IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006 HCV 01691

BETWEEN LATOYA BROWN CLAIMANT

AND THE ATTORNEY GENERAL FOR JAMAICA DEFENDANT

Ms. Dorothy Lightbourne QC instructed by Lightbourne & Hamilton for the claimant

Ms. Monique Harrison and Ms. Celia Middleton instructed by the Director of State Proceedings for the defendant

Heard: 23rd and 24th April; 1st and 12th May, 2015

Negligence – claimant shot during operations by the security forces – claimant blind in both eyes – Assessment of damages – Loss of marriage prospects – Award of interest – Exercise of the court's discretion under the Law Reform (Miscellaneous Provisions) Act.

Evan Brown J

Introduction

[1] Between the 7th and 9th July, 2001 a fierce storm raged in western Kingston. This storm was characterised by showers of bullets and streams of blood as members of the security forces traded bullets with armed civilians. There were howls of terror and hushed cries for help as bodies fell to the ground, some maimed and others lifeless. During the eye of the storm, under the glare of the morning sun, 19 year old Latoya Brown ventured away from the shelter of her home. A bullet struck her in the head and darkness overcame her. That bullet, she claimed, was propelled from the barrel of a gun in the hands of a member of the security forces.

[2] Although there was heavy gunfire on the 7th and 8th of July, on the morning of the 9th at about 8 o'clock there was calm. So, sometime between 8.15 am and 9:00 am, the

claimant accompanied her friend Daleth Smith to Regent Street in the parish of Kingston. Ms Smith had been staying at the claimant's home from the 6th July but was prevented from leaving on account of the hail of lead. Ms Smith desired to go home to her son.

Case for the claimant

[3] It was in this lull that they set out on their journey. On reaching the corner of Regent and North Streets, they observed a contingent of Jamaica Defence Force soldiers and members of the Jamaica Constabulary Force at the corner of Bond and North Streets. On seeing them the claimant remarked to Ms Smith that she had company to continue on her journey. Consequently, the claimant turned with the intention to go back along Regent Street.

[4] Ms Smith continued on her journey, walking towards the soldiers and police. As Ms Smith walked along North Street she heard several gunshots coming from the direction in which she was headed. That caused Ms Smith to run towards Regent Street. The claimant also heard the gunshots and saw Ms Smith running back towards her. While Ms Smith was running towards her the claimant was shot. She felt dizzy, held onto the sides of her face and fell to the ground. She was instantly blinded and blood oozed from her face.

[5] As Ms Smith ran along Regent Street she came upon the claimant on the ground. The claimant said "Daleth mi get shot". The claimant would later give a statement to the police in which she admittedly said she did not know who shot her. However, in her witness statement she asserted that it was the police who shot her. When it was suggested to her that the truth was contained in her police statement, she replied that what she was telling the court was the truth, the whole truth and nothing but the truth.

[6] Having been shot in the head, the claimant's head ached. In order to obtain some relief, the claimant asked Ms Smith to tie her head. A female bystander came to the claimant's assistance and used a handkerchief to band the claimant's head. After that the claimant was placed on a handcart and taken to the Denham Town Police

Station. At the Denham Town Police Station they were advised that there was no vehicle to take her to the hospital. With no vehicular assistance available, the claimant was conveyed to the Kingston Public Hospital (KPH) on the handcart.

[7] The handcart is a familiar four wheel conveyance in market districts such as the Coronation Market. Its usual cargo is farm produce, not humans. It is propelled by the feet of the person pushing and steering it. Crude handmade rubber wheels reduce the friction between the handcart and its terrain but comfort is not a factor for its usual cargo. Neither is the handcart built for speed as speed is not a requisite in the short distances it traverses in and around the markets. Its speed, such as it might be, is a function of the strength, agility and dexterity of the person pushing it.

[8] From the handcart the claimant was taken to the emergency room. She was immediately admitted. Dr. Wong treated the claimant at the KPH. He diagnosed her with having bilateral ruptured globes, right upper and lower lid lacerations as well as lacerations and soft tissue loss to both temporal regions (sites of the entry and exit of the bullet). She had no vision in either eye. A CT scan performed the same day revealed fractures of both maxillae and orbit. Bilateral eviscerations, that is, the removal of the remnants of ocular tissue from both globes, were done on the 10th July, 2001. She was discharged on the 13th July, 2001 with an appointment to the Eye Clinic one week later.

[9] The claimant's complete blindness was confirmed by Dr. Lisa Leo-Rhynie. According to Dr. Leo-Rhynie, there is no possibility of the claimant regaining any vision as the eyes have been removed. The claimant was fitted with prostheses in the eye sockets. The prostheses were fitted for cosmesis only, they have no visual power. Cosmesis is the art of surgery which aims to preserve, increase or restore physical beauty.

[10] The incident left the claimant traumatized. She suffered from nightmares and feelings of terror, especially whenever she heard explosions. That warranted visits to Dr. Aggrey Irons, Consultant Psychiatrist. She was treated for three months. There was

no report from Dr. Irons. This psychiatric issue remained unresolved as the claimant said sometimes she still had nightmares and feelings of terror.

Case for the defence

[11] In response to the claim, the defendant averred that, among other things, at the material time the security forces were shot at by armed civilians in the vicinity of Regent Street and they exchanged gunfire with these civilians in self-defence. Further, the defendant denied that any member of the security forces shot the claimant. The contention was that if the claimant was shot, she was not in the contemplation of the security forces at the material time.

[12] The defendant called one witness, a member of the Jamaica Constabulary Force, who was in the vicinity of where the claimant was shot on the day of the incident. That was Superintendent Warren Turner, a Sergeant at the time of the incident. He was instructed to drive a police armoured unit to the vicinity of the Coronation Market. There he was to provide cover to facilitate the collection of bodies for carriage to the KPH. Cover was necessary as there were reports of the civilians collecting the bodies being shot at as they went about the task of retrieving the bodies.

[13] Whilst Superintendent Turner was providing this cover he heard the sound of gunfire. He, however, could not say where the gunfire was coming from. No shots were fired at his vehicle that day. Subsequent to these events there was a Commission of Inquiry which, the Superintendent said, exonerated all the members of the security forces. He concluded by saying that he did not know the claimant.

Issue for resolution

[14] The first issue for my determination is, was it a member of the security forces who shot and injured the claimant? If the answer to that question is in the affirmative, the next question is, was that shooting done negligently? The claimant can only succeed if both questions are answered in the affirmative.

Applicable Law

[15] As I observed in ***Namishy Clarke v The Attorney-General*** 2007 HCV 00031 delivered 11th December, 2009:

> *"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."*

[16] Following on that, the standard of care required from those who bear arms on behalf of the state was articulated by Hanna J in ***Daniel Lynch v Michael Fitzgerald et al*** (1938) I.R. 356 (***Lynch v Fitzgerld***). His elegant language at pages 404-405 bears repeating:

> *"But it is an invariable rule that the degree of force to be used always be moderated and proportioned to the circumstances of the case, and the end to be attained. Hence it is that 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 care, and the greatest pain must be exercised to avoid the infliction of fatal injuries, but if in resisting 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 authorized to carry arms, to use these weapons according to the rules just enunciated, and, if death should unfortunately ensue, they will, nevertheless be justified."*

[17] Those principles are compendiously captured in the judgment of McKain J in ***Joseph Andrews v Attorney-General of Jamaica*** (1981) 18 JLR 434,438:

> *"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 person than a fugitive may be located."*

[18] Hanna J's theme of proportionality is mirrored in the Jamaica Constabulary Force's Human Rights and Police Use of Force and Firearms policy document. Article 14 reads:

> *"The use of force by members of the JCF must accord with the principles of proportionality (i.e. the anticipated harm or injury to be prevented is equal to or greater than the harm which is likely to be caused by the use of force and that the objective cannot be achieved by a lesser degree of force). In no case should the use of force, which is disproportionate to the legitimate objective to be achieved, be used or authorised."*

[19] There is therefore no doubt that the members of the security forces may, to be unforensic for a moment, fight fire with fire when confronting criminal gunmen. However, even in the confrontation of armed outlaws, before they proceed to discharge their firearms the public has to be considered. In other words, when members of the security forces propose to discharge their firearms where persons other than armed criminals are, the law constrains the lawmen not to injure these innocent bystanders.

[20] They must take reasonable care to avoid discharging their firearms in circumstances where reasonable foresight telegraphs that injury would be likely to result to innocent bystanders. These innocent bystanders are the very persons who are so closely and directly affected by the officers' discharge of firearms that they ought reasonably to have them in their contemplation as being so affected when they are directing their minds to the discharge of their firearms.

[21] With those principles in mind, I turn my attention to the predicate question, was it a member of the security forces who shot and injured the claimant? The unequivocal answer to that question is yes. The unchallenged evidence was that at the material time only the members of the security forces fired their weapons. Secondly, I accept the evidence that the discharge of their weapon was in the direction of the claimant and her friend Ms Daleth Smith.

[22] Ms Smith was turned upon her heels by a hail of bullets as she walked towards the members of the security forces. As she fled in the direction of the claimant, she came upon the claimant on the ground, suffering from a gunshot wound. That evidence

constrains me, rather, its logic impels the mind to the only reasonable and inescapable inference that the claimant was shot by a member of the security forces.

[23] Was that shooting intentional? That was the assertion of the claimant in her witness statement and orally before me. I find myself unable to accept the contention of intentional shooting for two reasons. First, and most importantly, the claimant was thoroughly discredited on the point under cross-examination. An explanation was warranted for the change from having first said she did not know who shot her to the about face assertion that it was the security forces. Instead of an explanation the impossible position of having spoken the truth on both occasions was adopted.

[24] The second reason for rejecting the allegation of intentional shooting comes from the claimant's description of the incident. According to the claimant, her face was turned away from the members of the security forces at the time of the shooting. As I understood her, the shooting occurred after she had bade Ms. Smith goodbye and turned to go back home. In those circumstances, the natural limitations placed upon her optical capabilities would have prevented the claimant from making the detailed observations she asserted in her witness statement almost thirteen years after the event.

[25] The final reason for rejecting the proposition of intentional shooting springs from the matrix of the unfolding events. The evidence on both sides is that the area had been transformed into a sea of fierce hostilities with law enforcement on one side, the outlaws on the other and the innocent bystanders in the middle of the maelstrom. Although no evidence came from the defendant that the security forces were shooting at guntoting criminals at the material time, that they were, cannot be ruled out, having regard to the prevailing atmosphere.

[26] Even if the security forces did not intentionally fire upon the claimant, in the circumstances they owed her a duty of care. These were the circumstances. The claimant was an unarmed female walking along the public thoroughfare in broad daylight and plain sight. Since she was shot by a member of the security forces, can it

be seriously argued as it was averred in the defence, that she was not in the contemplation of the security forces? Ought she not to have been?

[27] In the situation in which the security forces found themselves the claimant, and indeed Ms Daleth Smith, were persons who were closely and directly affected by the discharge of their firearms. The claimant and Ms Daleth Smith, the innocent bystanders, are the very persons the neighbour principle says the security forces ought reasonably to have had in their contemplation as being so affected when they directed their minds to discharging their weapons: ***Donoghue v Stevenson*** [1932] A.C. 562,579. The security forces were under a duty to take reasonable care to avoid discharging their firearms in a public thoroughfare being traversed by unarmed civilians, be they male or female.

[28] If, as was said in the defence, the defendant did not have the claimant in its contemplation, then it is self-evident that they discharged their firearms without having first taken the greatest care and exercised the greatest pain to avoid the infliction of injury, fatal or otherwise: ***Lynch v Fitzgerald***, *supra*. Even more conclusively, when the security forces discharged their weapons in the circumstances in which the claimant was injured, they did not consider the public: ***Joseph Andrews v The Attorney-General of Jamaica***, *supra*.

[29] That was not the conduct which reasonable and prudent security forces ought to display. The security forces were clearly in breach of their duty of care to the claimant from which she has suffered damage of a most permanent kind. Ergo, the security forces were negligent in the discharge of their firearms which resulted in injury to the claimant. I therefore give judgment for the claimant.

Assessment of Damages

The Submissions

[30] In her closing submissions counsel for the defendant submitted that the court could not properly make any award under the heads of handicap on the labour market and special damages. There was either a dearth of or no evidence to support those

claims. Learned Queen's Counsel's concession was frank and timely. In respect of the claim for future help, I allowed an amendment of the particulars of claim at the end of Queen's Counsel's submission for its inclusion therein. The sum claimed and allowed for future is $2,000.000.00. Therefore, I am called upon to make an assessment of general damages.

[31] For the assessment of general damages both sides cited the same two authorities. The first cited was ***Owen Small v United Estates Ltd*** Suit No. CL 1993 S 415, delivered on March 10, 1998 reported in Khan's Volume 5, page 219 and Harrisons' Assessment of Damages 2nd ed. page 135 (***Owen Small***). In that case the claimant was a young man who lost his sight in both eyes, consequent on being burnt by chemicals. For his pain and suffering and loss of amenities he was awarded $7,000,000.00. When that figure is updated, using the March 2015 CPI of 221.5, that award today is $33,394,357.10. Learned counsel for the defence submitted that the award to the claimant should be discounted by 20%. Counsel advanced the longer period of hospitalization In **Owen Small**, two months as opposed to 4 days, as the distinguishing reason.

[32] The second case referenced was ***Linden Palmer v Neville Walker and others*** Suit No. C.L.P. 072/1990 & C.L.P. 176/1990 delivered on March 20, 1997 and reported at Khan's Volume 5 page 216 and Harrisons' Assessment of Damages 2nd ed. page 133 (***Palmer v Walker***). The claimant in ***Palmer v Walker*** was a 59 year old Deputy Commissioner of Police who lost sight in both eyes as a consequence of his involvement in a motor vehicle accident. He sustained other serious injuries. Under the head of general damages he was awarded $8,000,000.00. The updated award is $41,528,005.62 using the same CPI.

[33] Learned counsel for the defendant submitted that a discount of 30% should be applied to the award in ***Palmer v Walker***. That submission was grounded on three bases. First, the numerous other serious injuries suffered by that claimant. He had a dislocated left hip with fracture of the acetabulum, comminuted fracture of the proximal third of the left femur, 4 cm laceration over the right upper eye lid, 3 cm laceration

across the right eye, bilateral corneo-scleral laceration and fracture of the orbit. Secondly, the claimant in ***Palmer v Walker*** was hospitalized for three months. Finally, upon his discharge from the hospital he could not walk.

[34] Learned Queen's Counsel conceded the absence of the fractured femur and dislocated hip in the case at bar. She submitted however that this should not operate to discount the award made to the claimant in the instant case. The injuries suffered by both claimants are of the same level of severity once the invasive surgeries and resultant disability of the present claimant are taken into consideration, Queen's Counsel contended. What then, should the award to the claimant be?

Arriving at the Award

[35] The aim of compensatory damages in personal injury cases is to put the claimant into as good a position as if the personal injury never occurred: ***Remedies for Torts and Breach of Contract*** 3rd ed. Page 269. In addition to that, the court must be mindful that:

> *"personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards,"*

per Campbell JA in ***Beverley Dryden v Winston Layne*** SCCA 44/87 (unreported) delivered 12th June, 1989. In other words, although the court is to strive for consistency in making awards, the nuances in new cases are to be acknowledged and addressed. Lastly, I adopt the approach of Wooding, C.J. in ***Cornilliac v St. Louis*** (1964), 7 W.I.R. 491 in disaggregating the heads of general damages for purposes of analysis.

[36] Taking first the nature and extent of the injuries sustained, the claimant in the instant case and those claimants in the ***Owen Small*** and ***Palmer v Walker*** all sustained injuries to both eyes. There was consensus that the injuries to Linden Palmer were greater. So too would have been the pain and suffering he endured. The claimant in the instant case averred in her particulars of claim that she experienced pain in the eyes. However, when she testified she did not say if this continued up to the time of the trial. Indeed, she never said if and when the pain ceased.

[37] Nothing was said of her loss of amenities. None of the reports of ***Owen Small*** include any material to suggest that loss of amenities was a consideration in the award of general damages. There was evidence in ***Palmer v Walker*** that prior to the accident he was an ardent domino player and a great cricket fan. Those activities he could no longer enjoy, along with dancing, swimming and driving a motor vehicle. In respect of their resultant disability, all the claimants stand on the same ground – total blindness.

[38] From my consideration of the authorities cited, it appears to me, as was submitted by learned Queen's Counsel, that the bulk of the awards was for the complete loss of sight. Once that is acknowledged, it will be appreciated that only a small discount is called for in the instant case without more. That having been said, there are two factors to be taken into account on behalf of the claimant in this case.

[39] The first factor to consider is the age of the claimant. At the time of the incident she was a nubile young woman of nineteen years. ***Owen Small*** was described as a young man. So, while his age was not given in the reports youth is to be assumed. On the other hand the claimant in ***Palmer v Walker*** was 59 years old. It is clear that Panton, J (as he then was) in ***Owen Small*** took the claimant's age into consideration. Although ***Palmer v Walker*** was used a guide in ***Owen Small***, it is unclear how much weight was given to the disparity between the ages of the claimants.

[40] Be that as it may, I am of the view that the age of the claimant is a relevant factor for my consideration. The following is what appears under "Damages" in ***Owen Small***:

> *"For all practical purposes, the plaintiff's life was ruined. The mental anguish was obvious. He was a young man who had virtually lost all. The judge concluded that it was impossible to fix a sum of money that could compensate him for the inability to ever see again. He would have to be dependent on someone else at various stages of his life in the future."*

What was said of that claimant is equally true of this claimant. The single shot that plunged the claimant into a world of darkness left in its wake a blight upon her life that she will have to endure to the end of her days.

[41] And at nineteen, barring the vicissitudes of life, she is expected to suffer the blight occasioned by her disability longer than the claimant in ***Palmer v Walker***. Miss Brown became totally blind as she stood on the cusp of adulthood, her youth obscuring the distant horizon of old age. For her the sun was still rising. On the other hand, the claimant in ***Palmer v Walker*** stood on the threshold of retirement beholding the setting sun. This factor is sufficient to trump the absence of other injuries, entitling the claimant to an undiscounted award.

[42] One manifestation of the blight upon the claimant's life is her prospects for marriage, at the higher level, or just intimate relationships at the lower level. I venture to say that the claimant's chances in this area have been greatly diminished. The claimant's life may yet have that storied ending where she meets a prince whose love will transcend this most conspicuous of imperfections.

[43] But the issue is not that she may never marry. Indeed, she may decide not to marry. But what if she has that vision? Would her chances be the same as a woman who is sighted? The common sense answer seems to be that fewer men will find the claimant physically enchanting because of her total blindness. In an instant blindness transformed the claimant from nubile to old maid. To say that his difficult to dollarize this loss is truly to make an understatement.

Interest

[44] Learned counsel for the defence submitted that no interest should be awarded for approximately four years. Counsel disaggregated that period as follows:

> *"a. the period May 9, 2006 – September 10, 2009, a period during which no step was taken by the claimant in the proceedings.*
>
> *b. the period April 2, 2014 to April 23, 2015 as the matter was adjourned on April 2, 2014 arising from the inability of the court to reach the matter having regard to a part heard which was being heard."*

Reliance was placed on ***Dion Moss v Superintendent Reginald Grant and The Attorney- General of Jamaica*** [2013] JMSC Civ. 177 (***Moss v Grant***).

[45] ***Moss v Grant*** was an assessment of damages case dealing with detinue. The period for which interest was being claimed was eighteen years. The argument of the defence, which was accepted by the court, was that the period over which interest should be allowed should be restricted to nine years. The matters relied upon in ***Moss v Grant*** were:

> *"Delays by the Registry of two years in two instances each in the matter being set for trial; delay of some two years by the plaintiff in giving security for costs as ordered by the court; having to wait some three years after the case management conference for the matter to come for trial; adjournments by consent on at least two occasions to facilitate discussions, with the result, in one instance, of the matter not placed back on the trial list for some two years, and so on."*

The ratio of the decision by F. Williams J seems to be that it would be unjust to award interest for a period of delay over which the parties had no control.

[46] The court's power to award interest on general damages emanates from section 3 of the ***Law Reform (Miscellaneous Provisions) Act***. By virtue of that provision the court may award interest "if it thinks fit" on either the entire or part of the period between when the claim arose and the date of judgment. In making that determination the purpose for which interest on general damages is ordered should be borne in mind. Interest on general damages is awarded to compensate the claimant for being kept out of the capital sum between the date of service of the claim form and judgment: ***Pickett v British Rail Engineering Ltd.*** [1980] A.C.136.

[47] The rationale undergirding that position appears to be the recognition that there will be delays in the prosecution of a claim from filing to judgment. Under the ***Civil Procedure Rules, 2002*** part 74 claims are automatically referred to mediation. Aside from that, the parties may of their own volition enter into good faith discussions with a view to settling the matter. Whereas there is a timetable for the completion of mediation, settlement discussions can be a bit unwieldy. They may be long or they may be short. Whether it is mediation or settlement discussions, delay in arriving at a trial date is inevitable. The reasons for delays are myriad and no useful purpose is to be served in attempting anything resembling an exhaustive catalogue.

[48] In my opinion, the real question is whether the defendant has been prejudiced by the delay. If, as in ***Moss v Grant***, *supra*, some of the delay was occasioned by the claimant's contumacious conduct then justice demands that the claimant does not receive the benefit of his own improper conduct. However, delays built into the system or arising from acts over which the claimant had no control should not operate to abridge the period for which interest is awarded.

[49] In the instant case the claim was filed on the 9th May, 2006. An acknowledgement of service was filed on the 17th May, 2006. The next event was the filing of a Notice of Application for Court Orders on the 10th September, 2009 by the claimant. In that Notice of Application the claimant sought leave to enter judgment in default of the filing of a defence. The hearing was set for 24th March, 2010. The claimant's Notice of Application for Court Orders was met by a like application by the defence, filed on the 24th February, 2010. The defendant in its application sought an order extending time within which to file its defence.

[50] The claim proceeded to the point of automatic referral to mediation on the 30th July, 2012. That was followed by the Claimant's Notice of Application for Court Orders asking that mediation be dispensed with. The affidavit supporting that application shows the settlement of the claim was being actively pursued by the claimant with the defendant from 2006. In her submissions before me, learned Queen's Counsel said different Attorneys-General made unsuccessful promises to settle the claim.

[51] So, far from allowing the claim to gather the dust of each succeeding year the claimant was pursuing good faith negotiations with the defendant. Additionally, the claimant and defendant were not responsible for the postponement on the 2nd April, 2014. I am at loss as to how any of this could have worked to the prejudice of the defendant. The only person to be prejudiced by an abridgement of the period is the claimant. The defendant would thereby obtain a most undeserved benefit. Accordingly, I am unable to accept the submission of learned counsel for the defence on the point.

The Awards

[52] Based on the forgoing I make the following orders:

(i) General damages ------- $45,000,000.00 with interest at 3% per annum from the 10th May, 2006 to the 12th May, 2015.

(ii) Cost of Future Care ---------- $2,000,000.00

(iii) Costs to the claimant to be agreed or taxed.