IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV04084

BETWEEN A. C. CLAIMANT
(Full Name Withheld for Privacy)

A N D MARKSMAN LIMITED DEFENDANT

IN OPEN COURT

Mrs. Melissa Cunningham Cuff, Attorney-at-Law for the Claimant

Ms. Houston Thompson with Ms. Shanelle Nelson instructed by Nunes, Scholefield, Deleon & Co for the Defendant

HEARD: June 2, 2026 DELIVERED: June 16, 2026

TORT – NEGLIGENCE – EMPLOYERS' LIABILITY – WHETHER CLAIMANT HAS ESTABLISHED BREACH OF DUTY OF EMPLOYER TO PROVIDE SAFE SYSTEM OF WORK, A SAFE PLACE OF WORK, SUFFICIENT OR PROPER EQUIPMENT FOR WORK, ADEQUATE OR ANY TRAINING.

TORT – NEGLIGENCE – EMPLOYERS' LIABILITY – WHETHER DEFENDANT LIABLE TO CLAIMANT FOR EXPOSING HER TO A REAL RISK OF BEING ASSAULTED WHILST IN THE COURSE OF HER DUTY AS A SECURITY GUARD AT A THIRD PARTY PREMISES.

TORT – NEGLIGENCE – EMPLOYER'S LIABILITY – EXTENT AND SCOPE OF DUTY OF EMPLOYER OF SECURITY GUARD WHEN THEY ARE DEPLOYED TO A THIRD PARTY PREMISES TO PROVIDE SECURITY SERVICES.

DALE STAPLE J

BACKGROUND:

[1] It was the dead of night on the 5th February 2018. It was around midnight, or shortly past. The Claimant, a security guard in the employ of the Defendant, was at her

posting at the Montego Bay St. James location of Island Car Rentals Limited. She alone was assigned this duty as a late replacement for the assigned officer.

[2] Whilst on duty, the Claimant alleges she was sexually assaulted by an unknown assailant who had managed to gain entry onto the premises and had breached the guardhouse in which the Claimant was located.

[3] The assailant made good his escape, but he was, eventually, apprehended and placed before the Court. The outcome of the case is unknown, but irrelevant to this case.

[4] The Claimant alleges that the Defendant breached their duty to her as an employee. She claims that they failed to provide her with adequate personnel support; failed to give her adequate and appropriate equipment to reduce the risk of injury or to enable her to defend herself; failed to give her adequate training in self-defence or other security measures, among other things.

[5] The Claimant alleges that she suffered serious psychiatric injury as a consequence, to wit, post-traumatic stress disorder. She seeks damages for negligence as against the Defendant.

[6] For their part, the Defendant has put the Claimant to proof of her allegation that she was assaulted and suffered the injury as claimed. They go further to state that even if she was assaulted, they did not breach their duty to her as an employer, as they provided her with sufficient training; a safe location from which to do her work; and sufficient support staff who were within a short distance from the location at which she was deployed.

[7] The Defendant also asserted that the Claimant contributed to her own injury in all the circumstances of the case.

[8] It now falls to the Court to determine whether or not the Claimant has satisfied me that it was more likely than not that the Defendant owed her a duty of care; breached that duty and that the breach of duty led to damage and injury that was foreseeable.

THE LAW ON EMPLOYER'S LIABILITY

[9] It is not disputed that the Claimant was employed by the Defendant. As her employer, therefore, the Defendant would owe a duty of care to the Claimant to provide her a safe working environment as far as it was within their power so to do, bearing in mind that they did not own, control or occupy the premises at which she would be performing her duty.

[10] The authority of ***Davie v New Merton Board Mills***[1] established that amongst the duties of an employer to an employee is the duty to take reasonable care for their safety in providing, amongst other things, a safe place of work and a safe system of work. An employer must also provide sufficient and proper tools for the employee to perform their task, as well as a sufficient and sufficiently competent staff of workers to carry out the necessary tasks.

[11] The case of ***Ray McCalla v Atlas Protection et al***[2], as provided by the Claimant, also set out the duties of an employer viz their employee. As McDonald-Bishop J (as she then was) noted at paragraph 12 of the judgment:

> *"…This duty to take reasonable care for the employee's safety is personal and non-delegable. It is also said to be stricter than the duty to take reasonable care for oneself, and it exists whether or not the employment is inherently dangerous."*

[12] ***Ray McCalla*** is particularly instructive concerning the duty of employers of security guards when the guards are deployed to third-party locations for their duties.

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[1] [1959] 1 All ER 340
[2] Unreported, Supreme Court of Jamaica, 2006HCV04117, May 6, 2011

[13] According to McDonald-Bishop J (as she then was) at paragraph 16,

> *"The duty on the employer to ensure the safety of his employee remains throughout the whole of the course of the latter's employment but what will vary in each case is the degree of care to be taken by the employer. The fact of the matter, therefore, is that the first defendant's duty to the claimant to take reasonable care for his safety existed and continued whilst he worked on the second defendant's premises. What is to be considered is the degree of care that was required to be exercised on the part of the first defendant to ensure the claimant's safety while he performed his duties on those premises. So, the fact that the first defendant was not in control of those premises will arise as a material consideration in determining the question whether in all the circumstances it had discharged its common law duty of care."*

[14] Overall, the duty of the employer is simply a duty to take reasonable care for the safety of the employee. As Wolfe JA (Ag) (as he then was) said in the case of ***United Estates Limited v Samuel Durrant***[3], "*This duty…was not an absolute one and could be discharged by the exercise of due care and skill*."

[15] A corollary to this is the further complication of the intervention of a third party. Ordinarily, the employer is not responsible for the actions of a third party. However, there are certain circumstances in which the employer can be held liable for injuries caused to their employees by third parties.

[16] Marsh, J, in the unreported judgment of ***Leslie Powell v. Guardsman Ltd***[4]*,* stated:

> *"…Where the injury or damage is caused by a third party, as a general rule, a person ought not to be held liable in negligence for the third party's act or omission. However, in particular circumstances… (eg. master and servant) or where the contract governing the relationship between the parties provide for it, a person may be held liable in negligence to another for the act of a third party. There must be, however, a high degree of foreseeability that the*

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[3] (1992) 29 JLR 468 at 470

[4] Suit No. C.L. P 049 of 1999 delivered October 31, 2007

damage or injury caused by the third party would occur as a result of the act or omission of the person on whom falls the duty of care. The standard of proof is on a balance of probability and the onus of proof is on the claimant."

[17] One such instance concerns the provision of security services. It is accepted that being a security guard is an inherently risky job. A security guard is exposed to the risk of intrusion by unknown assailants and is charged with the core task of deterring such activities and doing as much as possible to prevent loss to life and property whilst not exposing himself to unnecessary risks of harm. A security guard is not always required to be a hero or perform heroic duties. He is simply to take reasonable steps, in the circumstances, to secure life and property. The risk of intrusion and confrontation with criminals varies depending on the location and the nature of what one is securing. Some areas are far more prone to criminal activities than others.

[18] So what is the degree of care required of an employer in these circumstances? McDonald-Bishop J in ***Ray McCalla*** said as follows[5]:

"It may be said, then, in summary, that the risk of harm to the claimant by criminal intrusion on the premises of the second defendant was a reasonably foreseeable risk of his employment. From this, it stands to reason that the first defendant's duty of care to the claimant did extend to protecting him, as far as skill and care would reasonably permit, from the criminal acts of third parties while he performed his duties on the second defendant's premises. For the first defendant to be absolved of any responsibility, it must be found that it had taken ***all steps that could reasonably have been taken, in the circumstances of the case, to ensure the safety of the claimant, the inherent dangerous nature of his job notwithstanding. In particular, it must be found that there was nothing more that could reasonably have been done by the first defendant, in all the circumstances, to either eliminate or to diminish the risk of***

[5] Unreported Supreme Court of Jamaica, Claim No. 2006 HCV 04117 delivered May 6, 2011 at paragraph 24

injury to the claimant at the hands of the intruder." (Emphasis mine)

THE EVIDENCE, FINDINGS OF FACT AND ANALYSIS

[19] I propose to approach this portion of the judgment by analyzing the various heads of negligence in the Claimant's Particulars of Claim.

[20] Before I do this, I will go through the Claimant's description of the location at which she was assigned on the night in question. According to the Claimant, in her Amended Particulars of Claim as well as her Witness Statement, the property to which she was assigned was essentially a lot for the storage of motor vehicles. It had no buildings on it, other than the guardhouse, which was described by her as a wooden structure. The property was secured by a perimeter fence, which is commonly described as a chain link fence. The guardhouse is next to the main gate of the facility.

[21] The photographs tendered as exhibits 2A-E were accepted into evidence by the parties as being accurate representations of the location at the time of the incident.

[22] I accepted the Claimant's evidence of the description of the property. There was no challenge to this in cross-examination and her description accords with the accepted evidence in the photographs.

[23] She further described the location as rather lonely. I accepted this evidence. It was supported by the Defendant's witness' evidence. I will set out the exchange in cross-examination, which forms one of the bases of my conclusion.

22. Q: Do you agree with me on February 4, 2018 there were bushes and vegetation on the properties neighbouring Island Car Rental?
    A: I would agree.

23. Q: Do you agree with me that to the left of Island Car Rental there was Wards Power Tools?
    A: I agree.

24. Q: You are aware that the incident took place on a Sunday Night into Monday Morning?
    A: I agree.

25. Q: You agree with me that at the time of the incident to the right of Island Car Rental was an empty lot?
    A: I agree.

26. Q: You agree that to the back of Island Car Rental on the night was an empty lot?
    A: Yes.

27. Q: These lots did not have lights installed on them?
    A: I agree.

28. Q: You agree that to the front of Island Car Rentals was a minor road?
    A: Yes.

29. Q: After that minor road is an area of vegetation. An empty area with shrubs and bushes?
    A: By my definition, grass.

30. Q: Beyond that was the highway?
    A: I agree.

31. Q: Beyond the highway was more vegetation?
    A: I agree.

32. Q: Beyond that was the sea?
    A No. Another minor road.

33. Q: The sea came after that minor road?
    A: Yes.

34. Q: At midnight on a Sunday, do you know if Wards Power Tools would be open?

    A: It would not be.

[24] From this evidence, which I accept, the area surrounding the location at which the Claimant was assigned was isolated and lonely. There was only one neighbouring premises, which was closed at the time of the incident. The surrounding properties were unlit and had shrubbery and grass. The Claimant would be exposed, but for the guardhouse.

Was the Claimant Assaulted?

[25] The Court agrees with the Defendant's supplemental submissions that it is for the Claimant to prove, on the balance of probabilities, that she was assaulted by the assailant. I specifically advise myself that there is no evidence capable of being corroborative – i.e. there is no evidence in this case, capable of confirming, in any material particular that the incident happened and that there was an assailant who did it. Accordingly, I warn myself that as sexual allegations are easy to make, but hard to refute, I must very carefully weigh the evidence presented before I can act on same. I also bear in mind the caution of which the Defendant reminded the Court in submissions, that the Claimant is the sole witness to this event so this requires greater scrutiny of the evidence. Unlike in criminal cases where there is possibility of hearing from the alleged assailant, there is no such possibility here as the Defendant is not the assailant and the assailant was not called as a witness. Therefore, I must be even more scrutinizing and vigilant in my assessment of the evidence before I can act on same. I must be satisfied on the balance of probabilities as that is the standard in the civil realm.

[26] Bearing all of the caution in mind, I accept the evidence from the Claimant that she was assaulted as she asserted. There is no evidence to suggest otherwise. When one examines the medical report, there is sufficient evidence of a sexual encounter. The absence of bruising, etc. does not mean that a non-consensual act did not take place.

[27] The Claimant testified, and I accepted, that there was an assailant identified and arrested and the matter was put before the Court. This enhances her credibility, in my view.

[28] It is true that the sequence of the event, as recounted in the witness statement, was different from that in the incident report admitted into evidence. However, the Claimant explained that the sequence was mixed up in the report and she stated that what was stated in the witness statement (her evidence in chief) was the true

version. In my view, this inconsistency was not material and did not go to the heart of the issue as to whether she was assaulted. Her credibility was not destroyed, in my view. I also remind myself that what was the evidence was what she accepted and that is what she said in her witness statement.

[29] Counsel for the Defendant, in their supplemental submissions at paragraph 77, said among other things, that Counsel was "restricted" in their cross-examination. I found this statement interesting, to put it mildly, especially as the Court categorically said to counsel that while it had concerns about the nature of the questions in light of the defence, the Court was not stopping counsel in their questioning of the Claimant. The most the court said was that counsel should be careful.

[30] The caution came at question 58. Counsel then asked another 98 questions, utilizing almost all of her agreed time of 1 ½ hour and more in cross-examination. So to say the Court restricted the cross-examination of the Claimant on the matter of her credibility is most unfortunate.

[31] The Claimant's evidence regarding the aftermath of the assault did raise some concerns. Specifically, the exchange of the phones with the assailant. The narrative was that the assailant took her company phone (colloquially a banger) by mistake and left her with his phone. She said that after jumping the fence and making good his escape, he returned to the fence and returned this phone and she ended up giving him back his phone. This, she said she did because she did not want to make him angry. She was still alone, he was still armed and she said she had no idea when help would arrive. This all seems reasonable to me in the circumstances.

[32] Counsel for the Defendant also heavily emphasized the absence of any signs of trauma on the genitalia of the Claimant; no torn or damaged clothing; or any bodily or semenal fluid. The Court will say, categorically, that the absence of physical

trauma or torn clothes in a case of alleged rape does not, by itself, make the story "incredulous". The Court readily acknowledges and reminds itself that it is not in every case of rape or sexual assault that the victim of the assault responds physically to the attack. The Court reminds itself that there are many cases when the person is put into such a state of fear or shock that they simply comply. So I bear these warnings in mind when assessing the Claimant's response to the attack. The Claimant said, in her evidence, that she was in fear of the assailant who asserted to her that he was from Flankers and one of St. James' most wanted men. I accept her evidence that he said this to her and it put her in a state of fear.

[33] When the assailant came into the guardroom, the Claimant said she screamed. He threatened that he would kill her if she screamed again and she said she went silent immediately. I accept her evidence in this regard. At paragraph 12 of her witness statement, she said that when he first entered the guardroom, he was rummaging through her bag and she thought he was going to rob her, so she remained quiet. It was after that that he told her to take off her pants. According to her she said "seriously" and the assailant became angry and asked her if "she wah dead". She said she did what he demanded as she saw the anger in his face, she was scared she was going to die. She repeatedly pleaded with him not to kill her. Later in the paragraph, she testified that, to paraphrase, she assessed her options and decided that surrender was the best one for her in the circumstances. I accept this evidence as being the truth. So there was clear evidence of coercion and forced compliance which I accept. Not every person sexually assaulted will fight back. It does not make their story any less capable of being accepted.

[34] Interestingly enough, the Defendant's witness also visited the guardroom after the incident. Yet there did not seem to be any evidence of any independent investigation on their part. He himself gave no evidence of what he saw of the guardroom when he went there.

[35] Concerning the absence of DNA in the report, the report does say that the Sexual Assault Kit body swabs were taken and handed to the accompanying police officer.

[36] What is more, a perpetrator was identified and put before the Court. This, as I said earlier, enhances the Claimant's credibility. Further, no evidence has been led to suggest any motive on the part of the Claimant to concoct such a story in the first place and then commit to the lie to the extent of going to the Defendant's counsellor right after the incident; taking the prescribed anti-retroviral medication (which I accept she did) for over a year; get herself retested after this period; seek out psychotherapy with an approved psychiatrist; and receiving pharmacotherapy in addition to sessions with a psychologist. In my view, the entirety of the conduct of the Claimant was reasonable and in accordance with how a person who was raped would act.

Failing to Provide a Safe System of Work

[37] In her Amended Particulars of Claim, the Claimant asserts that the Defendant failed to provide a safe system of work in that the Defendant assigned the Claimant to a location that they knew or ought to have known was unsafe for night duty by a lone female.

[38] When asked in cross-examination whether there was any policy by the Defendant about the deployment of workers in particular instances, the witness, Mr. Amair, said no. The exchange is important and I will set it out here.

> 4. Q: Is there a written policy from Marksman on lone worker deployment?
> A: I don't understand.
>
> 5. Q: Do you have a policy on when a guard is sent to work at a location on their own?
> A: There is no policy on that.
>
> 6. Q: Does Marksman that has [sic] a policy that addresses risks to night guards?
> A: There is no such policy.

7. Q: Before February 4, 2018 did Marksman have a policy that addressed female guards working alone?
   A: No.

[39] The additional context to this is that this case is not the first instance of the Defendant company being sued arising from incidents involving lone security guards. One such case, cited by the Defendant's counsel, was ***Lavern Anderson v Marksman Limited et al***[6]. This was a decision handed down in 2012 concerning a lone female unarmed guard on a premises at night. She was shot and injured by an assailant. The Court held the Defendant liable then. It is baffling, therefore, that there is still, as at this date, no policy relating to lone worker deployment; risks to night guards; or female guards working alone.

[40] A safe system of work describes the method and means by which the employee is to perform the task assigned by the employer. It involves the policies of the employer on how tasks are to be performed, who is to perform them as well as any other relevant information and instruction to ensure that the employee is safe whilst performing the tasks. It also includes the equipment with which they are to be provided; the number of workmen to be involved in the process(es); safety rules and regulations; compliance policies; how records are to be kept and so forth. The system can be examined as a whole, or broken down into component parts for the sake of analysis.

[41] To this end, procedures and policies are critical pieces of information to ascertain whether or not a system exists and what the details of that system are. Policies and procedures provide a reference point and guidance for employers and employees alike to ensure that everyone knows and understands the methods and means for the safe and effective performance of their duties. If there is a breakdown in policy or procedure, or they don't exist, then one is hard-pressed to

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[6] [2012] JMSC Civ 59

say that there is a safe system in place. The ship has no captain and is rudderless. Such a vessel will, inevitably, run into problems.

[42] In this case, the Defendant has admitted that they have no policy on the deployment of a lone female guard at night. What this means, in my view, is that the Defendant did not take the time to consider the circumstances under which such a deployment should happen; whether it should happen at all; what sort of additional equipment should be given (if any) to improve the safety of the female employee whilst deployed alone at night; what sort of training would be appropriate for such a deployment; what sort of institutional support might be necessary for such a deployment etc.

[43] There was no written protocol or procedure identified by the Defendant in their pleadings or evidence to which the Court could refer to determine if such a system existed and if it was adhered to on the night in question.

[44] Let us examine the evidence which supports this. The Claimant said in her evidence that she was deployed as a last-minute replacement for the previously assigned guard. I accept this as true and it was not refuted by the Defendant. There is no evidence of a protocol for replacement guards at a particular location and how this is to be effected. This is a systemic failure.

[45] She says that when she got to the location, the handing over procedure was not properly done. There is no proof, supplied by the Defendant, as to what this procedure is and whether there was compliance on the night in question. This is a systemic failure.

[46] The evidence from the Claimant, which I accept, is that during the night she made observations of men walking by and she called a Mr. Wayne Spence, a supervisor, who assured her that he was coming to check on her soon. According to Mr. Amair, there is a policy that guards are to be checked on periodically by a patrol team. However, he had no evidence to show that these checks were done on the night

in question, as the documentation was in writing and the records were lost. This represents another systemic failure. In any event, the Claimant testified, and I accept, that Mr. Spence did not come on either occasion on which she called him.

[47] In my view, the presence of routine patrols by a team from the Defendant company would serve as a deterrent to any intruder.

[48] The Defendant asserted in their defence that the location was secured by a perimeter fence and had adequate lighting and cameras. But in his evidence, Mr. Amair said that he could not confirm that the cameras were working on the night of the incident. This represents, in my view, another systemic failure. It represents a failure to have a routine procedure or policy to check to ensure that the security features installed by the customer are working during the course of the duty of the employee.

[49] What is more, in his evidence during cross-examination, Mr. Amair confirmed that there was no off-site monitoring of the footage from the cameras. So that even if the cameras were working, they would not be of any real-time assistance to the employee if something were to be happening. That is another systemic failure.

[50] In my view, the Defendant failed to have any system in place that contemplated the safety of a female employee deployed to a location alone at night. This was a lesson they should have learnt from the ***Lavern Anderson*** case, but clearly have not.

Failure to Provide Safety Equipment to Reduce the Risk of Injury to the Claimant

[51] The Claimant's evidence is that the Defendant provided her with a cellular phone on a closed user group (CUG) network as part of her safety equipment on deployment. Mr. Amair testified that the Claimant had access to a baton in the guardhouse. But he himself did not know if the baton was there. The Claimant said the baton was not present. I accept the evidence of the Claimant.

[52] I accept her evidence as I found her to be a generally credible and forthright witness and she was not shaken on cross-examination. Whilst I also found Mr. Amair to be forthright and credible, his answers showed that the Defendant did not take the time to make the necessary checks that the employee had the equipment at their disposal. There is no evidence, for example, that recent checks were made at the location for certain safety equipment and that the equipment was present and accounted for.

[53] The Claimant testified that she had no panic button and Mr. Amair confirmed this to be true. Instead, she was expected to use the cellular phone to make a call in case of an emergency. I found this to be inadequate.

[54] Imagine the scenario which was unfolding. The Claimant is being attacked by the assailant armed with a chopper. He is forcing open the door to the guardroom, whilst the Claimant is resisting the process. I accept her evidence of this to be the truth of it. In such a scenario, did the Defendant expect the Claimant to get the phone, locate the number for the Defendant's emergency response team and then place the call? This is unreasonable. With a panic button, all that one has to do is to depress the button and an alert would be sent to the emergency response location.

[55] I prefer the evidence of Mr. Amair over the Claimant in terms of the time it would take for the response team to arrive at the Claimant's location from the Defendant's response base in Ironshore. Mr. Amair said it would take them about a minute. The Claimant said 8 minutes. Given that it was midnight with minimal or no traffic, I accept the estimate of Mr. Amair as being the more likely estimate. In those circumstances, then, had the Claimant been outfitted with a panic button, the response team would more likely have been there within a minute or two and would have likely scared off the assailant before more harm was done.

[56] Mr. Amair gave no reason for the failure to deploy the Claimant with a panic button. In my view, a panic button is more adequate equipment for a lone security guard and is more likely to have been effective as a safety tool than a cellular phone.

Failure to Provide Adequate Training in Self-Defence, etc.

[57] I do not accept the evidence of the Claimant that she was not given any self-defence training. The only training she said she received was the PSRA (Private Security Regulation Authority) training and this did not provide any self-defence training. Here was the exchange in cross-examination:

> 146. S: The PSRA Training you received including [sic] basic self-defence training?
> A: I disagree. PSRA training is just an interview you do at the PSRA. Or they come to you do [sic] training in PSRA access control training.
>
> 147. Q: PSRA is the Private Security Regulation Authority?
> A: Yes.
>
> 148. S: You are not being honest when you say you did not receive any training from Marksman?
> A: I did not say I did not receive any training. I said I did not receive any self-defence training.

[58] Mr. Amair said in his witness statement that the Claimant was trained in accordance with the PSRA guidelines. These guidelines were never put into evidence. However, they are part of the Schedule to the **Private Security Regulation Authority Act**. Schedule 2 deals, in part, with security guard training. In it, there is mentioned a section on self defence. Specifically paragraph 3. But this only contains 2 elements: (a) how to use a baton; and (b) a practical exercise. The nature of this practical exercise is unclear. But clearly, self-defence training is limited to just baton use.

[59] In cross-examination, Mr. Amair admitted that the Claimant was not trained to disarm an attacker; was not trained in how to repel a sexual assault; and stated

that the training the Claimant got was focused on self-preservation and retreating to a safe location.

[60] It must be remembered that this is a security company that had a judgment of the Supreme Court against them where a lone female security guard in their employ was attacked by an assailant at a third party's property in the night. Yet, there was, in my view, no adequate training in self-defence added to their program or seemingly any improvement in the training system for the guards, in particular, females.

[61] In the circumstances, I find that the training provided was inadequate.

The Defendant's Failure to Address Issues with the Location at Which the Claimant was Assigned

[62] Under headings 2, 5 and 6 of her Amended Particulars of Claim, the Claimant asserted that the Defendant posted her at an unsafe location, failed to ensure that the location had additional security features such as cameras and adequate lighting and left her at an unfamiliar location without care for her safety.

[63] The Defendant submitted that the location was safe. However, I do not find that this was the case. The cameras were not being monitored off-site. There was also no evidence from the Defendant that they had checked to ensure that the cameras had been working on the night of the accident.

[64] Mr. Amair's evidence as to the lighting on the night in question was inadequate as he did not check at the property on the night in question. There was no evidence from any member of Island Car Rentals that would speak to the state of the property at the time either. I preferred the Claimant's evidence in this regard.

[65] The fencing is chain link fencing, as seen in the photographs. The wiring at the top of the fence is not such that would pose a tremendous difficulty for a skilled thief to scale.

[66] The Claimant said, and I accepted, that the door to the guardhouse had no locking mechanism. It was just the knob. Therefore, the door could not be locked from outside or in. There was no evidence from the Defendant that they made any recent checks on the door to see to it that the safety features were adequate. This was a major failing on their part, in my view. This is made more significant as they deploy only a single guard to that location and the guardhouse is their main source of protection and shelter. If it is compromised, then the guard has no place to which they can retreat and lock themselves away, as, according to Mr. Amair in cross-examination, is their policy.

[67] Mr. Amair's evidence of the description of the location shows that the location is quite lonely at night. In the absence of credible evidence that the cameras worked and were monitored, that the lights were all working, that the door to the guardhouse had a working locking mechanism and that the fencing was such that it would pose a challenge to intruders, I do not find that the location was a safe one for a lone security guard at night.

Contributory Negligence

[68] Whilst I am satisfied that the Defendant has adequately pleaded contributory negligence, I am not satisfied that the Claimant contributed to her own injury.

[69] The main plank of the Defendant's argument is that the Claimant did not lock the door to the guardhouse. But this argument is undermined by Mr. Amair's evidence that he did not check the door to see if the locking mechanism was working on the night of the incident or any reasonable time before that night. Therefore, they would have failed to produce any evidence to support their case that the Claimant failed to lock the door.

[70] It is to be remembered that as the Defendant has asserted negligence, they must provide the evidence to substantiate the allegation. They have failed so to do in this regard.

[71] There is no evidence that the Claimant failed to remain alert. Indeed, the evidence from the Claimant, which I accept, is that she saw men passing, on two occasions, and alerted Mr. Spence, the driver who dropped her off from the Defendant, as to their presence. It is true that she did not call the duty office. But she explained that she called Mr. Spence, the mobile supervisor, as he would be able to get to her faster. I find this to have been reasonable and Mr. Spence, I accept, is a person in authority as a supervisor.

[72] The Claimant was also attacked inside the guardhouse itself. When one looks at the location of the guardhouse in relation to the fence, it is easy to see how she could be caught off guard, even with reasonable diligence.

[73] I therefore reject the Defendant's assertion that the Claimant contributed to her own injuries.

Did the Breach Result in the Loss

[74] In my view, the Defendant's failures, as outlined above, resulted in the heightened risk of the incident happening to the Claimant and left her exposed to the assault without adequate means to protect herself from the harm.

[75] The Claimant detailed her ordeal after the assault. She says she had to take over 20 tablets in 72 hours. There was testing that had to be repeated every three months for a year and there was emergency contraception medication.

[76] Then, of course, there is the trauma of having to relive the encounter to the police, then to Marksman, and then, here in Court and having to endure the ordeal of cross-examination about the very incident.

[77] She described, and I accept, that in the days and weeks following the assault, she was anxious, distressed and fearful. She said the feelings became more severe over time. She described, and I accept, that awaiting the test results every three

months was difficult for her. She said, and I accept, that the fear and anxiety left her paralyzed and consumed her daily life.

[78] The Defendant provided a counsellor for her immediately after the incident. She said the sessions lasted a few months. She also did counselling through the Type V clinic at Overton Plaza between 2019 and 2020. She saw a therapist at Cornwall Regional Hospital sometime in 2021 and had sessions for over 1 year. Eventually, she was examined by Dr. McGill, who provided a report and is still seeing the Claimant.

[79] Dr. McGill saw the Claimant in 2025. In the report, the doctor notes that the Claimant was initially diagnosed in 2021 with Post-Traumatic Stress Disorder (PTSD) and that she was receiving treatment for same. Dr. McGill confirmed the diagnosis in her report. Dr. McGill recommended that, in addition to psychotherapy treatment, the Claimant was also to receive medication to help her cope. She said that the Claimant has a good prognosis provided she was compliant.

[80] In her answers to questions in clarification posed by the Defendant, Dr. McGill was firm in her position that the post-traumatic stress disorder was directly caused by the trauma suffered as a result of the assault. Dr. McGill conceded that the three (3) year delay in seeking treatment would have set the Claimant back in terms of her progress in dealing with the post-traumatic stress disorder. When asked if the delay would make it more difficult to confidently attribute the Claimant's current diagnosis and/or symptoms solely to the 2018 incident, the doctor said as follows:

> *"No. The clinical history would allow for other traumatic experiences to be identified. The delay though may allow for additional factors or events which may make it more difficult to treat PTSD symptoms"*

[81] Therefore, the expert, whom I accepted as such, made it clear that there is a causal connection between the traumatic incident and the Claimant's current PTSD condition.

[82] The doctor also ruled out other psychosocial factors such as ongoing occupational stress, family conflict, financial hardship, pre-existing mental health issues and/or subsequent life events as contributors to the PTSD condition. The doctor said these were predisposing factors. She said that they would not be seen as causes or contributors to PTSD and in any event, she took them into account when devising the treatment plan. To put it beyond doubt, she categorically stated that these factors are not part of the diagnostic criteria for PTSD and would not lead to its diagnosis.

[83] She did concede that these factors could aggravate the condition and make it more difficult to treat. She also accepted that delay in treatment could compound or reshape the symptoms over time.

[84] I do accept and find that there was a significant time delay in the Claimant continuing her treatment. There was no explanation given for the delay. As stated by the doctor, this has contributed to a delay in recovery. But did not mean that she did not suffer PTSD as a consequence of the incident.

[85] The Defendant argued in their submissions that they ought not to be held liable for the actions of a third party, especially in circumstances where there were no previously reported incidents at that particular location. They distinguished the ***Lavern Anderson*** decision, cited above, on this point. However, as stated in the ***Ray McCalla*** decision by McDonald-Bishop J (as she then was)[7]:

> *"It may be said then, in summary, that the risk of harm to the Claimant by criminal intrusion on the premises of the second defendant was a reasonably foreseeable risk of his employment. From this, it stands to reason that the first defendant's [security company's] duty of care to the Claimant [security company employee] did extend to protecting him, as far as skill and care would reasonably permit, from*

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[7] Ibid at n. 5 para 24

> *the criminal acts of third parties while he performed his duties on the second defendant's premises. For the first defendant to be absolved of any responsibility, it must be found that it had taken all steps that could reasonably have been taken, in the circumstances of the case, to ensure the safety of the Claimant, the inherent dangerous nature of his job notwithstanding."*

[86] In the circumstances therefore, I am satisfied, on the balance, that it was the Defendant's breach of duty that significantly contributed to the incident or significantly exposed the Claimant to the risk of the incident happening and that this incident caused the Claimant to be assaulted and to suffer the PTSD she experiences now.

[87] I reject the argument that the fact of there being no incident of this exact nature being reported before, absolves the Defendant of liability. Mr. Amair accepted that being a lone security guard is itself inherently risky. The Defendant has had the experience of their lone female security guard being attacked on the job. As the old adage says, "*Once bitten, twice shy*."

ASSESSMENT OF DAMAGES

General Damages

[88] This court readily accepts that money can never fully compensate for being raped or otherwise sexually assaulted. Indeed, quantifying damages for these types of cases have given many jurisdictions around the world serious problems. So much so that reports have often been commissioned to enquire into this issue[8].

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[8] See for example the work Civil Remedies for Sexual Assault BCLI Report No. 14, June 2001.

[89] In rape cases, for what should the Court compensate? I take guidance from the report commissioned for British Columbia, Canada published in June 2001, ***Civil Remedies for Sexual Assault***[9]**.**

> *"A conventional damage award for the inherent harm of sexual assault would have to meet several requirements. It must adequately compensate the plaintiff for the inherent harm of sexual assault, and make it worthwhile to pursue a claim, taking into account the costs of legal representation. It must also be a sum which is fair to defendants, and to society as a whole. This requirement raises the issue of whether the award should differ depending on the basis of the defendant's liability. In the view of the Committee, this would not accord with the compensatory principles of the damages system. Once liability and causation have been established, the focus turns to the plaintiff's injuries rather than the defendant's conduct. Sexual assault results in the same level of inherent harm regardless of whether the defendant's liability is based in assault and battery, negligence, breach of non-delegable duty, or vicarious liability. The defendant's conduct is a matter better dealt with in the context of damages for the consequential injuries of sexual assault, and aggravated and punitive damages. The amount of a conventional damage award for the inherent harm of sexual assault should also be in line with awards in similar cases, which would go some way towards ensuring that the requirements of fairness to plaintiffs and defendants are met. A final requirement is that such an award should not be used to decrease the overall level of compensation in sexual assault cases. We will discuss the range of awards in a following section, but at this stage, it is important to note that what we propose is a damage award to acknowledge the inherent harm in sexual assault cases, not a suggestion that the awards in such cases be downsized."*

[90] Compensation for sexual offences usually involves compensation for two main aspects of the event: the physical act itself, which is usually under the torts of Assault and Battery; and the mental trauma that usually accompanies it in the form of various psychiatric injuries such as depressive disorder or post-traumatic stress disorder.

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[9] Id at page 41

[91] It is recognized that the physical act itself is separate from the consequences that flow from the act. In a leading case from Ontario ***Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police***[10]*,* a woman who was sexually assaulted by a serial rapist successfully sued the police for negligence and breach of the Charter in circumstances where the police failed to warn her of the presence of a serial rapist in her community. The Court found the police grossly negligent.

[92] On the question of damages for rape in particular, the Court noted the horrific nature of the violation[11],

> *"rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatization which accident victims do not. Rape is not about sex; it is about anger, it is about power and it is about control. It is, in the words of Dr. Peter Jaffe, "an overwhelming life event." It is a form of violence intended to create terror, to dominate, to control, and to humiliate. It is an act of hostility and aggression. Forced sexual intercourse is inherently violent and profoundly degrading."*

Post-Traumatic Stress Disorder (PTSD)

[93] The Claimant submitted for consideration the decision of ***John Henry v South East Regional Health Authority et al***[12]. He suffered PTSD after being misdiagnosed with HIV. He was assessed as suffering moderately severe to severe PTSD. His symptoms were stress, anxiety, depression and fear of death. He experienced feelings of disgrace and shame consequent on his being told that he was unfaithful (to his spouse); further trauma after being treated for 2 years for a condition he did not have; severely damaged and strained relations with friends and family; being suspicious and overly sensitive; loss of sleep, shock, loss of consortium.

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[10] 160 DLR (4th) 697
[11] Id at page 746
[12] [2019] JMSC Civ 268

[94] He was awarded the sum of $8,500,000.00 in November of 2019. This sum now updates to approximately $ 12 million in today's money.

[95] The Claimant also submitted the case of ***Sharon Greenwood-Henry v AG of Jamaica***[13]. That claimant was the subject of a very humiliating strip and cavity search at the Norman Manley International Airport. Among her diagnoses was one for post-traumatic stress disorder. She was awarded the sum of $500,000.00 for Post-Traumatic Stress Disorder. This updates to just over $2 million today.

[96] The Defendant, for their part, submitted the same ***Sharon Greenwood Henry*** decision as well as the decision of ***Desmond Hepburn v AG of Jamaica***[14]. In this case, the Claimant was diagnosed as suffering major depressive disorder and was ultimately assessed a 19% whole person impairment. He was awarded the sum of $2.3m in 2023. This figure updates to roughly $2.6 million today.

[97] I distinguish *Desmond Hepburn* as it is a different diagnosis from PTSD and so I will not utilize that decision.

[98] I also examined the case of ***Charmaine Manning-Allen v Caledonia Medical Laboratory***[15]. This was another case of a misdiagnosis of HIV on the part of the Defendant. This Claimant was found by the court to be suffering from moderately severe PTSD, after a thorough analysis of the conflicting medical evidence and several authorities on the point. She was ultimately awarded the sum of $9,000,000.00 for her pain and suffering and loss of amenities. Importantly, the learned judge found the Claimant to be suffering a 10% whole person impairment.

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[13] (Unreported) Supreme Court of Jamaica, CLG 116/99 delivered October 26, 2005.
[14] [2023] JMSC Civ 27
[15] [2022] JMSC Civ 202

[99] There was also the case of ***Odane Edwards v AG of Jamaica***[16]. In that case, a minor was shot and injured by the police. As part of his injuries, he was diagnosed as suffering moderately severe PTSD. D. Fraser J (as he then was) awarded the Claimant $500,000.00 for the PTSD aspect of his claim. That sum updates to $954,663.21. What is instructive about this case is that Fraser J (as he then was) chose not to rely on the cases of **Joan Morgan and Cecil Lawrence et al v Ministry of Health et al** – a case dealing with misdiagnosis of HIV – as it was too dissimilar to the facts of the case before him.

[100] In the decision of ***Lavern Anderson v Marksman Limited***[17] Daye J awarded the Claimant security guard who was shot and injured whilst working as a lone female security guard, $1,000,000.00 for Post-Traumatic Stress Disorder. That award comes to $2.1 million today after indexation.

[101] When I look at the authorities therefore, there is a clear demarcation between cases of PTSD where there is a misdiagnosis of HIV and those cases where the PTSD arises as a result of some other action such as an assault, or false imprisonment etc. Bearing this in mind, I find that the ***John Henry*** case cannot be used as a comparator. Nor can I use the ***Charmaine Manning-Allen*** decision.

[102] It is important to note that in this case, there was no impairment rating assigned. Dr. McGill also said that the Claimant is to continue her treatment. But as I have said elsewhere[18] the absence of an impairment rating, does not preclude the Court from assessing damages where there is an apparent impairment. I am also guided by the recent decision of by sister Barnaby J in the decision of ***Ivy Williams v JUTC Limited***[19] where she said that,

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[16] [2013] JMSC Civ 116
[17] [2012] JMSC Civ 59
[18] See the decision in *JS (A minor) v Wessel Williams* [2024] JMSC Civ 116
[19] [2026] JMSC Civ 66 at paragraph 51

> *"While ratings can be very useful, where accepted medical evidence is that incapacity cannot be assessed because a claimant has not reached maximum medical improvement and/or is still receiving medical treatment, courts must have some latitude to make appropriate awards in consideration of well-established principles in order to justly compensate the Claimant."*

[103] In the case at bar, the Defendant has properly pleaded in their defence that the Claimant failed to adequately mitigate her loss. This is in the context of the Claimant's delay in getting herself treated by a psychiatrist. However, she did immediately receive counselling therefore, it was not a total failure to mitigate.

[104] I would say that the facts of this case fall somewhere in the spectrum between the assault PTSD cases and the misdiagnosis of HIV PTSD cases and might even be described as a hybrid of the two types of cases. For here we have a Claimant who has experienced the trauma of being assaulted sexually. Compounding that trauma is the waiting of over a year to know if she has suffered any other serious consequence of the assault. I agree it is different from the HIV diagnosis case as you are told something and have to live with that shock for a period of time until you are given the correct diagnosis.

[105] However, waiting for the news is similarly traumatic as the anticipation and fretting over what might be was traumatic for this claimant. However, Dr. McGill did not classify her PTSD as being either severe, moderately severe or moderate. She also opined that she was still undergoing treatment, but that her prognosis was good.

[106] The Claimant herself has stated that she has returned to work as a security supervisor employed to King Alarm.

[107] After leaving the Defendant's employ, the Claimant said she stayed home mostly, but did not return to work until around March of 2019. She said she did not want to go out or see people. The Claimant says she has intrusive memories of the assault, anxiety, low mood and difficulty sleeping and concentrating. During her interview

with Dr. McGill, the doctor noted that the Claimant had issues with short-term memory.

[108] The Claimant says she experiences ongoing stress, loss of confidence and difficulty feeling safe. Her relationship with her 19-year-old daughter has also been significantly impacted negatively. Her social life has also been negatively impacted and she finds it difficult to have normal relations with a man again. She has not had intimate relations since the incident.

[109] In the circumstances, I would increase the award from the assault PTSD cases range, but I will not go anywhere as high as the HIV misdiagnosis PTSD cases. My starting point would be $5,000,0000.00. The award would have to be discounted because of the delay in the Claimant getting appropriate medical attention between 2018 and 2021 and then the unexplained gap in continuing her treatment between 2021/2022 and the resumption in 2025, which, on the evidence, delayed the Claimant improving. It is not a significant discount, as the Claimant did seek and get counselling shortly after the incident. But it is apparent to me that what she needed was treatment from a psychiatrist and not simply counselling.

[110] I am of the view that an award of $3,500,000.00 is more than appropriate in all the circumstances of this case for the PTSD.

Assault & Battery

[111] For the Assault and Battery, the Court awards the sum of $6,500,000.00. The Claimant, though receiving no bruising or lacerations etc, was made to do and to endure violations of her person that are extremely intrusive and traumatic. A comparator is that of ***Sharon Greenwood-Henry,*** where the Claimant was assaulted when she was intrusively searched by a police officer in her vagina and then again made to endure another round of anal and vaginal examination by a doctor at the hospital. In those circumstances, Sykes J (as he then was) awarded the Claimant the sum of $1.1m for general damages for assault and battery. That sum now updates to $4.5m today after indexation.

[112] In my view, that award ought to be increased to take into account the fact that in this case, the assault was rape – meaning the penis entered the vagina. There was the added feature that there was no condom and the assailant discharged in the Claimant. The claimant was also forced to perform oral sex and had the same done to her despite her protestations. There can be no greater violation than all of what she went through. Therefore, I am of the view that an appropriate award would be $6,500,000.00.

DISPOSITION

1 Judgment for the Claimant against the Defendant

2 Damages to the Claimant assessed as follows:

General Damages for Pain and Suffering and Loss of Amenities in the sum of $10,000,000.00 as follows:

(i) (PTSD): $3,500,000.00; and

(ii) Assault and Battery: $6,500,000.00

3 Interest on General Damages at 3% from the 20th December 2023 to the 16th June 2026.

4 Costs to the Claimant to be taxed if not agreed.

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Dale Staple
Puisne Judge