IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008 HCV 00300

BETWEEN	**LOUISE NEWLAND (Personal Representative and Mother of the deceased Gerald Burton)**	**CLAIMANT**
A N D	**THE ATTORNEY GENERAL**	**DEFENDANT**

Mrs. Jacqueline Samuels-Brown Q.C., Mrs. Tameka Jordon and Miss T. Malcolm instructed by Jacqueline Samuels-Brown for the Claimant.

Mrs. Trudy-Ann Dixon-Frith and Miss Alicia McIntosh instructed by the Director of State Proceedings for the Defendant

HEARD: 21st, 22nd & 23rd September, 2010 and 20th December, 2010

CORAM: E. BROWN, J. (Ag.)

The case for the claimant, if accepted, would be at once bone-chilling, blood-freezing and apoplectic. The claimant's son, Gerald Burton, was shot while he stood with his hands raised and clutching no more than a cellular telephone, then dragged into a nearby yard by the scruff of the neck, as one would the carcass of a dog, and whatever life remained in him was drained away as his vital organs were perforated by

a hail bullets from gun-toting agents of the state. The unfathomable grief of a mother bearing witness to these traumatic events, rendered impotent to affect her son's fate by the unveiled threat of identical treatment should she dare to intervene, must have evoked expressions of grief comparable to the wail of a banshee. That the events unfolded in plain sight of not only the grief stricken mother and other onlookers, including Leacroft Gordon, a friend of Mr. Burton, is unsurpassed in audacity and sends seismic shocks to the substratum of the rule of law. *Au contraire*, the police officers do not deny intentionally shooting Mr. Burton but say this was done in lawful self-defence.

CASE FOR THE CLAIMANT

Miss Louise Newland testified that when she commenced witnessing the events, her son was standing with his hands in the air and speaking with Constable Gilbert Brown. At this time she was about twenty-five (25) feet away from her son. She was facing her son and the back of the policeman was towards her. A little way off were Superintendent Hewitt and another policeman called Harry J. Additionally, other policemen were beside the deceased with short and long guns pointing at him.

A big, fat policeman wearing a black wool tam entered this scene and pointed a gun at her son. She then saw and heard that officer shooting her son. Her son fell and cried out, "Mummy, mummy si mi

madda over deh so." In cross examination she asserted that the big fat policeman was Constable Gilbert Brown, although, admittedly she never said so in examination in chief. When he shot her son the policeman was about eight (8) feet from the deceased. Further, no gun fell from her fallen son's hand.

Upon beholding the shooting of her son Miss Newland ran towards him. However, the officer, possibly the shooter, pointed his firearm at her and said, "If yuh put yuh blood claat out yah a lick off yu head to." Thereafter, another officer drew the deceased into a yard. This yard was across from the yard which was her vantage point, probably number 5 Bedford Street. After he was pulled into the yard Miss Newland heard a series of gunshots.

Mr. Leacroft Gordon was called in support of Miss Newland. Mr. Gordon said he was with Mr. Burton and Germaine when the police came up. Gerald and Germaine were engaged in a game of Ludo on Bedford Street at the time. The police drove up in an unmarked car and three policemen disembarked. Two of those policemen ran pass into a yard in hot pursuit of a man who ran passed them. He next saw Gerald and another guy on the ground. No more mention was made of Germaine at this point. When the remaining policeman walked into a yard, the man on the ground with Gerald walked off.

As Gerald was following suit, the policeman returned and shouted to Gerald not to move. Gerald stopped and raised his hands, one of

which held a cellular phone. Then, without rhyme or reason, the policeman shot Gerald. He heard about fourteen (14) shots. He resiled from this under cross examination. He said he did not hear fourteen (14) shots at this time, though he didn't go on to say when.

Mr. Gordon testified that by the time Gerald fell to the ground the other officers returned. In cross examination Mr. Gordon said, more than one police officer was present at the time of the shooting but only one fired. Further, just before Gerald was injured only one policeman was pointing a firearm at him.

Mr. Gordon placed himself on Bedford Street at time of the shooting, standing about twenty (20) feet away. He was facing Gerald's back and the side of the policeman's face. Mr. Gordon swore that Gerald's back was towards the officer, with hands raised and resting on a zinc fence. Gerald was therefore shot in the back and, from a distance of approximately twelve (12) feet away.

He having been shot, Gerald fell face down, according to Mr. Gordon in cross examination. Mr. Burton was then pulled into an adjoining yard, premises number 3 Bedford Street. In cross examination Mr. Gordon said two officers held Gerald by his collar and pulled him on his stomach into the yard. In examination in chief he said thereafter he heard more gunshots. More gunshots became 'a shot' under cross examination.

CASE FOR THE DEFENCE

The defence called four witnesses but only two spoke directly to the killing of Mr. Gerald Burton viz Constables Terron Andrade and Gilbert Brown. The witness statements of the ballistics expert and pathologists were admitted into evidence.

Both Constables were traveling together at the material time. Constable Brown was the driver. Constable Andrade swore that he saw Mr. Burton and two others, known only as Cheez Trix and Dwight, exiting a yard onto Beresford Street and each was armed with a firearm. All three men opened fire at the police. Constable Brown said as he turned onto Beresford Street he heard gunshots and saw four men firing at them.

Both Constables got out of the vehicle. Constable Andrade said he took cover between two gate posts and returned the fire. Constable Brown was a little more dramatic. Constable Brown said he fell to the ground and rolled behind a utility pole and from there answered his assailants in like manner.

The Constables said Mr. Burton fell during the exchange of gunfire. Constable Brown was more specific. According to the latter, Mr. Burton fell into an open gateway and the perimeter wall. While Constable Andrade spoke with particularity concerning the firearm Mr. Burton had, Constable Brown was very general. Constable Brown said

the firearm fell from Mr. Burton's hand when he was felled by their bullets, only to be retrieved by his partner in crime, Dwight. Constable Brown confined himself to saying he wasn't close enough to recover Burton's firearm and discovered it missing on his approach when the firing subsided. During the exchange of gunfire Constable Brown never kept his eyes on the fallen Mr. Burton, he disclosed in cross examination. The firing appears to have been intense, lasting, in for five (5) minutes, in the estimation of Constable Brown. Constable Brown said the firing ceased only on the arrival of other policemen whereupon the gunmen fled.

Both Constables left and went to the bottom of Nelson Street. That may have been between five (5) to ten (10) minutes after Mr. Burton was shot, in the evidence Constable Andrade under cross examination. There, they appear to have separated as Constable Brown said he went to the Enid Anglin Community Centre.

While at this location, Constable Andrade said a man emerged from behind a zinc fence, armed with a firearm. That man fired at them then retreated from whence he came. Soon after, Constable Andrade heard gunshots emanating from that yard. Constable Brown said he confronted Germaine Edwards otherwise called Shawn Taliban in a yard. Germaine discharged one round at him which did not go unanswered. Constable Brown's repellence was as accurate as it was deadly, as Germaine fell to the ground, and gave up the ghost. At the end of the

shooting, Constable Andrade entered the yard and identified Germaine as his earlier assailant.

FORENSIC EVIDENCE

The post mortem report disclosed the following gunshot wounds on the body:

1. An entrance gunshot wound measuring 1 cm in diameter present on the left shoulder 31 cm below the top of the head 11 cm away from midline without gun powder deposition. It traveled through the underlying tissues, muscles, bones and exited on the medial aspect of left arm 40 cm below the top of head 20 cm away from midline. Size 7 cm x 4 cm. Direction is downwards. Fracture of humerus present.
2. An entrance gunshot wound measuring 1 cm in diameter present on the left anterior chest 37 cm below the top of head and 3 cm away from midline. Without gunpowder deposition. It traveled through underlying tissues, thoracic cavity, lacerating the left lung and exited on the left posterior chest 47 cm below the top of head 16 cm away from midline. Size 2 cm x 0.5 cm. Direction is backwards, downwards and to the left. Haemothorax present.
3. An entrance gunshot wound 1 cm in diameter present on the left anterior chest 38 cm below the top of head 11 cm away from

midline without gunpowder deposition. It traveled through the underlying tissues, thoracic cavity, left lung and the bullet lodged in the subcutaneous tissues on left posterior chest 54 cm below the top of head 10 cm away from midline. The recovered deformed copper jacket bullet was handed over to the police for necessary action. Direction is backwards, downwards and to left. Haemothorax present.

4. An entrance gunshot wound measuring 2 cm x 0.5 cm present on the left posterior chest 29 cm below the top of head 4 cm away from midline without gunpowder deposition. It is restricted to subcutaneous tissue and exited on the left posterior chest 29 cm below the top of head 5 cm away from midline. Size 4 cm x 0.5 cm.

5. An entrance gunshot wound 0.8 cm in diameter present on the right anterior abdomen 76 cm below the top of head 12 cm away from midline without gunpowder deposition. It traveled through underlying tissues peritoneal cavity right perinephrie tissues and exited on the right lateral thoraco abdomen 64 cm below the top of head 23 cm away from midline. Size 6 cm x 3 cm. Direction is upwards, backwards and to right.

6. An entrance gunshot wound 0.8 cm in diameter present on the left lateral abdomen 70 cm below the top of head 18 cm away from midline without gunpowder deposition. It traveled through

underlying tissues subcutaneous tissues peritoneal cavity right perinephrie tissue, bowel and exited on the right posterior abdomen 70 cm below top of head 9 cm away from midline. Size 1 cm in diameter. Direction is backwards and to right.

Analysis of Factual and Forensic Evidence

From Miss Newland's description of the event, her son was facing the policeman when he was shot on Bedford Street. Therefore the entrance wound be frontal or anterior chest in the medical jargon. Since that wound was frontal, it could only have been either number one (1), two (2), three (3), or five (5). Entrance wounds one (1) – three (3), the direction of the bullet in the body was downwards, whereas for entrance wound number five (5) it was upwards. The most favourable interpretation appears to be number five (5) since the Mr. Burton was upright when he was first shot and probably supine once pulled into the yard.

In that event, wounds one (1), two (2), three (3), four (4) and six (6) were inflicted in the yard. Since wounds one (1), two (2) and three (3) were to the front, they could all have been inflicted when Mr. Burton was couchant on his back. The body of Mr. Burton would have had to be inverted to account for wound number four (4).

However, Miss Newland spoke of "a series of gunshots", once the action moved to inside the yard. That connotes one continuous round of

gunfire, not sporadic. The scientific evidence suggests a pause in the shooting if Ms. Newland is to be believed that all the other gunshot wounds were inflicted in the yard. It would, however, be putting a severely strained interpretation on her evidence to say she meant there was the sound of gunshots, a lull then more gunshots. Such a pause in the shooting is wholly inconsistent with her description of the events.

That description raises more credibility issues with number six (6). That bullet entered Mr. Burton's body at the left lateral abdomen and exited at the right posterior abdomen. The wound had no gunpowder residue and traveled backwards and to the right. The attempt to harmonize this injury with the eyewitness account of Miss Newland inaugurates conceptualization challenges.

While it may not be entirely ludicrous to assume the officers had the dexterity to make upright a body rendered inert by gunshot injury, anything more to complete the picture would be just plain fanciful. Unless an aid in the nature of a pulley was used to get the body upright, then human crutches would have to be presumed. Assuming they were able to get Mr. Burton's body in a vertical position, how did they accomplish shooting him at the left side, from a distance greater than five (5) feet, and that without injuring any of their number? To have shot Mr. Burton in the side required the sort of superlative marksmanship for which the Jamaica Constabulary Force is not notorious.

On the other hand, whether Mr. Burton's body was supine or prostrate, the infliction of this injury was no less difficult. Surely, it could not have been inflicted by an officer standing upright. So, the shooter would have had to crouch very low, stoop or lie flat in line with Mr. Burton's body. There is no evidence on the Claimant's case to suggest how this injury came to be inflicted, hence the foregoing conjecture.

The sheer incredulity of the infliction of the sixth injury after body was dragged into the yard, is a taint that leaves its crimson indelibility across the length and breath of Mr. Leacroft Gordon's evidence. Mr. Gordon said Mr. Burton was first shot in the back. This finds some harmony with injury number four (4). This bullet traveled from the left posterior chest, was restricted to the subcutaneous, tissues and exited the left posterior chest. That is, it broke the skin and penetrated the underlying tissues.

That is as far as the harmony went. The 'more shots' that he certified as true in his witness statement, that were discharged after Mr. Burton was pulled into the yard, become 'a shot' in cross examination and maintained in re-examination. Wherever that one shot struck Mr. Burton's body, Mr. Gordon's evidence does not account for the other four gunshot wounds on Mr. Burton's body. This sets him on an inevitable, inexorable and irreversible path of collision with the forensic evidence.

It is against this background that the submission that on a balance of probabilities, the evidence of both Miss Newland and Mr. Gordon is corroborated by the forensic evidence must be viewed. With all due difference to learned counsel for the Claimant, the position is quite the contrary. Far from corroborating the eye witness evidence, the glare of the forensic evidence has laid bare its manifold weaknesses, unraveled it and left it in mocking disarray.

That notwithstanding, can the Claimant's case stand apart from the forensic evidence? Miss Newland asserted in examination in chief that when her son was shot Superintendent Hewitt and another policeman known as Harry J were a little way off. That was denied by Superintendent Hewitt. More importantly Mr. Gordon's evidence was that he saw both men after the shooting. Accordingly, her evidence on the point is rejected.

Secondly, the narrative of her evidence in chief forcefully impressed upon the mind that the identity of the policeman who shot her son on Bedford Street was not known to her. Her evidence was that while her son had his hands in the air and conversed with Constable Gilbert Brown, "a big fat policeman wearing a black wool tam" pointed a gun at Mr. Burton. Thereafter she "saw and heard... the officer shooting" her son.

If Constable Gilbert Brown was "the officer shooting [her] son", why not say so? In cross examination she contended that the officer so

unflatteringly described was in fact Constable Gilbert Brown. To her credit, she admitted that she never identified the cop who so summarily dispatched her son as Constable Gilbert Brown in her examination in chief. That admission came in the form of a retraction of the converse position, having first disagreed that no such thing was said in the witness statement. The Court is therefore in sympathy with the submission of learned counsel for the Defendant, that the Miss Newland began to fabricate her story.

Was it all a fabrication? From twenty-five (25) feet away from her son, Miss Newland heard the fading perishing fruit of her womb utter the words, "mummy, mummy, si mi madda over deh so." Coming from the child she brought into this world, her pathos must have been viscerally wrenching. But was it said?

The words were not corroborated by Mr. Gordon. On this point and others shortly to be adverted to, Mr. Gordon was as silent as the tomb. He placed himself at approximately twenty (20) feet from Mr. Burton when Burton was ordered not to move. Yet, he apparently heard nothing. Maybe Miss Newland had keener hearing, but it is passing strange that Mr. Gordon never spoke to this.

Additionally, Miss Newland said she ran towards them after this was said. That excited the wrathful threat to visit her with either death or serious bodily harm from Mr. Burton's assailant. Mr. Gordon was on the opposite side and supposedly nearer to the speaker yet, again,

silence, on the point. Not even the running attracted Mr. Gordon's attention.

Indeed, under cross examination, Mr. Gordon never saw Miss Newland when the police came on the scene. He said he saw her after Mr. Burton was injured. How then can any tribunal of fact accept her evidence that she was present, did and heard what she testified to?

A mere forty-five (45) feet separated them and she was as passive as she was active. Even allowing for the press of curiosity seekers, attention was called to her on three separate occasions. If Mr. Gordon saw Miss Newland proximate to the shooting why the deafening silence on all she said transpired? Unless of course Mr. Gordon meant that he saw her after the incident in the yard as well, in which case that she witnessed the incident would be even more suspect.

In fact, there was much discord between the two witnesses for the Claimant. They spoke with one voice in two areas only viz that Mr. Burton was shot once on Bedford Street, was dragged into a nearby yard then shot again. But even that one voice was with intonation. Whereas Miss Newland's evidence bears the inescapable interpretation that Mr. Burton was first shot from the front, Mr. Gordon says he was shot in the back. Further, while Miss Newland heard a series of shots after Mr. Burton was pulled into the yard, Mr. Gordon heard one solitary shot.

The disharmony is evident from the stage each set for the shooting of Mr. Burton. Mr. Gordon in chief spoke of three policemen coming on

the scene. Two chased two men into a yard while the other had Mr. Burton and the other man on the ground. It was this officer who shot Mr. Burton. His evidence is that by the time Mr. Burton fell to the ground the other officers returned.

So, only one officer was present when Mr. Burton was shot on Bedford Street. However, in cross examination he said more than one police officer was present at the time of the shooting but only one fired. But since only three came on the scene, two of whom went into the yard, returning by the time Mr. Burton fell to the ground, where did the others materialize from?

Although Miss Newland said there were several officers around Mr. Burton with guns trained on him, Mr. Burton was conversing with Constable Brown when he was shot. This too escaped the attention of Mr. Burton. On his version in chief there was no one to converse with at the material time. When this was changed in cross examination its impact was confined to numbers.

So, having so brazen-facedly shot Mr. Burton in front of many witnesses, Miss Newland and Mr. Gordon say the dastardly deed was brought to finality in the secret of a nearby yard, albeit one close enough for them to hear the gunshots. From a purely common sense point of view this wears thin the infinite bounds of credulity. The police had already flagrantly shot Mr. Burton, what was there to be gained by completing the act in the yard? The answer is a resounding nothing.

Anonymity of the shooter was already lost as was the circumstance of the shooting. Whether it was done on Bedford Street or in the yard, the allegation remained, wanton, cold-blooded execution by the police.

On the evidence, someone was indeed killed in a yard but it was not Mr. Burton. That person was Germaine. Mr. Burton was killed on Bedford Street. From their inability to tell a coherent account of the events of the 8th February, 2007, the Court concludes that neither was present. The Court is impelled by the evidence to the view that they heard of the separate killings and sought to conflate them in the telling of their story.

Mr. Gordon spoke of the killing of Germaine in this witness statement as if he had witnessed that event as well. However, in cross examination he admitted that he didn't see when Germaine Edwards was injured. That, in the judgment of this Court, was not all he contrived.

Mr. Gordon's vacillation on the central issue in the case so eroded his credibility that it was left vapour-thin at the end of the day. Turning to Miss Newland, she had a storyteller's tongue, long on artifact but ever so short on fact. Her evidence stands unrivaled in fictional value but drained of historicity.

Neither the individual accounts nor their collective account has met the bar of veracity, even on a balance of probabilities. The evidence of these two witnesses was so riddled with inconsistencies and contradictions too numerous to enumerate. The evidence of each was like

two gladiators battling for supremacy in the coliseum. While it is admitted that the ability of witnesses to observe, retain, recall and relate events differ, the disparity between their evidence should not be poles apart so that what results is a yawning unbridgeable credibility gap between them. Having seen and heard the witnesses for the Claimant the Court finds their evidence incapable of belief.

The account of a shootout given by the defence is more consistent with the multiple directions from which Mr. Burton was shot than the summary execution described by the Claimant and her witness. As has been contended by counsel for the Defendant, its witnesses told a coherent story and were unshaken in cross examination.

The Defendant contended that Mr. Burton was armed with a handgun and firing at them. Constable Andrade who spoke to this did not elaborate on the type of handgun. Therefore, it is not known if it was a .38 revolver or a semiautomatic pistol. This is an important fact when looking for gunpowder residue on the hands of a person alleged to have discharged a firearm, according to Superintendent Sydney Porteous, the ballistics expert.

The evidence of the Superintendent Porteous is that gunpowder residue is usually found on the hand of a person who discharges a firearm. However, the type of firearm used will determine whether any gunpowder residue is found. If a .38 revolver is used, gunpowder residue would be expected on the hand of the shooter. However, that is not the

case with a semiautomatic pistol. That is so because the latter firearm discharges with a closed breach. Therefore, most if not all the gunpowder residue emits from the muzzle of the firearm.

It was submitted that there was no gunpowder residue on the body of Mr. Burton, particularly his hands and that this falsifies the claim of a shoot out. No evidence was led to say Mr. Burton's hands were swabbed and the swab returned a negative result for gunpowder residue. That notwithstanding, even if there was such evidence, its value would have been negligible. That is, without evidence of the type of handgun alleged to have been carried by Mr. Burton, the absence of gunpowder residue could not be the basis for any conclusive finding.

Neither is it of any moment that there was no gunpowder residue around the gunshot wounds on Mr. Burton's body. From the evidence, both sides said Mr. Burton was shot from a distance too great to expect gunpowder deposits at the site of the wounds. Indeed, that is a fact more supportive of the case for the defence as one would have expected Mr. Burton to have been shot from close range in the yard.

What then of the known trajectory of the bullets? It was submitted that this corroborates the evidence of Miss Newland and Mr. Gordon as to how Mr. Burton was shot and where. It was incorrectly submitted that the trajectory of four of the six shots was downwards and backwards and one upwards and forward. In fact, the direction of the wound to the shoulder was downwards; two to the left anterior chest both backwards,

downwards and to the left; to the right anterior abdomen upwards, backwards and to the right; and left lateral abdomen backwards and to the right.

So, of the six gunshot wounds only two were both backwards and downwards. One was downwards only. Another was upwards and backwards, not upwards and forward as submitted. The sixth was backwards and to the right.

As was said before, Miss Newland didn't say in her witness statement where on his body Mr. Burton was first shot. However, Exhibit 8 contains a summary of the information received regarding the circumstances of the death. The provenance of the summary is not stated therein but it walks very close to Miss Newland's statement. Therefore some weight, though not enough to make it pivotal, must be given to it.

In that summary it says Mr. Burton was shot in the shoulder, while he had his hands in the air. Dr. Mynedi says the direction of that bullet was downwards. The difficulty that poses is Mr. Burton stood at 6' 3" and there was no shooting from above.

On Miss Newland's evidence the most likely wound Mr. Burton received while standing on Bedford Street was number five (5), that to his right anterior abdomen proceeding upwards, backwards and to the right. If that is correct, then the other wounds were inflicted in the yard. On that assumption, the trajectory of the bullets to the shoulder, left

anterior chest would suggests Mr. Burton was either crouching or lying flat on his back when the bullets entered his body.

If those wounds were inflicted while he was supine, again, how did he receive the wounds to his left posterior chest and left lateral abdomen? These wounds become the bane of the trajectory argument, utterly destroying its persuasive value. The unreliability of Mr. Gordon's evidence cannot be saved by this argument either. He, notably, said Mr. Burton was first shot once in the back then he heard only one other shot in the yard.

Having concluded that Mr. Burton was killed in a shootout with the police no liability attaches in the circumstances of this case. The police were confronted by three or four armed men, discharging bullets in their direction. The police did what was reasonably necessary. That is, they met force with force of arms. They were under no duty to retreat or cower in their vehicle until the danger had passed.

That Mr. Burton received multiple gunshot wounds from varying directions is consistent with the dynamics of a shootout. Therefore, that fact does not raise any issue of excessive force. The agony of the moment was wholly incompatible with detached reflection which allows for a weighing of their exact defensive measure. Theirs' was a moment of crisis requiring quick and decisive action. If in taking that reasonably necessary defensive action death results, the law has held that to be justifiable homicide from time immemorial.

DISCLOSURE

The issue of non-disclosure was raised at the trial. In her written submission learned counsel entreated the Court to strike out the Defendant's case and enter judgment for the Claimant as prayed in the Particulars of Claim. Alternatively, the court was invited to use that failure to draw inferences adverse to the defence.

By Notice of Application dated 5th October, 2009, the Claimant sought the following order:

That the Defendant specifically discloses or a witness summons be issued for the production of the following documents:

(a) Photographs/negatives and/or disc of photographs taken by one Mr. Chambers of the Bureau of Special Investigations on the 8th, 9th and 10th February, 2007;

(b) Copy of the station diary for the Hunts Bay Police Station and Bureau of Special Investigation showing the entry of fifty two (52) spent shells on the 9th February 2007 by the Claimant.

Those Orders were granted by Master Simmons (Ag.), as she then was, on the 10th November, 2009. At the time of granting the Orders sought, the Master vacated the trial dates of 30th November to 2nd December, 2009 and substituted the new trial dates of 21st – 23rd

September, 2010. That is a clear ten (10) months away. Nothing happened *ad interim* and the claim proceeded to trial as rescheduled.

It was at the end of the trial, as indicated earlier, that the application to strike out the statement of case for the defence was made. As Mance J. observed, *"an application at trial for dismissal of an action for default in discovery is unusual,"* **(Cephas Shipping Corporation v. Guardian Royal Exchange Association PLC (The Capricorn) [1995] 1 Lloyd's R 622, 644**.

The approach which commends itself to this Court from **The Capricorn**, is to see if the Claimant was able to establish her factual case without the further documentation which might have assisted her. The Court must then adjudge whether the absence of the documentation could be said ultimately to have prejudiced the Claimant. That the absence of the documentation may have made the Claimant's task more difficult is an insufficient basis for holding that a fair trial was not possible.

Indeed, according to the learned authors of **Disclosure** 3rd edition at 13.07, the Court has the express power to strike out a statement of case of a defaulting party where default has made the fair trial of an action impossible. The principles which should engage the mind of the Court are compendiously articulated as: "the circumstances including whether or not the failure was deliberate or contumelious, the reasons

given for the non-compliance, the extent of the non-compliance and the prejudice caused to the other party. (Ibid. paragraph 13.12).

This eleventh hour application is unusual because such an application is customarily the subject of pre-trial adjudication. That is so because:

> ***In modern times, the party ordered to give disclosure will be given every opportunity to comply with his disclosure obligations, but if he fails to comply with an "unless" order, unusually made after serious failure to comply with earlier orders, striking out a party's statement of case is automatic, and applications for relief against the consequences are generally unsympathetically received. (Ibid. paragraph 13.10).***

Although the learned authors of **Disclosure** have posited that facilitating compliance is the modern approach, the Court in ***Republic of Liberia v Edward Farrow Roye (1876) 1 A.C. 139*** proceeded in a similar fashion. In this case the Order dismissing the bill for default was made only after three different opportunities had been given for making an affidavit disclosing relevant documents. Those three opportunities spanned the 24th April, 1874 and 28th July, 1875. It was held that the Court undoubtedly had the power to dismiss the bill for default. Lord O'Hogan seems to have considered this conduct as 'pertinacious disregard' of the order for disclosure. (Ibid. p. 147).

So, it is not just that there has been disobedience of an order that has been made for disclosure. There must be conduct which can properly be described as pertinacious, contumelious or contumacious. That conduct presupposes an effort to enforce the order for discovery requiring the intervention of the Court. In fact, the enforcement procedure laid down under the **Civil Procedure Rules, 2002**, r. 28.14, makes this crystal clear.

Upon the making of the application to strike out the offending party's statement of case, or part thereof, the Court cannot do so summarily. At this stage whether it was an order for standard or specific disclosure, all the party would be in breach of is a 'bare' or non-peremptory order. The Court must go on, if the circumstances warrant, to make a peremptory order, expressed as final or 'unless'. It is the disobedience of this latter order that invokes the august and draconian power of striking out the offending party's statement of case, or part thereof as the case might be.

The peremptory order gives a further time within which to comply and makes plain what the consequences of non-compliance are. The dictum of Neill L. J, cited with approval by Otton L. J, in ***Star News Shops Ltd. v. Stafford Refrigeration Ltd. [1998] 1 W.L.R. 536, 544***, puts the position beyond doubt:

> ***A Court should not treat a party as having acted contumeliously and in plain defiance of the Court unless the position is clear and unless it is shown***

> ***that the party has been warned of the consequences but has nevertheless gone ahead and failed to comply with an order of the Court.***
> Otton L. J, concluded:
>
> ***It follows that, if a final order is not to be treated as a peremptory order, the breach of a 'bare' order cannot in the circumstances of this case be regarded as contumelious or contumacious behaviour.***

How then is the conduct of the Defendant to be assessed in the instant case, since the application has come at the latest possible time and in the face of a bare order? The safeguards embodied in the language and procedure of r. 28.14 cannot be resorted to. That is, since there is no evidence before the Court explaining the circumstances of the non-disclosure, such as there may be, all except one of the principles enunciated by the learned authors of **Disclosure** are unhelpful. Neither can the court make an unless order at this stage. While the Court is not unmindful of the submissions of learnéd counsel for the Defendant, the Court is constrained to consider the application in its overarching duty to deal with cases justly.

The issue joined at trial was the circumstances of the killing of Mr. Burton. Having analyzed the oral and documentary evidence presented, the Court is of the view that that issue was fully ventilated. Disclosure of the diary entry that the Claimant handed over fifty-two (52) spent shells

could only be confirmatory of the fact of shooting. The fact of shooting was admitted on both sides, of necessity.

Additionally, complaint was made concerning the record of a conversation between Miss Newland and Superintendent Hewitt sometime before the incident. It is settled law that the diary entry could only affect the credibility of Superintendent Hewitt. **R. v. Charles Jones and Raymond White (1976), 15 J.L.R. 20, 22.** If the Superintendent had used the words alleged, it might even have established prior malicious intention on the part of the Superintendent.

The Superintendent took no part in the killing of Mr. Burton, however. He was not even present at that time, contrary to the palpably false assertion by Miss Newland. The Superintendent's evidence was wholly irrelevant to the proceedings; *a fortiori* so was his credibility. Further, the facts the Claimant sought to establish, even if believed, would not lend themselves to a conclusion that the Superintendent's malicious intention, such as he might have had, infected the Constables who confronted Mr. Burton, notwithstanding the fact that he was their commanding officer.

In respect of order (a) of the orders granted by the Master (Ag.), and the originals of the police statements submitted to the Bureau of Special Investigations, their value at the trial would be pure speculation at this stage, but that is not critical. The Court will, however, indulge itself the following observation. It would require much exertion by a most fertile

imagination to conceive a material difference between those statements and the witness statements herein. Any such material departure would be tantamount to self-incrimination, the very antithesis of a policeman faced with an allegation of summary execution.

The inevitable conclusion is that the Claimant established her factual case without the further documentation which might have assisted her. Whatever difficulty the Claimant may have experienced in that presentation as a result the non-disclosure did not make itself manifest during the course of the trial. Even if the subtlety of that difficulty escaped the court's notice, the difficulty itself does not make for an unfair trial. Ergo, the Defendant's non-disclosure has not prejudiced the Claimant making the trial unfair. And a fair trial is the *raison de'tre* of r. 28. Further, neither the most expansive interpretation of r. 28 nor *dicta* in the case law supports the proposition of drawing adverse inferences from the failure to disclose.

The application to strike out the case for the defence therefore fails on both counts. Further, as indicated above, the case for the Claimant fails on the merits. Consequently, judgment is given for the Defendant. Costs to be taxed if not agreed.