

Judgment, Bosh

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1986/H129

BETWEEN MARY HIBBERT PLAINTIFF
AND REGINALD PARCHMENT DEFENDANT

Mr. L. Green and Miss S. Edwards for the Plaintiff
Mr. M. Frankson instructed by Gaynair and Fraser for the Defendant.

Heard: September 23, 24, 30 1998; March 24 & 25, May 6, 1999

HARRISON J.

Trial commenced in this matter on the 24th day of September 1998 but had a set back as the defendant became ill after the third day of trial. The trial resumed on March 24th 1999 and on March 25th, I reserved judgment and promised to deliver same as early as possible. I now seek to fulfil this promise.

THE PLEADINGS

The plaintiff's claim

From the pleadings and the evidence adduced in this trial, there is no dispute that the plaintiff was shot by the defendant whilst she was on his premises. Her claim is sounded in negligence and she alleges inter alia:

“3. On or around the 28th day of June 1985 while the plaintiff was taking water into the aforementioned dwelling house, the defendant negligently discharged a shot from his private firearm which caught the plaintiff in her abdomen thereby causing severe personal injury to the said plaintiff.

4. That at all material times the plaintiff was acting in her capacity as a domestic worker and this shooting took place while she was so acting.

Particulars of Negligence

(a) Failing to ensure that the person entering the defendant's premises was doing so lawfully and with his permission

(b) Failing to satisfy himself as to the identity of the person entering his dwelling house before discharging a shot from his firearm

© Shooting the plaintiff without enquiring as to the identity of the plaintiff

(d) Shooting the plaintiff in a manner which was manifestly unsafe to do so having regard to the circumstances.”

The defence

What was the defence to this cause of action? It alleges inter alia:

“2. The defendant says he instructed the plaintiff to retire to her dwelling place adjoining his house and not to await domestic water coming into the public water pipeline any time during the night as he himself would do so.

3. The plaintiff departed from his home, and during the night at about 12:30 a.m the defendant heard a noise emanating from his kitchen and arming himself with his firearm went downstairs to investigate.

4. The defendant was stealthily pushing the kitchen door open with a view to confronting what he thought was an intruder, when the plaintiff suddenly and without warning pulled the kitchen door open and staggered in front of the defendant, who taken by surprise discharged his firearm at the then unrecognised person.

5. In the premises, the defendant denies paragraph 3 of the statement of claim and expressly denies that he negligently discharged his firearm as alleged or at all.....

6. If, which is denied, the defendant was negligent, the defendant will contend that the plaintiff was guilty of contributory negligence.

Particulars

(a) Returning to the defendant’s premises in the dead of night without alerting(sic)

(b) failing to take any or any sufficient or proper care for her own safety

© Failing to disclose her presence on the property to the defendant

(d) Failing to identify herself to the defendant at the earliest opportunity or at all

(e) Disregarding the defendant’s instructions that he would collect the domestic water supply during the night and that it would be unnecessary for her so to do.

THE EVIDENCE

The plaintiff's case

The evidence given by the plaintiff is that she was employed to the defendant as a domestic helper at Whitehouse district, Westmoreland and that she was employed in that capacity on the 28th day of June, 1985. She was a 'live in' domestic helper on the date of the incident as the defendant had provided her with a bed-room in his house.

Her evidence further reveals that there was a water problem in the area, hence water had to be collected during the nights. On the 27th June 1985, there was no water in the defendant's house so he told her to "sit up, turn on the pipe" and as soon as the water came she should call him. During the night of the 27th June, she arose from bed and after turning on the light for the yard she went outside, looked up and called the defendant. This was an upstairs building.

She then said:

"...after I called him the second time he said "yes Mary". I called him the third time and he said to me: 'I am coming, start full the container, until I come down'. I go outside put the hose in the container, came back in the kitchen, standing at the sink.....catching some water into a pan that was in the sink. All I hear was 'boi' a loud noise. Mr. Parchment step up and ask me where the shot reach me. I say 'Mr. Parchment right in my tummy.'"

She was rushed to the Black River Hospital and was later admitted in the Cornwall Regional Hospital where she remained for some time.

Under cross-examination she has said there was an "exclusive" bright light in the kitchen at the time she got shot. She was unable to say from what direction the defendant came as she was standing beside the kitchen sink. However, she was facing the door to the car-port at the material time and that the door was half closed when she heard the explosion.

The evidence further reveals that the kitchen door opens inward. According to the plaintiff the defendant pushed the door open and the "gun shot go off same time." In explaining how he opened the door she said, "it was open so he just finish open it." She insisted that she was not standing behind the door when the defendant pushed it but was standing beside the sink and she was in "wide open view" of anyone who was in the carport.

When pressed if she knew whether the defendant could have seen her when he came downstairs she said no. However, in her evidence in chief, she had said, "yes he could see me". She contended that as far as she was aware, the defendant knew she was in the kitchen as she had his permission to be there.

She disagreed that about 2-3 weeks after she started working for the defendant that she began

sleeping at her cousin's house next door to the defendant's premises.

She said it was her job to get up late at night to catch water but she would not do this every night. The defendant had told her in "day-light" on the 27th, that she should get up and catch the water. She could not recall if she had been up late during the night of the 26th June catching water but on the 27th June she had retired at about 8:00 or 9:00 p.m and had awoken later to catch the water.

She admitted that she was wearing a cap whilst she was in the kitchen but she was not wearing shorts nor pants. She was wearing her night gown and a duster was tied around her waist.

In describing her movements during the night of the 27th June she said after she got up she went through the living room and then entered the kitchen. There was a "sitting room" upstairs and the defendant's bed-room was upstairs, directly above the kitchen. The first thing she did in the kitchen was to switch on the light. She next turned on the outside light from a switch inside the kitchen and according to her "you could see the whole of outside" when the outside light was switched on.

In answer to a question put to her, she said no screw driver was used to open the door leading from kitchen to the garage. The defence was put to her and this is how she responded to the suggestions -

"Sugg. The first time he pushed door you were standing behind it.

Ans. No

Sugg - Before you receive injury Mr. Parchment pushed door a second time

Ans. No

Sugg - And then he discharged his firearm

Ans - The firearm and the door go off the same time.

Sugg - When the door was pushed the second time you had screw driver in your hand

Ans - No.

Sugg - For whatsoever reason when you stumbled away from door, your hand was raised with screwdriver in it.

Ans. - No

Sugg - Before Mr. Parchment pushed door he called out and said "who is that?"

Ans - No."

The defendant's case

The defendant testified that he is a retiree and that he had employed the plaintiff in 1985 as a "live-in" helper and that a bed-room was provided for her downstairs. A cousin of the plaintiff had rented his cottage adjoining the premises and he had given her permission to sleep with the cousin during

the nights and to return to work in the mornings.

He further said that the plaintiff and himself had sat up during the night of the 26th June 1985 to catch water. On the night of the 27th March the plaintiff came to his window at about 8:00 p.m and enquired if he wanted her to sit up with him again. He told her no and that he would wait until he heard the villagers passing because it would have been unreasonable for him to ask her to sit up two nights in succession.

At about 11:45 p.m he heard sounds in his kitchen. He got up out of bed and decided to investigate. He armed himself with his firearm and went downstairs. When he went downstairs he "peeped" towards the kitchen and saw light. He continued and observed that the kitchen door was partly opened. He went towards the door and used one hand to push the door. He felt resistance and he realized there was something behind the door. He then decided to place one foot on a step facing the door and to use his elbow in a "forceful" manner to push the door with the left hand whilst the pistol was in his right hand. He pushed the door and realized that someone was behind the door. Due to the force he used, the person stumbled towards the stove with the right hand raised holding an object. According to him, the person resembled a man because he was wearing shorts, merino shirt and a cap. On seeing this person he fired one shot which hit the person in the abdomen and the person yelled out saying, " Lawd Maas Reg, yuh shoot mi". He ran and held the person and it was then that he discovered that it was the plaintiff.

He further testified that he had asked her why she did not respond when she saw him pushed the door but she said nothing. She however told him that she had heard from he got up and had come downstairs. He also said that when he had given her permission to sleep next door, he had told her not to return to the yard until daylight because of burglars in the area and at no time did he expect her to be on the premises during the night.

He contended that at the time he discharged his firearm he thought a burglar could have been in his kitchen.

Under cross-examination he said he got the impression that someone was in the kitchen before he pushed the door and that a split second had passed between the time he saw the person and when he fired the shot. The person was about some 3 ft. 6 ins away from him when he discharged the firearm.

He said that the kitchen door opens inward and he was standing almost in front of it when he discharged the shot. The person then staggered away from him before he was shot. He admitted that he did not make out the person clearly before he fired the shot. He had never seen the plaintiff in the attire which he described the person was wearing and he did not agree that she was dressed in her night gown.

It was suggested to him that he had not taken sufficient care to determine the identity of the person before he fired at the person. He said, " I did not have sufficient time to recognize who the person was".

ADDRESSES

Mr. Green argued that no issue was joined regarding the actual shooting and that the real issue was whether the defendant had lawful excuse for shooting this person who he claimed he saw in his kitchen.

He submitted that at no time during his evidence, did the defendant say he was under attack and neither could it be said that he perceived danger so he acted with justification in discharging his firearm. Neither was there any evidence that he was defending his life. The defendant had given no evidence of the person being armed with a screwdriver yet it was put to the plaintiff that she was so armed and when she stumbled away from the door she had the hand raised with a screwdriver held in it.

He further submitted that even if the person was a trespasser, this could not give the defendant any legal justification to discharge the firearm. He also submitted that there was a greater duty placed on the defendant in the situation where his domestic helper had a key for his house, occupies a room in his house and the area where she was shot was well lit.

Mr. Frankson on the other hand, submitted that the plaintiff's credibility had come into focus. He asked whether it was reasonably foreseeable for the plaintiff to be in the defendant's kitchen at the time when the shot was fired. Then he said, "was the plaintiff at the material time a person so closely and directly to be affected by the act of the defendant, that she should have been in his contemplation at the time that he discharged his firearm"?

He made the following submissions:

1. Since the defendant told the plaintiff not to return to the premises until daylight this was sufficient to exclude liability.
2. A householder was under no legal duty to identify someone who he reasonably believes to be an intruder before taking action to defend himself or his property.

Finally, he said that if there was no duty on the part of the defendant, then there was no breach of duty calling for an award of damages.

FINDINGS AND CONCLUSION

Credibility

In addressing the Court, Mr. Frankson said the Court should ask this question, "if the defendant knew that the plaintiff was in the house why would she want the court to believe that the defendant simply came downstairs and shot her"? From his point of view, the probabilities are that this version cannot be an accurate or credible reflection of the incident which occurred. Mr. Green submitted

however, that the plaintiff's story was clear and uncontradicted. The defendant on the other hand, had given evidence in contradiction of his pleadings.

What is abundantly clear from all of this, is that credibility is indeed a major issue. I have had the opportunity of observing the demeanour of the witnesses and as such I am therefore in a position to assess their credibility.

Assessment of the evidence and findings of facts

I accept the plaintiff as a witness of truth. I find her story quite credible and find that she has been honest and very frank with the court. On the other hand, I find that there are too many versions of this incident being put forward by the defendant. His evidence is in contradiction with paragraph 4 of the defence and the suggestions put to the plaintiff under cross-examination. The following excerpts from the evidence and allegations in the pleadings demonstrate the point:

1. At paragraph 4 it is alleged that the defendant, "stealthily pushing the kitchen door.....when the plaintiff suddenly and without warning pulled the kitchen door and staggered in front of the defendant who taken by surprise discharged his firearm.."(emphasis supplied)
2. It was suggested to the plaintiff that when the kitchen door was pushed she had a screw driver in her hand, she stumbled away from the door with her hand raised holding the screw driver in it.
3. The defendant had said in his evidence that he pushed the door and he realized that someone was behind the door. Due to the force he used, the person stumbled towards the stove with the hand holding an object.

Now, both plaintiff and defendant admit that the kitchen door opens inward. If, according to the defendant, he was pushing inward, and the plaintiff pulled the door (which must have been pulled to her) why would she be staggering out in front of him?

Suggestions which are put to the plaintiff would no doubt have been based on instructions given to the defendant's Attorney at Law by the defendant, so, why was it suggested to the plaintiff that she was armed with a screw driver and the defendant has made no mention of this in his evidence?

The defendant's evidence further revealed that it was after the person stumbled towards the stove and whilst the person was still in the kitchen that he discharged the firearm. However, the case put forward in the pleadings is that when the plaintiff staggered out in front of him, he was taken by surprise and he discharged his firearm.

Quite frankly, there are just too many versions put forward by the defendant, and his credibility in my view, is seriously affected. I find that he is not a witness of truth and I reject his defence.

I make the following finding of facts:

1. During the night of the 27th June 1985, the plaintiff had retired to bed sometime after 9:00 o'clock.
2. She got awake sometime later in the night, entered the kitchen and turned on the light in the kitchen.
3. She was wearing a cap, and a "duster" was tied around her "night gown" whilst she was in the kitchen. There was no one in that kitchen wearing shorts and a merino shirt.
4. She turned on the light for the yard, went outside and called to the defendant who was in his bedroom. She told him that there was water.
5. The defendant responded by saying that he would come downstairs.
6. The plaintiff began filling containers with water and returned to the kitchen.
7. There was an electric light burning in the kitchen when the defendant came downstairs.
8. Whilst she was standing by the kitchen sink, the door for the kitchen was partly opened and simultaneously with the defendant pushing the said door which opens inward, his firearm was discharged.
9. The plaintiff was shot in the region of the abdomen.
10. She was not armed with any screw-driver or any other form of weapon.
11. The defendant was never under attack and neither was there any reason for him to have perceived any attack.
12. The defendant did not enquire who was in the kitchen before his firearm was discharged.

The law

I must now consider the principles of law which are to be applied as the plaintiff's action is sounded in negligence. Did he owe her a duty of care and was this duty breached? The case of **Reville v Newbery** [1996] 1 All E.R 291 is most instructive. The facts of that case are as follows:

"The defendant who was 76-year-old, was sleeping in a brick shed on his allotment in order to protect valuable items stored in it when he was awoken in the middle of the night by the sound of the plaintiff attempting to break in. He took his shotgun, loaded it and, without being able to see whether there was anybody directly in front

of the door, fired a shot through a small hole in the door, wounding the plaintiff in the arm and chest. The plaintiff brought proceedings against the defendant, claiming damages for breach of the duty of care under s 1 of the Occupiers Liability Act 1984 and for negligence.

The trial judge found that although the defendant had not intended to hit the plaintiff he could reasonably have anticipated that he might do so and was thus negligent by reference to the standard of care to be expected from the reasonable man placed in the defendant's situation. The judge further found that the defendant had used greater violence than was justified in lawful self-defence and rejected the defendant's submission that he was relieved of all liability on the basis of the maxim *ex turpi causa non oritur actio* since the plaintiff had been involved in a criminal enterprise at the time of injury.

On the question of contributory negligence the judge found the plaintiff two-thirds to blame.

The defendant appealed. It was held that a plaintiff in a personal injury claim for damages for negligence was not debarred from making any recovery by the fact that he was a trespasser and engaged in criminal activities at the time the injury was suffered. The duty of care owed to a trespasser by an occupier under s 1 of the Occupiers Liability Act 1984 and by persons other than occupiers at common law, namely to take such care as was reasonable in all the circumstances of the case to see that the trespasser did not suffer injury on the premises, applied even where the trespasser was engaged in a criminal enterprise. On the facts, the judge had been justified in finding that the plaintiff was a person to whom the defendant owed some duty of care and that the defendant, who had used greater violence than was justified in lawful self-defence, was in breach of that duty, and in finding substantial contributory negligence on the part of the plaintiff."

On the facts of the instant case, I am of the view that the defendant ought to have had the plaintiff in contemplation when he proceeded downstairs with his pistol. She was his 'live-in' domestic helper and one who had access to the house. Since the kitchen light was burning and the door was partly opened, I hold that he would be obliged to ascertain who was in his kitchen before he discharged the firearm. I did not understand him to be saying that the shot was discharged accidentally and neither was that his case on the pleadings.

It is also my considered view, that he owed a duty of care to the plaintiff and he was in breach of that duty. She was an occupant in his premises and he was negligent by reference to the standard of care to be expected from the reasonable man placed in his position. I further hold that the particulars of negligence alleged in the statement of claim have been established and proved on a balance of probabilities and there is no contributory negligence on the part of the plaintiff. She is therefore entitled to an award of damages for the injury she sustained.

Damages

I now turn to quantify damages.

There is no claim for special damages as the defendant has met all the expenses incurred. General damages will therefore be dealt with under the head of pain and suffering and loss of amenities.

There are medical reports from Dr. B. Donaldson and Dr. E Nepal. They were admitted in evidence as exhibits 5 and 6 respectively under the provisions of the Evidence (Amendment) Act 1995.

The report of Dr. Donaldson of the Department of Surgery, Cornwall Regional Hospital, revealed that the plaintiff was admitted to that institution on the 29th June, 1985. She had undergone emergency surgery which involved repair of the small bowel and a loop colostomy. He then states:

“Post - operation was uneventful and she was discharged to Sav-la-Mar Hospital on the 6/7/85 where she had her colostomy closed on the 15/8/85. However, following that closure she developed a faecal fistula and was transferred to Cornwall regional Hospital where the closure was repeated on the 19/11/85.

The patient (sic) recovery was uneventful and she was followed up at Sav - la - Mar Hospital.”

The plaintiff was also seen by Dr. Nepal, and he noted that she was in fairly good health. His report which is dated November 28, 1996 reveals the following:

“ The visible scars were confined to her abdomen, 2 of which were from surgical incision and 1 from entry gun shot wound. The measurements were as followed(sic):

In the subumbilical midline region a 16 cm in long axis and 2.5 cm in transverse scar; in the left iliac fossa region a 10 cm x 2.5 cm oblique scar; in the right iliac fossa a gun shot entry wound measuring 2.5 cm in diameter. None of these scars showed tenderness or signs of keloid.”

In addressing the court on general damages, Mr. Green submitted that an award of \$1,489,013.00 would be appropriate. He relied upon the case of Williams v Stephens reported at page 122 of Khan's Personal Injury Awards, Vol. 4. In that case, a plaintiff who had sustained a gun-shot injury to the abdomen was awarded \$2,500,000 for general damages on the 19th November, 1996. He further submitted that that award would now value in the region of \$2, 978,025.00, having regards to the current consumer price index.

Mr. Frankson, on the other hand submitted that the injuries in the Williams case were far more serious than in the instant case. He submitted that the court should consider making an award of \$800,000.00 - \$500,000.00. He referred to the cases of Francis v Baker and Ors reported at page 129 of Khan's Personal Injury Awards, Volume 4 and Bonnick v The Attorney General reported page 384 of Harrison's Assessment of Damages for Personal Injuries.

I have given due consideration to the cases cited and in my view, although the injuries sustained by the plaintiff in Williams v Stephens are more serious than those which the plaintiff in this case suffered, I still believe that case is a useful guide.

The plaintiff Williams, was a banker, 31 years old at the time she was injured. She was shot in the abdomen and suffered shock with haematuria and haemoperitoneum and sensory loss in the lower limb. Emergency operation was done as the left kidney was shattered and there was perforation of the descending colon. The injury to the colon resulted with a loop colostomy. Post operatively she did well at first but she developed an abscess which caused her to return to the operating theatre. A faeces fistula was noted in the wound. She began losing weight and had to go overseas for further treatment. She did well, except for a small abscess at the site of the colostomy closure. Her injuries were considered very serious and life threatening. Her long term prognosis was good but there was a risk of abdominal adhesions as she had lost one kidney. She complained of a burning sensation in her lower limbs which could be permanent. There were unsightly scars over her abdomen and chest and corrective plastic surgery could provide a 60% - 70% improvement of the scars.

The plaintiff in this case, sustained a gunshot injury and also had a colostomy. She had developed a faecal fistula and was re-admitted into hospital for a further operation. She is left with scarring in the abdomen; two were surgical and the other was the gun shot injury. There are no signs of keloid, so she has been fortunate in this regard. She wore the colostomy from the 28th June 1985 up to November 1985. She spent one week in Cornwall Regional Hospital in the first instance and was then transferred to Savanna - la - Mar Hospital where she remained for four weeks. She spent another two weeks in the Cornwall Regional Hospital after the second surgery.

She experienced pain and discomfort and was embarrassed because of the colostomy. She also testified that she was unable to carry out her usual activities during the time she was hospitalized and after discharge. There was no further medical report on her and when last seen by Dr. Nepal he found her to be in fairly good health. She is now married and whilst the case was before the court she did not complain of any problems. She is indeed fortunate to be alive and has not suffered any permanent disabilities.

In all the circumstances therefore, it is my considered view that an award of Nine Hundred Thousand dollars (\$900,000.00) would be quite reasonable.

Conclusion

There shall be judgment for the plaintiff as follows:

General Damages

For pain and suffering and loss of amenities an award of Nine Hundred Thousand Dollars (\$900,000.00) with interest thereon at the rate of 3% p.a from the date of service of the writ of summons up to today.

The plaintiff shall have her costs taxed if not agreed.