

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2021/0017

BETWEEN:

JOSEPH HORSFORD

Appellant

and

GEOFFREY CROFT

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

The Appellant in person.
Mr. Sylvester Carrott for the Respondent.

2023: March 10.

Civil appeal – Intentional torts – Trespass to the person - Assault and battery – Jurisdiction of appellate court to interfere with findings of fact – Whether the judgment of the learned trial judge is inconsistent with her findings of fact and against the weight of the evidence – Whether the learned trial judge misdirected herself on the law of assault and battery

The appellant is the sole administrator of parcel 280 in the registration section of Falmouth and Bethesda. There is a strip of road that gives access to properties in that area from the public highway. The respondent uses this road to access his property. The appellant maintains, however, that the road forms part of the estate for which he is the sole administrator and insists that the respondent has no right of access. The appellant alleges that on 10th April 2023, he was standing on the road speaking to Serge Gobinet when he observed the respondent driving along the road. The appellant instructed the respondent to proceed no further but the respondent proceeded by driving into the appellant, knocking him onto a heap of thorn bushes.

The respondent however denies this version of events. Instead, he contends that the appellant tripped over a low wall or curb on the side of the road and fell into some bushes. He alleges that his vehicle never made contact with the appellant. At trial, the learned judge was clear that she accepted the version of events presented by the respondent and his witness, Mr. Serge Gobinet and decided in favour of the respondent.

Dissatisfied with the decision, the appellant appealed, essentially challenging (1) the judge's findings of fact and (2) the judge's understanding and application of the relevant legal principles to the facts of the case.

Held: dismissing the appeal and affirming the orders of the trial judge, that:

1. Assault and Battery are two separate intentional torts. To assault someone is to put that person in fear of an imminent battery; whereas battery is the intentional application of force to the person, however slight, without that person's consent. The appellant was required to prove, on a balance of probabilities, that the respondent committed the tort of assault and/or battery upon him and he failed to do so.

Fagan v Commissioner of Police of the Metropolis [1969] 1 QB 439 applied; **Halsbury's Laws of England**: Tort (Volume 97 (2015): (1) Trespass to the Person: paras [528] – [529] applied.

2. The judge properly directed herself in analyzing the evidence and applying the law to the facts as she found them. By framing the issue as "whether the claimant has, on a balance of probabilities, proven that the defendant committed a trespass to the person in the form of assault and/or battery upon the claimant" (*Joseph W Horsford v Geoffrey Croft* ANUHCV2012/0336 (delivered 2nd June 2021, unreported) para [6]), she was conscious that she was dealing with two separate torts. Moreover, the judge's statement of the elements of assault and battery accorded with the learning in *Halsbury's Laws of England*.
3. The circumstances in which an appellate court is entitled to interfere with a trial judge's findings of fact are "severely circumscribed." Such interference would only be justified if the judge's findings of primary fact are "plainly wrong", in the sense that either there was no evidence to support the finding, the finding was based on a misunderstanding of the evidence or was one that no reasonable judge could have reached. In the instant case, there was no justifiable basis on which to disturb the judge's findings of fact.

Kwok Kin Kwok v Yao Juan [2022] UKPC 52 applied.

REASONS FOR DECISION

- [1] **WARD JA:** On 10th March 2023, this Court heard an appeal against the judge's findings on a claim of assault and battery brought by the appellant, Joseph Horsford, against the respondent, Geoffrey Croft. We dismissed the appeal and

promised to provide written reasons at a later date. These are our reasons for dismissing the appeal.

Background

- [2] The appellant and the respondent have for years been engaged in a dispute related to land in Monks Hill Estate. The appellant is the sole administrator of parcel 280 in the registration section of Falmouth and Bethesda while the respondent is the registered owner of parcel 217.
- [3] There is a strip of road or path that gives access to properties in that area from the public highway and which abuts the respondent's property on its Eastern boundary. Right of access to this strip of road is the bone of contention giving rise to the current appeal. The respondent uses this road to access his property. However, the appellant maintains that the road forms part of the estate for which he is the sole administrator and insists that the respondent has no right of access in relation to this road. The appellant contended that he had made this clear to the respondent. Matters came to a head on 10th April 2012 when the appellant claimed that the respondent subjected him to an assault and battery.

The Appellant's Case

- [4] The appellant's witness statement was admitted as his evidence-in-chief. His case was that on 10th April 2012, he was standing on the road speaking to one Serge Gobinet, who was seated in his vehicle, when he observed the respondent driving his vehicle along the said road. He had earlier that morning expressly forbidden the respondent from using the road. The appellant stepped into the path of the vehicle and signaled to the respondent to stop. The vehicle stopped about eight to ten feet in front of him. The appellant shouted to the respondent: "Mr. Croft, you are not to drive on this lane. Turn back and go no further." The respondent shouted back at the appellant, "Get out of my fucking way or I will run you over." At the same time, and without a moment's hesitation, the respondent drove into the appellant knocking him on his rear backside¹ and onto a heap of thorn bush cuttings at the side of the road. The respondent drove

¹ Cross-examination Record of Appeal, page 124, lines 20-23; page 125, lines 12-13; page 133, lines 19-25.

away without stopping. Two of the appellant's workmen and another man assisted him to his feet and helped him pluck the thorns that had pierced his body. The appellant stated that he sustained bruising to his right forearm and a painful right hip.

The Respondent's Case

[5] The respondent gave evidence and called Mr. Serge Gobinet as his witness. The respondent admitted that the appellant had repeatedly told him that he was not permitted to use the road. He did so nonetheless because he claimed it was the only viable access to his property. As it relates to the events of 10th April, the respondent's case was that he was proceeding along the path with the intention of accessing the highway. He observed the appellant speaking to someone who was seated in a vehicle alongside the roadway. The appellant left the person and ran across the road in front of the respondent's vehicle, signaling the respondent to stop. When the respondent stopped the vehicle, the appellant positioned himself two to three feet from the right-hand side of the vehicle. The appellant shouted to him to get out of the vehicle, park it on the roadside and walk down the hill. To this, the respondent replied: "Out of my fucking way, Mr. Horsford, I have an appointment in town." With that, he continued driving down the path. As he drove off, he noticed that the appellant took a step back, and tripped over a low wall or curb on the side of the road and fell into some bushes at the side of the road. He then got up and dusted himself off. The respondent's evidence was that his vehicle never made contact with the appellant. He denied ever threatening to run over the appellant.

[6] The respondent's account was largely supported by the evidence of Mr. Serge Gobinet. Materially, he stated that after the appellant stopped the respondent's vehicle, which had come to a stop slightly ahead of his vehicle, he observed that the appellant went around the driver's side of the respondent's vehicle and spoke with him. He further observed that when the respondent drove off, the appellant stepped backward and fell over the curb and into some thorn bush at the side of the road. The witness stated that he saw "pretty much everything" as nothing was blocking his view. He stated that when the appellant fell, he was still at the side of the respondent's car. He was able to say so because he had

a clear view of the front.² The appellant got up, and shortly thereafter two men went to his assistance.

The Judgment in the Court Below

- [7] The approach the learned judge took was to first direct herself on the elements of assault and battery in accordance with the learning in Halsbury's Laws of England in the following terms:

"Assault is an intentional and overt act causing another to apprehend the infliction of immediate and unlawful force. The threat of violence exhibiting an intention to assault will give rise to liability only if there is a present ability (or perhaps perceived ability) to carry the threat into execution. An assault may be committed by words or gestures alone, provided they cause an apprehension of immediate unlawful force..."

"A battery is an act of the defendant which directly and intentionally or recklessly, causes some physical contact with the person of the claimant without his consent."³

- [8] Having directed herself on the law, the judge turned to an analysis of the evidence. She accepted the version of events presented by the respondent and his witness. The judge was particularly impressed with the evidence of Mr. Gobinet, of whom she said:

"The witness was clear and consistent that he saw the claimant walk to the defendant's driver-side passenger window to speak to the defendant. This court accepts the evidence of this witness. His evidence was clear, forthright and I found him to be a credible witness. This court places no weight on the admission of the witness that he was acquainted with the defendant prior to the incident.

This witness would not have seen how far the claimant stood from the right-hand side of the defendant's vehicle, but his evidence is that the defendant moved off in his vehicle, the claimant stepped back and stumbled onto the cuttings. Given the evidence of where the defendant's vehicle stopped in relation to the witness, the witness would have had a view of what transpired after the defendant drove away from the claimant."⁴

² Record of Appeal, page 233, lines 8-19.

³ Halsbury's Laws of England: Tort (Volume 97 (2015): (1) Trespass to the Person: paras [528] – [529].

⁴ Joseph W Horsford v Geoffrey Croft ANUHCv2012/0336 (delivered 2nd June 2021, unreported) paras [23] – [24].

[9] Having considered the evidence and the burden and standard of proof, the learned judge concluded:

“Accordingly, this court accepts the defendant’s version of events that the claimant was speaking to him through his driver side window. The defendant contended that the claimant was two to three feet from his vehicle when he said to the claimant to “out of my fucking way”. The burden of proof rests on the claimant and in this court’s view the claimant has not discharged the burden that the claimant’s version of the event was more likely than not to have occurred. In this circumstance the claimant has not proven that the defendant, directly, intentionally or recklessly caused physical contact with the person of the claimant. Additionally, this court notes that the medical report showed no injury or swelling to the claimant’s hip. The report spoke of tenderness to the area.

Having accepted that the claimant was to the side of the defendant’s vehicle it is difficult to see how the claimant would have suffered an intentional and overt act causing the claimant to apprehend the infliction of immediate and unlawful force. This is particularly in the context where both parties contend that the defendant said, “get out of my fucking way”. On this matter this court has again determined that the claimant has not proven its case on a balance of probabilities.”⁵

The Grounds of Appeal

[10] The appellant filed four grounds of appeal in the following terms:

(a) The judgment is contrary to the findings of fact of the learned trial judge.

The learned trial judge misunderstood the account given by Serge Gobinet bearing on his line of vision and observations at the critical time.

(b) The learned trial judge erred by giving full weight to the evidence of the witness, Serge Gobinet, when his verbal testimony, at trial, differs from his witness statement exchanged in 2013.

(c) The judge did not consider, or failed to appreciate, the import of the appellant’s allegation of assault and battery meaning an assault by the intimidation of the respondent’s threatening words, his sudden and hasty driving of his vehicle as he retorted without a moment’s hesitation when he was told to go no further etc.

⁵ *ibid* (n 4) [25] – [26].

(d) The learned trial judge based her judgment on the wrong principle of law; and the judgment is against the evidence.

[11] In summary, grounds (a) and (b) challenge the judge's findings of fact while grounds (b) and (c) challenge the judge's understanding and application of the relevant legal principles to the facts of the case.

The Appellant's Submissions

[12] The appellant submitted that the learned judge misdirected herself in law. The claim being one for assault and battery, the words used by the respondent in themselves amounted to an assault. Being struck by the respondent's vehicle was not critical to the claim for assault. According to the appellant's written submissions, it was "the respondent's threatening words, hostility, and sudden and hurried engaging of the engine of the motor car, over which he had control, that created the urgency to avoid being run over that prompted the appellant's quick action to avoid the threat of being run over."⁶ In oral submissions, the appellant contended that the judge took the wrong view that the appellant had to prove a battery as well. Further, in holding at paragraph 25 that the appellant had failed to prove that the respondent directly, intentionally or recklessly caused physical contact with the person of the appellant and that the medical report showed no injury or swelling to the claimant's hip, the judge based her judgment on the degree of injury that the appellant sustained. The proper test, submitted the appellant, is: "was it [the injuries] the natural result of what the alleged assailant said and did in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing."⁷

[13] The appellant further submitted that the judge misunderstood the evidence of the witness, Mr. Gobinet, in relation to his line of vision and observation at the critical time. It was submitted that he was not in a position to see what happened at the critical time.

⁶ Appellant's skeleton argument, para 11.

⁷ Appellant's skeleton argument, para 24.

The Respondent's Submissions

- [14] On behalf of the respondent, learned counsel, Mr. Sylvester Carrott, submitted that the critical issue in this case is whether the trial Judge could properly arrive at the conclusion that she did based on the evidence before her; or whether, based on the available evidence, the reliability and credibility of which she had to assess, she was plainly wrong. The assessment of the evidence and findings of credibility and the acceptance or rejection of the evidence were for the trial judge. The trial judge's view of the evidence and the findings that she made as to the primary facts were informed by the view which she took of the oral evidence, and she was entitled to do so.

Discussion

- [15] To succeed on his claim before the learned judge, the appellant was required to prove on a balance of probabilities that the respondent had committed the tort of assault and/or battery upon him. These two torts are distinguishable. To assault someone is to intentionally put that person in fear of an imminent battery: **Fagan v Commissioner of Police of the Metropolis**⁸ The application of physical force is not necessary; words or gestures may suffice. Thus, to threaten a person or to approach them menacingly can amount to an assault if the person reasonably fears or apprehends immediate violence to his person. Battery, on the other hand, is the intentional application of force to the person, however slight, without that person's consent. That force may be applied either through direct bodily contact between the defendant and the claimant, or by the defendant causing some object to come into contact with the person of the claimant.
- [16] As it relates to the tort of assault, the appellant grounds his case on the threat allegedly issued by the respondent to run him over immediately before driving off as the appellant stood at the front of his vehicle, mere feet away. In his written submissions, the appellant contended that "it was the respondent's threatening words, hostility, sudden and hurried engaging of the engine of the motor car over which he has control that created the urgency to avoid being run over that

⁸ [1969] 1 QB 439.

prompted the appellant's quick action in order to avoid the threat of being run over." He asserts that the judge misdirected herself in law in erroneously holding that it was necessary that the respondent make physical contact with the appellant to establish an assault. The appellant derives this view of the judge's reasons from the following passage found at paragraph 25 of the judgment:

"The appellant has not proven that the respondent directly, intentionally or recklessly caused physical contact with the person of the appellant. Additionally, this court notes that the medical report showed no injury or swelling to the claimant's hip."

[17] The appellant submitted that in that passage, the learned judge misdirected herself and failed to follow long established principles of law, and applied a wrong principle of law in holding that the appellant had the burden of proving physical contact and in equating the degree of physical injury as an element of assault and battery. In the premises, the appellant submitted that "the judgment is against the justice of the case and the law."⁹

[18] With respect, the appellant's submissions do not accurately reflect the judge's analysis of the evidence and her application of the law to the facts as she found them. The judge was conscious that she was dealing with two different torts. This is evident from her framing of the issue at paragraph 6 of her judgment as "whether the claimant has, on a balance of probabilities, proven that the defendant committed a trespass to the person in the form of assault and/or battery upon the claimant." The judge went on to correctly direct herself on the elements of both assault and battery in accordance with the learning in Halsbury's Laws of England.

[19] The judge then analysed the evidence and determined that she accepted the respondent's version of events. In coming to that conclusion, she placed much reliance on the evidence of Mr. Gobinet. There is no merit in the complaint that the judge misunderstood his evidence or erred in giving full weight to his evidence when his testimony at trial was at variance with his witness statement. There was no material difference in the accounts given by this witness. Having

⁹ Appellant's written submissions at para 25.

examined the evidence of Mr. Gobinet, as reflected in the Record of Appeal, we were satisfied that the judge's summary of his evidence was accurate.

[20] The judge found as a fact that based upon his position, Mr. Gobinet would have had a clear view of parts of the incident, although he would not have seen how far the appellant stood from the right-hand side of the respondent's vehicle. Nonetheless, the judge found that the witness was clear and consistent that he saw the appellant walk to the respondent's driver-side passenger window to speak to the respondent. She accepted his evidence that when the respondent moved off in his vehicle, the appellant stepped back (from the right side of the vehicle) and stumbled onto the bush cuttings. She specifically found that based on the evidence of where the witness was positioned, he would have had a view of what transpired after the respondent drove away from the appellant. This finding stands in stark contrast to the appellant's assertion in his oral submissions before this court and in his written submissions that the judge found at paragraph 24 of the judgment that Mr. Gobinet was not in a position to see what took place "at the critical moment in time when the assault and battery positively established the causation."¹⁰ There is no such finding in the judgment. All that the judge found at paragraph 24 is that Mr. Gobinet would not have seen how far the appellant stood from the right-hand side of the respondent's vehicle. However, evidence as to that distance was supplied by the respondent. The judge found that Mr. Gobinet's evidence was clear, consistent and forthright and she found him to be a credible witness.

[21] In effect, in expressly accepting the respondent's version of events, it is implicit that the judge accepted that the respondent told the appellant to get out his way and accepted the respondent's evidence that he never threatened to run over the appellant. Therefore, the appellant's reliance on the threat to ground the assault is completely undermined by the judge's finding of fact on this issue. Further, the judge expressly found as a fact that the appellant was speaking to the respondent through the driver-side window at the time that the respondent drove off. Having so found, the judge concluded:

¹⁰ Appellant's skeleton argument, para [24].

“Having accepted that the claimant was to the side of the defendant’s vehicle it is difficult to see how the claimant would have suffered an intentional and overt act causing the claimant to apprehend the infliction of immediate and unlawful force.”¹¹

- [22] In short, the judge found that there was no threat made by the respondent that caused the appellant to apprehend immediate personal violence, and that at the time the respondent drove off the appellant was standing at the side of the vehicle, which could only mean that he was never in peril of being subjected to any physical force to his person, and had not in fact been so subjected.
- [23] Contrary to the appellant’s submissions, when the judge stated that “the appellant has not proven that the respondent directly, intentionally or recklessly caused physical contact with the person of the appellant and further noted that the medical report showed no injury or swelling to the claimant’s hip,” the judge is not here speaking to the assault, nor is she saying that the appellant had the burden of proving physical contact in relation to assault, nor was she basing her judgment on the degree of injury the appellant sustained, as he contended in his oral and written submissions. The judge’s comments are directed to the claim in relation to battery, and her reference to the medical evidence simply makes the point that it does not support the appellant’s case that he was struck by the respondent’s vehicle as pleaded by the appellant, and as he asserted in his witness statement and several times under cross-examination.
- [24] The appellant complains that “the judgment is against the justice of the case and the law.” Translated, this seems to be not only a criticism of the judge’s understanding and application of the legal principles but also a complaint that the decision is against the weight of the evidence as it is traditionally expressed. The parties were sharply divided on the facts. In particular, they gave diametrically opposed evidence in relation to whether the respondent threatened to run over the appellant; whether the appellant was at the front or

¹¹ *ibid* (n 4) para [26].

side of the respondent's vehicle when it drove off; and whether the vehicle struck the appellant causing him to fall, or whether he fell when he stepped back and tripped on the curb. It therefore fell to the trial judge to resolve those disputes of facts by evaluating the credibility of the witnesses, the reliability of and weight to be attached to the evidence adduced, and, ultimately, to determine whether the evidence adduced was sufficient to prove the factual allegations of the appellant on a balance of probabilities. The learned judge concluded that the respondent's version was to be preferred.

- [25] The circumstances in which an appellate court is entitled to interfere with findings of fact made by a trial judge based on the oral evidence of witnesses has been described by the Privy Council as "severely circumscribed." In **Kwok Kin Kwok v Yao Juan**¹² the Board restated the guiding principles that should inform the approach of an appellate court in reviewing a trial judge's findings of fact. In summary, an appellate court should not interfere with a judge's findings of primary fact unless they are "plainly wrong", in the sense that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached. Rarely would it be justifiable for an appellate court to overturn a finding of fact which turns on the credibility of the witnesses. It should not do so unless it is satisfied that any advantage enjoyed by the trial judge by having seen and heard the witnesses could not be sufficient to explain or justify his conclusions. This restraint extends to the judge's evaluation of the facts and any inferences to be drawn from them.

- [26] The Board succinctly explained the reason for such appellate restraint in the following way:

'43. The reasons for such appellate restraint are not limited to the advantage enjoyed by the trial judge of having seen and heard the witnesses. They include the recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. The judge will be totally familiar with the evidence at trial, and is likely to gain a far deeper insight from living with the case over several days than the appeal court, whose view of the case will be circumscribed by the issues raised on appeal.

¹² [2022] UKPC 52.

44. Moreover, not every detail of the relevant evidence need be or can be captured in the reasons given by the judge for his findings. As Lord Hoffman said in *Pigłowska v Pigowski* [1999] 1 WLR 1360, 1372, citing from his own judgment in *Biogen Inc v Medeva plc* [1997] RPC 1, 45:

‘[The judge’s] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance...of which time and language do not permit exact impression, but which may play an important part in the judge’s overall evaluation.’”

[27] In the case at bar, the judge has carefully and clearly set out the reasons that led her to conclude that the respondent’s version of events was to be believed and that the appellant had not discharged the burden of proving his case on a balance of probabilities. The findings at which she arrived were clearly open to her on the evidence. Much turned on the view she took of the credibility of the witnesses, and of Mr. Gobinet in particular. It cannot be said that there was no evidence to support her findings, or that the findings were based on a misunderstanding of the evidence or were findings that no reasonable judge could have reached.

[28] In our view, the judge correctly directed herself on the law and faithfully applied the law to the facts as she found them. For all the foregoing reasons, we saw no basis for disturbing her decision.

[29] Order:

- (i) The appeal is dismissed;
- (ii) The orders of the trial judge affirmed;
- (iii) Pursuant to the order of the Court of Appeal dated the 29th day of May 2020 in ANUHCVP2018/0004, the appellant, Mr. Joseph Horsford, shall pay the respondent, Mr. Geoffrey Croft, the costs of the trial in ANUHCVP2012/0336, such costs to be determined by a judge of the High Court on the prescribed costs regime; and

- (iv) The appellant, Mr. Joseph Horsford, shall pay the respondent, Mr. Geoffrey Croft, the costs on this appeal to be assessed by a judge of the High Court, such costs not to exceed 2/3 of the costs below.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag]

By the Court

Chief Registrar