IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. W380/1995

BETWEEN	GARTH WHEATLE	PLAINTIFF
A N D	LASCELLES TOWNSEND	DEFENDANT

Miss Carol Davis for Plaintiff
Instructed by O. G. Harding and Company.

Franklyn Beckford for Defendant

Heard: 9,11,12th June and
10th July, 1998.

HARRIS, J.

The plaintiff's claim against the defendant is for damages for negligence and breach of contract as a result of injuries sustained by him when shot during the course of his employment. His claim was particularized as follows:-

"(a) Failing to take any or any adequate precautions for the safety of the Plaintiff while he was engaged upon the work.

(b) Exposing the Plaintiff to a risk of damage or injury of which he knew or ought to have known.

(c) Failing to take any or any adequate measures for the protection of the Plaintiff while he was engaged upon the work.

(d) Failing to take any or any adequate measures for the security of the Plaintiff when he knew or ought to have known that the area and the circumstances in which the Plaintiff was working was unsafe.

(e) Failing to provide or maintain a safe and proper system of work.

He was employed to the defendant as a delivery man on a van owned and driven by the defendant, from which baked products were sold to individuals and business establishments

in several areas in Saint Andrew. The Cavaliers area included one of the locales in which these products were sold.

On the 19th March, 1994 the plaintiff and defendant embarked on their usual task of selling and delivering their wares. At about 11:30 that morning they arrived at a shop in a district called Burnt Shop Road in the Cavaliers area. The defendant remained in the vehicle while the plaintiff went into the shop to take orders. After completing his assignment and in the act of returning to the van, he was attacked by gunmen, one of whom shot him in his lower left arm and in his left hip.

A duty resides with an employer to exercise reasonable care for the safety of his employee when that employee is performing his task. In acknowledgement of his principle, **Lord Oaskey** in **Paris v Stephney BC [1951] Ac 367** stated:-

> **"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case."**

In **Williams v Grimshaw and Others 1961 3 KIR 610** it was held that the defendants, employers of the plaintiff were under a duty not to expose the plaintiff to unnecessary risks including risk of injury by criminals. It was found however, that the defendants having taken reasonable precuations had not failed to take reasonable care for the safety of the employee and were therefore not liable.

In **Haughton v Hackney Borough County Council 1961 3 KIR 615** the plaintiff, a rent collector employed by the defendants, was robbed and injured while he was engaged in his duty of collecting rent in a room on premises owned by the defendants. The County Council owned a large number of flats and houses within its area, from which rent was collected from several points. The majority of these collecting points were furnished rooms equipped with grills or barriers behind which the collectors sat. The room in which the plaintiff carried out his collection of rent once weekly, was tenants' workshop. This room had no barriers or grilles, as the installation of barriers or grilles would have destroyed its usefulness as a workshop.

All rent collectors carried large amounts of cash. Three attacks were inflicted on rent collectors within a 14 month period. This was brought to the attention of the County Council through its borough treasurer, who requested the police to carry out surveillance at the rent collection points, after informing them of the places, days and times of the collection of rent. He also arranged for a porter in uniform to be present when the rent was being collected by the plaintiff and for a car to transport the collector to the bank.

It was held that although the construction of barriers or grilles in the room in which rent was collected would have been additional deterrent, considering the difficulties of installing grilles or barriers in that room and the fact that certain precautionary measures were taken by the defendants to protect the plaintiff from injury, they had complied with the required standard of reasonable care and were not liable.

The success of the plaintiff's claim in the present case, is dependent on whether he has established that a duty is owed to him by the defendant to provide him with a safe system of work. If this is established he must also show that the defendant was in breach of that duty consequent on which, he sustained damage.

The incident occurred at a place called Burnt Shop Road. This location, the plaintiff reported, is situated off the main road in the Cavaliers area. He also asserted that in January 1994, the same year of the incident, a "Bullah" van was robbed and in February following, a bread truck was also robbed and the occupants tied up and locked in the truck. He continued by saying that these robberies had taken place in the Cavaliers area. The defendant, although admitting having knowledge of the incidents, declared that they had not occurred in the area specified by the plaintiff. I accept the plaintiff's evidence and I am persuaded that the previous robberies had taken place within the general area in which the plaintiff was shot.

It was also the plaintiff's evidence that he discussed the matter of the robberies with the defendant who assured him he would have purchased a gun for their protection. He, however, did not do so. The defendant denied that any conversation about robberies or his purchasing a gun had taken place. The defendant's denial of the discussion is patently trasparent in light of his admission that he had been aware of the robberies. In my opinion the conversation did take place as stated by the plaintiff.

The method employed by the defendant of driving to various places to conduct sales of the baked products is not in itself dangerous. However, the defendant was aware that by selling in the Cavaliers area was dangerous, in that the plaintiff might be subject to an attack by criminals. He was therefore under an obligation to take reasonable care for the safety of the plaintiff. Had the defendant discharged his obligation to the plaintiff? What is the applicable test? "The test must be: has the employer taken reasonable care paying proper attention to the risk and paying reasonable attention to the other circumstances?" per **Lord Diplock** in **Haughton v Hackney Borough Council 1961. 3 KIR 615** at page **618.**

It had come to the defendant's knowledge that in the Cavaliers area, merchandise delivery vehicles, particularly those carrying baked products had been attacked by robbers. There is evidence that not only had there been previous attacks on persons who ply their trade in that area but that other delivery vehicles had ceased operating in the area due to robberies.

The plaintiff's witness Dorothy Henry, whose evidence I accept, has been a resident of the Cavaliers area for several years. She testified that vendors such as bread salesmen, were subject to constant attacks by robbers who on occasion stole merchandise from them when money was not available. The defendant's own witness Barrington Henry who has lived in the area from birth, related that the Desnoes and Geddes truck had ceased coming to the area. That truck now stops at the Stony

Hill Police Station, the point at which the residents of Cavalier now go to make their purchase of goods sold from the truck. The clear inference is that the Desnoes and Geddes truck had excluded Cavaliers from its sphere of operation because of notoriety of the area as one which is prone to robbery.

Having been apprised of the fact that there was the propensity in the area for salesmen and their assistants to be robbed, the defendant ought to have foreseen that the plaintiff would have been exposed to danger. It was reasonably foreseeable that the plaintiff would not only have been attacked but could encounter some form of violence when attacked during the course of his assisting him with sale of the products. The defendant would therefore be required to take precautionary measures to minimize his exposure to risk of injury.

The defendant contended that he had taken precautionary measures to protect the plaintiff by personally assuming the responsibility for the collection and the retention of the cash. Was this step adequate? In my opinion it was not. Firstly, the robbers would not have known that the plaintiff was not in possession of cash. Secondly, it was the custom of the robbers to take merchandise as well as money. It was the plaintiff who delivered the goods to the customers. He therefore was obviously a target for robbers.

Additionally, the plaintiff stated that on the morning of the incident, he went to the shop and took the order. While returning to the van in which he had left the defendant he saw 2 men standing next to him. He observed that the defendant nodded in his direction, the men thereafter approached him. By this time another grabbed him from behind. They all demanded money from him. When he informed them that he had none, he was shot and injured. The defendant remained unharmed. It is obvious that the defendant had directed the robbers to the plaintiff.

The defendant knew that there was a distinct possibility that the plaintiff could have been attacked in the area and some violence could have been committed on him. He took no precaution for the security of the plaintiff. His behaviour on date of the incident also shows he had even deliberately exposed the plaintiff to the attack when he directed the robbers to him. He has disastrously failed to conform with the standard of reasonable care required by him to safeguard the plaintiff from injury and is therefore liable to the plaintiff.

I will now give consideration to the matter of damages, and will first make reference to the claim for general damages.

Dr. Leighton Logan who testified on behalf of the plaintiff stated that his examination of him revealed that he received a "blow-out" wound to the lower part of his left forearm as well as an injury within the left testicular region of his body.

The injury to his arm was extensive. There was damage to the skin, soft tissue, tendon and bone of the medial aspect of the left forearm. Surgery was performed on the arm twice resulting in his receipt of a superior based thoraco epigastic flap. He has restriciton of movement in his left little finger and left ring finger. He now suffers 20% loss of hand function. However, it was estimated that with surgical intervention, this loss of hand function could be reduced to 10%.

His left testicle is grossly diminished. This Dr. Logan stated is presumably as a result of the entry of the bullet near the testicualr region of his body. Shrapnel was found in the supra pubic region of his body but this had not been removed. The deformity of the testicle is unlikely to affect his sexual functions or reproductive capability.

It is clear that the plaintiff suffered great pain as a result of his injury. He still experiences pain intermittently. There is an absence of cases with reference to the nature of the injuries sustained by the plaintiff from which guidance could be obtained in assessing an award for pain and suffering.

Miss Davis placed reliance on 2 cases, namely, **Scott v Jamaica Pre Pack Ltd. - Harrison's Reports page 284** and **Ellis v Jamaica Public Service Co. Ltd. Volume 4. Khan's Report page 105.** In my opinion the nature of the injuries and resultant disabilities experienced by the respective plaintiffs in these cases would render them incomparable to the present case.

I am of the view that the sum of $500,000.00 would be an appropriate award for the pain and suffering endured by by the plaintiff.

So far as the plaintiff's claim for future medical expenses is concerned, the injury to his arm has restricted movement in two of his fingers resulting in a 20% permanent partial disability of his left arm. Corrective surgery could possibly reduce this disability by 10%. The estimated cost of surgery is $72,000.00; which comprises: Surgeon's fees of $30,000.00, hospitalisation costs of $20,000.00 and anaesthetist's fees of $12,000.00. Physiotheraphy which is necessary following surgery, will cost an $8,000 - $10,000.00.

The plaintiff claims that he suffers loss of prospective earnings. The question which arises is whether he will in fact experience partial or complete loss of earnings for the rest of his life. The injury was inflicted to the plaintiff's left arm. He is right hand dominant. There is evidence that since the incident, he worked for 2 months recording the registration numbers of trucks transporting soil and listing the amount of trips made by them.

He is employable. He has been employed since the incident. Although his disability may render him incapable of engaging in certain types of occupation in particular, jobs which require lifting, there are other duties which he could perform from which he could earn an income commensurate with that which he earned as a handyman.

He stated that he had sought employment but was only able

to secure a job for two months. This was a year and 2 months after the incident. His injury to some extent may be a deterrent to his fully participating on the labour market. The injury, though creating a risk of unemployment, does not exclude him from the job market and a nominal award for his being handicapped on the labour market would be appropriate. In my opinion the sum of $50,000.00 would be adequate.

I will now turn to the head of special damages and first address the claim for loss of income. The plaintiff stated that he was paid $600 weekly by the defendant but this was increased to $700 the week preceding the incident. He also asserted that he earned an additional $600 per week as night watchman at a garage. The defendant admitted paying him $600 weekly but denied that he had given him an increase. He also disclaimed knowledge of the plaintiff being employed as a watchman. He acknowledged however, that the plaintiff slept at the garage and that he knew where the plaintiff lived, which was at a location other than the garage. This admission by the defendant obviously leads to the conclusion that the plaintiff's mission at the garage was in fact that of a watchman as indicated by him.

Although the plaintiff stated that his salary was increased by $100.00 the week immediately before the incident, it was disclosed by him that the defendant gave him $600 on one occasion after he was released from hospital. This sum is the equivalent of that which he would have paid him for a week. I therefore remain unconvinced that the plaintiff was in receipt of salary from the defendant exceeding $600 weekly. I accept that he also earned $600 per week as a watchman.

He stated that he was unable to work for a year after the incident. He merely stated he made efforts to obtain employment but failed to do so for 14 months, after which he obtained a temporary assignment for 2 months. There is no evidence as to exactly when, or where he sought employment.