

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. #2008/00959

BETWEEN

FABIEN GARCIA

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES

Mr. K. Ratiram Attorney-at-Law for the Claimant.

Mr. M. Smith Attorney-at-Law for the Defendant.

JUDGMENT

Introduction

1. On the 7th July, 2007, the claimant had been shot by a bullet allegedly discharged from the service revolver of a police officer on duty at the Valencia police post. In these proceedings, the claimant alleges that the shooting by the police officer constituted an actionable assault and battery, for which he is entitled to recover damages.
2. In the course of this judgement, the court considered whether the claimant had proved his case on a balance of probabilities and whether the facts establish the torts of assault and battery.

Procedural History

3. This claim was filed on 14th March 2008. The claimant sought damages for assault and battery, including aggravated and exemplary damages.
4. The Claimant relied on the testimony of two witnesses namely the Claimant himself and a friend of the Claimant, Nicholas Joseph, who was with the claimant at the time in question and who witnessed the event.
5. The Defendant relied on four witnesses that is to say: Police Constable (P.C.) Roy Campbell, Assistant Superintendent of Police Don Lezama, P.C. Anil Baboolal and P.C. Curtis Kheerai.

Facts

1. In the early hours of the 7th July, 2007, police officers attached to the Valencia Police Post intervened in an event at the Sword Fish Restaurant and Pub. The Police Officers ordered that the music be stopped, effectively aborting the festivities.
2. Patrons congregated on the roadway outside of the Swordfish Restaurant and Pub and became unruly, expressing their discontent at the steps taken by the police.
3. It was the uncontroverted evidence of the witnesses for the Defendant that a crowd had gathered on the pavement and on the roadway in front of the bar, and that fights were ongoing both within the bar and on the roadway. Unknown persons began hurling bottles at the police.
4. It was also common ground that the hurling of bottles was followed by a loud explosion, which resembled the sound of a gunshot.
5. P.C. Campbell, testifying on behalf of the Defendant, stated that at that point he became fearful for his life and that he took cover behind a marked police vehicle. While doing

so, P.C. Campbell deposed that he drew his service revolver and fired two shots into the air. In so doing, it was his intention to bring about a pause in the shooting from the crowd.

6. On the other hand, it was the evidence of Nicholas Joseph, who testified on behalf of the Claimant, that he saw the two police officers pull out their guns from their waists and point them in the direction of the group, of which the Claimant and Mr. Joseph were a part.
7. This is the main issue of fact, that is to say whether the police officers shot, as they alleged, into the air or whether they shot at the Claimant's group. This issue of fact will be considered later in this judgment.
8. There is no dispute that the Claimant suffered bullet wounds to his right leg and to his right elbow. In the course of cross-examination there was a suggestion on behalf of the Defendant that the Claimant's injury was caused by broken bottles as opposed to a gunshot. There was, however, no positive evidence adduced in support of this hypothesis. On the other hand, the Claimant produced the medical report of Dr. Kenneth Ugwu of the Sangre Grande Hospital. This document was tendered in evidence by consent.
9. Dr. Ugwu certified that he had seen the claimant at the Accident and Emergency Department on 7th July, 2007. Dr. Ugwu stated that the Claimant presented with a history of gunshot wound, and that upon examination "... *there was an entry and exit point ...*".
10. In my view, the contemporaneous medical report of Dr. Ugwu tilts the balance in favour of the Claimant. Dr. Ugwu indicated no uncertainty as to whether the wound had been caused by a gunshot. There was also no suggestion that it may have been a laceration caused by broken glass.

11. Accordingly, I accept the Claimant's evidence as unchallenged that on the morning of the 7th July, 2013, he had indeed been wounded by a bullet. I accept that as a result of the injury the Claimant was unable to work for about two months and that he lost some \$8000.00 in earnings.
12. I also accept as uncontroverted the claimant's evidence that he continued to experience pain in his leg for about two months and in his elbow for about two weeks. I also accept as established that the Claimant was unable to play football with his club from July to November 2007, that he experienced difficulty sleeping and walking.
13. I turn now to consider whether on a balance of probabilities, the Claimant has discharged his burden of proving that one or two police officers trained guns on the claimant's group of friends, or whether it is more probable, as alleged on behalf of the defendant, that P.C. Campbell shot into the air.
14. The Claimant himself did not testify that he saw the officers directing their guns on him. The Claimant testified that he heard the sound of breaking bottle and two loud explosions. He then experienced a sharp burning in his right leg and right elbow.
15. In support of his Claim, the claimant relied on the testimony of his friend Nicholas Joseph, who testified that he saw two police officers, one of East Indian origin and the other of African descent. These officers were identified as Police Constables Baboolal and Campbell.
16. Mr. Joseph testified that he saw both police officers pull their guns from their waists and point their guns in the direction of the group. He then heard explosions and pulled one of his friends to safety.
17. This aspect of Mr. Joseph's evidence is compatible in some measure with the defendant's evidence, in that P.C. Campbell admitted that he used his service revolver to fire a shot. It is therefore undisputed that at least one police officer discharged his service revolver on the morning in question and that the claimant experienced burning pain immediately thereafter. P.C. Campbell denied however that he shot at the group, and stated that he discharged his revolver into the air.

18. Mr. Joseph was cross-examined extensively as to what he saw and heard at the material time. Learned counsel, Ms. Jackman put to Mr. Joseph that his evidence was fabricated. Learned Counsel omitted however, to put the police officer's version of the narrative to Mr. Joseph. The specific suggestion that the police officers shot in the air rather than towards the group of friends was never put to Mr. Joseph.
19. In my view this omission is fatal to the Defendant's case. Having admitted that P.C. Campbell discharged his firearm, the defendant alleged that the officer shot into the air. This being the defendant's allegation, the burden was carried by the defendant to prove the allegation. Failure to put the defendant's case weighs against the defendant.
19. I considered as well the evidence adduced on behalf of the defendant. Both P.C. Baboolal and P.C. Campbell signed witness statements in support of the allegation that P.C. Campbell, taking cover behind a marked vehicle drew his service revolver and shot into the air. According to the testimony of both officers, the shot was fired only by P.C. Campbell, while P.C. Baboolal hid behind a metal garbage bin.
20. Their testimony is supported by the entries in the station diary, extracts of which were tendered in evidence by consent.
21. The relevant portion of the station diary contains the following record:

"This caused Constable Campbell who was one of these officers to discharge two rounds of .38 ammunition straight into the air from his Trinidad and Tobago service revolver ..."
22. In my view the testimony on behalf of the claimant is to be preferred. There is no indication in the station diary as to the officer who made the report or how soon it was made after the incident. In my view, there is a real possibility that the report made by the officers themselves is a self-serving document.
23. Accordingly I find on a balance of probabilities that P.C. Campbell and Baboolal shot directly at the claimant's group and as a result the claimant was injured.

Issues

21. Three issues arise to be determined in this case:
- i. *Whether the Claimant was subjected to an assault on the 7th July 2007 at the hands of a servant or agent of the State.*
 - ii. *Whether the Claimant was subjected to a battery on the 7th July 2007 at the hands of a servant or agent of the State.*
 - iii. *If the above questions are answered in the affirmative the Court will consider the appropriate measure of damages to which the Claimant is entitled?*

Law

22. An assault is the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact. An assault is established once the Claimant can prove that a reasonable man, if placed in his position at the relevant time, might have feared that unlawful physical force was about to be applied to him. See Cv. 2006-3721 *Sedley Skinner v The Attorney General* per Pemberton J.
23. A battery on the other hand is defined as the application of force to another, resulting in harmful or offensive contact. The elements necessary to constitute a battery are the application of physical force and the absence of a lawful basis for applying same.
24. Both assault and battery are actionable per se, which simply means that once a claimant can establish the occurrence of either, the court must award him compensation: see Pemberton J. in *Skinner v The Attorney General* Cv. 2006/3721 at paragraphs. 25 to 27.

General Damages

25. The Claimant is claiming \$50,000.00 - \$60,000.00 for General Damages (including Aggravated Damages).

The case of *Cornilliac v St Louis* [1965] 7 W.I.R. 491 sets out the factors the court must consider for assessing general damages. These are:

- i. The nature and extent of the injuries sustained;
 - ii. The nature and gravity of the resulting disability;
 - ii. The pain and suffering which the injured party endured and is likely to continue to endure;
 - iv. The loss of amenities; and
 - v. The extent to which the pecuniary prospects of the injured party have been affected.
26. In **Ramnarace v Boodoosingh** H.C.A No. S-503 of 1999 the plaintiff was shot in his face. At paragraph 17 of his judgment, Bereaux J., as he was then, considered three aggravating factors when assessing the damages. These are:
- i. The defendant shot the Plaintiff in a wilful and callous manner for no apparent/rational reason.
 - ii. The anguish and trauma caused to the Plaintiff at having been shot when he did nothing wrong.
 - iii. The fact that the Defendant continued to defend the court action to its conclusion, and to make allegations about the Plaintiff's good character.
27. In **Cummings v Cpl Francois & The Attorney General of Trinidad and Tobago** CV 2082/2005 the plaintiff was shot in the lower leg when a firearm of a fellow police officer was discharged while it was being cleaned. She suffered a 2cm laceration to her lower right leg and the bullet lodged in the soft tissue. There was no bone injury. She was awarded \$20,000.00 as an award for general damages. This award included an element of aggravation. It did not include a sum for special damages nor a sum for exemplary damages. Updated to December 2010 the award would be \$28,423.00.
28. In the case of **Harrycharan v Maharaj** H.C.A. S 154-157 of 1981 general damages was assessed to the tune of \$2,800.00. It is noteworthy that although this assessment was for lacerations, on the left forearm one 2" laceration and a ½" laceration and on the left arm one ½" laceration and a 1' laceration. These lacerations resulted from a car accident.
29. The case of **Brooks v Oxley** H.C.A. 2045 of 1977 is also instructive on the question of assessment of damages. In this case, the Plaintiff sustained three 3 cm lacerations to his forehead and three lacerations to his right arm with skin loss in the elbow region. He was

hospitalised for three days, and there was permanent scarring on his forehead and arm. In 1981 the plaintiff was awarded \$2,750.00. This, adjusted to December 2010, equates to \$24,123.00.

Exemplary Damages

30. The Claimant is also claiming \$40,000.00 - \$50,000.00 in exemplary damages. In support of this claim he posits two cases. First there is the case of ***Reid v The Attorney General*** H.C.A. 2496 of 2006. In this case the claimant was brutally beaten by prison officers. The learned judge described the beating as a, “...*vicious and unbridled attack on the Claimant...*”. In June 2007, the Claimant was awarded \$45,000.00 in exemplary damages.
31. Secondly there is the case of ***Wallace v The Attorney General*** H.C.A. 4009 of 2008. In this case the claimant, a prisoner, was beaten by prison officers. At para 64 of his judgment, des Vignes J. said, “...*I bear in mind the award I have already made by way of compensation which included an element of aggravated damages but at the same time I wish to reinforce this Court’s condemnation of the inhumane treatment meted out to the Claimant by these prison officers and to deter the officers and others from repeating such conduct.*” In October 2010 the Claimant in that case was awarded \$70,000.00 in exemplary damages.

Reasoning and Decision

1. In the early hours of the 7th July, 2007 the police officers at the Valencia Police Post faced a serious and undoubtedly frightening possibility of riot by a dissatisfied group of party-goers.
2. The concern of the police officers was heightened by the hurling of bottles by members of the crowd and by the discharge of gun shots.
3. In response, P.C. Campbell sought shelter behind a marked police vehicle and shot into the crowd. As a result the Claimant was injured.

4. The first issue which arises is whether the Claimant was successful in establishing that there had been an assault on him.
5. By definition, an assault is the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact. This definition was referred to above. It may be found in *Blacks Law Dictionary* (2007) and was quoted by Pemberton J. in *Sedley Skinner v The Attorney General*¹.
6. In this claim, it is not the case for the Claimant that he saw the gun being pointed at him. His companions observed that they were being shot at. The Claimant however, became aware of the threat of danger only when he was injured. By his evidence he could not have had any apprehension of imminent harmful contact. The Claimant has therefore fallen short of the test for an assault and in my view, he has failed to establish that he was assaulted.
7. A battery by definition is the application of force to another resulting in harmful contact². In her judgment, Justice Pemberton identified the following as the elements of a battery:
 - i. The application of physical force and*
 - ii the absence of a lawful basis for applying same ...*³
8. Earlier in this judgment, I decided that on a balance of probabilities the police officers shot at the claimant's group of friends. This was an application of force for which there was no lawful basis. In the exercise of his duties a police officer may use such force as is reasonable. In my view it was not reasonable to open fire on the claimant's group of friends, who were according to the evidence simply sitting on a curb.

¹ Cv. 2006-3721 Sedley Skinner v The Attorney General.

² Sedley Skinner v The Attorney General (supra) page 8 of 30 per Pemberton J.

³ Ibid.

9. As a result of his injury, the Claimant suffered pain with a temporary disability for two months. He also suffered a temporary loss of amenities for a similar period by virtue of his inability to participate in the sport of his choice.
10. In my view having regard to the earlier authorities, it is my view that a just award of general damages would be \$40,000.00.
11. In my view, an award of exemplary damages is unwarranted in this case. The evidence does not suggest that the actions of the police officers were oppressive. The police officers were faced with the possibility of an outbreak of mob violence. According to the evidence of P.C. Campbell, they feared for their own safety and had sent for help. Whereas their action in shooting of citizens is not to be condoned, it is my view that their conduct can in no way be described as oppressive. I will therefore refuse the claim for exemplary damages.
12. The Claimant is entitled to the special damages as claimed, that is to say: loss of earnings in the sum of \$8,000.00.

Orders

1. There will be judgment for the Claimant as against the Defendant in respect of the Claim for damages for battery.
2. The Defendant do pay to the Claimant \$40,000.00 as general damages.
3. The Defendant do pay to the Claimant \$8,000.00 as special damages.
4. The Defendant do pay to the Claimant interest at the statutory rate from the date of the Claim Form. Costs as prescribed in the sum of \$13,500.00.
5. There will be a stay of execution of forty-two (42) days.

Dated this 24th day of July, 2013

M. Dean-Armorer
Judge⁴

⁴ Christopher Forde – JRA
Irma Rampersad – Judicial Secretary