[2013] JMSC Civ. 135

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV02355

BETWEEN	**XIENNA MORGAN**	**CLAIMANT**
AND	**CORPORAL DELROY BROWN**	**1ST DEFENDANT**
AND	**CONSTABLE JUNIOR HALL**	**2ND DEFENDANT**
AND	**CONSTABLE KEVIN DAVIS**	**3RD DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**4TH DEFENDANT**

Althea McBean and Shauna-Gaye Mitchell instructed by Althea McBean & Co. for Claimant.
Gail Mitchell instructed by the Director of State Proceedings for 3rd and 4th Defendants.

Tresspass to the person- shooting by police – Whether malicious and or without reasonable and probable cause – Whether negligence has to be specifically pleaded.

Heard: 11th December 2013, 12th December 2013, 13th December 2013 and 19th December 2013

Cor: Batts J.

[1] This Judgement was delivered orally on the 19th December 2013 and I now record it in a permanent form. During the course of this matter I enquired of counsel whether an acknowledgment of service or a defence had been filed on behalf of the Defendants. I was informed that the claim had been served on the Third and Fourth Defendants but the Director of State Proceedings (DSP) had entered an acknowledgement of service on behalf of the Fourth Defendant only. I brought it to the attention of counsel for the DSP that it would be rather unusual for a judgment in default to be entered against their servant or agent, so that damages would be assessed, whilst liability was contested at a trial on behalf of the Attorney General. The more so where reliance was to be placed on the evidence of the Third Defendant against whom judgment was entered, and in circumstances where there was no issue as to vicarious

liability, it having been conceded that the Third Defendant was acting within the course of his employment.

[2] I therefore ordered, and counsel for the DSP agreed, that the claim would be dismissed against the First and Second Defendants (who counsel for the Claimant admits were not served) and proceed against the Third and Fourth Defendants with the DSP on the record for both. Permission was granted for the DSP to file an amendment to the defence to reflect the fact that it was on behalf of both the Third and Fourth Defendants. The consequence of this ruling was that the First and Second Defendants now became only witnesses and were asked to remain outside whilst evidence was led.

[3] The Claimant sought permission to amend her particulars of claim to allege negligence. This was refused as there was no connection in law between the ruling I made and the need for such an amendment. Furthermore such a claim is now barred by statute of limitation.

[4] I am forced to observe that whenever the DSP acknowledges service efforts should be made to ensure that the servants or agents of the Crown are appropriately represented.

[5] The facts and circumstances of this claim reflects another in a litany of sad occurrences in this land we love called Jamaica. It represents, and for this I adopt without amendment the words of my brother Evans Brown J.

> **"yet another of those unfortunate instances in which helpless bystanders are injured by gunshot in circumstances which have become all too pervading and ubiquitous, the spawn of that grotesque, ghastly gargantuan monster violent crime. It moves across the 4000 square miles of this fair isle like a juggernaut sometimes insidiously, but more often hurtling with ever increasing audacity to the terrorisation of citizens and sending seismic shocks to the very foundations of peace order and good governance. In its wake are persons such as the Claimant, bearing the marks of the consequences in her body. Marks so deeply scarred that they threaten to drain the soul of even the stoic of pathes"**
> **Per Brown J, Namishy Clarke v Attorney General Claim No. 2007/HCV -00031**.

[6] Having reviewed the evidence in this matter it is safe to say that the following is common ground:

a) In November 2005 there were problems in the Windward Road area in that there was gang warfare involving exchange of gunfire, the blocking of roads and even the burning of houses.

b) On the 3rd November 2005 there was in the vicinity of Noswad Road but along Windward road a roadblock at which a fire had been lit in the road

c) The police were attacked and at least one person threw a Molotov cocktail (otherwise called a bottle bomb) at them.

d) The police fired their weapons

e) The Claimant received gunshots wounds.

[7] It is safe to say that it has not been seriously contested that the bullet which caused injury to the Claimant, was discharged from the firearm of one of the three (3) police officers. This is not surprising as the evidence of the ballistics expert, Superintendent of police Carlton Herrisingh, is that the projectile given to him for comparison was discharged by a browning pistol with serial number 245pm28743. That pistol it is admitted was in the possession of and had been discharged by Corporal now Detective Sergeant Delroy Brown. It is true that the doctor gave evidence that the projectile taken from the Claimant was handed to a sergeant Thompson serial number 4348. Superintendent Herrisingh says the projectile for comparison was handed to him by a Sergeant Kessler. There was no evidence to connect the two that is to complete the chain of custody of the projectile. In this matter proof is required on a balance of probabilities. In this regard I find it is more probable than not that the projectile handed to Sergeant Thompson was the one delivered to the ballistic expert for examination in relation to this incident. It is not irrelevant to indicate that all police witnesses admitted that the shooting was investigated by the Bureau of Special Investigations although none surprisingly could recall the name of the investigator.

[8] I therefore find as a fact that the Claimant was shot by a police officer Detective Sergeant Delroy Brown (then a Corporal) on the 3rd November 2005.

[9] The issues of fact which were contested concern the details of the occurrence. The Defendant police officers say the three of them were in a marked police vehicle which was in the process of escorting a fire truck to the scene of a fire which had been lit in the road way. They described the debris in the road which they had to be manoeuvring through in order to get to the main road block at which the fire was lit. The police assert that three (3) men, two (2) armed with Molotov cocktails and the third with a firearm emerged in the roadway. Their police vehicle came to a halt. Two of the men threw Molotov cocktails which landed in the road in front of the police vehicle; the third man discharged a firearm at them. Two of the police officers, Delroy Brown (now a sergeant) and Constable Davis returned fire. Shortly thereafter a woman brought a young girl who had been shot and she was placed in the police vehicle and was rushed to the hospital. The police say that they did not see the Claimant prior to the shooting and there were no civilians in the vicinity at the time.

[10] The Claimant and her witness (who is her mother) stated that because of the shooting and disorder taking place in their community a decision was made to seek refuge at another house on the night in question. That house being the Claimant's step father's home. The group, consisting of the Claimant's mother, the Claimant (then 14 years old), her sister Teri-Ann, her grandmother and her little brother, were all walking along Windward road. At approximately 7:00 pm they came upon a roadblock with a fire lit in the vicinity of the Kentucky Fried Chicken restaurant. They went around the fire. They then saw some boys or young men (as they were unable to say their ages) starting to erect another road block in the vicinity of Hypolyte and Noswod road. It was dark. A police jeep drove up. Its lights were shining on them as three young men ran out in front of the Claimant and one of them threw a bottle bomb at the police. The police fired gunshots.

[11] I believe the words used to describe the incident during cross examination should be quoted :

Claimant:

"Police vehicle came saw blockage shining their lights. We walking a guy came out threw the bottle bomb and they opened fire"

Ann Marie Mcken (Claimant's mother):

"Q: You in the street, how far was police

A: The blockage was where you at

[Estimated 20 feet]

Their light was turned straight down to we. We feel safe because them can see we in the road.

Q: What happened when youth threw the bottle bomb

A: When him step out of the yard on same hand as KFC he fling it in direction of the police

Q: What you do

A: The same instant dem fling the bottle the police open fire. We just run off."

Earlier in cross examination that witness said:

"Q: Paragraph 8 you mentioned another youth was he one who was rolling the drum

A: No him taller. Him come out right in front of we and fling the bottle he had in his hand with fire pon it. I don't know how old him is because he taller than me"

[12] Let me say at this juncture that I accept the Claimant and her witness as witnesses of truth. It was not just their manner of giving evidence which was impressive. The fact is that the Claimant in particular was forthright and frank. She for example stated quite clearly that although she saw no guns that night she was unable to say whether any of the men had guns or whether any of them had fired at the police. When asked whether or not the injury had had any impact on her performance in school she also candidly stated that she did as well in school after as before the incident. There was no effort to guild lilies in her testimony.

[13] The evidence by the police officers did not impress me. They came there to paint a picture of an ambush and of men with Molotov cocktails and guns blazing who came at them. I find it incredible that notwithstanding the relative distances (25-30 feet as per the evidence of the police) no protagonist was shot nor was the police vehicle in any way damaged by gunshots. Also the Third Defendant (Constable Davis) seemed to have had sufficient time to exit the vehicle and dive to the ground. He fired with his M16 assault rifle. He also managed, it appears, to miss his target, or if he did hit, the target survived long enough to flee the scene. The police chose not to pursue the gunmen because they did not consider it safe to do so. The officers who gave evidence could not provide a description of the gunman and Constable Davis in particular could not recall if he had seen the face of his attacker. Sergeant Delroy Brown ventured the following description when pressed by me:

"J: Can you describe the gunman

A: No

J: Any of them

A: Appears to be male dark complexion medium height and medium built"

That witness had earlier told cross examining counsel that the man who fired at them was 20 to 30 feet away and he was unable to see his face. The police witnesses admit the road was lit with street lights and their car's headlights were on. I find it difficult to believe that three (3) police officers could fail to note anything distinctive whether as to mode of attire or feature about a gunman who is firing at them from such a distance.

[14] I also find the details of the police account improbable. That they observed three (3) men two (2) with Molotov cocktails and one with a firearm. They saw two of the men throw their firebombs and watched them fall to the ground in front of the car. They did not themselves fire their weapon until the third man discharged his firearm at them. This entire episode took place with only 20 to 30 feet separating them. Not only the aim of the police was faulty it seems but also the two men throwing Molotov cocktails. I therefore reject the account given by the Defendants and their witnesses.

[15] I do however accept that the incident was dynamic. The men, as the Claimant indicates emerged to set up another roadblock just as her little group of refugees arrived on the scene. The men were in front of them. Immediately the police arrived they were attacked. It is quite possible that the police did not see and it is certainly probable that they were not cognizant of the Claimant and her party when responding to the attack. Furthermore given the blocked roads, the fact that it was night and, the violence occurring generally, the police it seems to me might reasonably have assumed that innocent citizens would be in their homes and not wondering around in the vicinity of the roadblocks.

[16] My findings of fact on the issue where there is a divergence are as follows:

a) Three men emerged to erect a roadblock

b) They were between the police vehicle and the Claimant

c) Another man ran out and threw a Molotov cocktail at the police vehicle. he too was in front of the Claimant's group

d) The police fired at that man instinctively and while he was in the act of throwing the bomb

e) The men fled

f) The Claimant was shot as the bullet directed at the attacker missed its mark and hit her.

g) That bullet was discharged from Corporal Delroy Brown's firearm

h) The injury to the Claimant was an accident as the police were not aware of the presence of the Claimant or her mother on the road nor did they anticipate the presence of innocent civilians

[17] The question for the court therefore is, given the findings of fact and, the facts uncontested as outlined in paragraph 6 (above), are the Defendants liable to the Claimant for trespass to the person or for negligence.

[18] Counsel for the Crown in her closing submitted that negligence was not before the court as it had not been pleaded. I at that time expressed disagreement with the submission because the amended claim form alleged that the servants of the Crown discharged their weapons "without reasonable or probable cause" and the particulars of claim at paragraph 4 made a similar allegation. On further reflection and having reviewed the authorities it is clear that counsel for the Crown is correct. Actions for trespass on the case are now to be brought as negligence. Hence the pleader needs to clearly allege want of reasonable care. On the pleadings in this case there is no allegation of negligence.

[19] I hold that trespass to the person is sufficiently pleaded by an allegation of assault as in the context it includes battery see **Fagan v Metropolitan Police Commissioner [1968**] 3 ALL ER 442. The necessary intent to make one liable for the tort of trespass to the person includes recklessness or a high degree of negligence, per Lord Diplock, **Letang v Cooper** 1964 2 ALL ER 929 at935

> **"If A by failing to exercise reasonable care, inflicts direct personal injuries on B it is permissible today to describe the factual situation indifferently either as a cause of action in negligence or as a cause of action in trespass, and the action brought to obtain a remedy for this factual situation as an action for negligence or an action for trespass to the person- though I agree with Lord Denning MR that today "negligence" is the expression to be preferred but no procedural consequences flow from the choice of description by the pleader (see Fowler v**

Henning). They are simply alternative ways of describing the same factual situation"

In Wilson v Pringle (1968) 2 ALL ER 440 Lord Justice Croome – Johnson attempts to reconcile apparently conflicting dicta. He explained the view that trespass to the person and negligence were separate torts and claims arising out of an unintentional trespass must be brought in negligence. It was decided that in the tort of trespass the touching must be deliberate, there must be hostility and that an intention to injure was not necessary, **"it is the mere trespass by itself which is the offence"** page 445. The court also decided that the intentional touch necessary to establish the tort of trespass to the person must be a hostile touch. That case was an application for summary judgment where two (2) school boys had been involved in horseplay and the Defendant admitted that he had pushed the Plaintiff causing injuries. The decision of the judge below to enter summary judgment was quashed and the court decided that whether or not the element of "hostility" was present was a triable issue and further that defences such as self defence might arise.

[20] In this case there is no doubt that the police deliberately discharged their firearm. There is no doubt that they did so with hostility in the sense that they intended to do harm to an individual. It is not a defence in an action in trespass to the person to say I intended to shoot "A" but not "B" transferred "malice" can be preyed in aid by the Claimant. On the other hand if the police acted in lawful self defence it will be a complete defence to an action in trespass to the person.

[21] As there is no claim for negligence (or to trespass on the case) the Claimant cannot rely on a failure to take reasonable care when acting in self defence. On the authorities cited it does appear that self defence whilst an absolute defence to an action for trespass to the person is not an absolute defence to the action in negligence. In the latter situation the relevant duty of care and whether it has been breached will involve the exploration of the question whether in defending themselves the Defendants ought reasonably to have had the Claimant in their contemplation.

[22] On the facts as I have found them, it is safe to say that the Defendants acted in lawful self defence. A Molotov cocktail or firebomb is a dangerous device. It can inflict grievous injury and do damage to vehicle and property. In seeking to repel the attack in the way they did and in the instinctive manner as I have found, the Defendants were acting in lawful self defence and – had reasonable and probable cause. I should add that even if I am wrong and a claim to negligence does arise on the pleading, the facts as I have found them do not demonstrate any want of reasonable care. Police officers in the situation in which these Defendants found themselves, cannot be expected to pause to weigh in the balance their every move. The attacker was only 25 to 30 feet away, well within throwing range. It was dark and although

there were street lights and their own headlights, the road was littered with debris and a fire was alight in the roadway. That fire was the operational target of the police. When therefore the attacker emerged onto the roadway the response to my mind cannot be faulted because it was immediate and instinctive. If necessary I would also have held that the police were not negligent and had breached no duty of care to the Claimant.

[23] I therefore dismiss the claim and give judgment for the Defendants against the Claimant. If I am wrong however and in order to save costs and time I will indicate the award of damages I would otherwise have made. The pleaded injuries were mostly supported by the medical evidence led:

i. Gunshot wound to the back

ii. Gunshot wound to the arm with vascular injury, Ulnar nerve injury extensive scarring on left hand.

[24] The doctor described the entry wounds as both resulting from the same projectile. The bullet entered the upper left arm passing through it and entered the Claimant's body just under the armpit coming to a rest in the vicinity of her scapula. It was surgically removed from her back some time later. The doctor explained that notwithstanding two surgeries the effort to save the main artery in her left arm failed. She has not however lost the use of that arm as veins now bring sufficient blood supply. However she does not have a detectable pulse in the left hand and she has lost the sense of touch in her fingers of that hand. The left hand is also weaker than the right. The doctor had not seen her recently and was unable to say what was her measured permanent partial disability.

[25] Claimant's counsel relied upon **Williams v Burton** Khan 6d p101, **Barclay v Metropolitan Transport** Khan 6d p86 and **Isaac v Jones** Khan 5 p134 and submitted that three million ($3,000,000.00) dollars is an appropriate award. She also urged that five hundred thousand ($500,000.00) was appropriate for handicap on the labour market.

[26] Counsel for the Crown reserved her submissions on damages and put these in writing. by written submissions dated 17th December 2013. The Defendants relied upon **Bonnick v Attorney General** (29th April 1991), **Francis v Corporal Baker** (November 1992).

[27] Having reviewed the authorities I would have awarded two million five hundred thousand ($2,500,000.00) as damages for pain and suffering and loss of amenities. There was no contest to the special damages claimed therefore$30, 425.06 would have been the award in that regard, and $150,000.00 for lost earning capacity. The Claimant is no longer an infant and hence the title to the Claim needs adjustment to reflect that she became a Claimant in her own right and not by next friend.

[28] Finally in responding to the Crown's submission on damages, counsel for the Claimant placed before me **Crooks v Attorney General** (1999) UKPC 17 a decision of the Judicial Committee of the Privy Council. In that case the defence contended that as there was no plea that the act of the police officer was "malicious or without reasonable and probable cause" (Pursuant to section 33 of the Constabulary Force Act) the claim ought to be dismissed. The Judicial Committee agreed with the Jamaican Court of Appeal and held that an inadvertent or negligent act was not contemplated by section 33. In that case the officer tripped and fell and his firearm discharged. The court decided that as the police officer had no intention of discharging his firearm when he fell the discharge was a pure accident. It was therefore not discharged in the execution of his office as constable even though he was carrying it whilst in performance of his duties so that the attorney general would in any event be vicariously responsible. It was therefore unnecessary to make a section 33 plea and the matter would not be struck out. It was remitted for trial.

[29] Although quite frankly, I find the reasoning (and ultimate decision) in that case, and I say this with respect, rather odd, I am bound by it. The case however does not assist the Claimant as there is no plea of negligence before me. There is instead a plea pursuant to section 33. This suggests as the Crown submitted that the action is not brought in negligence particularly when regard is had to the decision of the Privy Council.

[30] Although the claim is dismissed, this court will place on record its strong recommendation that an ex gratia payment be made to this innocent claimant, who is now an adult, who was so honest in the evidence she gave. This citizen of Jamaica was injured by an act of the agent of the State. Another victim of violence, she was seeking refuge and the very agency set up to protect, inflicted harm on her. She is scarred for life. However a gesture such as is recommended may go a little way to restore some semblance of hope by demonstrating, that her island home Jamaica cares.

[30] It is left of me only to thank counsel who participated in this trial for their industry and professionalism.

There will be no order as to costs.

David Batts
Pusine Judge
15th July 2015