

IN THE SUPREME COURT OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007/HCV-00031

BETWEEN	NAMISHY CLARKE	CLAIMANT
AND	THE ATTORNEY - GENERAL	DEFENDANT

Trespass to the person - negligence - unintentional infliction of injury - self - defence - duties of a constable.

It has long been the law that where it is necessary for constables to meet force with force of arms, they may do so without weighing to a nicety the exact measure of their necessary defensive action, but they must do so without acting wantonly or recklessly. If they so conduct themselves, they ought not to be held tortiously liable for any resultant injury to innocent bystanders.

Mr. Sayon Hanson instructed by Williams and Young for claimant.

Miss Lisa White and Miss Carole Barnaby instructed by the Director of State Proceedings for the defendant.

HEARD: 30TH November, 2009; 1ST & 11TH December, 2009

Coram: Evan J. Brown, J. (Ag.)

1. The claimant's case is yet another of those unfortunate instances in which hapless bystanders are injured by gunshot in circumstances which have become all too pervading and ubiquitous, the spawn of that grotesque, ghastly gargantuan monster, violent crime. It moves across the 4,400 square miles of

this fair isle like a juggernaut, sometimes insidiously, but more often hurtling with ever increasing audacity to the terrorization of citizens and sending seismic shocks to the very foundations of peace, order and good governance. In its wake are persons such as the claimant, bearing the marks of the consequences in her body. Marks so deeply scarred that they threaten to drain the soul of even the stoic of pathos.

2. At about 5:45 a.m. on the 23rd January, 2006 at 2c Renford Road in the parish of Saint Andrew, colloquially called Dusty Path, the claimant sustained a gunshot injury to her left leg. This resulted in comminuted and grade 3b open fractures of the left fibia and fibula. The former is shinbone, the larger of the two long bones in the lower leg running from the knee to the ankle. The fibula is the other thinner bone in the lower leg. In consequence of that injury, she underwent four or five operations with another to endure sometime after the trial. In court she walked with an obvious limp from a conspicuous shortening of the leg. At twenty-five (25) years old, this nubile bartender has thereby suffered irrevocable diminished matrimonial prospects. The fact of having been shot finds harmony on the evidence but by whose hand was the subject of much discord. The claimant said it was a police constable. The constables refuted this, saying they were shooting at gunmen who engaged them with force of arms.

3. In the particulars of claim, it is alleged, *inter alia*, that:

On the 23rd day of January, 2006 at Renford Road in the parish of St. Andrew, a Police Constable, a servant and/or agent of the Crown wrongfully, falsely,

maliciously and without reasonable or probable cause, assault and beat the claimant by shooting her.

Alternatively, the police was negligent in his use of a firearm, as a result of which the claimant was shot.

In consequence thereof the claimant sustained injuries, suffered loss and damage and incurred expenses.

4. In support of her claim, the claimant testified that she had gone to 'Dusty Path' from a nearby yard where she was staying. She was throwing up when she "heard three shots and I pitched and dropped". In her witness statement she contended that she started to scream. She looked towards the gully and saw a police car. A policeman was stooping behind the open car door. That policeman ran towards her, with others in tow, after she screamed.

5. Reaching to her he threw "the gun over his shoulder", stooped beside her and asked "you no see the boy whey run pass you?" To that she responded, "Which boy. No boy no run pass me, a me alone stand up a drink me tea and a vomit, see the vomit they". When he stooped, she recognized him a 'Froggy', whom she had 'met' three nights earlier at the bar at which she worked. He was there in the company of friends. Recognizing him, she addressed him thus, "Froggy a really you shoot me." That evinced no direct response from the constable. In 2008, the policeman who shot her enquired of her about her foot and commented that she "was in the wrong place at the wrong time". She never identified any of the policemen called as 'Froggy'.

6. In cross examination, the claimant was as slippery as an eel. In vain she tried to maintain that she saw who shot her while admitting that she was injured while vomiting with her head down. She vacillated on the point. She asserted that when she heard the shots she saw who was shooting. However, she had to back pedal when confronted with her witness statement. She confessed that it was a mistake when she said the officer who shot her saw her in 2008 and said she was in the wrong place at the wrong time.

7. Both witnesses called by the defendant asserted that they were the first of a number of officers who went to the scene in response to information from police control that armed bandits were robbing motorists at the vicinity of East and Renford Roads. Upon their arrival, they saw four robbers; three armed with handguns and the fourth a rifle. The gunmen opened fire at them while running towards 'Dusty Path'. Two of the men actually ran onto 'Dusty Path'. They took cover and traded shots with the men. Both asserted that they saw no one but the marauders at the material time. Both denied being called 'Froggy'.

8. Under cross examination, Corporal Headley, the first of the two defence witnesses, said he fired at 'Dusty Path' although he was aware that people lived there. While saying he didn't exactly fire at a target, he disagreed he was firing wildly. He said he fired two rounds on single action from his M16 rifle. He eventually said he fired at the men who were firing at him. Although it was suggested to Corporal Headley and the other witness that there was no shoot-out that morning, neither was discredited on the point.

The Law and Reasoning

9. Much dust has settled since it was established that:

An action for trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part (**Robley v. Placide** (1966) 11 WIR 58, 59).

10. The first issue to be decided is whether the defendant's servants or agents, while acting as such, intentionally shot the claimant. A necessary prelude to that inquiry is, the question, by whom was the claimant injured? There was no forensic evidence before the court. Notwithstanding the fact that the medical evidence disclosed no exit wound, it is unknown whether the bullet remains an alien article in the body of the claimant to be interred with her bones or was extracted for ballistics comparison with the firearms of the constables. So, the preliminary question of who shot the claimant cannot be answered with any help from science.

11. Resort must therefore be had to an analysis of the attendant circumstances giving rise to her injury. The claimant was in the general area to which the assailants ran. The criminals were firing at the police who were some distance away. On the other hand, the police were firing at their attackers and therefore in the general direction of the claimant. In my judgment, it is therefore more probable than not that the bullet which found its mark in the

claimant's leg was discharged from a firearm being carried by one of the constables. Was it then that she was shot intentionally?

12. The claimant tried desperately to maintain that she was shot intentionally. She even opined in her witness statement that she may have been mistaken for a man, by reason of her dress and hairstyle. However, she was thoroughly discredited on the point during cross examination. The existing physical conditions did not assist her either. There was a meeting of the minds that 'Dusty Path' was dark at the time. Therefore, without stupendous optical ability, it would have been virtually impossible to see the claimant on 'Dusty Path' before entering thereon.

13. Since it was not possible to see the claimant before going on to 'Dusty Path', it begs the question, what were the constables firing at if the alleged marauders were phantoms? It would be an exceedingly strained view to take of the evidence, to say they went there, saw no one on the road nor on 'Dusty Path' and just decided to discharge a few rounds for the fun of it. Be it remembered that these two constables were not the only ones to have arrived on the scene. Even without the presence of the other officers, I have no difficulty in finding as a fact that there were armed robbers present that morning who engaged the constables in a gun battle.

14. Now, the evidence is that the constables saw no one but the gunmen; neither could they have, when they returned the fire. The accepted evidence is that they discharged their weapons at fleeing felons. The claimant was found

suffering from the gunshot injury after the shooting subsided. It was at that time they became aware of her. *Ergo*, it is tolerably clear that the injury to the claimant, although the direct consequence of the act of one or the other of the defendant's servants or agents, was caused unintentionally.

15. According to Lord Denning M.R. in **Letang v. Cooper** [1965] 1 QB 232 at page 239:

If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you please to describe it, in trespass to the person. If he does not inflict injury intentionally, but unintentionally, the plaintiff has no cause of action in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care.

So, finding as I have that the injury was unintentionally inflicted, the claimant's cause of action for assault and battery fails. Attention is now adverted to the question of negligence.

16. An instructive starting point is the much venerated definition of negligence expressed by the venerable Alderson B. in the case **Blythe v. Birmingham Water Works Co.** (1856) 11 Ex. 781, 784:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

17. Learned Counsel for the claimant relied on the dicta of McKain, J. in **Andrews v. The Attorney - General of Jamaica** (1981) 18 JLR 434, in urging

the court to find that the injury resulted from the negligent discharge of the firearms of the servants or agents of the defendant. For her part, learned lead counsel for the defendant submitted, among other things, "that as a matter of public policy, the police are immune from actions for negligence in respect of their activities in the suppression of crime". For that statement of principle, she relied on **Hill v. Chief Constable of West Yorkshire** [1988] 2 WLR 1049 and **Hyacinth Lawrence v. Constable Richard Davis & The Attorney - General of Jamaica** CL 1996 L 00103.

18. Accepting as I have, that the circumstances of the injury were as described by the constables, two conclusions flow therefrom inexorably. First, the constables discharged their firearms, as submitted by learned lead counsel for the defendant, while attempting to suppress a crime. That finds expression in the list of their statutory duties under section 13 of the Constabulary Force Act. In so far as s pertinent, section 13 says:

The duties of the police ... shall be [to] keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence, or who may be charged with having committed any offence ...

It is trite that in seeking to discharge those duties, the police may meet force with force. The constables may use such force as is reasonable in the circumstances in the prevention of a crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders (Archbold, 1998 paragraphs 19-39).

19. Secondly, the constables were acting in defence of themselves and defence of each other. The constables were confronted by heavily armed gun-toting marauders who displayed homicidal intention, or at least the intention to inflict serious bodily harm. That situation required quick and equal response. As was said in **Sigismund Palmer v. The Queen** [1971] AC 814, 831:

If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction.

In those circumstances, "it will be recognized that a person defending himself cannot weight to a nicety the exact measure of his necessary defensive action" (**Palmer**, supra, at page 832).

20. The standard of care required of the constables is that which was "reasonably demanded in the circumstances" (Asquith, LJ in **Dabora v. Bath Tramways Ltd.** [1946] 2 All ER 333,336). Since the constables were unaware of her presence on 'Dusty Path', how could they have had her in their contemplation, if time for contemplation they had? The constables cannot be said to be in breach of their duty of care in these circumstances. The law was applied in like fashion on facts quite similar to the instant case, in **Alexander Byfield v. The Attorney - General of Jamaica** (1980) 17 JLR 243.

21. It is convenient at this stage to examine **Andrews**, upon which learned counsel for the claimant placed considerable reliance. The facts of **Andrews** are glaringly distinguishable from the claimant's. The claimant in that case was shot

on the public road in circumstances in which it was alleged that the police were pursuing a felon who had taken flight at about 11:30 a.m. McKain, J found as a fact that the fugitive was no longer in sight upon the arrival of the police. Though it was being said otherwise, the learned judge said that the only guns fired were the police. She accepted that the police having come on the scene and observed the car the fugitive was driving, opened fire without more.

22. It was against that background that the extracted dicta ought to be understood. The learned judge said:

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

It is good law that an officer may repel force with force where his authority to arrest or imprison is being resisted, and even of 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 person than a fugitive may be located.

23. In this case, in contradistinction to the facts of **Andrews**, the constables did not wantonly and recklessly discharge their firearms. They were presented with force which warranted repulsion. I do not find that the constables proceeded to extremes without reasonable necessity. No member of the public was within their view in their moment of crisis.

24 It has long been the law that where it is necessary for constables to meet force with force of arms, they may do so without weighing to a nicety the exact measure of their necessary defensive action, but they must do so without acting wantonly or recklessly. If they so conduct themselves, they ought not to be held tortiously liable for any resultant injury to innocent bystanders.

25. I therefore find that the unintentional wounding of the claimant was not the consequence of any negligence on the part of the servants or agent of the defendants. Accordingly, I give judgment for the defendant with costs to be agreed or taxed.

Having regard to the permanent disability of the claimant and the circumstances of how she came to be in this condition, an *ex gratia* payment would not only be a magnanimous gesture, it would show a state with a human face that generations will call blessed.