[2020] JMSC Civ. 163

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV06011

BETWEEN	**THOMAS HAUGHTON**	**CLAIMANT**
AND	**ALEX BROWN**	**1st DEFENDANT**
AND	**THE CHAIRMAN (Board of Management of the Montego Bay Community College)**	**2nd DEFENDANT**
AND	**THE ATTORNEY GENERAL FOR THE ISLAND OF JAMAICA**	**3rd DEFENDANT**

IN OPEN COURT

Mr Leonard Green and Ms. Tashakaye Perue instructed by Chen, Green & Company for the Claimant

Ms. Kamau Ruddock instructed by Director of State Proceedings for the 2nd and 3rd Defendants

1st Defendant absent and unrepresented

Heard: January 27, February 5 and 7, and July 30, 2020

Negligence – Personal Injury – Whether 1st Defendant employee of 2nd Defendant so as to render 2nd Defendant vicariously liable – Whether *Res Ipsa Loquitur* applies Damages – Assessment

LINDO J:

The Claim

[1] Mr. Thomas Haughton, a farmer, lives on premises adjoining the Montego Bay Community College, Frome Campus. He alleges that on September 25, 2009 he

was in his backyard when a piece of steel came from under a ride on tractor lawn mower being operated by the 1st Defendant, Mr Alex Brown on the grounds of the 2nd Defendant, (the College) and pierced his right leg as a result of which he suffered injuries.

[2] By way of his Amended Claim Form and Amended Particulars of Claim, filed September 9, 2014, he claims against the 1st and 2nd Defendants, either jointly and or severally, to recover damages. The 3rd Defendant, the Attorney General of Jamaica, is sued in her capacity as the representative for the Government of Jamaica.

[3] Mr Haughton alleges, *inter alia*, that Mr. Brown was the duly authorized servant and/or agent of the 2nd Defendant and he outlines particulars of negligence of Mr Brown and of the injuries he sustained and relies on the doctrine *res ipsa loquitur*.

The Defence

[4] The 2nd and 3rd Defendants, in their joint defence filed on September 6, 2013, deny that Mr Brown was their servant and/or agent and their duly authorised tractor operator, and state that based on their request for assistance in clearing a plot located at the rear of the campus' premises, the Sugar Company sent Mr Brown along with its tractor, to clear the land.

[5] They also deny negligence of Mr Brown and add, *inter alia*, that the grass cutter attached to the tractor is fitted with a guard that prevents objects, such as a piece of steel, from being lifted up and thrown by it and assert that at no time did the grass cutter or tractor cause a piece of steel to go into Mr Haughton's neighbouring premises. They, however, admit the medical report dated November 13, 2009, signed by Dr Vincent Chisholm for Dr Venkat.

The Issues

[6] The court has to determine whether the injuries sustained by Mr Haughton were caused by the negligence of Mr Brown; whether Mr Brown was acting as a servant

or agent of the 2nd and 3rd Defendants at the material time, so as to render the 2nd and 3rd Defendants liable, and whether the 2nd and 3rd Defendants can be held liable in negligence and if so, the quantum of damages, if any, to be awarded to the Claimant.

The Trial

[7] The matter came on for trial on January 27, 2020. Mr. Haughton gave evidence on his own behalf and Mr. Linwall McFarlane, the Campus Director of the College, gave evidence on behalf of the 2nd and 3rd Defendants.

[8] Despite proof of service of the Claim Form and accompanying documents on Mr Brown, (as evidenced by the Affidavit of Service of Peter Young filed on December 30, 2011) he failed to file an Acknowledgment of Service or a Defence and took no part in the proceedings.

[9] The Medical Report of Dr Vincent Chisholm dated November 13, 2009 and Receipt from the Savanna-La-Mar Public General Hospital dated November 16, 2009 in the amount of $2,000.00 were agreed and admitted in evidence.

The Claimant's Case

[10] The Witness Statement of Mr. Haughton, filed on February 18, 2019, stood as his evidence in chief. His evidence consists of the facts set out in his statements of case and will therefore not be repeated.

[11] When cross-examined, Mr. Haughton said he was standing in his yard at the time of the accident and there was no wall between his property and the college campus. He denied frequently going over to the college campus and also denied cutting a hole in the fence or wall. He said a fence had separated the properties but it had broken down and "*it open, there is nothing there to stop anything*".

[12] He denied being involved in a previous accident or hurting his leg before the date of the incident. He admitted that a lot of scrap metal was on the school's compound

but denied ever falling on any of this scrap metal. He said he is unable to give the height of the fence and said he could not see the piece of steel coming towards him but could hear it. He also said he did not receive any burns before the incident and added that he was at least six yards away from the tractor at the time.

[13] In response to the court, he repeated that the wall and fence between the properties had broken down. He said it was "*plait wire that they use and fence the place*" and "*it came straight from the dirt*". He explained that "*the whole of the fence did break down completely and there was no fence to stop nothing*." He then admitted to seeing the piece of steel hitting him on his foot, which he described as "*steel that they use and build up house*". He said it was about eight inches long.

The 2nd and 3rd Defendants' Case

[14] The Witness Statement of Mr. Linwall McFarlane, filed May 2, 2019, stood as his evidence in chief. Further to the Notice of Intention to tender hearsay statements filed by the 2nd and 3rd Defendants on March 14, 2019, the following were admitted in evidence as exhibits 3 and 4:

Undated Report of Claston Spence, Supervisor for the Tractor Operator and undated "Report of Perceived Incident on September 25, 2009" signed by Alex Brown, tractor operator.

[15] Mr McFarlane says he was absent on the day in question and on September 28, 2009, he was "*made aware an elderly man visited the campus to speak to him about an incident*". He adds that he contacted Mr. Claston Spence, the supervisor of the tractor driver at the time, and asked for a written report of the incident and did an "*informal investigation*". He says the grass cutter attached to the tractor had a "*safety/protective guard*" and that the section of the college's property which was close to Mr. Haughton's house "*was fenced with a perimeter wall comprising of a four (4) feet wall at the base and a chain linked fence on the top of the base*".

[16] In amplifying his evidence in chief he said the cutter had a protective coat so that the blade was not exposed and the coat or guard went around entire circumference of the cutter.

[17] In cross examination, he said he was made aware of Mr Haughton's injuries about three or four days after the incident, and he did not know Mr Haughton. He said he did not speak to Mr Haughton but he saw it important to examine the tractor, and he carried out his investigations "days after" and observed the protective guard "*resting on the surface of the ground*". He said that "*the college inherited the compound. It inherited a perimeter fence*" and added that at the time of the incident, the wall was intact, but the chain link fence was cut, and individuals could walk through the opening. He also said he collected a statement from Mr Brown.

The Submissions

[18] On February 5 and 7, 2020, respectively, the parties filed their closing submissions. I will not restate them. However, it is to be noted that I have given due consideration to them as well as to the authorities cited, and will make reference to them only as I see it necessary to explain the reasons for my decision.

[19] I note, however, that in closing submissions filed by Counsel for the Claimant, it was expressed that the 1st Defendant was never served and is not a party to the proceedings.

The Law and Discussion

[20] The law in relation to negligence is well settled. In order for the Claimant to ground the claim he has to prove on a balance of probabilities that a duty of care was owed to him by the Defendants, there was a breach of that duty, there is a causal connection between the conduct of the Defendants and the damage caused, and that the particular kind of damage to him is not so unforeseeable as to be too remote.

[21] Mr Haughton was the school's literal neighbour within a dictionary definition, and he also falls in the category of "*persons so closely and directly affected...that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*" as stated in **Donoghue v Stevenson** [1932] AC 562.

[22] Mr Haughton was someone "*so closely and directly affected*" by the actions of Mr Brown who was mowing the lawn at the material time, that Mr Brown ought reasonably to have contemplated him being so affected. Mr. Haughton's case is therefore a classic example of the application of the "neighbour principle".

[23] I find that at the time of the incident the wall and fence separating the two properties had broken down and therefore must conclude that Mr Brown should have reasonably foreseen that Mr. Haughton was likely to be affected by his actions, or failure to act, while operating the tractor, and he ought to have exercised the reasonable care necessary in those circumstances. I am therefore satisfied that Mr Brown owed a duty of care to Mr. Haughton.

[24] The fact that Mr Haughton's property adjoins the college campus also makes it reasonable to conclude that the 2nd Defendant ought to have had Mr Haughton in its contemplation as being likely to be affected when it had Mr Brown engaged in operating the tractor on its premises. It is without a doubt therefore that the 2nd Defendant having engaged the services of the tractor and operator to carry out work on its property owed Mr Haughton a duty of care.

[25] The learned editors of **Clerk & Lindsell on Torts**, 22nd Ed., at page 541, note, *inter alia*, that:

> *"A defendant will be regarded as in breach of a duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man..."*

[26] The court is here concerned with whether a reasonable person in the Defendants' position would have foreseen the likely risk of injury to Mr Haughton.

[27] It would be reasonable for this court to infer that under the circumstances a reasonable man, in the 1st Defendant's position, would have taken steps to keep a proper lookout for persons in close proximity to the school's premises while the lawn was being cut. A reasonable man, under these circumstances, would ensure that it is safe to operate the mower and take the steps necessary to prevent injury to anyone. A reasonable man in the 2nd Defendant's position would ensure that there was no breach in the wall or fence so that it would be unlikely for a projectile to escape from its property to the adjoining property.

[28] I find as a fact that while Mr Brown was in the course of operating the lawn mower on the 2nd Defendant's premises, a piece of steel was flung from under it onto Mr Haughton's premises causing injury to him. I also accept that there was scrap metal on the college compound and that although there had been a fence, it had broken down and as such could not prevent anything from being flung from under the lawn mower, over to the neighbouring premises. Any reasonable operator of a lawn mower in circumstances as obtained on the campus property at the material time would have considered the possibility of material in the path of the mower being flung from under it with the likelihood of causing damage. I therefore find that Mr Brown failed to exercise any reasonable measure to prevent injury to the Claimant. He therefore breached the duty of care owed to Mr Haughton.

[29] The 2nd Defendant, with full knowledge that the fence or wall separating the two properties was not intact, failed to act reasonably in ensuring that there was no possibility of any projectile from their property going onto the adjoining property and as such is also in breach of the duty of care owed to Mr Haughton.

[30] I reject the evidence of Mr McFarlane in relation to his findings on an examination of the tractor, days after the incident. As submitted by Counsel for the Claimant, Mr Brown was not called as a witness to dispute the circumstances in which Mr Haughton contended he received his injuries and neither was he called to show that the tractor examined by Mr McFarlane was the same tractor operated by him on the day in question.

[31] In any event, Mr McFarlane's opinion that the incident could not have happened as claimed by Mr Haughton cannot be accepted as Mr McFarlane is not an expert witness and neither was he an eyewitness to the incident.

[32] I accept Mr Haughton's evidence and in particular his evidence that there was no wall or fence in place at the material time as it had broken down. Further, I bear in mind the evidence that the 2nd Defendant was aware that there was at least a breach in the fence prior to the accident. Additionally, the 'investigations' and examination of the tractor were said to be done some days after the incident.

[33] It is well settled that if, at the material time, Mr Brown was acting in the course of his employment, his employer would be vicariously liable for his negligence.

[34] What is being relied on in the instant case to establish a relationship of master and servant between Mr Brown and the 2nd Defendant is the fact that Mr. Brown was observed cutting the lawns of the campus on the day in question.

[35] No evidence was led as to the nature of any pre-existing relationship between the 2nd Defendant and the Sugar Company, which they claim owned the tractor and sent Mr Brown with it, or of any relationship between Mr Brown and the 2nd Defendant, which owned the premises on which the tractor was being operated. In any event, the Sugar Company is not a party to these proceedings and the veracity of the relationship between the parties and the Sugar Company was never tested in cross examination.

[36] The court finds favour with the submission of Counsel for the 2nd and 3rd Defendants that the college would have assumed the responsibility for the operation of the lawn mower on its compound and find that the 2nd Defendant failed to take reasonable steps to prevent the possibility of injury to Mr Haughton. The 2nd Defendant had a duty to ensure that persons coming on to the premises to work did not act in any manner which is likely to cause injury to a neighbour. The duty of care owed to Mr. Haughton by the 2nd Defendant was therefore breached.

[37] The court accepts Mr Haughton as a witness of truth and accepts his evidence as being credible. I found Mr. Haughton to be honest and forthright. He was able to clearly explain himself when questions were posed to him and although he appeared to be inconsistent in his evidence as to whether he saw and or heard the piece of steel before it hit him, I do not find that to be so material as to affect his credibility. In any event, the Defendants have not provided any evidence to rebut the factual circumstances surrounding the incident which I find on a balance of probabilities, took place in the manner stated by Mr Haughton.

[38] In determining the weight to be accorded to the 'reports' tendered in evidence by the 2nd and 3rd Defendants, I have borne in mind the fact that one was from the named 1st Defendant and that the makers of both documents were not witnesses for the defence. I have not placed any weight on the hearsay evidence presented. I however accept that the 2nd and 3rd Defendants witness admitted at least one material fact of Mr Haughton's case, which is, that the tractor driven by Mr Brown was on the compound of the 2nd Defendant on the day in question. I reject the evidence of Mr McFarlane as it relates to his examination of a tractor some days later, and his findings, as he is not an expert witness and in any event there is no evidence that the tractor he is said to have examined is the same tractor which was being operated by Mr Brown at the material time.

[39] I find, on a balance of probabilities, that the injury to Mr Haughton was not only a direct result of Mr Brown's operation of the mower on the premises of the 2nd Defendant, with the full knowledge of the 2nd Defendant, but it was also an injury of the kind that was reasonably foreseeable in the circumstances.

[40] The medical report provides compelling evidence that Mr. Haughton sustained injuries to his foot, as pleaded. I cannot agree with Counsel for the 2nd and 3rd Defendants that "the description of the wound as a burn wound is more consistent with another type of injury...". There was no expert medical evidence presented to contradict the evidence that the type of wound sustained by Mr Haughton would be inconsistent with the type of injury he received and neither has any evidence

been presented to contradict Mr Haughton's account of how he sustained the injury. I therefore accept that during the operation of the lawn mower by Mr Brown, a piece of steel was "flung" resulting in the injury Mr Haughton has complained of.

[41] This court therefore finds that Mr. Haughton has shown that the 1st and 2nd Defendants who had a duty of care to him, breached that duty and as a result he suffered damage. In view of all the circumstances I therefore find that Mr. Haughton has proven, on a balance of probabilities, that the Defendants were negligent on the day in question and are liable for the injuries he sustained.

[42] There will therefore be judgment for the Claimant against the Defendants.

Res Ipsa Loquitur

[43] For the sake of completeness, I will address the issue of whether the doctrine res ipsa loquitur applies in these proceedings as it was sought to be relied on by the Claimant in his statements of case.

[44] The elements of the doctrine, as stated by Morrison JA (as he then was) in **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ. 20, are that the occurrence was such that it would not normally have happened without negligence; the thing that inflicted the damage was under the sole management and control of the Defendant; and there must be no evidence as to why or how the accident took place.

[45] I find this doctrine to be inapplicable. The claimant has the onus of proving either a specific cause of the negligence on the defendant's part or that the accident occurred in circumstances in which, prima facie, it could not have occurred without such negligence. Mr Haughton has provided sufficient evidence to satisfy this court with a plausible explanation of how and why the incident occurred.

[46] I will now determine the quantum of damages to which he is entitled.

General Damages

[47] The medical report indicates that Mr Haughton was diagnosed with an entry/exit wound to the right leg, bleeding and burn wound to 'the medical' (sic) side of the right leg. X-rays revealed no bony abnormality and he was treated with tetanus toxoid injection, anti-inflammatory analgesics and antibiotic and the wound cleaned and dressed.

[48] Mr Haughton's evidence is that he attended the hospital out-patient clinic once, and visited the Frome clinic 'about five times'. His evidence also is that he was unable to stand or move around properly, his relatives had to assist him and that it was about three months after the incident that he was able to walk or move around properly.

[49] Counsel for Mr Haughton suggested that the sum of $1,800,000.00 would be appropriate and submitted the following cases as useful guides in arriving at a reasonable compensation:

1. **Claston Campbell v Omar Lawrence, Dale Mundell and Delroy Officer**, Suit No. C.L.C-135 of 2002, where the claimant sustained laceration to chin, trauma to chest resulting in severe chest pain and difficulty breathing, minor obsession to chest wall, trauma to back resulting in severe pain and swelling and difficulty walking properly for three weeks. He also sustained whiplash injury to the neck, resulting in pain and restriction of movement. The Claimant was awarded $650,000.00 in February 2003 (CPI 64.4) which updates to $2,713,043.47 (using the CPI for March 2020 which is 268.8).

2. **Neville Howitt v Vanguard Security Company Limited and Andrew Francis** Suit No. CL 1992/H194 delivered May 1999. The claimant in this case was shot in the right leg and one of the doctors who noted a "bullet entry wound to medical aspect of right leg, no exit wounds were seen X-Ray 11383 metallic foreign body to right calf…". He was awarded $400,000 (CPI 48.54) which updates to $2,170,367.38

3. **Pansy McDermott v Garnett Lewis and the Attorney General,** Suit No. C.L M 328 of 1998, (unreported) delivered in May 2002. This claimant was shot in the left thigh and suffered an entry-exit wound. The injury prevented her from engaging in activities requiring prolonged standing or walking for about three months and she was awarded $418,853.00 (CPI 61.46) for pain and suffering and loss of amenities. This updates to $1,831,885.56.

[50] Counsel for the 2nd and 3rd Defendants having submitted that "the Claimant's injuries were not caused by any breach of duty of care on their part", did not make any submission on the issue of quantum.

[51] I prefer the case of **Pansy McDermott** as a reasonable guide in the circumstances as both Claimants sustained entry/exit wound from a projectile and their period of incapacitation was similar. However, I am of the view that the award to Mr Haughton should be discounted as McDermott's injuries appear to have been more severe than Mr Haughton's and the wounds left scarring on her thigh which were said to have "scarred her psychologically". I am therefore of the view that a reasonable award to compensate Mr. Haughton would be $1,400,000.00.

Special Damages

[52] Special damages must be specifically pleaded and proved. (see: **Lawford Murphy v Luther Mills** (1976) 14 JLR 119) The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, based on the circumstances. (see: **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53).

[53] In his amended particulars of special damages, Mr. Haughton pleaded $44,500.00 for transportation expenses, medical report and Attorneys-at-Law cost. Of the pleaded amount, he has substantiated the sum of $2,000.00, the cost for the medical report. He has not provided any evidence in relation to his claim for Attorney-at- Law cost.

[54] In relation to his claim for transportation, he pleaded the sum of $2,500.00. Although no documentary proof of expense for transportation was provided, I

believe he attended the Hospital Outpatient Clinic once and then attended the Frome Clinic and although he travelled to the Frome Clinic on bicycle, he would have incurred travelling expenses to attend the Hospital and the Outpatient Clinic. In the circumstances, I find the sum of $2,500.00 claimed to be reasonable.

[55] Mr. Haughton gave evidence of expenses amounting to $67,500.00 for special damages, including loss of income at $21,000 per month, for three months. In keeping with the principle that judgment cannot be entered for an amount greater than the sum pleaded, no award will be made in respect of this expense.

[56] A total of $4,500.00 will therefore be awarded for special damages.

Disposition

Judgment for the Claimant against the Defendants with damages assessed and awarded as follows:

Special damages awarded in the sum of $4,500.00 with interest at 3% per annum from September 25, 2009 to date of judgment

General damages for pain and suffering and loss of amenities awarded in the sum of $1,400,000.00 with interest at 3% per annum from the date of service of the claim form to date of judgment

Costs to the Claimant to be taxed if not agreed.