

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: GDAHCV2008/0549

BETWEEN:

BERTRAND THOMAS

Claimant

AND

(1) CALLAN ANDREWS
(2) SPRONK LTD.

Defendants

Appearances:

Mr. Anselm Clouden for Claimant

Mr. Dickon Mitchell for Defendants

2012: July 17
2012: August 17

JUDGMENT

- [1] **ELLIS, J.:** By Claim Form and Statement of Claim filed on 11th November 2008, the Claimant commenced proceedings against the Defendant claiming damages for assault and battery.
- [2] The Amended Statement of Claim filed on 16th January 2009 claims that on or about 4th November 2006, the Claimant was a customer at the Second Defendant's premises known as Bananas Restaurant Bar and Nightclub (Bananas) when he was assaulted by the First Defendant, an employee of the Second Defendant.
- [3] The Claimant claims that as a result of the assault he sustained a fracture to his left foot and was unable to work for a period of three months. He claims special

damages in the sum of \$12,712.05, general damages, interest, costs and further or other relief.

- [4] In an Amended Defence filed jointly by the Defendants on 4th February 2009, the Defendants admit that the First Defendant slapped the Claimant but deny that this act was wrongful. They contend that on the night in question, the First Defendant was working as a bartender at Bananas when he approached the Claimant and requested payment for a drink purchased. They allege that the Claimant started to behave aggressively and pushed the First Defendant, throwing the contents of his drink in the face of the First Defendant and then pushed his hand into his pocket. The First Defendant states that he apprehended a further assault by the Claimant and in order to defend himself, he reacted instinctively and slapped the Defendant.
- [5] The Defendants contend that the First Defendant used no more force than was reasonably necessary to defend himself from the Claimant's unlawful and unprovoked attack.
- [6] They deny that they are liable for the pain and suffering, loss and damage incurred by the Claimant and dispute the contents of the medical report provided by the Claimant in support of his claim.
- [7] Alternatively, the Defendants deny that the Second Defendant was vicariously liable as the First Defendant was not acting in the scope or the course of his employment.
- [8] At the trial, the Claimant gave evidence on his own behalf. Kimberly Thomas swore a witness statement on behalf of the Claimant but failed to attend the hearing in compliance with the case management order. Following the Claimant's application, the Court ordered that her witness statement would not stand as evidence in the trial.
- [9] The First Defendant gave evidence on behalf of the Defence and called two other witnesses in support, Andy Cadore and Tracy St. Louis.

THE CLAIMANT'S CASE

- [10] The Claimant contends in his witness statement that on the night in question he was a customer in Bananas when a friend offered him a drink. He was served by bartender Tracy St. Louis and his friend paid for his drink. The Claimant then entered the dance hall where he met with one of his daughters and her friends. He stated that he was in the dance hall for about 20 minutes when he suddenly saw three persons coming through the door, dressed in white and black. One of the gentlemen informed him that he owed money for one beer. He states that he told the gentleman that his friend had paid for the beer but if he did not then he (the Claimant) would certainly pay for it.
- [11] He states that in reply, the gentleman stated "Outside you going". He was then accompanied outside through the backdoor by the three persons. He states that he stood up and said "Let me pay for the beer" and reached into his pocket to take out the money to pay for the beer when he suddenly received a punch to the left side of his face. He states that he fell to the ground and when he got back up he experienced a sharp pain in his left ankle.
- [12] He then left the nightclub together with his daughter who witnessed the incident and who told him that the assailant was Callan Andrews, the barman employed by the Second Defendant. He states that he later reported the assault to the Police.
- [13] Following the assault he went to the General Hospital and was examined by the medical practitioner. On the 6th November he attended the St. Augustine Medical Services and a plaster of Paris was applied below the knee. This was maintained for a period of 6 weeks. He states that he still experiences pain in his left foot especially when standing or walking for longer than 30 minutes. He annexed to his witness statement a medical report from Dr. Kester Dragon, dated 10th February 2007, detailing his injuries and diagnosis. The Report indicates that the Claimant suffered a fracture to the left distal fibula and a left peri-orbital contusion.

- [14] Under cross-examination, the Claimant acknowledged that on the night in question he ordered a beer at the bar but did not pay for it because he thought that it had been paid for by his friend. He stated that this was not his first drink that night. He admitted that he had had some friends over to his house that evening and that he had consumed about five beers before he went to the Bananas. When he arrived he ordered one beer, which he later poured into a plastic glass, before going into the nightclub.
- [15] He confirmed that that he was approached in the club by three persons including the First Defendant, a security officer and a young lady. He stated that it was the security officer who told him that he had not paid for the beer. He testifies that he said, "Let me pay for the beer" but that at the time he was talking to himself and not to anyone else. The security officer asked him to accompany them outside the Club and he complied. He repeatedly denied that the First Defendant ever spoke to him that night.
- [16] He exited the Club with the security officer and the First Defendant following behind him. He denied that either the security officer or the First Defendant spoke to him while they were outside of the nightclub. He denied that he was upset because he had been asked to pay for the beer or that he pushed or that he threw his drink at the First Defendant. He stated that he put his hand in his pocket to get the money to pay for the beer when he was struck by someone from behind him. He stated that he fell forward on his face. When he got back up he turned around, faced them and asked the security why he had hit him (although at the time he stated that he did not know who had struck him).
- [17] When examined by the Court, the Claimant stated that the blow he sustained was not a slap but rather a cuff to the left side of his face and over his eyes. He testified that at the time he was struck the security officer and the First Defendant were behind and to the left side of him. He repeatedly stated that at the time he was slapped he was not facing them.

- [18] Once they were outside the club, he also testified that he had no conversation with them before he was struck. He stated that prior to putting his hand in his pocket he made no statement indicating that he was going to pay for the beer. He indicated that he only made that comment when he was still inside the club.
- [19] The Claimant stated that after he got up he walked to his vehicle and went home. He later drove back to Bananas where he reported the incident to two police officers who were standing outside the bar.
- [20] The Claimant stated that he is the sole proprietor of a car rental agency and that his monthly salary at the time was \$3,500.00. He states that he was unable to work for three months and was thus unable to pay himself a salary. He indicated that he had not disclosed any of his salary cheques during Discovery and that he exhibited only one medical certificate evidencing sick leave for the period 6th November to 20th November 2006.

THE DEFENDANT'S CASE

- [21] In his witness statement, the First Defendant states that at the time of the incident he was employed by the Second Defendant as a bartender. He states that at around 1.30 a.m. of the morning in question, he was approached by one of the female bartenders Tracy St. Louis, who was working in the outside bar. She informed him that a customer had ordered a beer and had not paid for it.
- [22] He stated that along with the security officer, Andy Cadore and Tracy St. Louis, he went into the club. Once inside, Tracy St. Louis pointed out the customer. He approached the customer and told him that he owed for the beer. He then asked the Claimant to step outside because the music inside the club was very loud. The four of them went outside and Mr. Andy Cadore began to speak to the Claimant.
- [23] During this conversation the First Defendant states that he told the Claimant that the Heineken beer is only \$6.00. He states that the Claimant then "chucked him" and threw all the contents of his glass in his face. When the Claimant dipped his

hand into his pants pocket the First Defendant slapped him. The Claimant then fell and was picked up by Andy Cadore.

- [24] Under cross-examination, the First Defendant stated that at the time of the incident he was employed by the Second Defendant as a bar supervisor. He stated that he went into the nightclub along with the security officer Andy Cadore and Tracy St. Louis in search of the Claimant. When they initially approached the Claimant in the club there was very loud music playing which made it difficult to hear what anyone was saying. He denied that the Claimant ever offered to pay for the drink while he was inside the club.
- [25] The Claimant accompanied them outside with the Claimant walking to the front of them. He testified that the Claimant was standing in front of him with a plastic cup in his hand when he spoke to him. He stated that the Claimant pushed him and threw the contents of the cup into his face. He further testified that he saw the Claimant's right hand going into his pocket and that when he saw this, he slapped the Claimant on the left side of his face. He denied that he punched the Claimant or that the slap was delivered while he was standing to the rear left side of the Claimant. At the time of the slap the Claimant was facing him.
- [26] The First Defendant denied that he has a bullying disposition. He repeatedly denied that he was angry, irritated or agitated because he had to look for the Claimant who had failed to pay for his drink. He denied that he asked Andy Cadore if he had seen a white bearded man but agreed that Mr. Cadore did suggest looking for him in the club.
- [27] The First Defendant testified that the Claimant immediately fell to the ground after he was struck and that together with security officer Andy Cadore, he assisted the Claimant in getting up.
- [28] Andy Cadore in his witness statement states that on the night in question he was approached by the First Defendant who told him that a customer had not paid for a drink. The First Defendant was looking for the customer who had a white beard

and asked if he had seen him. He denied seeing a man fitting that description but both he and the First Defendant went into the nightclub in search of him. The Claimant was eventually located in the Club and Mr. Cadore went to speak to him. He states that he invited the Claimant to accompany him outside of the Club because the music was too loud.

[29] They then went outside the Club about 8 - 10 feet from the back door when he began to talk to the Claimant who had a drink in his hand. He states that when the Claimant was 1 - 2 feet away from them, he dashed his drink on the First Defendant and himself.

[30] He states that the First Defendant ended up slapping the Claimant on the left side of his face or neck and the Claimant fell down in front of them. He states that after he assisted him in getting up, the Claimant left with two girls.

[31] When cross-examined, Mr. Cadore stated that he was on duty on the night in question when he was approached by the First Defendant who was searching for a white bearded man who had failed to pay for a drink.

[32] He suggested to the First Defendant that they search in the Club, which they did. He was unable to recall whether Tracy St. Louis was also present. He stated that after the First Defendant identified the Claimant, he approached him saying "Boss, I would like to have a word with you", but because of the loud music inside the Club he asked the Claimant to accompany him outside.

[33] Once outside he testified that both he and the First Defendant spoke to the Claimant who at the time was standing with his back to the bathroom and facing them.

[34] He testified that he did not witness the Claimant push the First Defendant but that Claimant did "dash" his drink in his face. He stated that after this he bent over to wipe his face because he was unable to see. As such he did not see when the First Defendant hit Claimant. According to him, he only heard the sound of the blow "platow" and when he reopened his eyes he saw the Claimant on the ground.

- [35] He testified that he then helped the Claimant to get up. While he was doing so he testified that he saw two women leave the bathroom and go into the Club. One of them bawled out, "Look they killing a mister outside". He later saw a lady take the Claimant away. Despite his witness statement he could not recall whether there were one or two girls with him.
- [36] Mr. Cadore also testified that he is no longer employed by the Second Defendant and that although he knows the First Defendant, he would not describe them as good friends. He stated that while the First Defendant wanted to receive payment for the drink he did not appear to be anxious about it.
- [37] Tracy St. Louis was the final witness for the Defence. Her witness statement reveals that at the material time she was a bartender employed by the Second Defendant. She states that on the morning in question the Claimant, who appeared to be intoxicated, requested a beer but failed to pay for it.
- [38] She followed the Claimant into the nightclub and confronted him about failing to pay for the drink but he was reluctant to give her the money. She then reported the matter to the First Defendant. When the Claimant was outside the Club, she states that she witnessed a conversation between the Claimant and the First Defendant. Also present was the security guard. She stated that she witnessed the Claimant push the First Defendant, whereupon the First Defendant shoved the Claimant and smacked him across the face. She states that the Claimant then fell because he was drunk.
- [39] Under cross-examination Ms. St. Louis confirmed that on the night in question she served the Claimant a beer for which he did not pay. She stated that when she confronted the Claimant he was reluctant to pay for the drinks and so she reported the matter to the First Defendant.
- [40] She stated that she witnessed the First Defendant speak to the Claimant outside the Club in the presence of the security officer. She saw the First Defendant ask the Claimant to pay for the drink whereupon the Claimant pushed the First

Defendant. The First Defendant then slapped the Claimant in the face and he fell. After she was shown her witness statement (in which she indicated that the Claimant was smacked by the First Defendant), Ms. St. Louis insisted that she saw the First Defendant slap the Claimant on the left side of his face.

[41] When questioned by Counsel she indicated that if someone was intoxicated it was possible that they could fall if they were slapped.

[42] She stated that she did not witness the Claimant throw anything at the First Defendant. She did, however, recall seeing the Claimant with a drink in his hand.

ISSUES AND LAW

[43] The Parties' pre-trial memoranda reveal that there is no dispute that the Claimant was struck by the First Defendant while he was employed by the Second Defendant. Rather, the memoranda disclosed the following issues:

1. Whether the action of the First Defendant was reasonably justified as being in defence of self.
2. Whether the Claimant is entitled to any of the relief claimed and, if so, what is the appropriate quantum of damages.
3. Whether the Second Defendant is vicariously liable for the actions of the First Defendant.

[44] Although the Claimant has grounded his claim in assault, it is clear that what is in fact alleged is the tort of battery. An assault is an act of a defendant which causes a claimant reasonable apprehension of the infliction of a battery on him by the defendant. As distinct from battery, assault does not involve actual contact; it only needs intent and the resulting apprehension. The tort of battery, on the other hand, occurs where there is a voluntary act by the defendant intended to bring about contact with the claimant.

SELF DEFENCE AND THE TORT OF BATTERY

[45] Like assault, battery is an intentional tort. In the case of battery the requisite intent is merely to touch or make contact without consent. An assault or battery is however justified if committed in reasonable defence of oneself or another. In essence, reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm.

[46] What is reasonable will however depend, on the circumstances of each case. In that regard, several key principles have emerged from the jurisprudence:

1. The battery must be committed in actual defence from attack and not by way of retaliation after an attack.
2. Self-defence must be in response to an immediate threat of harm.
3. Self-defence is only justified if the individual reasonably believes that force is necessary to avoid an unlawful attack. This belief need not, however, be correct.

In **Ashley v Chief Constable of Sussex Police** [2008] UKHL 25 the members of the House of Lords (upholding the detailed judgment of Sir Anthony Clarke MR in the Court of Appeal) held that for the purposes of the law of torts, the defence would only be established where the belief of the defendant in an imminent attack was not only honest but "reasonable".¹ Lord Scott of Foscote rendering the leading opinion of the House, stated:

"But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorized as a criminal offence and attract penal sanctions. To hold, in a civil case, that a mistaken and unreasonably held belief by

¹ Lord Scott at page 18, Lord Rodger at page 53

A that he was about to be attacked by B justified a pre-emptive attack in believed self-defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance. ... I would have no hesitation whatever in holding that for civil law purposes an excuse of self- defence based on non-existent facts that are honestly but unreasonably believed to exist must fail."

4. The force used in self-defence must be reasonably commensurate with the attack. The key here is whether the person's response was a reasonable reaction to the situation. In **Eustace St. Rose v Eric Gordon** No. 0352 of 1996 H.C. Dominica (unreported); Rawlins J. observed;

"These defences may not be available to the Defendant, however even if the Claimant initiated or contributed to the incident if the subsequent injury to the Claimant is inflicted with a weapon, particularly where the injured person did not himself have a weapon or by a blow that is out of all proportion to the occasion."

5. And finally, force intended to inflict death or serious bodily injury is only justified if the individual reasonably believes he would suffer serious bodily injury or death from the attack.

BURDEN AND STANDARD OF PROOF

- [47] There can be no doubt that the burden of proof in trespass to the person lies with the Claimant to establish the interference with his person by the Defendants on a balance of probabilities. It is then for the Defendants to establish some justification or defence.
- [48] The First Defendant freely admits that he slapped the Claimant on the left side of his face. Given the admission of the battery, the onus of proof is on the Defendants to establish circumstances amounting to self-defence. In this regard, a Defendant must establish that:
1. His belief that he had to act in self-defence was honest and reasonable, even if it was a mistaken belief; and
 2. Having regard to all the circumstances of the case, including the fact that the action was taken in the heat of the moment, the action taken by him in self-defence was reasonable in that no more force was used than was necessary.
- [49] The necessity to taking action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be, whether or not

he was mistaken, but, if he made a mistake of fact, he can rely on that fact only if the mistake was a reasonable one for him to have made.²

ANALYSIS OF THE EVIDENCE/FINDINGS

[50] The central issue to be determined in this trial was whether the admitted battery was justified in all the circumstances as having been reasonably committed in self-defence.

[51] Generally, the Court was of the view that the Claimant was not a witness of truth. His vacillating contradictions posed a great difficulty for the Court. His oral testimony during the trial materially revised his witness statement and the Court is not satisfied on a balance of probabilities that either account is truthful.

[52] It was only in cross-examination that the Claimant revealed that he was struck from behind by the First Defendant. This was never raised either in his pleadings or in his witness statement.

[53] Further, in cross-examination, his evidence was that he had no conversation with the First Defendant or Mr. Cadore once they were outside the Club, and before he was struck. He testified that while in the Club he did say that he was prepared to pay for the drink but that when he made the comment, he was not talking to anyone but rather to himself.

[54] This oral testimony contradicted paragraph 5 of his witness statement in which he stated:

“One of the gentlemen called me and told me that I owed for one beer. I told him my friend had already paid for the beer; however, if he did not pay for it, I would certainly pay for it.”

² Neil Budhoo v Allan Campbell (2006 High Court of Trinidad and Tobago, No S-2366 of 2004 (unreported))

[55] In cross-examination he stated that when he was outside the Club he made no offer to pay for the drink. This contradicted paragraph 5 of his witness statement in which he stated:

"I was then accompanied outside through the backdoor by the said three persons. I then stood up, said: "Let me pay for the beer."

[56] When confronted by Counsel for the Defendants about these inconsistencies, the Claimant indicated that he did say those words when he was outside the nightclub but not outside the building. However, when questioned by the Court, the Claimant confirmed that when he indicated that he was prepared to pay for the drink he was inside of the nightclub and that when he went outside he did not repeat that statement. He further clarified that he did not repeat the statement prior to putting his hand in his pocket.

[57] Generally, the Court was of the view that the Claimant's description of the events immediately preceding the battery was implausible. The Claimant asks this Court to accept that shortly after leaving the nightclub and after he had in fact offered to pay for the beer he was struck from behind by the First Defendant in an unprovoked attack, described by his Counsel as a "sucker punch". According to him, the First Defendant never spoke to him that night, either inside the Club or outside. He denies that he pushed or chucked the First Defendant. He denies that he threw his drink into the face of the First Defendant or the security officer, Mr. Cadore. In fact he denies that he in any way provoked the response by the First Defendant and says that the First Defendant could not have acted in self-defence.

[58] What he does admit is that he had several drinks that night even before he arrived at Bananas. He admits that he did not pay for the drink which he ordered because he assumed that his friend had paid for it. He also admits that although he said that he was prepared to pay for the drink, he would have said so to himself and while he was in the admittedly noisy nightclub.

- [59] He also admits that he did put his hand into his pocket. When examined by the Court, he indicated that immediately prior to doing so he gave no indication that he intended to pay for the drinks.
- [60] On the other hand, the Court was satisfied that the witnesses for the Defence were generally credible and truthful. Counsel for the Claimant referred the Court to a number of inconsistencies in the evidence of the three witnesses for the Defence. He noted that although all three witnesses claimed to have witnessed the incident, their individual recollections differ. This is somewhat correct.
- [61] The evidence does reveal that while the First Defendant's evidence that he was pushed by the Claimant is corroborated by Tracy St. Louis, Andy Cadore indicates that he did not witness this. Further, while the First Defendant's evidence that the Claimant threw his drink into his face is corroborated by the Andy Cadore, Tracy St. Louis testified that she did not see this. He also noted that although Andy Cadore testified that the Claimant threw his drink in his face, this was not corroborated by the First Defendant.
- [62] Counsel for the Claimant submitted that these are serious contradictions on material particulars and that as a consequence the evidence of the Claimant should be preferred. The Court does not agree.
- [63] The Court would not describe the lack of corroboration as contradictory. The witnesses do not deny that these actions occurred. Rather, they simply indicate that they did not witness them. The Court does not consider that these matters significantly impacted the credibility of the defence witnesses. The Court appreciates that the events took place over a very short space of time and that what the witnesses observed may have been affected by their unique perspectives and by the rapidly unfolding events which occurred in the heat of the moment. Having had an opportunity to observe their demeanour, the Court is satisfied that they were sufficiently truthful in their responses.

- [64] Further, they all corroborate key aspects of each other's testimony which together, evidence the Claimant's aggressive behaviour on that night.
- [65] In all the circumstances of the case, the Court finds that the Defendants have discharged their burden to establish self-defence. It is clear that on the night in question the Claimant had had several drinks. He was adamant that his drink had been paid for by his friend and when payment was demanded by Tracy St. Louis, he refused. The Court finds that he became even more belligerent when approached by the First Defendant and Mr. Cadore and that he pushed the First Defendant and threw his drink in their direction. The drink flew into the faces of both Mr. Cadore and the First Defendant.
- [66] The Court further finds that at that time the Claimant was facing the First Defendant and Mr. Cadore and that he was not hit from behind. The Court doubts that the Claimant ever indicated that he was willing to pay for the drink. Even if this were accepted, on the Claimant's own evidence, the Court finds that this would not have come to the attention of the First Defendant.
- [67] When the Claimant then reached into his pocket, the Court finds that it was reasonable in those circumstances for the First Defendant to apprehend that he faced a further and immediate threat of harm by the Claimant. The Claimant states that he simply intended to pay for the beer. However light of his aggressive reaction and his admission that he gave no indication that he intended to pay for the drink before putting his hand into his pocket, the Court finds that it was reasonable for the First Defendant to contemplate a further imminent attack with some form of weapon.
- [68] The First Defendant admits to striking the Claimant once and this is not disputed by the Claimant. The Court finds the force used by the Claimant was in the nature of a slap or smack, which was not an excessive use of force in the circumstances. That the Claimant fell and injured himself is unfortunate, but the Court cannot ignore that his alcohol consumption may well have impacted this. Certainly Tracy

St. Louis's evidence regarding the apparent intoxication of the Claimant was not contradicted during the trial.

[69] At the end of the day, the question of whether reasonable force was used is the key question which must be answered. The Court has to determine whether the force used by the First Defendant was reasonable in the circumstances. A defendant relying on such a defence must provide sufficient evidence so that the judge can determine whether that action was reasonable given the circumstances.

[70] Counsel for the Claimant submits that it strains credibility that an older patron would "take on" three young employees over a \$6.00 drink. In the Court's view what is inherently improbable is that the Defendant would have hit the Claimant in the circumstances alleged by him. It is hardly likely that the First Defendant would have struck the Claimant in circumstances where he was wholly unprovoked and where the Claimant had clearly indicated that he was prepared to do precisely what the First Defendant had been seeking, that is to say, to pay for the drink which he had ordered.

VICARIOUS LIABILITY

[71] During the course of the trial Counsel for the Claimant contended that he was no longer pursuing this alternative defence, disputing vicarious liability. The Court commended this election. Given the related facts and the current state of the law in this area, it is unlikely that this defence would be sustainable. That said, having regard to the finding of this Court, nothing in this judgment hinges on this issue and the Court is not required to address this further.

CONCLUSION

[72] It is clear that if someone accused of assault and/or battery was responding appropriately to a threat of harm, then a lawsuit for assault and/or battery cannot succeed. Having reviewed the evidence, and with the benefit of having heard and observed the witnesses, the Court concludes on a balance of probabilities that the First Defendant acted reasonably and in self-defence.

[73] It is therefore ordered as follows:

- i. The Claimant's Claim is dismissed.
- ii. The Claimant shall pay the Defendants' costs in the sum of \$7,500.00.

Vicki Ann Ellis
High Court Judge