

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
CHARLES C. DIGGS)	Charles Diggs,
)	representing himself as Plaintiff
Plaintiff)	
)	
- and -)	
)	
CENTURY INVESTIGATION AND)	<i>Joel B. Kohm,</i>
SECURITY SERVICES INC. and)	for Century
MOUNT SINAI HOSPITAL)	
)	<i>Cynthia D. Clarke,</i>
Defendants)	for the Hospital
)	
)	
)	HEARD:
)	October 15, 16, 17, 18, 22 and 23, 2002

CAMERON J.:

THIS ACTION

[1] This is an action for damages for assaults by a male nurse ("Mr. M.N.") at Mount Sinai Hospital (the "Hospital") and by security officers employed by the defendant Century Investigations and Security Services Inc. ("Century"), which provides security service to the Hospital. The defendant Century counterclaims against the plaintiff Mr. Diggs for damages for defamation by libel.

[2] The Hospital claims against Century for contribution and indemnity under the *Negligence Act*, R.S.O. 1990, c. N.1, in respect of conduct by Century's security guard.

[3] I amend the style of cause by amending the name of Century to its proper name "Century Investigation and Security Services Inc."

[4] Special security was provided for this hearing as it was in the trial before Pitt J. on May 31 and June 1, 1999 in *Diggs v. Belair Insurance*, [1999] O.J. No. 2599 (S.C.J.), Court File No. 97-CV-128918. Mr. Diggs' conduct in that case, his conduct in his

opening statement in this trial and comments during the course of this trial would lead a reasonable person to conclude that he is mentally unstable. Mr. Diggs is an intelligent person and can compare and distinguish evidence.

FACTS

[5] On December 29, 1998 at about 3:10 p.m., Mr. Diggs presented himself at the registration desk inside the entrance to the emergency department ("ER") of the Hospital complaining of thirst and pain.

[6] Mr. Diggs was born December 25, 1960 and was at the time a street person. He is a diabetic. He testified that his insulin for the month, obtained on a card supplied by social services, had been taken from him. He was seen by an intern at 4:45 p.m. and blood tests were done. He was fed at 6:30 p.m. and at 7:00 p.m. he was given insulin and an electrolyte drip by intravenous needle ("I.V."). He stayed overnight on a bed in the hall just outside the main nursing station with the I.V. drip in his arm and was seen by a doctor at 7:15 a.m. At 8:20 a.m. he was given Novalin insulin and was noted as being angry about being in the Hospital and complaining about the food. He was interviewed by a social worker at 11:00 a.m. and a diabetes educator at about 2:45 p.m. He was given vials of insulin and discharged by Dr. D. at 3:00 p.m. on December 30.

[7] On December 31, 1998 at 8:30 p.m. Mr. Diggs was brought to the Hospital by ambulance. He complained of feeling weak and having trouble breathing. He was put on an I.V. drip at 8:40 p.m. and seen by a doctor at 9:05 p.m. He was given insulin at 9:30 p.m., seen by a doctor again at 10:30 p.m. Mr. Diggs was angry that he was going to be sent to a shelter and said he just wanted to sleep. He was reassessed by a doctor, given a stretcher near the nursing station, the I.V. drip was continued and he slept. At 6:30 a.m. he refused to go to a hostel. He is noted as having said, "I want an exam of my heart and stomach. I have frost around my heart". He denied having chest pain. At 7:00 a.m. he was still waiting to be reassessed.

[8] The ER "charge" nurse, Mr. M.N., came on duty at 7:30 a.m. He was told by the night nurse that Mr. Diggs had been discharged although there was nothing signed by doctor. It was not uncommon that a doctor's instructions were given orally. Mr. Diggs complained to Mr. M.N. of the treatment he was receiving at the Hospital.

[9] Mr. M.N. asked Mr. Diggs several times to get dressed and leave. Mr. Diggs did not. He was provided with a breakfast at 9:30 a.m. and persuaded to put on some clothes. He was then persuaded to move to the waiting room. He resisted further requests by Mr. M.N. to leave and became obnoxious and profane.

[10] Shortly before 11 a.m., Mr. M.N. telephoned Century for assistance. A security officer employed by Century ("Mr. S.O."), patrolling elsewhere in the Hospital, was dispatched by radio to the ER. Mr. S.O. was advised by Mr. M.N. that Mr. Diggs had

been discharged and had refused several requests to leave the Hospital. Mr. M.N. asked Mr. S.O. to remove Mr. Diggs from the Hospital. At that time Mr. Diggs was sitting in the ER waiting room in his insulated coveralls which zippered from ankle to neck.

[11] Mr. S.O. has been a licensed security guard since 1990 and has been employed by Century in hospitals since 1996. He has taken an accredited course in hospital security and other courses in non-violent crisis intervention and related issues. His shift on January 1, 1999 started at 6:30 a.m. and he was scheduled to work until 4 p.m. The only other security officers on duty that day were two female security officers. Mr. S.O. had experience in confronting patients who were reluctant to leave.

[12] Mr. S.O. was wearing a uniform which identified him as a security guard. There were other people in the area - patients and staff. Mr. S.O. asked Mr. Diggs to leave. Mr. Diggs was abusive and refused. Mr. S.O. told Mr. Diggs that if he did not leave within a few minutes he would be escorted out physically. Mr. Diggs refused to leave and slumped to the floor. Mr. S.O. again told him to leave and left to get some latex gloves, saying he would return in a few minutes. On his return Mr. Diggs was still on the floor.

[13] Mr. Diggs is over 6 ft. tall and weighs about 200 lbs. Mr. S.O. grabbed Mr. Diggs' coveralls from behind and pulled him across the tile floor to a point in the hall in front of the inner set of sliding glass entrance doors. Mr. Diggs said he would walk. He stood up and started flailing his arms at Mr. S.O. Mr. S.O. took hold of Mr. Diggs' right shoulder with his right hand, and his left hand held Mr. Diggs' left arm behind his back. Mr. Diggs was marched through the inner and outer sliding doors, turned left and let go at the sidewalk on University Avenue. Mr. Diggs threw pop cans and dirt at Mr. S.O. as the latter returned to the ER entrance.

[14] The area where Mr. Diggs stood up is beside the glass-doored counter of the ER registration office and within 30 feet of the main nursing station.

[15] Mr. S.O. testified that he had never seen Mr. Diggs before this incident and has not seen him since.

[16] The emergency department staff on duty at the time of these events consisted of:

(a) Day shift (7:30 a.m. to 7:30 p.m.)

1 or 2 doctors

8 nurses including a triage nurse and one nurse dealing with treatment of up to 60 ambulatory patients a day, and the others dealing with 20 or so bedridden patients and all of whom were regularly in and out of the main nursing station

2 reception clerks, one of whom was always on duty in the reception office which had a window onto the entrance foyer and was open to the waiting room

2 or 3 cleaners and porters

(b) Night shift

6 nurses, a cleaner and 1 or 2 doctors

In addition to staff, there were some patients in the halls and ambulatory patients being treated or sitting in the waiting room. The entrance to the emergency department and the halls outside the main nursing station were well lit, high traffic areas.

[17] On January 27, 1999 at about 11:30 a.m., Mr. Diggs created a disturbance at the Hospital and, using abusive language, demanded to see the head of the Hospital. He was taken to an interview room where he complained of a beating by a security guard on January 1, 1999. He completed a complaint form. A copy was given to the Hospital's patient relations facilitator who gave copies to the Century supervisor at the Hospital, Mr. S.S., and the president of Century.

[18] On February 3, 1999, Mr. Diggs returned to the Hospital and spoke to the patient relations office. Mr. Diggs was told that his complaints were passed on to Mr. S.S. and that the Hospital was sorry. Mr. Diggs was unhappy and said he wanted the security guard disciplined. He said he would take matters into his own hands. He was referred to the president of Century.

[19] On February 18, 1999, Mr. Diggs reappeared at the Hospital using abusive language. Mr. S.S. was on duty that day and was asked to escort Mr. Diggs off the property. While doing so Mr. Diggs continued to curse and threaten. Mr. Diggs then removed a denture plate with four false teeth, being the upper front teeth, and challenged Mr. S.S. to a fight. The challenge was declined.

THE PLEADINGS AND CASE HISTORY

[20] Mr. Diggs commenced this action by a Statement of Claim dated May 12, 1999. In it he claimed damages for \$5,000,000 for an alleged assault by the security guard when he was dragged along the floor and pushed against the wall, suffering a chipped tooth and a "spanged" neck. He also complained that a Dr. D. at the Hospital discharged him before it was prudent to do so. He then had to be readmitted to the Hospital. While there, his I.V. flow got clogged and was yanked out in a rude fashion leaving a bruised vein in his left arm.

[21] On June 29, 1999, a Fresh Statement of Claim was filed. The damages claimed were reduced to \$2,000,000. Mr. Diggs complained of being treated as a second class patient. He again complained of the clogged I.V. and the bruised vein in his left hand, and

of Dr. D. discharging him too soon. He also complained of the assault by a security guard on January 1, 1999 and the chipped tooth and "spanged" neck while being escorted out of the Hospital, resulting in long term pain in the upper body that causes problems with his circulation.

[22] On April 25, 2000, Mr. Diggs filed an Amended Fresh Statement of Claim which added the following:

- a) The plaintiff was touched on the testicles by a male nurse who had instructed the security guard to eject him;
- b) An intention to add the Solicitor General as a defendant because it issued a license to Century;
- c) All of the major hospitals will be notified of Century's behavior;
- d) "The police is the close friend of [Century] because of the assault caused by a security guard on a black man. Records show the dislike of black males (especially Rastas) by the Metro Police Department. Therefore it is my request to have the Human Rights Commission involved in this case. Also the plaintiff was called nigger by the guard and the nurse on 01/01/99 while the plaintiff was getting dress in the waiting area"; and
- e) "The plaintiff was reluctant to mention the sexual assault because of the nature of the situation. The nurse asked the plaintiff to come live with him because the plaintiff was homeless at the time. After the plaintiff turned the nurse's offer down, the nurse seemed to have been upset and disappointed at the plaintiff's rejecting his proposal. [The] nurse ... and security guard ... are both responsible for my injury even though it was the guard who injured my neck. While serving on Mount Sinai, I was threatened by [Mr. S.S.] of [Century]."

[23] Discoveries were held in late June, 2000.

[24] The trial date was originally set for June 21, 2001.

[25] On July 11, 2000, on a motion by the Hospital for partial summary judgment, the plaintiff's claims for medical malpractice were dismissed. Mr. Diggs appealed the decision.

[26] On December 19, 2001, a new trial date was set for June 17, 2002.

[27] On March 8, 2002, Mr. Diggs' appeal of the partial summary judgment order was dismissed.

[28] Another settlement conference was held on April 17, 2002.

[29] On May 21, 2002, Mr. Diggs attempted to add Dr. D. and another doctor as defendants. The Master dismissed the motion to add the other doctor. An order for substituted service was given respecting Dr. D. and the motion to add Dr. D. was adjourned. Costs were left to the trial judge.

[30] On May 27, 2002, Mr. Diggs sought a further adjournment of trial to enable him to add an allegation of sexual assault against Dr. D. The request was denied.

[31] On June 17, 2002, the trial was adjourned to October 15, 2002 by reason of defence counsel's involvement in another case. Costs were left to the trial judge.

TRIAL

[32] At the opening of trial, in my effort to clearly define the issues, Mr. Diggs stated the assaults as:

- a) In the early morning of December 30, 1998, while Mr. Diggs was lying on a stretcher on his side, he was given a sleeping potion and touched on the testicles by Mr. M.N. and, for the first time in these proceedings alleged that:
 - i) he had been sodomized by Mr. M.N.;
 - ii) Dr. D. had put his penis in Mr. Diggs' mouth.
- b) During the ejection from the Hospital at about 11:30 a.m. on January 1, 1999, while in the vestibule between the inner and outer sliding doors at the entrance to the Hospital's ER, Mr. Diggs was kneeling and Mr. S.O. held his head down and twisted his neck while keeping people away from the area. Another guard stood at the outer sliding door and a second security guard, Mr. S.S., and Mr. M.N. pulled Mr. Diggs' coveralls to his ankles, pulled down his pants and underpants, and in turn, sodomized Mr. Diggs.

[33] In his opening statement to me, Mr. Diggs said he was sexually assaulted by Dr. D. on the night of December 28 and by Mr. M.N. early in the morning on January 1 and again by Mr. M.N. and a security guard on being ejected. He said that on all occasions he was injected with a date rape drug. He then complained that he was a victim of discrimination and that "no white judge would ever believe a nigger over a white man". He said he was a Rastafarian. He raised his voice and became passionate on the issue of discrimination. He complained of the rapes of children by priests. Based on his opening comments, he is clearly homophobic and paranoid about racial discrimination.

[34] In his evidence, Mr. Diggs complained of having been given a sleeping potion on the night of December 29. When he woke up, Dr. D. had his penis in Mr. Diggs' face and then in his mouth. Mr. Diggs said Mr. M.N. had offered to have him come home to his apartment and sleep in his bed with him, which Mr. Diggs refused, saying he was not

gay. He said that when Mr. M.N. checked his I.V. bag, Mr. M.N. put a sleeping potion in it and when Mr. Diggs was sleeping Mr. M.N. sodomized him, putting his penis in Mr. Diggs' rectum. He said Mr. M.N. also felt his "privates".

[35] Mr. Diggs testified that on the morning of December 30, when he complained of pain, he was dragged off his bed by Mr. S.O. while the I.V. was still in his arm. He says the senior nurse on duty told Mr. S.O. to stop.

[36] Mr. Diggs testified that when Mr. S.O. came up to him in the waiting room on the morning of January 1, Mr. S.O. called him a bum, nigger and asshole and said no one would believe him over a white man. He testified that when Mr. S.O. dragged him across the floor, 10 or 12 people were watching. He said after Mr. S.O. marched him out to the sidewalk he returned to ask where he could lodge a complaint. Mr. Diggs said Mr. S.O. threw him on the floor of the foyer between the sliding doors with his knee in the back of Mr. Diggs' neck and twisted his neck. He testified that Mr. S.O. snapped his skull off his backbone.

[37] Mr. Diggs testified that while he was down on his knees Mr. M.N. and another security guard, Mr. S.S., pulled his coveralls off his shoulders and arms down to his ankles and pulled down his pants and underpants and sodomized him. They held a hand over his mouth so he could not yell. After that, they took Mr. Diggs outside and injected him with some date rape solution and some sleeping solution.

[38] Mr. Diggs said a doctor came out to check on him and he reset Mr. Diggs' neck. He said they then put him in the security office off the entry vestibule to "sleep it off". He then went over to the Toronto General Hospital ER and slept in the lobby. He did not seek medical treatment there. He later said Toronto General refused him treatment. He said he spent that night in Seton House on George Street.

[39] He saw his doctor two or three days later for whiplash and tried to treat himself with natural herbs. He said he took physiotherapy for three months.

[40] Mr. Diggs saw another doctor in Toronto General Hospital in early March who prescribed some pills, but his neck was getting better by then.

[41] Mr. Diggs said he complained to the police in March or April 1999, but they did nothing.

[42] The defendants and their witnesses denied all Mr. Diggs' allegations of improper conduct.

[43] Aside from Mr. Diggs' evidence there is not one scintilla of testimony or other evidence to corroborate any allegation of impropriety against Mr. Diggs, be it assault beyond what was reasonably necessary, sexual assault, injection of sleeping or date rape drugs or other misconduct. He produced no evidence of the injuries caused by the alleged twisting of his neck or of a chipped tooth.

[44] The transcript of the discovery on June 26, 2000 indicates that Mr. Diggs alleged at that time he was sodomized by Mr. M.N. and Mr. S.S. when he was first being ejected from the Hospital on January 1. At trial, he testified that the sexual assault occurred after he re-entered the Hospital and was being ejected a second time.

[45] Counsel for the Hospital acknowledges that she was aware some months prior to the trial of the allegations against Dr. D. She was not aware of the alleged sodomy by Mr. M.N. on December 29 prior to the opening of trial.

[46] The accusation by Mr. Diggs that he was dragged off his bed by Mr. S.O. on the early morning of December 30 when still hooked up to an I.V. was never pleaded and was first raised in his testimony before me.

FINDINGS

[47] The administrative and nursing staff of the Hospital who testified before me, including Dr. D. and Mr. M.N., and Mr. S.O. and Mr. S.S., the security guards, were impressive witnesses. They impressed me as honest, fair, professional and thoughtful people dedicated to the interests of the Hospital's patients. The frailties of their memories and inconsistencies in their evidence were consistent with the passage of 3½ years and were minor. None recalled any commotion or use of force against Mr. Diggs except Mr. M.N. and Mr. S.O. respecting the ejection of Mr. Diggs on January 1. None of them gave me any reasons to doubt the credibility and denials of any misconduct of Dr. D., Mr. M.N., Mr. S.O. and Mr. S.S. Their evidence was supported in all material respects by those who testified, save and except Mr. Diggs.

[48] I am satisfied that had there been any abusive or unprofessional treatment of Mr. Diggs, they would have noted it on his chart or reported it to a superior at the Hospital. There is no note on Mr. Diggs' charts of any abusive treatment or of injection of any noxious drug.

[49] The schedule for the security guards showed only Mr. S.O. and two female security officers were on duty around 11 a.m. to 12 noon on January 1, 1999. One of the female security guards could recall only Mr. S.O. as being the other security guard on duty. Mr. S.S. was not scheduled for duty and testified he was at his parents' home, over 100 km from Toronto, on that New Year's Day, having been at a dance the night before. He said he did not go near the Hospital on New Year's Day. It is highly improbable that there was a second male guard let alone three male guards, as alleged by Mr. Diggs, on duty at that time.

[50] Mr. Diggs testified that he did not raise the allegations of sexual assault against Mr. D. before the Spring of 2002 because:

- a) it was not until 2002 that he had recaptured his normal sense of memory which had been affected by the drugs injected into him on December 30, 1998 and again during the assault on him on leaving the Hospital on January 1, 1999; and
- b) such allegations of assault by "faggots" were very embarrassing to a man in the black community.

He indulges in the second explanation at the risk of his credibility. The first explanation is clearly preposterous.

[51] In 1999, Mr. Diggs was the plaintiff in a lawsuit against Belair Insurance Company, which had cancelled his truck insurance. The insurance company was represented by a female lawyer. In an unsworn and unsigned "affidavit" apparently intended to support a notice of motion dated ten days and served two days before the trial in May 1999, Mr. Diggs alleged that while riding a bicycle in 1983 (11 years before the events giving rise to the action) he was struck by a car driven by the lawyer who then pulled a gun on him saying she didn't like the fact she had to deal with a black man. He further suggested in the same document that when he met her again in the insurance company office in 1994 the lawyer again pulled a gun on him and uttered racial slurs at him. He then alleged in the "affidavit" that he was subject to oral sex and intercourse at gunpoint. Mr. Diggs confirmed before me in his solemnly affirmed evidence that these allegations were true.

[52] The lawyer was called as a witness. She testified that she was living in a western province in 1983 and did not come to Ontario until 1987. She firmly denied every allegation against her in the purported "affidavit". She further denied that she was at the insurance company's office. Her evidence was not shaken in the slightest on cross-examination. She further testified that Mr. Diggs was so belligerent and aggressive towards her at the discovery in the Belair case that she felt personally at risk and delisted her telephone number.

[53] During cross-examination of the lawyer, Mr. Diggs asked about the existence of blemishes on normally unexposed parts of the lawyer's body. At that point I told Mr. Diggs he was abusing the witness. There was no evidence beyond Mr. Diggs' unsigned "affidavit" that might make such a question relevant. It was clearly irrelevant to the issues in this case.

[54] Mr. Diggs' allegations against the Hospital and Century of assault, sexual assault, injection of noxious drugs and improper recording of events on charts are outrageous in every sense of the word, even if judged only by the number of assaults he now alleges, their timing, their locations, the traffic in those locations and his failure to allege them either on a timely basis to the police or in his complaints to the Hospital or in the first two versions of the Statement of Claim. The same may be said for his failure to allege the first assault by Mr. M.N. before the opening of this trial and his reasons for those delays.

[55] Mr. Diggs is resentful of and feels discriminated against by the white community. He will do anything, including defamation of character, preferably behind the protective privilege of court proceedings, to lash back at those he feels have wronged him in any way.

[56] December 30, 1998 and January 1, 1999 were cold and he wanted to remain in the warm and clean environment of the Hospital. He resented those who discharged him and who ejected him.

[57] Mr. Diggs' solemn affirmation is no hindrance to his fantastic fabrications of non-consensual sexual behaviour.

LAW

[58] The *Public Hospitals Act*, Hospital Management, R.R.O. 1990, Reg. 965, amended to O. Reg. 346/01, provides in s. 16:

(1) Where a patient is no longer in need of treatment in the hospital, the attending physician or midwife, or a member of the medical or midwifery staff designated by the physician or midwife, shall make an order that the patient be discharged and communicate the order to the patient.

(2) Where an order has been made with respect to the discharge of patient, the hospital shall discharge the patient and the patient shall leave the hospital on the date set out in the discharge order.

[59] The *Trespass to Property Act*, R.S.O. 1990, c. T.21, provides in s. 2(1):

Every person who is not acting under a right or authority conferred by law and who,

...

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence ...

[60] The *Criminal Code*, R.S.C. 1985, c. C-46, s. 41(1) provides:

Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

[61] An owner who has granted a right of entry to a person has not thereby relinquished its right to withdraw its invitation, and if a person whose invitation to enter has been withdrawn refuses to leave, he thereby becomes a trespasser and may be prosecuted: *R. v. Weitz*, [1991] O.J. No. 2827 (Gen. Div.); *R. v. Peters*, [1971] 1 O.R. 597 (C.A.); *Chopra v. T. Eaton Co.*, [1999] A.J. No. 277 (Q.B.) at para. 85.

[62] A trespasser cannot be forcibly repelled or ejected until he has been requested to leave the premises and a reasonable opportunity of doing so peaceably has been afforded him. In ejecting the trespasser, the occupier or other person with authority may use a reasonable degree of force, so long as he uses no more force than is reasonably necessary: *MacDonald v. Hees* (1974), 46 D.L.R. (3d) 720 (N.S.S.C.); *Mullins v. Levenick*, [1998] N.B.J. No. 60 (Q.B.).

[63] Mr. M.N. had been authorized by a doctor, through the advice of the nurse he was relieving, to discharge Mr. Diggs. He used progressive degrees of requests and encouragement to persuade Mr. Diggs to leave. When Mr. Diggs refused, Mr. M.N. called the security guard Mr. S.O., who asked Mr. Diggs to leave several times, warning him of the use of force if he refused. On Mr. Diggs' final refusal, Mr. S.O. used only reasonable force and no more than was reasonably necessary to eject Mr. Diggs.

Claim Dismissed

[64] Mr. Diggs has failed to satisfy the burden on him to persuade me on the balance of probabilities that he was assaulted in his ejection from the Hospital. Century has persuaded me that no more force than necessary was used in ejecting him.

Counterclaim by Century

[65] In cross-examination, Mr. Diggs acknowledged that on July 18, 2000, following discoveries in this litigation, he wrote a letter to Century's lawyer threatening to send the following letter to all hospitals in Canada (individuals' names in letter deleted):

On January 1st, 1999 while still a patient at the Mount Sinai Hospital, I got dragged [*sic*] out of my bed by a security guard that works for Century Investigation and Security Co. The same guard by the name [* *] not only dragged [*sic*] me when I was still asleep on the hospital bed but took part in a rape near the south doors of the Mount Sinai. He assisted a male nurse in the rape. Before the rape took place, the security guard called me a nigger and a fucking asshole. I was so shocked by Mr. [*]'s behavior. At this time there is a police investigation and a civil trial in the very near future in relation with the rape and with the racist remarks and acts of violence. The other violent act was that I did suffer and still feel pain to my neck due to the brutal acts by the security guard. My reason for this notification to you is to make you aware of the type of people that work for Century Investigations and Security Company. Also, it is only fair to the public that while still a patient at a hospital in which Century provides

security for be protected [sic]. It is also an awareness to any of the hospitals that do not use Century to take careful consideration before any hiring security to deal with the public. My conscience been bothering me with rather [sic] or not to notify the hospitals or not. This is no way a vexatious thing rather it's just a humanitarian gesture. Feel free to contact me if you have any questions. Thank you.

[66] Mr. Diggs also acknowledged before me in this trial that on or about August 16, 2000 he sent the following letter to the Hospital for Sick Children, Toronto General Hospital and Toronto Western Hospital:

This letter is in regards to the rape and injury caused by [* *] and a comrade of his. They work for Century Investigations and Security Company. I was raped, suffered whiplash injury, and racial and derogatory [sic] abuse. Mr. [*] acted upon the request of a male nurse that works at the Mount Sinai. There was a surveillance camera on that witnessed this crime. After they got done doing their dirty acts, they reenacted the dragging [sic] out of the hospital part of their crime. They took the original tape to protect themselves.

I am very concern [sic] about public safety. Century Investigations and Security Company is responsible for hiring unstable and dangerous people. It is my opinion that all of you be concerned about the safety of the public within your care. The security guard looks normal but it is obvious that anyone is able to fool the public and employees as well as employers. There is no way that you can tell which security guard is a stable person or not. Mr. [*] suprized [sic] me when he snaped [sic] and twisted my neck while I was getting ready to leave the hospital. I tried to leave but they held me back and told me that I was nothing and that nobody will beleave [sic] a nigger over a white man. He used other derogatory terms as well. I was forced to take a date rape pill so that I will not remember. This all happened on Jan. 1st, 1999 while I was an outpatient at the Mount Sinai Hospital. A male nurse by the name of [* *] was/is the perpetrator in this crime. I reported this crime to the police. A civil case is underway with the Ontario Supreme Court. The day this happened was the most embarrassing time in my life. I hope that all of the administrators of hospitals and nursing homes take a conscious look at who they hire to protect their residents and patients. Imagine that this be an elderly citizen or a handicap person. My biggest concern is children. It is my right as a citizen to warn you about posible [sic] danger. I would'nt [sic] put a thing pass [sic] these defendants attempt to fabricate evidence in this matter. I hope to hear from you soon, please feel free to call or write. Thank you.

I have a motion order from Judge [*] to give you notice about this situation. This is not vexatious just a humanitarian gesture.

[67] Mr. Diggs testified that he wrote the letters because he was angry and hoping for an apology and an out of court settlement. He stated that he is prepared to write more.

[68] Dr. D. and Mr. M.N., Mr. S.O. and Mr. S.S., all testified that they were never interviewed by police in respect of Mr. Diggs.

[69] I find the allegation of physical abuse, being dragged out of bed and rape by unstable employees published to a third party hospital to be libelous of a company in its business of providing security to hospitals. I have found such allegations to be false and so not entitled to a defence of justification. Further, they were done for the purpose of extorting a settlement of this lawsuit.

[70] The evidence established that after two weeks the video camera tapes were reused, taping over what was on the tape.

[71] Century produced no evidence of actual harm. General damages may be awarded at large on proof of a libel of an individual without proof of actual damage: *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 (S.C.C.) at paras. 164 to 173. A company is an artificial entity and can have no feelings and cannot be compensated by way of solatium for hurt feelings, but it does have goodwill or a business reputation. I find Mr. Diggs' conduct highhanded, spiteful, malicious and outrageous in circumstances sufficient to constitute a crime, and which are deserving of punishment. Century is entitled to awards of aggravated damages and exemplary punitive damages: *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.); *Hill* (above); *Campbell v. Cartmell*, [1999] O.J. No. 3553 (S.C.J.).

[72] I award Century general damages, as aggravated by Mr. Diggs' conduct, of \$4,000 and punitive damages of \$2,000.

SCHEDULING

[73] During the trial, I held several discussions with Mr. Diggs and counsel respecting scheduling of witnesses. On Friday, October 18, Mr. Diggs said he wanted his doctors and one of the nurses who treated him overnight on December 31-January 1 to testify. Otherwise, he said, he would be finished with his case.

[74] Ms. Clarke, for the Hospital, said the nurse would be available on Tuesday, October 22. Mr. Diggs said he was having trouble getting his doctor, and accused Ms. Clarke of turning the doctor against him. He claimed he would need help getting the doctor. I am satisfied Ms. Clarke did nothing improper in obtaining copies of the doctor's notes.

[75] I told Mr. Diggs that he should subpoena the doctor and any other witness he wanted for Tuesday, and that I would hear any witness waiting to testify on Tuesday at noon.

[76] It was agreed we would not sit Tuesday afternoon and I would hear argument on Wednesday.

[77] On Tuesday morning at 10 a.m., Ms. Clarke announced that the nurse was available to testify as Mr. Diggs' witness. Mr. Diggs said he did not want her evidence now because she would only lie like the others. Ms. Clarke did not need her testimony. I excused the nurse as a witness.

[78] Mr. Diggs said he had arranged with Dr. D.'s lawyer for Dr. D. to be present this afternoon. I said we had agreed not to sit then but I would be prepared to hear Dr. D. on Wednesday at 10 a.m. I questioned Mr. Diggs as to whether Dr. D. would help his case in view of Mr. Diggs' allegations against him. Mr. Diggs said he wanted him.

[79] Mr. Diggs then said he wanted three doctors who treated him on March 3, 1999 to testify but they would not be available until later on in the month. He asked me to adjourn the trial until early November. Defence counsel advised me that they had received no notice of the proposed evidence of these doctors and would be prejudiced by their evidence now. Mr. Diggs persisted, saying the trial was scheduled to go nine days and he was entitled to the adjournment.

[80] I denied Mr. Diggs' request. The action was started in May 1999, and his claim was amended twice. This trial date was set on June 17, 2002. Mr. Diggs has had four months to arrange for the attendance of his witnesses and I would not delay the trial further.

[81] Mr. Diggs accused me of discrimination contrary to the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, by reason of his colour and his handicap of a slight stutter. He said this was only the fifth day of a trial scheduled for nine days. He said he was on welfare, receiving \$516 a month and could not afford subpoenas. He also said he had the disadvantage of representing himself because he could not afford a lawyer.

[82] I assured Mr. Diggs I was not discriminating against him. I advised him that everyone had to follow the same rules and that I had given him liberties that I would not have given to a lawyer representing him. A case has to be ready on the date set for trial and cannot be adjourned because a party failed to prepare. Adjournments create havoc with the trial scheduling system and the schedules of all involved.

COSTS

[83] The Hospital has presented a bill of costs straddling January 1, 2002 on a solicitor-client basis and substantial indemnity basis totalling \$44,485 in fees, \$4,621.22 in disbursements plus GST to the eve of the last day of trial. Ms. Clarke was called in 1999.

[84] Century seeks fees of \$36,150 plus six days of trial on a solicitor-client substantial indemnity basis plus disbursements of \$1,918.91 plus GST. Mr. Kohm has been practicing for over 28 years.

[85] The circumstances clearly warrant costs on a substantial indemnity basis. There were 12 motions plus discoveries over two days, mediation and settlement conferences, and attendances to schedule trial.

[86] I recognize Mr. Diggs is impecunious and costs are probably not recoverable.

[87] I fix the Hospital's costs at \$40,000 plus GST and Century's costs at \$45,000 plus GST.

[88] I want to complement both counsel and their clients for their cooperative and professional conduct in this trial in difficult circumstances. The Hospital arranged for all staff still employed by it to testify if requested by the plaintiff. Counsel were most understanding of the plaintiff's difficulties. Their efforts greatly aided the work of the court, for which I thank them.

COMMENT

[89] During cross-examination of several witnesses brought forward by Mr. Diggs, but produced for him by the defendants, Mr. Diggs suggested their evidence was perjured. After they had testified he threatened to sue them for perjury. I found no reason to support any such allegations but I am concerned he may carry through with his threat in view of his allegations in this and other suits in which he has been involved.

FORMAL ORDER

[90] The defendants need not obtain the plaintiff's approval of the formal judgment.

CAMERON J.

Released: November 6, 2002