



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

**CLAIM NO. 2009 HCV03752**

<b>BETWEEN</b>	<b>FUTURE SERVICES LTD</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL</b>	<b>DEFENDANT</b>

**Mrs. N. Foster-Pusey for the Claimant**

**Ms. Lisa White and Miss Alicia McIntosh for the Defendant**

**Heard: 30<sup>th</sup> November 2010, 3<sup>rd</sup> December 2010, 11<sup>th</sup> and 18<sup>th</sup> April 2011**

***Whether pepper spray can be imported into Jamaica without a No Objection Letter from the Minister of National Security – implied repeal – Whether the Offensive Weapons Prohibition Act authorizes the possession of pepper spray and by implication its importation for personal protection – Whether the importation and sale of pepper spray in Jamaica is legal – appropriate use Hansard Notes of Parliament – Whether the matter is merely academic – Judicial Review-presumption of Regularity***

**SINCLAIR-HAYNES, J**

[1] The claimant, Future Services Ltd, members of staff suffered a series of violent attacks which culminated in the murder of its security officer by gunmen. Consequently, in an effort to protect its staff, it sought to purchase pepper spray (oleoresin capsicum) in Jamaica, but was unable to do so because pepper spray

was a controlled product which required the approval of the Minister of National Security in the form of a "No Objection Letter."

[2] The Minister of National Security sought and obtained the opinion of the Ministry of Health that pepper spray may be potentially harmful and lethal, especially to asthmatics and persons suffering from cardiac and bronchial problems. The claimant's application was consequently refused. It was advised that pepper spray was a restricted item which required a licence for its importation, pursuant to the Firearms Act. However, subsequent to the initiation of this Claim, on February 23, 2010 and by virtue of power conferred on the Minister by Section 39 of the Customs Act, the importation of the pepper spray was prohibited by the (Import Prohibition) (Miscellaneous Goods) Order, 2010 and was duly gazetted. The importation of pepper spray is thereby now banned.

[3] The claimant disagreed with the decision of the Minister of National Security refusing its application and instituted proceedings by way of Fixed Date Claim Form seeking the following:

- i. a declaration that the importation and sale of pepper spray is legal in Jamaica;
- ii. a declaration that the claimant may import pepper spray into Jamaica without the possession of a No Objection Letter from the Ministry of National Security;
- iii. a declaration that the provisions of the Firearms Act do not apply to the possession, importation and use of pepper spray;
- iv. in the alternative a declaration that insofar as the Firearms Act applies to the possession, importation and use of pepper spray, its provisions in that regard have been impliedly repealed by Section 2 of the Offensive Weapons (Prohibition) Act;

- v. a declaration that the provisions of the Offensive Weapons (Prohibition) Act OW(P)A authorize the possession (and by implication the importation) of pepper spray for personal protection.

## **The Claim**

### **Amendment to claim**

[4] The declaration sought that the provisions of the Firearms Act do not apply to the possession, importation and use of pepper spray was not pursued.

### **Claimant's Submissions**

#### **Submissions by Mrs. Foster-Pusey**

[5] Mrs. Foster-Pusey on behalf of the claimant contends that the Order made pursuant to Section 39 of the Customs Act which now prohibits the importation of pepper spray is inconsistent with the provisions of the Customs Act (which is the substantive legislation) and the provisions of the Firearms Act. Although Section 39 of the Customs Act empowers the Minister to prohibit the importation of any goods whatsoever into the island, Section 40 expressly provides that until revoked by Order under Section 39, arms and ammunition, are prohibited from importation "except with the written permission of the Commissioner." The words "except with the written permission of the Commissioner" are important because the Firearms Act provides for the grant of various licences, certificates and permits including firearm permits, firearm dealer's licences and firearm user's licences.

[6] The permission of the Commissioner of Customs is required so as not to make nonsense of the provisions of the Firearms Act. One of the main functions of the Firearm Licensing Authority, she submits, is the consideration of applications for firearm user's licences and import permits. Many security businesses and persons in Jamaica with the requisite permission to own guns, have to purchase and import firearms and ammunition. In the circumstances, it could never be the intention of the legislature that the importation of all firearms and ammunitions is now absolutely prohibited.

[7] The Firearm Act, defines firearms as including restricted weapons. It defines 'restricted weapon' as "any weapon of whatever description or design which is adapted for the discharge of any noxious liquid, gas or other thing." A canister of pepper spray therefore falls within the definition of a firearm and is a weapon for which an import permit can be granted by the Firearm Licensing Authority. This was not clear to the legislators, because they concluded that it was necessary to refer to pepper spray separately from the reference to firearms and ammunition although it falls within the definition of ammunition under the Firearms Act. This is misleading and leads to confusion and contradiction. The court must determine the outcome of the interplay between the provisions of the recent Order, the main provision of the Customs Act and the provisions of the Firearms Act which expressly provide for the importation of arms and ammunition under which rubric pepper spray falls.

[8] The defendant has acknowledged that any importation of pepper spray requires a permit. The Order made in 2010 is a piece of subsidiary legislation which was apparently not properly considered and is clearly inconsistent with the provisions of Section 40 of the Customs Act which is the substantive legislation. Section 40 of the Customs Act prevails and pepper spray can be imported if the importer:

- a. has acquired an import licence from the Firearm Licensing Authority; and thereafter
- b. has acquired the written permission of the Commissioner of Customs.

By such an interpretation, the provisions of the Firearms Act and the Customs Act can operate in harmony and an absurd situation is not created.

### **Submissions regarding the Sale of Pepper Spray**

[10] Section 2 (1) of the Firearms Act provides that a Firearm Dealer's Licence authorizes the holder of the licence to buy or sell at specified places firearms and ammunition of such type as are specified in the licence. Section 26A of the Act provides for the Firearm Licensing Authority to receive and consider applications for firearms licences, certificates or permits.

[11] Section 39 of the Customs Act provides that licences, certificates or permits not be granted in relation to any restricted weapon except with the prior approval of the Minister. Pepper spray is a restricted weapon which can be sold if a firearms dealer's licence is granted by the Firearm Licensing Authority for such an activity. In the circumstances, the claimant may import pepper spray into

Jamaica without the possession of a "No Objection Letter" from the Minister of National Security. Further, the defendant has not outlined the legislative basis for a requirement of a "No Objection Letter" from the minister. The court should therefore make a declaration that the claimant may import pepper spray without obtaining a "No Objection Letter" from the Ministry of National Security.

**Submissions concerning implied repeal of the provisions of the Firearms Act which apply to the possession, use and importation of pepper spray by Section 2 of OW(P) A.**

[12] It is her alternative submission that the provisions of the Firearms Act, insofar as they apply to possession, importation and use of pepper spray, have been impliedly repealed by Section 2 of the OW(P)A.

[13] There is an overlap with and contradiction between the provisions of the Offensive Weapons Prohibition Act and the Firearms Act regarding the use of and possession of pepper spray. An examination of both Acts along with the **Hansard** debates makes it clear that the legislators were providing for persons to be free to possess and use pepper spray for their personal defence. According to her, this is reflected in the debates of both the Lower and Upper Houses of Parliament. The legislature specifically considered how it would approach the possession and use of pepper spray when the OW(P)A was being debated. She relies on the following statements made by Mr. K. D. Knight Q.C, then Minister of National Security and Justice, who piloted the Bill in the Lower House. Additionally, the contributions by Senator A.J. Nicholson Q.C, Senator Hamaty, and Senator D. Lightbourne were submitted.

[14] Mr. Knight Q.C. in his introductory remarks stated:

*"Madam Speaker, the Committee was also very concerned about the matter of self- defence as the argument that was raised both in the Committee and wider public, was that persons oftentimes are in possession of these weapons for sell (sic) defence purposes, and because many of the persons who had these weapons do not have open access to gaining firearms licences, it was felt that they would be at a disadvantage, because those persons who have firearm licences on their applications you will see that the reason they give for wanting firearm is for the protection of life and property and, it was the view that something had to be done to cause those persons who would now be committing an offence by carrying these knives to have some means of self- defence. And in order to provide for such persons, the Bill was amended and in Clause 2 of it, Clause 2(ii), it was made very clear that the definition of Offensive Weapons does not include certain things, and these things are: - "A mace or pepper spray and depending upon the circumstances, the knowledge that will come to us at a later stage, any such other substance as the Minister may prescribe by order, subject to affirmative resolution." Now what is to be observed here, Madam Speaker, is that, the substances that persons can now have for the purpose of self-defence are non-lethal, substances but, at least the situation is that they are not left defenceless (emphasis supplied)."*

[15] In the Senate, Senator Nicholson Q.C, took responsibility for the Bill and members of the Senate were aware of the provisions concerning pepper spray/mace. She cites in support of her contention the following statement of Senator Hamaty:

*"But the Bill excludes ... as an offensive weapon, mace or pepper spray for personal protection. And I wish to caution that notwithstanding the above, if you spray anyone, you run the risk of being charged with assault and if you are carrying the spray without lawful excuse, then you, might find yourself liable for carrying an offensive weapon.*

*A defensive weapon can easily turn into an offensive weapon in how and when you use it. The spray causes severe burning of the skin, which can last for hours; it also cause temporary blindness, and causes your eyes to burn and it irritates your throat and other*

*mucus membrane. So not because mace or pepper spray, you can carry it for your own personal protection, it doesn't mean that you can use it recklessly or indiscriminately (emphasis supplied)."*

[16] Senator Lightbourne stated:

*"And then, Madam President, when we go to Section 2(2) we recognize that there is some recognition that you need to carry something for personal protection, and there is some element of self-defence in terms of the mace or pepper spray and, I do agree, these too can be offensive weapons ... the mace or pepper spray, in recognizing the self-defence ... is a very middle-class concept, and we have legislation for all of Jamaica."*

[17] A detailed examination of the debate makes it apparent that members of the Houses were not aware that pepper spray/mace fell within the definition of a firearm within the Firearms Act. The Firearms Act was passed in 1967 and has been amended at various times including 2005 and 2008. The definition of 'firearm' and 'restricted weapon' was included in the Act when it was passed in 1967. She submits that in 2001, in debating and passing the Offensive Weapons (Prohibition) Act, Parliament specifically considered that the use of pepper spray/mace should be allowed as a means of personal protection. It was the clear intention of Parliament that pepper spray/mace should have been allowed for use for personal protection and no mention was made of the need for a licence for its possession or use. She relies on Section 2(2) (A) of the OW(P)A which excludes mace and pepper spray which are found in the possession of persons for personal protection in public places as offensive weapons. An analysis of Section 2 leads to the following conclusions:

- i. mace or pepper spray would normally fall within the definition of an offensive weapon; it is not regarded as such where a person has it with him for personal protection;



- ii. a person who is carrying pepper spray or mace with him for his personal protection will not be in breach of Section 3 of the Offensive Weapons Prohibition Act.

[18] Section 3 of the Offensive Weapons (Prohibition) Act prohibits the possession of mace and pepper spray (which are regarded by Section 2 as offensive weapons) in public places without lawful authority or reasonable excuse. She submits that it is significant that Section 2(2) excludes mace and pepper spray from the category of offensive weapons which the person in possession has for his personal protection.

[19] She submits that reference to **Hansard** is appropriate in these circumstances. She relies on the statements made by the learned author, Michael Fordham in his text, **Judicial Review Handbook** 5<sup>th</sup> edition at page 309 which outlines the three conditions stated in the case of **Pepper v Hart** in which the use of the **Hansard** in court proceedings is permissible.

[20] He states:

*"29.4 Using Hansard: In carefully restricted circumstances, Courts will allow a question of statutory interpretation to be illuminated by a clear statement as to the meaning of the relevant provision made in Parliament by a promoter of the Bill.*

*29.4.2 Hansard: the three **Pepper v Hart** conditions ... Lord Browne-Wilkinson, describing permissible "reference to parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consist of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."*

[21] She contends that a reading of the statements, made by the aforementioned Minister and Senators reveals that the three conditions stipulated in **Pepper v Hart** (1993) 1 All ER 42 have been met.

[22] She also relies on the Western Australian Court of Appeal decision of **Hall v Collin** [2003] WASCA 74 (4<sup>th</sup> April 2003) in which a similar position was taken.

[23] Wheeler J, in his judgment in the **Hall** case concluded that possession of pepper spray was permissible as a precaution against the possibility of an attack. She submits that it is of interest that he sought confirmation of his view by referring to the relevant parliamentary debates. He stated:

*"If it were necessary to seek confirmation of the view which I take of the intended meaning of reg 7, it appears to me to be amply confirmed by a reference to the relevant parliamentary debates. As well as having the Bill for the Weapons Act before it, it appears that Parliament also had, at the time of debating that Bill, a draft schedule of proposed Regulations. In this context, there was considerable debate about pepper sprays or capsicum sprays. It was noted that the police did not wish them to be generally available. However, the Hon Attorney General, who introduced the legislation into the Legislative Council on behalf of the Government, made it plain that it was the Government's intention that people should be able to carry such sprays for the purposes of defence. He noted that the actual protection provided by such a spray may not be great, but that it was considered important that people should be able to "perceive" themselves as being safer. That appears also to have been the view taken by those other members of Parliament, from all parties, who referred to this issue: e.g. 20 October 1998 pages 2262, 2269; 23 March 1999 pages 6836-6837;*

*2 June 1999 - pages 8673-8674. It was plainly intended that women carrying sprays when they go out in the evening, or older and frailer members of the community carrying them in situations where they felt themselves to be in danger, would not be committing an offence under the legislation.*

*In the view which I take of the Weapons Act and Regulations, then, it is not necessary that there be an imminent threat, before such a spray can be possessed or carried. It is enough that a person has reasonable grounds to believe that circumstances in which it may be necessary to use the spray for that purpose may arise (emphasis supplied)."*

[24] It is clear, she submits, that Parliament in Jamaica had a similar intent to which Wheeler J referred. In Western Australia, the legislature was of the view that a controlled weapon could be possessed and used as a precaution against the possibility of an attack. This approach, she submits, is reflected in the Jamaican legislation, the OW(P)A in which mace or pepper spray is not included in the definition of offensive weapon where a person has either of them with him for personal protection.

[25] In these circumstances, the doctrine of implied repeal is applicable. Pepper spray as defined falls within the ambit of both pieces of legislation. The later legislation is to be applied so that the will of Parliament will govern the circumstances.

[26] It is her submission that the test as to the applicability of the doctrine of implied repeal is whether both statutory provisions irreconcilably conflict, so that they are unable to exist together. She relies on the following statement made by the learned authors of **Halsbury's Laws of England** (4<sup>th</sup> edition) Volume 44 para.966:

*"Repeal by implication is not favoured by the courts, for it is to be presumed that Parliament would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so. However, if provisions are enacted which cannot be reconciled with those of an existing statute, the only inference possible is that,*

*unless it failed to address its mind to the question, Parliament intended that the provisions of the existing statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms.*

*The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done, and their reconciliation must in particular be attempted if the later statute provides for construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision among them must be regarded as such an indication (emphasis ours)."*

[27] The provisions of the Firearms Act and the OW(P)A insofar as they both deal with the possession and use of pepper spray, are repugnant. The requirement by the Firearms Act for a Firearm User's Licence for the possession of pepper spray and the prior approval of the Minister before such a licence is granted are clearly repugnant to the provisions of the OW(P)A. The words and the Parliamentary intent of the later Act are clearly to allow the ordinary person to have a non-lethal means of self defence without the difficulty of applying for a licence whether firearm or otherwise.

[28] In the circumstances, the provisions relating to pepper spray under the Firearms Act, which deal with and impact upon the use and possession of pepper spray for personal defence are repealed by implication by the OW(P)A and are no longer applicable to pepper spray/mace.

[29] The claim is forcefully resisted by the Defendant.

### **Submission by Ms Lisa White on behalf of the Defendant**

[30] She submits that pepper spray is a type of ammunition as defined by the Firearms Act. The word 'ammunition' in the Firearms Act includes the term 'restricted ammunition', which means '...any ammunition containing or designed to contain any noxious gas or other thing...' The Firearms Act deals with the management and regulation of pepper spray, for example the importation, sale, dealing in, possession, licensed handling, exportation, use, transshipment, retention, detention by the police, and forfeiture by the Crown among other things.

[31] The provisions of the Firearms Act, Customs Act and the OW(P)A are not in conflict. Each represents a different layer of the law as it concerns the management, control and regulation of pepper spray as ammunition. She submits that when juxtaposed, read and understood properly, it is clear that they are not mutually exclusive or conflicting.

[32] The Firearms Act outlines in great detail and specificity, the steps to be taken by a natural person to regularize his or her position in relation to pepper spray. She highlights aspects of the Offensive Weapons (Prohibition) Act and the Firearms Act, Customs Act and the Customs (Import Prohibition) (Miscellaneous Goods) Order, 2010 as they relate to the issues.

### **Submissions regarding the Importation and Sale of Pepper Spray**

[33] The legal framework for importation and/or sale of pepper spray is provided for by the Customs Act and the Firearms Act. It is not open to any

person to import and/or sell pepper spray without lawful authority to do so in light of the Customs (Import Prohibition) (Miscellaneous Goods) Order, 2010 which forbade the importation of pepper spray into Jamaica. The order did not identify any date when the prohibition would no longer be in effect. It amounts to an absolute prohibition therefore the importation of pepper spray into the island of Jamaica is illegal until the revocation of the Order.

[34] The general scheme of the Firearms Act refers to natural persons and not legal persons. The word 'person' is not defined in the Firearms Act but is defined in the Interpretation Act as including *inter alia* any corporation, either aggregate or sole, association or other body of one or more persons. On examination of the scheme of the Firearms Act, it is clear that all references to 'person' refer to a natural person. The aspects of the Firearms Act which deal with the acquisition of a licence to possess ammunition, the possession of ammunition by a person, *et cetera*, refer to a 'natural' person. The claimant, not being a 'natural person', is not the proper person within the context of the law to make a claim that it can import pepper spray.

[35] If the Order did not exist, a person would need to have recourse to the provisions of the Firearms Act. Applications could be made under Section 2 of the Firearms Act for the following licences:

- a. "Firearm Dealer's Licence" which would enable the holder to buy and sell specialized ammunition from a specified place
- b. "Firearm Import Permit" which would allow the Defendant to import pepper spray into the island from a specified source and for a specified time.

- c. "Firearm Manufacturer's Licence" which would authorize the Defendant to buy and sell pepper spray at a specified place in Jamaica whether the Defendant or not the Defendant is a manufacturer.

[36] She regards as relevant Section 4 of the Firearms Act which requires that the importation of ammunition in Jamaica must be in accordance with Section 4 of the Firearms Act; contravention of which is a crime. She cites also sections 5, 6, 7 of the Firearms Act which regulates ammunition being brought into Jamaica by travellers.

#### **Submissions regarding the need for Judicial Review**

[37] This court is not the proper forum for the claimant's challenge of the validity of the Order as a piece of subsidiary legislation which is inconsistent with the substantive provisions of Section 40 of the Customs Act. The Order was made pursuant to the Minister's exercise of discretion. She relies on the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one). The prohibition of the importation of substances falls within the general provision of Section 39 of the Customs Act. She submits that Section 40 of the Customs Act sets out some of the items which are prohibited. The Order of the Minister constitutes a specific provision intended to identify in greater detail those items which are prohibited from being exported into Jamaica. The latter Order does not create a different effect from that which was intended in Section 39 of the Customs Act. It is setting out in greater detail the items prohibited. The Order is not inconsistent with the Customs Act. It should be presumed that

Parliament intended for both to be juxtaposed and proceed together as they are not to be in conflict. The general provisions of the Customs Act cannot trump the more specific provisions of the Minister's Order promulgated pursuant to the enabling provision under the said Act.

[38] The court does not have the jurisdiction in the face of the Ministerial Order to make a declaration that it is legal for the claimant to import pepper spray into the island of Jamaica. The proper recourse for the claimant was to seek judicial review of the Minister's decision. Any declaration made by the court as to importation would be *ultra vires*.

[39] It is questionable whether the Minister improperly exercised his discretion in the circumstances. The Order is not to be viewed as a regulation or other Gazette. The Court cannot ignore the Order as made. The Order must be presumed to be valid unless a Court of judicial review finds otherwise and quashes it. She relies on the matter of **McEldowne v Forde** [1971] A.C. 632. In that case Lord Pearson opined that the presumption of regularity (*omnia praesumuntur rite esse acta*), applies to a regulation made by a Minister. It is assumed to be *intra vires*. If its validity is challenged and it is contended that it was not made for the specified purpose, the court has to decide.

[40] The defendant also relies on the case of **O'Reilly v Mackman** [1982] 2 All E.R. 1124 which she contends supports her submission that the claimant needs to seek judicial review of the Minister's Order to advance this aspect of its case.



It is her contention that the question of importation has now become a nullity in the face of the Minister's Order.

**Defendant's submission that the issue to be decided is academic**

[41] She submits that the claimant is asking the court to engage in an exercise of futility as the issues are now academic. She relies on the cases of **Tindal v Wright** (**Times Law Reports**, May 5, 1992), **Ainsbury v Millingen** (1887) W.L.R. 379 and **Howard v Pickford Tool Co. Ltd.**, [1951] 1 K.B. 417.

[42] The Minister's Order absolutely prohibits the importation of pepper spray therefore the declarations sought by the claimant are no longer relevant. The court would be engaged in a waste of judicial time.

**Defendant's submission regarding importation of Pepper Spray into Jamaica without possession of a 'No Objection Letter' from the Ministry of National Security**

[43] It is Ms. White's submission that under the Firearms Act, a person may not import pepper spray into Jamaica without the prior approval of the Minister. The Firearms Act does not stipulate any particular form that that approval should take. Sections 29, 38 and 39 of the Firearms Act are instructive. The "No Objection Letter" is the Minister's approval which is given before the appropriate authority grants to suitable persons the requisite licences.

**Defendant's submissions regarding the implied repeal of the provisions of the Firearms Act relating to the use, importation and possession of pepper spray**

[44] She submits that the provisions of the Firearms Act apply to the possession, importation and use of pepper spray which is regarded as ammunition and/or restricted ammunition under the said Act. An examination of Section 2 of the Firearms Act defines Firearms User's Licence and Firearms User's Permit and places the responsibility on the holder of the licence to be in possession of his licence whenever he carries ammunition. The Firearms Act makes it an offence to be in possession of ammunition and to carry ammunition without having the requisite licences. She refers to Section 23 of the Firearms Act which prohibits the discharge of any ammunition within forty yards of any public road or in any public place unless the discharge was in the lawful protection of person or property. She also relies on Section 24 of the Firearms Act which makes it a felony to be in possession of ammunition with the intention to injure person or property.

[45] It is her submission that the respective provisions are not mutually exclusive nor do they conflict. The sections of the Firearms Act which speak to the use and possession of pepper spray as a form of ammunition dovetail with the provisions of the Offensive Weapons (Prohibition) Act. The provisions of the Firearms Act provide the lawful authority stipulated in Section 2(2) of the Offensive Weapons (Prohibition) Act.

[46] It is her further submission that the Offensive Weapons (Prohibition) Act does not state that a person does not need any of the licences or permits stipulated in the Firearms Act. The OW(P)A only speaks to the specific and unique situation that a person would not contravene the provisions of that legislation and would not be deemed to be in possession of an offensive weapon if he had pepper spray with him for his personal protection. According to her, the neat dovetailing of the Offensive Weapons (Prohibition) Act with the provision of the Firearms Act would facilitate a person legitimately acquiring a licence or permission so that he can carry pepper spray for personal protection. A person cannot carry pepper spray without a permit that allows it to be carried to that place, pursuant to the contents of the Firearm User's (Special) Permit and/or the Firearms User's Licence.

[47] It is her firm submission that the Offensive Weapons (Prohibition) Act does not restrict the powers of the court and/or the police under the Firearms Act which relate to use and possession of pepper spray. According to her, the purpose of both pieces of legislation is to prevent the unlawful use of pepper spray. The provisions of the Offensive Weapons (Prohibition) Act only deem pepper spray not to be an offensive weapon if it is possessed for personal protection. This means that the Offensive Weapons (Prohibition) Act builds on and does not subtract or cancel what is contained in the Firearms Act in relation to the use and possession of pepper spray as those matters are already dealt with by the Firearms Act.

[48] No exception is made for pepper spray under the OW(P)A in relation to the procedure of acquiring licences and permits which relates to its use and possession.

[49] The provisions of the Firearms Act regarding the importation of ammunition apply to pepper spray. The importation of pepper spray is not a purely financial matter. It is also a matter of security. This is confirmed by the provisions of the Firearms Act. Further, the claimant is not exempted under Section 52 of the Firearms Act. A perusal of the definition of offensive weapon and Section 3 in the former Act reveals that the parameters set in the Firearms Act as it relates to use and possession of pepper spray have not been repealed.

[50] Section 2 of the Offensive Weapons (Prohibition) Act is not inconsistent with any provision of the Firearms Act to the extent that it can be said that the former has impliedly repealed the latter in any respect, if at all. It is instructive that the Offensive Weapons (Prohibition) Act defines 'offensive weapon' as meaning 'any article made or adapted for use for causing injury to the person or which is intended by the person having such article with him to cause injury'. The paragraph defining "offensive weapon" does not include mace or pepper spray that a person has with him for personal protection.

[51] Section 3 of the Offensive Weapons (Prohibition) Act provides guidance as it prohibits the possession of offensive weapons in public places without lawful authority or reasonable excuse and prescribes that it is an offence to contravene the section.

[52] Both extracts from the Offensive Weapons (Prohibition) Act are clear. Parliament created an exceptional situation where pepper spray would not be deemed to be an offensive weapon. However, when used outside of that narrow circumstance, pepper spray is an offensive weapon. Further, in order not to be deemed to be an offensive weapon, the person who possesses pepper spray for his personal protection under the Offensive Weapons (Prohibition) Act must be licensed or granted permission to be in possession of the pepper spray pursuant to the Firearms Act. The provisions of the Offensive Weapons (Prohibition) Act stipulate that a person will not be prosecuted if, acting with lawful authority (under the Firearms Act), he or she possesses pepper spray for his or her personal protection. No right is established under any legislation for a person to possess or use pepper spray. Rather, provision is made for the use of pepper spray as self-defence not to be considered to be a criminal offence.

[53] Not every person will be granted a permit or licence to use and/or possess pepper spray under the Firearms Act. It therefore cannot be assumed that anyone is allowed to use pepper spray for his or her personal protection. A person deemed to be a restricted person under the Firearms Act could not avail himself or herself of the use and possession of pepper spray.

[54] She contends that possession of pepper spray for personal protection is not absolute as shown by Section 35A of the Firearms Act and the general scheme of the Offensive Weapons (Prohibition) Act. Both Acts when read together make provision for the ownership, possession and treatment of pepper spray. The Firearms Act stipulates that a person needs a permit to carry pepper

spray in a public place. Neither Act is independent of the other. Both pieces of legislation are clear as to the requisite intention to injure or cause injury to another person. No provision of the Firearms Act has been repealed in this regard.

[55] Under the Offensive Weapons (Prohibition) Act, pepper spray is not an offensive weapon if a person with lawful authority or reasonable excuse, has pepper spray in his or her possession for personal protection.

[56] The court should presume that Parliament did not intend to repeal the provisions of the Firearms Act as it relates to pepper spray. The Offensive Weapons (Prohibition) Act creates a new and different offence from what is contained in the Firearms Act. There is no conflict in this regard.

[57] The principles in relation to implied repeal do not apply to the Offensive Weapons (Prohibition) Act and the Firearms Act. Both Acts can be read together without confusion, inconsistency or contradiction. In fact, the provisions of the Offensive Weapons (Prohibition) Act specifically cite one instance in which possession of pepper spray is legal and the pepper spray will not be treated as an offensive weapon. It mentions nothing about importation and it is silent on sale, transshipment, transfer or purchase. It is also silent on the procedure to obtain licences and/or permits to import pepper spray among other things. On the contrary, the Firearms Act is quite specific and clear in relation to these issues. It cannot therefore be said that the provisions of the Offensive Weapons (Prohibition) Act impliedly repeal any provision of the Firearms Act. In support

of her submission she relies on Section 87 of the text **F.A.R. Bennion Statutory Interpretation. A Code: London, 1992 2<sup>nd</sup> ed.** reads as follows:

*“Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them.”*

### **Submissions regarding the use of Hansard**

[58] It is not proper for a part of **Hansard** to be placed before the court in the circumstances where the claimant is seeking to extrapolate certain bases for its submissions to the court. She also contends that the criteria prescribed in the case of **Pepper v Hart** [1993] AC 593 are to be strictly applied. These criteria have not been made out in the instant matter as none of the legislation in the instant matter is ambiguous or obscure or leads to absurdity. Further, the material relied upon does not consist of contradictory statements made by the proponents of the Bill in Parliament. Recourse to **Hansard** is unnecessary in this instance.

[59] If the court wishes to rely on an incomplete presentation of what was debated in both Houses of Parliament, it is the defendant’s submission that aspects of the debate illustrate that the Act is directed at regulating and controlling the carriage of offensive weapons in public places. It is further directed at controlling the use of offensive weapons in public places. The debate, and by extension the Offensive Weapons (Prohibition) Act, does not address any issue in relation to the importation, sale, distribution, or transfer of pepper spray.

[60] She outlines the following aspects of the debate:

- a. Right side of page 177, paragraphs 3 - 4 - Mr. Knight:

*"...the Bill had developed against the background of the increasing incidence of the use of offensive weapons in public places..."*

*The Bill seeks to prohibit the carrying of offensive weapons in a public place without lawful authority or reasonable excuse..."*

- b. Left side of page 178, paragraphs 2 & 3 – Mr. Knight:

*"The definition makes it clear that there are some weapons which are offensive per se, and therefore are absolutely prohibited and the reason being, that there is no discernible legitimate use of these weapons.*

*The Bill defines an Offensive Weapon to mean also situations where an article is made or adapted for use for causing injury to the person or which is intended by the person having such article with ..."*

- c. Left side of page 179, paragraphs 2, 3 & 4 – Mr. Knight:

*"It was made clear, however, that in relation to the second limb of the definition, as long as a person intended to use the article to cause injury, then that intent would transform the article into an offensive weapon. Questions were raised as to the proof of intent, and it was made clear that this could come about either by things said, or by things done, or a combination of both, but that in any event, the prosecution had a duty to prove the intent of the accused person.*

*And the Committee accepted the explanation and felt satisfied that intent would not be inferred from mere possession, but that there would have to be the other ingredients as I have mentioned.*

*Madam Speaker, the Bar Association made a submission in writing, and in their submission, they wanted clarity in the definition of the offence and to ensure that the prosecution had to prove knowledge in the individual, that the person had the offensive weapon knowingly. And therefore, they had*



*requested that the word 'knowingly' be inserted in the definition and this was done."*

- d. Right side of page 181, paragraph 2 – Mr. Knight:

*"We do not believe that this legislation is a panacea in terms of the control of crimes and violence but it is an additional step in that attempt. In the same way we try to control the illegal possession of firearms, we also try to control the possession of these types of weapons which are used oftentimes in the commission of serious offences."*

- e. Right side of page 182, paragraph 1 – Mr. Knight:

*"And Clause 5(2) empowers the Constable to seize any offensive weapon found and to call upon the person, request of the person that his true name and address be given. Where the person fails to give his name and address then the Constable at his discretion may arrest that person without a warrant."*

- k. Right side of page 223, paragraph 4 – left side of page 224 paragraph – Mr. Junor:

*"What you are seeking to do is to prevent the carrying of offensive weapons which cause injury to people and the question therefore and the logic of my Friend's arguments on the other side is that, you know, because the person needs these things for defence – and I asked the question and he answered it – if we feel that everybody in Jamaica should have a gun if they so desire, if that is what they are advocating, then let us hear it very clearly."*

- m. Right side of page 226, paragraph 3 – Mr. Douglas:

*"Thank you Madam Speaker. Madam Speaker, I wish to declare immediately that I have risen to support the Bill, "An Act to prohibit the carrying of Offensive Weapons in public places and for connected purposes."*

- n. Left side of page 232 - paragraph – right side of page 232 paragraph 1 – Mr. Douglas:

*"And therefore, Madam Speaker, I believe that when you look at the Bill there are really two points to it, 1, the nature of the offensive weapon that one is carrying and 2, the failure of a person to give his name and address if a Constable asks for your name and address. And that provision, Madam Speaker, is already in another Act, so there is nothing about that that is bringing in any sort of new provision to strengthen the hands of the Jamaica Constabulary."*

Right side of page 233, paragraph 2 – Mr. Samuda:

*"...the Minister ...is seeking to find that piece of legislation which will stem what appears to be a growing trend towards violence, especially domestic violence et cetera..."*

o. Right side of page 235, paragraphs 5 & 7 – Mr. Samuda:

*"...Now if you say you define, what is the mischief that the Minister seeks to prevent. He seeks to contain the carrying of weapons by persons who may have intention of using it to harm people that's the mischief..."*

*I think if he had the opportunity he would also seek to get them to stop carrying it even in private. So objectively, he is seeking to reduce the carriage of weapons that may commit injury..."*

p. Left side of page 238, paragraph 3 – right side of page 238, paragraph 1 – Mr. Samuda:

*"So I am saying Madam Speaker, I know the difficulties involved and I sympathize with the problems and I know that there has to be a solution but I am saying that as a first go round, what we ought to do is define the scope of the provisions, define more precisely those weapons which will automatically trigger a prosecution, define in a more narrow sense public places, it says pathways, define more narrowly. In other words, be more precise so that you know within a certain given limit you would be subject to prosecution and at another stage if it doesn't work, then we can go further to broaden it but the spirit of the legislation is one that has to be supported.*

*We recognize ...that this defence thing is a serious thing. Many of us would like to know that our wives who don't have*

*a gun have perhaps some mechanism to protect themselves, many of us would like to have that so the defence thing is a legitimate thing it's a legitimate argument, but you have to weigh that legitimacy against the tremendous harm that can befall the society if we do nothing about these weapons. That is the big question Madam Speaker, it is that middle of the road, it is that reasonableness of objective and the application of a solution that calls us to really think this through properly, very important..."*

- s. Right side of page 248, paragraph 2 – left side of page 249, paragraph 1 – Mr. Knight:

*"...Here is the situation in which there is this big argument being put forward, not to deprive persons of their right to have a weapon for self defence, a weapon, a lethal weapon. Madam Speaker, we debated this, you know, in the Committee Stage. And here is where this Bill is totally different from the original Bill, because one of the things we said is this, let us turn our minds to see how we can provide some defence of those who genuinely need defence, without putting into their hands lethal weapons. And that is how we came up with the clause that exempts from offensive weapon, the following substances, mace or pepper spray. That's what we could have thought of at the time, but we know that there are other substances that may come forward, that may exist now. There are other things like the auto. So that what was done was to have given this provision, this jurisdiction, to a Minister, it says, such other substance as the Minister may prescribe by order, subject to affirmative resolution. So it has to come here. But if something comes up that can be used, that is non-lethal and can be a form of defence for your defenceless persons, they can get it..."*

- t. Left side of page 251, paragraph 1 – Mr. Knight:

*"...A weapon may be made for causing injury to the person. A purely innocent weapon may be adapted for use to causing injury, and so the definition seeks to capture both situations. It is against the original manufacture of the weapon to cause injury, or the adaptation of a weapon to be used to cause injury. That is what it seeks to do..."*

- u Left side of page 251, paragraph 2 – the Chairman:

*"Mr. Samuda, you accept, because as a School Teacher, I have seen pencil used as an offensive weapon. It is made for writing, but a child stuck the other child with it, broke the pointing hand to the point where it is swollen. Isn't it an offensive weapon?"*

v. Aspects of page 422 – left of page 424 Mr. Nicholson:

*"...Madam President, the legislation that we, the Bill that we are about to contemplate has itself been in contemplation since 1966...*

*...the offensive weapons that were then in contemplation included switch blades, black jacks...And according to the then Commissioner of Police..., he stated that; "We are rapidly getting to the stage where we will have to introduce legislation such as is now in force in Canada and New Zealand, where it becomes an offence to have any weapon of this nature in public..."*

*Yes, those observations remain true thirty-five years later.*

*Madam President before going into the principles upon which the Bill has been erected, I think we should just look for a brief moment at the Memorandum of Objects and reasons. And with your leave I will just read it into the record.*

*"The Bill seeks to make provisions ...*

- a. Probing the carrying of offensive weapons in a public place without lawful authority or reasonable excuse. The definition of offensive weapons also includes any article made or adopted for use for causing injury or intended to be so used.*

w. Right of page 425, paragraph 2 – left of page 426  
Paragraphs 1 & 3 – Mr. Nicholson:

*"So with respect to manufacture and sale, the purport of the Bill ...the way the Bill is constructed, takes in any person who attempts, to manufacture or sell these implement in public, in a public place.*

*With respect to importation, Section 40 of the Customs Act lists the items that are prohibited from being imported until revoked by an Order of the Minister, that's the Minister of Finance, I think, under Section 39 of the Customs Act itself. Offensive weapons do not at present fall within the list of prohibited items under Section 40. Section 39 gives the Minister power to prohibit the importation of goods by orders for such time until the said order is revoked.*

*It is my strong suggestion that this Honourable Senate pursuant to the principles upon which this piece of legislation is erected ought to recommend that such an order be made by the Minister of Finance as a matter of urgency because, if this Bill is to be passed, it seems to me and to us who discussed it in the informal session that the importation of these implements should also be addressed without any delay. It is to be noted, Ma'am that the provisions regarding forfeiture and penalties under the Customs Act would be applicable in a situation, where a person is found attempting to import such items...*

*So the suggestion is made that this Honourable Senate recommend to the Minister of Finance that as a matter of urgency these prohibited weapons, prohibited implements, prohibited goods be placed in that Section of the Customs Act, Section 40, which would make importation an offence..."*

- z. Left side of page 443, paragraph 4 – right side of page 443, paragraph 1 – Mr. Hamaty:

*"But the Bill excludes Madam President, as an offensive weapon, mace or pepper spray for personal protection. And I wish to caution that notwithstanding the above, if you spray anyone, you run the risk of being charged with assault and if you are carrying the spray without lawful excuse, then you might find yourself liable for carrying an offensive weapon.*

*A defensive weapon can easily turn into an offensive weapon in how and when you use it. The spray causes severe burning of the skin, which can last for hours; it also cause temporary blindness, and causes your eyes to burn and it irritates your throat and other mucus membranes. So not because mace or pepper spray, you can carry it for your own personal protection, it doesn't mean that you can use it*

*recklessly or indiscriminately. So I just wish to point out Madam President.*

aa. Left side of page 448, paragraph 3 – Ms. Lightbourne:

*“...when we look at the definition of offensive weapon ...I do think it is a very broad ...definition:*

*“Any article made or adopted or use, or causing injury to the person or which is intended by the person having such article with him to cause such injury.”*

*I have no problem with the second bit ...but the first part of that definition includes just about everything. Anything can be an offensive weapon under that...”*

bb. Right side of page 448, paragraph 6 – left side of page 449 paragraph 2 – Ms. Lightbourne:

*“And then, madam President, when we go to Section 2(2) we recognize that there is some recognition that you need to carry something for personal protection, and there is some element of self defence in terms of the mace or the pepper spray and, I do agree, these too can be offensive weapons. They are not really exempted, they can be depending on how they are used, and this is what I like about this Section, it depends on how it is used, and I wish this definition of offensive weapon would have been, this wide definition would have been, whatever you have on you, how it is used, not just the fact of having it, but how you use it, or how you intend to use it.*

*And, Madam President, the mace or the pepper spray, in recognizing the self defence, mace or pepper spray. Madam President, it is a very middle class concept, and we have legislation for all of Jamaica. Mace and pepper spray is an uptown concept. What about those in the inner cities?*

cc. Left side of page 455, paragraph 4 – right side of page 455, paragraph 2 Mr. Rattray:

*“Let me remind you that the Act itself creates a separation. It identifies those weapons which you must not have and therefore your first question is, has that been properly done? When you look at what the Act does, it identifies weapons which no sensible person can look at and say that any [man]*

*should have because if they have them, it's for one thing. It's a weapon of destruction; it's an offensive weapon and intended to be used as such.*

*The second category are other weapons or instruments which can be converted to be used as weapons which are not absolutely prohibited, and we have to understand the distinction that is made in the Section in relation to that, the question of intent is applied in those cases which is what we had been plugging for."*

**Whether the Provisions of the Offensive Weapons (Prohibition) Act authorise the Possession and by Implication the Importation of Pepper Spray for Personal Protection**

[61] Miss White submits that the matter of **Hall v Collins** [2003] WASCA 74 is not helpful to the court as it concerns specific legislation in the Western region of Australia which is not in *pari materia* with the Offensive Weapons (Prohibition) Act or the Firearms Act. Further, she submits that there is a distinction between controlled and prohibited weapons in the Weapons Act, 1999 (Western Australia). There is no such distinction in the Offensive Weapons (Prohibition) Act.

**Decision**

**Whether the importation and sale of pepper spray is legal in Jamaica**

[62] The importation of firearms and ammunition is governed by the Firearms Act. Section 4(1) of the Firearms Act requires that the importation of firearm and ammunition must be under and in accordance with a Firearms Import Permit. Section 39 of the Customs Act confers upon the Minister the authority to prohibit the importation of any goods whatsoever whether for a specified period or

absolutely. Section 40 of the said Act prohibits the importation of arms and ammunition without the permission of the Commissioner.

[63] The Minister, in exercising the power conferred on him by Section 39 of the Customs Act, promulgated the Customs (Import Prohibition) Order, 2010 which prohibited the importation of pepper spray into Jamaica. In prohibiting the importation of pepper spray into the island, it cannot be seriously challenged that the Minister acted *intra vires*. Both the Customs Act and the Firearms Act confer the power on the Minister to regulate the importation of pepper spray into Jamaica. This court therefore has no power to declare that the importation of pepper spray into Jamaica is legal nor is this court, empowered to declare that the claimant may import pepper spray into Jamaica without the possession of a 'No Objection Letter' from the Minister of National Security. Moreover, the OW(P)A is silent as to the importation of pepper spray into Jamaica.

#### **The use and possession of pepper spray**

[64] The Offensive Weapons (Prohibition) Act does not state how persons may come into possession of pepper spray. The claimant is not presently in possession of pepper spray. It is seeking to import it and its importation is prohibited. Additionally the manufacture of pepper spray is governed by the Firearms Act. The OW(P)A is also silent as to the sale and manufacture of pepper spray. The claimant cannot therefore argue that it has a right to manufacture pepper spray by virtue of the OW(P)A. The issue of sale is not relevant in light of the Order.



**Whether the provisions of the OW(P)A authorize the possession (and by implication the importation) of pepper spray for personal protection.**

[65] By virtue of Section 20(1) (b) of the Firearms Act, it is an offence to be in possession of restricted ammunition. Restricted ammunition is defined by Section 2 of the Firearms Act as 'ammunition' which contains or is designed to contain any noxious liquid, gas or other thing'. 'Restricted weapon' is defined by the Act as 'any weapon of whatever description or design which is adapted for the discharge of 'any noxious liquid, gas or other thing'.

[66] Section 20(1) of the Firearms Act prohibits the possession of firearm and ammunition except under and in accordance with a Firearm User's Licence. The Act further prohibits the grant of a licence or permit without the prior approval of the Minister.

[67] Upon conviction, for the contravention of Section 20 of the Firearms Act, the offender is liable to life imprisonment if convicted before the High Court and to a fine of \$2,000.00 or a term of imprisonment not exceeding five (5) years with or without hard labour if convicted before a Magistrate. Undoubtedly, pepper spray is regarded as restricted ammunition by the Firearms Act. The possession of pepper spray by virtue of the Firearms Act is a serious offence and the penalty is harsh.

[68] Section 2 (1) (a) OW(P)A defines offensive weapons *inter alia* 'as any article made or adapted for the use of causing injury to the person or which is intended by the person having the article with him to cause injury'. Section 2 (2) of the OW(P)A states that the above-mentioned definition of offensive weapons

excludes pepper spray or mace from being offensive weapons if the possession is for personal protection. The interpretation given to Section 2 of the OW(P)A by the Defendant and the Claimant is so diametrical that it requires quoting:

*“Paragraph (a) of the definition of “offensive weapon” in subsection (1) does not include any of the following substances that a person has with him for personal protection, namely -*

- a. mace or pepper spray*
- b. ....”*

[69] The Section is worded quite plainly. It is axiomatic that OW(P)A has decriminalized the possession of pepper spray for personal protection in public places. However, under the Firearms Act it is a serious criminal offence to be in possession of pepper spray.

Section 3(1) of the OW(P)A states:

*“A person shall not, without lawful authority or reasonable excuse, knowingly have with him in any public place any offensive weapon falling within paragraph (a) or (b) of the definition of “offensive weapon.”*

[70] Pepper spray falls under paragraph (a). The clear and logical interpretation of Section 3(1) of the OW(P)A is that persons who are not in possession of pepper spray for personal protection are afforded the defence of reasonable excuse and lawful authority. However, the person who is in possession of pepper spray for personal protection does not need to resort to any of these defences because the Act plainly states that such persons are not regarded as being in possession of an offensive weapon.

[71] By virtue of Section 3(2) of the OW(P)A, persons who are found in a public place in possession of an offensive weapon namely, swordstick, ballistic knife,

butterfly knife, or any knife which is commonly known as a switchblade, ratchet knife or Rambo knife, or such other knife as the Minister may prescribe by order, are dealt with more stringently. These offenders cannot pray-in-aid the defence of lawful authority or reasonable excuse.

[72] The OW(P)A further provides that a person who contravenes subsection (1), that is, being found in a public place with pepper spray without lawful authority or reasonable excuse is afforded the further defence of having the article for the purpose of any lawful sport or lawful trade, business or occupation.

[73] The penalty for being knowingly in possession of pepper spray without lawful authority, reasonable excuse, or not having possession for the purposes of any lawful sport, trade, business or occupation is a fine of a paltry sum of \$4,000.00 and in default, a term of imprisonment not exceeding four months. It is significant too that a conviction under this Section is not to be recorded against the offender. This is diametrically opposite to what obtains under the Firearms Act.

[74] Pepper spray and mace under the Offensive Weapons (Prohibition) Act were clearly not intended to be treated as ammunition is treated under the Firearms Act. If the person is found in possession without lawful authority or reasonable excuse, the prosecution may make an Order for forfeiture of the weapon used in the commission of the offence.

[75] Section 4 of the Act provides that where the prosecutor intends to apply for a Forfeiture Order, he must give notice of his intention and the grounds to the

person who to his knowledge is the owner. Notice is not required to be given if the seizure was made in the presence of the owner of the offensive weapon. If upon service of the notice (which can be effected by two publications in the daily newspaper, printed and circulated in Jamaica), no person appears before the court to show cause why the Forfeiture Order should not be made, the weapon is presumed to be abandoned.

[76] Conversely, under the Firearms Act, the owner of the restricted ammunition would be summoned to answer a charge. It is therefore evident that the OW(P)A treats persons found in possession of pepper spray extremely leniently, whereas the treatment of such offenders under the Firearms Act is severe. This in my view, renders untenable Ms. White's argument that the provisions of the Firearms Act which speaks to the use and possession of pepper spray, dovetail with the provision of the OW(P)A and were meant to be read together. Importantly, there is no reference in the OW(P)A to the provision of the Firearms Act or that these provisions are subject to the Firearms Act. Additionally I find that her submission that legal authority means proper licences as required by the Firearms Act equally unsustainable.

**Whether the provisions of the Firearms Act which apply to the possession, importation and use of pepper spray have been impliedly repealed by Section 2 of the Offensive Weapons (Prohibition) Act**

[77] The test to be applied as stated by A.L. Smith J in **R v Davis** (1783)<sup>1</sup> Leach 271 is whether the provisions of both legislations which relate to the

possession and use of pepper spray can co-exist or whether they are so “inconsistent or repugnant that they cannot stand together”.

[78] Although it is not expressed by a later enactment that the provisions of an earlier enactment are repealed, if the provisions of the later enactment are contrary to those of the earlier, by implication, the later repeals the earlier in order to remove the inconsistency between them (See F.A.R. Bennion in his work **Statutory Interpretation** 2nd Edition at Sections 80 and 81). Adopting the words of the learned author, F.A.R. Bennion, it is a ‘logical necessity’ that the provisions of the Firearms Act which relate to the use and possession of pepper spray are unable to stand with the relevant provisions of the OW (P) A. If the two are inconsistent both cannot be valid as this would contravene the principle of contradiction. F.A.R. Bennion in his text opined that the doctrine of implied repeal is wider than is indicated by the principle of contradiction. He states that there are other bases for the application of the doctrine, for example the desire of Parliament to avoid anomalies. He cites the case of **R v Davis** (1783) 1Leach 271 as an example. In that case a statute which created a capital offence was impliedly repealed by a later Act which imposed a penalty of \$20.00.

[79] The disparate treatment of offenders by both Acts is analogous to the situation which obtained in the case of **R. v. Davis**. The treatment meted out by both Acts is not only inconsistent, it is anomalous.

[80] I agree with Ms. Foster- Pusey that reference to **Hansard** is appropriate. The requirements stated in the case of **Pepper v Hart** for its application have

been satisfied. The comments of Mr. Knight Q.C., who piloted the Bill in the Lower House and the comments of the other contributors to the debate illuminate the fact that the debaters of the Act were not aware that pepper spray was regarded as ammunition under the Firearms Act. At page 180 left- side, Mr Knight said:

*"The Committee was also very concerned about the matter of self-defence ... oftentimes are in possession of these weapons for sell (sic) defence purposes, and because many of the persons who had these weapons do no have open access to gaining firearms licences..." "... person can now have for the purpose of self-defence non- lethal substance but at least the situation is that they are not left defenceless."*

Clearly he never addressed his mind to the fact that mace and pepper spray are treated as ammunition and are governed by the Firearms Act. It is apparent however that the Minister's intention was to provide a relatively harmless means of self defence for persons who were not able to obtain firearm licences.

[81] Mr. Nicholson's comments also make it pellucid that the debaters of the Bill were not aware that pepper spray and mace were captured by the Firearms Act and required a firearms licence. He was cognizant of the fact that pepper spray could be an offensive weapon. In order to prevent reckless or indiscriminate use, he stated that the Bill provided for such persons to be charged with assault. He stated that if such persons were not in possession of pepper spray or mace with lawful excuse, the person might be liable for carrying an offensive weapon. The operative word is 'might'. There was no reference to a charge being proffered under the Firearms Act or serious consequences under

that Act. This, in my judgment, negates Miss White's submission that both Acts were intended to dovetail.

[82] The sections of the debate relied upon by Miss White are in my view, supportive of the claimant's submission that the legislators were ignorant of the applicability of the Firearms Act to pepper spray.

[83] Mr. Samuda's contribution to the debate also makes it quite plain that he too was unaware. He said, 'Many of us would like to know that our wives who don't have a gun perhaps have some mechanism to protect themselves' (See page 238 right side).

[84] The proponents of the legislation clearly demonstrated by their comments that they never intended that pepper spray and mace should be considered as ammunition within the meaning of the Firearms Act. The provisions of the Firearms Act, being the earlier Act, which are contrary to the OW(P)A (the later Act) are in my judgment, by implication, repealed in accordance with the maxim *leges posteriores priores contrarias abrogante* (later laws abrogate earlier contrary laws).

#### **Whether the issue of implied repeal has become academic**

[85] The Order prohibiting the importation of pepper spray into the country has been promulgated. The case of **Tindall v Wright** (1922) KB Div 521 provides guidance. The respondents in that case were summoned for the unlawful use of a motor vehicle. It was contended by the prosecutor that the vehicle was used

as a hackney carriage whilst it was licensed to be used for another purpose. The rate of duty which was chargeable for use as a hackney carriage was lower than that for which the vehicle was licensed. Consequently, the appellant was liable to an excise penalty. The justices held that the vehicle was not a hackney carriage and dismissed the information. On appeal two points were raised:

1. whether the respondents were liable to be charged under Section 8 (3) of the Roads Act 1920 or at all
2. whether their vehicle was a hackney carriage

While the appeal was pending, the first question was dealt with in the Divisional Court in the case of *Rex v Wood* 38 **The Times** LR 269. The case was decided adversely to the appellant's contention. That case was not distinguishable from the appellant's case.

[86] The second point had become academic but both parties wished the court to decide the matter. The Minister of Transport desired the court's decision in order to determine whether there was need to introduce an amending Act. Lord Hewart, C.J. who gave the decision of the court declined to accede to the request of the parties, and held that although a Government Department needed the court's guidance regarding the introduction of amending legislation (if necessary), the court would not decide a point of law which had become academic, although both parties are anxious to have it determined, and it was a matter of public importance.

[87] The case of **Alnsburg v Millington** [1887] 1 WLR 379, is instructive. The appellant and the defendant were granted joint tenancy of a council house. The



defendant was imprisoned. The appellant married another man and they moved into the house whilst the defendant was imprisoned. Upon his release, the appellant and her husband removed from the house and the respondent returned there. The appellant applied to the court *inter alia* for an injunction which required the respondent to vacate the house. The judge refused to grant the injunction. Whilst her appeal was pending before the House of Lords, the local authority granted her and her husband, the tenancy of a different council house. At that time the respondent was once again incarcerated.

[88] At the time the appeal was heard the tenancy was terminated. Their Lordships cited with approval the principle stated by Viscounts Simmonds LC in **Sun Life Assurance Company of Canada v Jervis** (1944 AC 111, 113- 114).

He said:

*"I do not think that it would be a proper exercise of the authority which this house possesses to hear appeals it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the house undertook to do so, it would not be deciding an existing is between the parties who are before it, but would be merely expressing its view on a legal conundrum which the appellant hope to get decided in their favour without in any way affecting the position between the parties... I think it is an essential quality of an appeal fit to be disposed of by this house that there should exist between the parties, a matter in actual controversy which the house undertakes to decide as a living issue."*

*Lord Bridge of Harwich at page 381 stated:*

*"It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them. They do not pronounce an abstract question of law when there is no dispute to be resolved."*

[89] Pepper spray is now prohibited from being imported into the island. The claimant is not presently in possession of spray. The issue whether the OW(P)A authorizes the possession of pepper spray is now academic. The decision of the court in the matter of **Howard and Pickford Tool Company Limited** [1951] KB 417 seals the issue. In that case it was held that the court's valuable power to make declaratory orders in appropriate cases should not be used to answer academic questions.

[90] In light of the foregoing, my conclusion regarding the issue of implied repeal is merely *obiter dictum*. Lord Hewart, C.J. in **Tindall v Wright** expressed that it is undesirable in the circumstances to comment. However, both counsels have submitted copiously on the issue. I felt constrained to comment albeit *obiter*.

[91] In the circumstances, the declarations sought by the claimant are refused.

No Order as to costs.