



[2015] JMSC Civ. 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006-HCV 03264

BETWEEN	DWAYNE HUMPHREY	CLAIMANT
AND	LUTHER LEWIS	1ST DEFENDANT
	MARKSMAN COMPANY LTD	2ND DEFENDANT
	CARIB CEMENT COMPANY LTD	3RD DEFENDANT

Mr. Garth Lyttle for Claimant.

Mr. John Givans and Ms. Lori-Ann Givans for 1st and 2nd Defendants/Ancillary Defendants.

Mr. Emile Leiba and Mr. Jonathan Morgan for 3rd Defendant/Ancillary Claimant instructed by Dunn Cox.

HEARD: 10th February 2015 and 26th March 2015

Negligence - Shotgun fired in air by security guard - Trespasser injured - Duty to Trespasser

Coram: Dunbar-Green J (Ag)

The Claim

[1] The claimant, Dwayne Humphrey, seeks damages from the defendants, Luther Lewis, Marksman Co. Ltd (Marksman) and Carib Cement Company Ltd for injuries

caused to him on 22nd November, 2003. At the time of the incident, he was a trespasser on the premises of Carib Cement (the premises) at Rockfort, St. Andrew.

[2] The second and third defendants are alleged to be vicariously liable for the acts of the first defendant.

[3] The particulars of Trespass and Assault and Battery are set out as follows:

- (a) shooting the claimant while he was unarmed;
- (b) shooting the claimant in the back of his head while he was in the act of moving away; and
- (c) inflicting gunshot injury on the claimant which the first defendant knew would cause severe personal injury to the claimant.

[4] Alternatively, the first defendant discharged his firearm without regard to the presence of the claimant.

[5] The particulars of injuries are as follows:

- (a) bullet entry wound at the back of head to the midline (wound explored under general anaesthetics);
- (b) left cerebella signs and mild neck stiffness;
- (c) comminuted depressed fracture of the occipital bone;
- (d) cerebral haemorrhagic combustion apart from the fracture of the occipital bone;
- (e) persistent headaches;
- (f) edema in cerebellum; and
- (g) risk of developing brain abscess.

Defence of the First and Second Defendants

[6] The first defendant denies aiming his shotgun at the claimant and shooting him in the back of his head. Instead, he discharged his shotgun, in the air, in defence of property, as the claimant and other men were chopping at a conveyor belt and wires on the premises.

Defence of Third Defendant

[7] The third defendant denies that the first defendant was its employee, servant and/or agent.

[8] The second defendant was an independent contractor engaged by the third defendant to provide security services at the premises.

Amended Ancillary Claim

[9] The third defendant/ancillary claimant claims, inter alia, a contribution to and/ or indemnity against any liability found against the third defendant/ancillary claimant.

Agreed Evidence

[10] The parties agreed the following exhibits:

- I. Report of Dr. R. A. Hussain dated 30th January 2004;
- II. Report of Dr. R. A. Hussain dated 22nd December 2004;
- III. Report of Dr. Cheeks dated 13th September 2008;
- IV. Report of Dr. Webster dated 3rd August 2011;
- V. Report of Dr. Anza Ali dated 13th August 2012; and
- VI. Report of Dr. Mullock dated 25th July 2013.
- VII. Engagement Contract between the second and third defendants.

[11] Counsel for the defendants took no issue in respect of the unavailability of the original documents.

Standard of Proof

[12] The court must decide whether, on a balance of probabilities, one or more of the defendants are liable as alleged.

Claimant's Evidence

[13] The witness statement of the claimant was ordered to stand as his evidence in chief. The court disallowed his request for amplification to include a claim by his mother for \$520,000 for assistance to him over a period of four years. There was no credible factual evidence to support this claim.

[14] According to the claimant, he and his friends were on the premises playing football when the first defendant, armed with a shotgun, approached and ordered them to leave. Just as they turned around and started to walk away, the claimant heard a loud explosion. He then felt a burning sensation to the back of his head and blood flowing from the area. He woke up in the Kingston Public Hospital where he spent thirteen (13) days.

[15] In cross examination, the claimant denied that he had a machete and that he and a group of men had chopped any conveyor belt. He said he had last worked as a casual worker in November, 2004. He also accepted that he had not seen who or what caused the explosion.

First and Second Defendants' Evidence

[16] The first defendant's witness statement was ordered to stand as his evidence in chief.

[17] At the time of the incident, he was contracted to Marksman as an armed security guard. He was a licensed firearm holder and had received extensive training in the management, handling and use of firearms. He had also worked as an armed security guard, for several years, before joining Marksman.

[18] In the afternoon of the incident, he was on duty at the premises. He was armed with a 12 gauge Remington shotgun. Security guard, Mr. Noel Arnold, was also on duty, armed with a .38 Smith & Wesson revolver.

[19] The first defendant saw several men, including the claimant, approaching the guard house. Some of them were armed with machetes.

[20] He approached the men and told them to leave the property, as they were trespassing. The men agreed to leave and the first defendant and the other security guard escorted them to the entrance to the premises.

[21] At the entrance to the premises, several of the men began chopping at a conveyer belt and electric wires.

[22] The first defendant repeatedly requested of them to desist but was ignored.

[23] According to the first defendant, "I had no choice but to discharge my gun in the air to have them desist from their acts of vandalism." He also said that his firearm was the only one which was discharged.

[24] He subsequently learned that someone might have been shot and went in search of the person but found no one.

[25] The police were called and two machetes, a wheel barrow and three detainees were taken away.

[26] The first defendant was subsequently tried and convicted for illegal possession of firearm and shooting with intent, in relation to the incident. He was sentenced to three (3) years probation.

[27] He testified that he did not aim his firearm at the claimant and had taken special care to point his firearm in the air.

The Third Defendant's Evidence

[28] Mr. Adrian Spence, Materials Manager, at Carib Cement, testified that the third defendant had contracted with the second defendant from June 2003 to provide security

services at its premises. At no time was the first defendant an employee of the third defendant. The second defendant was solely responsible for engaging, training and instructing its personnel.

[29] A copy of the engagement contract between the second and third defendants was tendered, and by agreement, was admitted into evidence as Exhibit VII.

Findings of Fact

[30] The evidence clearly established that at the time of the incident, the claimant was a trespasser.

[31] The medical evidence established that the claimant had suffered a gunshot wound to the back of the head and fragments of a bullet were surgically removed from the wound.

[32] There was no evidence, other than the first defendant's, as to where his firearm was aimed at the time of discharge. I accept, as believable, his evidence that he had fired his shot-gun in the air and that his was the only firearm to have been discharged during the incident.

[33] However, I am not convinced about the circumstances which the first defendant said led up to the discharge of his shot-gun. I have arrived at this position for the reason that there is no supporting evidence of any damage to property and no indication of anyone being prosecuted for the alleged actions of the men.

[34] I do not believe the first defendant's statement that the claimant was "one of those on the conveyor belt." Had he observed men on the conveyor belt, to include the claimant, how could he not have seen that the claimant had been injured, consequent on the discharge of his firearm? In any event, there was no evidence or allegation that the claimant was armed with a machete or chopping at the conveyor belt.

[35] I find more believable the claimant's evidence that he had been leaving, along with the other men, when he heard an explosion. I also find that the cause of his injury was the discharge of a bullet or pellets from the first defendant's shotgun.

[36] There was no challenge to the third defendant's evidence that the second defendant was an independent contractor and that the first defendant was not an employee, servant or agent of the third defendant. I so find.

[37] There was no issue that the first defendant was an employee of the second defendant at the time of the incident. I so find.

Issues to be decided

[38] This court has to decide the following:

- (i) whether the first defendant shot the claimant intentionally;
- (ii) alternatively, whether the first defendant owed the claimant a duty of care and if so, did he breach that duty;
- (iii) whether the first defendant's actions caused the damage sustained by the claimant;
- (iv) whether harm was foreseeable;
- (v) the nature and extent of the claimant's injuries; and
- (vi) the quantum of damages, if any, to be awarded to the claimant.

Analysis

[39] There is a duty to a trespasser not to harm him by intentional acts or by doing acts in reckless disregard for his safety. (**Street on Torts**, 4th ed. 192).

[40] In **Letany v. Cooper** [1965] 1QB 232 at 239 Lord Denning stated the rule as follows:

If one man intentionally applies force directly to another, the Plaintiff has a cause of action in assault and battery, or if you please describe it in trespass to the person. If he does not inflict injury intentionally, but unintentionally, the Plaintiff had no cause of action in trespass. His only cause of action is in negligence and then only on proof of want of reasonable care.

[41] Similarly, in **Robley v. Placide** [1966] WLR 58, 59 the court stated:

An action for trespass to the person does not lie if the injury to the Plaintiff, although the direct consequence of the act of the Defendant, was caused unintentionally and without negligence on the Defendant's part."

[42] There is no evidence before this court that the first defendant had intentionally shot the claimant nor can it be inferred from any of the facts.

[43] Having found no evidence to sustain an intentional infliction, the claim for trespass fails.

[44] I now turn to the question of whether the first defendant had acted in reckless disregard for the claimant's safety.

[45] In **Austin Ellis v. Jamaica Railway Corp.**, SCCA 92/89 delivered 6th July 1992, and referenced at page 269 in **Harrison Law Notes and Materials**, the duty of an occupier to a trespasser was stated as follows:

An occupier is required in accordance with his duty of common humanity to take reasonable care regarding the well being of a trespasser where (1) there is a foreseeable risk of his acts doing harm to a trespasser or (2) he knows of the presence of the trespasser.

[46] In the well-known case of **Herrington v. British Railway Board** (1972) AC 877, Lord Reid said at page 899:

So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it..

[47] At the time he discharged his firearm, the first defendant was aware of the claimant's presence in the vicinity. Based on the evidence, the claimant was not outside the area of foreseeable danger. He was not at a great distance from the first defendant.

[48] A security guard, with extensive training in "the management, handling and use of firearms" is obligated by law to conduct himself at a standard which is commensurate with his training. **Street** (supra, 101) states the principle in these terms:

In order to protect the interest of others against the risks of certain harms the law prescribes certain standards of conduct to which persons in particular circumstances ought to conform, and, if, from failure to attain those standards, such harm ensues, this is actionable negligence.

[49] As a trained user of a shot-gun, the first defendant ought to have known that the angling of his weapon was an important consideration if he intended to discharge it in close proximity to the trespasser.

[50] The first defendant did not say whether, on discharge of the shotgun, it was pointed directly above his head, angled away from him, angled towards the claimant or away from the claimant. However, the injuries establish that the shotgun was not angled in a manner such that pellets could not come in contact with the claimant.

[51] The first defendant failed to demonstrate the required skill of a trained security guard and breached his duty of care to the claimant.

[52] In my view, there was no evidence that this incident was one over which the first defendant had no control and “the effect of which could not have been avoided by the greatest care and skill” (*Robley*, supra, 60).

[53] For these reasons, I hold that the claimant has successfully established, on a balance of probabilities, his claim in negligence.

Assessment of Damages

[54] The medical report of Dr. R. A. Hussein dated 30th January 2004, established the following injuries:

(i) left cerebella signs of mild neck stiffness;

(ii) principle injury of bullet entry wound over the back of his head;

(iii) communitated depressed fracture of the occipital bone;

(iv) cerebral haemorrhagic contusion;

(v) edema in the cerebellum;and

(vi) small risk of brain abscess.

[55] The claimant made good neurological recovery with no residual neurological disability.

Other medical reports

[56] Dr. Randolph Cheeks, Consultant Neurosurgeon, in his report of 13th September 2008, revealed similar findings to those of Dr. Hussein at the time of admission, except for the presence of a bullet fragment which was surgically removed. In his clinical examination of 11th September 2008, the claimant was found to have made excellent recovery but for a scar to the occipital nerve of the scalp which causes the claimant to

experience headaches and neuropathic pains in the territory of distribution of the nerve. The PPD resulting from this is three percent (3%) of whole person.

[57] Dr. Cheeks stated that “[prognostically], he is unlikely to suffer from any new complications in the future arising out of this injury, and given that the only residual disability relates to a sensory scalp nerve, I do not think that his ability to earn his living in his usual socio-economic environment has been compromised.”

General Damages

[58] Mr. Lyttle relied on the cases of ***Clinton Bernard v. Special Cons. Morgan & Attorney General of Jamaica C.L. (1991) B 023*** cited in ***Khan 6, 5th Edition, p.182*** and ***Deborah Douglas v. AG. C.L. 2005 HCV 00453*** cited in ***Khan 5, p.150***.

[59] In ***Clinton Bernard***, McCalla, J. (as she then was) found that the claimant who was shot by the police had endured the following injuries, treatment and disability:

1. *Unconsciousness*
2. *Shot in head*
3. *Spent one month in hospital*
4. *Pain*
5. *Inability to walk or move left hand*
6. *Epilepsy, requiring medication for rest of life.*

The Consultant Neurosurgeon found:

- (i) *The plaintiff anxious with a perceptible limp;*
- (ii) *Obvious wasting of muscles of right buttock, right thigh and right calf muscles;*
- (iii) *Moderate weakness (grade 2-3) in his right upper and lower limbs which was more severe (grade 2) in dorsi-flexion and plantar flexion of his right foot; and*

(iv) Brisker reflexes on the right side and bilateral extensor plantar responses indicating a spastic right hemiparesis attributable to the injury of the motor cortex of the left side of his brain.

(v) He concluded that the plaintiff was unlikely to get any further significant recovery and that the permanent disabilities of post traumatic epilepsy and his right hemiparesis would moderately impair his ability to earn his living.

[60] The award for pain, suffering and loss of amenities was two million dollar (\$2,000,000.00).

[61] At June 2000, the date of the award, the Consumer Price Index (CPI) was 54.51. Using a CPI of 224.1 (at December, 2014) the award is now eight million two hundred thousand dollars (\$8,200,000.00).

[62] In ***Deborah Douglas***, McDonald-Bishop, J. (Acting) found that the claimant who was shot by the police endured injuries, treatment and disability as follows:

- *Gunshot wound to head*
- *Large gaping wound on left side of head with extensive disruption of scalp and skull; brain tissue could be seen in the depth of the wound*
- *Weakness of right extremities*
- *Extensive fracturing of left parietal region of skull*
- *Bullet fragments within cranial cavity*
- *Compound injury to the left hemisphere of the brain*
- *45% disability*

[63] The opinion of the Consultant Neurosurgeon was that: -

(1) She was virtually incapable of expressing herself verbally in complete sentences and that her daily activities required supervision and direction.

(2) The gunshot wound damaged the motor pathways in the brain resulting in spastic weakness of the right extremities and that walking was difficult.

(3) She was an epileptic for life needing anticonvulsants at approximately \$1000 per month.

(4) Permanent partial disability was 45% of the whole person.

(5) No improvement in her neurological status was anticipated and her ability to earn her living had been destroyed. She was unable to function in any capacity in her usual socio-economic environment.

[64] The award for pain, suffering and loss of amenities was \$6,900,000. In December, 2006, the CPI was 120. Using CPI of 224.1 at December, 2014 the amount would now be \$15,462,900.

[65] Using these two authorities as guides, Mr. Lyttle submitted that an award of six million dollars (\$6,000,000) would be reasonable in the instant case. He also asked the court to award three million dollars (\$3,000,000) for loss on the labour market and sixty nine thousand dollars (\$69,000) for special damages.

[66] Mr. Givans contended that the injuries in the two cases cited by Mr. Lyttle were much more severe than in the instant case. He cited the cases of ***Lascelles Campbell v. Clifton Barrett et al*** Suit No. C.L. 6248, 1995 and ***Henry Bryan v. Noel Hoshue et al***, reported in Khans Vol 5, p.177.

[67] I find ***Lascelles Campbell*** to be the most helpful case. The claimant's injuries were:

- 1. 1 ½ inch laceration of left parietal region*
- 2. Headaches 3 times weekly lasting days at times*
- 3. Non-conclusive seizure disorder caused by head injury*
- 4. Fracture of right occipital bone*

5. *Loss of sharpness of memory*

6. *Short term memory defect of 10 – 12%*

7. *Deformity of right little finger and pain thereto*

8. *7% whole person disability*

[68] He was awarded \$900,000 in September 2005. The CPI then was 93.79. Using a CPI of 224.1 (December, 2014), the award amounts to \$2,150,442.47.

[69] Although Mr. Lyttle submitted that the claimant had an onset of seizure, Dr. Ali seemed not to have found any evidence of such. I have also considered that the injuries in ***Lascelles Campbell*** were more severe.

[70] Considering these circumstances, I am of the view that an award of two million (\$2,000,000.000) is appropriate for the injuries in the instance case.

Handicap on the labour market

[71] There is no claim in the pleadings for handicap on the labour market. Mr. Lyttle, however, in oral submissions, asked the court to award three million dollars (\$3,000,000.000) under this head.

[72] The court accepts the submission of Mr. Givans that there was no evidence to support this award. He relied on ***Dovan Pommells v George Edwards et al*** Khans Vol 3, pp.138-144.

[73] Based on that authority and Dr. Cheek's prognosis that the claimant's injury should not affect his ability to earn a living in his usual socio-economic environment, I make no award under this heading.

Special Damages

[74] I make an award of \$69,000 for special damages, as set out in the witness statement and agreed by the parties.

Conclusion

[75] Based on the foregoing, the first defendant is liable to the claimant in damages for negligence. The second defendant is vicariously liable for the negligence of the first defendant. Judgment is hereby given for the claimant against the first and second defendants.

Orders

[76] Accordingly, I make the following orders:

1. General Damages in the sum of \$2,000,000 with interest at a rate of 6% per annum from the date of service of the claim to 31st January 2009 and thereafter 3% per annum to the date of judgment.
2. Special Damages in the sum of \$69,000 with interest at a rate of 3% per annum from the 22nd November 2003, to 30th June 2006 and a rate of 6% per annum from 1st July 2006 to 31st January 2009 and thereafter 3% per annum to the date of judgment.
3. Costs to the claimant against the second defendant to be taxed if not agreed.
4. The second defendant will pay the costs of the first and third defendants, as agreed or taxed.