[2012] JMSC Civ 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2005/HCV 01106

BETWEEN	BRYAN GREEN	CLAIMANT
AND	SGT.COCHRANE	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Kwame Gordon instructed by Frater, Ennis & Gordon for the claimant.

Lisa White Instructed by Director of State Proceedings for the defendants.

Heard: 23rd September 2010, 9th December 2010 and 1st March 2012

False Imprisonment – Taking Control over the Claimant – Proof in Special Damages – Aggravated Damages – Handicap on the Labour Market

Campbell, J.

[1] The claimant, Pvt. Bryan Green, 32, is a member of the Jamaica National Reserves. He serves in the Third Battalion. He is a fulltime member of the reserves. Prior to this incident he had eight years of service.

[2] On the 1st February 2003 at or about 5 p.m., the claimant, accompanied by three male friends, were travelling on foot in the rural community of Farm District, on the way from his home in Numpriel District, an adjoining community. An approaching police car stopped and, according to the claimant, Sgt. Cochrane alighted and said: “Gimme a search, where unno coming from?”

[3] The claimant’s account was that after searching two of the other men, “the 1st defendant immediately held onto me and started to pull me towards the police car.” He was eventually released and the claimant identification was requested.

After an examination of Pvt. Green's identification, the police officers boarded the vehicle and drove off. Someone, of the four males, remarked that they (the officers) were drunk, the claimant remarked, "Dem tek man fi fool."

[4] What unfolded next can only be described as a display of raw brutality. The police car reversed, thereby blocking the claimant's path. Sgt. Cochrane alighted, exchanged words with the claimant, then used the butt of his M16 rifle to strike the claimant in his chest, then pointed the rifle at him and shot him. The claimant was then ordered into the police vehicle. When he failed to comply, Sgt. Cochrane ordered his colleague to "put the boy" in the car. The claimant resisted being placed into the car for fear of his life, but was persuaded by one of the police officers to go in the car.

[5] Earl Powell, called by the claimant, agrees with the claimant that the 1st defendant appeared drunk and had the smell of alcohol on his breath. Powell testified that the 1st defendant's eyes were red and his speech was slurring.

[6] The claimant had alleged in his particulars of claim:

> On or about the 1st day of February 2003, while the claimant was lawfully walking along the public road at Farm District aforesaid the First-named Defendant, without reasonable and or probable cause, used his M16 rifle to stamp the Claimant in his chest and as the Claimant stumbled backwards the said First-named Defendant aimed the said M16 rifle at the Claimant and shot him causing serious injuries to the Claimant.
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> Thereafter, the First–named Defendant grabbed the Claimant and forcefully threw him into a police service vehicle and took the Claimant to the Mandeville Hospital where the Claimant was unlawfully and spitefully detained by the First-named Defendant for over two hours before he was allowed to receive medical attention.

[7] At the trial, the defendants admitted liability, in relation to cause of action of Assault and Battery. The court has to determine the quantum of damages. Issue was joined on the question of false imprisonment.

False Imprisonment

[8] The learned authors of Salmond on the Law of Torts, Fifteenth Edition, page 100; defines the tort of false imprisonment as follows;

> "The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is."

[9] It is clear that there needs be no actual imprisonment, the taking possession or control of the person constitutes the essence of the tort. This control may be effected without physical contact. The principle is aptly demonstrated in **Bostien v Kirpalani Ltd** an unreported decision of the High Court of Trinidad and Tobago, No. 861 of 1975. (See Tort, Text, Cases & Materials by Gilbert Kodilinye, p24), where Deyalsingh, J. says,

> "It is clear from the authorities that to constitute false imprisonment there must be a restraint of liberty ….. a taking control over or possession of the plaintiff or control of his will. The restraint of liberty is the gist of the tort. Such restraint need not be by force or actual physical possession. It is enough if pressure of any sort is present which reasonably leads the plaintiff to believe that he is not free to leave, or if the circumstances are such that the reasonable inference is that the plaintiff was under restraint, even if the plaintiff himself was unaware of such restraint. There must, in all cases, be an intention by the defendant to exercise control over the plaintiff's movement or his will and it matters not what means are utilized to give effect to this intention."

[10] In the written submissions on behalf of the defendants, it was stated that, "The tort of false imprisonment is not made out on the evidence which is before the court. The mere reversal of a car that does not totally block the path of a person

does not amount to false imprisonment. The defence highlighted areas of the evidence to further ground the submissions; that the claimant got into the car on his own volition and that he was not physically restrained in the car.

[11] The evidence of the claimant, on this point was compelling, credible and unchallenged. Having been shot by the police sergeant who, according to the claimant, "appears to be drunk". The sergeant ordered him to, "go inna the car boy before mi kill you." The 1st defendant next ordered his colleague "to come put the boy inna the car." In the face of this, the claimant still hesitated because he feared even more dire consequences than he had already suffered. He feared that if he went into the car he would be killed. The corporal to whom the order was given tells the claimant to go into the car "to go to the hospital," and the claimant complied. The reasonable inference is that Sgt. Cochrane was still exercising control over the claimant.

[12] The sole witness for the defendants was Spl. Sergant, Bryan Holness, whose witness statement was admitted into evidence pursuant to, Evidence Act, S31 (e). He had been present on an earlier date to give evidence, the matter had not gone on, and was unfit for medical reasons to attend at the adjourned hearing. At paragraph 5 of his witness statement, Holness' evidence on this point was, "after the man was shot he was placed in the car by Cpl. Manning and Sgt. Cochrane and I drove with them to the Mandeville Hospital."

[13] There is nothing to contradict the claimant's evidence that the 1st defendant had ordered him into the car or he would be killed. I accept his evidence on this point. Holness' statement indicates that, two police officers placed the claimant in the car. There is no evidence that the clear intention of the 1st defendant to take control of the claimant, as expressed in his command to the claimant to get into the car, had been relinquished. Earl Powell, in his evidence in chief, which was unchallenged before us, at paragraph 17, says, "The police car was reversed and

the back of the car was used to block the claimant and prevented him from walking any further along the roadway."

[14] The submission on behalf of the defendants, that the car had not totally blocked the path of the claimant, is to my mind untenable. For the reasons that there is no evidence to support such a proposition, further, the circumstances of this case are such to lead to the conclusion of a total restraint of the plaintiff's liberty. It is a question of fact in each case whether there was a restraint or not. Whereas here, the claimant is confronted by a police officer, who appears drunk to the point of staggering, is armed with an M16, it is difficult to find that the police officer's clear actions to restrain the claimant's liberty, are to be measured against the ability of the claimant to circumvent the defendant's directives. An order given by such a defendant does not reasonably brook opposition. The claimant could not reasonably be expected to do anything but remain within the restraint created by the vehicle.

[15] I find that the 1st defendant's control of the claimant started from the police's vehicle reversed to block the claimant's path to his being driven to the Mandeville Hospital. I find for the claimant on his claim for false imprisonment.

General Damages

[16] Assault and Battery. Evidence of the injury to the claimant came substantially through the testimony of Dr. Jones, Orthopedics Surgeon. He said he made an assessment of the claimant and produced a report on the 22nd July 2003. The report noted a severely comminuted fracture of the distal ulnar with segmented loss of bone along with a transverse fracture of the distal third of his radius. He was assessed as having open fracture of the right radius and ulna. Macerated muscle bellies and tendons of the long flexors of his fingers, severed flexor tendons to index finger, partially severed flexor carpi ulnas and tendons, severed median nerves, large soft tissue defect in thenar compartment.

[17] His treatment included wound debridgement and irrigation. His radial fracture was stabled with an external fixator and his ulnar with an intramedullary device. He was discharged from the hospital on the 13th February 2003.

[18] The report notes that, in order for the groin flap to be liable his forearm had to remain attached to his groin for at least six weeks; it was released on the 6th March 2003 and was discharged from the hospital on the 10th March 2003. He developed a no-union of the ulna. Bone grafting was recommended and carried out on the 9th June 2005. The report noted the combined disability of his right hand was 49 - 56%; a whole person impairment was assessed at between 38 - 44%.

[19] Dr. Jones testified to an improvement in the claimant's condition when he last saw him, to a whole person impairment of 24%. He had earlier opined that with physiotherapy, the claimant would improve. In cross-examination, he said that Dr. Palmer had, in a report shown to him dated the 10th June 2006, made findings which indicated an improvement of almost 50%. Dr. Jones said that the claimant had reached his maximum improvement.

[20] Several authorities were rehearsed before the court, **Cecil Brooks v Maurice Whittingham and Another** (unreported) Khans Vol. 5 page 118, decision dated the 10th July 1998. The plaintiff had suffered injuries to neck and foream, paralysis and loss of sensation of right upper limb, displaced fracture of distal third of right radius. His disability was assessed at 60% of the whole person. An award of $1,500,000.00 is updated to $5,085,902.10.

[21] In **Cons. Hugh Mullings v Cons. Cooper and Anor**. Khan Vol. 5 p110, the claimant suffered a left brachial artery injury, medial, ulnar & radial nerve injury to left arm, fracture to the left humerus had a permanent disability of 54%; he was awarded $1,800,000.00, which updated represents $4,887,417.20. Mr. Gordon submitted that a figure of $3.9M would compensate the claimant's injury. Crown

counsel's initial submissions were that an award of $4,000,000.00 would be reasonable in the circumstances. In her further written submissions, that figure was revised to $3.7M. The injuries in the instant case are not as serious as in either of these cases. I make an award of $4,000,000.00.

Special Damages

[22] The claimant had particularized his claim for special damages, which totaled $3,239,184.50. The reception of the supporting receipts into evidence was objected to, on the basis that there was no evidence to explain their generation, and that there was duplication. The witness admitted that there was no mention in the witness statement that he had chartered taxis or was there any reference to receipts for his 30 visits to the doctor. Similarly, there was no mention in witness statement about visits to the doctor. He testified that the date he paid the doctor was not necessarily the date he visited the doctor. Receipt may have the date the payment was made. Crown Counsel objected to some of the receipts on the basis, they were not matched to a particular visit to the doctor. Two receipts from the UWI were stated to be duplications, the 2nd February 2003 and the 3rd November 2003. A sum of $155,820.00 presented as incurred to Manuchant, was challenged on the basis of being mere estimate, no expenses were incurred on the evidence. Similarly, receipts for two medical reports, which the court received no evidence of, raised objection. To my mind, the objections are well made, the imperative not to just throw figures at the court does not translate to, any document can be thrown instead. It must go to prove that it was received in respect of an expenditure that is in evidence and must relate directly to that expenditure in some material particular. I make an award of $132,060.50 for Special Damages.

Aggravated Damages

[23] In the decision of the House of Lords in **Rookes v Barnard** (1964), A.C. 1129; the court, in assessing the compensation, may;

> "Take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff proper feelings of dignity and pride."

[24] Aggravated damages are compensation for hurt feelings; they are not punitive. The defendants did not contest the assault and battery which the claimant is alleging was aggravated by the conduct of the 1st defendant. Nonetheless, the defendant's counsel urged that no award be paid, because of the failure of the claimants to observe the stipulations of CPR 8.7(2) and 8.9(1) & (2), that a claimant who seeks aggravated damages must say so in the claim form and the claimant must include in the claim form or the particulars of claim, a statement of all the facts on which the claimant relies: such statement being as short as practicable.

[25] The claim form alleges aggravated damages. The defendant's counsel, during the closing submission indicated before this court, "We do not contest injury that flow from the assault and battery," and submitted that should the court make an award, the recommended sum is $200,000.00. It was open to the claimant, up to his closing submissions to amend his particulars to meet the requirements of the rules. Claimant's counsel might have felt that the concession by crown counsel made such an amendment unnecessary. These concessions by crown counsel are inconsistent with her submissions on this point. An award of $200,000.00 is made.

False Imprisonment

[26] There was no pecuniary loss alleged as a result of the false imprisonment the claimant suffered. The injury was to his pride and dignity; he no doubt was humiliated before his companions. In **Cassie v Williams and the Attorney General**, suit no. C.L. 1994/C 364 assessed the 20th February 2000; the court awarded $50,000.00 for being falsely imprisoned for twenty four hours. I would make an award for $30,000.00.

Handicap on the Labour Market

[27] Handicap on the labour market is not necessarily confined to loss of earnings at the date of trial, but includes cases where the claimant's injuries have placed him at a disadvantage as compared to his competitors in the labour market. The effect is he may be more susceptible to job loss than his less-impaired colleagues. If he should lose his job, he would experience greater difficulty than his competitors in finding a job, because of his impairment.

[28] Counsel for the claimant submitted that an award of handicap on the labour market be made as there was evidence to support the claim. This was not foreshadowed in the claim or in the particulars of claim. The defendants have opposed such an award for those very reasons. The pleadings are to indicate to the defendants what case they are to meet. Counsel for the claimant failed to mention anything in relation to this claim, despite the matter having started in 2008 and adjourned for a protracted period to accommodate the arrival of medical evidence. He failed to mention this claim in his oral submission on the 9th December 2010 before the court and only did so in his written submission filed on the 15th December 2010. No award under this head.

The Court orders:

Damages

(1) Pain and Suffering - $4,000,000.00
Special Damages - $132,060.50
Aggravated Damages $200,000.00
False Imprisonment $30,000.00

Cost to the claimant to be agreed or taxed.