



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2009 HCV 04450**

<b>BETWEEN</b>	<b>MORAIN HURST (b.n.f. CARLTON HURST)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>WEBSTER RADWAY</b>	<b>DEFENDANT</b>

**Carleen McFarlane and Tamiko Smith  
instructed by Frater, Ennis and Gordon for Claimant**

**Carol Davis instructed by Carol Davis & Co. for Defendant.**

**September 27, 2012, October 5, 2012 & 11<sup>th</sup> October, 2012**

**Assessment of Damages – Dog Bite – Infant Claimant**

***CORAM: JUSTICE DAVID BATTS***

1. This Assessment of Damages came on for hearing on the 27<sup>th</sup> September, 2012. On that date all evidence was taken and submissions made. The claimant however sought permission to provide to the court a copy of a further authority on damages. The court granted permission provided it was served on the Defendant's Counsel who was given permission to provide a short written submission on the said authority.
2. A copy authority was received from the Claimant's attorneys by the court, and the note on the authority from the Defendant was received on the 2<sup>nd</sup> October, 2012.
3. The Court took time to consider its decision and now delivers the same..

4. The Claimant's first witness was Morain Hurst. He indicated that he was 10 years old. Due to his diminutive frame this court decided to treat him as a child of tender years. Upon being questioned as to his awareness of the oath, the Bible and their significance he answered clearly and concisely. I was satisfied that he was aware of the significance of the oath and allowed him to be sworn and to give evidence.
5. He identified his witness statement on a document he signed in relation to his dog bite case. The witness statement was therefore allowed to stand as his evidence in chief. That witness statement outlines the circumstances in which on the 3<sup>rd</sup> January 2009 he was attacked by 2 dogs the property of the defendant. He was held on foot and the neck by the dogs. He was bitten on his arms, legs and back. The statement says he felt pain. The statement has the date as the 3<sup>rd</sup> January, 2010 however that is an error when regard is had to all the other documentary evidence.
6. In cross-examination he said that prior to writing his name on the witness statement he had been told to write it and that the only thing he read were the words –

“I believe fact stated in this statement are true.”

He read those words with some difficulty but sufficiently clearly for the court.

7. In cross examination the witness also stated that his mother and father did not reside at the same address. He stated that other than the bites by the dog nothing else happened to him. He remembered that Mr. Radway (the Defendant) had come to see him at the hospital he denied that Mr. Radway also visited him at home on the same day that he left the hospital. He said after he came out of hospital he was o.k. but he “visited it back”, 2 or 3 times afterwards. He describes the neck as “scratching and sticking.” He admitted that after awhile that had stopped.

8. Carlton Hurst his father and next friend for the purpose of commencing legal action also gave evidence. He described himself as a taxi driver and identified his witness statement. The court determined that his witness statement dated 15 May, 2010 would stand as his evidence in chief. This revealed that Morain was admitted to the St. Ann's Bay Hospital before being transferred to the Kingston Public Hospital and then the Bustamante Hospital for Children (Children's Hospital) and finally the University Hospital. The statement detailed the expenses incurred in relation to Morain's injury and gave an account of an offer to settle made by the complainant.
  
9. In Cross examination the witness admitted he was not sure that Morain was discharged on the 4<sup>th</sup> January and that it could have been the 7<sup>th</sup>. He stated that as a painter he was paid by cash and never rendered bills. He said he got a receipt from Dr. Guy. He drove his own car to court and did not take a taxi. He recalled a visit by the Defendant (Mr. Radway) to his home. He denied that at the time of the visit all the children were playing. He said Mr. Radway came the day after Morain came from hospital but he could not recall if it was the 7<sup>th</sup> January. He recalled Mr. Radway calling to Morain and asking him if he was o.k. and that Morain "nodded" his head. The witness was challenged strongly on the alleged offer made by Mr. Radway. It was suggested that Mr. Radway never told him that no lawyer can get him to pay more than \$50,000.00. The witness responded,

"He said that he offer \$30,000.00 I said it too early for me to make that decision. He said his bottom line is \$50,000 and he would pay me in cash next week."
  
10. The Defendant Mr. Webster Radway then gave evidence. He acknowledged his witness statement which was admitted as his evidence in chief. That statement explained the circumstances of the dogs escape in that it was consequent on a power cut which caused his automatic gate to malfunction.

11. In cross-examination Mr. Radway said that it took him only about 5 minutes if not less to get out to the gate after he was called. He did not see Morain. He says it took him ½ hour to 45 minutes to get to the hospital. He offered Mr. Hurst and his wife a lift to the hospital. He said he asked the doctor who was treating Morain if he was going to be alright and the doctor said “of course the child is alright.”
12. He said he told the medical personnel he was the owner of the dog that bit the child and the nurse took a statement from him. He said he saw the doctor use his finger and press on the neck wound (witness indicated to the court) and put on a plaster. He saw no stitches as doctor said “they don’t stitch dog bite.” He spent 2 -3 hours at the hospital and only saw one plaster applied. It was suggested that the doctor had not said child is alright but he maintained this was so. He was also challenged with respect to the day of his visit to the claimant’s house and the details of what transpired. It was suggested that he did not see Morain playing with his sisters when he went there.
13. In answer to the court he said he did not know what game the children were playing as Morain was sitting with his sisters on the grass.
14. A medical report dated 20<sup>th</sup> January 2009 by Dr. Morais Guy was admitted by consent as Exhibit 1. The report describes the injuries to 6 year old Morain Hurst, as seen by the doctor on the 9<sup>th</sup> January 2009:-
  - a. Multiple abrasions and lacerations to the upper neck which were 75% healed.
  - b. A 2 cm by 1 cm laceration to the left lateral aspect of the neck almost fully healed
  - c. A 6 cm. linear laceration to the left side of the neck non sutured and 75% healed.
  - d. Abrasions to the right side of the forehead almost healed

- e. Linear lacerations to the right thigh almost healed
- f. Three puncture wounds to the right arm, clean non-infected and 50% healed.

The doctor stated that the child had discomfort rotating his neck and walking was painful. Treatment involved dressing the wounds and medication. The doctor considered the injuries to be serious.

The doctor makes reference to an injury to the head and the witness statement of Morain states that he hit his head on the road and was bleeding through his ears and nose. The doctor does not refer to any reported phobia although young Morain says in his witness statement,

“Since the dogs attack me I have become afraid of dogs.”

15. After the close of the Defendant's case the complainant's attorney made submissions. She relied on the authorities of ***Maria Protz-Marcocchio v. Smatt suit M150/CL 1995*** reported in ***Khan 5<sup>th</sup> Edition*** at page 284, and ***Gobern v. Kelly CL 1987 S251*** cited by ***Jones J in the Smatt*** case. Counsel submitted that an award of \$1 million for Pain, Suffering and Loss of Amenities was appropriate. As regards Special Damages she admitted that no documentation to support any of it was provided but she asked that awards be made nevertheless.
16. In her submissions Miss Carol Davis for the Defendant indicated that she agreed to the loss of shirt, pants and brief all valued at \$3,200.00. She was however otherwise not able to agree on any other item of Special Damages due to the absence of supporting evidence documentary or otherwise. This court is aware that Claimants ought not to throw figures at the court, however where the evidence establishes that expense was incurred and the circumstances demonstrate that it is reasonable to infer same, then an award can be made.
17. As regards General Damages Miss Davis the Defendant's Counsel regarded the ***Smatt*** case cited by the Claimant as more serious due to Dr. Iron's evidence in

that case and the plastic surgery that was required. Counsel also submitted that the court ought not to take account of Morain's evidence as it was not read over to him nor did he read it. She pointed out that thankfully the child had recovered well and quickly. She thought the case of *Eric Gray v. Prendergast* noted at page 400 of the 1<sup>st</sup> edition **Harrison's Assessment of Damages for Personal Injuries** was of relevance. In her submissions \$150,000.00 was the appropriate award for Pain, Suffering and Loss of Amenities.

18. When asked by the Court whether the fact that five (5) days hospitalization resulted from the injury was relevant, Miss Davis stated that the five (5) days may have been required for observation. It was not necessarily an indication of the severity of the injury.
19. In considering this matter the court acknowledges the impressive physical recovery of the infant Claimant. I cannot award damages for what might have been, as the consequences to the child could easily have been far more severe. On the other hand the court when considering the Pain, Suffering and Loss of Amenities, must have regard to the terrifying ordeal that Morain went through—the bites on several areas of his body indicate the ferocity of the attack. Also the 5 days in hospital, as to which I accept the evidence at Paragraph 5 of Carlton Hurst's witness statement. This was compounded by his being transferred to 2 other hospitals in a relatively short period. I accept the evidence in Paragraph 8 of young Morain's witness statement and the fact that he bled from his ears and nose. Given the nature of the attack, his age and the fact the dogs had grabbed him on his neck he could hardly have avoided hitting the ground with his head. The fact that in cross examination he did not mention the blow to his head is easily accounted for by his age at the time of the incident which is some 3 years ago. As regards his age I accept Morain's viva voce evidence that he is now 10 years old. He would therefore have been 7 years old and not 6 years at the time as stated in the witness statement dated 15<sup>th</sup> May 2010. He does however appear very small for a 10 year old but he answered questions boldly and appeared fully cognizant of the proceedings. Similarly I accept that Morain has a

fear of dogs. Given his age and the severity of the attack it would be strange if he did not on a balance of probabilities therefore I accept his evidence.

20. Counsel did invite the court to disregard his witness statement. However, it already having been admitted as his evidence in chief, any treatment consequent on the admission that he had not read it or had it read over to him goes to the weight to be given to his evidence and does not render it a nullity.
21. The cases cited are distinguishable by the disparity in ages of the complainants, the differing nature of the bites, and of course the difference in treatment regimen in each. The award in the **Ernest Smatt** case represents the upper limit as that claimant had medical evidence of her phobia and required plastic surgery consequent on the dog bites. The Eric Gray case has more modest injuries and represents the lower limit.
22. Having therefore considered the evidence, the authorities and the case in the round my award is as follows:

Pain, Suffering and Loss of Amenities	\$500,000.00
Special Damages:	
Loss of Income: Nil	
Paid to Dr. Morais Guy:	\$4,000.00
Travelling to St. Ann's Bay Hospital and Ocho Rios	\$6,000.00
Shirt destroyed (agreed)	\$2,200.00
Pants destroyed (agreed)	\$ 800.00
Brief destroyed (agreed)	\$ 200.00
Pair boots destroyed	Nil
One Towel	Nil
One rag	Nil

Interest will run on the General Damages from the date of service of the claim being 9<sup>th</sup> September 2009.

Interest will run at 3% on the Special damages from the date of the accident that is 3<sup>rd</sup> January, 2009 to 5<sup>th</sup> October, 2012.

Costs to the Claimant.