

Judgment Both

4/19/93  
KINGSTON  
Jamaica

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT No. C.L. L. 028/1987

BETWEEN                      JEAN LOCKE                      PLAINTIFF  
AND                              THE ATTORNEY GENERAL FOR JAMAICA                      DEFENDANT

Miss J. Cummings instructed by Gaynair and Fraser  
for Plaintiff.

Mr. W. Campbell and Miss M. Henry instructed by the  
Director of State Proceedings for Defendant.

Heard: April 19, 20; June 24, 1993

Judgment

HARRISON J. (Ag.)

The Pleadings

The claim as disclosed, alleges an action for Assault.

At paragraph 3, the plaintiff alleges:

"On or about the 27th day of July, 1986 the plaintiff was lawfully inside her house when a member of the Jamaica Constabulary Force who is and was at all material times stationed at Constant Spring Police Station and whose name is unknown maliciously and/or without reasonable and probable cause discharged a bullet from his firearm causing same to hit the plaintiff on her arm as a consequence whereby the plaintiff suffered severe physical injury, loss and damage."

The defendant, who is joined pursuant to the Crown Proceedings Act, admits at paragraph 3 of the Defence that the plaintiff was injured by a bullet from a fire-arm on or about July 27th, 1986 and states:

"The defendant will say that at the material time there was an exchange of gunfire between a party of policemen and men armed with guns; that some time later the plaintiff reported to the police that she was hit. If that which is not admitted that the plaintiff was shot by a policeman during the exchange of gunfire afore-said, the defendant will contend that the said policeman acted in reasonable self-defence and that the said shooting was accidental."

The Evidence

The plaintiff testified that on Sunday the 27th July, 1986 at about 6.00 a.m. she was in her house at 7A Grants Pen Avenue, Kingston 8. She was asleep when she felt a stinging sensation on her hand which awoke her. Simultaneously with the stinging, she heard a gunshot and she saw blood running down at her side. She looked through a window and saw three men running down the Avenue. They were running away from her so she could not see their faces. According to her, they were "a good distance from the window."

She reported to Mervyn Clarke, her common law husband, and one Candy Gray that she was shot.

Within a short while and whilst they were standing on the street a policeman who she knew as Henry, of Constant Spring Police Station, came up to them and enquired "who get shot." Constable Henry then radioed for a car and two other policemen arrived shortly. She was placed in this car and taken to the University of the West Indies Hospital where she was treated for a gunshot injury to the left scapula.

The plaintiff was unable to say who shot her. She asserted that no one else was seen running down the Avenue apart from the three men. She heard only one gunshot and was unable to say if other shots were fired before hearing that shot as she was asleep. She was unable to say if Constable Henry was one of the three men she saw running down the Avenue.

Candy Gray, was called as a witness for the plaintiff. She recalled that on the aforesaid date and time she was sweeping her yard at 7A Grants Pen Avenue. She heard a gunshot and "rush back" to her doorway.

About five minutes later she saw three men running down the road, and each one had a gun in his hand. She recognised one of the men to be Henry, a police officer, but was unable to say who were the other two.

According to Miss Gray, these three men came from 16 Grants Pen Avenue which was "just a step across" from 7A Grants Pen Avenue. The men were running, but they "were not running too fast, they were trotting." She also said, "my heart was jumping out after the shot but I still looked at the men. I don't know if the men were chasing one another but the way how they were trotting I just know they were trotting; they were not chasing anyone."

Whilst herself, the plaintiff and Mervyn Clarke were standing on the street, a policeman came up to them and enquired who was shot. This policeman had a gun in his hand and she recognised him as one of the three men she saw running down the Avenue that morning.

She was most emphatic in her response to a question that "one and only one shot" was fired. She strongly disagreed with the suggestion that there was a shoot out between the police and gunmen.

Detective Acting Corporal Leroy Hanson was called as a defence witness. He recalled that on the 27th July, 1986, at about 6.00 a.m. he was on mobile patrol with other policemen and that he was armed with an M16 rifle. They were travelling along Barbican Road when on reaching in the vicinity of a bridge which leads from Barbican Road to Grants Pen Avenue, he saw two men armed with guns. He spoke to the driver of the vehicle who stopped immediately. Cons. Prendergast and himself alighted from the vehicle and headed towards the bridge. The men who had the guns in their hands turned around and opened up fire at them. They threw themselves to the ground, took up cover and returned fire. The two men ran and were chased.

On reaching an empty lot along Grants Pen Avenue, he saw one of the men on the roof of a house who fired shots at them. He returned fire; the man jumped off the roof and ran away. Other policemen arrived on the scene and assisted in a search but the men made good their escape.

Hanson said he had feared for his life when the men fired at him. At no time did he have any intention of shooting the plaintiff and he did not see her before the exchange of gun fire. He denied that Cons. Prendergast, a Cpl. Henry and himself came through 16 Grants Pen Avenue and neither did they pass 7A Grants Pen Avenue. He also denied that only one shot was fired that morning.

A bullet mark was seen on the inner wall of the Plaintiff's house. There was also a hole in the door, which, Cpl. Hanson said could have been caused by a bullet.

The Issues

Section 33 of the Constabulary Force Act provides as follows:

"Every action to be brought against a Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable and probable cause; and if at the trial of such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

The plaintiff's claim lies solely for Assault. As a matter of ordinary prudence, Negligence was not alleged in the alternative. It was therefore necessary for the plaintiff to prove that an assault was committed, and that it was done either maliciously or without reasonable and probable cause.

The evidence reveals that neither the plaintiff nor her witness knew how the injury was inflicted. It means therefore that one must look at all the circumstances surrounding this alleged shooting and see whether or not the plaintiff has satisfied this Court on a balance of probabilities that she was assaulted by the police either maliciously or without reasonable and probable cause.

Both the plaintiff and her witness have asserted that only one gunshot was heard that morning. The plaintiff, who was very much asleep has admitted that she cannot say whether or not other shots were fired before she heard the one which caused her to be awoken. Miss Gray on the other hand was up and about sweeping her yard. She recalls vividly, the sequence of events which took place that Sunday morning. In an apparent state of shock she said, "my heart was jumping out after the shot, but I still looked at the men ...." She was most emphatic that "one and only one shot" was fired. She never got the impression that anyone was being chased; rather the police were trotting and she demonstrated how they were doing this. Furthermore, she said some five minutes after the explosion, she saw the police emerging from 16 Grants Pen Avenue with guns in their hands.

On the police side, the evidence revealed that there were several gunshots that morning. Cpl. Hanson admitted discharging at least five rounds of ammunition. Constable Prendergast also fired shots, and so, did the gunmen. One could conclude therefore from this account that there was pandemonium on Grants Pen Avenue that Sunday morning.

A few questions must be resolved. Firstly, was it one shot that was fired or was there an exchange of gunshots? Secondly, was it a shot from the policemen's rifle or from the gunmen's firearms which hit the plaintiff?

### Credibility

I was very impressed with the plaintiff and her witness.

They have been frank with the Court and I find them honest.

On the other hand, I was not impressed at all with Ag. Cpl. Hanson. His credibility was substantially impaired. A major area of conflict arose in this way.

In chief, he said, "... I saw two men armed with guns. They were on a bridge .... I spoke to driver who immediately stopped vehicle ...." When he was cross-examined he said "... I told driver of vehicle to stop because I recognised one of two men. My intention was to accost him ....." He explained to the Court that both statements meant the same thing. I cannot agree with him. On the contrary, I find the statements contradictory.

### Findings

I find the following facts:

1. The plaintiff was asleep in her house at 7A Grants Pen Avenue on the morning of July 27, 1986.
2. Candy Gray was sweeping her yard at the aforesaid address at or about 6.00 a.m. on July 27, 1986.
3. Ag. Cpl. Hanson, Constable Prendergast, and Cpl. Henry were on mobile patrol along Barbican Road in the vicinity of Grants Pen Avenue and were armed with firearms.
4. Two men were seen on a bridge leading towards Grants Pen Avenue and upon being accosted by Ag. Cpl. Hanson who had then alighted from the vehicle, ran off.
5. A single gunshot was fired which found its mark through the door of the plaintiff's house causing her injury.
6. Within a short while of the explosion, the three policemen were seen emerging from 16 Grants Pen Avenue; each with a gun in his hand.

7. The policemen trotted down Grants Pen Avenue in search of the men who had made good their escape.
8. One of the policemen returned to where the plaintiff, Candy Gray and Mervyn Clarke were standing along Grants Pen Avenue and enquired who got shot.
9. There was no shoot-out between the police and gunmen which necessitated retaliation on the part of the police in order to save life and limb.

### Conclusion

Ag. Cpl. Hanson has admitted that as he stood on the bridge where the men were seen he would have been facing 7A Grants Pen Avenue. He maintained however, that houses and a zinc fence separated him from that address. He then had his rifle in hand.

It has been proven that 7A Grants Pen Avenue is "a step across" from 16 Grants Pen Avenue and within minutes of the explosion three policemen were seen emerging from the latter address, each carrying a gun in his hand. No other person was seen leaving 16 Grants Pen Avenue and neither was anyone else seen with firearms.

There is also unchallenged evidence that the plaintiff's house is on a "rising" at the premises and that it faces 16 Grants Pen Avenue. It would therefore be in the direct line of fire if the police opened fire whilst they were on the bridge.

In light of the above evidence, and my finding that there was only one shot fired, a reasonable inference could be drawn that the explosion which was heard came from one of the policemen's rifle. No explanation was given why Cpl. Hanson needed to accost this man. Had he been a fleeing felon then it would have been quite justifiable in the circumstances to have used force to apprehend him. In the absence of an explanation I hold that the shooting by the police would be unlawful.

I accept the evidence of Ag. Cpl. Hanson that he fired at the men but I reject that the men returned fire.

I accept as a correct statement of the law the dicta of Carberry J.A. in Supreme Court Civil Appeal No. 43/78 delivered 12th June 1980 in Attorney General for Jamaica v. Miguel Green where he states at page 6:

"It seems to us that if A deliberately fires at B, misses and hits C standing nearby or behind B, that A is liable for assault unless there are circumstances which justified his original firing at B, and it is also shown that he was not negligent. We would agree that the onus of proof as to negligence if A justifies the original shooting at B, would rest upon the Plaintiff C."

It is my view therefore that there was no reasonable and probable cause on the part of the police shooting at these men. Therefore, having shot at them unlawfully and without reasonable cause and having hit the plaintiff, she would be entitled to damages in assault. On a balance of probabilities the plaintiff's claim in assault therefore succeeds.

Damages

I now turn to the issue of general damages.

Exhibit 1, Medical Report on the Plaintiff, issued by Dr. Bernard Maragh, states inter alia:

"... Examination at the time revealed a healthy young lady with a normal seven months pregnancy and a small entry wound in the soft tissue over the scapula and a 2 cm. exit wound approximately 10 cms. horizontally and lateral to the entry wound.

There were no bony deformities. Her wounds were cleaned and dressed and she was given prophylactic injections against Tetanus and infections.

There should be no permanent sequelae from her injuries and it is expected she would be away from her normal activities for a period of ten days."

The plaintiff recounted that she was treated at the University Hospital and sent home. The Doctor examined her left hand dressed it and applied plaster. She felt pain from her left hand. She was unable to bathe herself and neither could she wash. She was incapacitated for six weeks. This was the evidence which was given so far as her injury was concerned.

In arriving at an award under the head of pain and suffering and loss of amenities I am guided by the dicta of Campbell J.A. in Beverley Dryden v. Winston Layne (b.n.f. Stanley Lane) S.C.C.A. 44/87 unreported where he said:

"Personal injury awards should be reasonable and assessed with moderation and that as far as possible comparable injuries should be compensated by comparable awards."

Both Attorneys referred to the case of Paul McEwan v. The Attorney General and Anor. (unreported) C.L. 1987/M. 501 Assessment of Damages by Morris J. Ag. on the 9th October, 1990. The plaintiff in that case was shot by the police in the left thigh. His injury resulted in a disability whereby there was a loss of sensation in the quadriceps, blunted sensation in the distribution of the lateral cutaneous nerve of the thigh, weakness in the quadriceps and disfigurement.

The plaintiff in the present case suffered no disability hence it is my view that the case above is easily distinguished. Miss Cummings also referred to the case of George Gordon v. Con. Bowers and the Attorney General (unreported) C.L. 1986/G. 265 before Morris J. Ag. on the 24th May 1990. Again, that case is of very little assistance. The plaintiff who was shot by the police had a permanent deformity of the chest wall resulting from rib fractures at the time of injury.

As a guide I refer to a case which was decided in the Supreme Court. It is George Brown v. Det. Sgt. Isiah Laing & The Attorney General for Jamaica (unreported) C.L. 1989/B. 029 before Chester Orr Senior Puisne Judge on the 2nd day of July, 1992. The plaintiff in that case was shot by the police on the 15th August, 1988 at Burke Road, St. Andrew. He sustained three large circular wounds in the region of the right scapula extending down to the muscle. He also received <sup>a</sup> superficial circular wound on the left side of the abdomen. He was admitted to Kingston Public Hospital for 24 hours and was treated with tetanus toxide injection and penecillin. The wounds were cleaned and dressed. He returned as an out-patient on two occasions. Thereafter, he did his own dressing. He was awarded \$35,000.00 as general damages for pain and suffering and loss of amenities.

The plaintiff in the present case sustained a small entry wound in the soft tissue over the left scapula and a 2cm exit wound. She was treated at hospital and sent home after her wounds, were cleaned and she was given injections against tetanus and infections. She attended a clinic after leaving hospital but she did not say for what period she received treatment.

It is my opinion, that although the injuries in the instant case are not as serious as those cited in the case above, they are comparable. Both plaintiffs had suffered from gunshot injuries to the scapula and the period of incapacitation was short. There were no resulting disabilities. I am inclined to the view therefore, that the plaintiff in this case would have received a lesser award. I would therefore use a base figure of \$32,000.00 as a starting point.

In trying to arrive at a proper figure, I have to bear in mind the rapid growth of inflation and the devaluation of our dollar. In Hepburn Harris v.

Carlton Walker S.C.C.A. 40/90 Rowe P. said:

"Cases tried between 1984 and 1987 were cited to support the proposition that general damages awarded in those years should be massively increased to reflect the rapid growth of inflation. Central Soya of Jamaica Ltd. v. Junior Freeman S.C.C.A. 18/84 suggested that the depreciation of the value of the Jamaican dollar over a given period of time can be used as a measure to preserve the real value of the damages to an injured person who receives his money at a future date. It is time that a more precise and sophisticated method to be devised to find the quantum of money of the day, taking into account inflationary trends in the economy."

The Court of Appeal has sanctioned the use of the Consumer Price Indices provided by the Statistical Institute of Jamaica as providing a method of finding the quantum of money of the day taking into account the inflationary trends in the economy. The consumer price index in June, 1993 is approximately 450. It was approximately 386 in July 1992. By applying these indices to the proposed base figure of \$32,000.00, an approximate sum of \$38,000.00 would be realised. This sum of \$38,000.00 would therefore be awarded for pain and suffering and loss of amenities under general damages.

I now turn to special damages.

The plaintiff testified that she was a shop keeper and was unable to operate her shop for six weeks and that she usually made \$500.00 per week in this shop. However, when she was cross-examined it was borne out that her common law husband and herself operated the shop together. Furthermore, he did operate the business during the period she was incapacitated. There was no evidence to substantiate that her absence from the shop reduced sale thereby resulting in loss of income. I therefore accept the submissions of the Defence that the plaintiff's absence from the shop did not materially, if at all, affect any earning derived from that business.

The medical evidence revealed that the Doctor expected that the plaintiff would be incapacitated for a period of ten days. She testified however that she could not work for six weeks. She was unable to wash her clothes and to bathe herself because of her injuries. During this period Miss Gray assisted her personally, washed her clothes and attended to the plaintiff's little baby and she was paid \$100.00 per week for her services.

I am of the view that the period of incapacitation was not unduly long. The sum paid weekly to Miss Gray was extremely reasonable and I would allow this item of special damages.

The plaintiff further claimed loss of a nightie valued at \$60.00, a sheet valued \$100.00, a pillow case valued \$40.00, transportation from the hospital to home \$30.00, a metal pan valued \$30.00, and \$80.00 for medical report. These losses were proven and will be allowed.

Summary

1. There will be judgment for the plaintiff on the claim.
2. There will be an award of \$38,000.00 as general damages with interest at 3% from the service of the Writ to today.
3. There will be an award of \$940.00 as special damages made up as follows:

a) Night dress valued at	\$ 60.00
b) One sheet	\$100.00
c) One pillow case	\$ 40.00
d) One metal pan	\$ 30.00
e) Transportation	\$ 30.00
f) Domestic assistance	\$600.00
g) Medical Report	\$ 80.00
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Total	\$940.00

There will be interest at 3% on this sum of \$940.00 from the date of the service of the Writ to today.

There will be costs to the plaintiff to be taxed if not agreed.