



[2017] JMSC Civ. 165

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2007 HCV 03828**

<b>BETWEEN</b>	<b>AUDLEY GILBERT</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

David Batts instructed by Miss Nancy Anderson for the Claimant.

Mr. Nigel Gayle and Miss A. McIntosh instructed by the Director of States Proceedings for the Defendant.

**HEARD: January 24, 25, 26 of 2011 and November 3, 2017**

***Assault and Battery – Person in Custody of State – By Officer in the course of Duty – Self Defence – Loss of Sight to Left Eye – Damages***

**DAYE, J.**

[1] On the 26<sup>th</sup> September 2007 the Claimant commenced a claim against the Attorney General for damages for assault on him while he was an inmate at the Tower Street Adult Correctional Centre by a Correctional Officer employed to the state.

[2] The Correctional Officer inflicted a blow to his left eye with a baton on the 27<sup>th</sup> September 2001. He subsequently lost vision to his left eye. This claim was filed just before the expiration of 6 year limitation for instituting claims for damaged for personal injuries.

**[3]** The claimant pleaded that the act or acts of the Correctional Officer were done maliciously and /or without probable or reasonable cause by the Correctional Officer purporting to act in the course of his duties.

**[4]** The defendant in their defence of the 28<sup>th</sup> February 2008 plead the Correctional Officer acted in self defence. They alleged the claimant attacked the Correctional Officer with a jammer after he refused to obey a lawful order to leave the area he was. The Correctional Officer, they say, had to use a baton to defend himself and the claimant was injured and taken to Kingston Public Hospital for treatment that same day. (Paragraph 6 of Defence)

**[5]** At a Case Management Conference dated 10<sup>th</sup> March, 2010 one of the orders was:

“Permission granted to the Claimant to rely on Medical Report of Dr. Mark Wong, Resident Ophthalmology Department dated 6<sup>th</sup> January 2005 as an expert report without calling the doctor as a witness unless the Defendant obtains permission at the Pre-trial Review to call the doctor as witness for cross examination.”

This medical report was admitted as expert testimony of the trial as exhibit one. There was no other order to call the doctor for cross examination.

**[6]** The doctor in his report described his assessment of the claimant on the 27<sup>th</sup> September 2001 when he attended to him at the Kingston Public Hospital. He found the:

- The visual acuity in the left eye was perception of light
- Left vitreous haemorrhage
- To rule out a left retinal detachment
- A left anterior uveitis

The claimant was treated with topical medication and discharged from hospital after a day and given a one week appointment for the eye clinic.

**[7]** The injuries the doctor found on at follow up treatment of the claimant are itemized in “Particulars of Injuries” is his claim:

- (a) Left vitreous haemorrhage; left retinal detachment and left anterior uveitis,
- (b) Left infumescent anteriority dislocated lens with acute glaucoma in the left eye.
- (c) Two operation on his left eye [1. 13/10/01 to remove dislocated lens  
2. 23/10/01] A modified anterior vitrectomy for high intraocular pressure in his left eye]
- (d) Total left retinal detachment with no perception of light in his left eye;
- (e) Total blindness to left eye.

**[8]** The claimant bears the burden to prove on a balance of probability that it was the blow to his left eye inflicted by the correctional officer’s baton on the 27<sup>th</sup> September 2001 that caused all the injuries to his left eye that rendered him totally blind in his left eye.

**[9]** There was no challenge by the Defendant that it was the use of the baton by the Correctional Officer that caused the blindness to the claimant’s left eye. I therefore hold that the claimant has discharged this burden of proof. The challenge is that this baton was not used by the Correctional Officer maliciously or without reasonable or probable cause but the baton was used in self defence. This leads to an examination of the evidence of the claimant and the Correctional Officer how this injury was sustained. Understandably they give different and conflicting account of this incident.

## **Claimant's Account**

[10] The claimant states in his witness statement dated the 7<sup>th</sup> October 2010 that he was 59 years old and a welder by trade. He did welding all his life. He also did welding while he was incarcerated. He was incarcerated in 1991 at the Tower Street Adult Correctional Centre until March 2003 when he was released.

[11] On the 27<sup>th</sup> October 2001 he went to the fence surrounding a football field where a football match was playing among inmates. He was watching this match with other inmates at this fence. There is a building above this football field where a Correctional Officer was posted. The claimant left the Prison Hospital where he went for treatment to his back, to the fence of the football field. A Correctional Officer approaching two inmates and spoke to them. He waved his baton and told them to leave which they did. Then he deponed:

7. He had his baton in his hand and was pointing it at my face.
8. I did not say anything to him and slowly followed the two men walking in front of me as due to the problem with my back I could not walk quickly. Suddenly I felt a blow to the back of my upper right thigh and realised Mr. Farquharson had hit me with his baton.
9. I stopped walking and stood back against the fence holding the diamond shape wire to support me, I assumed he had hit me because I couldn't walk fast enough.....
10. He came up to me and grabbed my merino shirt on my chest, twisting it into his hand. He said "Officer, officer", to which I believe he meant the Superintendent's office. He tried to pull me off the fence and twisted my shirt, wringing into his hand to use more force but I had my fingers in the wire. He shouted "move right now and pushed me into the fence before raising his baton above his shoulder and striking me in the face, hitting me in the left eye.

“.....I was in so much pain, I just put my hands over my face and I could no longer see anything or recognise anyone.”

### **The Defendant's Account**

**[12]** The Defendant deponed in his witness statement dated 3<sup>rd</sup> August 2010, which stood as his evidence in chief that he was on day shift on the 29<sup>th</sup> September 2001 doing patrol duty on the prison compound. At about 3:00p.m he saw the claimant and a group of inmates at the perimeter fence of the security cells and the special location conversing with inmates in the cells. He explained to the group of inmates outside the cell that it was a restricted area and ordered them to leave. The other inmates complied but the claimant did not. He repeated this order six (6) times to the claimant. He began using indecent and abusive language and advanced towards him in an aggressive manner.

**[13]** Then he said:

- “7. Without further warning, the claimant attacked me grabbed onto the left side of my shirt pocket. I tried to release my whistle to blow for help but the claimant held on to it and I could not retrieve it from him.
8. During the struggle, my baton was hanging over my shoulder. After much effort I manage to release the claimant's hold of my shirt and pushed him away from me. The claimant then pulled a weapon, an improvised jammer that was made of steel, which was about 5 inches long from his waist and advanced towards me with same in an aggressive manner. I proceed to defend myself from the claimant, attack me, who wanted to physically harm me.

9. I quickly removed my baton from my right shoulder and used it to defend myself. I hit the jammer his hand with my baton and it fell the ground. Both of us rushed to pick up the jammer but I was able to retrieve it before the claimant could. Immediately, the claimant advanced towards me in a boisterous manner and held onto my feet in an attempt to throw me to the ground. Instinctively in order to release the claimant's hold on my feet, I quickly flicked my baton on his hand and the baton caught him on the left side of his face causing him to sustain injury."
  
12. The claimant was subsequently charged with the offence of gross misconduct, using indecent language, disobeying lawful orders, attacking an officer with a jammer and assaulting an officer. He was tried, found guilty and lost three days remission."

The Correctional Officer concluded that it was the Claimant who disobeyed his command assault and battered him. He said he acted reasonably and with probable cause in the execution of his duty.

### **Issue of Fact**

**[14]** I have the benefit of seeing and hearing the claimant and his witness Everton Bailey and the Correctional Officer Harry Farquharson in cross examination. Each witness maintained their account of the incident in cross-examination. The issues of fact that arose on the pleadings as also with evidence are:

- (a). Where did this assault took place? At the football field fence or on the perimeter fence of the security cells?

- (b). Did the Correctional Officer have his baton in his hand when he gave the Claimant the command to move?
- (c). Did the Claimant disobey the Correctional Officer command?
- (d). Did the Claimant hold onto the wire fence of the football field and the Correctional Officer try to pull him from the field?
- (e). Did the Claimant have a jammer in his possession?
- (f). Did the Claimant attack the Correctional Officer with the jammer?
- (g). Did the Claimant hold on to the Correctional Officer's feet in an attempt to throw him to the ground and after a struggle he got the jammer?

#### Finding of Facts

- (a) I find the claimant was assaulted by the Correctional Officer. This assault took place by the perimeter fence of the football field and not the perimeter fence of the security cells of the Tower Street Adult Correction Center. I accept the evidence of the Claimant and his witness that they were watching football outside the fence surrounding its football field. That this was customary for the inmate to do at the centre.
- (b) At the time the Correctional Officer gave the claimant the command or order to move from the football fence he already had his baton in his hand and not over his shoulder. I accept the claimant's evidence and his witness on this issue of fact.
- (c) The correctional officer did give a command to leave the area. The claimant did not respond to this command promptly. I am unable to say if any injury to the claimant's back that day prevented him from responding promptly to the command or not.

- (d) I find the claimant did hold onto the fence of the football field after the officer grabbed his merino. A struggle developed. The officer pulled the claimant from the fence. The officer did hit the claimant at the fence with his baton on his right hand.
- (e) The claimant was not in possession of any jammer or any weapon at the time he was assaulted. The officer at the time of his pleading only alleged generally he was attacked and he acted in self defence. He did not state what he was attacked with. This was in February 2008. It was only in August 2010 when he gave his witness statement he introduced the fact that it was a jammer the claimant used to attack him. A serious attack on an officer with a lethal weapon would elicit a clear statement from early what was used to attack the officer.
- (f) It followed that I do not find the claimant attacked the Correctional Officer. The officer's witness statement that he instinctively hit the claimant with his baton because he was trying to hold his feet betrays his sincerity that he was under any attack with any jammer in the first instance.
- (g) It means also and I do not find the claimant attempted to hold the officer feet after they struggle to get any jammer that fell from his hand. The offence for which the claimant was charged and the penalty of three days remission does not bear any proportionality to the gravity of any attack or the officer warranting the use of such reasonable force to use the baton and hit the claimant in his face.

I hold the officer took personal offence that the claimant did not promptly obeyed his lawful order to move from the perimeter football fence. It is this that lead to the physical conflict with the claimant and other resultant assault battery of the claimant.



- [15] In **Aston Dennis v The Attorney General and Sergeant Mantle McBean**. Claim No. 2003 HCV 1823 delivered January 30, 2006 the claimant sued the Defendant for assault and battery. The claimant was accused by the officers of the Transport Authority of operating his vehicle, illegally in Ocho Rios, St. Ann. They informed him that they would impound his vehicle. They asked for keys of his vehicle and he refused to give them. He accompanied them to the Ocho Rios Police Station. A report was made there. The police handcuffed the claimant, beat him and placed him in a cell as he refused to hand over the keys of his vehicle. The claimant sustained fracture of 4<sup>th</sup> right finger, pain to lower back, hip and waist. Finger was splintered. It was healed without deformity. General Damages awarded \$450,000.00 in January 2006
- [16] Brooks, J, as he then was, found the submission untenable that a refusal of a motorist to hand over keys of his car to an ostensible lawful order of a police officer entitle the police to use reasonable force to get it. The court found the use of force in these circumstances of the injuries of claimant did not fell as a part of the police duty “to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury” The judge also found that the officer beating and threats to the complainant was activated by malice. Therefore the claimant had proved the police officer injured him maliciously and without reasonable or probable cause.

In the present case I also hold that the Correctional Officer injured the claimant. He hit him in his left eye with the baton, maliciously and without reasonable and probable cause. (See end notes 2).

### **Submissions**

- [17] I accept the defendant’s submission as a matter of law that a Correctional Officer is conferred by statute within the power; protection and privileges of a constable (section 14 of the Corrections Act). The law does authorise a Correctional Officer to use a weapon on an inmate using violence against any person (Section 15 (3)

of the Corrections Act). In my view this is merely a codification of one limb of the defence of self defence.

- [18] The defendant in their bundle of authorities rely on **Palmer v the Queen [1971] AC. 814**, **Byfield v the Attorney General (1980) 17 J.L.R. 243** and **Michael Smith v the Attorney General, S.C. Suit No. C.L. 2001 – 5044** delivered February 17, 2005 to support their argument that the Correctional Officer acted in self defence and acting with reasonable and probable cause.
- [19] They also relied on the statutory defence open to police officer acting in the execution of their duty in section 33 of the **Constabulary Force Act**. The law on self defence is now as stated is in **Solomon Beckford v the Queen** and not as stated in **Palmer v The Queen** It is that a person must have an honest belief that he or she or someone connected to their life is in danger or is about to suffer serious harm and may use such reasonable force in the circumstances to repel such an attack. The person must be judge by his mistaken view of the facts. The same test of self defence in the criminal law is applicable to self defence in civil law and the tort of assault and battery.
- [20] It is correct that self defence is available to a defendant officer in a claim of tort of assault against him (See **Byfield and Smith (supra)**). I agreed if self defence is established by the defendant then the claimant has not discharged the burden of proving the defendant acted maliciously or without reasonable or probable causes. (See 33 of the Constable Force Act). The facts of these two cases warranted the findings of the court. (2 See end notes 1).
- [21] In the present case I find the defendant did not act in self defence. The claimant has discharged the burden of proving that the defendant injured him maliciously and without reasonable or probable cause. The defendant does not have the protecting of the section 33 Defence.
- [22] Since the seminal decision of **Jennifer Ebanks v Spl/Cpl. Aggrey Crooks, The Attorney S.C.C.A No. 33/93, delivered 25<sup>th</sup> March, 1996** the police officer do

not have the protection of Section 33 of the Constabulary Force Act where a claimant plead and proved they acted negligently in the execution of their duty (per Carey J. A. paragraph 6 and Forte J, A. para14 and 15).

## **Damages**

**[23]** Now what are the damages in the compensation the claimant is entitled to for the loss of his left eye? In his pleading, the Claimant claimed:

- (a). Special Damages,
- (b). General Damages,
- (c). Interest
- (d). Costs.

## **General Damages**

**[24]** A claimant is entitled to general damages for:

- (1). Pain and suffering and loss of amenities suffered in a result of his injuries.  
Also, the claimant is entitled to
- (2). Loss of earnings and
- (3). Diminution in his earning capacity or handicap on the labour market.

**[25]** The claimant has the duty to adduce evidence to establish each of these heads of damages. The nature and extent of injury affecting the claimant's left eye is already detailed in the agreed expert report of Dr. Mark Wong. It is settled principle that the court is constrained to assess damages for non pecuniary losses by reference to previous awards in comparable cases. Comparable cases in this context, must be reference to cases of similar nature, cases of the same

ilk. (**INSAU Everaldo Ellis v The Attorney General and Constable Ransford Fraser delivered March 21, 2001 at page 7**) (malicious prosecution of false imprisonment case)

[26] Justice Karl Harrison in **Pat Bellafanti v National Housing Trust and George Rainford and The Attorney General suit no. C.L. 1993 361** ( a loss of right eye injury) called attention to the fact that assessing damages for pain and suffering and loss of amenities that compensation must be assessed in money even if appears to be measuring measurable. He further observed relying on Lord Reid in **H. West & Sons Ltd., v Shepherd [1964] AG 326** “that compensation should be based much less on the nature of injuries than on the extent of the injured man’s consequential difficulties in daily life.”

[27] Back to the evidence of the claimant. In his witness statement he states that:

- (a). After he was hit in his left eye with the correctional officer’s baton he was in much pain. He could not see anything or anyone. (Paragraph 11).
- (b). His eye was forced shut due to the swelling that develop and when he was admitted even right at the Kingston Public Hospital (Paragraph 12).
- (c). Prior that he got stitches in his left eye (paragraph 12).
- (d). He has no sight in his left side of the face. This impairs the vision in his right eye. It is often burning with pain and irritation. (Paragraph 20)
- (e). He is a welder. He worked as a welder all his life. Prior to incarceration he worked as a welder for 2 years with a company. In custody he was sent to the juvenile and female adult correctional centre to do welding. He answered in cross-examination that he got his share of \$5,000.00 or sometimes less

for work done in prison by his team of inmates of which he was head. (Paragraphs 21).

- (f). His life is affected by this injury and he cannot get over it.
- (g). He try to get welding work since he was released from prison several times but he get turned down because his eye is sick.

**[28]** At the time after claimant gave his witness statement in October 2010 he was 59 years old. It means at the time of trial he was 60 years old. The time of injury in 2001 he was 50 years and he would be 52 years old when he was release.

**[29]** The claimant did suffer pain and suffering to his left eye. Also there was burning and pain to his right eye up to 2010. There is no evidence that the pain is continuing or will continue. But the nature of the injury is such that he will have discomfort during his life. That is he will feel more self consciousness of his physical condition than when he was not injured. This is a loss of amenity. He was not given any specific evidence of his prior social activity and how if any they were affected by the injury but his basic social life will be affected.

**[30]** He gives general evidence that the loss of sight to his left has affected his ability to earn a living from his trade as a welder. I accept that he will be at a disadvantage on the labour market as a welder. Also that he will suffer loss of earning capacity. His evidence does not show at all how much he usually earn as a welder either weekly or forth nightly earning. The sum of \$5,000.00 he earns in prison is an estimate and it does not disclose whether this earning is weekly, monthly or what average period. He did not specifically plead loss of earning capacity but his evidence shows this. It is just deficient as his amount of earnings.

**[31]** The multiplicand/multiplier method cannot be use to assess any loss of earning capacity. It is the only the lump sum method on the authorities, that is open to assess his loss of earning capacity. This is still limited as there is no precise

earning of the claimant. One possible route is to use the Labour Agreement of Incorporated Master Builder Association for the year 2010 and 2011.

[32] This agreement provides the basic daily, weekly and hourly paid rate for different trade's men in the building industry at different grades and level. Smith C.J used the minimum wages of the occupation of mother of child who was physically disabled due to a motor vehicle accident, to assess the child's future earnings. But this is asking the court to find the evidence and then rate the assessment. **(Douglas v KSAC, Lylelta Flo Douglas (1981) 18 J.L.R. 338**

[33] There is also no evidence to support psychological trauma. The claimant slightly say in his evidence that he thinks about his injury all the time. This could be some reference to depression on post traumatic stress disorder. But there is no evidence to support this. The damages for which he should be compensated rest on the evidence mainly on pain and suffering and loss of amenities.

### **Quantum of Damages**

[34] **Pat Bellafanti (supra)** who lost a right eye of a result of a motor vehicle accident, he was awarded \$1,000,000.00 for pain and suffering. This was updated to \$4, 188,988.60 in December 2011. And as at December 2016 updated to \$5,551,643.33 using the formula, present consumer price index divided by consumer price index at date of award times award. The other awards cited in judgment of K. Harrison J, were also updated up to December 2011. They were:

**Margot Thompson v Foster Trucking (1994)**, female student lost 89% vision in the right eye. She was hit by a piece of steel protruding then from under truck. Awarded general damages \$1,574,205.00 in December 2011. Updated to \$2,087,455.90.

**Mavado Wilson v Caribbean Arrival Group Co. Ltd., (1989)** (42 years old lost his left eye. He was a mason carpenter when acid and water was flashed in his eye at work). Updated award of

General Damages in December 2011 \$2,006,000.00. Further undated to December 2016 is \$2,652,077.38.

**Samuel Thomas v BZC Toamix Ltd., (1990)** (42 years old casual worker lost 100 % vision to his left eye). Awarded general damages at December 2011, \$2,462,176.20. Updated December 2016 to \$2,957,518.60

**William Tulloch v Fitz Henry** the claimant who was a 50 years old labourer was struck with a bottle on 23<sup>rd</sup> February, 1983. He lost sight in his right eye. Updated award in December 2011 for general damages \$1,801,399.70. Further updated to December 2016 is \$2,388,924.74

**Julian Cameron v Basil Wilson (1992)** claimant had a total loss of visual activity to his left eye. He was a passenger in a motor vehicle which collided in a culvert. Updated general damages in December 2011 \$2,250,000.00. Further updated in December 2016 is \$2,983,385.80.

[35] K. Harrison, J. found these cases were not applicable to **Pat Bellafanti's** claim as he was a journalist that depended on his eyes for his job and he would have difficulty in driving and judging depth. The judge's view seems to imply the effect on the claimant of his loss of sight required a higher award for damages. In the present case the occupation of the claimant, the age of the claimant and the effect of the loss of eye are within similar range. So these cases are useful guides.

[36] The awards of these cases were updated in **Lavern Anderson v Marksman Ltd., Kaiser Bauxite Co and Jamaica Bauxite Mining Ltd., [2012] JMSC Civ. 59** (per Daye, J. para 80-85) These awards must be updated from December 2012 to September 2017 to obtain their present value to give the claimant general damages for pain and suffering and loss of amenities.

[37] The facts of **Lavern Anderson's** case are that she lost sight in her left eye in 1998 while she was on duty as a security guard employed to the security company and assigned duty at the bauxite premises. An unknown gun man entered the large premises by a section of the property not fully protected and she was shot in her face by a shot gun when she went to assist another guard. She was awarded \$5,000,000.00 for pain and suffering and loss of amenities in general damages in 2012 but she also got \$1 million for psychological injury that was proved. This award updated from September 2011 to December 2016 is \$6,627,284.96.

Award for General Damages - \$5,000,000.00.

Interests at 3% per annum from date of service (of claim) to date of judgement.

#### **Particulars of Special Damages**

a).	Medication (\$400x12 months x 6 years) =	\$28,800.00
(b).	Medical Certificates	\$1,750.00
(c.)	Transportation = to and from hospital (\$200x3+3 years)	\$1,800.00

#### **Special Damages**

The Claimant must proved special damages. There was no documentary or any other evidence adduced by the claimant to prove his Particulars of Special damages. (c/f per Cooke, J.A, principles of Special Damages, **The Attorney General v Tanya Clarke, SCCA. No. 109 of 2002, dated December 20, 2004**) He has only proved \$11,759.00 for medical certificates by the receipts admitted in evidence as Exhibit 2.

Award special damages \$1,759.00.



Interest 3% per annum from 27<sup>th</sup> September 2001 to September 28, 2017.

Costs to the claimant to be agreed or taxed.

## End Note

### Definition of Malice and Reasonable and Probable Cause

Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 p. 616 paragraph 135 refers:

“A plaintiff in an action for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact including that the defendant was activated either by spite or ill will against the plaintiff, or by indirect or improper motives. If the defendant has any purpose other than that of bringing a person to justice that is malice.” (see M. McIntosh. J. Suit C.L. **Peter Lewis v. The Attorney General and Cons. Phillip Dodd** 1992/L027 delivered November 15, 2002.)

See also Peter Lewis supra page 8 refers to the definition of reasonable Probable cause in **Atkinson v. Reynolds and the Attorney General** (1990) 27 JLR 463 at 487 letter A.

“Reasonable and probable cause means a honest relief in the guilt of the accused based on a full conviction founded on reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead any ordinary, prudent and cautious man placed in the position of an accuser to the conclusion that the person charged was probably guilty of the crime.”

See also Jones J's application of this definition in **Michael Smith v. The Attorney General S.C. Suit No. C.L. 2001 S 004**, delivered February 5, 2005 page 14 citing the definition of Hawkins, J. in **Hicks v. Faulkner** (1878) 8 Q.B.D page 507.