

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. B023 OF 1991

BETWEEN	CLINTON BERNARD	PLAINTIFF
A N D	SPECIAL CONSTABLE PAUL MORGAN	1 ST DEFENDANT
A N D	ATTORNEY GENERAL OF JAMAICA	2 ND DEFENDANT

Heard 17/1/2000 and 9/6/2000

Mrs. Antonnette Haughton-Cardenas appears for Plaintiff

Mr. C. Cochrane instructed by Director of State Proceedings appears for
second defendant

McCalla, J.

By Writ of Summons filed on the 28th January, 1991 the Plaintiff seeks to recover damages against the defendants jointly and/or severally for assault, malicious prosecution and false imprisonment arising out of an incident which occurred on the 11th February, 1990 at the Central Sorting Office on South Camp

Road in Kingston. The second named defendant has been joined in the action by virtue of the Crown Proceedings Act.

In the statement of claim it is pleaded that the first defendant at all material times was a member of the Island Special Constabulary Force.

The relevant paragraphs of the statement of claim read as follows:

Para. 4 “on the 11th day of February, 1990 the plaintiff was using the public telephone situate at the Central Sorting Office of the Post Office Department at South Camp Road, Kingston 5.

Para. 5 while so using the telephone the first defendant came up to the plaintiff, slapped him on his hand and beat him on his chest in order to deprive the plaintiff of the use of the said public telephone. The plaintiff refused to hand over the public telephone to the first defendant, whereupon the first defendant pulled a gun, stepped back and with malice aforethought shot the Plaintiff in his head.”

It is pleaded further that the plaintiff was taken to the Kingston Public Hospital by his father where he was admitted. The first defendant maliciously and without reasonable or probable cause arrested and charged the Plaintiff for Assault and handcuffed him to the bed on which he lay until the 17th February 1990, when

he was granted bail. On the 24th April 1990 when the Plaintiff appeared in the Resident Magistrates Court he was discharged. Particulars of injuries as also of special damages have been pleaded.

Consequently, the Plaintiff seeks to recover aggravated and exemplary damages as well as damages for Assault, false imprisonment and malicious prosecution.

Paragraph 4 of the Defence of the Second Defendant states inter alia:

“.....The Second Defendant will say that the acts of the First-Named Defendant on February 11, 1990 at the Central Sorting Office, South Camp Road, Kingston 5, were done entirely for the benefit of the First-named Defendant and he was not acting in the course of his employment or for his employer's benefit.”

The evidence adduced by the Plaintiff may be summarised as follows:

Clinton Bernard, a Lithographic Printer aged 32 years, on 11th February 1990, accompanied by his parents, went to the Central Sorting Office in Kingston with the intention of making a telephone call. It was about 9:00p.m. and on their arrival there about fifteen persons were seen standing in line. Plaintiff joined the line and awaited his turn to use the telephone. He testified that as soon as he took the telephone and dialed a number, “out of the blue, out of nowhere” a man came up and said “Police,” and demanded the use of the telephone. Plaintiff protested

and remarked that had it been a bank he would have had to join the line. He was greeted with the response "boy me naw join no line, give me the phone."

Mr. Bernard refused to give up the telephone whereupon he was slapped on his hand and shoved. He testified further that the first defendant then took two steps backwards, pulled a gun from under his shirt, pointed it at him and the next thing he heard was an explosion. He fell backwards and lost consciousness.

When he regained consciousness at the Kingston Public Hospital he found himself surrounded by men in uniforms. He was arrested for assaulting a police officer and handcuffed to his bed by the first defendant.

Mr. Bernard spent nearly a month in hospital, was in pain and unable to walk or move his left hand.

He was subsequently dismissed of the charges which had been laid against him.

At the time of the incident Mr. Bernard had been employed at a salary of about \$2,000.00 per week but his doctors advised him that he was no longer fit to carry out the work which he previously did. He has secured no alternative employment as he is subject to having epileptic seizures at unpredictable times. He will have to take medication for the rest of his life.

Plaintiff testified that he spends \$2,000.00 per month on medication to prevent epileptic seizures and about \$800.00 per month on medication to alleviate

pain. Prior to the incident he used to play football but no longer does so because of the possibility of seizures.

Under cross examination Mr. Bernard testified that on the night in question the first defendant was not dressed in uniform. At that time Plaintiff had not been committing any crime or disturbing the peace. Since his arrest he has not seen the first defendant nor has he ever been called to give evidence.

Plaintiff's mother Esmie Bernard gave evidence in support of his case. She testified that having witnessed the shooting of her son she spoke to the policeman who told her that her son was not dead as the bullet had only grazed his head. Cross-examined by Counsel for Second Defendant as to how she knew that the first defendant was a policeman she responded as follows:

“.....when Clinton held onto the phone he appeared from nowhere held onto the phone and said ‘I’m going to make a long distance call!’ He then said ‘boy leggo this, police’...”

On the night that her son was shot she never saw him nor anyone else at the telephone booth creating a disturbance or committing any crime.

The second defendant called no witnesses as to fact, but Clive Blair, a Sergeant of Police in his capacity as Sub Officer in charge of the Police Registry produced records and gave evidence. His duties included the processing and

storage of records relating to members of the Jamaica Constabulary Force, the Island Special Constabulary Force and District Constables.

The records showed that the First Defendant had been a member of the Island Special Constabulary Force, but with effect from the 17th March 1990 had been dismissed for absence from work for over 48 hours. He has left the island for an unknown destination. Prior to his dismissal, he had been stationed at St. Andrew South from 15th September 1987.

In response to Plaintiff's counsel he testified that in case of an emergency it would be considered normal for a police officer to go to the head of a line in order to use a telephone as a matter of urgency.

The main thrust of the submissions advanced on behalf of the second defendant was that having regard to the provisions of Section 13 of the Constabulary Force Act, the action of the First Defendant could in no way be said to be connected to what the law stipulates he can or should do.

Section 13 states:

"The duties of the police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all

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summonses.....to do and perform all the duties appertaining to the office of a Constable.”

The shooting of a civilian in the head in circumstances alluded to by the Plaintiff would not fall within any of the prescribed duties he argued. In the circumstances, the Plaintiff could only be given an ex gratia payment.

Citing passages from the case of Attorney General and Oswald Reid Supreme Court Civil Appeal No. 107/92, he submitted that the first defendant was on a frolic of his own. He bolstered his argument by referring to evidence that the first defendant was stationed at the Hunts Bay Police Station, while the act complained of took place at South Camp Road. He argued further that the Court could take judicial notice that it was not within his police division.

Mr. Cochrane in urging the Court not to decide the issue of liability in favor of the Plaintiff, referred to a passage at page 15 of the Judgment which states as follows:

“If Mr. Robinson is correct in his contention it would have chaotic results. The Government would be liable for any wrongful act of a police officer committed while he is on duty, even if such acts are outside the scope of his employment and independent of what he was employed to do. The mere fact that an officer used an opportunity given him by virtue of being a policeman

to commit an act independently of those authorised by the Government cannot in accordance with settled principles create a vicarious liability in the Government.”

Plaintiff's counsel on the other hand cited and relied on the case of Hamlet Bryan vs Lindo (1986) 23 J.L.R. 127 and sought to distinguish the case of Oswald Reid from the present case on the basis that the action of the police officer in this case must have been closely connected with the work he was authorised to do but was an unauthorised mode of doing such work. She contended that the only reasonable inference to be drawn from the circumstances is that the action of the First Defendant was closely connected with the work he was authorised to do.

In the case of Oswald Reid reference is made to the case of Hilton vs. Thomas Burton [1961] All E R 74 at page 76 and the test to be applied stated as follows:

“I think that the true test can best be expressed in these words ‘was the second defendant doing something that he was employed to do, if so however improper the manner in which he was doing it the master is liable.’ ...”

The crucial question then is whether in this case the Attorney General is vicariously liable for the conduct of the First Defendant which caused the injuries sustained by the Plaintiff.

Indeed, at page 15 of the judgement in Oswald Reid Wright J A stressed that the determination of the question in each case must depend on an assessment of the particular circumstances under which the alleged acts were committed.

In my judgement the circumstances of this case are distinguishable from those in the case of Oswald Reid. The First Defendant demanded the use of the telephone by identifying himself as being a police officer albeit in a most crude and vulgar manner. The witness for the defence has admitted that it would be within the scope of a police officer's duty to demand the use of a telephone as a matter of urgency if the necessity arose.

Although no evidence has been adduced that at the relevant time the first defendant was on duty, in the absence of evidence to the contrary the reasonable inference to be drawn is that his demand was somehow connected to his duties.

The act of shooting the Plaintiff was unlawful and clearly did not fall within any of his prescribed duties but was nevertheless in furtherance of his demand. He subsequently arrested and charged the Plaintiff for assaulting him and by that act he could only have been asserting that at the material time he was executing his duties as a police officer.

In these circumstances I find that the Attorney General is vicariously liable for the action of the first defendant. The Plaintiff has established his case on a

balance of probabilities and the defence fails. I turn now to deal with the assessment of damages.

Relying on the case of Neville Hamilton vs Caleb Malcolm C.L. 1989/P002 a case in which the Plaintiff, a sideman, sustained head injuries, Mr. Cochrane submitted that the award made in that case when converted to the money of today would amount to \$1,124,910.00 and that that award should be discounted as in Neville Hamilton the injuries were more severe.

On the question of the award of damages for false imprisonment he submitted that if the Court found for the Plaintiff on the issue of liability the sum of \$15,000.00 per day would be a reasonable sum to be awarded. He based this submission on the case of Adolphus Williams vs. Attorney General for Jamaica suit No. C.L. 1993/W237. He submitted that an award of \$50,000.00 would be reasonable for the claim for Malicious Prosecution. On the issue of Special Damages counsel referred to the case of Lawford Murphy vs. Luther Mills (1976) 14 J.L.R. 119 in support of his submissions that the Plaintiff has failed to prove the items of special damages specifically.

Mrs. Haughton-Cardenas took issue with the submission in respect of the level of severity of the injuries sustained by the Plaintiff and referred to the medical evidence adduced.

The Medical Certificate of Dr. J.A. McHardy a Consultant Neurosurgeon who examined the Plaintiff on the 10th October 1994 states inter alia:

“He was complaining of:

1. Severe left sided headache
2. Two black-outs during the past year when he had not been taking his anticonvulsant therapy
3. Pain with weakness at times between both shoulders down the spine to the waist
4. Pain in right lower limb and cramp in back of left thigh when the ambient temperature is low.

On examination he was an anxious young man who walked with a perceptible limp. He had obvious wasting of the muscles of his right buttock, right thigh and right calf muscles. He had a moderate weakness (grade 2-3) in his right upper and lower limbs which was more severe (grade 2) in dorsiflexion and plantar flexion of his right foot. The reflexes were brisker on the right side and he had bilateral extensor plantar responses indicating of a spastic right hemiparesis attributable to the injury of the motor cortex of the left side of his brain.

It is now more than three years since he was injured and he is unlikely to get any further significant recovery.

The permanent disabilities of post traumatic epilepsy and his right hemiparesis will moderately impair his ability to earn his living.”

Counsel for Plaintiff cited and relied on the case of Isaac Muir vs. Metropolitan Parks and Markets Suit No. C.L. 1991/M090 and referred to the injuries sustained in that case which were:

Unconsciousness

Blow to left frontal region of the head

Laceration of left forehead

Central concussion

Compound fracture of skull

In that case the Plaintiff suffered concussion associated with a compound linear fracture of the skull vault and was experiencing post-concussional syndrome associated with a compound linear fracture of the skull vault and also post concussional syndrome associated with post traumatic epilepsy. He was given medication to control epileptic seizures and would require anti-epilepsy medication for the rest of his life.

The award made in that case for pain and suffering and loss of amenities when converted using the current Consumer Price Index amounts to \$2,482,751.70.

She also cited the case of Carl Richard Archie (b.n.f.) Carl William Archie vs. International Rentals and Leroy Kennedy a Judgment of Bingham, J (as he then was), delivered on 8/6/84 and made reference to the injuries and resulting disabilities in that case, which if converted at current rates would amount to \$2,581,631.70.

Mrs. Haughton-Cardenas referred to the case of Alfred Hinds vs. Eric Smith t/as Cash Rent a Car Suit No. C.L. 1998/H002 where the award made would amount to \$1,610,636.58 using the relevant conversion figures. She also urged the court to consider that the Plaintiff is now unable to play soccer which he previously did, would be restricted in employment and will suffer hardship on the labour market.

As regards proof of special damages she submitted that the medical evidence discloses a continuing need for medication, that although uncorroborated, the plaintiff has given evidence in proof of amounts claimed by him.

In reference to her submission that an award of exemplary damages would be appropriate, Mr. Cochrane's response, with which the Court agrees, was that in

the absence of specific pleading and particularisation no such award should be made.

In considering the items of special damages claimed, as regards the claim for loss of earnings, notwithstanding the absence of corroborative evidence of employment, I accept evidence of the Plaintiff as to his employment and remuneration prior to the incident. I accept the medical evidence as to the Plaintiff's continuing need for medication. Plaintiff testified that his failure to produce receipts was as a result of his house having burnt down in 1998.

Subsequent to that he has incurred expenses for medication and received receipts. None has been produced. Nevertheless, the Court accepts his evidence that he has incurred monthly expenses for anti-convulsant medication as also for medication to alleviate pain. The evidence in relation to the latter is not specific and the amount claimed must be reduced.

In the circumstances I made the following awards for special damages:

Loss of earnings 11/2/90 to 31/5/90

15 weeks at \$2,000 per week	-	\$30,000.00
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Cost of anti-convulsant therapy

120 months at \$2,000 per month	-	\$240,000.00
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Cost of pain killers 120 months

at \$400.00 per month	-	\$48,000.00
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On the issue of general damages, having considered the authorities cited and submissions made, the Court finds that an award of \$2,000,000.00 for pain and suffering and loss of amenities would be appropriate as also an additional award of \$50,000.00 for hardship on the labour market.

Further, damages are awarded for false imprisonment for six (6) days at \$20,000.00 per day amounting to the sum of \$120,000.00 and for malicious prosecution, an award of \$60,000 is made.

Interest granted on special damages of \$318,000.00 at the rate of 6% per annum from 1 1/2/90 until today.

General damages awarded in the amount of \$2,230,000.00 with interest on the sum of \$2,000,000.00 at the rate of 6% per annum from date of service of the writ of summons until today.

Costs granted to the Plaintiff, to be agreed or taxed.