

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1979/F027

|         |                      |           |
|---------|----------------------|-----------|
| BETWEEN | GEORGE FINN          | PLAINTIFF |
| AND     | THE ATTORNEY GENERAL | DEFENDANT |

Dennis Daley and Mrs. Donna Scott-Thoorasingh for the plaintiff.

Rupert Lopez of the Attorney General's Department for the defendant.

May 18, 19, 1981

WOLFE, J.:

Arising out of an incident, which may best be described as a tragedy, the plaintiff, George Finn, was shot and severely injured by the police on Sunday the 30th day of April, 1978.

Consequent thereto he commenced an action against the Attorney General by virtue of the Crown Proceedings Act 1959.

Paragraph three (3) of the Statement of Claim sets out the particulars of the plaintiff's claim thus:

" On or about the 30th of April, 1978 at or in the region of Salisbury Avenue off Barbican Road in the parish of Saint Andrew the plaintiff was riding a motor cycle when Albert Reid and Rupert Johnson, both members of the Jamaica Constabulary Force attached to the Office of the Commissioner of Police, acting maliciously and without reasonable or probable cause, assaulted the plaintiff by deliberately discharging firearms several times at him and shooting him in several places in the region of his back. "

The issues to be resolved in this action were essentially factual and involved no intricate principles of law, but the allegations against members of the security forces are of a sufficiently grave and weighty nature to merit a written judgment.

The plaintiff testified that he was on the 30th April, 1978, employed as a Headman at the Sites and Services Division of the Ministry of Housing. On the eventful day he was the driver of a motor cycle accompanied by a pillion rider, Stanley Daley, now deceased, along Barbican Road in Saint Andrew. Somewhere along the Barbican Road he stopped the motor cycle and George Daley alighted and spoke to a lady

who was walking along Barbican Road. Having spoken to this lady, Daley remounted and they continued on their journey turning on to Salisbury Avenue which runs off Barbican Road.

While travelling along Salisbury Avenue, the plaintiff observed a motor car proceeding behind him. He continued on his journey. Then suddenly he heard a shot from behind, his motor cycle wobbled and the pillion rider, Daley, fell therefrom. Two more explosions were heard and the plaintiff experienced "a terrible burning" in his back. Following a third explosion, he felt a burning sensation to his right leg whereupon he lost control of the motor cycle, collided into the sidewalk and fell to the ground on his right side.

The motor car which had been travelling behind came to a stop and two men alighted and one of the two men shot him in his left shoulder and thigh as he lay helpless on the ground.

He shouted to the man to spare his life. The man placed his foot on the plaintiff's face and threatened to finish him off. A crowd gathered and this apparently averted the demise of the plaintiff.

The plaintiff was placed on the back seat of the car and the corpse of Stanley Daley thrown on top of him. On arrival at the University Hospital the plaintiff lost consciousness. He regained consciousness the following day in the hospital. He remained a patient in the institution until the 6th June, 1978, and upon discharge he was placed in custody at the Matildas Corner Police Station for some nine days before being admitted to bail.

Charges were preferred against him for Larceny from the Person as evidenced by Exhibits Five and Six and on the 22nd of February, 1978, the records were endorsed "No Order made. Complainants cannot be found."

By consent two medical reports were tendered and admitted in evidence as Exhibits One and Two.

The court wishes to record its disappointment at the failure of the parties to call the medical practitioner to testify. The court is of the view that the viva voce evidence of the medical expert would have been of greater assistance to it than the bare medical reports

which were tendered in evidence.

For reasons which shall become apparent, I set out herein the details of the Medical Reports.

Exhibit I Medical Report dated 16th March, 1979:

" MEDICAL REPORT:  
George Finn  
UHWI No. 371708

This patient was admitted to the University Hospital on 30 April 1978 having sustained multiple gunshot wounds.

On admission he was conscious, alert and sweating. He was in obvious shock, peripheral pulses were not palpable and his blood pressure was unrecordable. He had pale mucous membranes and cold extremities. He had multiple gunshot wounds of the left shoulder, the back and both thighs. There was marked abdominal rigidity and evidence of free fluid within the abdomen.

X Rays revealed a fracture of the left clavicle with a fragmented bullet in the soft tissues of the left shoulder; a bullet in the soft tissues of the right thigh; free air in the peritoneal cavity and a bullet in the anterior chest wall.

He was rapidly resuscitated with intravenous fluids and immediately taken to the Operating Theatre. At laparotomy he was found to have multiple perforations of the colon and small intestine and a fracture of the left kidney. Left nephrectomy was performed, the damaged small intestine was resected and primary anastomosis accomplished, extended right hemicolectomy with ileo-transverse colostomy performed, the perforations of the sigmoid colon closed and the loop exteriorised, and a gastrostomy tube placed. Left tube thoracostomy was performed at the start of the procedure and urethral dilatation had to be done in order to facilitate the passage of a urethral catheter. He had a cardiac arrest at the start of the procedure but was rapidly and easily resuscitated.

Post-operatively he did fairly well. He was nursed in the Intensive Care Unit for two days before being returned to the Surgical wards. He developed a fever in the post-operative period which settled on antibiotics. The exteriorised colon healed without event and was replaced on 29 May 1978. He was discharged from the University Hospital on 6 June 1978.

He has continued to do satisfactorily following discharge. He was last seen on 12 December 1978 at which time he was well and was discharged from the Clinic. "

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Exhibit 2 Medical Report dated 12th May, 1981

" SUPPLIMENTAL MEDICAL REPORT

ON  
George Finn  
U.H.W.I. #37-17-08

This patient was admitted to the University Hospital on 30th April 1978 having sustained multiple gunshot wounds. The details of his hospitalisation have, for the most part, outlined in my report of 16th March 1979.

In regard to the number of bullet wounds sustained by the patient a review of his hospital records revealed the following:-

There were eight entry wounds, one in the left shoulder, two in the left back, two in the right thigh and one in the left thigh. Two of these entry wounds - the one in the left thigh posteriorily and the one on the inner aspect of the right thigh - were believed to have been caused by one bullet.

I last saw the patient on 7th February 1981 at which time he had no specific complaints and, apart from the scars of surgery and of his injuries, I could find no specific disabilities.

His injuries were of a very serious nature and he is fortunate to have survived. The loss of one kidney should not in any way incapacitate him. He has, in my opinion, made a complete recovery. "

The defendant's case is diametrically opposed to that of the plaintiff's. Corporal Rupert Johnson testified that on the 30th April, 1978, he was on mobile patrol, in an unmarked police vehicle, along with Constable Silbert Reid at approximately 9:30 in the forenoon. Upon reaching the intersection of Barbican and Widcombe Roads he observed a girl of about 15 - 16 years of age at the intersection. She was in tears. He enquired of her what was the matter with her whereupon she pointed to two men riding on a motor cycle along Barbican Road saying that the men had just held her up with guns and knife and robbed her of a chain, bangles and ring. He invited the young girl, Carmen Evans, into the vehicle and went in pursuit of the men. On approaching the men along Barbican Avenue, so says Corporal Johnson, he sounded his

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horn and Reid himself shouted police. The driver of the motor cycle accelerated and turned on to Salisbury Avenue. The chase continued along Salisbury Avenue, amidst shouts of "Police, Stop!"

It would seem, from the evidence of Corporal Johnson, that the pillion rider realizing the police were closing in on them, pulled a gun from his waist, jumped from the motor cycle and engaged the police in a gun battle. Johnson identified the plaintiff as being the pillion rider.

The plaintiff made good his escape by jumping over a fence onto nearby premises, while the other man fell mortally wounded. Upon search of the nearby premises, the plaintiff was removed from the cellar of a building, wounded and bleeding, minus gun. A search of the premises in an attempt to recover the gun proved fruitless. A search of the deceased Daley's person led to the recovery of a knife, three gold chains, three gold rings and three bangles. Carmen Evans identified and claimed in the presence of the plaintiff one gold chain, one gold ring and two gold bangles from amongst the articles recovered from Daley's person. A knife was recovered from the plaintiff. Johnson contended that both men were taken to the hospital in different vehicles. And that later that day he made a report to Detective Sergeant Reynolds who carried out investigations.

Sergeant Reynolds gave evidence of receiving a report from Corporal Johnson at the Matildas Corner Police Station. This report he alleged was made in the presence of the plaintiff and Carmen Evans and that having received the reports he instructed Johnson to take the injured plaintiff to the hospital but not before he Johnson had handed over to him a quantity of jewellery and a knife.

Later that day Sergeant Reynolds arrested and charged the plaintiff at the University Hospital with the offences of Robbery with Aggravation, Shooting with intent and illegal possession of firearm.

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A critical analysis of the evidence is necessary to arrive at what is the more probable of the two versions, bearing in mind that plaintiff's burden is based on a balance of probabilities.

The first significant feature of the evidence is the admission by the plaintiff that his colleague Daley did dismount from the motor cycle and speak to a woman along Barbican Road. Was it really a woman that Daley stopped and spoke to or was it the girl Carmen Evans who complained to the police of having been just robbed by two men on a motor cycle, which two men were the plaintiff and Daley?

In this regard I find as a fact that Daley did rob the complainant Carmen Evans. I am constrained to so find as I am not prepared to accept that the police went in pursuit of these men without rhyme or reason and opened fire on them.

I am satisfied that the police pursued the men because of Carmen Evans' report. I further hold that the police officers were justified in their pursuit of the men with a view to their apprehension on the basis of Carmen Evans' report.

Section 13 of the Constabulary Force Act states in part:

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

It having been established that the plaintiff and Daley were fleeing felons, the question arises: what degree of force could be used to apprehend them? The degree of force used would materially depend on whether or not they were armed and if in fact they were armed, whether they had used force of arms to prevent their apprehension.

It is settled law that an officer may repel force by force where his authority to arrest or imprison is resisted, and will be justified in so doing even if death should be the consequence, yet he ought not to proceed to extremities upon every slight interruption, not without reasonable necessity.

Where a felon fleeing from Justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be

otherwise overtaken.

A number of factors lead me to conclude that neither the plaintiff nor his colleague was armed, viz:

1. The situation of the entry wounds on the plaintiff's body.
2. The failure to recover the alleged gun after extensive search by the police.
3. Notwithstanding the number of shots fired by the plaintiff not one shot hit the vehicle in which the officers were travelling, or any nearby fence or the officers themselves.
4. The only charges laid against the plaintiff were for Larceny.
5. Had the plaintiff or his colleague been in possession of a gun and attacked the police in the manner described by Corporal Johnson, I fail to see that an experienced officer such as Detective Inspector Reynolds would have failed to place the plaintiff before the Gun Court in respect of these offences.
6. To compound all this the plaintiff is offered bail by the police in the paltry sum of \$200 - \$300.

I do not believe that Detective Inspector Reynolds would have granted the plaintiff bail, had there been the allegation of a shootout with the police, prior to appearance in the Gun Court.

I am sure that Detective Inspector Reynolds is well aware of the provisions of the Gun Court Act relative to the question of bail.

Let me state here and now that I do not accept as true and satisfactory the explanation given by Reynolds as to the reasons why he admitted the plaintiff to bail.

I find as a fact that the plaintiff was granted bail because the only charges laid against him were for Larceny from the Person and that there was no allegation as to the use of a gun by the plaintiff or his partner in crime.

The court therefore rejects the contention that the Police Officers were brought under gunfire by the plaintiff. The court further

rejects the evidence of the defendant's witness when he testified that the plaintiff jumped over a fence and was subsequently removed from the cellar of a house, which is situated on premises along Salisbury Avenue.

I accept as true that plaintiff's evidence that he fell on the sidewalk of premises along Salisbury Avenue.

I find that this evidence was introduced by the defendant to explain the failure to recover the alleged firearm. The jumping over the fence and the subsequent discovery of the plaintiff underneath the cellar would provide ample opportunity by the plaintiff for the disposal of the firearm.

What degree of force then was the officers entitled to use in apprehending the plaintiff "a mere" escaping felon? The age old test must be applied, to wit, "reasonable force".

Hanna J. in Lynch v. Fitzgerald [1938] I.R. 382, having reviewed all the previous authorities on the subject The power to use firearms, had this to say:

" Arms, now at such a stage of perfection that they cannot be employed without grave danger to life and limb even of distant and innocent persons, must be used with the greatest of care, and the greatest pains must be exercised to avoid the infliction of fatal injuries, but if inresisting crimes of felonious violence, all resources have been exhausted and all possible methods employed without success, then it becomes not only justifiable but it is the duty of detective officers, or other members authorised to carry arms, to use these weapons according to the rules just enunciated, and, if death should unfortunately ensue, they will nevertheless be justified. A gun should never be used or used with any specified degree of force if there is any doubt as to the necessity. "

I dare say that the perfection of arms have increased manyfold since the pronouncement of Hanna J. and consequently greater caution must be exercised in their usage.

In 1879, the report of the Criminal Code Bill Commission stated:

" We take one great principle of Common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means;

" and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. "

Regrettably, and I say regrettably because the plaintiff was in some measure the author of his misfortune, on the evidence it cannot be said that the plaintiff could not otherwise have been apprehended by the police other than the use of such severe force.

Further, thereto, I do not believe that the officers honestly believed that all other means of apprehension were hopeless and that in such circumstances they resorted to the force used. Even if they had so believed I would in any event found the degree of force used in the circumstances excessive and wholly disproportioned to the injury or mischief it was intended to prevent.

In the circumstances, I find that the injuries inflicted upon the plaintiff were not justified in law and were done without reasonable or probable cause.

Consequently, there will be judgment for the plaintiff.

On the question of damages, Mr. Daly for the plaintiff moved the court to make an award of exemplary or aggravated damages.

The principles on which courts are entitled to make an award of exemplary damages are enunciated in Rookes v. Barnard [1964] A.C. 1129.

In the instant case, if such an award were to be made, it would be made on the basis of oppressive, arbitrary or unconstitutional action by servants of the Government. It must be shown that there was an abuse of power or authority.

It is my considered opinion that a distinction must be drawn between the mere abuse of authority and the demonstration of exuberance in the exercise of such authority. Abuse conveys a deliberate misuse of power whereas in the latter case the exercise of the authority is accompanied by over enthusiasm.

I am not convinced that the actions of the officers were such an abuse of power that would qualify the plaintiff for an award of exemplary damages.

In any event, exemplary damages should only be awarded in

exceptional circumstances. The circumstances of this case do not permit me to hold that they were exceptional.

Aggravated damages are awarded to a plaintiff to compensate him for any aggravated harm done to him as a result of the special circumstances of the case. It must be noted that provocation on the part of the plaintiff, while it may not reduce the plaintiff's damages below the real amount due for the injury done, may disentitle him to aggravated damages. See Fotin v. Katapodis 108 C.L.R. 177

The plaintiff might have averted this whole situation had he yielded the call of the police to stop and in this regard I find that he courted danger. I therefore refrain from making an award of aggravated damages to the plaintiff.

AWARD OF DAMAGES:

The plaintiff's claim as to Special Damage was seriously challenged in one area only, mainly the claim for loss of earnings.

The plaintiff testified that at the time of the incident he was employed as a headman to the Sites and Services Division of the Ministry of Construction (Housing). Exhibit 3 which was tendered in evidence by consent categorically disputes this fact. I find as a fact that the plaintiff was not so employed and was indeed unemployed at the material date.

The claim for Special Damages will therefore be reduced by the amount of One Thousand One Hundred and Twenty Dollars being the amount claimed for loss of earnings.

In the area of General Damages, it cannot be denied that the plaintiff was seriously injured. However, Exhibit 2 which is dated 12th May, 1981, and which is based on an examination of the plaintiff done on the 7th February, 1981, states:

" His injuries were of a very serious nature and he is fortunate to have survived. The loss of one kidney should not in anyway incapacitate him. He has in my opinion, made a complete recovery.

I am of the view that in all the circumstances of the case,

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an award of Eighteen Thousand Dollars (\$18,000.00) by way of General Damages would be adequate compensation to the plaintiff.

Accordingly, there will be judgment for the plaintiff for \$18,301.00 computed as follows:

|                 |                                         |
|-----------------|-----------------------------------------|
| Special Damages | \$ 301.00                               |
| General Damages | \$18,000.00                             |
|                 | <hr/>                                   |
|                 | \$18, <sup>301</sup> <del>000</del> .00 |

with costs to be taxed if not agreed.

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