

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-02297

BETWEEN

NIGEL MAYERS

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before: Master Alexander

Appearances:

For the claimants: Mr Lemuel Murphy

For the defendant: Mr Keith Scotland instructed by Mr Nairob Smart

DECISION

Background

1. This is a claim for assault and battery of the claimant, who suffered severe personal injuries by gunshot wounds at the hands of the police. It led to the claimant spending approximately 44 days in various hospitals, including 2 days in a coma. The facts as pleaded by the claimant is that on 10th October, 2004 around 7:30 p.m. the claimant, Nigel Mayers (hereinafter “Nigel”) was at a house in Mount Marie, Tobago in the company of a ‘friend’ when on hearing footsteps outside the house and realizing it was the police they ran into the nearby bushes. Nigel and his friend were pursued into the bushes by the police where the alleged assault and battery occurred that resulted in Nigel sustaining personal injuries for which he now seeks compensation. Judgment on liability was entered on 25th February, 2011 by Tiwary-Reddy J for damages to be assessed by a master and costs of the action to be assessed, in default of agreement.

Assault and battery

2. An assault is the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact. See *Sedley Skinner v The Attorney General of Trinidad and Tobago* CV 2006-3721 @ paragraphs 25 and 26 per Pemberton J. Battery covers intentional or reckless use of unlawful force on another person, resulting in harmful or offensive contact. Thus, anything that amounts to a blow whether inflicted by hand, weapon or missile, is a battery. See Clerk and Lindsell on Tort at paragraph 17-03.

3. It is trite law that awards of damages in assault and battery cases resulting in bodily injuries are arrived at by the same channel as in any claim for personal injury. See *Mahadeo Sookhai v The Attorney General* CV2006-00986. Hence a claimant can claim both pecuniary and non-pecuniary damages. In the case at bar, however, no claim for special damages was made. Pecuniary damages are, therefore, not considered. With respect to the claim for non-pecuniary damages, the usual principles in assessing damages for personal injuries would apply as set out in *Cornilliac v St Louis* (1965) 7 WIR 491 including: (a) The nature and extent of the injuries sustained; (b) The nature and gravity of the resulting physical disability; (c) The pain and suffering which had to be endured; (d) The loss of amenities suffered; and (e) The extent to which the plaintiff's pecuniary prospects have been materially affected. The first 3 limbs would be considered in determining the appropriate award, as Nigel also did not provide any evidence as to loss of amenities.

4. Nigel's evidence in chief is that on the said night of the incident, after hiding for several minutes in the bushes, he and his friend surrendered to the officers who ordered them to put both hands behind their heads and to lie flat on the ground. Whilst in that prone position on the ground, booted feet were placed on Nigel and he was then shot in his left foot by one of the officers. The police officers then searched his pockets and removed cash and his small New Testament Bible which was thrown onto the ground, before proceeding to shoot him several more times about his body, particularly the chest area. He was lifted up, dropped and then placed to lean against a nearby tree, where he was shot once more in his side. At this point, he fell unconscious. He claims that throughout this ordeal he was

subjected to expletives and threats to end his life. He survived but his friend was shot dead in the process.

5. The nature and extent of the injuries arising from the assault and battery were outlined in Nigel's witness statement. This was also supported by the medical evidence, as seen in medical reports dated 3rd August, 2005 and 2nd April, 2008. The evidence as to the nature and extent of the injuries was unchallenged. Nigel was shot in his left leg and multiple times in the chest area. As a result, he suffered 2 punctured lungs, a broken rib and laceration to the thigh. He was in a coma for 2 days and spent approximately 35 days at the Chest Clinic at Mount Hope. Dr Penco, the thoracic surgeon, who treated him, states that whilst Nigel had other injuries, he treated him specifically for his 2 collapsed lungs (i.e. pneumothoraxes), which he describes as a severe and dangerous case. In treating Nigel: tubes were inserted into his chest; he received blood transfusion and intravenous drips; was bedridden; used a catheter to perform bodily functions; was unable to eat solid foods for a period; experienced breathing problems; expectorated blood in his urine and mucus; had an internal ruptured bleeding haemorrhoid causing him to bleed from his anus; developed bedsores and was unable to pass stools due to his initial inability to eat. Further, in evidence is the fact that Nigel has no lingering disability from his injuries and, except for the continuing intermittent pains in the chest and thigh, he has made a full recovery.
6. Nigel states that as a result of the trauma from being shot multiple times, he experienced an exceptional amount and intensity of pain and suffering from his injuries. His evidence is that on first being shot, he felt a burning at the entry point of the wound and was in substantial pain. Shortly thereafter when he was shot twice more in the chest near the heart, the areas of passage of the bullet were marked by the same burning sensation and he was "in real pain". He states that he woke up at the Scarborough General Hospital in pain and with chest tubes inserted from under his arms; an oxygen mask on and with difficulty breathing. He was transferred to the Port of Spain General Hospital on 12th October, 2004 and when he woke up the next day, he states, "[M]y chest was hurting me a lot. I told the nurse and she brought pain killers for me to take. A little while after taking the pain killers, the pain lessened. However when the medication wore off, I began feeling pain again. Then they gave me more. That was the cycle." He claims that his dressings had to be changed a few

times at the hospital and this exercise was painful. As he was handcuffed to the bed and with an intravenous needle and catheter in his wrists, the act of bathing and dressing him were very painful and embarrassing.

7. On 18th October, 2004 he was transferred to the Chest Clinic at the Eric Williams Medical Science Complex, Mt Hope because of breathing difficulties. At the Mt Hope Hospital, his chest tube had to be replaced and he described the process as very painful. On 9th November, 2004 he underwent a surgical procedure called bronchoscopy where a tube with a camera was sent down his throat. He states that after the surgery he was still in a lot of pain. He describes his life post surgery, “as a constant cycle of pain, discomfort, embarrassment and medication” until he was returned to the prison at Frederick Street. According to his evidence, he would invariably get medication, from the prison’s infirmary, for the pain in his chest and thigh and that up to today he still experiences the effects of his gunshot wounds. He claims that sometimes he would have trouble breathing, pain in the chest (especially when lifting heavy objects) and in the left thigh, when it is cold weather. Dr Penco confirms that Nigel, who also had a fractured rib, would have been in severe pain from the 2 collapsed lungs and would have had difficulty breathing because of the pain. At the hospital, Nigel was given antibiotics, pain killers and sedatives to relieve or minimize the chest pain and allow him to breathe.
8. Nigel has given a comprehensive account of the assault in his witness statement and has provided the court with real evidence by way of medical report and notes/records, which have been bolstered by the testimony of his attending doctor, to assist in determining a reasonable figure to award in relation to the injuries sustained. The evidence was unchallenged and uncontroverted and the defendant who had an opportunity to cross examine did not shake or discredit the witnesses. The evidence as to the assault and battery and resultant injuries, pain and suffering is accepted. It is also accepted that there was no permanent residual or lingering disability from the battery.
9. The award of damages here is to compensate Nigel for the injury done to him. In making this compensatory award, account can be taken of any aggravating features to arrive at a single figure award since, “[T]hese damages are intended to be compensatory and include what is referred

to as aggravated damages, i.e. damages which are meant to provide compensation for the mental suffering inflicted on the plaintiff as opposed to the physical injuries he may have suffered. Under this head of mental suffering are included such matters as the affront to the person's dignity, the humiliation he has suffered, the damage to his reputation and standing in the eyes of others and matters of that sort.” **Thaddeus Bernard, Airports Authority of Trinidad v Nixie Quashie CA Civ 159/1992.**

Case Law

10. Counsel for Nigel pointed the court to 19 cases in support of his submission that an award should be made of \$500,000.00 on the instant fact scenario. Almost all of these cases, with the exception of those discussed below are not on par with the instant facts. To be reiterated is the fact that the instant case at bar involves assault and battery only, whilst some of the other cases supplied as a guide dealt with other heads such as false imprisonment, malicious prosecution and even constitutional breaches. To be noted also is that as a rule, assault and battery have been treated as a separate award from awards under heads such as false imprisonment. See recommendation of the Privy Council in **Tamara Merson v the Attorney General of the Bahamas PC Appeal 61 of 2003** that a court ought to make a separate award of damages for the assault and battery and the false imprisonment. The most relevant cases include:

- **Kenton Sylvester v AG and ors HCA 4025 of 1992** judgment delivered on 31st July 2002 where for 8 fractured ribs; a broken right humerus; broken left radius and ulna; trauma to the eye; loss of consciousness for an unspecified duration; contused liver; punctured lung; abrasions and soft tissue injuries to the face and chest, the plaintiff was awarded **\$200,000.00** in general damages inclusive of aggravated damages, adjusted to December, 2010 as **\$369,697.00**.
- **Richard Ramnarace v Vishsam Boodoosingh HCA S-503 of 1999** judgment delivered on 6th July, 2001 where for being shot in the face; loss of 5 teeth and tip of tongue; scarring; unable to eat solid foods or talk for 2 ½ months the plaintiff was awarded **\$150,000.00** in general damages inclusive of aggravated damages, being **\$286,211.00** when adjusted to December, 2010.

11. Both the ***Kenton Sylvester*** case as well as the ***Richard Ramnarace*** case showcased injuries which were more extensive than those on our present facts. Nigel's injuries, however, were severe and life threatening and were caused by multiple gunshots mainly to his lungs and thigh; he also sustained a fractured rib. Based on the evidence, his injuries caused breathing difficulties and were exceptionally painful.

12. Of lesser relevance in terms of similarity of injuries are the following cases. To my mind, whilst the injuries below were of lesser severity than the instant case, they assisted with the assessing exercise:

- ***Sean Wallace v AG CV 2008-04009*** delivered on 2nd October, 2009 where for abrasions to face, swelling and tender welt to shoulder, thighs, calves, back, chest, arms, abdomen, laceration to inner lower lip; an award was made for general damages inclusive of aggravation in the sum of **\$160,000.00**, adjusted to December, 2010 at **\$178,416.00**, and exemplary damages of **\$70,000.00**.
- ***Bullock v AG CV2007-01766*** delivered on 9th February, 2009 where for welts, abrasions, swelling and bruising to the head, chest, neck, back and stomach; broken jaw; 4 dislodged teeth and lacerations to the jaw and inside of mouth and where no medical attention was provided until the next morning an award was made for general damages inclusive of aggravation in the sum of **\$130,000.00**, adjusted to December, 2010 at **\$150,263.00**, and exemplary damages of **\$50,000.00**.
- ***Martin Reid v AG CV2006-0246*** delivered on 6th June, 2007 where for blunt head trauma; post concussion syndrome (no focal cranial abnormalities); broken left middle finger; with continuing blackouts, pains to back of head and headaches an award was made for general damages inclusive of aggravation in the sum of **\$65,000.00**, adjusted to December, 2010 at **\$89,617.00**, and exemplary damages of **\$45,000.00**.
- ***Morris Kenny v AG HCA T-62 of 1997*** delivered on 11th March, 2002 where the plaintiff who was unconscious for 2 days; suffered soft tissue injuries consisting of welt and abrasions to lower back and back of right thigh; and warded for 1 week was

awarded general damages inclusive of aggravation in the sum of **\$50,000.00** and exemplary damages of **\$60,000.00**.

- ***Owen Goring v AG CV2010-03643*** delivered on 26th July, 2011 where for laceration to the face; tenderness, swelling, bruising and pain over entire body; and a short period of unconsciousness following an intense and prolonged period of licks from officers, an award was made for general damages in the sum of **\$100,000.00** and exemplary damages of **\$100,000.00**.

13. On our present facts, there was non-existent or threadbare evidence of injury to feelings, indignity, mental suffering, disgrace and humiliation, save and except that Nigel claims he felt some embarrassment from having to rely on the nurses at the hospital for basic bathroom needs. Of note is Moosai J's comment that, "*beyond this, the tort of assault affords protection from the insult which may arise from interference with the person. Thus a further important head of damage is the injury to feelings, the indignity, mental suffering, disgrace and humiliation that may be caused.*" ***Mahadeo Sookhai v The AG of Trinidad and Tobago CV2006-02986***. In the cases relied on by counsel for Nigel, there was clear evidence of injury to feelings, indignity, disgrace and humiliation, which would have influenced the sum awarded. However, I am unable to find any evidence of injury to feelings on the present facts, save as noted above. In the instant case, Nigel sought to evade capture by the police when he was pursued and shot. To my mind, he would have been subjected to some form of torture when after surrendering he heard his life being threatened; and then was shot several times in his chest. In the circumstances, I formed the view that a reasonable award of damages for the assault and battery would fall in the vicinity of that in ***Richard Ramnarace*** and ***Kenton Sylvester***. In making this award I took into account the effects of inflation, the injuries sustained, the pain and suffering endured as well as the fact that he has made a complete recovery from his injuries, save for the occasional continuing pains in the areas of the gunshot wounds.

14. I also considered and rejected counsel for the defendant's submission that nominal damages of \$20,000.00 be awarded since there was no updated medical report; no evidence of permanent partial disability; Nigel had received the best treatment at the State's medical institutions; he was given painkillers to address his pain, which nullified his suffering; he received constant supervision at the hospitals; he was fully recovered; and the injuries were

not grave or of any lasting effect. I also rejected the submission that little if any weight should attach to Dr Penco's evidence (given his problems with recall; the fact that he did not have his notes or Nigel's records with him; and that the 2005 medical report was not signed by him but a junior doctor under him). In my view, Dr Penco gave comprehensive evidence in chief, on which he was cross examined extensively, as to his treatment of Nigel and the pain and suffering consequent on the injuries of having 2 collapsed lungs due to bullet wounds. His evidence was not shaken or impeached under cross examination so was accepted.

15. In addition, I considered whether it was a case deserving of an award for aggravated damages. Aggravated damages can be awarded where there are aggravating features about the case which would result in the claimant not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. It also covers any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in an insulting, malicious or oppressive manner either in relation to the arrest or imprisonment. To my mind, this matter deals with the search for, pursuit of and shooting of a person known to and wanted by the police. There was no case made out for any other head of damages except assault and battery. The continued shooting of Nigel after he was apprehended and lying in a prone position on the ground, in their custody, with a bullet to his thigh, was to my mind "overdone" and so deserving of an uplift for aggravated damages. In this regard, I note counsel for the defendant's submission that if Nigel's version of events is accepted aggravated damages ought to be awarded. I concluded that an appropriate award for the injuries sustained would be **\$250,000.00** inclusive of an uplift for aggravated damages.

Exemplary Damages

16. Exemplary damages are awarded to mark the court's disapproval where the offender's behaviour amounted to oppressive, arbitrary and unconstitutional action. These terms must be read disjunctively. See *Rookes v Barnard* [1964] AC 1129 as well as *Holden v Chief Constable of Lancashire* [1987] QB 380 at 388. It is also required that the act must have been committed by one exercising government power. Exemplary damages are usually only awarded if compensatory damages are inadequate to punish the defendant or deter others

and mark the court's disapproval (the "if but only if" test) per Lord Diplock in *Broome v Cassell* [1972] AC 1126; the claimant is the victim of the defendant's punishable behaviour per Lord Devlin in *Rookes v Barnard* (supra); the defendant has not been already punished for wrongful conduct as in *Archer v Brown* [1985] 1 QB 401, 423; the apportionment of the award of exemplary damages would not lead to injustice amongst multiple defendants as it would be particularly difficult for the court to determine culpability *AB* [1993] QB 527-528 and 531; the defendant has not acted in good faith *Holden v Chief Constable of Lancashire* (supra); the claimant has not caused or contributed to the behaviour complained of *Thompson v Commissioner of Police of the Metropolis* [1998]QB 498.

17. In the case of *Cliff Persad v AG HCA S-1971 of 2007* as well as *Maurice Koon Koon v AG CV2009-01530* the plaintiffs were not awarded exemplary damages since, although the courts found the officers acted improperly, their actions were not deemed to be high-handed, arbitrary, reckless, oppressive or irresponsible nor were they motivated by malice or bad faith. Counsel for the defendant has asked the court not to award exemplary damages as it is not in dispute that the officers were in lawful pursuit of Nigel who was wanted on inquiries for robbery, shooting of a police corporal and to execute a murder warrant. Nigel in his evidence admitted that when he was apprehended the police officers addressed him by his alias "Duffu" and threatened to kill him for running. He gave evidence that he lived in Pelican Extension, Morvant, Trinidad but at the time of the incident was "staying" in a house in Tobago, when the police came in search of him. Is this case deserving of an award for exemplary damages?
18. In the instant case, there is no claim by Nigel that any false criminal charges were brought against him and/or he was not unlawfully deprived of his liberty. Nigel was wanted by the police. From his evidence, it can be inferred that he was hiding out in a house in Tobago in the company of another man, whom he claimed was staying there with him. The incident occurred when he was evading capture by the police and had slipped into a forested area to hide. He claims that he had surrendered when he was dealt multiple gunshots by the police. This evidence is not disputed. He has since made a full recovery but for some pains from time to time. He has received compensation for his injuries. I am satisfied on the evidence, however, that the instant case is one fit for a further response from this court. In this

regard, I note that recent awards for exemplary damages have been elevated to \$70,000.00 and \$100,000.00 (see *Sean Wallace case* and *Owen Goring case*) to send a signal from the courts. I also note the awards made in other cases of \$50,000.00 and \$60,000.00 as well as lower awards. In arriving at an appropriate award in the case at bar, I bear in mind the need for moderation and restraint in making an award of exemplary damages; and the need to take account of the awards that I have already made by way of compensation, which included an element of aggravated damages.

19. Every citizen is entitled to due process of law. This does not include the police acting as self appointed executioners in the absence of a fair trial. It remains the law that a man is innocent until proven guilty. To my mind, the police displayed savagery in their callous shooting of Nigel after he was apprehended and whilst he lay on the ground in their custody. The clear inference and conclusion that can be drawn from the evidence is that the police officers exercised no restraint in their handling of this situation. To demonstrate my public disapproval of and alarm at what has occurred at the hands of police officers whose motto is to protect and serve and make it clear to the Commissioner of Police and his men that conduct of this nature will not be tolerated, I award the sum of **\$50,000.00** as exemplary damages.

Order

20. It is thus the order of this court that the defendant do pay the claimant -

- (i) General damages for assault and battery in the sum of **\$250,000.00** inclusive of an uplift for aggravated damages with interest at the rate of 9% per annum from 10th October, 2004 to 8th January, 2013.
- (ii) Exemplary damages in the sum of **\$50,000.00**.
- (iii) Costs assessed in the sum of **\$42,037.50**.

Dated 8th January, 2013

Martha Alexander

Master