IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Landry v. Landry, 2012NSSC 443

Date: 20121219
Docket: 233933
Registry: Antigonish

Between:

Joyce Landry

Plaintiff

v.

Gerard Landry, Mildred Landry, Andrew Landry

Defendants

Judge: The Honourable Justice N. Scaravelli.

Heard: October 29, 30, 31, 2012, November 1, 2, 2012,
in Antigonish, Nova Scotia

Counsel: Adam Rodgers, for the Plaintiff, Joyce Landry
Clarence Beckett and Jeremy Smith co-counsel,
for the Defendants, Gerard Landry, Mildred Landry,
Andrew Landry

By the Court:

[1] The plaintiff alleges she suffered physical and psychological injuries at the hands of the defendants as a result of an altercation that occurred when she attended their property in July of 2004. The physical assault alleged falls under the ***Tort of Battery***. At trial the plaintiff amended her action, without objection, to plead the ***Occupier's Liability Act of Nova Scotia*** as a result of her fall at the time. The defendant's deny that an assault occurred. They further deny the plaintiff's fall was caused by any negligence on their part.

BACKGROUND BASED ON FINDINGS OF FACT

[2] The plaintiff Joyce Landry and her estranged husband at the time, Sylvester Landry are joint owners of land and dwelling located on Highway 4, Harve Boucher, Antigonish County, N.S. The defendants Gerard Landry and Mildred Landry are married and joint owners of land and dwelling adjacent to the plaintiff's property. The defendant Andrew Landry is the son of Gerard and Mildred Landry. At the time of the alleged incident he lived with his parents.

[3] The parties are related through marriage. The defendant Gerard Landry and the plaintiff's estranged husband are brothers. Despite this connection the relations between the parties were very strained for a substantial time prior to the incident.

[4] The plaintiff and defendants share a common driveway located on the boundary of their respective properties. This driveway existed and was used by both parties prior to the defendant's constructing a separate driveway on their own property. The defendants continued to occasionally use the common driveway. The use and maintenance of this driveway has been the subject of controversy between the parties over prior years. The plaintiff made it known she was unhappy with the defendants use of the driveway. She at times would park her vehicle in the middle of the driveway requiring the defendants to attempt to go around her vehicle or back down the driveway. The plaintiff complained to the RCMP on occasion. The defendants complained of the plaintiff cutting grass and bushes on their property side of the driveway and on their land near the plaintiff's home. Relations were further strained when the defendants complained to the local dog catcher regarding the aggressive nature of the plaintiff's pit bull dog. Complaints about the dog resulted in the plaintiff being advised of the requirement to have the dog muzzled when off the plaintiff's property.

THE INCIDENT

[5] As expected, the parties have different versions of the events on the evening of July 2004.

PLAINTIFF'S EVIDENCE

[6] The plaintiff testified that at approximately 10:00 p.m. she took her dog for a walk on the common driveway that lead's to Highway No. 4. The dog was on a leash and the plaintiff was carrying a flashlight. As she was walking back up the driveway she observed a vehicle turn onto the bottom of the driveway and accelerate up the driveway. The plaintiff backed up towards the edge of the driveway and yanked on the dog chain to get the dog out of the way. The vehicle turned onto the defendant's property and continued over the defendant's driveway to their house.

[7] The plaintiff testified she was upset the vehicle accelerated towards her. She was not absolutely certain the vehicle belonged to the defendants. She called the RCMP. A woman at dispatch asked the plaintiff if she had obtained the license

plate number of the vehicle. The plaintiff responded that she would be able to get the plate number.

[8] The plaintiff left her house with her flashlight, cell phone, pen and paper and her dog on a leash. She walked along the defendant's connecting driveway to their house. Her evidence is that she encountered Gerard Landry outside the home. She told him she came to get the license plate of the vehicle and that he gave her permission. She also asked who was driving the vehicle. Andrew Landry appeared and shouted at her to go home, that she would get nothing. Mildred Landry came out of the house and gave the plaintiff a portable phone telling her to call the police. The plaintiff advised she had already called the police. As she turned to walk back down the driveway Mildred Landry blocked her path. As the plaintiff kept walking Mildred kept jumping in front of her. She took the phone and struck the plaintiff on the right forearm and shoulder. She grabbed the plaintiff's right arm trying to push her to go back. Andrew Landry was beside the plaintiff with his arms spread out forcing her to go to the left off the edge of the driveway. The plaintiff felt her feet get caught up on something. As the plaintiff was pushing to get around Mildred, she felt pain in the back of her leg. As she cried out in pain Mildred Landry pushed her and she fell to the ground. The plaintiff still holding the dog on her leash fell at a point one or two feet off the driveway where there were railway logs located on

the ground with flowerpots on top. The plaintiff thought that both she and the dog may have knocked over the flowerpot as it was dark.

[9] According to the plaintiff the defendants did not believe she was actually injured. Mildred Landry directed her husband to get a camera and take pictures of the pit bull not wearing a muzzle. The plaintiff testified she crawled across the defendant's driveway onto the grass, got up and walked to her home where she encountered the RCMP. She was later transported to the hospital by ambulance. The plaintiff testified that she suffered bruises to her arm from being hit with the phone. More seriously she suffered a torn hamstring. She was unable to return to work as a registered nurse for a period of time. She eventually returned to work however, could not continue as a result of the stress of these legal proceedings, in particular discovery examinations.

DEFENDANT'S EVIDENCE

[10] The defendants testified they travelled from New Glasgow to Havre Boucher that evening. Mildred Landry was driving the vehicle as it turned onto the common driveway and saw the plaintiff with her dog. According to the defendants, she was off the edge of the driveway on the grass with the dog on a leash at the edge of the driveway. Mildred Landry slowed and stopped the vehicle when she reached the

plaintiff. The plaintiff pulled on the leash, pulling the dog back as it motioned towards the vehicle. The vehicle proceeded past the plaintiff turning right off the common driveway onto the defendant's connecting driveway to their house.

[11] The defendants were not expecting to see the plaintiff on the driveway at that time of evening and felt that the plaintiff would be upset with their using the driveway given the history between them.

[12] Gerard Landry testified he and Andrew took their dog outside for relief after arriving home. Gerard Landry saw a figure with a flashlight coming up the driveway. He told Andrew to put the dog in the house. Gerard yelled out to the plaintiff. She responded by saying they tried to run her over with the car. According to Mr. Landry he used foul language and told her to go home. As Andrew came out of the house she approached him placing the flashlight under his chin and asked if he was the driver of the vehicle. Andrew raised his hands in the air to avoid contact and told the plaintiff to leave the property. According to Gerard Landry the plaintiff was screaming while asserting her right to be on the property to obtain the plate number. She stated she was going to call the police. At that point Mildred came out of the house with a cordless phone which she passed to the plaintiff directing her to call the police. As the plaintiff was dialing, Gerard Landry noticed the pit bull dog was not muzzled. When he mentioned this to the plaintiff

she passed the phone back to Mildred Landry. Gerard walked to his vehicle for his camera in order to take a picture of the dog. On his way back he observed the plaintiff backing down the driveway with Andrew and Mildred on either side. He did not see the plaintiff fall but did see her on the ground. He did not see Mildred or Andrew touch the plaintiff. He did hear the plaintiff state that Mildred had tripped her. While on the ground the plaintiff made a call on her cell phone stating she had been assaulted. No one attempted to assist the plaintiff while on the ground as they believed she was faking an injury. The plaintiff got up and hobbled home. Gerard followed her at a distance until he saw the RCMP vehicles driving up the driveway. One officer went to the plaintiff's residence the other to the defendant's home. The defendants told their story and gave separate formal statements the following day. No charges were laid.

[13] Andrew Landry testified the plaintiff was very agitated and loud when she approached him. She was within an inch of his face with a flashlight but did not touch him. He raised his hands in the air when he told her to go home and told her that she was not welcome on the property. She stated she had permission from the RCMP to be there. She said they tried to hit her with the car. Mildred Landry came out of the house with the phone and told the plaintiff to call the RCMP. As the plaintiff was dialing, Gerard Landry noticed the dog was not muzzled. At that time the plaintiff passed the phone back to Mildred. Gerard walked to his vehicle to

retrieve the camera. The plaintiff began backing up with Andrew and Mildred on each side. The plaintiff tripped and fell in the area where the railway logs and flowerpots were located just off the driveway. The plaintiff accused Mildred of pushing her. Andrew testified that at no time did he or Mildred touch the plaintiff. Although they thought the plaintiff was faking an injury Mildred would not allow Andrew to assist her as she believed touching the plaintiff would worsen the situation.

[14] Mildred Landry testified she was in the house when she heard the commotion outside. She looked out the window and saw Andrew with his hands in the air shouting at the plaintiff to go home and get out of his face. The plaintiff was shouting that she wanted the license number and was going to call the police. Mildred took the portable phone from the house and approached the three of them, who were all shouting and moving back and forth. Mildred passed the phone to the plaintiff and told her to call the police. The dog was between her and the plaintiff. When Gerard noticed the dog with no muzzle Mildred told him to retrieve the camera for pictures. The plaintiff passed the phone back to Mildred. At that point they were all moving around with the plaintiff backing up when she fell. According to Mildred the plaintiff stated she was shoved and pushed. Mildred did not see what caused the plaintiff to fall but assumed she could have tripped over the flowerpot located on top of the railway log or the dog attached to the leash she was holding.

Mildred Landry denied she struck or pushed the plaintiff to the ground. She testified there was no physical contact between her and the plaintiff, other then their fingers possibly touching when they passed the phone back and forth.

ANALYSIS

[15] The ***Tort of Battery***, often referred to as ***Assault and Battery***, is a form of trespass against a person. In order to succeed in her claim for damages the plaintiff must prove on a balance of probabilities that the defendants intentionally caused physical contact with the plaintiff resulting in injury to her. ***Linden and Feldthusen, Canadian Tort Law, 9th A.D.***

[16] I am satisfied the plaintiff fell and was injured at the time of the confrontation between the parties outside the defendant's home. The issue is whether the defendants intentionally caused the injury.

[17] The factual dispute surrounding the incident tasks the court with assessing the credibility of the parties who were the only witnesses to the event. Assessment of credibility is an imperfect science. The exercise often involves consideration of any prior inconsistent statements or implausible explanations in a material area. Also independent evidence in support of or in contradiction of testimony of a party or the

absence of independent evidence. The manner in which the parties testify is also relevant to the overall consideration of credibility.

[18] Generally I was not given the impression that the plaintiff was being accurate in her testimony. There were material inconsistencies and contradictions in her evidence that negatively impact on the credibility of her evidence. The plaintiff also tended to elaborate answers beyond the questions asked of her in order to advance her case. Under cross-examination she often deflected questions and was reluctant to admit facts that she may have thought would reflect negatively on her case.

[19] In support of her evidence of having been assaulted by Mildred Landry, the plaintiff provided photographs depicting a bruise on her right forearm which she testified was caused by the blow from the phone. As well, another bruise visible on her right arm was stated to have occurred when Mildred Landry grabbed hold of her.

[20] The plaintiff gave a police statement on July 25th, the day following the incident. The written statement is 7 pages in length. The plaintiff signed each page and confirmed its truthfulness of each page. Inconsistences exist regarding the statement and her evidence at trial. In the statement to police the plaintiff stated she pulled the dog out of the way to avoid it being struck by the car accelerating up the

driveway. She knew it was Gerard Landry's vehicle but did not know who was driving. She stated "she had enough of this" and called the RCMP detachment to report the vehicle next door almost struck her. The person she spoke to told her to go over and get the plate number. When she arrived she told Gerard Landry she wanted the plate number and received permission. She also wanted to know who was driving the vehicle. Andrew Landry came towards her with his arms open and told her to call the police. Mildred Landry appeared with a phone telling her to call the police. The plaintiff tried to leave and Mildred Landry came in front of her and put her arms in front of the plaintiff blocking her. Andrew Landry was on the side blocking her. Mildred Landry was between the plaintiff and her dog on a leash held by the plaintiff. Mildred Landry had her hands up pushing against her and the next thing the plaintiff knew she was on the ground. At the end of her statement in response to question from the police officer, the plaintiff stated that Mildred Landry had both hands on her shoulders and her chest when she pushed her.

[21] The police statement does not mention Mildred Landry striking her with a phone or grabbing her arm, both actions the plaintiff asserts caused the bruising marks shown in the photographs exhibited at trial. When asked to explain this omission in cross examination, the plaintiff stated it was because she was in pain at the time she gave the statement. The plaintiff was referred to her discovery evidence in 2006 where she was given her police statement to review. After a break

to review the statement at discovery she confirmed the statement was accurate and she did not wish to make any corrections. Under further cross examination the plaintiff could not explain why she did not correct the statement at the time of discovery.

[22] Athough the plaintiff's Statement of Claim alleges Mildred Landry struck her in the arm and chest with the phone, the pleadings do not allege Ms. Landry grabbed the plaintiff at all. Nor is there an allegation that Ms. Landry pushed the plaintiff to the ground. The Claim alleges her fall was caused by obstruction of the creosote logs while attempting to leave the property "to avoid further blows from the defendant Mildred Landry". Her police statement does not mention the creosote logs contributing to her fall.

[23] Both the plaintiff's police statement and pleadings allege that the defendant's vehicle almost struck her when travelling up the driveway. Under cross-examination regarding her discovery evidence the plaintiff eventually acknowledged that she was well off the paved driveway and that she was in no danger of being struck by the vehicle. She also acknowledged the RCMP detachment did not instruct for her to go to the defendant's home.

[24] The testimony of the defendants was corroborative on the material facts as would be expected. They also gave police statements and were subject to discovery examination. Their evidence was not contradicted or otherwise seriously challenged under cross-examination.

[25] I find the evidence supports the conclusion that there was history of bad relations between the parties prior to the incident. In particular the plaintiff was perturbed over the defendants use of the common driveway. On the night of the incident the plaintiff was not threatened by the approaching vehicle. She was aware it was Gerard Landry's vehicle. She was however, upset over the defendants use of the driveway. Out of frustration and a sense of being harassed the plaintiff called the police and walked to the defendant's residence with her unmuzzled pitbull primarily to confront the defendants. A confrontation did occur with both parties raising their voices. The plaintiff was aware she was unwelcome on the property and was told to leave. After stating her right to be there and her threat to call police, she was offered the telephone by Mildred Landry and told to call the police. It is at this point where the evidence of the parties significantly diverge.

[26] It is open to question the plausibility of the plaintiff's assertion that Mildred Landry and Andrew Landry blocked her with their bodies in order to prevent her from leaving their property in light of the evidence that the plaintiff was told by the

defendants she was unwelcome and ordered to leave the property. Moreover, the evidence of the defendants past concerns with the aggressive behaviour of the plaintiff's pit bull dog and Mildred Landry's evidence of her fear of pit bulls, makes it difficult to imagine her standing between the unmuzzled pit bull and it's owner striking the plaintiff and pushing her to the ground while the dog remained docile. All of this to have occurred while the defendants were aware the RCMP had already been called.

[27] The plaintiff bears the burden of establishing on a balance of probabilities that she was intentionally assaulted and injured by the defendants. Where the evidence leaves the court in a state of uncertainty as to whether an intentional assault occurred, the burden of proof is applied and the court must find in favour of the defendants.

OCCUPIER'S LIABILITY

[28] In addition to the allegation of an assault by the defendants, the plaintiff also alleges her fall resulted from their negligence. The duty of an occupier is set out as in Section 4 of the ***Occupier's Liability Act.*** It imposes a duty of reasonable care in the circumstances of the case to ensure persons are reasonably safe while on the

property. The circumstances of the entry onto the premises is a relevant consideration when determining the duty of care.

[29] The creosote railway logs are located on the grass off to the side of the gravelled portion of the driveway. Flower pots on top of the logs amplify their location. This area does not form part of the driveway walking area. The logs did not present an unusual danger. The plaintiff argues the logs became dangerous when the defendants pushed her to that location. She did not testify that she was unaware of their location from prior visits when relations were cordial. Clearly, the parties were all moving about at the time. The plaintiff testified she had turned to leave. It was dark in this area of the driveway and the plaintiff was the only person with a flashlight. The evidence of the plaintiff is that she was adjacent to the creosote logs but she fell as a result of being pushed down by Mildred Landry. The evidence is not clear that the logs caused the plaintiff's fall or injury. Even it if were the cause, the plaintiff has not established on credible evidence the fall was a result of negligence on the part of the defendants. The fall, of itself, does not create a presumption of negligence. As a result I dismiss the plaintiff's action.

PROVISIONAL ASSESSMENT OF DAMAGES

[30] Having found the defendants are not liable for the injury suffered by the plaintiff, I will provisionally assess damages. The plaintiff's main physical complaint relates to a hamstring injury to her leg. Her evidence is that while she and Mildred Landry were pushing against each other she felt a sharp pain in her leg before Mildred Landry pushed her to the ground. She had to crawl across the defendant's driveway and then hobble home. Initially she complained of pain in her back thigh as well as a picking sensation in her leg. She was unable to walk without pain for a period of time. She was treated by way of prescribed medication, physiotherapy and message therapy.

[31] The plaintiff was unable to return to work at St. Martha's Hospital, Antigonish as a registered nurse. She was in receipt of disability payments for a period of time which were ultimately terminated. The plaintiff returned to work at the hospital in the early part of 2007 and continued to work for approximately 6 months until the date of her discovery. She testified she became anxious at discovery and thereafter felt she was unable to function or cope with her anxiety resulting in her inability to return to work. She has not attempted to return to work following her discovery in 2007. The plaintiff testified she is physically able but not mentally able to return to work. She needs to get this lawsuit behind her before

considering a return to work. Her current physical complaints are difficulty in sitting for long periods of time and a picking sensation in her legs, mainly her foot. She continues to experience pain throughout her body when stressed. She was exhibiting pain at trial. The plaintiff testified that she requires special chairs for sitting any length of time and utilized these chairs at trial.

[32] In terms of pre-existing medical condition, the plaintiff was diagnosed with fibromyalgia in 1998. Her symptoms consisted of sore muscles all over her body which were exacerbated by stress. She was also diagnosed with steroid myopathy around the same time. During the treatment period she was off work returning to her permanent part time position at the hospital in 2003. Prior to her fall in July, 2004, the plaintiff testified she would have flair ups of pain but was able to keep it under control. She also had very bad pain in her knees which she described as “confulation patella” for which she was prescribed viox and celebrex. The plaintiff had also been previously diagnosed with migraine headaches.

[33] Under cross-examination the plaintiff referred to earlier discovery examination and her police statement where she described hopping across the defendant’s driveway after falling and not crawling as she had testified at trial. The defendant acknowledged not requiring her special chairs when she travelled to Florida by car for a month in 2010 or for her 3 month Florida trip in 2012. During

the period between 2008 and 2010, while off work, the plaintiff provided home care for her mother in her mother's home.

[34] The plaintiff testified her pre-injury prescriptions for viox and celebrex were for discomfort in her knees and not arthritis. She was referred to medical record entries made by Dr. Boucher in 2002, 2003 with entries "VIOX for ARTH" and "FIBRO+ARTH VIOX" and "OSTEOARTH-VIOX". When asked as a registered nurse to confirm that "ARTH" indicated arthritis the plaintiff replied she could not make that determination. When referred to the high dosages of viox prescribed, the plaintiff initially testified she was sharing the drug with her sister only later to agree she may have been taking all of the drug.

[35] Expert medical evidence was introduced by filing of medical reports. Specialist reports submitted by the plaintiff were prepared by Dr. Yepes and Dr. Boudreau, orthopaedic surgeons, Dr. MacDougall, neurologist and Dr. Mahar, physical medicine. These reports cover the period between 2005 and 2006. Physician narrative notes of Dr. Boucher ending in 2005 were also admitted into evidence. The plaintiff did not provide any further updated medical information. The defendant produced an independent medical examination report prepared by Dr. Gross, orthopaedics, dated August 2009.

[36] Based on objective medical reports I am satisfied the plaintiff suffered a probable hamstring tear of the underlying muscle in her leg at the time she fell. Given the degree of the injury described in the reports as well as the prognoses where expressed, I find this injury should have resolved in 3 to 6 months and that she would have been physically able to return to work 6 months following the injury. There is no medical evidence supporting the plaintiff's claim that her current painful complaints relate to the injury suffered from the fall and not her pre-existing conditions.

[37] The plaintiff's claim that she continues to suffer from litigation anxiety or stress which prevents her from returning to work is not sustainable. The plaintiff failed to provide expert evidence substantiating her claim that her anxiety issues relate in anyway to the incident or her ability to work. Moreover the stress of litigation is not, of itself, a compensable head of damages. ***Bullock v. Trafalgar Insurance Co. of Canada 1996 Carswell Ont. 2645; Dasilva vs. MacLean 2011 ABQB 618.***

[38] I find there is no merit to the plaintiff's claim for loss of future income, diminished earning capacity and cost of future care. The plaintiff would be entitled to recover past loss of income for period of 6 months post injury based on her regular part time employment. Her income in 2003 and prorated for 2004 would

average $46,000.00 per year. Therefore the amount allotted for past loss of income is $23,000.00.

[39] The plaintiff submits general damages should be in the ***Smith vs. Stubbert*** range or higher. The plaintiff seeks an award of $60,000.00 for general damages. Based on my findings I have determined that the plaintiff does not suffer from persistent troubling or permanent injuries that relate to her fall. As a result, the authorities cited by the plaintiff are of no assistance to the court in assessing damages. The defendant was unable to provide authorities relating to a hamstring injury that resolved within a relatively short period of time. Authorities were submitted dealing with shoulder injuries as well as head and neck injuries. Considering the circumstances of this case I would award the sum of $10,000.00 general damages.

[40] Prejudgement interest is awarded at 2.5 percent. The defendants submit the amount of interest should be reduced as a result of the delay by the plaintiff failing to bring the matter to trial for 8 years. Section 41 (k) (iii) of the ***Judicature Act*** allows the court discretion to decline or reduce the rate of interest on damages where the claimant has been responsible for undue delay in the litigation. I am satisfied this case merits a reduction of interest. The plaintiff was responsible for delays in discovery examination resulting in a court application an order for her to

attend. Failure to produce undertakings resulted in two applications and orders by the court. Having still not received compliance with the orders to produce, the defendant moved to have the matter set down for trial. Under the circumstances I would limit the award of prejudgment interest to 5 years.

[41] In summary the plaintiff's claim is dismissed with costs to the defendants. Provisional damages have been assessed. I reserve jurisdiction to deal with costs in the event the parties are unable to agree.