



[2015] JMSC Civ. 66

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV06327

BETWEEN	GASSAN AZAN	CLAIMANT
AND	BANK OF NOVA SCOTIA JAMAICA LIMITED	1 ST DEFENDANT
AND	JAMAICA PROPERTY COMPANY LIMITED	2 ND DEFENDANT
AND	MCKAY SECURITY SERVICES AND INVESTIGATIVE SERVICES LIMITED	3 RD DEFENDANT

Mr. Seyon Hanson for the claimant

Ms C Wignall and Ms K M Reid instructed by Nunes, Scholefield, Deleon & Co for 2nd Defendant

Mrs. Denise Senior-Smith and Mr. Oswest Senior-Smith for the 3rd Defendant

Heard: July 8th and 9th, 2015 and September 16th, 2015

Negligence - Whether the defendants should be held responsible for the physical injury sustained to the claimant by a person who he had no control over - Whether the defendants could rely on the exclusion clause to exempt themselves from liability - Whether the security guard was negligent in failing to prevent the attack on the claimant - Whether the defendants were liable for the dog bites.

G Brown, J.

[1] The claimant filed an action seeking to recover damages for personal injuries inflicted by a robber whilst walking in the car park at the Scotiabank Centre. The

claimant was a customer of the Bank of Nova Scotia. On July 11, 2008 he parked his motor car in the parking lot occupied by the 2nd defendant with the intention to deposit the sum of \$700,000 in his account.

- [2] At the entrance there was a security booth manned by a security guard employed to the 3rd defendant who handed the claimant a ticket with instructions to have it stamped by an employee of the bank. On the back of the ticket there was a clause exempting the 2nd defendant from being responsible for any injury, loss or damage. A similar notice was placed on the front of the security booth.
- [3] The claimant parked his motor car and was walking towards the bank with a bag containing cash. On reaching the disabled parking space he was attacked by an unknown knife wielding assailant who attempted to rob him of the bag. The claimant refused to hand over the bag and both men began to wrestle. The assailant proceeded to inflict a number of stab wounds to the claimant. A security guard with a dog heard the shouts for help and ran to his aid. In the melee the dog bit the claimant and the attacker fled without the cash. He was then taken to a nearby doctor for treatment. The action against the bank was discontinued by the claimant.
- [4] It was the claimant's contention that the 2nd and 3rd defendants should have foreseen that persons using the car park would be carrying money to the bank and should take steps to secure their safety. It was submitted by the claimant's counsel that since the defendants had control over the area where the claimant was attacked and injured, and in the circumstances where he submitted himself to their supervision and direction in the controlled area, (i.e. the parking lot) then A special relationship can be implied, and this in turn gave rise to a duty of care to protect the claimant against the wrongful act of a third party. They had breached this duty by failing to take reasonable care to protect him against the criminal act of his assailant while in the car park. He further claimed that the security guard was negligent in failing to apprehend the attacker within a reasonable time and allowing the dog to bite him.

[5] The issues in this case were as follows:

- a) Whether the defendants should be held responsible for the physical injury sustained to the claimant by a person who he had no control over.
- b) Whether the defendants could rely on the exclusion clause to exempt themselves from liability.
- c) Whether the security guard was negligent in failing to prevent the attack on the claimant.
- d) Whether the defendants were liable for the dog bites

[6] It is trite law that an occupier of land owes a duty of care to a person lawfully upon the land. The common duty of care is defined by the Occupiers' Liability Act as a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. However, this duty is in respect of dangers due to the state of the premises or to things done or omitted to be done on them. (*Tinsley v Dudley* [1951] 2 KB 18). In this case the claimant was not complaining about the physical condition of the parking lot but the omission by the defendant to make the property secure from criminals.

[7] Counsel for the claimant submitted that the 2nd defendant should have installed security cameras, erect perimeter fence and employ additional security guards to prevent criminals from entering the parking lot. The omission to implement these measures was a breach of the duty of care to the claimant who was lawfully on the land. This breach caused the injuries sustained by the claimant at the hands of his attacker.

[8] Counsels for the defendants on the other hand contented that the defendants owed no duty to the claimant as they had no control over the unknown assailant who in his attempt to rob him inflicted the wounds. The dog bites were as a result of the security guard action in rescuing him from his attacker.

- [9] At common law an occupier is not responsible for the act of a third person except where the claimant can establish that the former owes him a duty of care. In *Weld-Blundell v Stevens* [1920] A.C. 956 Lord Sumner said: “In general (apart from special contracts and relations and the maxim respondent superior), even although A is at fault, he is not responsible for injury to C, which B, A, stranger to him, deliberately chooses to do. Though A, may have given the occasion for B’s mischievous activity, B then becomes a new and independent cause.”
- [10] In *Smith v Leurs* (1945) 70 CLR 256 at 261 Dixon J said: ... apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is however exceptional to find in the law a duty to control another’s actions to prevent harm to a stranger. The general rule is that one man is under no duty of controlling another to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.”
- [11] The issue whether a special relation exist between the occupier of a car park and a visitor so as to render him liable for the action of a stranger was considered in *Tinsley v Dudley* where a customer at a public house left his motor cycle in a covered yard, marked garage from which it was stolen. It was held that the occupier was under no duty to guard his invitee’s goods brought on to the premises against the risk of theft. Jenkins L.J. in his judgment wrote:

“There is no warrant at all on the authorities as far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers from

defects in the premises, but from the risk of the goods been stolen by some third party. That implied liability, so far as I know, is unknown to the law. It would be a liability of a most sweeping and comprehensive character and would entered into a very great number of cases it existed. It would by now be well established by the authorities.”

- [12] In the Australian case of **Modbury Triangle Shopping Centre Pty Ltd. v Anzil** [2000] HCA 61; 205 CLR 254; 176 ALR 411; 75 ALJR 164 (23 November 2000) the plaintiff was attacked and badly injured while walking to his car in the outdoor car park of a suburban shopping centre. It was accepted that the defendant owed a duty of care to persons lawful on its premises. The court held that the car park owner was entitled to succeed upon the ground that its duty as an occupier of land did not extend to taking reasonable care to prevent physical injury to the plaintiff resulting from the criminal behavior of third parties on the land. After reviewing the relevant cases Gleeson CJ said: “the most that can be said of the present case is that the risk of harm of the kind suffered by the first respondent was foreseeable in the sense that it was real and not far-fetched. The existence of such a risk is not sufficient to impose on an occupier of land a duty to take reasonable care to prevent harm, to somebody lawfully upon the land, for the criminal behaviour of a third party who comes onto the land. To impose such a burden upon occupiers of land, in the absence of contract or some special relationship of the kind earlier mentioned, would be contrary to principle; a principle which is based upon considerations of practicality and fairness. The principle cannot be negated by listing all the particular facts of the case and applying to the sum of them the question-begging characterization that are special. There was nothing special about the relationship between the appellant and the first respondent. There was nothing about the relationship which relevantly distinguished him from large numbers of the members of the public who might have business at the Centre, or might otherwise lawfully use the car park. Most of the facts said to make the case special are, upon analysis, no more than evidence that the risk of harm to the first respondent was foreseeable.” He finally concluded by saying: “the finding on

causation adverse, to the appellant can only be justified on the basis of an erroneous view of the nature of the appellant's duties as occupier. On an accurate legal appreciation of those duties, the appellant's omission to leave the lights on may have facilitated the crime, as did its decision to provide a car park, and the first respondent's decision to park there. But it was not a cause of the first respondent's injuries."

- [13]** [In **Ashby v Tolhurst** [1937] 2 K B 242 the owner of a motor car left it on a private parking ground, and on payment of 1s. Received from the attendant a ticket headed the "English Court of Appeal held that the relation between the proprietors of a car park and the owner of the car was that of licensors and licensee, and therefore were under no liability whatever in regards to the car." The court also held "that the conditions on the ticket relieved the proprietors of all liabilities."
- [14]** The claimant in this case was permitted by the security guard at the entrance to park his motor car in the parking lot as he had indicated he was a customer of the bank. This was in accordance with an agreement between the bank and the 2nd defendant. He was given a parking ticket with instructions to have it stamped by the bank's staff. The claimant then exited his motor car with a bag containing \$700,000 and began walking in the direction of the bank. Suddenly the man ran from the public area and viciously attacked him.
- [15]** [The 3rd defendant was contracted by the 2nd defendant to provide security in the parking lot. Three guards were posted to monitor the parking lot. They were not engaged to provide body guard services to the occupiers of the building, their employees or clients. This was never challenged by the claimant and there was no evidence before the court that the defendants had breached their respective agreements. In any event the claimant testified that he had always transported money to the bank without any assistance from the security guards posted in the parking lot. It is my considered opinion that the claimant in this case was in the same position as the plaintiff in the Modbury case, and therefore his action against the defendants must fail.

[16] The claimant also sought to recover damages for the dog bites. The evidence before the court was that an unknown assailant suddenly appeared from outside the car park and attacked the claimant. The security guard who was nearby heard his cry and immediately ran to his aid with the dog. He blamed the guard for allowing the dog to bite him and was therefore entitled to be awarded damages in accordance section 2 of The Dogs (Liability for Injuries by) Act. Reference was made to the case of **Brown v Henry** (1946) 5 JLR 52 where the court said: “The Act imposes a strict liability on the owner of a dog which causes injury to any person, independent of proof of scienter, The, intervening act of a third party can be raised as a defence only where the owner of a dog has done everything he reasonably could be expected to do to prevent a third person from meddling with it.”

[17] It was the claimant’s contention that the dog bite was as a result of the dog handler’s negligence and the 3rd defendant was therefore vicariously responsible. In the statement of claim the claimant particularized the 3rd defendant’s negligence as follows:

- a) Failing to come to the claimant’s assistance upon the claimant raising an alarm that he was being attacked within a reasonable time or at all;
- b) Releasing a dangerous animal while the claimant was bleeding on the ground having been stabbed by the attacker;
- c) Allowing the said dog to bite the claimant repeatedly and aggressively inflicting severe injury and damage to the claimant; providing an untrained or poorly trained dog handler who released the dog well knowing that the dog was likely to attack the claimant.
- d) Providing an untrained dog;
- e) Providing a dog that was trained to attack rather than apprehend; providing a handler who was incapable of controlling the dog;

- f) Releasing the dog well knowing that the dog could not distinguish between victim and assailant.

[18] It is settled law that he who alleges negligence must prove it. The burden of proof was on the claimant to satisfy the court on a balance of probability that the security guard with the dog was negligent. The claimant had made allegations with regards to the training and competence of the handler and the dog. He did not call and witness to support these allegations. On the other hand, the defendant called a witness who testified that the dog was properly trained. The handler also gave evidence as to his training and experience. Thus, the court accepted the defendant's case that the handler and the dog were properly trained.

[19] The claimant also alleged that the handler was negligent in failing to assist him but instead released the dog thereby allowing it to bite him repeatedly and aggressively inflicting severe injury while he was on the ground bleeding from the knife wounds. In his witness statement the claimant said:

That my many calls for help alerted passers-by, as well as a security guard who was in the parking lot, and who was ten feet away from me while I was being attacked, and who had a dog under his control.

That the said security guard with the dog who was at all material times employed to the third defendant did not come to my assistance but instead released the dog which proceeded to viciously attack and bite me instead of attacking the person who was attacking me.

That the dog proceeded to bite me repeatedly, and inflicted serious bites to me, and the security guard under whose control the said dog was, failed, refused and/or neglected to prevent the dog from attacking me, and failed to stop the attack in a timely manner, and only retrieved the said dog after I had suffered grave injuries as a result of the attack.

[20] The claimant in cross examination testified that he first saw the guard with the dog on the bank's step before he was attacked by his assailant. He also said that his assailant was then leaning against the wall of the building which was separate and apart from the parking lot. The man suddenly attacked him and sought to relieve him of the bag with the cash. He shouted for help, thief and murder during his distress. He refused to release his hold and the man used a knife to inflict wounds

to his body. He was thrown to the ground. However, the assailant ran on the approach of the dog which then bit him twice.

- [21] The gravamen of the claimant's case was that guard failed to come to his rescue and instead released the dog from its leach which caused it to attack and bite him instead of the assailant. Delroy Smith was called as a witness for the 3rd defendant. He maintained that on seeing the struggle between the men he ran in their direction with the dog under his control. He denied that he had released the dog from its leach. He said in his witness statement:

I was on duty at the Bank of Nova Scotia. I was at the front of the bank on the podium when my attention was drawn to the sound of a man screaming and I ran towards the sound. I had noticed that a woman who was located on the sidewalk facing Port Royal Street that leads to the bank was standing and looking in the direction of the bank's parking lot.

While running towards the sound I heard the man saying "leggo mi, leggo mi". I could not see the man I could only hear him as there was a blind spot.

When I could see the man he was in a sitting position leaning to the left, clutching a bag while another man stood over him, slashing him repeatedly and was holding onto the bag. My first impression was that the man with the knife was going to kill the man that was holding onto the bag.

I immediately went to help the man who I later learnt to be the claimant. Without releasing the dog, I loosened my reign so that I was holding one section of the leach. At no time at all did I let go of the leach totally.

- [22] The security guard in his evidence maintained that he was not in the vicinity of the car park as first alleged by the claimant or was not standing ten metres away when the attack occurred. The claimant admitted that the incident happened very quickly although it had seemed like ages to him at the time. It was the distress shouts and a woman nearby that alerted him to the robbery and he reacted immediately to assist him.

- [23] The claimant's evidence and the security guard's version varied significantly. The claimant at first said that guard was in the car park with the dog about ten metres away from him. In cross-examination he changed and said he was on the steps. At the same his assailant he said was leaning on the bank's wall when he first him.

Therefore, the security guard would have been closer to him and the assailant would have had to pass him before launching his attack. I find it difficult to accept that the man would have attacked in with the guard standing close by with the dog and then immediately ran when he saw the dog.

[24] Delroy Smith testified that he was the security guard who heard the scream and rescued the claimant from his assailant. I accepted his evidence that he did in fact went to the claimant's assistance with alacrity. He was clearly not in the vicinity at the time but was on the podium as instructed by his supervisor.

[25] Mr. Dave Smith the 2nd defendant's property manager, in his testimony confirmed the security arrangements the 2nd defendant had with the bank and the number of guards employed. He said three guards were deployed to the parking lot. One guard was positioned at the entrance to issue the parking tickets; a second guard was posted to the northern side of the parking lot and the third one to the podium. This corroborated the guard's story that he was not in the parking lot but on the podium. I am therefore satisfied that the claimant was not speaking the truth when he said the guard was ten meters from him but was indeed some distant away from the crime scene.

[26] Delroy Smith later explained how the claimant came to be bitten by the dog. He said: due to the fact that the claimant and the attacker were struggling whilst attempting to have the dog position itself between the attacker and the claimant the dog nipped the claimant causing puncture marks. The attacker pushed Max but Max attacked him and he released the bag that opened. Money fell out of the bag. The attacker then ran across Port Royal Street.

[27] It was accepted that it was the intervention of the dog that caused the assailant to flee. The dog was carrying out what he was trained to do. It thwarted the robbery and saved the victim's life and money. Notwithstanding this noble deed, he sought compensation for the *"two bites" he received from the dog named max.*

- [28] I accept the security guard's evidence that the claimant was on the ground resisting his attacker who was then using a knife to inflict some serious injuries to him. He held on to the bag with the money and was struggling with the robber when the security guard attempted to rescue him. He was not in a position to determine the guard's action. I reject his assertion that the dog bit him repeatedly and aggressively thereby inflicting severe injury and damage to him. His medical reports and his testimony contradicted this and clearly showed that the bites were not serious.
- [29] In this case the question to be answered was whether the security guard owed the claimant a duty of care to intervene and rescue him from his assailant. The security guard did not create the danger. At common law he owed no duty to the claimant to respond to the claimant's call for help. Likewise, he would not be liable if his response was negligent, unless his negligence amounted to a positive act which directly caused greater injury than would have occurred if he had not intervened at all. See (**OLL Ltd v Secretary of State for Transport** [1997] 3 ALL ER 897).
- [30] The assault by the dog was clearly unintentional and the intervention by the security guard was reasonably necessary to rescue the claimant from his assailant. The burden was on the claimant to show that the injury caused by the dog was greater than would have occurred if he had not intervened. It was clear from the medical certificates that the knife wounds inflicted by the criminal were very serious compared with the two or three dog bites. The guard's only weapon was the dog and he used it effectively to save both the claimant's life and his property. It is my view that the claimant has failed to establish negligence against the defendants.
- [31] The third issue raised was whether the notice at the entrance and on the ticket issued to the claimant excluded the 2nd defendant from any liability. The claimant maintained that he had not seen this notice that was placed at the entrance nor was it brought to his attention. Likewise, he did not read the ticket. He was a frequent user of the park. A photograph of the notice was exhibited which showed that it was prominently displayed for all visitors to see. In **Thornton v Shoe Lane**

Parking [1971] 1 ALL ER 686 it was held that the defendants could not claim the protection of the condition because they had not taken adequate steps to bring it to the plaintiff's notice. They should have posted a prominent notice at the entrance, or used something like red ink on the ticket.

- [32]** In this case the 2nd defendant had indeed place the condition in a prominent place and need not have instructed the guard to bring it to each visitor's attention. The defendants therefore should not be held responsible for his failure to read it and were protected by the exemption clause.
- [33]** The claimant's action against the defendants must fail as on the facts they were not negligent. He created his demise by transporting large amount of cash without any security thereby endangering himself and the security guard who rescued him. Fortunately for the claimant, the robber was not armed with a gun and made no attempt to attack the security guard.
- [34]** Judgment is entered for the 2nd and 3rd defendants with costs to be agreed or taxed.