



[2016] JMSC CIV. 183

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION

CLAIM NO. 2009HCV02888

BETWEEN	MACHEL NUGENT	CLAIMANT
AND	SGT. PAUL GAMMON	1 ST DEFENDANT
AND	CONS. GLENFORD HENRY	2 ND DEFENDANT
AND	SGT. PAUL ROBINSON	3 RD DEFENDANT
AND	DET/CPL. RICHARD DAVIDSON	4 TH DEFENDANT
AND	CONS. CHRISTOPHER GREEN	5 TH DEFENDANT
AND	CONS. DEMERTE SOOMAN	6 TH DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	7 TH DEFENDANT

IN OPEN COURT

Ms Laurel Gregg, Ms. Marion Rose Green and Ms Coleen Franklin for Claimant

Mrs. Gail Mitchell instructed by the Director of State Proceedings for the Defendants.

Assault and Battery - Gunshot Injury Causing Paralysis – Whether reasonable or probable cause shown – Claim for Aggravated and Exemplary Damages

Damages – Assessment - Pain and Suffering and Loss of Amenities- Loss of Earnings- Costs for Household Help

Heard: January 18, 20, 21, 25, 26 and 27, 2016 and February 5 and June 3, 2016, July 4, 2016 and November 4, 2016.

LINDO, J

[1] This is a claim by Machel Nugent, who alleges that on August 17, 2005 he was driving Toyota corolla motor vehicle registered 8327EK , operating same as a 'robot taxi' in the Half Way Tree area when he was engaged in a chase by the police and was shot and injured.

[2] On June 4, 2009 he filed a claim form and particulars of claim which was subsequently amended and a further amended Particulars of claim was filed on January 27,2015. He claims damages for assault and battery, including aggravated and/or exemplary damages, for the injuries and consequential pain and suffering and loss of amenities.

[3] A defence was filed on October 23, 2009 and an amended defence filed on February 25, 2014. The defence states, *inter alia*, that "Save that it is admitted that on or about 17th August, 2005 something happened that brought the claimant into contact with the...defendants who were acting in the course of their duties, paragraph 4 of the Particulars of Claim is denied..."

[4] Paragraph 4 of the Further Amended Particulars of claim states as follows:

On or about 17th August, 2005, the claimant was driving his taxi along Park Lane in the parish of Saint Andrew when the first, second, third, fourth, fifth and sixth defendants, purporting to act jointly and /or severally in the course of his/their duty unlawfully and/or wilfully and without reasonable and/or probable cause, discharged his/their loaded firearm so that the bullets from the said firearm hit and injured the claimant as a consequence of which the Claimant is paralysed from the waist down."

[5] It is not in dispute that the 1st to 6th defendants were at the material time servants or agents of the Crown, acting in the course of their employment and that on August 17, 2005 there was a chase from the vicinity of Burger King in the Half Way Tree area onto Eastwood Park Road, onto Red Hills Road and in and out of Park Lane which runs from Red Hills Road, involving the claimant and the 1st and 2nd defendants and that the 3rd , 4th , 5th and 6th defendants arrived on the scene travelling in the opposite direction. It is

also not disputed that gunshots were fired by the 2nd, 3rd, 4th, 5th, and 6th defendants and that during the incident the claimant who was unarmed, was shot and injured.

[6] The dispute in this case is whether there was a shootout between the police and men in the Park Lane community during which the claimant was shot and injured.

Claimant's Case

[7] The claimant gave evidence on his own behalf and he called his mother, Sarah Brown, and his friend Audley Strachan as witnesses in support of his claim. His supplemental witness statement and his "amplified witness statement dated January 27, 2015" were admitted as his examination in chief, permission having been granted by the court on October 15, 2015 for the claimant to rely on the latter.

[8] He recounts that on the day in question, he was parked along the intersection of Pavilion Mall and Eastwood Park Road and was about to pick up a passenger when he heard another taxi operator shout "police" and he drove off, looked in his rear view mirror, saw a marked police radio car with two officers, one of whom he recognised as the 2nd defendant. He states that the radio car chased him onto Westminster road, Cassiadean and onto Red Hills Road and he turned into Park Lane and heard two gunshots and on looking in his rear view mirror he saw a hand holding a gun protruding from the passenger side of the police car window and realized that the shooting was coming from the police car that was chasing him.

[9] He indicates that he panicked and was in fear for his life and continued driving "a little faster", circled around Park Lane, and people had congregated on the sidewalk and some of them were throwing things such as bottles at the radio car. He states that when he drove to the back of Park Lane where there were no people, more shots were fired at him from the police vehicle and that he had circled the lane about three times and when he reached the middle of the lane he saw another police car coming up the lane, another shot was fired from the radio car behind him and immediately the police in the radio car in front of him started firing into his car. He states that he "slammed the car into a shop to his left and it stopped" and that he put both hands out the window, heard more gunshots, so he opened the car door and slid out onto the ground.

[10] He states further that when he was on the ground, the 2nd defendant came over to him and started kicking him in his face. He adds that he was feeling pain all over his body and a female who lay on top of him was pulled off by one of the police officers and that **Audley Strachan** came over to him and he told him that he could not move and that he should not let the police take him to the hospital as he was in fear.

[11] His evidence also is that he was taken to the University Hospital of the West Indies (UHWI), was examined and treated and he spent nineteen days and that after he left the hospital, he inspected the car and noticed holes in the back passenger door, the windscreen and back of the trunk of the car and saw damage to the right hand side of the vehicle. These, he states, were not there prior to the incident. He also indicates that there was blood on the back of the driver's seat.

[12] The claimant adds that since the incident he has had to live with his mother and that he is unable to urinate normally, suffers constantly from constipation, and that defecating involves manually removing the stool with gloved fingers. He points out that expenses have been incurred for travelling, medical reports, medication and medical treatment for which he has some receipts, and states that he is no longer able to support his children financially and that the injury he sustained has affected his relationship with women and prevents him from being able to participate in activities that he once enjoyed.

[13] The following documents were agreed and tendered in evidence:

1. Medical report of Dr P Charles dated March 6, 2008 and receipt for report dated October 24, 2008 in the sum of \$1,500.00; Medical report of Dr Dwight Webster dated December 10, 2013 and receipt for report dated December 17, 2013 in the sum of \$40,000.00
2. 22 receipts for transportation to Mona Rehab and return in the sum of \$1,800.00 each, totalling \$39,600.00
3. 10 receipts for transportation to and from UHWI in the sum of \$1,400.00 each, totalling \$14,000.00

4. Receipt for transportation to and from KPH for two days in the sum of \$1,000.00
5. 12 receipts showing payments to UHWI (Miscellaneous) totalling \$18,450.00
6. Miscellaneous receipts showing payments to various pharmacies for medication and medical treatment
7. Pro forma invoice from Manuchant Ltd for purchase of wheelchair in the sum of \$22,000.00

[14] In cross examination by Mrs Mitchell, he indicated that he was an apprentice auto air conditioning technician and admitted to being fully aware that he was breaking the law by taking the risk of operating a 'robot taxi'. He indicated that he was still on Eastwood Park Road when he saw the police and maintained that he was alone in the vehicle. He insisted that the police did not stop him and speak to him while he was parked in the vicinity of Pavilion Mall.

[15] He stated that when he saw the police he was driving at about 30 - 40 mph and he continued on Eastwood Park Road at that speed. He said the police were blowing the car horn and as he drove along Red Hills Road he was driving at about "60 – 70 and probably 75 mph", and that there were a few cars on the road, but no vehicles that he would have caused to "run off the road".

[16] The claimant admitted that he has seen the 2nd defendant on a regular basis so was able to recognise him and stated that he knew him from early 2004. He said he was in total fear so he continued to flee from the police. He stated that he did not expect any reaction from the people in Park Lane and expressed the view that the bullet that entered his body could have been one of the bullets that entered his vehicle. When asked if he is able to say who would have fired those shots, he indicated that he would have to say the police as only the police were firing. When pressed, he insisted that two shots came from behind him while in Park Lane.

[17] He explained that he went into Park Lane as he expected to be prevented from being beaten up by the police as there would be "a lot of eyes". He insisted that it was true that when one radio car was in the opposite direction and one in front of him, they started firing on his car and it was the defendants who caused bullet holes in his vehicle

as they were the only ones firing. He also insisted that he was speaking the truth when he said he was kicked by the 2nd defendant. He indicated that he was not charged for any offence for anything done on that day.

[18] Ms Sarah Brown's witness statement dated October 20, 2014 was admitted as her examination in chief. She states that she worked as a telephone operator and dispatcher and earned \$4,500.00 but left that job two weeks before the incident. She indicates that she was offered a job which would pay \$5,000.00 per week and was due to start the job but as a result of the injuries suffered by the claimant, he became totally dependent on her and she had to decline the job and stay home to take care of him. She states that she has been his principal caregiver to this day.

[19] Under cross examination, she indicated that since the incident she works one day per week and when she goes out to work, she asks persons in her yard to "look in on him". She also stated that friends help out "monetarily and otherwise" and that she bought all the claimant's medications at all times.

[20] Audley Strachan gave evidence that he was at home, sitting on the sidewalk, when he saw the claimant "driving up the road ...being chased by a police car...". He states that the claimant passed him and went around the circle, came back and passed him again "with the radio car still chasing him..." He indicates that one of the police officers in the car had a hand gun which he pointed at him because he had a barrel in his hand to throw at them.

[21] He states further that when he heard the shots, he saw fire coming from the gun that the officer had in his hand and the officer was firing at the claimant's car, which was close to the radio car. He states further that the claimant's car crashed and at that time a second police car was coming up the road, and the claimant's car was "caught in the middle of the two radio cars". He adds that he and other people ran towards the claimant and the police officers came out of their vehicles and went over to him and people "swarmed" the police officers preventing them from getting to him and the claimant told him not to let the police take him to the hospital. He also states that at the time of the incident the only persons who were firing shots were the police.

[22] When cross examined, he insisted that the claimant was caught in the middle of the two police cars, as one was blocking him and he swerved to the left and crashed in the shop and that no gunmen were in the area and no one was firing at the police.

Defendants' Case

[23] Five of the defendants gave evidence and twenty two photographs were tendered and admitted in evidence as Exhibits 8a – p and 9a – f.

[24] Deputy Superintendent Paul Gammon, (Gammon) the 1st defendant, gave evidence that he was not armed that day and that he spoke to the claimant in the vicinity of Burger King. He states that he chased the claimant's car into Park Lane, back onto Red Hills Road and back onto Park lane at which time he saw a male passenger alight from the rear of the car. He states further that on the third occasion when the car turned on Park Lane, he heard explosions like gunshots, people started throwing missiles in the path of the vehicle he was driving, the 2nd defendant, (Henry) returned gunfire and he saw another service vehicle coming in the opposite direction, the claimant's car crashed into a food stall and he came to a stop "in the rear of the white Toyota corolla motor car".

[25] He adds that he heard a "barrage of shots", came out of his vehicle and "took cover" and observed that some of the shots were being fired from an unfinished building to his right and that a "clear complexion man with bushy hair had a short black gun...pointed in my direction". He states that he heard several more explosions and the man ran to the back of the roof and disappeared and the shooting subsided shortly after. He also states that they tried to assist the driver of the Toyota corolla but he was taken from them by "an angry mob"

[26] In cross examination, he maintained that he spoke to the claimant at Half Way Tree in the vicinity of Burger King and he sped away and that Henry was with him as the observer. He said the claimant's car "slowed down somewhat" on the second time it came around the circle and a passenger in the rear alighted from the left rear door, and that on the third occasion people on the sidewalk started to throw stones in the path of his vehicle, "rubbish pans and all of that...". He added that some of the items thrown hit

the wind screen, roof and trunk of the vehicle and at this stage the claimant's car was two car lengths ahead.

[27] He stated that he heard a gunshot and heard "one or two shots" from Henry, but did not see Henry return the fire and also stated that he stopped almost immediately behind the claimant, "touching the back of his car" and the radio car stopped "almost in front, to the side of him" on the opposite side of the road. He indicated that they did not pass the claimant's car and "gunshots started to fire" and he got out of his car and went around the left side to the rear of the car to take cover and that Henry was "right beside" him. When asked where the other officers were, he indicated that he was unable to say and he also said he could not say exactly where the gunshots were coming from or how many he heard. He also stated that he could not see the clothing of the "fair skinned, bushy haired, rasta" who he said pointed a gun in "our" direction.

[28] When asked what he meant by "our" direction, his response was, "Henry and I and other police... all of us in the same location". He indicated that when the shooting stopped he and Henry "walked down to where Nugent is" and that Nugent said he could not move. He said he did not attempt to help the claimant but "Sgt Robinson and his team did". He explained that the four officers came up to the claimant and tried to assist him and the people "came and physically took him up and bring another car and placed him in the car". He admitted that a lot of people came over and talked to the claimant, denied that a lady was on top of him and insisted that he saw a man on a roof. He indicated that he did not attempt to go after the man as he was not armed. When asked if he saw any officer make attempt to do so, he indicated that he was unable to say.

[29] Sergeant Henry's evidence in chief is contained in his witness statement filed on December 15, 2014. He states that he was in the vehicle with Gammon, armed with service pistol and twenty six rounds of 9mm cartridges and that when the claimant sped off, Gammon activated sirens and made a call to Control, while giving chase.

[30] He states that on the second occasion the claimant drove into Park Lane, he saw a man alight from the claimant's vehicle and run into a yard and that the chase continued and on the third occasion he saw a man in a blue, sleeveless T shirt, four car

lengths away, point a black gun in their direction and he “took cover in the car while still seeing the man”, and returned fire in his direction and that they were still pursuing the Toyota corolla when it was intercepted by the marked police car and it crashed. He further indicates that he got out of the vehicle, took cover beside it, saw man in red, short sleeved T shirt with number 6 on it, dark colour pants, head wrapped, approximately a chain away, pointing a black hand gun in the direction of Robinson and the other policemen, he heard explosions and returned three shots in the direction of the man who pushed open a zinc gate and ran inside a yard. He add that “instantly” large group of citizens gathered hurling stones etc at him, his colleagues and the police cars and that this lasted for a short while. He states that when the shooting subsided they tried to assist the driver of the corolla but “he was taken from us”. He also states that both service vehicles were damaged.

[31] When cross examined, Henry stated that on the third occasion when the vehicle “circled”, he saw a man on his left, next to a zinc fence on the sidewalk, dressed in blue T shirt and black pants, pointing a black hand gun in his direction and Nugent’s car was “about a car’s length”. He said the man fired first, roughly two to three shots in the direction of his car and neither the car nor occupants got hit. He said he had 28 bullets and that he pushed his gun through the window and fired on the man who escaped through the zinc fence. He stated that the vehicle did not drive past the zinc fence and just about when the man ran, the claimant’s vehicle was intercepted and he saw it crash into a stall.

[32] He stated that the man with the shirt with number 6 on it, fired shots and he “didn’t move towards him, but other officers pursued him”. When asked which officers, he said, “three other officers except for Mr Gammon... Robinson, Richardson and one other officer, can’t recall” He also said he saw Robinson “strategically placed self and making observation.”

[33] Henry admitted to going up to the claimant’s car and trying to assist him when he was lying on the ground. He indicated that people were making a lot of noise and was hindering them and shouting “police brutality” and that the people were physically blocking them. He agreed that he heard people say Nugent got shot and should be

taken to the hospital and stated that they were all there “for a minute or two” before he was taken away.

[34] Sgt. Robinson recounts that he heard gunshots “as he turned into Park Lane”, and he saw the car with the police vehicle behind, in chase, heard more explosions, swerved to avoid a head on collision with the Toyota and it crashed in a stall and came to a stop behind his radio car, “about 15 feet”. He states that the other radio car ran into back of the Toyota and immediately residents began throwing missiles. He also states that a clear complexioned man with unkempt hair, who was “atop” an unfinished building, pointed a short black gun in his direction, he heard explosions and became frightened so he threw himself to the ground and returned fire.

[35] He states further that he heard two more explosions and saw two men, one in a red T shirt with number 6 on it, pointing a gun in his direction and he fired one shot at him and both men ran into a yard with a zinc gate. He adds that he heard several more explosions coming from different directions and “angry residents dispersed into nearby premises”, the shooting stopped and he heard the car driver saying he was shot. He indicates that he “radioed” for assistance and “attempted to assist this young man.....into my radio car” but angry residents took him and placed him in a green car which took him to hospital and he followed at some distance behind.

[36] He also indicates that the windshield of the service vehicle he was driving was damaged and that there was gunshot to right rear door and jamb, the top was dented and the right front fender was also damaged.

[37] He admitted in cross examination that he turned left onto Park Lane and saw the Toyota corolla and the marked police vehicle coming head on, he swerved left, passed the Toyota by “1½ to 2 car lengths” and the Toyota crashed to the left and the police vehicle stopped at the back of the corolla and people were everywhere and they threw debris and were hurling insults at the police. He added that they immediately alighted their vehicle. He said he could not recall what Gammon and Henry did at the time but that he saw Nugent “trying to come out of vehicle” and he said “me get shot, me get shot”.

[38] When asked if he saw Gammon and Henry go over to the claimant, he said “I don’t recall who first went over to assist him but upon trying to assist him police were prevented by angry citizens”. He admitted that he went over to the claimant who was saying they were going to kill him and that the people were shouting “police brutality” and they managed to put him in a green motor car and it was at that time he radioed for assistance.

[39] He also stated that when he alighted from his car he saw a man on an unfinished building about 20 – 30 feet away fire in their direction and he threw himself on the ground and returned fire in the man’s direction and the man disappeared into the building and he then noticed two men, one in a red shirt with the number six on it, “about 30 – 40 or a little more” feet away when “they” fired. He said he could not recall if people were close to those men, but people were scattered and people were where he was. When pressed, he said one of the men had a hand gun and the other was standing beside him and it was the one in the red shirt who fired two or three shots, but he heard other gunshots coming from other directions.

[40] When further cross examined, he indicated that he first heard gunshots just before entering the lane, but had not seen the police car chasing Nugent’s car. When asked if there were many persons on the road he said “no”. He admitted that he could see Henry and Gammon quite clearly but said he could not recall seeing Henry close to Nugent, and he was unable to say if an officer searched Nugent. He admitted that a crowd had converged but could not recall if he saw a lady on top of Nugent.

[41] Cons Davidson’s evidence is that he heard gunshots on approaching Park Lane and that he saw a white car approaching with a police vehicle closely behind. He indicates that he heard several explosions and the vehicle he was in swerved left, and the Toyota “speed pass with police in pursuit”. He adds that the toyota crashed, the police unit stopped behind it, and he came out of his vehicle and took cover where Robinson was. He states also that angry residents converged hurling missiles at the police and vehicle and that he saw “a light complexion, bushy haired man on top of roof of building in front of me point gun at my colleagues”. He states that he heard explosions and that he pointed his M16 and fired two shots and that the weapon

malfunctioned. He adds that his colleagues were also firing and he pulled his browning pistol and fired two shots and the man “alighted from building and escaped”. He states further that he heard more gunshots and it stopped after a while and the residents also stopped throwing missiles and he heard “groaning sounds coming from the Toyota... a man crawled out ...said get he was shot”. His evidence further is that along with his colleagues he tried to place the claimant in the service vehicle in which they were travelling but the claimant was taken away and placed in a green motor car. He indicates that Robinson drove them to UHWI and he then realized that Green was injured and bleeding.

[42] In cross examination, Davidson said the circumstances did not facilitate making any attempt to go after the man who he said was firing from the roof because whilst the man “jumped” from the roof, he could still hear gunshots. He indicated that when the gun fire had ceased, women and children started to hurl “bottles, stones, whatever they could find”. He indicated that the officers did not go over to the claimant as the citizens would not allow it. He denied seeing his colleagues get close to the claimant, denied seeing anyone search him, but indicated that he saw women and children around him. He however admitted to getting as close as about 20 feet to the claimant.

[43] He indicated that at the scene he did not look at the car he was in nor at the other service car, but that he looked at the car he travelled in when he was on the hospital compound. When it was suggested to him that the windshield of the vehicle he was in was not broken, he indicated that on the day it had a broken windshield, he saw a dent on the roof and gunshot on the right door jamb. He denied that any of the officers fired into the claimant’s car.

[44] Cons Green’s evidence is that he saw a white Toyota corolla motor car travelling at a fast speed and a marked police vehicle travelling behind it with sirens on. He states further that the car “entered” Park Lane followed by the police car and the vehicles drove in and out of Park Lane about 2 times. He adds that on the third time when vehicles entered Park Lane, he heard about 3 explosions and noticed that neither vehicle had exited. He states further that they travelled towards Park Lane and were “surprised by the speeding car with the police vehicle still behind it”. He indicates that

the police vehicle swung left and the Toyota corolla motor car crashed into a nearby stall and all three vehicles came to a stop.

[45] He states further that thereafter he heard “a hail of gunshots” and saw angry residents throwing missiles at them and after securing himself, he noticed a clear complexioned man had a gun in his hand and he was firing from an unfinished building. He indicates that he returned the fire in the man’s direction and he turned and disappeared and that after the shooting subsided and the throwing of missiles stopped, he realized he was bruised and bleeding and he heard the driver of the Toyota corolla motor car “shouting out” that he got shot. He also states that efforts were made by his colleagues to have him transported to hospital but angry residents pulled him away.

[46] When cross examined, he stated that people came into the picture “in more abundance after the shooting had stopped.” He admitted to firing “about two” shots, stated that he did not go over to the claimant’s car and neither did he see the claimant exit the car, or on the ground and he did not see other officers around the claimant, but indicated that people were “around the claimant”. When it was suggested to him that he or one of his colleagues fired shots into the claimant’s car, he denied it.

[47] Counsel for the claimant submitted that Section 33 of the Constabulary Force Act provides that in order for a claim in tort to succeed against a member of the Jamaica Constabulary Force, it must be proved that such a tort was committed either with malice or without reasonable or probable cause.

[48] With regards to the issue of self defence, she pointed out that self defence can only properly exist and be established in circumstances where there exists on the relevant defendant’s part an honest belief that he needed to take action to defend himself, but also that the extent of the action of defending having was reasonable as distinct from excessive. She cited the case of **Beckford v. R [1988] Ac 130** in support of this submission.

[49] Counsel indicated that a police officer has no legal duty to retreat “in the execution of his statutory duty to arrest persons who were prima facis committing in his view the offence of being armed with an offensive weapon”. She submitted that the

case of **Robley v.. Placide (1966) 11 WIR 58**, authority for the stated principle, can be distinguished from the case at bar as the claimant was not armed and did not pose any threats to any person at the time the defendants fired at him.

[50] Counsel for the defendants pointed out that the claimant speaks of hearing gunshots when he went into Park Lane and alleges that he saw a hand holding a gun pointing from the passenger side of the police car window, but that in cross-examination, while insisting that he heard gunshots coming from the police, he admitted he could not see behind him.

[51] She noted that no mention is made of his being shot until after he exited his car and made much of the fact that the claimant indicated that his reason for going into Park Lane was that it was to be prevented from being beaten up by the police as there would be a lot of eyes. She pointed out that the evidence of Audley Strachan is that he knows of gangs in the communities of Park Lane and 100 Lane, of “flare ups” between the two communities. She also noted that in his evidence he speaks of attack on police officers by residents in the Park Lane community who hurled missiles at the police, a version consistent with that of the police defendants.

[52] Counsel reviewed the evidence of the police witnesses noting that five of them said they returned fire after seeing a man on top of an unfinished building and a man with a number six on his shirt point guns in their direction and hearing explosions. She noted that they stated that they were “fearful; frightened; terrified; became fearful for the lives of colleagues...”

[53] Counsel indicated that although the court did not have the benefit of any ballistics expert opinion, if the court accepted that the three holes to the right hand side of the claimant’s car are bullet holes, then it was one of the bullets to the rear passenger door which entered his body. Counsel therefore suggested that had one or any of the 3rd, 4th, 5th, or 6th, defendants fired into the Toyota Corolla driven by the claimant, the entry wound would have been higher up on his body and would have been done from “anteriorly, as opposed to posteriorly” as noted in the medical reports in evidence.

[54] Counsel then examined the law applicable to assault and battery, and concluded that for the claimant to succeed, the court would have to accept that the police were the only ones firing guns. She also expressed the view that based on the evidence, especially of what appears to be gunshot or bullet holes in the claimant's car and where they are located, it "seems to lead to a very strong inference that the shots hitting the claimant's car was (sic) fired by persons firing at the police. They fired in the direction of the claimant."

[55] Counsel submitted that shots fired by Henry, before the other four defendants came on the scene, were fired "in response to being fired upon" and noted that bullet holes are on the right, and there does not appear to be any to the back windscreen of the claimant's car. She suggested that "this is how Henry, the 2nd defendant would have had to fire based on his position for any such bullet to have entered the claimant where the medical reports say it did"

[56] Counsel further submitted that the police defendants acted in a justifiable manner in the circumstances which faced them and none of them acted with any malice. She also submitted that it is more likely that it is one of the bullets fired by men firing at the police which entered the claimant as he was shot from behind, "at an angle and distance that allowed him to survive"

[57] In view of the evidence adduced in this case, the issues to be resolved are

- (i) whether the claimant was shot by the police, and if so, whether the claimant has proven that they were acting maliciously or without reasonable or probable cause; and
- (ii) if the claimant was shot by the police, whether the evidence shows that the police were acting in self defence or in defence of others

In coming to a determination the credibility of the witnesses is crucial. If the claimant's account is found to be more credible, it falls to be determined whether there is sufficient evidence to substantiate his claim for damages under the different heads claimed.

Law and Analysis

[58] Section 33 of the Constabulary Force Act, requires that in order for a claim in tort against a member of the constabulary force to succeed, it must be proven by the claimant that such tort was committed either with malice, or without reasonable or probable cause.

[59] As a matter of law, self defence can only be established in circumstances where there exists on the part of the defendant, an honest belief that he needed to take action in order to defend himself, and that the extent of the action taken was reasonable.

[60] The claimant has a duty to prove on a balance of probabilities that his injuries and losses were caused by the wrong acts of the defendants or one of the defendants, acting as servants or agents of the Crown.

[61] No forensic evidence was placed before the court for a determination to be made as to whether the bullet which injured the claimant came from the firearm of one of the police officers or from another source. The defendants deny that they assaulted and or battered the claimant but they admit that they fired shots in self defence and in defence of their colleagues.

[62] The claimant and the witness called on his behalf agree that the police were the only persons who were firing guns and they saw no one else with any guns. They also agree that the police fired guns at the claimant's car.

[63] The sequence of events as I understand the evidence, and as I find as a fact, is that the claimant was being chased by the police and when they entered Park Lane, Henry fired two or more shots at the claimant's car which were heard by Robinson and his team leading them to enter Park Lane. I find also that people were hurling missiles at the police and in the path of the vehicle driven by Gammon and that Henry fired a number of shots subsequently, and that the service vehicle driven by Robinson, on entering Park Lane came face to face with the claimant's car, both cars swerved to avoid a head on collision and the officers in that vehicle fired their weapons at the claimant's car which crashed, and even after it crashed, the police continued to shoot,

and a crowd gathered hurling stones and other missiles at the police and shouting police brutality.

[64] I find that there was no passenger in the claimant's car and that the evidence that "the car slowed somewhat" elicited in cross examination as to how he exited from the rear door of the car which was said to be speeding and driving recklessly, is a fabrication.

[65] It is my view that the introduction in the scenario of the alleged passenger who is said to have alighted from the vehicle which was being chased, the man with the number 6 on his shirt and the man on roof of unfinished building, were concoctions designed to explain the discharge of firearms in the course of pursuing the claimant and at the point when he was intercepted and his vehicle crashed.

[66] I find that the claimant was in fear and was trying to escape the police who were chasing him and that he panicked and drove at a fast speed. I believe it was reasonable for him to assume that they were trying to harm him as I find that shots were fired at his vehicle by Henry and I find that to be a reasonable explanation for him to speed up.

[67] Having seen and heard the claimant and assessed his demeanour, I find him to be a witness of truth. He was calm throughout, gave his evidence in a simple and forth right manner and he stood up very well in cross examination.

[68] Although I found minor discrepancies between the evidence of the claimant and his witness, Audley Strachan, I do not regard them as fundamental so as to be fatal to his case. For example, Strachan said he did not see the police kick the claimant although he went up to where the car stopped.

[69] On the other hand, the defendants were not forthright and there were numerous inconsistencies in their evidence which lead me to find their evidence to be untruthful and fabricated. This is particularly with regard to the alleged passenger in the claimant's vehicle, man in blue T shirt said to be seen by Henry, the man firing from roof of unfinished house and man with number six 6 on shirt, standing beside another man. I note also that the police witnesses were not agreed as to how this "clear complexioned

man” exited the building he was said to be on. Additionally, in relation to the man who Henry claimed “was pursued”, none of the officers who were alleged to have pursued this man gave any such evidence.

[70] I reject the evidence of the defendants that there were men firing at them and that they were prevented from getting near to the claimant because of the angry crowd that had gathered and note the inconsistencies in their evidence in this regard. I find on the evidence that all the police officers got close to the claimant and I find on a balance of probabilities that he was in fact kicked by Henry. This, I find, is a case of cruel treatment meted out to the claimant even after he had sustained a gunshot wound.

[71] It is the defendants who have raised the defence of self defence, as well as acting in defence of their colleagues. They therefore have the evidentiary burden to provide sufficient evidence to the court in order to enable such defence to be considered.

[72] This court, does not accept the evidence that they ever perceived any threat to their lives or safety, or to the life or safety of any of their colleagues. Neither does this court accept the evidence that after the claimant’s car crashed persons were shooting at the police and they fired back. This court finds that the defence of self defence or defence of others has been entirely disproven and that the claimant was a victim of the tort of assault and battery, committed without reasonable or probable cause.

[73] I accept that in the exercise of their duties, police officers may use such force as is reasonable. In my view it was not reasonable for the police to open fire on the claimant who was trying to escape from them and was not armed. In light of the claimant speeding in and around Park Lane to evade the police officers, I believe they would have had reasonable cause to attempt to stop his vehicle. They do not however contend that they fired shots at the vehicle in trying to stop it or that they were even shooting at its tyres, or at all. They assert that they fired shots in self defence at men who fired at them and I find it strange that despite these allegations none of these police officers were injured.

[74] An examination of the photographs tendered in evidence reveal that three holes which appear to be bullet holes are to the right hand side of the claimant's vehicle. Although the court had no assistance by way of expert ballistic evidence, I find on a balance of probabilities that the holes are in fact bullet holes and that it is one of those bullets which entered the body of the claimant.

[75] This court finds that the claimant has proven on a balance of probabilities that the sequence of events as outlined by him and the injury he sustained was a direct consequence of the acts of the defendants, done without reasonable or probable cause and that the police were the only persons firing on that occasion. It is my view that the evidence that the claimant was fired upon without reasonable cause is consistent with the fact that he was not armed

[76] The behaviour of the police I find, was completely unjustified and they were not entitled to place the claimant at risk of personal injury by shooting at him in the absence of any threat to themselves. I find that there was no such threat as they would have the court believe as there was no passenger in the claimant's vehicle and neither was there any gunmen shooting from any roof or otherwise and that these allegations are fabrications after the incident.

[77] The fact of injury by gunshot, I note, is accepted by the defendants although the cause is not accepted and it was contended that the medical evidence did not corroborate the evidence of the claimant that he was kicked and that, in effect, this reflected an exaggeration by the claimant which should guide the court on how to treat with his evidence, generally.

[78] I find that the events which took place on that day were sufficiently traumatic and directly impacted the claimant and do not therefore consider his recounting, including the fact of being kicked by Henry, as an exaggeration. I accept his testimony and I am prepared to accept that the medical reports are incomplete or otherwise understated, prominence being given to the more serious injury sustained by the claimant, that being the gunshot wound leading to paralysis.

[79] Having regard to the totality of the evidence, the court finds, on a balance of probabilities, that the claimant's case is far more credible than that of the defendants and that he was assaulted and that a battery was inflicted upon him by the police in the manner as he has testified. I find that one of the bullets fired by the police, in the direction of the claimant's motor car, entered the vehicle and entered his body at the 11th intercostals space on the right, 5 cm from the midline, posteriorly, as stated in the medical reports. There shall therefore be judgment for the claimant.

[80] I will now determine the appropriate award of damages to which the claimant is entitled.

General damages

Pain and suffering and loss of amenities

[81] The injury sustained by the claimant is serious and has a long term physical impact. He is now wheelchair bound, impotent, suffers from constipation and has to insert a catheter in his penis when he wants to urinate. He is no longer able to play football and cricket or go to parties, dances or stage shows as he said he did before the incident and is unable to assist with his children as he did before.

[82] Under this head of damages, both Counsel submitted that in arriving at an award the following cases may be of assistance:

1. **Lloyd Clarke v Cpl Quest, Cons Barrett, Dist Cons. Bernard and the Attorney General**, 2007HCV 01550, unreported, delivered December 12, 2008. In that case the claimant suffered a gunshot wound which caused complete paraplegia below T10 – 11 urethral level; his disability was assessed at 65% of the whole person and he was awarded \$26,000,000.00 (CPI 136.5) When updated using the current CPI (234.2) it amounts to \$44,609,523.81
2. **Viola Barrett v Stewart & The Attorney General**, 2004HCV1997, unreported, delivered May 2005 where a 65 year old farmer suffered spinal injury resulting in paralysis in both lower limbs when injured by bullet from firearm. She was

assessed as 99% disabled and was awarded \$14,600,000.00? (CPI 88.74) which updates to \$38,531,890.91.

3. **Anthony Wright v Lucient Brown**, Khan, Vol.5, pg. 201. He suffered gunshot wound to right upper arm and right side of chest; bullet lodged in and damaged spinal cord; paraplegic from waist down. He would be confined to a wheelchair without the use of his lower limbs, had no fecal or urinary control and was impotent sexually. His PPD was assessed at 70% and on March 3, 2000, he was awarded \$8,000,000.00 (CPI 53.30) which revalues at \$35,151,969.98 (CPI 234.2)

[83] Counsel for the claimant noted that the differences in relation to the cases are that in the case of the claimant in the case at bar, he was living an independent mature adult life with his partner and since the incident he has no partner and has to live with his mother on whom he is totally dependent. She also indicated that in the case at bar, “an aggravated assault was committed on him as he was kicked in the head by one of the defendants as he lay unarmed and injured on the ground”.

[84] Counsel for the defendant submitted that the three cases bear some similarity to the case at bar, pointing out that the cases of Wright and Clarke bear greater similarity and suggested that should any sum be awarded to the claimant for general damages, a reasonable amount appears to be in the range of \$34m to \$44m.

[85] I have had regard to the injuries suffered by the claimant and find that they approximate most closely to those of the claimant in the case of Clarke although the assessment of disability of Clarke is higher. The court considers that an appropriate award under the head of general damages is \$40,000,000.00. This has been arrived at based on a consideration of the medical evidence contained in the reports and a consideration of the authorities referred to by both Counsel. I have also taken into consideration the fact that the claimant has been assessed as having 59%PPD.

Aggravated damages

[86] Counsel for the claimant submitted that an award for aggravated damages should be made for the added “insult, humiliation and suffering” the claimant suffered when he was kicked by one of the defendants while he was lying injured on the ground. She also submitted that the conduct of the defendants was “arbitrarily, (sic) oppressive and unconstitutional when they shot at the claimant when he was unarmed and that such conduct warrants an award of exemplary damages.

[87] She referred to the case of **Everton Foster v The Attorney General and Anthony Malcolm** CL 1997/F 135, unreported, heard on July 18, 2003 where the court awarded \$50,000.00 for aggravated damages where the court said “ the manner in which the police officer dragged, draped and taunted the plaintiff warrants an award of aggravated damages”

[88] Counsel for the defendants noted that aggravated damages are imposed on a Defendant whose conduct increased the injury to the Claimant, causing distress, embarrassment and or humiliation and damage to reputation. She also noted that the claimant “singles out the second defendant as the one who behaved outrageously, caused injury to his feeling and dignity”. She submitted that the claimant “has brazenly told a glaring lie”, noting that his witness, Audley Strachan, did not corroborate his allegations that he was kicked several times in his face by Cons Henry. She indicated that it was curious that there was no medical evidence corroborating his allegations in this regard

[89] I accept that aggravated damages are awarded where the defendants conduct is sufficiently outrageous to merit condemnation and punishment. I am guided by the Court of Appeal case of **The Attorney General & Burton v Anderson**, SCCA 76 of 2004, delivered March 17, 2006 where Justice McCalla, JA (as she then was) cited **Thompson v Commissioner of Police of the Metropolis** [1998] QB 498, in which Lord Wolf, at page 516 said:

“such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award”

[90] I find that the factual basis of the award for aggravated damages has been made out as the conduct of the police, Henry, in particular, is an aggravating feature, it being a case of cruel treatment meted out to the claimant even after he was shot and injured. This requires the court to make an award above the amount required to compensate him for the treatment meted out to him. I believe the affront to his dignity by being kicked while lying helpless should be compensated by a further sum of \$100,000.00.

Exemplary damages

[91] Counsel for the claimant submitted that the conduct of the defendants as agents of the state when they shot the claimant who was unarmed and kicked him when he was injured and lying on the ground, warrants an award of exemplary damages. In this regard she also referred to the case of Everton Foster, *supra*, where the court awarded \$90,000.00 to the claimant for exemplary damages.

[92] Counsel for the defendants submitted that when a claim is made under this head “the evidence will have to be tested against the guiding principles of the seminal case of **Rookes v Barnard [1964] AC 1129** which distils the basis on which this type of compensation is awarded”.

[93] She further submitted that none of the Crown’s servants acted in any oppressive, arbitrary or unconstitutional manner, they were not shooting at the claimant, none of them kicked him and there is no evidence, medical or otherwise put before the court in this regard. She therefore concluded that the claimant’s case “has not been made out in any respect for which he alleges”.

[94] I agree that the conduct of the defendant must merit punishment in order for an award of exemplary damages to be made. In view of my findings that the claimant was kicked by the 2nd defendant after he was shot and injured and that the police continued shooting after the Claimant’s car had crashed, follows that this Claimant has raised

sufficient matters indicative of conduct which is oppressive, arbitrary or unconstitutional to move this court to exercise its discretion to award exemplary damages.

[95] In determining the award to be made, I find guidance in the decision in **Takitota v AG of the Bahamas**, Privy Council Appeal No. 71 of 2007, delivered March 18 2009 where it was stated that:

*“The award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1129 at 1223, ...to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1081,... emphasised the need for moderation in assessing exemplary damages. That principle has been followed in *The Bahamas* (see *Tynes v Barr* (1994) 45 WIR at 26), but in *Merson v Cartwright and the Attorney General* [2005] UKPC 38, ... the Privy Council upheld an award of \$100,000 exemplary damages, which they regarded as high but within the permissible bracket.”*

[96] I believe an award under this head is justified to mark the court’s disapproval of the outrageous conduct of the defendants, who I find discharged their firearms indiscriminately and shot at the claimant who was unarmed and trying to escape from them. I am of the view that an award of \$100,000.00 is appropriate.

Loss of Future Earnings

[97] In relation to the claim for loss of future earnings, the claimant gave evidence that he earned \$4,000.00 per week, gross, and that he is now unable to work as a taxi driver. He admitted that he was operating a ‘robot taxi’ and gave evidence that he was an apprentice auto a/c technician.

[98] Counsel for the claimant submitted that the claimant would be entitled to the sum of \$18,780,000.00 being \$4,000.00 per day for six days per week for a period of fifteen years.

[99] The authorities indicate that under this head of damages, the basis is the amount the claimant would have earned in the future and has been prevented from so earning because of the injury.

[100] In **Mayne and McGregor on Damages**, 12th Ed., at page 167, the learned authors state as follows:

“...the amount is calculated by taking the figure of the claimant’s annual earnings at the time of the injury, less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last, which, if the injury is for the claimant’s life, will require a calculation of the period of his expectation of working life. The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given...and second that contingencies might have arisen to cut off the earnings before the period of disability would otherwise come to its end...”

[101] Guided by the abovementioned principles, I find that there is no evidential basis for an award for loss of future income in this case as he has not provided sufficient evidence on which the court can make a determination on how much, if anything, he would be entitled.

Special Damages

[102] For special damages, the claimant has pleaded the following:

\$55,200.00 as transportation costs, a total of \$86,780.00 for medical treatment and reports, \$44,767.95 “and continuing” for the cost of medication, \$4,000.00 per day for six days per week from August 18, 2005 to January 22, 2015 “and continuing”, for loss of earnings, \$25,912.00 for the cost of a wheelchair and \$6,300.00 for the loss of shirt, trousers and shoes.

[103] Counsel for the defendant submitted that in relation to travelling, medical bills and medication, only to the extent that such sums have been strictly proven should they be compensated.

[104] I note that in the particulars of claim, the claimant has added “and continuing” in respect of claims for cost of medication, cost of household help, cost of treatment, cost of transportation and for loss of earnings.

[105] In **Thomas v Arscott & Anor** (1986) 23 JLR 144 where the Court of Appeal reduced the damages awarded from the amount proven to the amount pleaded, **Rowe P at page 151 I – 152A** said::

“In my opinion special damages must both be pleaded and proved. The addition of the term ‘and continuing’ in a claim for loss of earnings etc is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum”

[106] There has been no further amendment to the particulars of claim and no application has been made for the pleadings to be amended, so in applying the above principle, the sum allowed for medication and medical treatment is \$131,547.95, as pleaded.

[107] In relation to the claim for transportation expenses, I accept that the claimant having sustained serious injuries required treatment which necessitated his travelling to the hospital and to doctors on several occasions. He has provided receipts to substantiate his claim in this regard. I will make an award of \$ 55,400.00, as pleaded, as I find in view of the circumstances that the sum pleaded is reasonable. He has not provided any evidence in relation loss of shirt, trousers or shoes and as such no award will be made in respect of that claim.

Loss of Income

[108] Counsel for the claimant submitted that at the time of the incident the claimant was 23 years old and that although he is not able to provide documentary proof of his loss of earnings, the court may take account of the fact that by virtue of his trade it is

difficult to obtain and present exact figures for loss of earning and that in these instances the court should use its own experience and best judgment of conditions in Jamaica to come to a decision “as to what is proved”. She cited the case of **Walters v Mitchell (1992) 29 JLR 173** in support of this submission.

[109] Counsel for the defendants submitted that “outside of the absence of strict proof by Mr Nugent in this regard, he ought not to profit from his illegal activity”.

[110] The evidence in relation to the alleged loss of earnings is unsatisfactory. His evidence was that he operated a “robot taxi” and earned approximately \$4,000.00 per day at the time of the incident. There is no evidence to support this claim. I will therefore make no award under this head.

Cost of Household Help

[111] The claimant has claimed the sum of \$12,000.00 per week for the period September 3, 2005 to January 22, 2015, “and continuing”. Referring to the case of **Hunt v Severs (1994) 2 WLR 602**, Counsel submitted that with regard to the claim for household help/nursing assistance, although no documentary proof has been submitted, the court should take into account the nature of the injuries “and draw therefrom as a fact that assistance is needed”. She indicated that the daily cost of care is not excessive.

[112] Counsel for the defendants submitted that no proof has been put before the court for consideration and even if the court considers the evidence of the claimant’s mother, in respect of any assistance rendered to him, such assistance “seems to have been ad hoc and out of generosity of neighbours, but no paid service”

[113] I find that it was necessary for him to get assistance based on his injury and level of disability and that he would have required assistance at least from the day he was discharged from the hospital. Although no documentary evidence was provided to substantiate this claim, I find that to insist on a strict adherence of proof in this case would result in injustice. His evidence in relation to this claim, which I accept as true, is that his mother now has the responsibility of looking after him and that she has lost

income because she has had to take care of him on a full time basis. Her evidence is also to this effect.

[114] Taking into consideration that the minimum wage as at September 2005 was \$2,400.00 weekly, I find that the sum being claimed is excessive. As there was no amendment to the particulars of claim, the court has to do its best in the circumstances in arriving at an appropriate award. I find that the sum of \$2,400.00 per week is a reasonable sum. I will therefore make an award at that rate for the period September 3, 2005, the date he was discharged from the hospital, to the date of judgment.

[115] In light of all the foregoing, damages are assessed and awarded as follows: Special damages in the sum of \$186,947.95 with interest at the rate of 6% per annum from August 17, 2005 to June 21, 2006 and at the rate of 3% per annum from June 22, 2006 to November 4, 2016.

Household help at minimum wage of \$2,400.00 per week from September 3, 2005 to the date of judgment ie \$1,392,800.00 (no interest)

General damages for pain and suffering and loss of amenities awarded in the sum of \$40,000,000.00 with interest thereon at the rate of 3% from (the date of service of the claim form to) November 4, 2016.

Exemplary damages awarded in the sum of \$100,000.00

Aggravated damages awarded in the sum of \$100,000.00

Costs to the claimant to be taxed, if not agreed.