgment, those factors demonstrate sufficient proximity."

And at para. 32:

"Foreseeability of injury. It is a well-known fact that the consumption of alcohol can lead to the loss of control and violence, both verbal and physical. Lord Faulks acknowledged as much. In the present case, Comojo's own risk assessment recognises the existence of those risks. It must be foreseeable to any licensed hotelier that there is some risk that one guest might assault another. The risk may be low in respectable members-only establishments and much higher in a

² [2011] EWCA Civ 13

nightclub open to the public. The degree of risk, which will dictate what precautions have to be taken, will vary.”

[17] I note that the United Kingdom has its own Occupier’s Liability Act which was enacted in 1957 and as such its case law after the passage of the Act would reflect those statutory provisions. On the other hand, Grenada has no such statutory provisions on occupiers’ liability and therefore the common law principles on occupiers’ liability prior to the enactment of the English Occupiers’ Liability Act are applicable in the circumstances.

Whether that duty of care was discharged

[18] Lord Porter in **London Graving Dock**³ elucidated the considerations the court must have regard to in determining what amounts to “unusual danger”. His Lordship opined at page 4:

“I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. To my mind, danger may be unusual though fully recognised, and I am not prepared to accept the view that the word unusual is to be construed subjectively as meaning unexpected by the particular invitee concerned.”⁴ (Underlining supplied)

At page 5 Lord Porter continued:

“I think unusual is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises.” (Underlining supplied)

[19] Having regard to the opinion of Lord Porter that what amounts to unusual danger will vary, I am obliged to examine the facts of this case to determine whether Mr. Bain exercised reasonable care in the circumstances.

[20] Mr. Bain has stated the following in discharge of his duty of care:

³ London Graving Dock Co. Ltd v Horton [1951] 2 All ER 1

- (1) He hires police officers to provide security as “bouncers” whenever the nightclub is in operation.
- (2) He would also hire one Cletus Hypolite to provide security whenever there were parties and the nightclub was opened.
- (3) He would personally intervene and diffuse altercations between patrons whenever they occur on the property.
- (4) One of the attackers was disarmed by a patron of the bar.
- (5) After the attack he called on patrons of the bar to take Mr. Francis to the hospital.
- (6) A patron of the bar took Mr. Francis to the hospital.
- (7) His daughter called the police.

[21] Mr. Bain’s counsel submits that in light of the nature of the premises and the nature of the activities expected to be occurring on that particular night, a reasonable system of security to be implemented by Mr. Bain would be (i) the intervention by community members or owners to break up any fracas and separate the parties, (ii) ask a person/s to leave the premises if they persisted in being rowdy and disruptive and (iii) ultimately call the police in the event of an escalation.

[22] Ultimately the exercise of a duty of care to a visitor will depend on the facts and circumstances of the each case and the establishment where it occurred. This was view expressed by Smith LJ in **Everett**⁵. Smith LJ explained that:

“The common duty of care is an extremely flexible concept, adaptable to the very wide range of circumstances to which it has to be applied....I do not think it possible to define the circumstances in which there will be liability. Circumstances will vary so widely.”⁶

[23] In relation to the liability of the management or operators of nightclubs, Smith LJ further stated:

“However, I think it will be a rare nightclub that does not need some security arrangement which can be activated as and when the need arises. What they need to be will vary...In a nightclub where

⁵ [2011] EWCA Civ 13

⁶ Ibid at para. 36

experience has shown that entrants quite often try to bring in offensive weapons, it may be necessary to arrange for everyone to be searched.⁷ (Underlining supplied)

[24] I note from the evidence that Bain's Disco is a small bar and nightclub which operates from a rural village in the parish of Saint David. The people who patronize the bar are generally those from the community and possibly nearby communities who are possibly familiar with each other. Further, the evidence suggests that Bain's Disco is not an upscale, members-only establishment but a small family-run business that usually operates on weekends. Additionally, it is uncontroverted that Bain's Disco hires security on nights when the nightclub is in operation. I accept the evidence from Mr. Bain which was uncontroverted that on that particular night, the nightclub was not in operation. The evidence indicates that the bar may attract a small crowd generally on bar nights. I accept Mr. Bain's evidence that on the night in question, the bar was patronised by about 20 persons.

[25] Given the above facts and evidence, I do not agree with counsel for the claimant that Mr. Bain in exercising his duty of care must have had a system to stop and search patrons for weapons before they entered the bar or hired security at the entrance of the property on nights when the bar is in operation.

[26] In my view, such duties would be onerous on Mr. Bain given:

- (1) the nature of his establishment being a small family-run bar which is operated from the downstairs of the Bain's residence;
- (2) the bar being located in a rural community that is patronised by a few community members; and
- (3) having regard to nature of activities which take place on the property which generally involves members of the community patronising the bar to drink, relax and unwind.

[27] Further, I note that apart from the chopping incident involving Mr. Francis, there was only one prior violent incident which occurred in 2002 more than 9 years before the incident in this case which occurred in 2011. Additionally, I

⁷ [2011] EWCA Civ 13 at para. 36

am of the view that the need to hire security for a small crowd of 20 people at a community bar is unreasonable given the circumstances of this case. I accept Mr. Bain's evidence that on a "slow night" the bar may have up to 5 persons in attendance. However, on a busy night he can expect up to forty to fifty persons at the bar. This evidence suggests to me that the need for security would be less in the circumstances. However, if the crowd is generally over 100 persons, I accept that there is a higher likelihood that security personnel may be required to contain and control the crowd of people if there is physical altercation among patrons.

Was the attack reasonably foreseeable?

[28] In respect of the issue of whether the attack on Mr. Francis and the injuries he sustained therefrom were reasonably foreseeable, I note that there was no evidence that:

- (1) Mr. Thomas and Mr. Telesford, the third and fourth defendants, were intoxicated at the bar before or during the attack;
- (2) An attack was imminent. I accept Mr. Francis' evidence that the attack on him was spontaneous and without warning;
- (3) A heated verbal exchange or physical altercation or interaction ensued between the parties to the brawl at Bain's Disco immediately prior to the assault, which may or ought to have placed a duty on the Bains as occupiers to diffuse the situation before it escalated;
- (4) The Bains knew of the prior physical altercation between Mr. Francis and Mr. Thomas which occurred at a sporting event outside of the property;
- (5) Violent fights, brawls or assaults are commonplace or a regular occurrence at Bain's Disco. In fact, the evidence reveals, as I have indicated above, that the establishment has been in operation for over

35 years and has only experienced one prior incidents of serious violence which occurred on the property.

[29] Further, the evidence reveals that Mr. Francis at that material time was a regular patron of the bar. There is no evidence that he has been subject to any other physical or violent attacks at Bain's Disco.

[30] I find that –

- (1) there was no duty on the Bains to maintain armed or other security or search the patrons on the nights that the bar alone was open. I find that the arrangement that was in place to secure patrons on the night in question was quite reasonable given the facts of this claim;
- (2) the violent attack on Mr. Francis was a spontaneous, isolated and unfortunate event between him and the third and fourth defendants. The incident was not reasonably foreseeable by the Bains as occupiers;
- (3) the injuries sustained by Mr. Francis which emanated from the assault and battery by the third and fourth defendants were not reasonable foreseeable in the circumstances.

[31] In light of the above, I am satisfied that the Bains discharged their duty of care which they owed to Mr. Francis as a patron and visitor of their establishment, Bain's Disco.

[32] In any event, I also agree with Mr. Bain in his defence that Mr. Francis as a regular patron of the bar knew that there was generally no security at the bar and/ or no system of frisk and search of patrons upon entry on bar nights. Therefore, Mr. Francis as a regular patron of the bar accepted this risk with full knowledge of any possible dangers involved as stated by Lord Porter in **London Graving Dock** at page 5 of the judgment. Mr. Francis has therefore failed in his effort to prove that the Bains are liable in this claim.

[33] As a final note, I will say that Mr. Francis is not without relief. His claim against his attackers, Mr. Thomas and Mr. Telesford still subsists. Indeed he has obtained judgment against them for his loss and injuries. He is entitled to

pursue them for damages flowing from the same. However, his claim against the Bains has not been established and is refused.

Conclusion

[34] For all these reasons, I order that:

- (1) The claimant's claim filed on 15th April 2013 against the first and second defendants, Sebastian Bain and Vanella Bain is refused.
- (2) The first defendant, Sebastian Bain, is entitled to costs in the sum of \$3,500.00.

Raulston L. A. Glasgow
High Court Judge

By the Court

Registrar