

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

**GRENADA
CLAIM NO. GDAHCV 2014/0002**

BETWEEN:

DOMINIC HOPKIN

Claimant

AND

JUDE LESSEY

Defendant

Before:

The Hon. Mde. Agnes Actie

Appearances:-

Mr. Zuriel Francique for the Claimant

Mr. Ruggles Ferguson for the Defendant

2020: September 29

JUDGMENT

- [1] **ACTIE J.:** The court is asked to rule on an application to strike out the witness statements of three of the defendant's witnesses on the ground that the witness statements are irrelevant and more prejudicial than probative.

Background

- [2] On 6th January 2014, the claimant filed a claim against the Defendant for damages for assault and battery occurring on the 13th May 2012. It is evidence that the defendant hit the claimant with a brick causing significant damages to the claimant.

[3] The defendant in his defence filed on 18th February 2014 admits to hitting the claimant with a concrete block but denies the claimant's version of how the alleged incident transpired. The Defendant states that he is remorseful, and his actions were as a result of provocation and being placed in a situation of fear that harm would be inflicted upon him by the Claimant.

[4] By way of an application filed 9th March 2018, the claimant applied to strike out the witness statements of William Charles, John Beggs and Earle Lang filed on behalf of the Defendant.

Issue

[5] Whether the witness statements are irrelevant and more prejudicial than probative and therefore ought to be struck out.

The Claimant's submissions

[6] Counsel for the Claimant submits that William Charles did not witness the alleged incident and his statement consists of allegations by the defendant of threats and provocation by an undisclosed person. Counsel submits that those allegations are irrelevant to the matter.

[7] Counsel contends that the witness statement of John Beggst is irrelevant and prejudicial and can be of no value to the matter. The witness statement shows that he did not witness the alleged incident and that paragraphs 5 to 7 of the witness statement relate to an incident in 2007 which is unrelated to the case at bar and which has already been dealt with by the Court.

[8] With respect to the witness statement of Earle Lang, counsel submits that Mr. Lang did not witness the alleged incident, however, paragraph 4 of his witness statement appears to give character references and instances of provocation of the Defendant by the Claimant.

- [9] Counsel relies on the authority of **Duggan v HMB Holdings Ltd**¹ which outlines the principles to be considered in a striking out application. Counsel also relies on the authority of **Horsford v Croft**² and posits that the issues in that authority are similar and that the Court should give the authority full consideration especially to paragraphs 4, 5 and 7, in particular where the Court ruled – “**statements in pleadings in previous litigation are not evidence against the party pleadings in subsequent proceedings and therefore inadmissible.**”³

The Defendant’s submissions

- [10] Counsel for the Defendant subsumed his submissions under two broad categories:
- (i) Whether the evidence in the impugned witness statements are relevant.
 - (ii) Whether the impugned witness statement is more prejudicial than probative
- [11] Counsel referred the Court to sections 5, 8, 14 and 50 of the Evidence Act which govern the admissibility of relevant evidence and states as follows:
- (i) The subject matter of the present claim arises from an alleged offence committed by the Defendant against the Claimant.
 - (ii) There is no dispute that the Defendant committed the act which caused the injury to the Claimant.
 - (iii) The issue is over the circumstances in which the injury inflicted by the Defendant on the Claimant took place.

¹ ANUHCv2002/0055.

² ANUHCv2012/0336.

³ Ibid 1 at paragraph 7.

- (iv) There were no eye-witnesses to the event and no direct evidence of the incident other than that of the Claimant and the Defendant who both have conflicting versions of the event.
- (v) The Defendant's defence is that he acted in self defence out of fear for his life.

[12] In relation to the witness statement of John Beggs, counsel submits that Mr. Beggs' evidence relates to an incident that took place in the past where the claimant engaged in violent action against him. Counsel further submits that the evidence of Mr. Beggs would be relevant under section 14 of the **Evidence Act**⁴ as it shows the defendant's state of mind before he carried out the act that caused injury to the claimant. Moreover, counsel submits that the claimant's alleged violent action on Mr. Beggs is also relevant pursuant to section 8(2) of the **Evidence Act**. Counsel also submits that Mr. Beggs evidence refers to the character of the claimant and falls under the exception under section 50 of the **Evidence Act**, which allows character evidence when it is otherwise relevant.

[13] With respect to the William Charles, counsel submits that the evidence refers to the mental state and conduct of the defendant in the period leading up to and immediately before the incident. Counsel submits that it shows the extent to which the defendant went to avoid the claimant and as such, is relevant pursuant to section 8 and 14 of the **Evidence Act**.

[14] With respect to the evidence of Earle Lang, counsel states Mr. Lang personally witnessed occasions of the Claimant being aggressive towards the Defendant.

[15] Counsel submits where the court is to determine whether evidence is more prejudicial than probative a balancing act must be carried out. Counsel submits that the court has no power under Rule 29.5 CPR or otherwise to exclude evidence

⁴ Ibid 2.

which is relevant and admissible on the basis that the evidence is more prejudicial than probative.

- [16] With respect to Rule 29.5, counsel submits that the rule extends to inadmissible evidence or evidence that is scandalous, irrelevant or otherwise oppressive. Counsel submits that the Defendant has shown that the impugned evidence is not irrelevant, and the Claimant has not argued that it is scandalous or oppressive.
- [17] Counsel further submits that even if the court has the power to strike out admissible evidence on the ground that the prejudicial effect outweighs the probative value, this power cannot be properly applied in this matter. He submits that the impugned evidence goes to the very heart of the defendant's defence that he acted in self defence or honest believe that he was being attacked by a person who had a track record of violence that was personally known to the Defendant.

Discussion and Analysis

- [18] **Rule 29.5** empowers the court to strike out evidence, which is inadmissible, scandalous, irrelevant or otherwise oppressive out of any witness statement. The Court is also empowered under various provisions of the **Evidence Act** to exclude evidence.
- [19] **Section 50 of the Evidence Act** provides:
- “In civil cases, character to prove conduct imputed irrelevant
50. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him or her is irrelevant, except in so far as such character appears from facts, otherwise relevant.”

Witness statement of Earle Lang

- [20] In relation to the witness statement of Earle Lang, the court finds that paragraph 4 of the witness statement is in nature character evidence. Mr. Lang gives the following opinion evidence which is tendered to impugn the Claimant's character

and reputation: ***“I would describe him as very provokeful [sic]. He always provoking people.”*** This statement is tendered to impugn the character of the Claimant and therefore irrelevant and inadmissible pursuant to **Section 50 of the Evidence Act** as it is based on the opinion evidence of the Claimant’s character and does not fall within the exception of section 50 which allows character evidence that appears from facts.

[21] In Paragraph 6, lines 3 and 4, of his witness statement Mr. Lang states: ***“I do recall hearing someone say at one point “Ton Ton, leave Jude alone”***. The court is of the view that the above statement in paragraph 6 amounts to first hand hearsay, which is admissible provided that Mr. Lang intends to abide by the hearsay notice in section 36E (2) and (3) of the **Evidence Act**.

[22] Also in paragraph 7 lines 1 and 2 of his witness statement Mr Lang states that he personally witnessed ***“Ton Ton provoking Jude”*** and ***“He would say things as “J for Jackass, J is for Jude” “the most he would say in a humble tone is Man leave me alone, what ah do you?”***. The court is of the view that these statements at paragraph 7 lines 1 and 2 amount to character evidence of an alleged incident between the claimant and the defendant and is tendered to impugn the claimant’s character and reputation. The statements are therefore inadmissible pursuant to Section 50 of the **Evidence Act** as it is based on Mr. Lang’s opinion of the claimant’s character.

[23] Line 1 of paragraph 8 of Mr. Lang’s witness statement where he states, ***“Sometime after I hear the person say ‘Ton Ton leave Jude alone’.”*** amounts to first-hand hearsay which is inadmissible.

Witness statement of Williams Charles

[24] Mr. William Charles in paragraph 3, in particular lines 1 and 2 thereof stated as follows:

“Around 2006 or thereabout Jude shared with me that he was having a problem with someone in the village who was always provoking and threatening to kill him...”

[25] Also, Mr. Charles in paragraph, lines 3 and 4 stated as follows:

“Jude often confirmed to me that he was staying down in Union to avoid the potential conflict in Upper Capitol...”

[26] The court is of the view that the above impugned statements in paragraph 3 and 4 are more prejudicial than probative. Paragraph 3 impugns the character and reputation of the claimant by way of opinion evidence. **Section 36L of the Evidence Act** provides:

“Power of Court to exclude evidence 36L.

It is hereby declared that in any proceedings the Court may exclude evidence if, in the opinion of the Court, the prejudicial effect of that evidence outweighs its probative value.”

The above statements in paragraph 3, lines 1 and 2 and paragraph 4, lines 3 and 4 are accordingly excluded and therefore inadmissible.

Witness statement of John Beggs

[27] The court is of the view that the entire witness statement is filled with opinion evidence, irrelevant and inadmissible evidence of a previous incident between Mr. Beggs and the claimant in a matter that has been adjudicated upon some 13 years ago in a separate matter.

[28] Paragraphs 4, 5, 6, 7 and 8, are wholly irrelevant and inadmissible. In paragraph 4, line 1, Mr. Beggs stated as follows: ***“I know the Claimant to be a provocative and violent person”***. This statement amounts to opinion evidence and is therefore irrelevant.

[29] In the Court of Appeal authority of **Joseph W. Horsford v Geoffrey Croft**, Her Ladyship, Blenman JA enunciated as follows:

“The witness statement should contain the evidence which that person would be allowed to give orally. A witness statement should not contain inadmissible evidence. Legal arguments or opinion evidence (except from someone who is qualified to provide that evidence), or irrelevant evidence (i.e. evidence which has no bearing on the facts in issue) should not be included in the witness statement.”⁵

- [30] Paragraph 5 of Mr. Beggs witness statement speaks to the alleged violent incident involving the claimant and Mr. Beggs. Paragraph 6 is a continuation of Mr. Beggs narrative of what transpired in Court. The paragraphs are wholly irrelevant and are more prejudicial than probative. An account of a prior incident involving and impugning the character of the claimant, in a separate matter is not relevant to these proceedings presently before the court. In the circumstances the entire witness statement of Mr. Beggs is hereby struck out for its irrelevance and prejudicial effect.
- [31] The court notes that the defendant alleges that his defence is primarily that of self defence. However, the particulars pleaded in the defence, his witness statement and that of his witnesses together with the submissions predominantly highlight provocation rather than self defence.
- [32] Provocation is not a defence in a tort action. Provocation is limited to mitigation of aggravated or exemplary damages, for example, where the defendant has acted in a high-handed manner or with malice. The defendant in such a case in which aggravated/exemplary damages are recoverable is entitled to show that the claimant’s own conduct was responsible for the commission of the act and to use this fact to mitigate damages. **Halsbury's Laws of England (3rd edition) Vol. 11** states "a plaintiff...who has provoked the defendant's conduct by his own will not be entitled to exemplary damages. In **Volume 12 (4th ed.)** it is stated: "provocation does not serve to reduce the damages recoverable by way of compensation for physical injury, though it may negative the award of aggravated or exemplary damages".

⁵ ANUHCVP2014/0006 at paragraph 36.

[33] Exemplary/aggravated damages is not in issue as the claimant did not claim in accordance with the requirement in Rule 8.6(3). The Court, having reviewed the defendant's defence and witness statements, was of the view that the defence did not have a realistic prospect of succeeding on the issue of self defence and directed the parties to file submissions on the point. Counsel for the defendant strenuously argues that the facts as pleaded can sustain a defence of self defence. The Court is reminded that a mini trial should not be conducted in an application for summary judgment. The defendant will therefore be given the opportunity at trial to convince the court on this narrow point to satisfy the elements of self defence.

Conclusion

[34] For the reasons given above, it is ordered as follows orders:

- (a) The witness statements of Earl Lang and John Beggs are struck out.
- (b) Paragraph 3, lines 1 and 2 starting with " Around 2006 and ending with "Kill him" "and paragraph 4, lines 3 and 4 starting with "I knew" and ending with "his mother" of the witness statement of William Charles are hereby struck out.
- (c) Costs to the claimant in the sum of \$500.00.
- (d) The matter shall be listed for trial with a time period of two (2) hours on 30th October 2020 at 9 am, with leave to file a consent order, if sooner settled.

**Agnes Actie
High Court Judge**

By the Court

Registrar