[2012] JMCA Civ 53

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 18/2010

BEFORE THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**JULIUS ROY**	**APPELLANT**
AND	**AUDREY JOLLY**	**RESPONDENT**

Paul Beswick instructed by Messrs Ballantyne Beswick and Company for the appellant

Mr Akin Adaramaja for the respondent

9 November 2011 and 23 November 2012

HARRIS JA

[1] Sometime in December 2006, the appellant, in the process of delivering sand at 15 Glen Drive caused some to spill on the wall of 16 Glen Drive. Following this, the respondent complained that her wall had been defaced by the sand. This led to an altercation between the parties resulting in the appellant sustaining injury to his left eye, inflicted by the respondent's fingers. The

appellant reported the matter to the police who sent him to seek medical attention which he obtained.

[2] On 15 May 2007, the appellant brought an action against the respondent, in the Resident Magistrate's Court for the Corporate Area, claiming $200,000.00 for pain and suffering, medical expenses and loss of income. The appellant is dissatisfied with the decision of the learned Resident Magistrate made on 14 November 2007 and has now appealed.

[3] The appellant testified that when the respondent registered her complaint about her wall, the person to whom the sand was delivered assured her that he would wash the wall after the sand was removed. The assurance given by him did not appease the respondent. Being unhappy with the state of affairs, she began to quarrel. He, the appellant, then said to her, "But lady you no hear the man say im will wash the wall." The respondent, who was on the opposite side of the road, ran across to him, rested her stomach against his chest and stuck two of her fingers in his left eye, damaging it.

[4] The injury, he asserted, impaired his vision. He also said that he had no defect in his vision prior to the injury and that due to the injury he experienced severe pain in the eye for about three months, during which period he was unable to earn an income. He stated his income to be $25,000.00 weekly prior to receiving the injury. It was also disclosed by him that he met medical expenses,

and receipts amounting to $9,934.80 were submitted by him and tendered into evidence.

[5] It was the respondent's evidence that she lived at 16 Glen Drive and that she was at home when she heard a motor vehicle stop at her gate and "heard shoveling coming from the vehicle". Her child went to investigate and upon her delay in returning, she also went to make investigations. Following this, she inquired of Mr Roy Edwards as to the ownership of the sand and was told that it belonged to a Mr Robert who lived across the street. She told Mr Edwards not to deposit the sand where it had been placed. Mr Edwards, she asserted, began to quarrel while she stood beside him alongside the truck.

[6] The appellant, she declared, came over to her and said "Let the big nasty woman go bout her business so mi can finish mi wuk." In signifying her displeasure with the appellant's comments, she retorted by referring to him as "big and nasty". She said that he then "flashed his hand towards her face," which she blocked with her hand. She denied injuring his eye or that she used her body to touch his.

[7] The learned Resident Magistrate admitted into evidence testimony from the appellant that the respondent had been charged and convicted for the offence of assault occasioning bodily harm, in respect of the injury to the appellant's eye, she having pleaded guilty to the charge. In cross-examination,

the respondent admitted the conviction but stated that she had not entered a guilty plea.

[8] On the date of the determination of the trial, the learned Resident Magistrate made the following orders:

> "By trial judgment for the plaintiff in the sum of $3,578.00. Parties to bear own cost [sic]."

In her reasons for judgment she said:

> "Judgment that both the defendant and plaintiff contributed to the injury to the extent of 50% and there was no evidence to link the defendant with any damage which the plaintiff alleged flowed from the injury. The defendant should pay the plaintiff $3,578.00 with each party bearing their own legal costs."

The first ground of appeal is as follows:

> "(a) The Court failed to take proper or any account whatsoever of the unchallenged evidence that the defendant had been convicted after a trial in the criminal court of assault occasioning bodily harm in respect of the same set of facts and circumstances which led to the injury inflicted on the claimant, and that he [sic] standard of proof in the said criminal court being that of beyond reasonable doubt superceded the standard of proof required for the claimant to prove that he [sic] injury was inflicted by the defendant intentionally."

[9] In her reasons for judgment the learned Resident Magistrate said:

> "The law is that the court is not bound by the decision of the criminal court. The civil court must look at the evidence before it. Since neither party called any witness and they both took the witness stand on their

> own behalf, the court must assess which witness is more credible and on a balance of probabilities which evidence is more credible, and rule accordingly."

[10] On the evidence before the learned Resident Magistrate, Mr Beswick argued, all that was required to be proved was that the appellant's injury resulted from a deliberate act. There was evidence from the appellant as well as evidence from the respondent corroborating that of the appellant, which left the court with no other choice than to have found the respondent liable, he contended. The respondent, he submitted, admitted her conviction, yet the learned Resident Magistrate failed to properly assess and give due weight to this aspect of her evidence and although the learned Resident Magistrate essentially stated the general principles, she made no findings as to the criminal aspect of the evidence. In support of these submissions, counsel placed reliance on **Lane v Holloway** [1967] 3 All ER 129, **Hunter v Chief Constable of West Midlands et al** [1981] 3 All ER 727, **Ingram v Ingram** [1956] 1 All ER 785 and **R v D; R v J** [1996] 1 All ER 881.

[11] Counsel further submitted that even if the court is not bound by the decision of the criminal court as the learned Resident Magistrate stated, which view is inconsistent with principle and practice, the respondent, having admitted her conviction, was estopped from contending that the appellant had been criminally assaulted by her.

[12] Mr Adaramaja, in response, submitted that the learned Resident Magistrate was correct in stating that she was not bound by the decision of the criminal court. Citing **Hollington v F Hewthorn** [1943] 2 All ER 35, counsel argued that it is not for a court to make a decision on what was decided in another court, nor was the learned Resident Magistrate duty bound to adhere to the fact that the respondent admitted that she was convicted by finding that she was estopped from denying such admission, he argued. What was important, he submitted, was the evidence before the learned Resident Magistrate and her findings of fact.

[13] Mr Beswick's complaint as to the failure of the learned Resident Magistrate to treat the respondent's conviction as corroborating the appellant's evidence that he had sustained the wound to his eye at the hand of the respondent, is not well founded. Although the learned Resident Magistrate admitted the evidence of the respondent's conviction, she could not have acted upon it in keeping with the well recognized rule in **Hollington** that a criminal conviction is not evidence in a civil proceeding that the person convicted committed the offence. Even if the admission of the conviction emanated from the respondent, this would not have rendered the conviction admissible in evidence.

[14] In **Hollington**, it was held that evidence could not be given in a civil case that one of the drivers involved in a motor vehicle collision was convicted of a road traffic offence in that accident. **Hollington** is still the law in this

jurisdiction and until a change has been sanctioned by the legistature, this court is duty bound to adhere to it.

[15] In his quest to persuade this court that serious consideration ought to be given to the respondent's conviction as being corroborative of the appellant's evidence, Mr Beswick sought assistance from the following statement of Lord Denning MR in **Lane v Holloway** when he said:

> " … An objection was taken to the judge being told what took place there. It was said that what takes place in a criminal court is not evidence in a civil court. I have for a long time doubted **Hollington v F Hewthorn & Co Ltd** and hope that it may soon be done away with. I do not think that it prevents our being told that the magistrates found the defendant guilty of unlawful wounding." *(emphasis added)*

[16] There can be no doubt that Lord Denning's dictum must be treated as a comment. His statement does not overrule the decision in **Hollington**. Lord Denning was merely of the view that the criminal conviction could be brought to the attention of the civil court. His statement was not a positive or expressed pronouncement that the previous conviction should be admissible evidence and should be acted upon. The statement, therefore, would not be a guide which would encourage this court to depart from **Hollington**.

[17] Counsel submitted by way of written submissions, that although the issue in **Hunter** emanated from a criminal case decided against a plaintiff in a civil action, in principle the same procedure ought to be applicable to a defendant in a civil case.

[18] There is nothing to prevent a party who has been convicted in a criminal case from being a plaintiff in a civil case. However, **Hunter** does not avail the appellant. He cannot secure refuge under that case. It is important to reiterate that, in this jurisdiction, the law as to the admissibility of a conviction in a civil case is that which has been laid down in **Hollington**. At the date of the **Hunter** decision, the admissibility of the evidence of a criminal conviction in a civil case was permissible by virtue of the (English) Civil Evidence Act 1968. Section 11(1) of that Act reversed or overruled the principle laid down in **Hollington** by allowing into evidence a conviction in subsequent civil proceedings as proof of the commission of the offence by the party so convicted. Clearly, **Hunter** is inapplicable to the case at bar.

[19] **R v D; R v J** is also inapplicable. In that case, the admission of a judgment which contained specific findings relevant to the hearing of an appeal would have been permissible under the express provision of section 23 (1) of the Criminal Appeal Act 1968.

[20] In **Ingram v Ingram** the wife was convicted on two counts of an indictment charging her for espionage. Her conviction affected her husband's health. On a visit to her in prison she informed him that she did not wish to have anything more to do with him. Subsequently, neither party evinced an intention to resume cohabitation. The husband petitioned for a divorce. At the trial, the wife's conviction was admitted in evidence and the petition was amended to include an allegation of cruelty on the part of the wife. Evidence of the wife's

conviction was used to draw the inference that the wife had been guilty of active and treasonable conduct and that such conduct amounted to cruelty.

[21] In **Ingram v Ingram**, Sachs J, in admitting the evidence of the wife's conviction chose to depart from **Hollington**. This court is bound by the principle laid down by **Hollington**. In any event, **Ingram v Ingram** was a first instance decision which will not be followed.

[22] It is my view, that in obedience to the rule in **Hollington,** the learned Resident Magistrate should not have admitted the criminal conviction of the respondent into evidence. However, she rightly declined to address the issue, or to make a ruling as to its effect on the appellant's case. The respondent's conviction cannot be regarded as evidence corroborating that of the appellant as to how he received his injury. Therefore, the conviction is, undoubtedly, not evidence supporting any liability on the part of the respondent to the appellant. This ground is therefore unsustainable.

Grounds (b) and (c)

[23] It will be convenient to consider these grounds simultaneously.

> "(b) The Court erred in law in failing to recognize that even assuming that the defendant did not intend the injury to the claimant to occur, that having ruled that the defendant was in some way responsible for the injury, the Court was obliged to assess the damages attributable to pain and suffering and loss of amenities, as well as the special damages resulting from loss of employment,

(c) The holding of the Court that the injury was accidental was supported by the evidence presented by the parties was in error."

In his written submissions counsel stated:

"28. It is submitted that he [sic] court does not demand from every litigant absolute precision in regards to the submission of evidence particularly evidence which is compiled by third parties. It is clear that the appellant was injured and that he sought medical attention. Indeed, the Resident Magistrate's award recognizes this. There is no rational basis therefore for excluding a part of the [sic] his medical expenses.

29. It is submitted that whatever the date on the medical reports presented by the appellant, it is evidence that these receipts and reports arose from his [sic] injury to his eye caused by the respondent. In those circumstances, the court ought to award these amounts to the appellant.

30. It is submitted that the evidence of the appellant was unchallenged in relation to his injury, the pain and suffering he experienced, and the fact that he was unable to work for some three months after his injury, and the loss of earnings consequent thereon. It is therefore entirely improper for the Resident Magistrate to hold that the respondent could not be held accountable for this loss. The evidence of the appellant was clear and convincing on these issues and he was not cross examined in relation to any point about pain and suffering, the extent of the injury, his earnings, the period of convalescence, or his residual damage."

[24] Mr Beswick submitted that the learned Resident Magistrate effectively treated the appellant's claim as one of negligence although the claim was one of an assault. The learned Resident Magistrate, he argued, confused herself by her finding that the tort of assault requires intention, then stating that if a reasonable person could have foreseen that the appellant would have received injury as a result of his actions that would be sufficient to show intention. She thereafter concluded that the appellant's injury was not as a result of a deliberate or malicious attack.

[25] The learned Resident Magistrate correctly identified the cause of action as an assault. However, although she stated that intention was the relevant requirement in the appellant's case, she went on to find that the foreseeability test in negligence would be adequate proof of the respondent's action. She said:

> "Strictly speaking the tort of assault from which the plaintiff's injury would flow, requires 'intention.' However if the court is satisfied that a reasonable man would foresee that the plaintiff could be injured as a result of the defendant's action, then that together with the defendant's action will be sufficient."

[26] From the foregoing, it can be observed that she was somewhat bewildered as to what is required to prove the tort. It is clear that she did not appreciate that there are two distinct requirements in satisfying proof of an assault. At common law, in an action for an assault, the success of a claimant is dependent on either proof of intention or negligence. As a consequence, on a

claim for an assault, there must be, on the one hand, proof, that the assault was a deliberate act of the defendant or, on the other hand, that it was as a result of the defendant's negligent act. The onus of proof rests on the claimant. No liability on the part of a defendant will accrue, if the assault is unintentional or it is devoid of negligence.

[27] In **Fowler v Lanning** [1959] 1 QB 426, Lord Diplock, at page 439, after embarking on a comparative and comprehensive review of earlier cases on the tort, placed the law in the following perspective:

> "1. Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.
>
> 2. Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place.
>
> 3. If it were right to say with Blackburn J. in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (i.e, injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbor which, in the absence of damage to the plaintiff, would not in themselves be unlawful – of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples. For Blackburn J., in the passage I have quoted

> from *Fletcher v Rylands*, was in truth doing no more than stating the converse of the principle referred to by Lord Macmillian in *Read v. J. Lyons & Co. Ltd.*, that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.
>
> 4. The onus of proving negligence, where the trespass is not intentional, lies upon the plaintiff, whether the action be framed in trespass or in negligence. This has been unquestioned law in highway cases ever since *Holmes v. Mather*, and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases. It is, indeed, but an illustration of the rule that he who affirms must prove, which lies at the root of our law of evidence."

[28] The evidence shows that there was a dispute between the appellant and the respondent. The appellant's case is that the respondent intentionally stuck her two fingers into his left eye injuring it. The learned Resident Magistrate rejected the appellant's evidence and found the respondent's narrative of the events credible. She then found as follows:

> "It is evident that the plaintiff was stabbed in the eye on the day in question. However, it appears not to have been as a result of a deliberate and malicious act. The defendant's case is that it occurred when she tried to block what she perceived as an assault on her. She is not sure whose hand actually stabbed the plaintiff in his eye."

[29] By the finding that the respondent's attack on the appellant was not deliberate or malicious, I understand the learned Resident Magistrate to be saying that the assault was accidental, that is, it would not have been caused intentionally. If, as the learned Resident Magistrate concluded, the assault by the respondent was unintentional, then, the appellant's claim would not have been established. However, she expressly stated that the appellant's injury would require proof of intention and did in fact award judgment to the appellant, although restricting the award to part of the special damages claimed by him.

[30] Her finding that both parties were contributorily negligent reveals that she had given consideration to the law of negligence. Negligence would not have arisen on the appellant's case. Despite this, the fact that she made an award can only be taken to mean that she had in fact found in favour of the appellant.

[31] The appellant's case is that the injury to his eye was deliberately inflicted by the respondent. Therefore, it was for the learned Resident Magistrate to have considered the issue as to whether the appellant had proved that the respondent had injured him intentionally.

[32] The learned Resident Magistrate found that the respondent may have been untruthful in stating that she was not upset by the unsavoury comment made by the appellant but found that her anger was expressed in her remark in retaliation to that which was made by the appellant.

[33] It is somewhat mystifying that the learned magistrate accepted the respondent's evidence in preference to the appellant's. Her rejection of the appellant's account of the incident and her acceptance of the respondent's account do not accord with reason. There was evidence from the appellant that the respondent placed her body against his, and stuck her fingers into his eyes. The respondent's evidence is that she blocked the appellant's hand in an effort to avoid him hitting her in the face. Clearly, she would have been in close proximity to him and it is reasonable to infer that her fingers would also have been pointed towards the direction of his face. In such circumstances, on the balance of probabilities, her fingers could have gone into the appellant's eye. It is without doubt that the respondent was angry because of the unflattering remarks made by the appellant and it would not be unreasonable to infer that she had retaliated, not only by using the disparaging remarks but also, by deliberately inserting her fingers into his eye.

[34] The respondent was clearly responsible for the appellant's injury and full liability must be assigned to her. It follows that the appellant would be entitled to damages for his injury.

[35] The only award made by the learned Resident Magistrate was in respect of medical expenses. She awarded $3,578.00, which was less than one half of the appellant's medical expenses claimed. In making the award, the learned Resident Magistrate said:

> "There is no medical report to justify the plaintiff having to stay home for three months and sleep 'because the sun bothered' him and also no medical report linking his inability to see at nights with this injury.
>
> The court takes judicial notice that the main cause for [sic] inability to see/drive at nights is an entirely different ophthalmic problem which may have no connection with injury whatsoever. No professional evidence was brought to show otherwise and to connect the injury with this problem. The defendant cannot therefore be held [sic] for any loss as a result of the plaintiff deciding to stay home for three months nor for any income he may have lost as a result of his inability to drive at nights."

[36] It is true that no medical report was tendered into evidence to show that the appellant would have been incapacitated for three months. However, the learned Resident Magistrate's finding, by taking judicial notice that the appellant's inability to drive or see at nights may relate to a different ophthalmic problem unconnected to his injury, is not a matter for which judicial notice can be taken. The finding is obviously speculative and therefore wrong. The appellant stated that prior to the injury his vision was unimpaired and that it has been affected since the respondent's attack. The learned Resident Magistrate accepted that he received the injury. There was evidence from him that he experienced pain in the eye and received medical attention. Receipts from Dr Cole who treated him were tendered into evidence. In these circumstances, the fact that the appellant did not tender a medical report does not mean that he would not have been entitled to compensation for pain and suffering.

[37] In determining a reasonable compensatory award for a claimant's injury, it is customary for the court to seek guidance by examining comparative awards in similar cases. However, in my research, I have been unable to unearth any case which could be of some assistance in finding an appropriate sum to be awarded. It is frequently said that the court is generally faced with a very difficult task in arriving at a suitable compensatory remedy in money's worth for a claimant's suffering. In striving to find a reasonable compensation, the court measures the "immeasurable". In carrying out such an imprecise exercise, the court normally does its best. The court, as a matter of course, weighs up the circumstances of the case and adopts an approach which justifies a particular award. The injury to the appellant's eye is not severe. The pain has disappeared. However, there is evidence that there is still some impairment of his vision as he stated that he has been unable to see clearly since the incident. He can still engage in his occupation. He can drive in the days but has difficulty with his sight when he drives at night. In all the circumstances, a sum of $80,000.00 would be a fair monetary compensation for his pain and suffering.

[38] I now move to the loss claimed by the appellant for special damages. He stated that he earned $25,000.00 weekly prior to the incident and was unable to work for three months as a result of the injury. Special damages must be specifically proved - see **Bonham-Carter v Hyde Park Hotel** 64 LTR 177. However, this is not an inflexible principle. Although specific proof is required for special damages, there may be situations, depending on the circumstances of

the case, which accommodate the relaxation of the principle. In some cases, the incurring of some expenditure may not be readily capable of strict proof. As a consequence, the court may assign to itself the task of determining whether strict proof is an absolute prerequisite in the making of an award: see **Attorney General v Tanya Clarke (Nee Tyrell)** SCCA No 109/2002 delivered 20 December 2004; **Walters v Mitchell** (1992) 29 JLR 173; **Ashcroft v Curtin** [1971] 3 All ER 1208; **Grant v Motilal Moonan Ltd & Anor** (1988) 43 WIR 372 and **Central Soya of Jamaica Ltd v Freeman** (1985) 22 JLR 152. In its endeavour to arrive at a reasonable conclusion, the court seeks to satisfy the demands of justice by looking at the circumstances of the particular case: see **Ashcroft v Curtin**. Therefore, to demand strict adherence to the principle laid down in **Bonham-Carter** may cause some injustice to a claimant who had legitimately suffered damage.

[39] Although the appellant testified that he sustained loss of income, he had not advanced or tendered any evidence, documentary or otherwise, in support of such loss. Despite this, the court will not be disinclined to make an award for his loss of income. However, the full loss of $25,000.00 weekly for the period of three months will not be awarded. In my view, a sum of $10,000.00 per week for eight weeks would be adequate compensation for his loss. Accordingly, the sum of $80,000.00 is awarded for loss of income.

[40] So far as the appellant's claim for medical expenses is concerned, the sum of $9,934.80, supported by the receipts tendered into evidence by him, will be awarded.

Ground (d)

> "The court erred in holding that the conviction of the defendant is a consequence of her own actions and is not a basis in law or in the discretion of the Court for denying the claimant the costs of the trial instituted to obtain a judgment for his damages."

In his written submission counsel stated as follows:

> "34. It is submitted that the appellant is entitled to the costs of the trial entirely. No reason has been advanced in the judgment of the Resident Magistrate for the refusal to award the costs of the trial or any part thereof to the appellant, who even with a judgment riddled with inconsistencies and a failure to properly weigh and appreciate the evidence before the court, was partially successful."

[41] The general rule is that a successful party is entitled to his costs. Although costs are in the discretion of the court and costs may be denied, there must be some good reason for depriving a successful party of his costs. It is clear from the learned Resident Magistrate's conclusions that costs were not awarded to the appellant for the reason espoused by her that there is no evidence connecting the respondent with the appellant's injury. She had undoubtedly erred in so concluding. This conclusion is unsustainable, and as counsel for the appellant

rightly submitted, no good reason has been proffered by the learned Resident Magistrate for denying the appellant his costs.

[42] There was adequate evidence to ascribe liability to the respondent. It cannot be said that there are any circumstances which would warrant the appellant being deprived of his costs.

[43] I would allow the appeal as to quantum and give judgment for the appellant in the sum of $169,934.80, made up as follows:-

General damages	-	$80,000.00
Special damages	-	$89,934,80
		$169,934.80

Costs of $15,000.00 are awarded to the appellant.

DUKHARAN JA

[44] I have read in draft the judgment of Harris JA and agree with her reasoning and conclusion. There is nothing I wish to add.

PHILLIPS JA

[45] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

Appeal as to quantum allowed. Judgment for the appellant in the sum of $169,934.80 made up as follows:

General damages	$80,000.00
Special damages	$89,934.80
	$169,934.80

Costs of $15,000.00 are awarded to the appellant.