IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006 HCV 04260

BETWEEN	BARBARA McLEOD (Mother of deceased, Michael Dorsette)	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	THE COMMISSIONER OF POLICE	2ND DEFENDANT

Ms A. Reynolds and Ms. K. Exell instructed by Bailey, Terrelonge and Allen for the Claimant
Ms M. Chisholm and Mr. G. Kelly instructed by the Director of State Proceedings for the Defendants

Police party – Constable shooting and killing of deceased – Whether discharge of firearm negligent/malicious/without reasonable and probable cause – Whether Constable acting in lawful self-defence – Whether deceased was acting lawfully at the time of the police shooting – Whether deceased was gainfully employed at the time of his death – Whether Claimant and child were dependents of the deceased – Quantum of loss of dependency

Heard on: 7th and 8th March, 2011and 20th December, 2011

Written submissions to be filed by 21st March, 2011, received on 9th September, 2011

Coram: Morrison, J

“Trigger mortis” is a term coined by Marya Manneg, playwright, radio-scriptwriter and satarist to reflect the phenomenon or penchant of gun shooters. It is a malformation of the index finger for grasping the revolver. The gun has become an extension of the Jamaican arm.

[1] The case at bar is yet another instance of a case of trigger mortis impacting on a citizen of this country. It is engulfed in controversy. Mr. Michael Dorsette, as a result of this incident, has gone off, as it were to, The Great Unknown, leaving behind the scattered hopes and dashed dreams of his bemused dependents – his mother and his child.

[2] The truth of this tragedy may, I hope, find its atonement, somehow, in the redemptive facts.
To digress, I am not unmindful of the passage of time since the hearing of this matter was concluded. Yet, I feel an uneasy urge to place on record the cause of the delay in the delivery of this judgment.

[3] Having concluded the hearing of this matter, I ordered, as per The Civil Procedure Rules, that written submissions be exchanged and filed by March 21, 2011. However, I was not put in receipt of the submissions until September 9, 2011, though, seemingly, they had been filed more or less on time. It may very well mean that attorneys-at-law out of their own interests and caution need to summon greater vigilance to aid in the timely delivery of the submissions to the Judge’s assigned Clerk. Any failure in that regard may well protract, as in this case, the late receipt of the judgment.

The Submission of the Claimant

[4] The nub of their submission, tersely put, is that Constable McDermott was not acting in self-defence when he shot and killed Michael Dorsette. Had Mr. Dorsette survived, they argue, he could have brought a claim for assault and battery against the Defendants. That being the case, the constituted Claimant, acting under the aegis of the Fatal Accidents Act, has a right in law to maintain this action.

[5] The Defendants in seeking to deflect the claim built their rampart on the bases that the Claimant had to prove that Constable McDermott acted negligently in the discharge of his firearm at the material time.

[6] As to the issue of credibility they proclaim that the version of events as given by Constable McDermott and Detective Corporal Walters is to preferred to that of young Jovian Markland.

[7] Heavy reliance was put upon the Fatal Accidents Act, The Constabulary Force Act and the Crown Proceedings Act. The Claimant also relied on the case law authorities of **Braithwaite v R** [2010] EWCA Crim. 1082; **Finn v The Attorney General** (1981) 18 JLR 120; **R v Williams** (1987) 84 Cr. App. Reports 299.

The Attorney General of Jamaica v Miguel Green, SCCA 43/78 delivered on 12/6/80; **Joseph Andrews v The Attorney General of Jamaica** (1981) 18 JLR 435; **Alexander Byfield v The Attorney General of Jamaica** (1980) 17 JLR 243; **George Finn v The Attorney General of Jamaica**, Claim No. 2007 HCV 00031, judgment delivered on 11/12/2009; **Ashley and Another v. Chief Constable of Sussex Police** [2007] 1 WLR 398.

[8] ***<u>The Issues</u>***

a) whether the deceased, Mr. Dorsette was in the company of another man;
b) whether they were both armed and if so discharged firearms at the police to escape being accosted by them;
c) whether Constable McDermott discharged his firearm in lawful self-defence.

[9] The pivot of the factual contentions turns, I find, on the credibility of young Jovian Markland for the Claimant and on Constable McDermott and Detective Daniel Walters for the Defendants. Even with this observation in mind I am mindfully aware that the forensic evidence generated by this case has to be closely scrutinized.

[10] It is the evidence of the then young 11 years old, Master Jovian Markland, that he was at home at Taylor's Land, Bull Bay, St. Andrew at about 6.00 p.m. on November 9, 2000. He, along with his brother, Rayon, were to the back of their yard. Young Markland was then engaged in the domestic chore of washing his physical education gears. While he was thus disposed he heard the sound of gun shots and a commotion. His back was then turned in the direction of the din. He turned around to confront the seeming disturbance only to see his cousin, Michael Dorsette, running into an open lot that was across from his vantage. The corrosive effect of what ensued must, I take it, have etched its mark upon his memory: he saw a policeman who was also in the said open lot, shoot at Michael Dorsette as the latter was in the act of scaling over a neighbour's fence. Young Markland was steadfast, throughout his evidence, that he did not see Mr. Dorsette with a firearm at all as alleged by the defence, nor did he see Dorsette use the impugned firearm to shoot at anyone. He was equally adamant that at

the time of the shooting of Mr. Dorsette that Mr. Dorsette was not in the company of another who had shot at or was shooting at the police.

[11] In contrast, the Defendants case is, that on the day in question, a police party of which Constable McDermott was a part, were on mobile patrol duties in the Nine Miles area of Bull Bay. They, acting on information, were on the lookout for a white Toyota motor car with gunmen aboard that was heading in the direction of the Bull Pay Police Station. Constable McDermott, Corporal Walters (as he then was) and Corporal Blake left the said station upon seeing a vehicle that matched the given description. According to McDermott, the car of interest turned onto Greenvale Road. In that regard, he had vascillated having said on a previous occasion that the said car had turned into Taylor Land, a point which he later confirmed in re-examination.

[12] He was unsupported by Walters on that aspect of his evidence. Again, their testimonies diverge in that having lost sight of the car of interest, serendipitously, they espied Dorsette and one Booba. It is the claim of McDermott that he heard Blake shout the name Booba after the last-named and Dorsette had been spotted by the police. Walters did not give any ringing support for that recollection. Further, it is claimed by McDermott, that the men, Booba and Dorsette, fired guns at the police party. He, McDermott, fired shots at the men, in return, he having jumped from the jeep in which all the police officers were travelling. It is singularly remarkable, then, that all Walters can say about this piece of evidence, is that he believed that McDermott fired at the men. Perhaps, in the scheme of things, no great store should be placed on the fact that Walters, while being fired on, did not resort to discharging his firearm at the supposed felons. Notwithstanding his indisposition and to go to the aid of his colleague and the fact that the shooting did not transpire in front of his very eyes, the fact is, he had purported to hear other gunshot explosions, McDermott's version of that aspect of the events, was therefore unsupported.

[13] Now, it seems to me that two critical pieces of facts need to be answered on the state of the evidence as led: was Dorsette in the company of another? Was Dorsette and that other armed and did they fire at the police party? One should think that some kind of forensic support would be forthcoming if the posed questions are answered in the affirmative. None was forthcoming.

[14] Thus, there were glaring deficiencies on the case for the Defendants; no gun was recovered from the scene; no gun powder residue was found on the hands of the deceased Michael Dorsette; no spent shell were recovered from the scene. Dorsette had been shot in the back.

[15] That apart, the force of the credibility of the police shifted seismically to incredulity when Walters said that the felon "Booba" was never investigated for his brazen crime against the security forces.

[16] I am to say, therefore, that the account of the incident as given by the police does not scintillate as being true. I prefer the account given by Jovian Markland as being more probable that not.

[17] Having made these findings it is otiose to say that I reject that the police were acting in lawful self-defence, the corollary being, that Dorsette was killed in unjustifiable circumstances. The sub-text of Dorsette being wanted on a warrant pursuant to the laying of two informations by Walters cannot, in the context be anything other than a pretext for the unceremonial and involuntary dispatch of Dorsette into the "bosom of our fathers."

The Law

[18] Section 3 of the Fatal Accidents Act reads: "Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured

to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

[19] Section 4(4) makes it plain that any action brought in pursuance of the provisions of this Act shall be "by and in the name of the personal representative of the deceased person …," and that any such action shall be for the benefit of the near relations of the deceased person. Near relations according to Section 2 include parent and child of the deceased person.

[20] Accordingly, the current claim by Ms Barbara McLeod on behalf of herself and Britannia Dorsette, daughter of the deceased, is well-founded.

[21] At the same time I am cognizant of the fact that the Honourable Miss Justice Beckford on July 29, 2009 pronounced as invalid that part of the claim pursuant to the Law Reform (Miscellaneous Provisions) Act. With that aspect of the case out of the way I now engage with the other legal submissions.

[22] According to Section 13 of the Constabulary Force Act, "the duties of the Police … shall be to keep watch by day and night, to apprehend or summon before a Justice, persons found committing any offence or whom they may be reasonably suspected of having committed any offence."

[23] It is without ambivalence, based on judicial pronouncements, that the duty of the police includes the apprehension of wrongdoers with the aim of bringing them to justice. **Joseph Andrews v. The Attorney for Jamaica,** supra, makes clear that the police are empowered not only to carry firearms but are vindicated,

through necessity, in their use, when apprehending a suspected person and in protecting themselves from serious attack. "The police were acting in the course of their duty in trying to apprehend a fleeing felon …"

[24] What had happened in that case was, the Plaintiff was shot my members of the Jamaica Constabulary Force, who, while in the course of their lawful duty, essayed to apprehend a fleeing felon. The Plaintiff's cause of action was grounded in assault or negligence in that the sustained injury was caused negligently and maliciously and without reasonable or probable cause. The Defendant pleaded negligence on the part of the Plaintiff in failing to take cover or evasive action, failing to keep any proper look-out or to heed the presence and movement of a felon.

[25] In that context, distinguishable from the case at bar, the Court made its pronouncements as to the duty and power of a police officer in apprehending or trying to apprehend a fleeing felon.

[26] However, a police officer, in that situation, is not to be taken as having the *carte blanche* authority to proceed to extremes without reasonable necessity and without due consideration for members of the public in the execution of their duty.

[27] Accordingly, it was held that the police were negligent for the welfare of members of the public in firing as they did.

[28] The cases of **George Finn v The Attorney General for Jamaica and Namishy Clarke v The Attorney General for Jamaica** *supra,* serve to underscore that where it is necessary, such as, where his authority to arrest or imprison is resisted, to meet force by force or arms, in self-defence even if death ensues. However, the Constable is not to be assumed to be given the uncircumscribed literality of action: he must endeavour to prosecute his task without acting wantonly or recklessly.

[29] Indisputably, self-defence is available under Section 14(2)(b) of the Constitution of Jamaica which provides that, "without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case –

(a) …

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) …

(d) in order lawfully to prevent the commission of that person of a criminal offence, or if he dies …

[30] If further authority is needed one needs look no further than to this passage from **Archbold, Criminal Practice and Pleading, 35th Edition,** paragraph 2527:

> *"Where an officer of justice is resisted in the legal execution of his duty he may repel force by force; and if in doing so, he kills the party resisting, it is justifiable homicide; and this is civil as well in criminal cases … and this is not merely on the principle of self-defence … but upon that principle, that the necessity of executing the duty the law imposed upon him, jointly … still, there must be an apparent necessity for the killing: for if the officer were to kill after the resistance had ceased … or if there were no reasonable necessity for the violence used upon the part of the officer … the killing would be manslaughter at least."*

[31] Based on my findings of facts, a review of the relevant section of the Constitution of Jamaica, case law and textbook, I am moved to say that Constable McDermott was not acting in lawful self-defence when he shot and killed Michael Dorsette, the authority of case of **Ashley and Another v Chief Constabulary of Sussex Police**, *supra*, notwithstanding.

[32] In that latter case the proposition is laid down that, "In civil proceedings, a defendant who mistakenly believed that it was necessary to act in self-defence must show that his mistaken belief was reasonably held and that the force he used was reasonable; that whether or not the mistake made and the force used were reasonable depended on all the circumstances of the case, which included the fact that action might have had to be taken in the heat of the moment …"

[33] There as here, the Defendant failed to prove that he was acting in lawful self-defence. Here, it is untenable to maintain that in the absence of incriminating evidence in tandem with the fatal injury to the back of the deceased, that the police were acting in self-defence.

[33] In the upshot, and on a balance of probabilities, the Claimant having established that Cons. McDermott was negligent in the killing of Michael Dorsette, judgment is entered for the Claimant. The quantum of damages now beckons.

Quantum of Damages

[34] I find that the challenge as mounted by the Defendants concerning the father/daughter relationship between Michael Dorsette and Britannia Dorsette to be less than plausible.
In any event, I accept the evidence of Ms Barbara McLeod and Mr. Jovian Markland that, in sum, the deceased's regard and dealings with Britannia Dorsette as being his daughter is, in all probability, more than a "consummation devoutly to be wished."

[35] It is established by S.4(4) of the Fatal Accidents Act that, “if in any such action the court finds for the plaintiff, then, subject to the provisions of subsection (5), the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected loss causes to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the Defendant) shall be divided accordingly among the near relations.”

[36] According to Subsection 5 of the Act, *supra*, “In the assessment of damages under subsection (4) the Court –

a) “may take into account the funeral expenses in respect of the deceased person, if such expenses have been incurred by the near relations of the deceased person.”

[37] I accept that at the time when Michael Dorsette met his demise he was a vendor of men’s clothing and toiletries at the Downtown Kingston Market and in the Bull Bay Community.

[38] He earned, according to Ms. McLeod about $7,000.00 per week of which he contributed the sum of $2,800.00 per week towards their household expenses and a sum of $2,000.00 towards Britannia’s maintenance. His earnings, I daresay, are more than a trifle overestimated. The basis of its computation is rather suspect. All that has happened is that a figure was tossed at the court. I therefore incline to applying minimum wage which was $1,200.00 per week in the year 2000.

[39] I am well aware of the principles expressed in the authorities of **Bonham Carter v Hyde Park Hotel Ltd** (1948) 64 T.L.R. 177 and **Radcliffe v Evans** (1892) 2 Q.B. 524. When conflated they amount to this: It is for the Plaintiff, in an action for damages, to prove then. When doing so the pleadings and proof

must contain as much certainty and particularity as is possible. However, the stricture of the rule, of strict proof, must be looked at in the reality of the social parlien of the particular plaintiff. Thus, in **Grant v Motilal Moonan Ltd and Another** (1988) 43 W.I.R. 372, it was held that proof of earnings was not simply a matter of slavishly following the case law authorities that require strict proof. A plaintiff ought not to be denied his reasonable claim on account of his inability to produce supporting documentation in its proof.

[40] In the instant case the deceased was a Vendor. To have expected him, much less his mother, to have possessed extant documents relevant to his vending business may very well be the vainest pedantary of which Bowen, LJ spoke of in Radcliffe v Evans, *supra.* Even so, I cannot accept Ms McLeod's evidence on the basis as proferred. It is too conjectural.

[41] The above findings, in my view, constitute the S.4(4) qualification of the, "actual or reasonably expected loss causes to him or her by reasons of the death of the deceased person …"
Taff Vale Railway Co. v. Jenkins (1913) AC 1 on which the Claimant relies, puts it beyond doubt under the equivalent English provision of the Fatal Accidents Act: "It is not a condition precedent to the maintenance of an action … that the deceased should have been actually earning money or money's worth or contributing to the support of the Plaintiff at or before the date of the death, provided that the Plaintiff had a reasonable expectation of a pecuniary benefit from the continuance of his life." The evidence in the instant case is slender yet credible. I find that there was a reasonable expectation of a pecuniary benefit from the continuance of the life of Mr. Dorsette.

[42] Mindful of the approach to be followed in assessing damages in a fatal accident case I need only refer to an except from the case of **Davies v Powell Duffryn Associated Colliers Ltd** [1942] AC 601. There Lord Wright had this to say:

> *"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of employment. Then there is an estimate of how much was required or expanded for his personal and living expenses. The balance will give a datum of basic figure which will generally be turned into a lump sum by taking a certain number of years purchase."*

[43] What is that certain number of years purchase? It seems to me that the multiplier/multiplicand approach is the methodology best suited to answer the question as poses.

[44] Based on the authority of **Jamaica Public Service Co. Ltd. v Elsada Morgan et al** (1986) 23 J.L.R. 138 I accept that the appropriate multiplier is 14. The minimum wage multiplicand of $1,200.00 per week has to be reduced to take into account his personal and living expenses.
I am prepared to reduce that sum by half and thereby award the dependency thus: 14x52x600 = $436,800.00. Under S. 4(5)(c) of the Fatal Accidents Act the sum of $200,000.00 for funeral and testamentary expenses is also recoverable as special damages. I so award:

[45] In the final analysis, on a balance of probabilities, I award the sum of $668,000.00 for special damages with interest thereon at 3% from November 9, 2000 to the date of judgment.

[46] The Claimant is to have her costs agreed, if not, then taxed.