

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M 150 OF 1995

BETWEEN MARIA PROTZ-MARCOCCHIO PLAINTIFF

AND ERNEST (ERNIE) SMATT DEFENDANT

Mr. John Sinclair instructed by Clough, Long & Co. for plaintiff

Miss Kathryn Phipps for defendant

Heard: April 22, 2002

ASSESSMENT OF DAMAGES

JONES, J. (Ag.)

The plaintiff was bitten by dogs belonging to the defendant on October 8, 1993. There is no issue as to liability. The matter now comes before the court for assessment of damages.

On the issue of pain and suffering and loss of amenities Mr Sinclair referred me to two cases with dog bites. First, in *Marie Phillips vs. Forrester* at page 400 in "Assessment of Damages for Personal Injuries" by Harrison & Harrison the damages were agreed by consent on May 20, 1991 for \$20,000.00 inclusive of cost. The injuries were lacerations to the posterior aspect of the plaintiff's left calf. There were also several long jagged scratch marks to the posterior aspect of the right leg and scarring on both legs. Second, in *Gobern vs. Lloyd Kelly C.L 1987 /G251* damages were assessed on June 30, 1993, for a dog bite. The injuries were

a septic laceration 2 ½ "long and ¼ "deep on the inner lower part of the left leg. The plaintiff was incapacitated for 5 ½ weeks. There was a scar but no permanent disability. \$30,000.00 was awarded for pain and suffering. I prefer the award in Gobern as it was an actual assessment and not a settlement and secondly it is closer in type to the injury in this case. This amount of \$30,000.00 adjusted to today's dollars would yield \$244,766.68. The report from Dr Noel Black on the plaintiff's physical injuries is set out below:

**NOEL A. BLACK M.B., BS. (Lond.)**

Park Avenue, P.O. Box 15,  
St. Ann's Bay, St. Ann.  
Tel.: (809) 972-2296

March 9, 1995

TO WHOM IT MAY CONCERN

This is to certify that I saw Maria Pratz on the 8/10/93. She was alleged to have been bitten by a dog.

On examination she had a severe lacerated wound on the upper part of the back on right leg about 1½" long.

She also had a puncture wound on the outer side of the right leg. There was also two other puncture wounds on the front of the right thigh.

The injury is considered serious, as the wounds took a long time to heal.

Follow-up visit was done on 3/2/94. On examination there was evidence of infection in the wound on back of right leg, and there is evidence of severe discolouration on the back of the right leg and right side of the leg.

I would recommend Plastic Surgery.

SIGNED.....

DR. NOEL A. BLACK MB. BS. (Lond)

I do not accept the plaintiff's evidence about her loss of earnings. The evidence was not supported by any contract or documentation even though the plaintiff's evidence was that she had contracts for specific amounts. I am reminded of the guidance given by Rowe P in *Hepburn Harris vs. Carlton Walker (unreported)* SCCA 40/90 delivered on December 10, 1990 where he said:

*"plaintiff's ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned..."*

Dr. Aggrey Irons a consultant psychiatrist of twenty-five years experience gave evidence on behalf of the plaintiff. He said that the plaintiff suffered from severe phobic anxiety with vivid recall, withdrawal reaction and avoidance reaction specifically related to dogs. He concluded that this constituted a post traumatic stress disorder related to an incident in which she was attacked by dogs in October 1993. He also concluded that there was no evidence of malignancy.

On the issue of psychological injury, Mr. Sinclair then referred me to the case of *Hinz vs. Berry* [1970] 1 All ER 1074. In that case the court was prepared to make an award of damages for nervous shock suffered by the plaintiff after she witnessed her husband dying, and her children injured, in an accident. I found *Page vs. Smith* [1995] 2 All ER 736 to be more helpful. It was a case in which the plaintiff himself was actually involved in the accident, and the court held that the

defendant's duty of care extended to neurosis incurred as a result of the accident itself. The facts are taken from the head note:

*"The plaintiff was involved in a collision with the defendant when the latter failed to give way when turning out of a side road. The plaintiff was physically unhurt in the collision, but the accident caused him to suffer the onset of myalgic encephalomyelitis (ME) from which he had suffered for about 20 years but which was then in remission. The recrudescence of ME was likely to prevent him from ever working again. The plaintiff brought an action against the defendant claiming damages for chronic and permanent ME. The defendant admitted liability for the accident but disputed liability for damages. The judge awarded the plaintiff damages of £162,153 on the ground that once it was established that the plaintiff had ME, that a relapse or recrudescence of his condition could be triggered by the trauma of an accident of moderate severity and that he had suffered nervous shock as the result of being involved in the accident, the aggravation of his condition was a foreseeable consequence for which the defendant was liable. The defendant appealed, contending (i) that the plaintiff had not proved a causal connection between the accident and the aggravation of his condition and (ii) that the judge, in deciding that the plaintiff's injury was foreseeable, had failed to consider whether a person of reasonable fortitude would have suffered shock from the accident and had wrongly decided that foreseeability of injury from nervous shock was not necessary in the case of a plaintiff who had been directly involved in the accident rather than a mere spectator. The Court of Appeal allowed the appeal on the grounds, inter alia, that in claims for damages due to nervous shock it was in all cases incumbent on the plaintiff to prove that injury by nervous shock was reasonably foreseeable by the defendant. The plaintiff appealed to the House of Lords.*

*Held -(Lord Keith and Lord Jauncey dissenting) Applying the principle that the defendant had to take his victim as he found him, a negligent driver sued for damages arising out of a motor vehicle accident caused by him was liable for damages for nervous shock suffered by a primary victim of the accident if personal injury of some kind to that person was reasonably foreseeable as a result of the accident. In the case of primary victims of an accident the test in all cases was the same, namely whether the defendant could reasonably foresee that his conduct would expose the plaintiff to the risk of personal injury, whether physical or psychiatric. In the case of an affirmative answer, the duty of care was established, even though physical injury did not in fact occur. The plaintiff was not required to prove that injury by nervous shock was reasonably foreseeable by the defendant and it was irrelevant that the defendant could not have foreseen that the plaintiff had an 'eggshell personality' since (per Lord Browne-Wilkinson) it was established by medical*

*science that psychiatric illness could be suffered as a consequence of an accident although not demonstrably attributable directly to physical injury to the plaintiff. It followed that the appeal would be allowed*

Lord Lloyd of Berwick had this to say at pg. 767:

*"...the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not, in fact, occur. There is no justification for regarding physical and psychiatric injury as different 'kinds of damage'. A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him."*

I am satisfied that post traumatic stress disorder was a foreseeable outcome of the attack by the plaintiff's dogs, and that a duty of care by the defendant is established. I also find as a fact that the post traumatic stress disorder suffered by the plaintiff was directly due to the attack by the defendant's dogs. This is a recognized psychiatric illness of which compensation can be made. Special damages were agreed between the parties at \$38,588.00

This court assessed damages as follows:

General Damages

Pain and suffering and loss of amenities	\$244,770
Post traumatic stress disorder	<u>\$100,000</u>
	<b>\$344,770</b>

Interest is awarded at the rate of 6% per annum from the date of service of the writ of summons up to today.

Special Damages:

\$33,588

Interest on special damages is awarded on the sum of \$33,588 with interest at the rate of 6% per annum from October 8, 1993 up to today.

Judgment for plaintiff for sum of \$378,358.00 with cost to be taxed if not agreed.

**May 3, 2002**