



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 03385/2007

BETWEEN DOLTON BLAIR CLAIMANT
A N D THE ATTORNEY GENERAL DEFENDANT
FOR JAMAICA

Howard Hamilton Q.C. and Rachel Dibbs instructed by Arlene Harrison Henry for the Claimant

Lisa Whyte instructed by the Director of State Proceedings for the Defendant.

Heard: 23rd, 24th, 25th April and 1st November, 2013

Tort- negligence – Assault and battery – whether police acted maliciously and/or without reasonable and probable cause when discharging firearms – Whether Claimant was shot by the police.

CORAM: JUSTICE DAVID BATTS

[1] At the commencement of this matter the parties helpfully indicated that the following were agreed and should be admitted as Exhibits. They were marked as follows:

- Exhibit 1 Medical Report of Dr. Pilgrim dated 8th March 2006
- Exhibit 2 Medical Report of Dr. Rose dated 30 May 2007
- Exhibit 3 (a) Certificate of Marcia Dunbar dated 26 May 2005 (re Envelopes A)
- (b) Certificate of Marcia Dunbar dated 26 May 2005 (Re Envelope F)
- Exhibit 4 Ballistic Certificate of Daniel Wray dated 27 June 2005

- Exhibit 5 Entries in ISCF Firearm Registry for 22 January 2005
- Exhibit 6 20 Photographs and Index to Photographs
- Exhibit 7 Bundle of receipts for Transportation
- Exhibit 8 Bundle of receipts medically related

[2] In her clear and concise opening for the Claimant Miss Dibbs stated that on the 22 January 2005 her client was conducting lawful business in the West Street Market downtown. The police were at the time carrying out duties as it related to persons vending on the sidewalk. An altercation developed with a female vendor.

“It is our case’, counsel stated, “the Claimant was shot by the police in retaliation for missiles being hurled at them from which the Claimant suffered injury and had to be hospitalized for 8 days and unable to work for a substantial period of time.”

[3] In its pleaded Defence the Crown stated that during the course of their duties the police were attacked with missiles by citizens and that during that attack,

“.. armed civilians shot directly at the police. Some of the Police personnel exchanged gunfire with these civilians in defence of their lives and those of their colleagues while taking cover. It is not admitted that any injury to the Claimant resulted from the actions of members of the police party. The Claimant must prove same.”

[4] The issues for my determination are therefore largely factual. In this regard several witnesses gave evidence. There was also scientific and expert evidence as well as the photographs to be considered. Having carefully considered the matter I have come to the conclusion that the Claimant has not proved on a balance of probabilities that she was intentionally shot by the police or that the police acted maliciously and/or without reasonable or probable cause.

I do so with heavy heart as the Claimant has been injured even though she was entirely innocent and unconcerned with the events which unfolded around her.

[5] I shall refer to the evidence called only to the extent necessary to demonstrate the reasons for my decision.

[6] The Claimant is Dolton Peaches Blair and described herself as a licensed Informal Commercial Importer (ICI). In her witness statement dated 11th October 2010 she does not allege any deliberate act by the police in relation to herself. She states that she was inside the market whilst the police activity in relation to vendors was taking place outside the market. In her words,

“I did not see Denise being removed. I did not pay attention as I knew the police were present and I expected all matters to be alright. I continued to show an item to Ms. McKenzie who is currently off the island.”

She then related seeing people running and shouting that the police were using pepper spray. She remained inside and heard 3 explosions which sounded like gunshots. She again indicates that she did not run because she “formed the view” the police were firing warning shots in the air to scare the people. It is important to quote the following paragraphs from her statement,

“19. I then heard several more shots coming from the direction where the police were at the same location.

20. I then looked outside to the gate where the police were and saw a tall dark complexion policeman with a long gun pointing towards where the people and I were inside of the market. I drew back inside behind the metal partition of my stall to take cover. I was standing. I saw other persons – buyers and sellers, children and adult throw themselves on the ground of the arcade seeking cover from gunfire from the police.

21. I heard other explosions sounding like gunshots coming from the front of the market where I saw the policeman with the long gun pointed at us in the

market and other armed policemen at the very entrance of the arcade.

22. I felt when I was hit on my right leg below the knee and blood was spraying through my pants foot.”

[7] The Claimant goes on later in her witness statement to deny that anyone fired at the police and to allege that the police,

“Opened fire in the market and at the crowd.”

It is clear to me however, that the Claimant was not in a position to say whether anyone had opened fire on the police or even whether the police fired at the crowd. This is because firstly her account as related above reveals just what she saw. Secondly her own description of the locus and the fact that her stall was covered and walled with zinc, reduced her ability to see what was happening outside the market. Thirdly, by her own admission she took no great interest in what was going on outside as it did not concern her. The sound of gunfire must have been indeed frightening and in that context she is unlikely to have been able to note many details.

[8] The Claimant stated that she saw a police officer pointing a gun and then she withdrew into her stall. She received a gunshot in her leg. This means the police were either very bad shots or the police were not aiming at her torso. The fact that no one else, in what all parties agree was a crowded market, was injured also suggests that the police were not firing into the crowd as the Claimant would have us believe. Can a court say that firing above the head of a crowd of people who are hurling missiles is reckless and without reasonable and or probable cause? I think not.

[9] Denise Crossdale was called to support the Claimants account. She it was who sparked the confrontation that day. In her witness statement, which stood as the evidence in chief, she candidly admitted to refusing to heed the police request to remove her stall. Her account ends as she was “thrown” into the back

of the police jeep. She admits to a crowd gathering and expressing support for her. She said they were pepper sprayed.

[10] This witness added no support to the Claimant's case as she was not present when any shooting took place. She however corroborates the police account of a hostile crowd present. There was a tangential issue as to whether Inspector Sawyer was present and involved in the incident. This witness supports the Claimant's account in that regard also. However as Inspector Sawyer is not a named Defendant I do not find it terribly relevant and therefore I find it unnecessary to resolve that factual divergence.

[11] The Defendant called 3 witnesses. I was impressed by their demeanour and in particular with the evidence of Special Sergeant Jennifer Dixon. She was the officer who attempted to remove Miss Denise Crossdale from atop her barrel. I accept as truthful her account that,

"Before I left the vicinity of West and Beckford Streets a crowd gathered and it mashed up the glass of the police jeep in which Denise Crossdale was being transported. Persons from the crowd used some big stones and glass bottles to do so.

[12] As with Miss Crossdale however she could not assist with the identity of those firing gunshots or the direction in which the shots were fired. She was at the Kingston Central Police Station when the shots were fired.

[13] Special Constable Dexter Spence and Commander Vivian Sawyers gave rather similar accounts. Both speak, in their witness statements, to seeing several gunmen and to being fired at by these gunmen. Both state that it was Assistant Commissioner Fletcher who interacted with the vendors and instructed them to move. They detailed the incident with Miss Crossdale and described the activity of the hostile crowd and the throwing of missiles.

[14] Special Constable Dexter Spence stated that he observed a man of dark complexion sporting a dreadlocks hairstyle dressed in blue shirt and blue jeans pants with a gun in hand running,

“From the direction of the corner of Pechon Street heading
In our direction”,

The witness says the man fired several shots in his direction and he took cover behind some stalls and fired 2 shots in the man's direction. He stated further,

“I noticed there were other gunmen in the same area as I heard loud explosions coming from different directions in this man's vicinity. I was pinned down for most of the exchange when other police personnel from enforcement came to our rescue and it was then these gunmen ran and escaped.”

[15]. Commander Vivian Sawyers stated that he had not discharged his firearms. He said when he first saw the gunmen they were running with guns and were coming from the direction of Pechon Street. They ran towards the West Street market Arcade. At para. 13 of his witness statement he says,

“13. The gunmen ran into West Street Market arcade and were discharging their firearms in the police's direction while they did so.

14. After they went into the West Street Market Arcade, the firing quelled down. The police did not continue to fire.”

[16] It is important to note whereas Spl. Cons. Spence denied having pepper spray or of being issued with pepper spray that day his superior stated he was not sure if pepper spray had been issued that day. Spl. Cons. Dexter Spence also stated that he did not anticipate trouble although the mission might involve taking up

goods and affecting people's livelihood. Commander Sawyers, who at the time was an Inspector, stated that he anticipated trouble was possible. Spl. Cons. Spence admitted that he felt provoked while the missiles were being thrown at the police. He stated that the police officers (including himself) who fired shots did not fire in a direction towards the market. He admitted no gunmen were shot and he had seen no evidence that a gunman was shot. He admitted in cross examination that he only saw one gunman and this was the man sporting dreadlocked hair. That gunman he said was going in the direction of the arcade. He explained paragraphs 9, 10 and 11 (which referred to gunmen) by saying that he had not actually seen them but from the barrage of shots he heard and the direction from which it was coming he knew there were other gunmen.

[17] There were over 20 police officers involved in the operation. Commander Sawyers stated in reexamination that he saw between 7 to 11 gunmen running across. When asked why he did not discharge his firearm, he stated,

"I think it was wise for me to go on the radio and to call for help."

When it was suggested that the reason he did not fire was because as a trained responsible officer he did not consider it safe enough to do so, the witness, after a long pause said he disagreed with the suggestion.

[18] In considering this evidence I bear in mind the dynamism of the events facing the police officers that day. Also the consistency with the Claimant's evidence as to the hostility of the crowd, the incident with one vendor and the gunshots. I was impressed by the demeanour of the police witnesses, who as I have related candidly indicated some things and particularly Spl. Sgt. Dixon who did not assert that she saw more than she did in fact see. I am satisfied that there was at least one gunman who fired at the police that day. I find that the police did return fire.

[19] The gunmen ran into the market and the police officers fired at them. It is true Spl. Cons. Spence asserts the police were firing away from the market but the question is why do so if the gunmen are running towards the market as he stated. It is more probable than not that some shots were fired in the direction of the market.

[20] I am fortified in my findings of fact by the evidence of Deputy Supt. Reginald Anthony Mowatt now retired. He gave evidence that no members of the Island Special Constabulary Force were issued Glock 9 mm pistols at the date of the incident and none were ever issued Ruger 9 mm pistols. The evidence of Mr. Don Wray the Ballistics Expert indicates that some spent shells were located on the scene which were compatible with a 9 mm Ruger and Glock [see Exhibit 4].

[21] I find as a fact that some weapons were discharged in response to the attack by the crowd, and that shots were fired by the police in defence from an attack by gunmen.

[22] My factual findings may therefore be summarized as follows:

- a. On the day in question whilst a contingent of police officers were doing "illegal vendor removal" duties, they came under attack by a hostile crowd outside the market.
- b. The Claimant was inside the market and in her stall. Her stall had zinc walls and roof. Her stall is located some 50 feet from the West Street entrance to the market.
- c. The police responded by discharging their firearms over the head of the hostile crowd.
- d. I find that in the circumstances which faced them this was not an unreasonable course of action.
- e. I find also that at least one person fired gunshots at the police. That person in the company of others ran into the market.

- f. I find that the police returned the fire, and it was reasonable for them to do so. They did not fire into the crowded market.
- g. The police were located at the West Street entrance to the arcade and when firing at the gunmen they were not firing in the Claimant's direction..
- h. I find that the Claimant was not intentionally shot by a Police Officer.
- i. I find that the conduct of the police on the day in question was reasonable and was not malicious or otherwise unlawful.
- j. I find that that the Claimant was injured by a bullet which ricocheted as she hid in her zinc stall.

[23] The question is whether as a matter of law the police were negligent or otherwise liable on the facts as I have found them. The standard of proof in these proceedings is on a balance of probabilities. On the evidence the probability is that the incident occurred as I have found. On my findings assault and battery are ruled out as there was no necessary intent. The question is whether there has been a breach of the duty of care. The claimant was within her zinc stall in a crowded market. The police firing above the heads in a crowd would not be in breach of a duty of care. When returning fire they ought to have in contemplation persons around and beyond who might be affected. **Robley v Placide (1966) 11 WIR 58** however suggests that that may not extend to anticipation that a bullet may ricochet and strike someone who was out of sight and within a zinc stall. In my judgment in the heat of the moment the police officers could not reasonably be expected to weigh all that in the balance when they returned fire at the fleeing gunman. I do not think it can be said the police acted maliciously and/or without reasonable and probable cause on the day in question. See also **Namishy Clarke v AG HCV 00031/2007** per Evan Brown J. (Ag.) (as he then was) judgment delivered 11th December 2009.

[24] I will indicate the damages I would otherwise have awarded. I do this so that in the event there is an appeal and it is successful the Claimant need not have to repeat either the process of a trial or go to an assessment.

[25] The Claimant's injury is summarized in a report dated 8th March 2006 (Exhibit 1) from the South East Regional Health Authority. She sustained a gunshot injury to her right leg. This resulted in a fracture to middle 1/3 fibula and anterior tibial injury. Dr. Christopher Rose in a report dated 30th November 2007 (Exhibit 12) says the Claimant presented with a swelling of right leg, intermittent pains to right knee and muscle contraction especially at nights. His diagnosis was gunshot wound with post traumatic lymphoedema. This latter condition is transient. He said x-rays revealed bullet fragments. He assessed her whole person permanent impairment at 4% which is in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment 5th edition.

[26] With respect to the authorities on pain suffering and loss of amenities which have been cited, I find the following most relevant: ***Yvonne McKenzie v Marcia South HCV 2007/1499 Khan Vol. 6*** and ***Hyde v AG 1998 CL H055 Khan Vol. 6***. I would have assessed damages for Pain Suffering and Loss of Amenities at \$3 million.

[27] As regards Special Damages there has, as is to be expected given the nature of her employment, been insufficient documentary support for the claim. On the evidence and doing the best that one can in terms of assessing the loss, I would have awarded:

a)	Cost of medical reports	\$ 14,000.00
b)	Cost of medical treatment	\$ 35,250.00
c)	Loss of income	\$100,000.00
d)	Cost of Transport to obtain treatment	\$ 40,000.00

[28] In the result however there is judgment for the Defendant against the Claimant with costs to be taxed if not agreed. The facts and circumstances of this case are such that I would urge the relevant authorities to consider an ex gratia payment to this innocent Claimant.

A handwritten signature in black ink, appearing to read "David Batts". The signature is cursive and somewhat stylized, with a large initial "D" and a prominent flourish at the end.

David Batts
Puisne Judge

