



[2020] JMSC Civ 200

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV06005

BETWEEN	BOB BANJO	CLAIMANT
AND	SOUTHERN REGIONAL HEALTH AUTHORITY	1ST DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

IN OPEN COURT

Mr. Glenroy Mellish for the Claimant

Ms. Althea Jarrett instructed by the Director of State Proceedings for the Defendants

Heard: July 27, 2020 & October 9, 2020

**MEDICAL PRACTITIONER – BREACH OF THE DUTY OF CONFIDENTIALITY–
PUBLIC INTEREST – DOCTOR'S DUTY TO PATIENT AND TO PUBLIC- BREACH OF
CONSTITUTIONAL RIGHT TO PRIVACY- DAMAGES FOR BREACH OF THE DUTY
OF CONFIDENCE- FALSE IMPRISONMENT- DEFAMATION**

WOLFE-REECE, J

INTRODUCTION

[1] This case has its genesis in suspicions by medical practitioners employed to the 1st Defendant that the Claimant was suffering from a highly contagious and deadly disease, that being the Ebola Virus. The facts of the case demonstrate that there

is a fine line between fear resulting in discrimination and precaution in the public interest.

- [2] Dr Bob Banjo filed a Claim Form the 9th December, 2014 against the Defendants to recover damages for false imprisonment, defamation, unlawful disclosure of his private patient information and breach of his constitutional right to privacy.

Background

- [3] Dr Bob Banjo, the Claimant, holds a Doctorate Degree (Ph. D.) in Industrial Management and is a former lecturer. The Claimant is a native of Nigeria who was granted citizenship in Jamaica in September, 1992 after living and working in Jamaica since July, 1986.
- [4] In July 2014 the Claimant visited his home country of Nigeria and returned to Jamaica on August 27, 2014. Approximately two months later, on the 18th October, 2014 the Claimant fell ill and exhibited symptoms of vomiting and sweating profusely. After contacting the Accident and Emergency Department of the Mandeville Regional Hospital he was advised by Dr Masada James to visit the emergency room to be assessed. He acted upon the Doctor's instructions and visited the said facility.
- [5] Upon his arrival to the hospital he was assessed by Dr James and a female nurse who took his temperature and blood pressure. During an exchange with the nurse the Claimant disclosed that he recently travelled to Nigeria. All the parties to the proceedings agree that this revelation led the medical team to conclude that Dr Banjo might be suffering from the Ebola virus.
- [6] The matter was escalated to the Senior Medical Officer at the facility, Dr Everton McIntosh, who spoke to the Claimant and informed him that information had been forwarded to the Ministry of Health for them to check with immigration in order to verify his travel history. The Claimant was required to stay in the hospital until the health care representatives got directives on how to treat him.

- [7] Following confirmation that the symptoms being experienced by the Claimant did not fit the case definition of Ebola virus he was treated for his illness and allowed to leave.

Claimant's case

- [8] The evidence of the Claimant is that after he advised Nurse Allen-Sharpe about his travel history she left the room in which he was seated in search of Dr James. He noted that he overheard Nurse Allen-Sharpe telling Dr James that he had just come from Nigeria. He further noted and described that he recognized a level of excitement in the facility as people began to walk by the office where he was seated and would be looking into the office at him. According to him, he heard another exchange from a nurse who said that he displayed symptoms of Ebola.
- [9] The Claimant stated in his evidence that he arrived at the hospital about 5:10 am. He explained that he sat in Dr James' office for the entire time that he was at the hospital. Whilst there he stated that he was experiencing feelings of dizziness, discomfort and nausea however no one attended to him despite his enquiries as to when he would be treated.
- [10] The Claimant further explained that after advising Dr James that he had an appointment in Kingston and would be leaving, Dr James told him that he could not leave and instructed the ward assistant to notify the security that he was not to leave the premises.
- [11] Dr Banjo asserts that he spoke to Dr McIntosh, the senior medical officer who explained that he is awaiting directives from Kingston as to the course to take in relation to him. He further argued that he made attempts to dispel any concerns in the mind of Dr McIntosh that he suffering from the Ebola virus by explaining that he returned to Jamaica from Nigeria 8 weeks prior to attending the hospital. According to him Dr McIntosh responded by accusing Dr Banjo of telling Nurse Allen-Sharpe inconsistent information, in that, he advised the nurse that he was a medical doctor. Dr Banjo quickly corrected this information by noting that he never

said he was a medical doctor but only indicated that he had a Doctor of Philosophy (PhD).

[12] The Claimant noted that it was not until 2:00 p.m. that was advised that he would be released. His evidence is that he left at 3:25 p.m. after being treated for high blood pressure. He said that upon exiting the hospital he was met by a crowd outside the accident and emergency centre with people shouting out “Ebola Man”.

[13] He argued that the incident has caused both him and his family much distress and embarrassment. He further argued that he has suffered financial loss as result of the incident

Defendants’ case

[14] The Defendants deny that the Claimant was falsely imprisoned or defamed and they also deny that there was any unlawful disclosure of the patient’s information or breach of his right to privacy.

[15] On the issue of whether the Claimant was falsely imprisoned, Learned Counsel, Miss Jarrett submitted that the medical team at the Mandeville Regional Hospital were justified in not discharging the Claimant until they received information from the Chief Medical Officer that it was safe to discharge the Claimant after ruling that he was not suffering from the deadly Ebola virus.

[16] Counsel pointed out to the Court that the evidence at paragraph 4 of the witness statement of Dr Janie Miller sets the foundation for the concerns expressed by the medical practitioner. Dr Miller described the Ebola virus as highly contagious with a high mortality rate. Dr Miller also explained that any error made in discharging Dr Banjo prior to ruling out the Ebola virus could negatively impact the health of the healthcare professionals involved in his treatment and several other members of the local and wider population.

- [17] Counsel relied on the defence of necessity in urging the Court to find that the detention of the Claimant was a necessary step in the public interest to minimize the possible spread of highly contagious and deadly virus.
- [18] On the issue of whether the Claimant was defamed, Counsel submitted that the words which the Claimant claimed to have heard did constitute a defamatory statement. This, Miss Jarrett said, was confirmed by the Claimant himself, when he agreed during cross-examination that “*he never heard any member of the medical team saying that he had the Ebola virus*”. Rather, what he admitted to hearing was members of the team discussing the fact that he had symptoms that resembled the Ebola virus. Counsel surmised that these words were not defamatory in nature.
- [19] Miss Jarrett asserted that it could not be said that the medical team breached doctor/patient confidentiality because at all material times the doctors and members of the medical team were acting in accordance with protocols laid down by the Ministry of Health to deal with the possible threat of the deadly Ebola virus. She noted that the nurses were required to report matters to their supervisors in the execution of their duties and that Dr McIntosh was required to report suspected cases of the Ebola virus to the Ministry of Health or the Eastern Regional Directorship.
- [20] In response to Dr Banjo’s claim that his constitutional right to privacy as enshrined under section 13(3)(j)(ii) of the Charter of Fundamental Rights and Freedom was breached, Counsel emphasised the fact that this right is not absolute and is subject to section 13(1)(c) which provides that this right shall be given effect as long as to do so does not prejudice the rights and freedoms of others. Counsel submitted that there was no breach to the Claimant’s right to privacy, however, she concluded that if there was any such breach, it was demonstrably justified in a free and democratic society.

[21] Lastly, Counsel submitted that the Claimant is not entitled to special damages as he has failed to specifically prove his loss.

Issues

- i. **Whether there was any unlawful disclosure of patient information by the Defendants**
- ii. **Whether the Defendants uttered defamatory statements about the Claimant which would cause others to shun or avoid him**
- iii. **Whether the Claimant was falsely imprisoned by the Defendants**

LAW AND ANALYSIS

Issue # 1

[22] The case of **W v Egdell and others** [1990] 1 All ER 835 highlights the point that there are instances which warrant disclosing a patient's information to serve a greater public interest. A brief synopsis of the facts of the case are relevant to emphasize the point to be made. In that case, W was detained as a mental patient after he shot and killed five people and wounded two others. He was detained at the mental hospital without limit of time on the basis that he was perceived to be a potential threat to public safety. About ten years after being detained he sought to make an application before a mental health review tribunal for his ultimate discharge. Dr Ghosh, the medical officer in charge of his treatment, diagnosed him as suffering from schizophrenia which could be treated by drugs.

[23] W's attorney-at-law sought to have an independent psychiatrist evaluate W in a bid to produce a report in support of his application. Dr Egdell, the psychiatrist engaged for that purpose produced a report strongly opposing W's discharge and instead recommended that further testing and treatment be conducted especially in light of W's long-standing interest in firearms and explosives.

- [24] Upon receiving the report W's attorney decided not to put the report before the tribunal. Once Dr Egdell heard that the report would not be placed before the tribunal he contacted the hospital in charge of W's report and ensured that they obtained a copy of the report. Dr Egdell went further in prompting the hospital to send a copy of the report to the Secretary of State who in turn made the report available to the tribunal. The disclosure of the report led W to file a writ against Dr Egdell and the recipients of the report seeking (i) an injunction to restrain them from using or disclosing the report, (ii) delivery up of all copies of the report and (iii) damages for breach of the duty of confidence.
- [25] Bingham LJ came to the conclusion that Dr Egdell acted in accordance with the law with his conduct being necessary in the interests of public safety and the prevention of crime. Bingham LJ reasoned that while there is a public interest to be preserved in protection of confidence in professional relationships, this public interest may be overridden by a prevailing interest which favours disclosure by highlighting several cases which traversed this balancing exercise. He expressed on page 848 as follows:

The decided cases very clearly establish (1) that the law recognises an important public interest in maintaining professional duties of confidence but (2) that the law treats such duties not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure. Thus the public interest in the administration of justice may require a clergyman, a banker, a medical man, a journalist or an accountant to breach his professional duty of confidence(emphasis mine) (A-G v Mulholland [1963] 1 All ER 767 at 771, [1963] 2 QB 477 at 489-490, Chantrey Martin & Co v Martin [1953] 2 All ER 691, [1953] 2 QB 286). In Parry-Jones v Law Society [1968] 1 All ER 177, [1969] 1 Ch 1 a solicitor's duty of confidence towards his clients was held to be overridden by his duty to comply with the law of the land, which required him to produce documents for inspection under the Solicitors' Accounts Rules. A doctor's duty of confidence to his patient may be overridden by clear statutory language (as in Hunter v Mann [1974] 2 All ER 414, [1974] QB 767). A banker owes his customer an undoubted duty of confidence, but he may become subject to a duty to the public to disclose, as where danger to the state or public duty supersede the duty of agent to principal (Tournier v National Provincial and Union Bank of England [1924] 1 KB 461 at 473, 486, [1923] All ER Rep 550 at 554, 561). An employee may justify breach of a duty of confidence towards his employer otherwise binding on him when there is a public interest in the

subject matter of his disclosure (Initial Services Ltd v Putterill [1967] 3 All ER 145, [1968] 1 QB 396, Lion Laboratories v Evans [1984] 2 All ER 417, [1985] QB 526). These qualifications of the duty of confidence arise not because that duty is not accorded legal recognition but for the reason clearly given by Lord Goff in his speech in (A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 at 659, [1988] 3 WLR 776 at 807, the Spycatcher case), quoted by Scott J ([1989] 1 All ER 1089 at 1102, [1989] 2 WLR 689 at 710):

'The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.'

- [26] Therefore, this Court must look at the evidence and ask itself the following question; Can it be said that this is a case where the public interest in favour of disclosure outweighs the public interest to preserve Dr Banjo's patient information? I would answer this question in the affirmative. Firstly, in the evidence of Dr Janice Miller, in particular paragraph 4 of her witness statement filed on the 25th January, 2019 she described the threat to public health in the following manner:

Infection with the Ebola virus is known to have a very high mortality Rate. The virus is highly contagious. Additionally, the early manifestations of infection with the Ebola virus is known to have symptoms seen with other conditions. If Dr Banjo's travel dates were incorrect and he was still within the incubation period for the disease, any error made in discharging him if he is subsequently found to have been infected with the Ebola virus could negatively impact on the health of the healthcare professionals involved in his treatment and expose several other members of the local and wider population to this deadly virus.

- [27] What I found even more compelling is the Claimant's own admission during cross-examination. He himself accepts that if he in fact had the Ebola virus and was allowed to be discharged a serious health crisis would have ensued. He further agreed that the workers were following protocols. Whilst he gave his evidence, what it appears he had a problem with was not so much the disclosure or the

detention, but the length of time that it took for him to be treated. The following exchange ensued between Dr Banjo and Miss Jarrett:

Q. u will accept that if u had the virus on 18.10 .2014 there would have been a serious public health crisis if u were allowed to leave the hospital

A. yes

Q. U will accept, that medical personnel, on line staff have to follow protocol?

A. yes

Q. one of those protocols was to contact the Ministry of Health

A. yes but no for so long

Q. u would accept that without your passport confirmation had to be had of your travel history

A. yes but not for so long

[28] It was raised by Mr. Mellish in his submissions that Dr. McIntosh had agreed that he was in fact the person who spoke to the newspaper reporter and was referenced to in the article which was tendered into evidence. My assessment of the article makes no reference to the Claimant by name. Neither was there anything in the article that was suggesting that it was Dr. Banjo. It was not until the Claimant did an interview with Livern Barrett from the Daily Gleaner that his name and complete circumstances were published.

[29] I have concluded that there is no evidence that that the medical personnel and or online staff unlawfully disclosed any of Dr Banjo's patient information and or medical information. The information disseminated to the Ministry of Health was reasonably necessary in the public interest and is therefore justified.

Issue # 2

[30] Defamation is an umbrella term used to describe the torts of libel and slander. Section 2 of the Defamation Act provides that '*defamatory matter means any*

matter published by a person that is, may be, or is alleged to be, defamatory of another person.' The issue of what is considered to be defamatory was not specifically defined by the Act and for the purpose of these proceedings, this question is very relevant. It is generally accepted that defamatory statements are words which expose the plaintiff to hatred, ridicule and contempt. The House of Lords in the case of **Sim v Stretch** - [1936] 2 All ER 1237 expressed that that definition might be too narrow and laid down that a defamatory statement is one which tends to lower the plaintiff in the estimation of right thinking members of society. The Board defined the term as follows:

The criterion by which words are to be considered capable of being defamatory has generally been regarded as settled by authority of long standing. The definition generally laid down is that the words expose the plaintiff to hatred, ridicule and contempt. The definition is here thought by Lord Atkin to be probably too narrow. In the present case he proposes the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? This, of course, is not a test of universal application, because one has to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. This qualification, however, would only seem to require that there should be substituted for "right-thinking member of society generally," the person or class of persons whose reaction to the publication forms the test of the defamatory character of the words.

[31] In the current case, the Claimant claims that suggestions by the health care professionals at the Mandeville Hospital that he exhibited symptoms similar to the Ebola virus was defamatory. It is settled law that it is actionable per se to impute that the Claimant is suffering from a contagious and infectious disease as such allegations would lead to persons to shun and avoid him. However, the cases established that the category of diseases is limited to venereal diseases and leprosy. The Court of Appeal expressed this point in **Murray v Williams** (1936) 6 JLR 180, where Brown, JA stated:

In this Court as a result of the contentions advanced by the appellant's counsel there are three questions which fall for decision. They are: -

- 1) *Are the words defamatory?*
- 2) *Are they actionable without proof of special damage?*

- 3) *If they are not actionable without proof of special damage, has special damage been proved?*

These questions are settled by legal decisions and the text books.

(1) In our opinion the words are capable of being defamatory as used in the circumstances of this case. It is defamatory to impute insanity in certain cases or to attribute to the plaintiff certain contagious and infectious diseases of a loathsome nature and it has been pointed out that no substantial distinction can be drawn between an imputation of mental disease and one of bodily disease. Clerk and Lindsell on Torts p. 502.

As to (2). If the matter were one of principle, small pox, scarlet fever, measles, and similar contagious diseases would be within the rule, but small pox is not and it is improbable that the list will be extended. For practical purposes the rule may be taken to be limited to statements attributing venereal disease. Clerk and Lindsell on Torts 8TH Edn. P. 506. In Jones v Jones [1916] 1 K.B. 351, affirmed in the House of Lords, the case is thus stated by Swinfen Eady L. J.”

[32] The dicta of Brown JA is very instructive in determining the issue relating to defamation. The passage illustrates that the first thing that the Claimant must establish is that the words uttered were defamatory in character. After he has passed that first threshold, the court must then determine whether the defamatory statement is actionable per se, that is, without proof of damage. As is highlighted above, the cases have established that the category of diseases which give rise to damages without the need to specifically prove damages is limited to venereal diseases and leprosy (see also of **Hinds v Lee** [1952] 6 J.L.R. 170). Lastly, where the court comes to conclusion that the disease which is alleged is not within the closed category laid down by law, the Judge must then look to the evidence to see if the Claimant has specifically proven his damages. If no damage was specifically proven, then no damages can be awarded.

[33] In answering the first question of whether the assertion that Dr Banjo exhibited symptoms which resembled the Ebola virus can be said to be defamatory we must look at whether the words tend to lower the Claimant in the estimation of right-thinking members of society. Lord Atkin reasoned in **Sim v Stretch** - [1936] 2 All ER 1237 that consideration must be given to the person or class of persons who hears the publication in determining whether the words were defamatory in nature.

- [34]** Dr Banjo himself acknowledged that he never heard any member of the team saying that he was infected with the Ebola virus. Rather they expressed that he had symptoms that resembled the manifestation of the virus. When asked whether he knew that vomiting was a sign of the virus, he responded by saying that he was unaware. When asked whether he knew that sweating profusely was another sign of the virus, he responded by saying he was unaware. Based on the symptoms exhibited by Dr Banjo, coupled with his travel history, the medical team suspected the possibility of the virus but did not state definitely that the Claimant was infected with the virus.
- [35]** To my mind, medical professionals not only have a duty to the public and to patients. They have a duty to themselves to take precaution when dealing with patients who present with symptoms of any communicable disease. Taking precaution should not be seen as an attempt to shun or avoid the patient but is a necessary and reasonable measure to protect healthcare workers and the general public especially in light of the fact that this publication was made to healthcare workers who knew and would understand that there was no diagnosis made in relation to the Claimant. Rather, the medical practitioners were taking steps to determine the exact source of Dr Banjo's illness and whether the deadly virus could properly be ruled out.
- [36]** Given my findings that the words uttered were not defamatory in nature, I need not go any further to consider the issues of damages. However, for completeness, I wish to point out that allegations made in relation to the Ebola virus does not fall within the closed category of cases laid down by law which give rise to damages without the need to prove special damages. Therefore, the Claimant would be required to specifically prove his loss and this he has failed to do which means that even if the words were defamatory he would not be entitled to an award in damages.

False imprisonment

[37] In order to succeed in a claim for false imprisonment the Claimant must establish that he endured a total loss of liberty without any justifiable excuse on the part of the Defendant for such detention. It is important to note that the Claimant does not bear the burden of proving that the detention was unlawful, rather, it falls upon the Defendant to prove that the restraint or imprisonment was justified. The authors of Halsbury Laws of England Volume 97 2015 5th Edition paragraph 543 provide a comprehensive overview of the area which I consider to be useful for these proceedings.

543. Restraint of person.

A claim of false imprisonment lies at the suit of a person unlawfully imprisoned against the person who causes the imprisonment. Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. It is not necessary that the person detained is aware of the detention at the time. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. A prisoner whose liberty has been taken away by lawful authority has no residual liberty enabling him to bring a claim for false imprisonment against the prison authorities or Home Office in respect of his confinement within a particular part of the prison.

The gist of the claim of false imprisonment is the mere imprisonment. The claimant need not prove that the imprisonment was unlawful independently of the tort or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification.

[38] A person's right to liberty is enshrined in our constitution and is specifically guaranteed under sections 13(3)(a) & 14(1) of the Charter of fundamental rights and freedom. It cannot be overemphasised that the rights guaranteed under the charter are not absolute and are subject to certain exceptions. Section 13(3)(a) provides that a person's right to liberty may be deprived in the execution of the sentence of a court in respect of a criminal offence. Section 14(1)(h)(i), which is more relevant for these proceedings, allows for the derogation of the right to

prevent the spread of an infectious or contagious diseases. The section reads as follows:

14.-(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances-

(h) the detention of a person (i) for the prevention of the spreading of an infectious or contagious disease constituting a serious threat to public health

[39] Based on the Claimant's evidence, in particular paragraph 12 of his witness statement, the detention commenced at about 6:30 a.m. when he alleges that Dr James advised him that he could not leave the premises and instructed the ward to advise the security to prevent him from leaving. Dr Banjo's specific words are as follows:

At about 6:30 a.m. I decided to inquire from Dr James how much longer I would need to wait before being seen by him. He informed me that he was on a call with the Chief Medical Officer in Kingston and would attend to me after his call. I waited a further hour before I returned to Dr James informing him that I had an appointment in Kingston and would be leaving. Dr James responded I could not leave and instructed the ward assistant to notify the security of Accident & Emergency that I was not to leave and that they were to stop me if I tried.

[40] Dr McIntosh denies at paragraph 16 of his witness statement that the Claimant was falsely imprisoned. Rather, he explained that they had a duty to rule out the Ebola Virus and to protect the staff and patients of the hospital and the public as a whole.

[41] I accept the Claimant's evidence as truth when he says that he was advised by Dr James that he would not leave the premises. I also accept that he was under the genuine belief that if he tried to leave, the security personnel would prevent him from doing so. Under ordinary circumstances, such restriction on the Claimant's liberty may satisfy the requirements of false imprisonment. However, as indicated earlier the Defendant bears the burden of proving that the restraint on the Claimant's liberty was justified. Without any doubt, I find that the Defendants in this matter successfully discharged this burden by proving that they were acting in the

public interest by preventing the possible spread of a communicable disease. Therefore, I conclude that the Claimant has failed to prove that he was falsely imprisoned.

[42] It is patently clear there is no way for a doctor to look at a patient and know whether he or she is suffering from a particular virus or illness. The medical practitioner will need information from the patient and in this particular case, the patient's travel history became relevant for the purpose of ascertaining whether he may have been exposed to the virus as a result of visiting an area where the virus was prevalent. It may seem to many persons in Jamaica and in particular the Claimant that the period he had to wait was unduly long, however, this is the situation which plagues our public health system as we have more patients than hands and facilities to care for them. The evidence reveals that this situation required instruction and checks to be made outside of the Mandeville Hospital, that in itself also contributed to the delay in treatment of the Claimant.

DISPOSAL

- (i) Judgment awarded in favour of the 1st and 2nd Defendants.
- (ii) Costs awarded to the 1st and 2nd Defendants to be taxed if not agreed