



[2013] JMSC CIV 131

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005HCV5632

BETWEEN	Pauline Johnson (Administratrix for the estate of Garfield Gregory, deceased)	Claimant
AND	Dwight Bennett	1 st Defendant
AND	Merrick Moulton	2 nd Defendant
AND	Linval Tennant	3 rd Defendant
AND	The Attorney General of Jamaica	4 th Defendant

Ms. A. Haughton instructed by A. Haughton & Associates for the Claimant

Ms. M. Chisholm and Ms. S. Orr instructed by the Director of State Proceedings for the Defendants

Heard: July 24, 2009 and September 20, 2013

Negligence – Duty of Care owed by Legal Custodian of Prisoner -Special Relationship
between Custodian and person in his Custody

Campbell J

[1] The claimant is the Administratrix for the estate for her late son, Garfield Gregory. The first, second, and third defendants are members of the Jamaica Constabulary Force. The fourth defendant is sued under and by virtue of the Crown Proceedings Act.

[2] On the 17th February 2003, Garfield Gregory was convicted in the Resident Magistrate's Court for the offence of assault occasional bodily harm. He was fined

\$30,000.00 or three months. He was later placed in the guard room, and taken to the cells. He was searched and placed in one of five cells at the station, Shortly after entering the cell, a loud commotion was heard. He was seen with blood on his clothing and restrained from re-entering the cell. He was handcuffed and taken on foot to the Linstead Hospital, some three chains away. It was alleged that whilst on his way to the hospital, he collapsed and fell. He was assisted to his feet by the police officers accompanying him. Shortly after his arrival, at the hospital he was pronounced dead.

(3) On the 30th December 2005, a claim was filed against the defendants claiming damages under and by virtue of the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act, of the wrongful death of Garfield Gregory from a stab wound he sustained while in custody at the Linstead Police Station, where the first and second defendants were on cell guard duty and station guard duty respectively and the third defendant was on Mobile Patrol Duty.

[4] The negligence of the defendants was particularized as follows:

- a) Failing to search and/or thoroughly search persons placed under police custody;
- b) Failing to thoroughly search prison cells for objects that may be used as weapons;
- c) Failing to detect the ratchet knife used in the wounding of the deceased so as to prevent it being used in the wounding of the deceased so as to prevent it being used as a weapon;
- d) Failing to provide any or adequate security for persons placed in the custody of the police;
- e) Failing to provide separate holding areas for offenders whose offence varies in nature and extent;
- f) Failing to provide a safe place for inmates;
- g) Failing to provide transportation for the deceased to be taken to the Linstead Public Hospital.

[5] The defendants in a Defence filed 5th April 2006, said at paragraph 3:

- (iii) Paragraph 6 of the Particulars of Claim is admitted save that it is denied that the deceased collapsed on arrival and was pronounced dead. The 4th Defendant will say that the deceased was acting boisterously and did not appear weak when he was taken to the Linstead Hospital, less than a chain away from the police station, and upon arrival at the hospital he was strong enough to give his name and other pertinent information to hospital personnel. The Defendants will further say that there was no motor vehicle available at the police station as the police vehicle was on assignment in the Linstead area.
- iv. The 4th Defendant will say that the 1st, 2nd and 3rd Defendants acted with requisite care in the circumstances.
- v. The Particulars of Negligence are denied. The 4th defendant will say that the 1st, 2nd, and 3rd defendants undertook reasonable and through searches of all inmates and cells and performed all requisite duties in accordance with the law.
- vi. The 4th Defendant will further say that the 1st and 3rd defendants did make all reasonable efforts, in these circumstances, to ensure that the deceased was taken to the Linstead Public Hospital as expeditiously as possible.

[6] The Claimant identified the issues as follows:

- (a) Whether the servants and agents of the Crown failed in their duty to ensure that the inmates in the cell with the deceased were not armed.
- (b) Whether the servants or agents of the Crown having failed to disarm men in their custody and having failed to ensure that there were no weapons in the cell which the deceased was held negligent in and in breach of their duty which leads to the deceased being murdered by an inmate in the cell.

[7] Pauline Bennett, the girlfriend of the deceased, gave evidence that the deceased having been fined a sum of \$30,000.00 or three (3) months on a plea of guilty, was taken downstairs. His shoes laces, belt, watch, chain and phone, were removed and handed to her. He was given a meal by his girlfriend, who then left the station. She later received a telephone call and returned to the station, where she received information of his death. One police officer told her, that, "they put him in a cell with a guy call Chicken

and him stab him.” The officer also said “if I was there Garfield wouldn’t die cause me wouldn’t make them put him in that cell with him.” The witness further in her witness statement, said that the accused whilst being taken to the cell was asking the officer not to place him there. She was not cross-examined, or any challenged raised to her evidence in respect of the statements that the police officers made.

[8] Constable Moulton said he conducted a preliminary search of the deceased. Moulton said the reason for the search was that he was coming into custody and he wanted to make sure “the environment was safe.” Moulton said there were five cells. One cell can hold five to six prisoners. The prisoners are stripped search, down to their underwear, dependent on who does the search. He said he knew the prisoner called Chicken before that day. Chicken had been in the cells about four weeks, had been involved in “squabbles.” Did not hear of Chicken being involved in, physical violence. Less than two minutes after Garfield Gregory was taken to the cell he heard an uproar.

[9] Constable Moulton further testified that, prisoners are allowed visiting days. Articles brought on those days for the prisoners are searched. In cross-examination, he said that he was not able to say whether Chicken was searched. He was aware that a ratchet-knife was found after the incident in cell #1, in which the deceased was placed. Chicken was being held for shooting with intent and murder. In cases where a prisoner is insane, he is segregated from the others. He said it was a part of his job description “to rub down” (search) people. He said of available police cars, there was one for general policing, and one for CIB, neither of those vehicles was present at the station at the time of the incident. In his estimation, the deceased could walk. His merino was soaked with blood. The deceased was handcuffed. He testified that rudimentary courses in first aid were a part of his training. He was not aware of the seriousness of the deceased injury.

[10] There were about 17 persons in the cell; all the cells were similarly populated. Moulton said he was shown a ratchet-knife, which was about nine inches in length when opened. The officer agreed that the number one cell was overpopulated; having more than twice the number of prisoners it was meant to hold. He admitted that there was “no

evidence" that Chicken was searched. He opined that dangerous people ought to be kept away from the remainder of the men in custody.

Discussion

[11] It is admitted on the case for the defence that a knife does not belong in a cell. There is a regulatory regime of thorough searches designed to ensure that no prohibited material or, thing enters the cell. Crown Counsel did not resist the submission that the defendants had a duty to control the acts of a prisoner who is in his lawful custody. If in breach of that duty another person is injured, then the defendants are culpable. In **Home Office v Dorset Yacht** [1970] A.C 1004, Lord Diplock, put the proposition in this way at page, 1063 letter G:

"A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics:

- (1) *That A has the legal right to detain C in penal custody and to control his acts while in custody;*
- (2) *That A is actually exercising his legal right of custody of C at the time of C's tortious and*
- (3) *That A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics;*
- (4) *That at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and*
- (5) *That A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did."*

[12] His Lordship then proceeded to examine, two cases in which the special relationships caused by the prisoner being in the actual custody of the defendant, gave

the defendant the continuing control over the acts of the prisoner. Moreover, the fact of physical control, over the plaintiff also, placed him in a position to see that the plaintiff was likely to be injured by his fellow prisoner. At page 1061 letter G, Lord Diplock said:

*"In two cases **Ellis v. Home Office** (1953 2 All E.R. 149) and **D'Arcy v Prison Commissioners** (**Times Newspaper** - 15th November 1955) it was assumed, in the absence of argument to the contrary, that the legal custodian of a prisoner detained in a prison owed to the plaintiff, another prisoner confined in the same prison, a duty of care to prevent the first prisoner from assaulting the plaintiff and causing him physical injuries. Unlike the present case, at the time of the tortious act of the prisoner for the consequences of which it was assumed that the custodian was liable, the prisoner was in the actual custody of the defendant and the relationship between them gave to the defendant a continuing power of physical control over the acts of the prisoner. The relationship between the defendants and the plaintiffs in these two cases too bore no obvious analogy to that between the plaintiff and the defendant in the present case. In each of the cases the defendant in the exercise of a legal right and physical power of custody and control of the plaintiff had required him to be in a position in which the defendant ought reasonably and probably to have foreseen that he was likely to be injured by his fellow prisoner."*

And at page 1062 letter A:

*"In my view, it is the combination of these two characteristics, one of the relationship between the defendant as custodian and the person actually committing the wrong to the deceased and the other of the relationship between the defendant and the plaintiff which supply the reason for the existence of the duty in care in these two cases - which I conceded as Counsel in **Ellis v Home Office**. The latter characteristic would be present also in the relationship between the defendant and any other person admitted to the prison who sustained similar damage from the tortious act of a prisoner, since the Home Office as occupiers and managers of the prison have the legal right to control the admission and the*

movements of a visitor while he is on the prison premises. A similar duty of care would thus be owed to him."

[13] Ms. Orr for the defendants accepted that the defendants owed the claimant a duty of care. That duty was to keep the prisoners reasonably safe. It was not an absolute duty. She relied on **Ellis v Home Office**, where the Court of Appeal, held that, the conduct of the prison officer in leaving the door of the cells open, could not have been reasonably expected to result in an attack on the plaintiff. Ms. Orr submitted that the duty on custodians was not an absolute duty, akin to the duty in the Occupiers Liability Act.

It was further submitted that, there could be no reasonable foreseeability, when the prisoner, who mounted the attack had never been involved in a violent episode before. In respect of the searches, counsel referred to the evidence of Officer Moulton, in which he testified of the practice that prisoners were searched in the guard-room, and before being placed in the cells. Counsel indicated that there were also random checks. On the question of the transportation, it was submitted, that the evidence was that there were two vehicles assigned and both were being used. The evidence was that the Linstead Public Hospital was only, 3 chains away, and the deceased appeared strong enough to walk there. According to Counsel, the most prudent course was to take him to the hospital and not await the arrival of the patrol car.

[14] It is unchallenged that a knife was found in the cell. When opened this knife was nine inches long. The system was breached, and the defendants are unable to say where and when it was breached. There was no record that the, prisoner, Chicken, had ever been searched on being placed in the cell. There was no direct evidence that any of the 17 men in the overcrowded cell was searched. The cell had twice as many prisoners as it was meant to carry. If squabbles were taking place before the entry of the deceased, it was foreseeable that the deceased presence, causing as it would a further diminution in the available space, would aggravate those squabbles. It is to be borne in mind that the commotion was heard only two minutes after the deceased had entered. There is no evidence that the defendants had attempted to locate the cause for the squabbles Chicken had been involved in, with a view of bringing them to an end.

In the absence of attempts to ascertain the source of the "squabbles," from an inmate who was charged with extremely serious offences, indicates a failure on the part of his custodian to appreciate that his behaviour posed risk to the other prisoners.

[15] The search being done by a pat down and, removal of clothing, may not be the most efficient means of searching for weapons and contraband. That a nine inch knife could evade that search, if search there was, is proof of the ineffectiveness of the search. The prisoner was fatally wounded, and "spewing blood." There is no evidence that the most cursory of examination was done to identify the location of the wound. That would have revealed a wound in the region of the deceased heart, and may have affected the decision as to whether the walk to the hospital was a prudent course to adopt. Could trained medical assistance be summoned from the hospital? Would the prisoner's chance of survival be improved by such a move? There is no evidence that an attempt was made to obtain alternative means of transport, in the absence of the police units. Was an effort made to contact the police units?

[16] In **Doris Fuller v Attorney General** [1998] 56 WIR 337, the Court of Appeal, the administratrix's son had died in the Constant Spring lock-up, after being taken off the streets. He was placed in a cell with 18 other prisoners. The cell was poorly ventilated; the policemen on duty had failed to respond to the cries emanating from the cells. An appeal was raised against the inadequate sums awarded and the failure of the learned trial judge to make an award of damages for breach of the deceased constitutional rights. The Court after perusing the regulations for lock-ups said:

"Also, safeguards are provided so as to ensure that inmates have the protection of law. For example, here are some of the records which the officer in charge of the lock-up is obliged to keep (see the Prisons (Lock-ups) Regulations 1980, The Jamaica Gazette Supplement: Proclamations, Rules and Regulations Wednesday, 10 September 1980):

These regulations have been cited to demonstrate that, when there is false imprisonment in a lock-up, the assumption is that conditions to be observed and required by the regulations accord with that which is expected of a civilised regime. If there is some falling off of standards, then aggravated damages is a

remedy under the Law Reform (Miscellaneous Provisions) Act. Had Agana survived and the conditions of imprisonment merely been 'insanitary and humiliating' then exemplary damages would have been an appropriate remedy; see Attorney-General of St Christopher, Nevis and Anguilla v Reynolds (1979) 43 WIR 108."

Damages

Under the Fatal Accident Act, and under the Law Reform (Miscellaneous Provisions) Act

[17] There was no evidence of a dependency up to the date of his death. Loss is to be restricted to damages under the Law Reform (Miscellaneous Provisions) Act.

Loss of Expectation of Life, the lost years, in **Godfrey Dyer and Derrick Dyer v Gloria Stone** (1990) 27 JLR 268, Forte JA, gives a useful direction on the determination of a multiplier. The multiplier is age related, but there is no fixed formula for the computation of the multiplier. It must take into account the many contingencies, vicissitudes and imponderables of life. In **Jamaica Public Service Co. Ltd. v Elsada Morgan** [1986] 25 JLR 429; the Court of Appeal approved a multiplier of 14 years for a healthy man who died at 25 years.

Multiplicand

[18] He earned \$25,000.00 per month or \$300,000.00 per annum.

The court must determine both the pre-trial and post trial dependency for the period before death, evidence of probable earnings at the time of trial, together with the evidence of earnings at the time of death. These are considered together, and the median determines the earnings between death and trial. No figures were put in evidence to support a finding for earnings at the time of trial - \$300,000.00.

In assessing the deceased lost of earnings in the lost years, the years he would have been earning had he been alive. The living expenses are conventionally assessed at one-third of his net earnings. In order to compensate for the lost \$300,000.00 x 7 = \$2,100,000.00 - \$700,000.00 = \$1,400,000.00

The post trial, the likely earnings of the deceased at the date of trial, minus the statutory deductions, equal $\$216,000.00 \times 7 = \$1,512,000.00$.

[19] I make the following Orders:

General Damages

i	Pre-trial years	-	\$1,400,000.00
ii	Post-trial years	-	1,512,000.00
iii	Lost of expectation of life	-	50,000.00
iv	Interest on General Damages at the rate of 3% from January 3, 2006 to September 20, 2013.		
v	Interest on pre-trial award of \$1,400,000.00 at 3% from February 17, 2003 to September 20, 2013.		
vi	Interest on Special Damages at the rate of 6% from February 17, 2003 to June 21, 2006 and at 3% thereafter until September 20, 2013.		

Special Damages

Funeral Expenses	-	454,888.31
Attorney costs	-	320,000.00
Cost of Death Certificate	-	890.00
Cost to Advertise Legal Notice	-	2,980.00
Administrator General Department Registration Fee	-	<u>1,000.00</u>
Total	-	\$779,758.31

Costs to be taxed if not agreed.