

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. A42/79

BETWEEN	Joseph Andrews	Plaintiff
A N D	Attorney General	Defendant

J.W. Kirlew Q.C. and A. Gillman instructed M. Morrison for plaintiff

Glen Brown for Attorney General

Heard: 11th December, 1981

Delivered:

Judgment

McKain J:

The plaintiff's claim is for assault/or negligence against the Attorney General under the Crown Proceedings Act and reads as under:

Paragraph 3

"On the 23rd April, 1978 at about 11.30 a.m. the plaintiff was on Bread Lane in the parish of Kingston standing by his bicycle selling ice cream when a motor vehicle entered Bread Lane was parked and the driver ran away. A jeep marked "POLICE" then stopped at the corner of Charles Street and Bread Lane and a number of policemen members of the Jamaica Constabulary Force came from the jeep and started firing and as a consequence the plaintiff was hit by a bullet."

The police continued running along Bread Lane and firing and then ran across North Street.

Paragraph 4

"As a consequence of his injury the plaintiff suffered pain and loss, was hospitalized and incurred medical and other expenses."

Paragraph 5

"The injury to the plaintiff was caused negligently and maliciously without reasonable or probable cause."

The particulars of negligence detailed:

- (a) The policemen discharged their firearms without aiming at any particular person.
- (b) The policemen discharged their firearm on Bread Lane without regard for persons on their lawful business on the said Bread Lane.

Paragraph 6 of the defendant's defence was that, if the plaintiff suffered any injuries, such injuries was cause (sic) or contributed to solely by the negligence of the plaintiff in:

- (a) Failing to take cover or other evasive action.
- (b) Failing to keep any proper lookout or to heed the presence and movement of the gunman firing from Fiat Motorcar FR 2207.

Plaintiff's Case

The plaintiff an ice cream vendor was on the 23rd April about 10.30 a.m. selling ice cream on Bread Lane near the corner of Bread Lane and Charles Street. He heard and saw a white car with one man in it come quickly along Charles Street and make the corner into Bread Lane. The car made a slow movement as if to stop and before it stopped a man ran out leaving the car empty with its engine running. The man ran in front of an empty garbage truck parked on Bread Lane on opposite side road to the plaintiff and facing south. The man ran to the right side of the truck between a fence and the truck, then to the back of the truck, and he did not see where the man turned after that. The man was empty handed. The man did not fire a gun from the car or at all.

The car meanwhile, unattended, ran into the cycle, hit it, went into the sidewalk and "make a full stop." His cycle was fastened on the sidewalk by the car.

He was busy trying to extricate the cycle when he heard a sudden stop at the intersection of Charles Street and Bread Lane. Without turning fully around he looked around and saw that a police jeep had come up, also the wrong way from west on Charles Street and to quote the plaintiff, "Before police jump out of jeep they open fire to the direction of the car. I got shot in my right side and I fell on ground."

The jeep then stopped at the corner and except for the driver all the policemen came out and ran up Bread Lane, firing guns in the same direction the car driver had run. The driver of the jeep then drove it round the corner and on to Bread Lane and parked.

Citizens who had converged on the scene took up the plaintiff and put him in a brown car and he was taken, bleeding from his side to the G.P.H. where he remained four days.

The plaintiff called one eyewitness, Ray Nolan, who described himself as a Cabinet Maker living in Tivoli Gardens.

He said on that day he was standing on the piazza at the corner of Bread Lane and Charles Street on the side of the road where the garbage truck was parked. Four men including himself were there speaking and the plaintiff's ice cream cycle was parked on the opposite side of the road. He noticed a car coming west to east along Charles Street. The car turned up Bread Lane, and as it did so hit the plaintiff's bicycle. A man got out of the car, ran before the garbage truck, round its front and up the lane and about one chain away he turned on the left hand side of the road and went through an abandoned lot. Shortly after a land rover came along Charles Street west to east, stopped at the corner of Bread Lane and Charles Street. Shots were fired from the jeep. "Then the police came out of the jeep ran up Bread Lane where couple more shots were fired to Bread Lane and North Street corner."

Witness said he had seen the ice cream vendor drop to the ground and crying when the police came and shots were fired. By that time "the man had gone his ways when the jeep came." The man had nothing in his hand, nor did he fire any shots. He saw the man's two empty hands. The man passed near before him.

The witness further said he had been standing there even before the garbage truck came and parked. It was not taking garbage but the driver lived somewhere there and usually parked at that point.

Because of the way the truck was parked in the road and the way the plaintiff's cycle was parked driving passage up Bread Lane was difficult so when the cream car came along and turned the corner it could not make it up the road and it bounced the cycle. He said when the cycle was hit the police was not there yet. He insisted on cross-examination that about two shots were fired from the jeep before the policemen jumped out of it and that after those shots the police ran up Bread Lane still firing, but by then the plaintiff had already been injured.

He said the driver of the jeep never came out of it. The road was blocked, so the plaintiff's cycle was drawn away by citizens and the jeep was driven up Bread Lane by the driver, about two minutes after the men from it had run up Bread Lane firing.

The windscreen of the car was shot out at the time of the shooting by the police.

Defendant's Case

The sole witness called for the defence, Acting Corporal Morris, said he was the driver of the police jeep that day. He was on patrol with four other policemen in the jeep when they got a message and went to

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Tivoli Gardens where they saw a Fiat parked along Hugh Shearer Highway. He drove behind it and stopped and was about to alight when the driver of the car looked in his direction and drove off, alone in the car. They pursued the car along Bustanante Highway where the car driver fired two shots at the jeep. Shots were returned from the jeep.

The chase continued along Charles Street and into Bread Lane, the jeep about 1 - 1½ chains behind the car. He saw the car stop at Bread Lane and turn on the lane, a man jumped from it, pointed a gun in direction of jeep and fired two shots. The man ran round a garbage truck parked there. Witness says he came from the jeep and while ^{they were} chasing ^{him} the fugitive fired two shots at his party. Police returned the fire. He heard several shots fired. No shots were fired from the jeep before he alighted. The fleeing man escaped in a gully.

"At the conclusion of the operation a man was taken to me and I told certain things. This man was bleeding from his right side. I did not see him when I alighted from the vehicle. When I fired I was firing at fleeing fugitive who jumped from car and fired at us." (The underlines are mine).

It is a common allegation the police sometimes make whenever a person is shot by them, that such person attacked them with knife or arms, as the case may be, thus compelling them to shoot their attacker.

The duty of the police is to apprehend wrongdoers and bring them to justice. In so doing they may kill the wrongdoer. It is the right of every man, police or civilian to defend himself from any physical attack positive or anticipated.

The nature of the offence committed by the Fiat driver was not capital it was Larceny . One thing is apparent from the story told by both

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the plaintiff and defendant, the wrongdoer was fleeing, by way of driving and by abandoning the car and running away. It is the driving away which led the police to conclude he was a felon. The offence of Larceny by the fugitive may well have not been proved.

It is not uncommon that a pursued wrongdoer can be driving and firing at an object some distance behind him with the intention at least to prevent capture. But it is highly improbable, ^{How} accurate can be his aim in such circumstances? He can be effective if he is being driven. In this case the pursuit was for some distance, at best all he could succeed in doing is firing wildly behind him. There were five armed policemen in a jeep pursuing him, and $1\frac{1}{2}$ chains behind him. Accepting that the driver of the jeep could also drive and fire his weapon he was ably supported by four unencumbered assistants and he would be firing at a target before him. Two shots were alleged fired by the fugitive, several by the police (I would say possible five at least) who are at a greater advantage, and whose greatest task was to fire at a moving target, as against the fugitive's task of seeing where he is going and seeing at what he was firing to his rear, while at the same time going great speed.

It says nothing for police marksmanship that at $1 - 1\frac{1}{2}$ chains away five of them could not disable the car of the fugitive or even hit it. Unless of course, and this is the point to consider the fugitive was much further away from them than the Corporal states and I accept that such was the situation when the car turned into Bread Lane.

The plaintiff and his witness are both emphatic on the point that when the car came up, the driver escaped from it even before it stopped and had disappeared from the view of any vehicle approaching the corner from west to east.

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Acting Corporal Morris says when the car turned in Bread Lane he turned behind it. He saw the car driver come out on the Lane and went as related by the plaintiff and his witness. He fired at the fleeing man. He also says that the car and garbage truck blocked entry to Bread Lane.

I accept the plaintiff's witness' evidence that he was on the scene. He says the fugitive ran towards his direction. The defendant says the fugitive ran in the direction round the front of truck to the right side road and up the Lane. At that stage he fired at fugitive. Was he then unaware of the presence of the witness and four other persons in the direction in which he says he fired? It seems to me, however poor their aim might be that five armed men, firing at one fleeing man one chain away, failed to hit him, unless of course the object of their pursuit was not in sight as the plaintiff says. I accept it as a fact and I hold that the fugitive was not in sight when the police arrived on the scene.

The plaintiff and witness state that the only guns fired were by the police.

I accept the evidence of the plaintiff and his witness on this point.

The defendant maintains that if the plaintiff says he was shot in the area he was shot by bullets fired from gun of the fleeing man. He is also positive no shots from the police hit the plaintiff. But then if I accept what he says, he did not even know any bystander was shot until after everything was over. It is difficult therefore to understand on what grounds he bases his knowledge that it was the fugitive whose gunfire would have injured the plaintiff when more than one person was firing and both sides were exchanging shots, according to him.

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He maintains he "fired at the fleeing fugitive who jumped from the car and fired at us." That fugitive by his evidence and that of the plaintiff's witness jumped out of a car which was on the left side of road facing North Street the same side on which the plaintiff was with his cycle. According to the defendant we have the front of the car hitting plaintiff's cycle. We have the fugitive come out of the front of the car, so it must follow that the front door of the car is behind and not ahead of the plaintiff. Based on the Corporal's evidence if, as he says, the fugitive jumped out and fired at the police party, then the plaintiff would be nowhere within firing range of the fugitive. But he would certainly be in firing range of the defendant's servants the policemen who were firing in his direction.

On the balance of probabilities it is more likely the shot to hit the plaintiff would more readily be coming from the direction of the police party and aimed up Bread Lane at a time when the plaintiff was positioned ahead of the party.

I accept the evidence of the plaintiff's witness that when the fugitive alighted from the car leaving its engine running, he had nothing in his hands, and in particular that he had no gun in his hand. I am satisfied that the fugitive did not hesitate once he alighted but immediately made his escape, and that this was accomplished before the police party came on the scene.

I find that the police came on the scene, saw the car and without more ~~starting~~ firing in its direction under the impression that the driver was still in it. That the jeep driver, the witness for the defence, did not come out of the car until he drove it up Bread Lane, after the other policemen had already run up Bread Lane in the general direction the

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fugitive had taken, and driving passage up the Lane was provided. I find also that the plaintiff was hit when shots were fired from the police vehicle when it came in sight of the abandoned car.

It is common ground between the three witnesses that:

- (a) The presence of the garbage truck, parked as it was obstructed the free and easy passage of any other vehicle intending to turn suddenly into Bread Lane then.
- (b) That the cycle and car had to be removed before any other vehicle, including the police jeep could proceed up Bread Lane.

Duty of Police

The duty of the police is, among other things, the apprehension of wrongdoers in the society with a view to bringing them to justice. A policeman is empowered to carry firearms and to use it when necessary both in the apprehension of a suspected wrongdoer, and in protecting himself from serious attack from any quarter.

Section 13 of the Constabulary Force Act states:

"The duty of the police under these Act shall be to keep watch by day and night, to apprehend or summon before a Justice of the Peace, persons found committing any offence or whom they may reasonably suspect of having committed any offence."

It cannot therefore be said that the police were not acting in performance of their duties given the explanation that as a result of a radio message they came upon a suspect and were pursuing him with the intention of apprehending him. The officer said the suspected offence was Larceny of a motor car. It is quite clear from all the evidence the fugitive was a fleeing felon. It is equally clear the duty of the police was to apprehend him.

Was force necessary? The answer lies in the fact of whether or not the fugitive was armed and if armed, did he present force which the police was obliged to repel with force of arms.

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It is good law that an officer may repel^{force}/with force where his authority to arrest or imprison is being resisted, and even if death should result yet this consequence would be justifiable by law.

But he ought not to proceed to extremes without reasonable necessity, and the public has to be considered if he proposes to discharge a firearm where other persons than a fugitive may be located. In the instant case, the plaintiff and his witness state, and this I accept that the fugitive was gone when the police arrived on the scene, and immediately they came they started firing.

I reject the evidence of the defendant that they were brought under gun fire by the fugitive. It would indeed be extraordinary for a fugitive turning and firing at a party of at least four pursuing police and managing to hit a standing target from which he was moving away as against the police moving towards that target, that is, in the direction of the plaintiff and firing in the meantime and not hit the target. I repeat it is no credit to police marksmanship. It is difficult to accept and I reject this suggestion.

The duty was on the police to see that in firing at the suspect, even if he had fired at them (which proposition I have already stated that I reject) they did not harm innocent bystanders.

I am of the view that a remarkable degree of negligence for the welfare of the public was exhibited that day and that the police, believing the fugitive in the moving car, fired at it and hit the plaintiff. The defence pleaded is indeed truly novel and the mind boggles at the thought of the chaos that would ensue were any law to be enacted which could support such^a/proposition. How does a man going lawfully about his own business and lawfully using what is an unencumbered highway take evasive

action or cover against an unexpected event? It is preposterous to say an ordinary person on the highway must every possible moment look about him to see if there is going to be a car coming in his direction, and indicating a fleeing gunman is driving it and will be discharging gun in his direction on alighting from the car. Every individual would be forced to remain home permanently or face the risk of deliberately exposing himself as a target for gunfire which he ought to take for granted once he leaves the safety of his house.

Here is the case of an ordinary citizen going about his task of earning his daily bread, by pushing a pedal cycle about several neighbourhoods. He has been doing so for years. No one ever brought to his notice that he should wear bullet proof vest just in case he happens to be an innocent person caught in a line of crossfire while making normal use of the highways.

Robbers he can look for, but gunmen in Fiats? No.

It could not be common sense even for a person to see a white car, any make, draw up near him and to anticipate that a man will be jumping out with blazing gun, firing at him, or even in his direction. He is entitled to assume that given the presence of such a person in his vicinity it will not necessarily mean that person is going to discharge the gun at him, and he may well decide to stand where he is, as the best possible way of avoiding gunfire instead of not knowing which way gunfire will erupt and move perhaps into the very line of firing.

Danages

Dr. Aubrey Russell treated the plaintiff after he had left hospital; sent him to Nuttall Hospital where X-Ray revealed a bullet lodged

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about $\frac{1}{2}$ centimeter to the right side of fourth lumbar vertebrae. He said he referred the plaintiff to Dr. McNeil-Smith, Consultant Surgeon, with a view to the extrication of the bullet. Dr. McNeil-Smith wrote confirming his own view which was that the bullet was in a "delicate situation" to try extrication. He said this was so because all the nerves supplying the right limb, that is, the right leg came out from the spinal cord there and in the middle of the muscle and damage to those nerves in the process of extrication of the bullet could cause paralysis of the entire limb. The doctor decided it was better not to take the risk of the operation but to let the plaintiff tolerate the presence of the bullet. He ordered physiotherapy which was merely prophylactic treatment. He was of the view that the pain complained of was caused by the presence of the bullet.

He says if the patient walks slowly it will be less painful than his riding a cycle.

He also said with the passage of time many things could occur. The bullet could move into a position more harmful to the patient and the nerves could be paralysed. If the bullet "migrated" and got into a large blood vessel it could block it. Or on an optimistic view, the bullet could migrate and stop anywhere or even pass out, but one could not predict what it would do.

This means the plaintiff will at all times be in a state of uncertainty as to the movement of the bullet.

He rides a cycle for his living selling ice cream.

He said he made \$90.00 per week on an investment of \$170.00. He also said the profit varied weekly depending on his sales but that his profit was now \$30 - \$40 per week and not less than \$30.00, as he had to cut down on his route which had been Luke Lane, Heywood Street, go by Princess Street on to Spanish Town Road to Broad Lane, North Street back

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on Spanish Town Road, up Maxfield Avenue to Ornard Road, Chesholm Avenue, back to Kencot. He worked Thursday to Sunday and depending on sale made Twenty Dollars (\$20.00) some days and \$30.00 some.

I accept those figures as a realistic result of the change in his sales schedule. I was not told the age of the plaintiff and would judge him to be a man in his early forties and allow him a multiplier of 15 years at \$35.00 per week.

For General Damages I allow him \$35.00 per week as average earning lost, with a multiplier of 15 years = \$27,300

Pain and Suffering	<u>15,000</u>
	\$42,300
Special damages were not successfully challenged and I allow plaintiff as claimed	<u>818</u>
Total	\$43,118

There will be judgment for the plaintiff in the sum of \$43,118 with cost to be agreed or taxed.

A. McKain
Judge

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