



[2020] JMSC Civ 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV03750

BETWEEN	NATTAL SMITH	CLAIMANT
AND	NEWTON WRIGHT	DEFENDANT

IN OPEN COURT

Mr Seyon Hanson instructed by Seyon T. Hanson & Co for the Claimant.

Defendant absent and unrepresented

Heard: January 15, 2020 and May 19, 2020

Damages – Assessment of – Assault & Battery – Trespass to land – Aggravated Damages – Whether appropriate in the circumstances

LINDO, J

[1] On June 24, 2013, the Claimant Nattal Smith filed a Claim and Particulars of Claim in which he sought, *inter alia*, damages for assault and battery; damages for trespass including aggravated damages; recovery of possession of premises and an injunction against the Defendant, Newton Wright.

[2] Liability is not in issue as the Defendant was served personally with the claim form and accompanying documents on July 16, 2013 and on June 5, 2014 a Default Judgment was entered against him (Binder 761 Folio 283) with damages to be assessed. By virtue of the Default Judgment the Claimant is entitled to recover possession of premises located at Hermitage Dam Road, Kingston 9 consisting of an unfinished three story house on approximately one acre of land

in the vicinity of Seaview. He is also entitled to an injunction restraining the Defendant whether by himself or by his servants or agents from entering, using or remaining on the said premises.

- [3] The matter came on for Assessment of Damages on a number of occasions between January 28, 2015 and December 17, 2018 and was adjourned on each occasion for varying reasons, including the fact that the Claimant needed to produce an updated medical certificate and the Defendant had not been served with documents relevant to the hearing.
- [4] On January 15, 2020, on proof of notice to the Defendant the court embarked on the hearing. The witness statement of the Claimant filed on April 23, 2018, stood as his evidence in chief and he gave further evidence by way of amplification of his evidence contained in the witness statement.
- [5] His evidence is that he is a farmer and upholsterer and that between June 1997 and September 14, 2008 he resided at an unfinished three story house located at Hermitage Dam Road in Saint Andrew where he planted crops on the property. He states that he was in open and undisturbed possession until early November 2007 when he was attacked and beaten by the Defendant who took away his key and chased him away from the said property. He states that he reported the matter to the police and remained on the property, residing in another section, until about September 14, 2008 when the Defendant attacked him, hit him on his upper left hand with a machete, "inflicting in total about seven (7) hits" and robbed him of \$1,000.00. He adds that he attended the Stony Hill Clinic and was ordered to do x-ray and was prescribed medication.
- [6] He also states that after the attack he was prevented from returning to the property and the Defendant assumed possession of his belongings including furniture, tools, pets, clothing and other miscellaneous items with an estimated value of \$445,750.00. He adds that the Defendant entered the property without his consent and continues to trespass on the property.

- [7] He states further that Marshaw Cockburn introduced him to Commissioned Land Surveyor, Dennis Clay who prepared a diagram in respect of the property on his behalf.
- [8] The following were tendered and admitted in evidence as Exhibits 1 and 2, respectively:
1. Surveyor's diagram dated August 8, 2008
 2. Medical report of Dr Clivia Baird Chin dated February 26, 2018.

Special damages

- [9] In his Particulars of Claim, the Claimant provided a list of items and their respective estimated value. These are items which he claims he was forced to abandon and the Defendant assumed possession of, when he was chased from the property. At no point was actual proof of the value of the items provided. This, I find, would appear to be a classic case of "throwing figures at the head of the court", without proof of those figures, as was mentioned in **Bonham-Carter v Hyde Park Hotel Ltd** [1948] 64 TLR 177.
- [10] Learned Counsel for the Claimant submitted that the court should take a similar approach as in the case of **Shaquille Forbes v Ralston Baker et al**, Claim No. 2006HCV02938, unreported, delivered March 3, 2011, as it relates to a claim for special damages, without proof. In that case, the court considered relaxing the requirement for strict proof for special damages in relation to expenses incurred for taxi fare and at home care of the infant, where no receipts were tendered in support of these claims.
- [11] Although the Claimant has pleaded and particularised the sum claimed, but has failed to strictly prove the value of these items, I find that the circumstances of this case are such that there can be a relaxation of the general principle relating to strict proof. I am guided by the decision in **Desmond Walters v Carlene**

Mitchell (1992) 29 JLR 173, where Wolfe J.A, (as he then was), at page 176, said:

“There is support for the approach which the judge adopted. At paragraph 1528 of McGregor on Damages, 12th Edition the learned author states:

‘However, with proof as with pleading, the courts are realistic and accept that the particularity must be tailored to the facts: Bowen, L.J., laid this down in the leading case on pleading and proof of damage, Radcliffe v. Evans [1892] 2 Q.B. 524 (C.A.) In relation to special damage he said:

The character of the acts themselves which produce the damage and the circumstances under which the acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

[12] I am also persuaded by the decision in **Grant v Motilal Moonan Ltd and Another** (1988) 43 WIR 372 in which articles belonging to the Claimant were damaged by a car owned by the 1st Respondent and driven by the 2nd Respondent. As in the case at bar, the special damages were particularised, the Defendant failed to enter an appearance and Judgment in Default was obtained by the Claimant. At the Assessment of Damages, the Claimant produced a list of the damaged articles and the value she assigned to each, but failed to produce any receipts or provide evidence as to when they were purchased. The Master held that the value had not been proved and awarded an ‘*ex gratia*’ payment. On appeal, the Court of Appeal of Trinidad and Tobago allowed the appeal. The court held that although special damages must be pleaded, particularised and strictly proved, the appellant had prima facie established the cost of the articles.

[13] Applying the principles from the cases to the instant case, I am of the view that the Claimant would in the circumstances be unable to provide documentary proof of the value of the items and would also not be able to have them valued by an independent person. I therefore find that this is an appropriate case for the relaxation of the rule and as the Defendant has not sought to defend the claim, I find that the Claimant has prima facie established the cost of the items and the

values placed on the items have not been found to be unreasonable. There will therefore be an award of \$445,750.00, as pleaded.

General damages

Assault and Battery

- [14] The medical report of Dr. Clivia Baird Chin dated February 26, 2018, admitted into evidence as Exhibit 2, indicates that the Claimant was assessed as having left upper limb contusion, secondary to an attack with the flat portion of a machete. He did not require any dressing or further follow up, was treated with Panadol and sent home
- [15] As it relates to the claim for damages for the personal injuries sustained, Counsel submitted the case of **Peter Marshall v Carlton Cole et al**, Recent Personal Injury Awards made in the Supreme Court of Jamaica, Volume 6, Ursula Khan, page 109 as a guide in determining the quantum of damages to be awarded. In **Peter Marshall**, the claimant sustained moderate whiplash, sprain, swollen and tender left wrist and left hand, and moderate lower back pain and spasm. He was treated with analgesics and cataflam injections and had no residual pain and suffering. Mr. Marshall was awarded \$350,000.00 in October 2006 (CPI 99.83), which updates to \$942,402.08 using the CPI of 268.8 (March 2020) Counsel submitted that the injuries are similar in nature to the injuries sustained by the Claimant in the instant case and suggested that \$1,050,000.00 would be appropriate.
- [16] I do not agree with Counsel that the Claimant's injuries are similar to that of Peter Marshall. I find that Peter Marshall's injuries were far more severe. This claimant had no whiplash injury and neither did he have any back pain or spasm which could be comparable to that case.
- [17] I note that Counsel, with reference to the case of **Maxwell Russell v The Attorney General for Jamaica and Corporal McDonald**, Claim No. 2006

HCV04042, Khan, Personal Injury Awards, page 204, submitted further, that an appropriate award for assault and battery would be \$500,000.00. This he has stated as a separate award for the personal injuries suffered by the Claimant as a result of the assault and battery.

[18] In **Doris Fuller (Administratrix estate Agana Barrett, deceased) v The Attorney General**, (1998) 56 W.I.R 337, Downer, JA, at page 23, quoting from McGregor on Damages 13th Ed., page 1262, said:

“In so far as an assault and battery results in physical injury to the plaintiff, the damages will be calculated as in any other action for personal injury. Beyond this the tort of assault affords protection not only from physical injury but also from the insult which may arise from interference with the person...”

[19] In the instant case, the Claimant sustained minor injuries as a result of the assault and battery. He is entitled to damages for the personal injury suffered.

[20] I am guided by the CA in the Doris Fuller case, and I therefore do not agree with Counsel that the matter can be segmented in that manner as this is a claim which involves personal injury for the assault and battery for which an award of compensation in the form of general damages would be made. To make a separate award for assault and battery would be double compensation.

[21] In January 2008, (CPI 119.4), Russell was awarded \$500,000 for assault and battery, which updates to \$1,125,628.14 (CPI 268.8). I agree with Counsel that the assault committed in the case of **Maxwell Russell** was far more severe than in the instant case. As such, I am of the view that an appropriate award under this head is \$450,000.00

Trespass to land

[22] The learned authors of **Clerk and Lindsell on Torts**, 20th Edition, at paragraph 19 – 01 indicate that trespass to land consists of any unjustifiable intrusion by one person upon the land in the possession of another. The law regarding

trespass to land, does not require a Claimant to be the owner of the land, as trespass to land consists of interference with the possession of the land.

- [23] Although there was no registered title produced in respect of the property, the Claimant's evidence is that he has been in undisturbed possession of the land from about June 1997 and that the trespass took place on or about September 14, 2008 or 9. This shows the act of possession and the intention to possess the property to the exclusion of all others, which places him in a strong position to establish title by adverse possession. He seeks compensation for crops and trees which he states he planted and from which he claims he earned an income. He also seeks recovery of possession and an injunction.
- [24] The survey diagram prepared by Commissioned Land Surveyor, Dennis W. Clay, dated August 8, 2008, admitted in evidence as Exhibit 1, indicates that it was prepared at the instance of Marshaw Cockburn and the Claimant, Nattal Smith, and states that the area of the land is 3370.039 square metres.
- [25] It is trite law that trespass to land is actionable without proof of loss, but, as stated by Brooks JA at paragraph [52] of the case of **George Rowe v Robin Rowe** [2014] JMCA Civ. 46, unreported, delivered December 12, 2014, "*...proof of loss is however, what is required to assist the court in quantifying the appropriate award of damages...*"
- [26] In this case the Claimant has not adduced any evidence concerning the value of the land although he indicates that he earned income from the various trees and crops which he planted, and neither has he given any evidence as to the amount he normally earned, although, with respect to the building, his evidence is that he spent \$75,000.00 to make a section habitable.
- [27] From the evidence led, it is understood that the Defendant is still on the property. The Claimant has not provided any evidence to show any financial loss suffered save and except the loss of items he claimed he had to abandon. I have taken into consideration the fact that the trespass to the land has been going on for

approximately eleven years and I am of the view that an award of nominal damages would be appropriate.

- [28] The issue of nominal damages for trespass was considered by McDonald-Bishop J, as she then was, in **Delia Burke v Deputy Superintendent Carol McKenzie and Another**, [2014] JMSC Civ 139. In that case, the learned judge awarded \$65,000.00 as nominal damages after referring to the case of **Linneth Vassell & Cyril Vassell v The Attorney General** (1996) 33 JLR 1 in which she noted that the case involved the invasion of their home. The learned judge also referred to the general principles governing the award of nominal damages.
- [29] While I agree with the submission of Counsel that it is open to the court to take into account all that the Claimant had to leave as a result of the trespass, which I have, I have no basis to award the sum of \$50,000.00 per year, as submitted, as there has been no evidence presented from which I can determine the value of the property.
- [30] In Court of Appeal case of **George Rowe**, *supra*, Brooks JA, at paragraph [62], cautioned that “trial judges must be mindful... that if they are of the view that only nominal damages are merited, there should be compliance with the principle explained in **The Mediana**”.
- [31] I have therefore examined the case of **The Owners of the Steamship “Mediana” v The Owners, Master and crew of the Lightship “Comet” – “The Mediana”** [1900] AC 113 where the Earl of Halsbury LC, at page 116, pointed out that:

“ ‘Nominal damages’ is a technical phrase which means that you have negative anything like real damage but you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your right has been infringed. But the term “nominal damages” does not mean small damages.”

[32] Guided by the above principle, I am of the view that the Claimant is entitled to damages as his right to possession of the property has been infringed. With additional guidance from the Privy Council case of **Greer v Alstons Engineering Sales & Services Limited** [2003] UKPC 46, from which I heed the caution that courts have a duty to ensure that awards are not “out of scale” I am of the view that an appropriate award for trespass to land in this case would be \$150,000.00, and I so award.

Aggravated Damages

[33] In **Rookes v Barnard** [1964] AC 1129, Lord Devlin pointed out elements required for a claim for aggravated damages to succeed. At page 1221, he said:

“It is very well established that in cases where the damages are at large the jury (or judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s pride and dignity...”

[34] The case of **Thompson v Commissioner of Police of the Metropolis** [1998] QB 498, which has been quoted with approval in a number of cases in our jurisdiction, provides guidance on the award of aggravated damages. Lord Woolf, in considering conditions appropriate for an award of aggravated damages observed that:

“... such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to the basic award ... “

[35] It was submitted on behalf of the Claimant that the manner in which he sustained the injuries, being in the form of a vicious attack on his person, qualifies him for recovery of an award of aggravated damages. Counsel submitted the case of **Maxwell Russell v The Attorney General for Jamaica and Corporal McDonald**, Claim No. 2006 HCV04042, Khan, Personal Injury Awards, page 204 as comparable. He noted however that the manner in which the assault was

carried out in the Maxwell Russell case, and the weapon used, would allow for an adjustment downwards in the value of the award to this claimant and submitted that \$300,000.00 should be awarded.

[36] Maxwell Russell was awarded \$200,000.00 in January 2008, based on the degree of humiliation, indignity and injury to his feelings suffered at the hands of the defendants in circumstances where he was beaten up in prison and was handcuffed at the hospital in full view of patients and visitors and he suffered distress and depression.

[37] I am guided by the Court of Appeal case of **The Attorney General v Gary Hemans**, [2015] JMCA Civ. 63 where Williams JA (Ag.) (as she then was) said:

“...aggravated damages are to be awarded only where there was some feature in the behaviour of the appellant that required the respondent being additionally compensated beyond that which he would have received for the assault...”

[38] I therefore accept that aggravated damages are awarded where the defendant's conduct is sufficiently outrageous to merit condemnation and punishment and would serve to compensate the claimant for the conduct of the defendant which increased the injury to him causing distress, embarrassment and/or humiliation and damage to his reputation.

[39] In the instant case, although the claimant was attacked and beaten with a machete, he has not provided any evidence to show any particular circumstances or any aggravating features which would require an additional award for aggravated damages. There will therefore be no award under this head.

Disposition

[40] Damages are assessed and awarded as follows:

Special damages awarded in the sum of \$445,750.00 with interest at 3% per annum from September 14, 2008 to date of judgment

General damages for assault and battery awarded in the sum of \$450,000.00 with interest at 3% per annum from July 16, 2013 to date of judgment

Damages for trespass to land awarded in the sum of \$150,000.00

Costs to the Claimant to be agreed or taxed.