BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1254 of 1997

BETWEEN

TREVOR HOYTE **PLAINTIFF**

AND

MILLER ST. JOHN **DEFENDANT**

Before: The Honourable Madam Justice Kaye Goodridge, Judge of the High Court.

2007: October 8, 9, 26

2008: October 29, November 12,

December 10

2011: November 15, 23

2013: June 4

Mr. Theodore Walcott, Q.C., Attorney-at-Law for the Plaintiff

Mr. Mark Goodridge and Ms. Debbie Browne, Attorneys-at-Law of Jones & Goodridge for the Defendant

DECISION

Introduction

The Claim

[1] This is an action brought by the plaintiff for damages in respect of personal injuries which he suffered while at the defendant's premises, Eastmount Plantation, in the parish of St. John on 16th April, 1994. The plaintiff alleged that he was opening a window in a bedroom when an explosion occurred and his left hand was seriously injured.

[2] It is the plaintiff's contention that he was a lawful visitor at the premises. He was there, at the defendant's request, to effect repairs to windows. He alleged that his injuries were caused by a breach of the common duty of care under **section 4** of the **Occupiers Liability Act, Cap. 209** (the **Act**) and/or by reason of the defendant's negligence. The plaintiff has also relied on the maxim *res ipsa loquitur*.

The Defence

[3] The defendant denied that the plaintiff entered his house pursuant to any agreement between himself and the plaintiff for the purpose of carrying out repairs. The defendant also denied that the plaintiff was, at the material time, a lawful visitor at, or that he was carrying out repairs to the property in the course of his employment. The defendant further denied that any explosion occurred at the said window or that he was guilty of any breach of the common duty of care or was negligent.

[4] During the course of the trial, the plaintiff withdrew the claim for loss of wages. Counsel for the defendant informed the court that the defendant admitted that the plaintiff fell within the class of visitor for the purposes of the **Act**. In consequence, no issue turns on the defence that the plaintiff was not a lawful visitor to the premises.

The Plaintiff's Case

The Evidence

[5] The plaintiff gave evidence and called two witnesses, Station Sergeant Eric Franklyn and Ms. Pauline Hurdle, in support of his case.

[6] The plaintiff testified that he was born on 2nd April, 1959 and that he lived at Lemon Arbor, St. John. He is a carpenter, having started this career at the age of 16 years.

[7] On the day in question, he went to Eastmount to do carpentry, as an arrangement had been made with the defendant for him and Mr. Stu Waithe (now deceased) to do the work. He had known the defendant for about four years prior to the incident because he had gone to his house on several occasions with Mr. Stu Waithe to do work. The defendant had requested Mr. Waithe and him to repair the windows. They went to the house on the Wednesday before 16th April, 1994 and he measured the windows. They went downstairs where he wrote out a quotation for the material.

[8] The plaintiff gave evidence that he had seen the defendant at the gas station at Four Roads, St. John on two occasions and he had told him that he had the material for the repairs and requested him to come and do the job for him.

[9] According to the plaintiff, on the day in question, he found Mr. Waithe sitting in the verandah downstairs at the defendant's home when he arrived there at about 8.30 a.m. The material was stored in the verandah. They left their toolboxes alongside the material and went upstairs. The plaintiff turned on the light in the bedroom.

[10] Mr. Waithe went to the window to the left while the plaintiff went to the one on the right and opened the curtains. The window had two shutters made of pine on the inside and a cross-bar which went across the window into the wall at either side of the windows.

[11] The plaintiff removed the cross-bar from the window. He saw a string at the top of the window attached to a small nail to the left side of the window. He observed an Ovaltine tin with a battery attached to it. The tin was at the bottom of the window attached to the string. The bedroom contained a bed, table, cabinet, chairs and other furniture.

[12] He further testified that he pulled the string to remove it because it was in the way. There was an explosion and his left hand was hurt. He was taken to the Queen Elizabeth Hospital where he remained for about eight weeks. Station Sergeant Franklyn came to see him whilst he was hospitalized and took a statement from him.

[13] During cross-examination, the plaintiff said that Mr. Waithe was the principal person who dealt with the defendant. He maintained that he had done repairs to the defendant's home prior to 1994. The plaintiff denied that the repairs were to be done to the ceiling. When asked about the state of the bedroom, the plaintiff said that it did not appear to be in use or occupied as there was old furniture stored in it. The house was not in prime condition and needed many repairs.

[14] Under further cross-examination, the plaintiff stated that there were curtains in that bedroom and that the room was dusty and dark. He had turned on the light and was opening the window for light and not for any repairs. He said that when he arrived at the defendant's house the defendant was outside with his horses and cows and he told him and Mr. Waithe to go upstairs.

[15] When questioned further, the plaintiff agreed that, after the explosion, there was damage to his shirt in the area of the left shirt pocket and there were a lot of fine holes in the shirt. He was unable to say what condition the window was in after the explosion.

[16] The plaintiff denied that the defendant met him and Mr. Waithe on the way down the stairs. The plaintiff stated that he had never carried anything explosive in his shirt and maintained that the holes in his shirt were caused by the explosion. The plaintiff said that he did not see any security devices at the defendant's house and that the house was not very secure.

Evidence of Station Sergeant Eric Franklyn

[17] The plaintiff's witness, Station Sergeant Eric Franklyn testified that he recalled receiving a report on 16th April, 1994 that a worker had been injured at the defendant's house. He went to the house sometime in the morning and spoke to the defendant in connection with the report.

[18] The defendant showed him to a room upstairs and pointed out a window. The defendant said that the plaintiff was supposed to be doing repairs inside the room and it was alleged that on trying to open the window, there was some sort of explosion and he received injuries. The room was photographed and a police forensic expert visited the scene.

[19] The witness gave evidence that he examined the window and he recalled seeing what appeared to be a bloodstain in some part of the room. It appeared to him, "as if the room was being cleaned recently". Station Sergeant Franklyn recalled that a miniature Ovaltine key ring came into his possession and the key ring, along with the clothes worn by the plaintiff at the time of the incident were submitted to the Forensic Laboratory for analysis. There was something like burn marks on the clothes.

[20] Under cross-examination, the witness said that there was nothing significant on examination of the window. He did not recall seeing any sort of device in the window. As far as he could recall, there wasn't any damage to the window nor did he see any curtains at the window. Further, tests carried out on the key ring revealed no evidence of any explosive material. Station Sergeant Franklyn stated that if there had been any evidence of a booby trap or an explosive device at the window that morning he would have considered that significant. In further questioning he stated that no charge was ever laid against the defendant.

Evidence of Ms. Pauline Hurdle

[21] The final witness for the plaintiff was Ms. Pauline Hurdle. She testified that Mr. Waithe and the plaintiff built her house and also carried out repairs on it. She stated that she had known the plaintiff from 1992 and that he worked with Mr. Waithe as his apprentice. Ms. Hurdle testified that she knew the defendant as he used to come to the supermarket at Four Roads when she worked there.

The Defendant's Case

The Evidence

Evidence of Mr. Miller St. John

[22] The defendant gave evidence and called one witness, his wife. He testified that he lived at Eastmount Plantation with his wife. Mr. Waithe had been the carpenter for the plantation when his father lived there before. Ceiling repairs were to be done in one of the bedrooms so he had contacted Mr. Waithe who came and measured the area and told him what materials to purchase. He bought the materials and placed them in the same bedroom upstairs.

[23] The defendant recalled that Mr. Waithe had come to his house on the Thursday evening to make sure that the lumber had been purchased so he could start work on the Saturday.

[24] The witness next described the bedroom in which the repairs were to be done as being unoccupied and containing a bed, wardrobe, a couple of boxes with old clothes and the materials for the repairs. There were no curtains in that bedroom. The windows were not in a bad condition and were working. The outside shutters stayed open all the time, the sashes were up and the inside shutters would blow in and out.

[25] The defendant testified that he operated a dairy farm and on the day in question, the cows had escaped and he, his girlfriend (now wife) and a neighbour were rounding up the cows. Mr. Waithe and his helper were in the gallery (verandah) sitting down. He did not know the helper. They went inside to work.

[26] While outside, the defendant heard a loud noise. He went inside the house and saw Mr. Waithe and the plaintiff coming out of the bedroom. The plaintiff was holding his hand which was bleeding. He asked what had happened but got no reply. The defendant noticed that the plaintiff's shirt had a lot of burn marks to the left side where there was a pocket.

[27] The defendant gave the plaintiff a towel to wrap his hand. They went into the gallery and the defendant called the ambulance and the police. He also gave the plaintiff some orange juice to drink. The emergency medical technicians arrived within half an hour and attended to the plaintiff before transporting him to the hospital. They took an Ovaltine key ring with them. This key ring was about an inch long with a chain and his wife used to hook it onto her school bag along with other key rings.

[28] Police officers came about 25 minutes after the ambulance had arrived. Station Sergeant Franklyn interviewed the defendant and recorded a statement from him. The defendant went upstairs accompanied by police officers. He noticed bloodstains on the floor around the middle of the room. There was no damage to, nor any burn marks on, any of the windows in the bedroom. He did not see a battery, string, nail or Ovaltine tin.

[29] Sergeant Annel came to the house about a day later and carried out investigations, during which time he pointed out to the defendant a piece of flesh which was on the opposite side of the room, not in the area of the window.

[30] The defendant testified that he did not know how the plaintiff's hand got injured. He had never placed anything to injure anyone in his house. He testified that the plaintiff never came to his house before 16th April, 1994 to do work. He had no conversation with the plaintiff nor had any negotiations with the plaintiff about the money to be paid. He stated that his wife cleaned up the room after the police had concluded their investigations but did not recall if this was done on the same day or after.

[31] Under cross-examination, the defendant stated that the window sills were made of concrete, the windows did not require repairs, and neither the frames nor the shutters needed fixing. He stated that the bedroom did not contain chairs and tables. The defendant maintained that there were no curtains at the windows, which were open day and night. Further, the defendant insisted that there was no string on the left side of the window nor did he see any small object looking like a battery.

[32] In further cross-examination, the defendant denied discussing the incident at any time with his wife. He said that Mr. Waithe always brought someone when he worked at his home but that person was not the plaintiff. Later in the cross-examination the defendant said that on the day in question he recognized the helper to be the plaintiff. In re-examination, the defendant changed that testimony to state that when he had seen the two persons in the patio, he knew Mr. Waithe but not the other man at the time.

Evidence of Mrs. Sandra St. John

[33] The defendant's wife, Mrs. Sandra St. John, gave evidence that prior to 1994, Mr. Waithe had carried out repairs at the defendant's house and that she did not know about the plaintiff having done any repairs. The witness testified that she owned an Ovaltine key ring which was made of plastic, circular, orange in colour, with the word Ovaltine written across it and with a silver chain.

[34] On the day of the incident, she saw Mr. Waithe with the key ring in his hand but there was no damage to it. She supported the defendant's assertions that the house had no curtains, and that it was the ceiling which was to be repaired.

[35] The witness gave evidence of going into the bedroom with the police officers, and of observing blood on the floor. She did not go back into the room until the afternoon after the police officers had left. She cleaned the room the following day. The witness testified that she never saw any devices such as nails or string in that bedroom.

[36] Under cross-examination, the witness said that she discussed the incident with her husband on the first day and that they had subsequent discussions about it. She said that they talked about what would happen, what was going on in the room. She stated that there were clothes on the bed and that the defendant would go there possibly every day to get a shirt.

The Issues

[37] The issues which arise for the determination of the court are as follows:

1. Whether there was a breach of the statutory duty of care owed by the defendant to the plaintiff under the Act which resulted in the plaintiff's injury.

2. (a) Whether the plaintiff is entitled to recover damages and, if so;

   (b) What is the measure of damages?

Issue No. 1

Whether there was a breach of the statutory duty of care owed by the defendant to the plaintiff under the Act which resulted in the plaintiff's injury.

The Submissions of the Parties

The Plaintiff's Submissions

[38] Mr. Walcott Q.C, Counsel for the plaintiff, submitted that the defendant had engaged the services of the plaintiff and Mr. Waithe to carry out carpentry at his house. The defendant therefore owed a duty of care to the plaintiff to ensure that he was safe while on the premises. The evidence showed that there was a loud explosion while the plaintiff and Mr. Waithe were in the bedroom upstairs. There were things there which caused the explosion and those things belonged to the defendant's wife.

[39] Counsel also submitted that there was negligence on the part of the defendant. He observed that the house was left open many times and that it was possible for persons to gain entry. Both the defendant and his wife had denied placing the items in the window. In his submission this was not the act of a stranger. The plaintiff's injury showed that someone had deliberately placed a contraption at the window to deter trespassers. It was easy for trespassers to enter the building having regard to its state of disrepair. The device was created either by the defendant or on his behalf to deter trespassers. The defendant had breached the duty of care owed to the plaintiff and he was liable for the injuries suffered by the plaintiff.

The Defendant's Submissions

[40] Mr. Goodridge, counsel for the defendant, submitted that the maxim *res ipsa loquitur* does not apply in this case because the plaintiff had sought to explain the events which led to the accident, namely, the pulling of a string, an Ovaltine tin and an explosion. He had identified, quite clearly, the relevant act or omission.

[41] Counsel submitted that the plaintiff's story was far fetched and was concocted, and that he had not established negligence. The court ought not to believe the plaintiff because he gave conflicting evidence. Counsel referred to the plaintiff's evidence that he started the work on a Monday while the other witnesses stated that the incident happened on a Saturday. He noted that the plaintiff had testified that he was off work for two to three years but admitted in cross-examination that he was mistaken about this fact. He urged the court to find that the plaintiff was not a truthful witness, having regard to a number of conflicts in his evidence. He submitted that the burden was on the plaintiff to establish the defendant's negligence and that the plaintiff had failed to prove his case. His claim should therefore be dismissed.

The Law

[42] **Section 4** of the **Act** provides:

(1) An occupier of premises owes the same duty (in this Act referred to as "the common duty of care") to all his visitors, except so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case 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.

Discussion

[43] According to **section 4** of the **Act**, the occupier of premises owes a common duty of care to all his lawful visitors, that is, the duty to take such care as in all the circumstances of the case 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.

[44] The plaintiff's case is that he had known the defendant previously, and they had had conversations about horses. The plaintiff agreed under cross-examination that Mr. Waithe was the principal person who dealt with the defendant. However, the defendant stated that his first contact with the plaintiff was on the day of the accident. He denied making any arrangement with the plaintiff to do work at his house and stated that on previous occasions when Mr. Waithe did work for him, he was accompanied by an assistant who was not the plaintiff.

[45] My impression of the plaintiff is that he is a simple person who was easily confused. It became apparent early in his evidence-in-chief that the plaintiff had difficulty understanding some of the questions posed by his counsel. It is my opinion that any inconsistencies which arose on his evidence were due to his simple mindedness and not to any deliberate attempt to mislead the court or to tell untruths. Whether or not the plaintiff was engaged by the defendant directly is to my mind not a critical factor in this case. The defendant saw the plaintiff on the premises, and admitted under cross-examination that he was Mr. Waithe's helper. The plaintiff was therefore a lawful visitor. What is important is that the defendant was under a duty to ensure that the plaintiff, as a lawful visitor, was reasonably safe while on his premises.

[46] It has not been disputed by the defendant that the plaintiff was seriously injured while on his premises. The plaintiff testified that the injury occurred when he pulled a string at the window and there was an explosion. The medical evidence reveals that the plaintiff suffered a blast injury to his left hand. There was damage to the plaintiff's left shirt pocket. The defendant said that he was outside with his cows when he heard a loud noise. This is consistent with the plaintiff's story that there was an explosion. There is also the evidence of Station Sergeant Franklyn that the defendant told him that the plaintiff was supposed to be doing repairs in the room and it was alleged that there was some sort of explosion when he tried to open the window. Flesh was subsequently found in the room in which the explosion occurred. I find as a fact that there was an explosion in that very room. What was the cause of the explosion?

[47] The thrust of the plaintiff's case is that there was some sort of device or booby trap placed at the window in the defendant's home which exploded. The plaintiff mentioned an Ovaltine tin. No such tin was found but an Ovaltine key ring was found after the explosion and Mrs. St. John said that it was hers. I do not think that this is a matter of mere coincidence. It lends credence to the plaintiff's account of the incident. The defendant denied that there was any such device and testified that he did not know how the plaintiff's hand got injured.

[48] Station Sergeant Franklyn testified that when he went to the defendant's home there was nothing significant found at the window. However, his evidence is that when he went into the bedroom it appeared as if it had been cleaned recently. The defendant said that his wife had cleaned the room either the same day or the day after, and the wife said that she had cleaned the room the day after the explosion. I accept the evidence of Station Sergeant Franklyn and conclude that the room was cleaned before the police arrived, thereby removing evidence of the explosion except for the piece of flesh and the Ovaltine key ring.

[49] The plaintiff said that he did not have any explosives on his person when he was injured. The evidence is that the plaintiff's shirt had what seemed to be burn marks on it, but Station Sergeant Franklyn was unable to state the result of the forensic analysis which was carried out on the clothes, as the police file could not be located.

[50] Having (a) seen and heard the witnesses (b) concluded that the room was cleaned before the police arrived (c) considered that the defendant denied that he discussed the incident with his wife while she stated that they did discuss the incident and (d) analysed the evidence in its entirety, I accept the plaintiff's evidence and find as a fact that the plaintiff's account more likely than not represents the truth of what took place. It is therefore the finding of the court that the plaintiff has established, on a balance of probabilities, that his injuries were caused by a device on the defendant's premises which exploded. There was therefore a breach of the common duty of care owed by the defendant to the plaintiff under the **Act**.

The Common Law Duty of Care

[51] There was an alternative pleading in negligence which I now consider for the sake of completeness. It is clear from my findings of fact above that the plaintiff was a person whom the defendant ought to have foreseen would be injured if he did not take proper care. A reasonably prudent occupier would have ensured that the premises (in particular the bedroom) was reasonably safe for workmen. That not being the case, because of the device which exploded, the duty of care was breached thereby resulting in injury to the plaintiff.

Res Ipsa Loquitur

[52] The plaintiff pleaded *res ipsa loquitur* but the evidence adduced did not support that maxim and it was not addressed by his counsel in his submissions. The question whether to apply the maxim usually arises where the plaintiff is able to prove the happening of an accident but little else – ***Charlesworth & Percy on Negligence, 12th edition*** at para. 6-101. This is not the case here. I have found that the accident occurred as a result of the explosion of a device. The maxim is therefore inapplicable.

Issue No. 2

(a) Whether the plaintiff is entitled to recover damages and, if so;

(b) What is the measure of damages?

(a) Is the Plaintiff entitled to recover damages?

[53] Since there was a breach of the duty of care by the defendant resulting in injury to the plaintiff, the plaintiff is entitled to recover damages in respect of the injury which he suffered as a result of that breach. I turn now to the measure of damages.

(b) The Measure of damages

[54] The plaintiff gave evidence that he was taken to the Queen Elizabeth Hospital after the accident where he was detained for about eight weeks. He testified that if he tries to lift anything heavy, such as plywood, he experiences pain in two fingers. Previously, he had enjoyed recreational cricket which he was forced to discontinue because of the injury

[55] The plaintiff had been unemployed for about six weeks before the accident. He had not been paying national insurance contributions or income tax and received no disability benefits while he was off sick. The plaintiff returned to work as a carpenter on 5th April, 1995 and is now in full-time employment with a company.

[56] The court has had the benefit of the following reports which have not been challenged by the defendant:

1. Medical report from the Queen Elizabeth Hospital dated 12th October, 1995;

2. Occupational therapy report from the Queen Elizabeth Hospital dated 5th February, 1996;

3. Medical report from Dr. Jerry Thorne FRCS dated 29th October, 2007.

[57] A perusal of these reports disclose that the plaintiff suffered an approximate 6 cm x 4 cm explosive injury to the mid palm of his left (non-dominant) hand. He also suffered fractures of the distal and third metacarpals, and a comminuted fracture of the third proximal phalanx.

There was significant soft tissue injury. He underwent surgery on a number of occasions and the blast injury was covered with a skin graft. The plaintiff underwent occupational therapy between June 1994 and January 1995.

[58] It is the opinion of Dr. Thorne that the plaintiff has been left with a residual cosmetic deficit of the left hand. There is no occupational disability, but the total permanent physical impairment has been assessed at 40%.

[59] The injury caused the plaintiff a severe degree of pain and suffering which was exacerbated by the necessity for a series of surgical interventions and by the rigours of rehabilitative therapy.

[60] Mr. Walcott cited the cases of **Gibbs v Cowles Kemp & Kemp G9-001 and C (A Child) v London Underground Kemp & Kemp G 9-002** for the court's consideration. In **Gibbs**, the claimant aged 26, suffered a mutilating hand injury to his left (non dominant) hand involving complete amputation of the middle finger and the ring finger and fractures of the index finger. The claimant was left severely incapacitated with a hand that had an abnormal cosmetic appearance. He had been unable to return to work and at the date of trial was unemployed. The total award was £117,373 of which the sum of £32,000 was for pain and suffering.

[61] In **C (A Child),** the claimant was nine years old. The ends of her index, middle and ring fingers were severed. Her deformed hand severely reduced her chances of obtaining a husband through an arranged marriage, in that she came from a traditional Muslim family of Pakistani origin. She was awarded the sum of £55,000 of which £28,000 was for pain and suffering.

[62] In response, Mr. Goodridge submitted that those cases were totally outside the facts of the case and were not helpful to the court. The authorities were not a proper guide for the court to use in assessing damages. In addition, the injuries and resulting disability in **Gibbs** were more severe than those suffered by the plaintiff. The case of **C (A Child)** was not relevant as it involved a child.

[63] Mr. Goodridge referred to **Kemp & Kemp's The Quantum of Damages, volume 4 JSB -049** and submitted that the plaintiff's case fell between the categories of (f) Less Serious Hand Injury and (g) Moderate Hand Injury. In his opinion, the damages were in the region of $30,000 to $40,000.

Discussion

[64] I did not find either of the cases cited by Mr. Walcott to be of much assistance, since the facts are dissimilar to the facts in this case.

[65] The plaintiff suffered a severe injury to his left hand, which involved fractures, and amputation of the fourth finger distal to the distal interphalangeal joint. He has been left with a claw-like hand and permanent impairment. The plaintiff experiences pain if he tries to lift any heavy object. He is no longer able to play cricket, an activity which he enjoyed, because of the injury.

[66] I consider that the injury suffered by the plaintiff falls within the category of **Serious Hand Injuries in the Judicial Studies Board Guidelines 10th edition 2010** where the awards range from a low of £19,000 to a high of £40,650. Having regard to the evidence, it is the court's opinion that an award of $65,000 would be an appropriate award for pain, suffering and loss of amenities.

Special damages in the sum of $460 were not in dispute.

Disposal

[67] In the circumstances, judgment is given for the plaintiff in the sum of $65,000 general damages and $460 special damages. Interest on the general damages will be at the rate of 6% from today until payment and on the special damages at the rate of 6% from the date of the filing of the writ until payment, with costs to be taxed or agreed.

KAYE GOODRIDGE,

Judge of the High Court.