



[2020] JMSC Civ 142

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

**CLAIM NO. 2007 HCV 02729**

<b>BETWEEN</b>	<b>JERMAINE MCINTOSH</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DEPARTMENT OF CORRECTIONAL SERVICES LIMITED</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>nd</sup> DEFENDANT</b>

**Mrs. Kasian Kennedy and Miss Shanice Nesbeth instructed by Townsend, Whyte & Porter for the Claimant**

**Mr. Andre Moulton instructed by Director of State Proceedings for 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**HEARD ON THE 11<sup>th</sup> & 12<sup>th</sup> December, 2019 and 3<sup>rd</sup> July, 2020**

Negligence – Personal Injury- Credibility-Duty owed by correctional officer to inmate-Res ipsa loquitur

WILTSHIRE, J.

**Background**

- [1]** The claim arises out of an incident on the 31<sup>st</sup> March, 2005 at the Tower Street Adult Correctional Centre in the parish of Kingston when during a melee/insurrection shots were fired by correctional officers and/or inmates. The Claimant who was an inmate at the material time maintains that he was hanging out his clothes to dry when he was shot and sustained injuries to his face. He claims against the Defendants, the Department of Correctional Services and the Attorney General, jointly and severally for damages for negligence.

## **The Claim**

**[2]** The Claimant alleged that during the melee correctional officers negligently discharged firearm/firearms causing his injury and/or through their negligence allowed inmate/ inmates to have in their possession firearm/firearms which were discharged. He particularised the negligence as follows:

- Failing to take reasonable care for the safety of prisoners;
- Failing to take any care or any reasonable care to see that the Claimant would be reasonably safe within the premises;
- Failing to ensure that dangerous weapons were not in the possession of inmates;
- Failing to make any or any sufficient warning, that shots were being discharged within close proximity of the Claimant, and that the Claimant should take cover;
- In the circumstances, failing to discharge the common duty of care owed by the First Defendant to the Claimant
- Res ipsa loquitur

## **The Defence**

**[3]** On behalf of both defendants Counsel for the Attorney General filed the defence. In it the defendants admitted that the 1st Defendant is and was at all material times, the authority vested with the legal responsibility for the safe custody, imprisonment or detention of persons incarcerated. They denied the particulars of the incident and stated that on March 31, 2005, there was an insurrection at the Tower Street Adult Correctional Centre (hereinafter referred to as “the correctional facility”), in which the Claimant was an inmate. In a planned bid to escape from the correctional facility, another inmate, namely Richard Harrison, armed with a firearm, began firing shots in the direction of correctional officers on duty at the relevant time. In response thereto, the correctional officers returned fire and an exchange of gun fire ensued. The Defendants maintained that at all material times, the Claimant had knowledge of and/or was a participant in the execution of the plan to escape from the correctional facility and/or seized an opportunity to attempt to escape from the correctional facility.

[4] The Defendants stated that at the time of the incident, the Claimant was seen running towards the gate lodge of the correctional facility when the inmate Richard Harrison began firing shots at correctional officers. The Defendants said that the gate lodge is a restricted area and is the entrance/exit to the said correctional facility. Whilst in the vicinity of the gate lodge, a correctional officer accosted the Claimant and a struggle ensued between both men, during which other correctional officers intervened and gave assistance. The correctional officers who gave assistance were armed, but they did not discharge their weapons in assisting to dismantle the struggle. When the shooting subsided, it was discovered that the Claimant was injured and he was taken to the Kingston Public Hospital.

i) The Defendants also contended that, the correctional officers acted in self defence and to avert the escape of prisoners /inmates from the correctional facility and in so doing they used no more force than what was reasonable in the circumstances. Further or in the alternative, the Defendants stated that the Claimant's injuries, were wholly caused or contributed to by his own negligence in that he:

- (a) failed to remain in authorized areas of the correctional facility;
- (b) failed to take any or any adequate steps to report to correctional officers and/ or appropriate authority the plan to escape; and
- (c) was present at the gate lodge - a restricted area;

Further or in the alternative, the Defendants stated that the Claimant by his own illegal acts and /or conduct and acting in concert with another inmate Richard Harrison created a dangerous situation with the knowledge of the risk of injury or damage to himself and the correctional officers at the correctional facility.

### **Claimant's Evidence**

[5] The Claimant testified that on or about the 31<sup>st</sup> day of March 2005, sometime in the morning, he was going about his usual daily activities and was permitted by the warders on duty to go outside to the line area to hang some clothes. At the time of the incident, the process of hanging clothes at the line area by inmates was all done under the close supervision of the warders on duty, who would sit at the entrance to the passage way connected to the cell block area. The line area was in an open area which is about 15-20 feet from the entrance area/gate area to the passage that

is connected to the cell blocks. The line area was about 20-25 feet from the main gate area where the Officers conducted routine searches of visitors and where vehicles and other personnel enter and exit.

- [6]** He said on the day in question at least five (5) warders were on duty at the entrance area/gate area of his cell block. After hanging his clothes, he was on his way back to his cell block when he heard several gunshots in quick succession and immediately felt a stinging sensation to the back of his head and the next thing he recalled is waking up in the Kingston Public Hospital. He did not know how or when he got to the hospital.
- [7]** According to the Claimant while at the hospital he was treated for a swelling and bruising around his left eye, several lacerations and a gunshot wound below his lower lip as well as other injuries. He was constantly in a lot of pain and discomfort. He said he was treated by Dr. R. E. Cheeks and a Medical Report dated the 13<sup>th</sup> day of September 2005 was prepared detailing his injuries. He said he had seen the medical report and noticed that it correctly outlined most of his injuries, but that it made no reference to the fact that he also lost his front teeth, suffered from a broken finger and an injury to the back of his head as a result of the incident on the 31<sup>st</sup> day of March 2005.
- [8]** He said he was discharged into the custody of the police and transported to the Tower Street Adult Correctional Centre and that once he was back at the Tower Street Adult Correctional Centre, he was shocked to learn that on the day that he was injured, there was an attempt by some prisoners to escape from the facility and that in a bid to control the situation, Correctional Officers discharged their firearms and exchanged gun fire with an armed inmate. This incident, he said resulted in the death of some persons and injury to several persons including himself.
- [9]** He said to his surprise, it was being said that he was a part of the group of prisoners who tried to escape from the facility. He said he was extremely surprised that this is being said, as on that day he was being closely supervised by the warders on duty in his section as he hung his clothes and was returning to his cell block. He said he was never charged for attempting to escape from the facility or any other offence in respect of this incident which occurred on March 31, 2005.
- [10]** He said he was wearing regular clothes on the day in question and it is entirely false to say that he was wearing a white shirt and khaki pants as a disguise. At that time he was considered an

Appellant as he had filed his application for leave to appeal and all Appellants were permitted to wear regular clothes, while all other prisoners wore white shirt and khaki pants.

### **Defendant's Evidence**

- [11] The Defendants relied on the evidence of Gary Bloomfield, a Corporal within the Department of Correctional Services (“DCS”) and Acting Overseer Carl Rhone. Mr. Bloomfield testified that on March 31, 2005, while stationed at Tower Street Adult Correctional Centre he was assigned to the gate lodge where his duties were to assist in processing visitors who entered the prison to visit inmates. He was positioned at the visitor’s desk which was located to the north-west of the gate lodge, north of the Visitor’s booth and west of the front desk, where the desk officer sat adjacent to the main gate.
- [12] On the morning of March 31, 2005, whilst he was searching visitors’ bags, he heard gunshots and a sudden commotion within the gate lodge. When he looked out into the gate lodge, he saw correctional officer Cleopatrik Blake wrestling with inmate Jermaine McIntosh. They were wrestling over his mini-14 rifle. At the same time, correctional officer Roger Mills was firing his gun toward the Inner Gate at inmate Richard Harrison. He immediately ran to the assistance of Blake and hit inmate McIntosh in the head which caused him to lose his grip on correctional officer Blake. He and correctional officer Blake then sought cover by the Main Gate until the shooting subsided.
- [13] However, before he ran to the gate for cover, he looked toward the Inner Gate and saw an inmate drop an object that looked like a revolver and run toward the prison yard. He also noticed that the mini -14 rifle of correctional officer Blake did not have the magazine as it had been ejected during his tussle with inmate McIntosh.
- [14] Carl Rhone testified that on the 31<sup>st</sup> March, 2005, he was assigned to the gate lodge where he was stationed in the key room. He heard explosions that he identified as gun shots coming from the southern area of the gate lodge, toward the inner gate. He looked outside toward the eastern side of the gate lodge, near the visitor’s booth and saw correctional officer Cleopatrik Blake wrestling with an inmate who was trying to disarm him of his mini-14 rifle.
- [15] Correctional officer Blake was still wrestling with the inmate, who he would learn was Jermaine McIntosh, when other officers came to his assistance and he was able to break free from inmate McIntosh. He said that he did not see correctional officer Blake fire his weapon and when he

examined his rifle he observed that the magazine had been ejected and that the rifle itself was jammed and could not fire.

[16] During the insurrection, it was a hectic scene with gunshots coming from the prison yard and gun shots being returned by correctional officer Roger Mills. After the shooting subsided, it was determined that inmate Jermaine McIntosh attempted to escape the prison alongside the shooter inmate Richard Harrison and that through the efforts of the correctional officers on duty at the time this attempted prison escape was thwarted.

[17] He indicated that he did not see inmate McIntosh get shot or who shot him. He opined that it was unlikely that he would have received a gunshot wound after leaving the bath to hang out his clothes because the layout of the prison yard where the cell blocks were located would not have exposed inmate McIntosh to the risk of being hit with a bullet fired from the gate lodge. He explained that the cell blocks stretched parallel to Tower Street, with a driveway between them. This driveway stretched from the Main Gate on Tower Street going in a southerly direction. The bathrooms on the cell block were at the further point east or west on a cell block away from that drive way. If an inmate had left the bath area to hang his clothes, he would not be in the line of sight or fire of any bullet coming from the gate lodge.

[18] Mr. Rhone further stated that inmate McIntosh was likely shot in the gate lodge whilst he was attempting to escape. He said that after the shooting subsided the Claimant was located in the gate lodge wearing a white tee shirt and khaki coloured pants, which is the uniform assigned to orderlies. He was not an orderly, but Mr. Rhone expressed the belief that he attempted to disguise himself as one to gain access to the gate lodge.

### **The Medical Evidence**

[19] The Medical Report of Dr R. E. Cheeks dated September 17, 2005 was admitted into evidence. It indicated that the Claimant was "*Allegedly injured during prison disturbance. Conscious on Admission.*" The doctor's findings were "*laceration below eyebrow, Gunshot wound below lower lip; laceration over mastoid region on left; swelling and bruising around left eye; laceration to chin.*"

## Submissions

### The Claimant

[20] Counsel identified the applicable law in the decided case of **Pauline Johnson (Administratrix for the estate of Garfield Gregory, deceased) v Dwight Bennet, Merrick Moulton, Linval Tennant and The Attorney General of Jamaica** [2013 JMSC CIV 131], para 11, where it was indicated that in **Home Office v Dorset Yacht** [1970] A.C. 104, Lord Diplock put the proposition in this way at page 1063 letter G:

*'A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics:*

- i. That A has the legal right to detain C in penal custody and to control his acts while in custody,*
- ii. That A is actually exercising his legal right of custody of C at the time of C's tortious act*
- iii. That A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics;*
- iv. That at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and*
- v. That A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did. '*

[21] Lord Diplock, in that decision, went on to examine two cases in which the special relationship caused by the prisoner being in actual custody of the Defendant gave the Defendant the continuing control over the acts of the prisoner. Moreover, the fact of physical control over the plaintiff also placed him in a position to see the plaintiff was likely to be injured by his fellow prisoner. At page 1061 letter G, Lord Diplock said:

*"In two cases **Ellis v Home Office** (1953 2 All E.R. 149) and **D'arcy v Prison Commissioners** (Times Newspaper — 15<sup>th</sup> November 1955) it*

*was assumed, in the absence of argument to the contrary, that the legal custodian of a prisoner detained in a prison owed the plaintiff, another prisoner confined in the same prison, a duty of care to prevent the first prisoner from assaulting the plaintiff and causing him physical injuries. Unlike the present case, at the time of the tortious act of the prisoner for the consequences of which it was assumed that the custodian was liable, the prisoner was in the actual custody of the defendant and the relationship between them gave to the defendant a continuing power of physical control over the acts of the prisoner. The relationship between the defendants and the plaintiffs in these two cases bore no obvious analogy to that between the plaintiff and the defendant in the present case. In each of the cases the defendant in the exercise of a legal right and physical power of custody and control of the plaintiff had required him to be in a position in which the defendant ought reasonably and probably to have foreseen that he was likely to be injured by his fellow prisoner”.*

*And at page 1062 letter A:*

*“In my view, it is the combination of these two characteristics, one of the relationship between the defendant as custodian and the person actually committing the wrong to the deceased and the other of the relationship between the defendant and the plaintiff which supply the reason for the existence of the duty in care in these two cases — which I conceded as Counsel in *Ellis v Home Office*. The latter characteristic would be present also between the defendant and any other person admitted to the prison who sustained similar damage from tortious act of a prisoner, since the Home Office as occupiers and managers of the prison have the legal right to control the admission and the movements of a visitor while he is on the prison premises. A similar duty of care would those be owed to him.”*

[22] Counsel noted that at paragraph 14 of **Pauline Johnson** (supra) the court made the pronouncement that it was unchallenged that a knife was found in the cell hence the system was

breached and the Defendants therein were unable to say where and when it was breached. The court went on to rule in favour of the Claimant.

**[23]** Counsel conceded that the 1<sup>st</sup> Defendant was not a proper party to the matter. It was submitted that the Claimant's evidence was credible and was to be preferred to the evidence given by the witnesses for the Defendants. It was argued that the witnesses for the Defence, were not able to say when the Claimant was shot, and in light of the evidence of Acting Overseer Carl Rhone who conceded under cross examination that he was not able to see all the persons that were firing, they would not be able to say

- a. which direction the shot that injured the Claimant would have come from or
- b. whether or not the Claimant could have been injured in the manner described by him.

**[24]** Counsel therefore submitted that the Claimant's injuries were consistent with his account. Further that it was reasonable for the court to infer that the Claimant would have fallen to the ground and sustained additional injuries. Based on the evidence of the Defendants' witnesses Mr. Bloomfield in assisting Mr. Blake hit the Claimant on his head, whilst according to Mr. Rhone the officers who went to Mr. Blake's assistance were pulling the Claimant. In light of this evidence the actions of merely hitting someone in the head or pulling them would not have resulted in the injuries suffered by the Claimant.

**[25]** Counsel contended that the evidence in chief and cross examination of the Defence witnesses revealed material inconsistencies/discrepancies as follows:

- (a) Whether one or more than one officer went to Mr. Blake's assistance? According to Mr. Bloomfield he was the only person to go Mr. Blake's assistance, whilst according to Mr. Rhone more than one officer went to Mr. Blake's assistance.
- (b) What was done to the inmate by the officer/officers that went to assist Mr. Blake? According to Mr. Bloomfield he hit the inmate on his head whilst according to Mr. Rhone the officers that went to Mr. Blake's assistance would have been pulling the inmate.
- (c) Whether or not the white tee-shirt and khaki pants was used as a disguise by the Claimant? It is significant that this theory of the case was abandoned by the Defence as their witnesses under cross *examination stated as follows:*

A. As an appellant he has the right to wear any clothes he wishes including the Khaki pants and the white shirt.

Q. It is correct that persons who are appellants wear different clothing from other prisoners?

A. They are not required to wear prison uniform

Q. What is the prison uniform

A. There is a khaki pants and white t-shirt.

[26] Counsel recounted the evidence that the correctional officers did fire shots, shots were being fired by an inmate, and the Claimant was a prisoner who was in the lawful custody of the Defendants. It was therefore submitted that the Defendants had a duty to control the acts of the prisoners in their custody and the Claimant was owed a duty of care by the agents and servants of the Crown who work in the Department of Correctional Services to ensure his safety. As such, in accordance with the law as outlined in **Pauline Johnson** (supra) the only question for this court was whether or not it was reasonably foreseeable that the Claimant would have been harmed in all the circumstances.

[27] Counsel further submitted that the system was breached and the Defendants are unable to say how and when the system was breached. Further on the evidence given by Mr. Carl Rhone this was as a result of negligence on the part of its agents and or servants as Mr. Rhone testified that there were systems in place for searching cells and the purpose of doing searches was to ensure that no contraband to include weapons were in the cells. By extension this applied generally to ensuring that there were no weapons in the possession of any inmate at any time.

### **The Defendants**

[28] *Counsel for the Defendants placed reliance on the following authorities:*

(a) **Desmond Kinlock v Commissioner of Corrections, the AG & Ors.** [2019]  
*JMS Civ 20*

(b) **Byfield v Attorney General** (1980) 17 JLR 243

(c) **Pauline Johnson v the Attorney General & Ors.** [2013] JMSC Civ 131  
*(unreported)*

(d) *Subbiah v Canada 2013 FC 1194 (CanL11)*

- [29] Counsel argued that on cross-examination, the Claimant was asked where he felt the stinging sensation and he responded that it was to the back left of his head. The melee and insurrection was taking place to the Claimant's right, therefore, if he was shot by gunshots fired from the gate area, it would have been on his right hand side. Further, in cross-examination, the Claimant was asked when he heard the gunshots, did he take note of where they were coming from and his response was "no". Given the proximity of the clothes line to the gate area based on the Claimant's evidence and the unchallenged evidence that the melee and insurrection was taking place in the gate area, it was surprising that the Claimant could not identify where the gun shots were coming from or attempt to take cover.
- [30] Counsel referred to Dr. Cheeks' reports that the Claimant's gunshot wound was below his lower lip and submitted that it suggested that the Claimant was not walking away from the gunshots but walking toward it. It was also submitted that the injuries detailed in the report did not align with the Claimant's indication of when he got injured or how he got injured. On the Claimant's evidence he had insufficiently proven to this court a nexus for the causation of his injuries on his version of the events.
- [31] It was further submitted that the Claimant's version of the events were more aligned with Corporal Broomfield's evidence that the Claimant was fighting with a prison guard and that it was Corporal Broomfield who struck the Claimant to get him to release the weapon he was attempting to secure. The injuries were more in line with those that one would gain from a physical fight.
- [32] Counsel submitted that section 15 of the Corrections Act permits the use of weapons against any inmate where there are reasonable grounds to believe he is escaping or attempting to escape and permits the use of weapons against any inmate using violence to any person if such officer has reasonable grounds to believe that such person is in danger of life or limb. Counsel stated that in light of the escape attempt and inmate Harrison's using a firearm to endanger the lives of correctional officers the use of firearms to subdue him and prevent the attempted escape was reasonable in the circumstances and permitted by statute.
- [33] Counsel acknowledged that the Claimant was owed a duty of care by the agents and servants of the Crown who work in the Department of Correctional Services at Tower Street. **Johnson (supra)** and **Subbiah (supra)** laid out this common law duty as stated in **Ellis v Home Office**

(**supra**): there is a duty on prison officials to ensure the safety of inmates. However, it was argued this was not an absolute duty and there was no absolute liability on prison authorities to prevent all harm to inmates; liability generally flowed where correctional authorities have actual knowledge of harm. In other words, harm must be reasonably foreseeable.

[34] It was further argued that It could not be said that it would be reasonably foreseeable that a firearm could be smuggled into Tower Street and into the hands of an inmate. When the Court views the facts of **Ellis**, Counsel submitted that the court should come to the same conclusion as the Court of Appeal in **Ellis**, that the prison authorities did not breach their duty of care to the prisoner who was injured.

[35] The Claimant is seeking to have this court accept without more that it could only be negligence on the part of the prison authorities which led to a prisoner being armed with a firearm. If the prisoner who complains of the injury is a part of the attempted escape, then this Court would be allowing the Claimant to benefit from creating his own harm.

[36] Further, the court should note that no evidence has been produced by the Claimant as to the breach of duty of the prison authorities which resulted in a prisoner gaining a firearm. No question was raised as to whether the firearm was brought in from outside the prison and if any was, the only evidence teased out by the Claimants was speculative. It was submitted that the Court is not in a satisfactory position to say based on the evidence that an inmate gained a firearm due to an insufficient search as was suggested in **Johnson** due to the size of the knife that was found therein. The Court cannot say how the inmate got the firearm because no evidence was led in this regard, which leaves the Court unable to pronounce upon whether the Defendants had reasonable foreseeability of the events as they unfolded.

[37] Counsel finally submitted that Res Ipsa would not be applicable in the circumstances as the Claimant gave a reason for his injuries which the Defendants refuted and proffered a more plausible version of events that resulted in the Claimant's injuries. Consequently, the doctrine of Res Ipsa loquitur is not applicable to the facts of this case.

### **The Issues**

[38] The court must determine the following:

- (a) Whether the Department of Correctional Services (DCS) is a justiciable person and should have been joined as the 1<sup>st</sup> Defendant in this claim
- (b) Whether the Claimant's version of events is more credible than that of the Defendant's
- (c) Whether the injuries suffered by the Claimant resulted from the negligence of correctional officers at Tower Street Adult Correctional Centre?
- (d) Whether the doctrine of Res Ipsa Loquitur applies.

## Law and Analysis

### **Issue 1- Whether the Department of Correctional Services (DCS) is a justiciable person and should have been joined as the 1<sup>st</sup> Defendant in this claim?**

**[39]** The case of **Desmond Kinlock v Denny McFarlane and others** [2019] JMSC Civ 20 is instructive. Palmer J stated there that:

*“Section 13 (2) of Crown Proceedings Act states that, ‘Civil Proceedings against the Crown shall be instituted against the Attorney General.’ Where a claim is brought against the Crown, the only proper defendant is the Attorney General, as the Attorney General is the Crown’s legal representative for the purposes of any such claim. See: The Attorney General v Gladstone Miller – Supr. Ct. Civil Appeal No. 95 of 1997, esp. at p.14, per Bingham, J.A.*

The court accepts that the proper Defendant in this case is the Attorney General.

### **Issue 2 - Whether the Claimant's version of events is more credible than that of the Defendants?**

**[40]** The court does not find the Claimant to be a witness of truth. He testified that he did not know how he was injured or how or when he reached the hospital. The medical report of Dr Cheeks however stated that he was conscious on admission. This suggests that he was aware of his admission to the hospital and did not simply wake up to find himself there with a tube coming from his nose. In addition, his medical report stated less injuries than he claimed. In his particulars he said he suffered the following:

- i. Laceration below eyebrow
- ii. Gunshot wound below lower lip
- iii. Laceration over mastoid region on left

- iv. Swelling and bruising around the left eye
- v. Laceration to chin
- vi. Broken right middle finger
- vii. Inability to extend right middle finger
- viii. Loss of several front teeth
- ix. Severe headaches and dizzy spells
- x. Unconsciousness
- xi. Bangs head against wall in sleep

There was no additional medical report to substantiate the additional injuries. Further indication of the Claimant's lack of credibility is his evidence that he learnt of the reason for his injuries when he returned to the prison more than a month after the incident. The court finds that incredible. The evidence of the correctional officers is preferred as it is consistent with the Claimant's injuries. The Claimant further said he was walking away from the line area, which based on the evidence of the layout of the prison yard meant he would be moving away from the gates when he was shot. Had he been truly returning to his cell and only felt a stinging sensation to the left back of his head, what is the explanation for all his other injuries?

### **Issue 3 - Whether the injuries suffered by the Claimant resulted from the negligence of the correctional officers?**

[41] The court accepts the principles with respect to liability of a Defendant as outlined in the case of **Pauline Johnson (Administratrix for the estate of Garfield Gregory, deceased) v Dwight Bennet, Merrick Moulton, Linval Tennant and The Attorney General of Jamaica** (supra). That case concerned a claimant inmate being injured by another inmate with an unauthorized weapon. The Defendant had control over both inmates and was responsible to keep the claimant safe from the other inmate. In the case at bar it was not shown that the Claimant was injured by another prisoner. There is no evidence of who shot the Claimant. What is known is that there was a prison break in operation, during which the Claimant was injured. That was not the same as the situation in the **Pauline** case where it was clearly shown that the claimant was injured by

another inmate in what would have been a preventable and foreseeable event if the weapon had been found and confiscated by proper search of cells and or inmates. This the correctional officers were duty bound to do in order to keep the facility safe for inmates.

**[42]** The Claimant in the instant case has not shown that his injury was caused by a fellow inmate. It was not determined that he was shot by an inmate or by the correctional officers. All that can be said is that he was shot. Gun fire was being exchanged and the Claimant could have been shot by either inmate or correctional officer. The court is of the view that it is more likely that he was shot by the officers in his bid to escape.

**[43]** The Claimant has not shown where the gun used by the inmate came from and that it was in his possession due to the officers' failure to search cells. It cannot be said conclusively that the possession by inmates of guns is proof that the officers in a jail break attempt had neglected their duty to search cells and keep inmates safe. In any event the Claimant has not produced any evidence that the gun or guns being fired by the inmate(s) had caused him harm.

**[44]** If he was shot by officers, as is accepted as the more likely occurrence, this was within their mandate to use force as the court accepts that the Claimant was attempting to relieve an officer of his weapon and was himself trying to escape. The Corrections Act section 15(1) states:

*“(1) Every correctional officer may use weapons against any inmate who he has reasonable grounds to believe is escaping or attempting to escape; but resort shall not be had to the use of any such weapons unless such officer has reasonable grounds to believe that he cannot otherwise prevent the escape”.*

*(2) If an inmate is engaged in any combined outbreak or in any attempt to force or break open the outside door or gate or enclosure wall of the adult correctional centre. a correctional officer may use weapons against such inmate if he has reasonable grounds to believe that he cannot otherwise prevent the escape and may continue to use such weapons so long as such combined outbreak or attempt is being actually undertaken.*

*(3) Every correctional officer may use weapons against any inmate using violence to any person if such officer has reasonable grounds to believe that*

*such person is in danger of life or limb, or that other grievous hurt is likely to be caused to him.*

*(4) Before using firearms against an inmate under the authority contained in subsection (1), the correctional officer shall, if possible, give a warning to the inmate that he is about to fire on him.”*

[45] The Claimant was attempting to escape and having been injured in the process cannot succeed in saying the Defendants had failed to take any care or any reasonable care to see that he would be reasonably safe within the premises. The Defendants had a general duty to keep those in their care safe. However, where the inmate is part of a prison break the duty of the officers is to stop the break and to use force if needed. The fact of the gun being in the hands of prisoners alone cannot in these circumstances point to negligence on the part of officers. Moreover, it cannot be said that the mere presence of the gun generated unsafe circumstances. What generated the unsafe circumstances was the action by the prisoners in trying to escape and shots being fired by at least one of them and returned by officers. The Claimant in attempting to escape brought this on himself. It was his unlawful act that resulted in his injuries.

#### **Issue 4- Whether the doctrine of Res Ipsa Loquitur is applicable**

[46] The doctrine of Res Ipsa loquitur is inapplicable to the facts of this case. According to Halsbury's Laws of England:

*“The maxim res ipsa loquitur applies only where the causes of the accident are unknown but the inference of negligence is clear from the nature of the accident. If the causes are sufficiently known the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred. Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine.*

*In order that the maxim res ipsa loquitur should apply the defendant must be in control of the thing which causes the accident. It is not always essential that the defendant be in complete control of all the circumstances, provided that the happening of the accident is evidence of negligence on the part of the defendant or someone for whom he is responsible B. If the instrumentality is in the control of one of several employees of the same employer, and the claimant cannot point to the particular employee who is in control, the rule may still be invoked so as to make the employer vicariously liable.*

*The harm must be of such a kind that it does not ordinarily happen if proper care is being taken. The doctrine of res ipsa loquitur has been applied to things falling from buildings, and to accidents resulting from defective machines, apparatus or vehicles. It has also been applied where motor cars mount the pavement or where aircraft crash on taking off. On the other hand, it was held inapplicable where a fire, having been left by a lodger in his grate, spread from his room and damaged neighbouring rooms. Even though the matter is not one of common experience, where an unexplained accident occurs from a thing under the defendant's control, and medical or other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligence for the court.*

*Where the claimant successfully alleges res ipsa loquitur its effect is to furnish evidence of "negligence on which a court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not reverse the burden of proof, so that where the defendant provides a plausible explanation without proving either of those matters, the court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference."(78 Halsbury's Laws of England (2018) paras 65- 68)*

[47] All that the Claimant had shown was that he had been shot and otherwise injured. The Claimant has not shown that this was an accident which could not have occurred unless the Defendants were negligent. The Claimant had indeed been shot but this was in the course of his trying to escape. If he was shot by the officers this was within their rights as correctional officers trying to stop a prison escape or to defend themselves against the attack by an inmate. If he was shot by officers as he attempted to escape, then he was injured due to his own wrong doing and not accidentally. If he had been shot by an inmate that could have made the Defendants liable. He has not proved the latter. He has not shown that the only way he could have been shot was because the Defendants were negligent.

[48] In **Youngman v. Pirelli General Cable Work, Limited** [1940] 1 K.B. 1 the case concerned a claim for negligence when an electrical worker was electrocuted on live lines while working on a pole. He claimed res ipsa loquitur. The court said at pages 25-27 per Finlay L.J.

*"The judgment which I am about to read is the judgment of Clauson L.J. with which I agree. This is an appeal by the plaintiffs from a judgment of Judge Rowlands in the county court at Beccles in an action remitted from the High Court. His Honour gave judgment for the defendants. The*

*plaintiffs sue under the Fatal Accidents Act as representatives and relatives of one Arthur Youngman, who, while working for the defendants as an electrical linesman, was killed by an electric shock. The claim is based in the first place on negligence, and in the second place on breach of statutory duty. At the date of the death of the deceased on July 13, 1937, the defendants were constructing and operating certain electrical installations at Chorley in Lancashire upon an area which was being laid out as, and was to some extent, at least, in course of construction as, a munitions factory. Part of this installation consisted of four poles in close proximity to one another carrying certain live electrical wires charged with current of about 440 volts. The deceased under his foreman's orders ascended one of the poles in order to place a further wire in position. While he was near the top of one of the poles something occurred, the result of which was that a charge of electricity at the voltage mentioned passed through his body causing immediate death."*

*"A number of possible causes of the accident were discussed before the learned judge. It appeared, and there can be no doubt, that the death would not have occurred unless the body of the deceased, while in contact at one point with a conducting material, such as a metal cross-bar, with an earthed "conductor," came into contact at another point either directly or through some conducting medium with an electrically charged wire, in which case a circuit would be completed, and electrocution would ensue as it in fact did. There was, however, no evidence of how the critical contact occurred, or as to whether it occurred in consequences of negligence or if negligence be postulated, whose the negligence was. In those circumstances the county court judge obviously could not treat the plaintiffs as having proved common law negligence; and the only question remaining on this part of the case was whether the principle of res ipsa loquitur could be applied with the result that on mere evidence of the death without more, and in the absence of, explanation by the defendants (which was admittedly absent), it could be held that negligence must be imputed to the defendants. The learned county court judge took the view that the principle of res ipsa loquitur was inapplicable; and I cannot differ from his conclusion, if only because the only fact proved, the electrocution, is perfectly consistent with the not unreasonable possibility of the deceased having carelessly touched an uninsulated live wire. If this were the fact it is obvious that the electrocution could be attributed to the defendants' negligence only if it could be predicted that the presence of an uninsulated live wire in an electrical installation is of itself evidence of negligence. No attempt was made to prove or indeed even to suggest such a thing."*

**[49]** The injuring of the Claimant was not an occurrence that necessarily indicated negligence. The presence of a gun alone was not indicative of res ipsa loquitur. The injury was explained therefore and the Claimant cannot claim res ipsa loquitur.

## **Conclusion**

**[50]** The Claimant's claim in negligence has failed. Judgment for the Defendant. Costs awarded to the Defendant to be taxed if not agreed.

