

1996

S.H. No. 133923

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Leahy v. Day, 1999 NSSC 99

BETWEEN:

**CARL EDWARD LEAHY of Head Jeddore, in the
Halifax Regional Municipality, Province of Nova Scotia**

PLAINTIFF

- and -

**BLANCHARD DAY of Oyster Pond, Jeddore, in the
Halifax Regional Municipality, Province of Nova Scotia**

DEFENDANT

D E C I S I O N

HEARD BEFORE: The Honourable Justice Walter R. E. Goodfellow in the
Supreme Court of Nova Scotia on June 15 and 16, 1999

DECISION: June 23, 1999

COUNSEL: Ronald W. Burton, Solicitor for the Plaintiff
Blanchard Day - Not represented or present

GOODFELLOW, J.:

1. BACKGROUND

Carl Edward Leahy, now 33, a paramedic and volunteer member of the Oyster Pond Volunteer Fire Department, on the 20th of March, 1996 answered a fire call related to a burning automobile. He was the first to arrive on the scene 365 East Jeddore Road, the home of the defendant, Blanchard Day.

Blanchard Day is referred to in evidence as being in his late seventies and in communications by him to the court, he represents his age at 80 plus.

The motor vehicle was next to the home and part of the home also caught fire. Mr. Leahy inquired of Mr. Day how the fire started and Mr. Day's response was to punch him out. He threw four punches, two or three which landed on Mr. Leahy's face.

Mr. Day declined attending the trial.

2. FAILURE TO ATTEND

The Originating Notice was issued the 9th of December, 1996 and served upon Mr. Day personally on the 30th of December, 1996.

Mr. Darrell E. Dexter, barrister and M.L.A., filed a defence for Mr. Day February 3rd, 1997. The file proceeded through various stages of caseload management correspondence and the plaintiff filed his list of documents May 6th, 1997 and Mr. Dexter filed Mr. Day's list of documents June 3rd, 1997.

A Notice of Examination for Discovery was issued directed to Mr. Day the 4th of July, 1997 and it appears that Mr. Day probably did not show up for the Discovery.

The file was commenced on the caseflow management fast track and when Mr. Day disagreed, it was moved to the holding track and a subsequent attempt by the plaintiff to return it to fast track was opposed as well by Mr. Day and the matter in the summer of 1997 was placed on standard track.

Mr. Dexter filed a Discovery Status Report on behalf of Mr. Day February 4th, 1998 and Mr. Leahy's solicitor filed his Discovery Status Report February 5th, 1998. On the 23rd of February, 1998 Blanchard Day filed a Notice of Change of Solicitor indicating hereafter he would be acting in person. There was an attempt to hold a Resolution type Conference and there is in the file a Date Assignment Conference 4th of November, 1998 at which time the trial dates of June 14, 15, 16, and 17th, 1999 were assigned.

The Prothonotary's Office wrote to Mr. Leahy's counsel at Mr. Day November 26th, 1998 giving formal notice of setting of the trial dates June 14th to 17th, 1999. There has also been a considerable volume of correspondence referring to the trial dates, including a letter from Justice Oland to Mr. Leahy's counsel and Mr. Day November 5th, 1998.

No objection was filed to the dates selected for trial.

Mr. Leahy's counsel proceeded to prepare for trial including issuing subpoenas, etcetera, and there followed several communications from Mr. Day to various courthouse staff members and there is a memorandum from the scheduler May 17th, 1999 where Mr. Day apparently advised he would not be able to attend, that he and his wife are sick and unable to travel and that he is 80 plus years old and very upset.

Mr. Day attended at the courthouse in Halifax on May the 19th to confirm that he would not be able to come to the courthouse for the trial and I prepared a letter

reviewing the background and this letter dated May 19th, 1999 I arranged to be personally served upon Mr. Day and the Deputy Sheriff's Affidavit on file confirms service upon him on the 21st of May, 1999. The letter clearly confirms that the trial will remain as scheduled and shall commence Tuesday, the 15th of June, 1999. No medical certificate or other documentation was filed by or on behalf of Mr. Day. There were additional telephone calls, including one from the local member's constituency office and the consistent advice given was that the matter must proceed as scheduled. At no time was a medical certificate, affidavit, or notice of motion for adjournment filed. At no time was there any indication of when the matter could be heard, if an adjournment took place. Mr. Day was repeatedly advised to obtain counsel. On many occasions, copies of correspondence were, as a matter of courtesy, sent to his former solicitor who had no obligation in the matter once Mr. Day filed his Notice of Intention to act in person.

On the opening date of the trial, Tuesday, the 15th of June, a person identifying herself as Mrs. Day called and indicated that Mr. Day would not be able to attend the trial and once again, the advice was given that the trial would commence, if necessary, in his absence as scheduled.

In all these circumstances, I determined the trial should proceed.

3. RELIEF SOUGHT

Special Damages	-	\$ 1,956.44
Future cost of care	-	\$10,000.00
Physical injury	-	\$ 5,000.00
Psychological damages	-	\$40,000.00
Aggravated damages	-	<u>\$ 2,500.00</u>

TOTAL DAMAGES SOUGHT - \$59,456.44

4. LIABILITY

Mr. Leahy's solicitor at the opening of the trial indicated that Mr. Leahy was no longer pursuing his claim with respect to slander and that the claim was proceeding on the basis of assault. I heard the evidence of Carl Leahy as to what transpired and find that Mr. Day struck Mr. Leahy in the face causing a small abrasion to the lower area of the eye and a cut or fat lip plus trauma to one tooth. Corroboration of the injuries was provided by other witnesses and I have the assistance of a guilty plea by Mr. Day on the 6th of April, 1999 to the following charge:

“BLANCHARD ISHMAEL DAY, of East Jeddore, did at or near East Jeddore, in the County of Halifax, Province of Nova Scotia, on or about the 20th of March, A.D. 1996 DID COMMIT AN ASSAULT ON CARL LEAHY, CONTRARY TO SECTION 266 OF THE CRIMINAL CODE.”

Mr. Day was placed on a Probation Order for a period of one year and fined \$230.00 or in default of payment by the 18th of September, 1996, to serve a period of five days in an institution. It appears that Mr. Day paid in full and was given receipt number 97629.

Liability having been established, it remains for me to assess the damages.

5. GENERAL DAMAGES

(a) TOOTH

One of more of the blows received by Mr. Leahy caused trauma to his No. 2-1 tooth and Doctor Frazer A. Mullins, dental surgeon, saw Mr. Leahy on March 26th, 1996 in relation to this injury.

Mr. Leahy said very little about his tooth and when asked if it bothered him, he responded that he was aware that it was always there. Doctor Mullins, in his report, indicated that the tooth was sensitive to hot and cold and tender to palpitation but the radiograph was inconclusive as to whether there was any permanent damage and the treatment was to wait and see what developed. Doctor Mullins indicated that there was no appreciable improvement in the next six months and referred Mr. Leahy to a Doctor Greg Burk, an endodontic specialist, on September 17th, 1996. Doctor Burk performed a root canal but there remained tenderness and soreness at times. Doctor Mullins evidence indicated that future surgery was likely with replacement of the tooth or a bridge a possibility.

Overall, Mr. Leahy has had a measure of pain and inconvenience relating to the trauma to his tooth and runs the risk of losing it. Doctor Mullins indicated that prior to the trauma the tooth was asymptomatic.

I assess general damages for the pain, inconvenience and quite possible loss of the tooth itself in the amount of \$1,500.00.

(b) GENERAL DAMAGES

This is a more difficult area to address. Mr. Leahy, as confirmed by Fire Chief Kerr and volunteer firefighter paramedic, Brian Hutt, was upset and shaking after this incident and Brian Hutt took him to the local hospital to be checked out. Mr. Leahy suffered a slight bruise on the lower portion of his eye and a fat lip. Mr. Leahy did not lose consciousness nor is there any evidence that the force even knocked him down.

Mr. Leahy was seen by his family doctor, Doctor Muirhead, who also gave evidence. Mr. Leahy went so far as to say that as a result of this incident and previous ones with Mr. Day, he is fearful of Mr. Day. He says that he suffers anxiety and fear of meeting up with Mr. Day, that Mr. Day might come and shoot him and his family and that as a result of his anxiety, he snaps at his wife, he is upset all the time, is unable to sleep, has no energy, and when he has a panic attack, he thinks he is going crazy and going to die. He relates muscle tension to his anxiety which can be seven days a week and twenty-four hours a day and he says he is going to be on medication the rest of his life.

Mrs. Leahy, who is 31, relates her husband's anxiety and her husband's view that there is a vendetta and that Mr. Day is out to get him. Her husband has tightening in his chest, he is always checking his heart rate, his blood pressure, and overall, he fidgets and anxious and she says he has had to take extra medication on occasions. The morning of the trial, he did not sleep much the previous evening, was shaking, he had the door locked all night and suffered diarrhea and she herself says she is afraid of Mr. Day because he is known to have guns. She indicated that her husband always has an upset stomach and that her husband is a worrier.

It should be related that this was the "third" incident between Mr. Leahy and Mr. Day. Apparently, on one occasion Mr. Leahy was on a property adjacent to Mr. Day's and they had words. On the 21st of May, 1990 before they married, Mr. Leahy and his soon-to-be wife apparently drove in or turned around in Mr. Day's driveway and then stopped up the road and in their evidence Mr. Day came after them and was in possession of a gun and let them know in no uncertain terms what he thought of them using his driveway.

The claim advanced in general damages is a substantial one alleging that the panic and anxiety attacks Mr. Leahy suffers are a direct foreseeable result of the assault by Mr. Day on March 20th, 1996. Keith Leahy, also a volunteer firefighter and a brother of Mr. Leahy, gave evidence and he was on hand at the fire scene. He, in fact, drove the second truck and saw Mr. Day and his son-in-law. The son-in-law was using a garden hose and Mr. Day he described as hollering and freaked out by the fire. He acknowledged that they have known Mr. Day for some time and stated that "Mr. Day never really bothered us, I don't know if the other episode had anything to do with it". He did observe that after the fire episode his brother was nervous of Blanche (Day). He said that Blanche is on the road all the time but that he personally never had a problem with him.

Keith Leahy was asked to comment on a portion of Doctor Allison's medical legal report which reads:

"I have been seeing Mr. Leahy as an out-patient since 1993 when he was referred to me by his family physician. I had the strong impression that the panic symptoms and anxiety symptoms, at least until late 1995, were related almost solely to major financial issues in his life, and had evolved as a reaction to financial stresses created by the recession and as a reaction to the significant effort and work that he had put into establishing a business."

Keith Leahy's response was he would not disagree with the Doctor's remarks. Keith Leahy confirmed the entering into business of he and his brother, a convenient store operation in 1987, and it would appear that Carl Leahy's problems with respect to sleeping commenced sometime after that. Carl Leahy saw Doctor Allison, a psychiatrist, for the first time in 1993 and the diagnosis was a general anxiety disorder with panic attacks and there was reference by one of the doctor's to this diagnosis having taken place as early as 1992.

In determining whether a punch-out could cause the panic attacks and anxiety disorder which Carl Leahy continues to suffer, it has to be borne in mind the lengthy history of these disorders existing prior to this episode of March the 20th, 1996. In addition, while Carl Leahy indicates this great and literally twenty-four hour fear of Mr. Day, the only episodes that have occurred are ones where Mr. Leahy was on Mr. Day's property; i.e., on one occasion in his driveway, and on the second occasion, as a volunteer fireman, and on the third occasion, Mr. Leahy was on the property adjacent to Mr. Day's.

There have been no written or verbal threats by Mr. Day and no other confrontations save the three recited. It is a long bow to elevate these circumstances into a vendetta.

I have carefully reviewed all of the evidence relating to this substantial damage claim. Doctor Allison in his report to Mr. Leahy's solicitor April 24th, 1999 indicates that he has been seeing Mr. Leahy since 1993 for assessment and management of significant symptoms of anxiety and from the very outset he concluded:

"It was quite apparent that he was suffering from a panic disorder which he had probably had for a number of years before I saw him."

Interestingly enough, Mr. Leahy first informed Doctor Allison of this alleged assault in December of 1998 - long after its occurrence. Mr. Leahy also related the driveway incident to Doctor Allison who in his report went on to state:

"It is difficult to gage how much of Mr. Leahy's anxiety disorder and panic disorder has been related to these episodes, and particularly to the assault in March 1996."

Doctor Allison goes on to indicate that there was improvement in Mr. Leahy's condition and that in his view, there has been aggravation of Mr. Leahy's underlying anxiety. The conclusion must be read in the context of his entire report and weighed in the totality of the evidence and the opportunity I have had of observing the various witnesses and in particular, Carl and Michelle Leahy.

I note Mr. Leahy has responsible employment as a paramedic and there is no evidence of interference in his employment. Additionally, at the time of this incident, he was Assistant Deputy Chief of the Oyster Pond Fire Department and since then has been elevated to Deputy Chief.

As Doctor Allison acknowledged, litigation itself can be a very stressful event and on its conclusion, there should be some relief to Mr. Leahy.

Mr. and Mrs. Leahy are very fine young people. Not only does the evidence fail to establish that Mr. Day is the cause of Mr. Leahy's anxiety disorder and panic attacks but clearly establishes these conditions have existed for a long period of time unrelated to the assault of March the 20th, 1996 and at the very most, there is some degree of aggravation. One is left with the very distinct determination that Mr. Leahy's preexisting and continuing problems of anxiety disorder and panic attacks were clearly going to continue irrespective of whether this assault took place. His outline of what he says of the consequences of the assault are pre-existing and far too remote and what he is entitled to damages for is the limited degree of aggravation **Cashen v. Donovan** (1999) 173 N.S.R. (2d) 87.

The combined claim for general damages of \$45,000.00 is entirely out of line. Limited pain and suffering warrants only a relatively nominal amount of damages. The bruise to the lower eye and cut lip healed fairly quickly and the only real element of

damages of any consequence is assessing the degree of aggravation of Mr. Leahy's pre-existing condition. In my view, a reasonable, if not slightly generous, award of general damages for the injuries and consequences of the injuries suffered by Mr. Leahy is \$7,500.00.

(c) FUTURE COST OF CARE

The relief sought includes a claim for future cost of care in the amount of \$10,000.00 and the evidence fails to establish any entitlement. The only evidence relating at all to the future is in relation to the cost of prescription and other drugs. Mr. Leahy has a long history of medication being required for his pre-existing condition and the increase in the utilization of medication post to March 20th, 1996 should be of short duration and is adequately addressed in the special damages claim.

(d) SPECIAL DAMAGES

Mr. Leahy had the moral and financial support of the Oyster Pond Volunteer Fire Department which advanced funds as required for which Mr. Leahy has an obligation of reimbursement. The breakdown of the special damages is:

Dental Surgeon, Dr. Burk	-	\$357.00
Dentist, Dr. Mullins	-	\$287.00
Mileage (1,850 km x \$0.20/km)	-	\$370.00
Forest Hill Drug Mart	-	<u>\$942.44</u>
TOTAL	-	<u>\$1,956.44</u>

I have some slight reservation as to the Forest Hill Drug Mart item but on balance consider it appropriate, as are the other special damages claimed, and therefore, Mr. Leahy will recover special damages in the amount of \$1,956.44.

6. PUNITIVE - EXEMPLARY DAMAGES

Definition: An award of punitive damages is based on the defendant's conduct rather than the plaintiff's loss. These damages are awarded to:

- i) punish the wrongdoer;
- ii) deter the tortfeasor or others from committing a similar act; or
- iii) prevent the wrongdoer from acquiring an undue profit from his unlawful act.

Punitive damages are designed to express the repugnance of the public towards the outrageous and despicable conduct of the defendant.

In **Conrad v. Household Financial Corp. et al** (1992), 118 N.S.R. (2d) 56; 327 A.P.R. 56, the Nova Scotia Court of Appeal approved an award of punitive damages which were clearly separate from the compensatory damages to Mrs. Conrad for the contractual breach of employment and represented an actionable wrong that occurred post the breach of contract which conduct was described as reprehensible.

Freeman, J.A., at p. 60, made it clear that Mrs. Conrad recovered under the contract for general damage and that she was entitled to punitive damages because her employer's conduct towards her was reprehensible and the circumstances also warranted a warning to other employers not to abuse their relatively advantageous positions over their employees. Freeman, J.A., went on at p. 61 to adopt MacIntyre, J., in **Vorvis v. Insurance Corp. of British Columbia**, [1989] 1 S.C.R. 1085; 94 N.R. 321; 58 D.L.R. (4th) 193; [1989] 4 W.W.R. 218; 36 B.C.L.R. (2d) 273; 90 C.L.L.C. 14,035; 25 C.C.E.L. 81, at p. 1107, where MacIntyre, J., discussed the exceptional character of punitive damages and stated:

“...Punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.”

He cited with approval **Warner v. Arsenault** (1982), 53 N.S.R. (2d) 146; 109 A.P.R. 146 (C.A.), in which the late Mr. Justice Pace of this court stated at p. 152:

“Exemplary or punitive damages may be awarded where the defendant’s conduct is such as to merit punishment. This may be exemplified by malice, fraud or cruelty as well as other abusive or insolent acts toward the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate of the offender that the law will not tolerate conduct which wilfully disregards the rights of others.”

In **Thompson v. Zurich Insurance Co.** (1984), 45 O.R. (2d) 744 (H.C.), Penell, J., at p. 753 stated:

“To support an award of punitive damages, there must be evidence of malice directly or inferentially. Malice, however, does not solely mean personal ill will. It may also mean such a wanton and reckless disregard of the right of another as amounts to the equivalent of malice.”

La Forest, J., in **Hill v. Church of Scientology of Toronto and Manning** (1995), 184 N.R. 1; 84 O.A.C. 1 (S.C.C.), at p. 84:

“(4) Punitive Damages

(a) General Principles

“Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.”

In **Norberg v. Wynrib** an adult became addicted to painkillers and to one addictive drug in particular. She obtained the drugs from various doctors and from her sister and eventually began to see Dr. Wynrib, an elderly medical practitioner. Using several pretexts she obtained prescriptions from him. At some point the doctor made suggestions of a sexual nature, and Ms. Norberg went elsewhere, but in due course returned to Dr. Wynrib and there followed several instances of fondling and simulated intercourse over a period in excess of one year. Ms. Norberg admitted that the doctor did not at any time use any physical force, and that she “played” on the fact that he liked her and that she knew throughout the relationship that he was lonely. The trial judge dismissed Ms. Norberg’s claim on the basis of consent and the Court of Appeal, in the majority view, agreed with the trial judge. On appeal to the Supreme Court of Canada, the appeal was granted and the issue of damages was addressed for the first time. In addition to awarding general damages for pain, suffering, humiliation, etc., the court noted that, in several of the sexual assault cases, punitive damages were not awarded where the offender had been convicted on the basis that such an award would amount to double punishment. The Supreme Court of Canada, in awarding \$10,000

punitive damages, concluded that the doctor's conduct, while not harsh, vindictive or malicious, was reprehensible and offensive. It was also the exchange of drugs for sex by a doctor in a position of power and that such conduct cried out for deterrence.

It is worth rereading the passage quoted above of La Forest, J.'s, comments on punitive damages in **Hill v. Scientology**. The misconduct should be so malicious, oppressive and high handed that it offends the court's sense of decency to such an extent that it calls for punishment which carries with it a deterrent element. Care must be exercised that punitive damages do not simply become an add-on for conduct that is already addressed in the award of general damages.

7. AGGRAVATED DAMAGES

The Supreme Court of Canada recently, in **Hill v. Church of Scientology**, supra, La Forest, J., stated at pp. 80 and 81:

“(3) Aggravated Damages

(a) General Principles

“Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libelous statement. The nature of these damages was aptly described by Robins, J.A., in **Walker v. CFTO Ltd.**, supra, in these words at p. 111:

‘Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff may be entitled to what has come to be known as “aggravated damages”.’

“These damages take into account the additional harm caused to the plaintiff’s feelings by the defendant’s outrageous and malicious conduct. Like general or specific damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

“If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.”

Aggravated damages are awarded for the aggravation by the conduct of the offender that causes additional consequences to the injured party which consequences are not encompassed within the basic general damage award.

I have addressed the consequences to Mr. Leahy of Mr. Day’s conduct within the basic general damage award.

8. CONCLUSION -

PUNITIVE - EXEMPLARY DAMAGES - AGGRAVATED DAMAGES

Mr. Day on entering a plea of guilty was fined and placed on probation. Punishment by the criminal law does not preclude an award of punitive damages. **Stevenson v. Vance**, (1989) 87 N.S.R. (2d) 96. To assault a volunteer fireman whose attendance at a fire scene carries with it exposure to danger is reprehensible and offensive conduct deserving of full condemnation and deterrence. Volunteer service is

such a major part of the social fabric of communities that it calls for protection of such volunteers and cries out for condemnation in the way of punishment beyond that invoked by the **Criminal Code**.

In these circumstances, I assess punitive damages against Blanchard Day payable to Carl Leahy in the amount of \$2,500.00.

9. SUMMARY OF DAMAGES

- 1) General damages - tooth - \$1,500.00.
- 2) General damages, including aggravation of pre-existing conditions - \$7,500.00.
- 3) Special damages - \$1,956.44
- 4) Punitive damages - \$2,500.00

10. PRE-JUDGMENT INTEREST

The Plaintiff is entitled to pre-judgment interest at the rate of 2.5 per cent on the general and punitive damages and 5.5 per cent on the special damages. The special damages were in part incurred over a time frame and I would award pre-judgment interest at 5.5 per cent for two years.

11. COSTS AND DISBURSEMENTS

The total recovery constituting the "amount involved" is \$13,456.44 and I award party and party costs in accordance with tariff A, scale 3, \$2,075.00 plus disbursements, \$1,763.14. It is noted that the disbursements do not include any fee for attendance by Doctor Allison.

J.

