

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1987/P103

BETWEEN

JACQUELINE PEART

PLAINTIFF

AND

JAPHETH (VAN) FORD

DEFENDANT

Claim in Assault/and or Negligence

Miss P. Dyer for the plaintiff

P. Bailey for the defendant

Bingham J.

Hearing on March 22, 1990, March 11, 1991 and April 5, 1991

Reasons for Judgment

On March 11, on completion of the evidence in this matter and after hearing submissions I gave an oral judgment for the defendant and promised at that time to reduce my reasons for arriving at this decision into writing.

This is now a fulfilment of that promise.

This claim arose out of an incident on 12th September 1985 along Fairfield Road in Saint Catherine.

In the Statement of Claim it was alleged inter alia at paragraph 2 that:-

"On or about 12th day of September 1985 at Fairfield Road in the Parish of Saint Catherine the Defendant wrongfully and negligently assaulted and beat the Plaintiff by firing his revolver and hitting the Plaintiff in the region of the right shoulder."

The Claim also described the particulars of the injuries, the Medical treatment which the plaintiff subsequently received, the particulars of special damages and ended with the consequential reliefs claimed.

Although the mere discharge of a firearm per se is not evidence of negligence it is of some significance that no particulars of negligence were pleaded.

The defendant in the Defence pleaded at paragraph 11, admitted that he discharged his firearm on the date alleged in the Statement of Claim.

At paragraphs 3-5, however, the defendant averred that:-

3. "In further answer to paragraph 2 of the Statement of Claim the Defendant says that he is and was at all material times the owner and operator of a farm at Fairfield Road, St. Catherine from which farm produce was stolen by praedial thieves from time to time and that on the date of the incident which is the subject matter of this action the Defendant chased and held a praedial thief who had stolen produce from the said farm and while the Defendant was taking steps to get the praedial thief to the Police Station a hostile mob including the Plaintiff advanced towards the Defendant. The said mob was threatening and abusive and the Defendant was put in fear and apprehended immediate danger to himself.

4. In apprehension of the impending threat of serious bodily injury or death, the Defendant in an attempt to scare off the mob discharged his firearm when the Plaintiff was unintentionally struck and injured as the Defendant defended himself.

5. The Defendant says that in acting as aforesaid and having regard to the prevailing circumstances and the dilemma in which he was placed he acted reasonably in discharging his firearm and was not guilty of the negligence alleged or any other act of negligence at all."

In the Reply the Plaintiff now contends that:-

2. "In response to paragraph 3 of the Defence, the Plaintiff says that nothing was stolen from the Defendant's Farm on the day in question but the man who was held by the Defendant was alleged to have stolen three (3) fish from the Defendant's Farm about one year previously and further says that there was no hostile crowd as the majority of the persons who were present at the scene when the alleged thief was held were the defendant's workers and that no one was abusing the Defendant and that the Defendant had no reason to fear any impending or immediate danger to himself. That the Plaintiff was walking from a way-side stall where she was assisting her mother to sell produce and was walking towards her home when she was injured by the Defendant.

3. In response to paragraph 4 of the Defence the Plaintiff says that there was no impending or immediate danger of injury when the Defendant discharged his firearm and say that the Defendant discharged his firearm when the alleged thief ran through a roadway leading to the Plaintiff's home and others.

4. In response to paragraph 6 of the said Defence the Plaintiff says that she was lawfully using the roadway at Fairfield Road with no interest in the incident created by the Defendant when the Defendant negligently discharged his firearm.

5. In response to paragraph 7 of the Defence the Plaintiff says that the Defendant gave her mother Sylvia McLaren the sum of \$100.00 to assist her with her expenses, rendered medical attention to the Plaintiff after her discharge from Hospital and transported her on one occasion to the Kingston Public Hospital and that he paid no further expenses and is still indebted to the Plaintiff.

6. In response to paragraph 9 of the Defence the Plaintiff says that no Criminal Proceedings were instituted at the request of her mother based on an oral agreement with her that he would compensate the Plaintiff for her injuries."

It may be convenient at this stage to state that there was no evidence coming from the plaintiff or her witness that there was any agreement arrived at between the plaintiff's mother and the defendant. (vide paragraph 6 of reply). Moreover what the evidence revealed was that following the incident the Police visited the scene and carried out investigations and subsequently visited the plaintiff's home and spoke to her. There is no evidence of any subsequent criminal proceedings being brought against the defendant or of his licensed firearm being taken from him or of his permit to keep and carry it being revoked by the proper Authority.

The Issues

It is common ground and not in dispute that the injury to the plaintiff was caused by a bullet from the discharge by the defendant of his licensed firearm. On the question of liability the sole remaining issue left for determination on the pleadings was therefore, in what circumstances was the firearm discharged by the defendant? If the allegations as set out at paragraph 2 of the Statement of Claim and further amplified in the Reply were established then the result would be a finding for the plaintiff on the issue of liability. If on the other hand the allegations as set out in the defence at paragraph 3 - 6 were established on the evidence then the defendant's conduct in this regard would have been justifiable in the circumstances and no liability could ensue.

It is, therefore, necessary to examine the evidence as it emerges in determining what in fact occurred on the date in question.

The Evidence

The Plaintiff now 20 years of age and who at the time of the incident was then a school girl aged 15 years of age attending Crescent All-age School, as the evidence unfolded, although the school year had begun, she was assisting her mother selling produce at a Stall on the Fairfield Road which is situated about two chains from her home. To get to her home she would have to turn off Fairfield Road and proceed down a lane for about one chain. About noon of that day her mother came from market and sent the plaintiff to prepare some lunch for her. She then left her mother at the stall and while walking on the Lane she saw Dr. Ford (the defendant) and a boy called "Wrecker." The defendant was holding "Wrecker" in his pants waist. "Wrecker" was shouting out "let me go!" There were other persons present. The crowd numbered about 30 persons. Of these persons who were in the crowd most of them were strangers. The plaintiff recognised one Donavan Grey (her witness), a dreadlocks named "Jockey" but whose correct christian name was Richard and a boy named "Danny". She testified that she never /heard anyone in that crowd threatening the defendant. The plaintiff passed by the gathering and continued on her way home accompanied by her older sister Dawn. While they were walking going down into the Lane she was hit by the bullet which penetrated the back of her right shoulder. She became unconscious shortly thereafter and later regained consciousness in the Spanish Town Hospital where she remained for some eight days during which period she was treated for the injuries she received. Fragments of the bullet were removed from the chest area.

There is no issue that it was the defendant, who is a registered medical practitioner and who had the plaintiff transported to the hospital, saw to her treatment there, and took a personal interest in her case. The evidence as it emerged indicate that he displayed a marked degree of concern and compassion as to the plaintiff's condition. This was exemplified by conduct on his part aimed at ensuring that her recovery would be as total and complete as medical skill and after care could make it.

To return to the narrative of the events, however, given the plaintiff's account she was along with her sister Dawn in the Lane leading to her home and in the role of an innocent passerby when she was hit from behind by a bullet discharged from defendant's gun. The plaintiff was not, however, given her account, able to say in what circumstances, the defendant discharged the firearm. This gap in the plaintiff's case was left to be filled by the testimony of Donavan Grey. Grey who is the virtual brother-in-law of the plaintiff; he is the father of two children born to her sister Ann Marie, who once worked on the defendant's farm but who was fired before the day of the incident for persistent fighting.

On the day in question Grey stated that he was at the back of a bush a few chains from Fairfield Road playing cards, a card game popularly known as "Peter Pat." Although he was a good distance to the back of the bush engaged in this game he was nevertheless able to discern in some detail what was taking place on Fairfield Road. His account of the events as they unfolded was so very graphic and equally descriptive as to warrant repetition. Under examination by learned Counsel for the plaintiff the following dialogue emerged:-

Q. Did you see anything happen that day?

A. Yes Mam.

Q. Could you tell us what you saw?

A. I saw Dr. Ford have a young man holding him into his waist.

Q. Did you see anything else?

A. Yes Mam. After Mr Ford hold him in the waist here comes some excitement. Through everybody Ford hold him in his waist. The people them ask him 'what's wrong?'

Q. When you saw this excitement did you remain in the bush?

A. No I came out and was looking what going on and the crowd ask Mr Ford 'what happen?' Mr Ford said, 'he steal fish out his fish pond'. The people them ask him 'how much him want fe the fish?' Mr Ford still had the young man in his waist leaning up by the light post on the ground. The people them a beg him to 'give the guy a chance and they will pay him any amount it

cost even a hundred or, two hundred dollars'. After that Mr Ford said 'he is not giving him a chance. Him going lock him up.' By him said that the youth start to rassle him trying to get away. The youth then get away through Mr Ford have the gun in his hand. After the youth got away he ran down in the Lane and when he ran Mr Ford take out him gun and run around the light post and fire it down the road. After him fire it the youth run go round a house and little after Mr Ford run around the house a girl call out 'Mr Ford you shot a young lady into the lane.'

Q. At the time Mr Ford fired the gun did you see anybody into the lane?

A. Yes Sir. I saw two persons in the lane at that time. They were Jacqueline (Plaintiff) and Ann Marie Peart.

(underlines for emphasis)

This account of the witness Donovan Grey was further persisted in when under cross examination the witness was asked:-

Q. You are sure that it was Ann marie and Jacqueline who were down in the Lane?

A. Yes sir."

It is important at this stage to recall that the plaintiff had testified to walking home along with her sister Dawn. As Ann Marie, another sister, was someone with whom the witness was intimately connected, there could be no possibility of him mistaking her for Dawn who the witness under cross examination later admitted knowing to be another of the plaintiff's sisters.

The witness Grey was in the back of the bush playing cards while at the same time he sought to describe the incident as it was unfolding out unto the road. Given his description of the circumstances leading up to the discharge of the firearm, when his account is compared and contrasted with that of the plaintiff: apart from it being common ground that the defendant was holding "Wrecker" in his waist while the boy shouted to be released, there was a material conflict between the plaintiff's account and that of the witness Grey.

I found the plaintiff's account to be further remarkable for the absence of any mention by her of the participation by the members of the crowd in the

incident as she passed by with her sister Dawn on her way home.

Given the fact alluded to by the plaintiff that Grey was among the three persons she saw and recognised in the crowd, the witness and herself could not have been describing the same incident. Certainly Grey from the back of the bush could not have seen all that he said he saw. Moreover, had he been on the scene and witnessed the circumstances of the discharge of the firearm as his evidence suggested, his credibility has been shaken beyond recall by his failure in not recognising Dawn as being in the company of the plaintiff and not his sweetheart and baby mother Ann Marie.

Given the doubtful veracity of Grey's account, therefore, one would now have to turn to the accounts of the defendant and his witness to determine whether anything emerged therefrom which assisted the plaintiff's case. When one examined this evidence what resulted was the testimony of a defendant whose demeanour stamped him as being a frank, soft spoken sincere person and a Doctor who from the evidence exhibited a deep concern not only for the plaintiff's well being following the incident, but appeared to have operated his farm in the Fairfield area mainly for the benefit of the persons who inhabited the area, as some thirty five persons were able to sustain their families from their earnings. His demeanour in Court was not only consistent with a manner suggesting a good relationship with his workers but was equally inconsistent with someone who as Donavan Grey would have me believe, had acted on the day in question by discharging his firearm at an unharmed young man who was running away, in what amounted to a reckless and indiscriminate manner. The unchallenged evidence established that the defendant who, no doubt must have invested a tidy sum of money in establishing his farm, and like many other farmers was the victim of the praedial thief. "Wrecker" was one of these culprits. The defendant who did not live on the farm but who from the evidence visited it from time to time, on the day in question came along and caught "Wrecker" with fishes. Although there was no positive evidence as to how many fishes "Wrecker" was held with, the response of the crowd bears out that this was the reason for him being held. The defendant from his conduct was no doubt determined to make an example of "Wrecker" and to hand him over to the Police. His conduct resulted in a hostile crowd of persons from the area gathering. They were aggressive in their manner and demanded the

the release of "Wrecker". Persons in that crowd were armed with various implements. They were also in an angry mood and were heard by the defendant to be uttering expletives.

There is no issue as to the fact that among the crowd was a dreadlock (another name for a rastaman). The defendant described him as being in the forefront of the hostile advances made on him. This man, according to the defendant had a machete. To quote from the defendant's account:

"The fellow that I held was trying to get away because of members of the crowd who pushed me unto a barbed wire and hit me with a bottle on my shoulder. The fellow "Wrecker" then twisted from my hand and the crowd came down. I drew my revolver which is a licensed firearm which was in the waist of my pants. About five minutes had passed when I drew my firearm from the waist of my pants and had it in my hand. There was a Rastaman in the crowd with a machete."

When asked as to how he felt the defendant's response was that "he thought they intended to kill him." There were statements such as "You are a black r---- cloth" ----- "I am going to kill this f----- man today," emanating from persons in the crowd. It was in those circumstances that the defendant said he discharged the firearm at the Rastaman. The fact that the plaintiff was hit supports that she was in all probability within the range of fire when hit. His account is more consistent with her being a part of the crowd that had gathered during the incident and not as she has placed herself down the lane which leads off Fairfield Road and on her way to her home when she was hit by the bullet. As she sought to place herself at one stage as passing the crowd and seeing the defendant holding unto "Wrecker", she would in all probability out of curiosity have stopped even for a moment to enquire and observe what was taking place. Had she been more concerned with preparing lunch for her mother, based on the unchallenged account of the defendant, she need not have passed by the section of Fairfield Road where the incident was taking place. It is against this back ground that I find the account given by Donavan Grey as ^{to} the circumstances prevailing when the firearm was discharged to be not only unlikely but highly improbable.

The defendant called one witness Beverley Duncan, someone who hails from the Fairfield area and who used to work on the defendant's farm as a labourer and who is now employed as a domestic helper. She testified to being

engaged on the day in question weeding calaloo when the incident occurred. The result was to cause the work on the farm to be halted as the workers converged on the scene to observe what was taking place. She supported the defendant's account as to the hostile mood of the persons in the crowd. Her account however, varied as to least one material particular from that of the defendant in so far as she placed the rastaman (dreadlock) seated on a bike while advancing on the defendant with the machete. She was, however, certain as to seeing the plaintiff in the crowd and when challenged in cross-examination as to her being on the scene she was very emphatic in her response to being present and witnessing what took place. Given the fact that she is no longer employed on the farm, as it was closed down from in 1986, and that she is still living in the area, it must have taken some courage on her part to come forward to give evidence in support of the defendant's case.

I found her to be a frank witness, although when her demanour is examined, given the fact that the incident took place over five years ago, her recollection of the event may not be now as vivid as someone who was no more than that of a mere onlooker as distinct from someone actively involved in the incident such as the defendant. In so far therefore as her account varied from that of the defendant I would accept the defendant's account.

Conclusions and Findings

When the evidence is examined, evaluated and assessed what this matter resolves itself to is an action in which the plaintiff received a bullet wound which was the result of the discharge by the defendant of his firearm. This fact although not in issue cannot per se establish the Claim either in negligence or for Assault. The onus of proof in this regard resting on the plaintiff to establish on a balance of probabilities/ ^{the} existence of either of these two heads of the Claim. On the plaintiff's side, she was unable to assist the Court as to the circumstances in which the defendant discharged his firearm and the account of Donavan Grey when examined, in my view for the reasons which I have stated stamps him as a witness of doubtful veracity and someone whose testimony ought not to be relied upon. I was more impressed with the demeanour of the defendant and I regarded his account as being more in keeping with the manner the incident occurred. In so far as his account varied from that of his witness I preferred his account. They are at least at one as to the circumstances prevailing at

time when the firearm was discharged.

On the facts as I have found them to be the situation in which the defendant was confronted was:-

1. He was in the act of attempting to apprehend a thief.
2. He was being prevented from carrying out his lawful duty in handing over the thief to the police by an hostile mob who were determined to secure the release of the culprit.
3. Certain persons forming part of this hostile mob had succeeded in injuring the defendant and were threatening him with serious bodily harm.
4. The conduct of the defendant in discharging the firearm given the factual situation was reasonable and necessary in the circumstances.
5. The defendant's discharge of the firearm in so far as it caused injury to the plaintiff was neither intentional or negligent, there being no lack of reasonable care on his part.

In this regard the dictum of Justice Holmes of the United States Supreme Court, cited with approval in a case from the Trinidad Court of Appeal Robley vs Flacide [1966] 11 W.I.R. 58 at pg. 62 G-H. that:-

"Detached reflection cannot be demanded in the presence of an uplifted knife."

and given the facts of the instant case this principle further enunciated by Phillips J.A. in this case **is** applicable to the circumstances with and which the defendant was confronted/placed no duty on him to ascertain the exact whereabouts of the plaintiff in order to ensure that she was not within the range of fire at the moment of the discharge by him of the gun. Once it was established that the defendant in discharging the firearm at the hostile mob who was at that moment were threatening him with serious bodily harm, then his action in so doing would be lawful and justifiable and the injury to the plaintiff, although unfortunate was one to which no liability could ensue being neither intentional or negligent.

Despite this the defendant has on the evidence exhibited a deep sense of humanity and compassion in attending to the plaintiff's condition. He being a medical practitioner one would have expected no less. However, both on the facts as I have determined them and on the Law when applied thereto, judgment must be entered for the defendant with costs to be agreed or taxed.