

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 4/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN **CARLENE DAVIS** **APPELLANT**
AND **GWENSETA MURRAY** **RESPONDENT**

Mrs Jeanne Barnes for the appellant

Respondent not appearing or represented

16 December 2015

ORAL JUDGMENT

BROOKS JA

[1] This is an appeal from the decision of the learned Resident Magistrate for the Corporate Area Civil Division, made on 9 September 2011, in which she granted a default judgment against the respondent Ms Gwenseta Murray, in favour of the appellant, Ms Carlene Davis. Ms Davis is dissatisfied with the quantum of damages that the learned Resident Magistrate awarded. Ms Davis asserts that the learned Resident

Magistrate erred when she awarded only \$500.00 for general damages for a dog bite injury that Ms Davis suffered, and \$3,016.00 for costs.

[2] Ms Davis suffered her injury on 23 August 2006 at about 5:00 pm in the Belvedere area of Saint Andrew. She was walking past premises near to her workplace when dogs ran out from those premises and attacked her. She backed away from them but in doing so she fell. One of the dogs bit her on her left leg. In the learned Resident Magistrate's review of the evidence, she noted that Ms Davis also testified to have suffered injuries to her back, her right elbow and her left thigh as a result of the fall.

[3] Ms Davis received medical treatment that day but the wounds took some time to heal and up to 18 September 2006 she was still having them dressed. She testified that she was unable to work for five days because her "foot was swollen". She had to walk with a stick for some time and had difficulty walking uphill at that time. She said that it was 14 or 15 dogs that attacked her.

[4] The learned Resident Magistrate found that Ms Davis had, in her testimony, exaggerated the number of dogs that had attacked her. She also found that Ms Davis had fully recovered from the injuries as she "appeared in good physical condition when she appeared in court". She found that Ms Davis had suffered no residual effect from the injury.

[5] The learned Resident Magistrate also found that Ms Davis "had tried to mislead the court in terms of the actual monetary loss she suffered". She based this finding on

the fact that Ms Davis' evidence concerning some of her expenditure was contradicted by the documentary evidence.

[6] As a result, she found that Ms Davis was only entitled to nominal damages. The orders that the learned Resident Magistrate made were as follows:

"Judgment

Special Damages	\$12,024.41
General Damages	\$ 500.00
Total	\$12,524.41
Costs	\$ 3,016.00"

[7] The main ground of complaint against the judgment was that the award for general damages and for costs was "unreasonable, unfair and unjust". Mrs Barnes, on behalf of Ms Davis argued that the learned Resident Magistrate erred in disregarding Ms Davis' evidence of the time for which she incurred pain and suffering as a result of the injury. Learned counsel submitted that a larger award should have been made for general damages. Mrs Barnes relied on the case of **Marva Protz-Marcocchio v Ernest Smatt** (Suit No CL 1995/M150 (delivered 22 April 2002)) in which Jones J (Ag) (as he then was) awarded the sum of \$344,770.00 for general damages. Mrs Barnes accepted that the injuries suffered by the claimant in that case were more severe than those which Ms Davis had suffered, but argued that an award of \$34,477.00 (10% of the award in **Protz-Marcocchio**), when updated using the consumer price index (CPI), "would be a fair and reasonable amount". She submitted that the appropriate award would be \$295,325.61, but she was prepared to have the amount reduced to \$250,000.00 so as to bring it within the jurisdiction of the Resident Magistrate's Court.

[8] We find that the learned Resident Magistrate did indeed err in failing to take into account the testimony of Ms Davis as to the time that it took to recuperate from the injuries. Although the learned Resident Magistrate was less than impressed with Ms Davis as a witness, the uncontested documentary evidence shows that Ms Davis was bitten and had received treatment for her injuries. She received medication, including injections and analgesics, and had had the wounds dressed at least five times after the initial treatment by the first doctor who saw her. In those circumstances, the learned Resident Magistrate should not have found that Ms Davis was only entitled to nominal damages.

[9] It is true that in **Beverley Dryden v Winston Layne** SCCA No 44/1987, delivered 12 June 1989, Campbell JA did say that:

“...a physical injury without consequences would attract only a nominal award. It is the consequence of the disability which really measures the loss for which the disabled is to be compensated.”

The learned judge of appeal was relying, for that position, on dictum taken from the judgment of Lord Reid in **H West and Son Ltd v Shepherd** [1964] AC 326. Lord Reid said, in part:

“...So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man’s consequential difficulties in his daily life.”

It cannot be said, however, that Ms Davis had no consequences flowing from her injury.

[10] The learned Resident Magistrate stated that Ms Davis complained of pains. There was also an indication in the medical report that was tendered into evidence that Ms

Davis suffered a "painful bite" to her left leg. In terms of loss of amenities, Ms Davis testified that she was unable to go to work for five days, unable to walk uphill and had to walk with a stick for some time. The learned Resident Magistrate ought to have taken those matters into account and ought to have given an award reflecting them.

[11] The **Protz-Marcocchio** case cited by Mrs Barnes is not an appropriate guide for assessing damages in the instant case. This is because there were many other issues involved in the computation of damages in **Protz-Marcocchio**, including the need for surgery and the existence of post-traumatic stress disorder, which required treatment for six months. Those factors do not exist in the present case, and the proportionate approach suggested by Mrs Barnes would not be as helpful as a case with similar injuries and consequences.

[12] The reported cases in this area are few, but in **Eric Gray (b n f Beryl Wallace) v Prendergast** (Suit No CL 1988/G206 (delivered 11 October 1990)), Edwards J granted \$2,700.00 for damages where the claimant suffered superficial bruises and a laceration of the right arm that required stitches. The claimant was an 11 year old schoolboy who had been bitten by a dog. Although it is an old case, the award, when updated using the CPI for September 2011 (the date of the judgment in this case), would be \$73,861.59.

[13] Based on that decision, we find that the learned Resident Magistrate should have awarded at least \$80,000.00 to Ms Davis for general damages. Her decision to award \$500.00 for general damages, therefore, cannot stand. We take into account, however,

the fact that the claimant in **Gray**, although he received stitches for his wound, was a young child, and would have recovered far more quickly than Ms Davis did. In this case, there was need for dressing of the wound for over three weeks. We find that a greater sum should be awarded. The award of \$500.00 as general damages must be set aside and a sum of \$120,000.00 substituted.

[14] The award merits an award of interest from the date of service of the plaint note, that is, 9 February 2011 to the date of the judgment in the court below. Interest shall be calculated at the rate of 3% per annum for that period.

[15] The award of costs by the learned Resident Magistrate will not, however, be disturbed. A determination of costs is not usually disturbed by this court, in the absence of good and compelling reasons so to do. We see no reason to depart from that approach in this case.

ORDER

1. The appeal is allowed in part.
2. The award of \$500.00 for general damages made by the learned Resident Magistrate on 9 September 2011 is set aside and a sum of \$120,000.00 substituted therefor.
3. Interest is awarded on the sum of \$120,000.00 at the rate of 3% per annum from 9 February 2011 to 9 September 2011.
4. All other orders of the learned Resident Magistrate are affirmed.
5. Costs of the appeal to the appellant in the sum of \$30,000.00.