



[2021] JMSC Civ. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV07909

BETWEEN	MARJORIE VERNON	CLAIMANT
AND	DEPUTY SUPERINTENDENT OF POLICE DENVA BAKER	1st DEFENDANT
AND	LIEUTENANT MAXWELL GORDON	2nd DEFENDANT
AND	CONSTABLE MARLON GRANT	3rd DEFENDANT
AND	PRIVATE CARNEIL HYLTON	4th DEFENDANT
AND	LANCE CORPORAL ALVIN PRYCE	5th DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	6th DEFENDANT

IN OPEN COURT

Oraine Nelson instructed by A McBean & Company, for the Claimant.

Faith Hall and Robert Clarke instructed by Director of State Proceedings, for the Defendants.

Heard: November 11, 12, 13, 2020 and February 19, 2021

**TRESPASS TO THE PERSON - NEGLIGENCE – ASSAULT – ALLEGED SHOOTING BY THE POLICE AND
SOLIDER- INNOCENT BYSTANDER- SELF DEFENCE – BURDEN OF PROOF AS REGARDS SELF
DEFENCE**

BROWN, Y., J.

Background

- [1] Sometime between 5:30 and 5:50 on the morning of January 20, 2006, bullets pierced a window of Marjorie Vernon's house and injured both her thighs, rendering her another victim of gun battle between the security forces and gunmen. The scene of this unfortunate incident was 1 Goodwin Park Road, Central Kingston where a joint police/military operation - which included thirty-two police officers and twenty-three soldiers- had gone in search of illegal guns as well as two wanted men known to them as Marcus Davis and "Killer". Both men were said to have been residents at that premises. Upon their arrival at the property - a big yard with several houses – the team of security officers alleged that they were fired upon by the gunman Davis whereupon a shootout ensued. It was then that Ms. Vernon, who lived in the second house at said address, was shot in both thighs in her living room. Thereafter, on December 16, 2011, she instituted a claim to recover damages for assault and negligence against five members of that joint police/military team and the Attorney General who was joined as the 6th defendant by virtue of the Crown Proceedings Act. She asserted in her Amended Particulars of Claim that: "The police and soldiers began firing shots in the Claimant's yard during which they unlawfully, recklessly and negligently shot the Claimant in her right and left legs while purporting to act in the execution of their duties as servants of the Crown".
- [2] Whilst not disputing Miss Vernon's claim of having been shot and injured inside her house, it was advanced by the defendant security officers that they were assailed by a hail of gunfire from the weapon of wanted men upon entry of the subject premises. And so, in the quest to defend themselves and their team members and in fear for their lives, they discharged their firearms. They also contended that the Claimant was not in their range of vision when they had expended their firearms in the shootout and furthermore, there was no intention to harm her.

Case for the claimant

- [3] I do not propose to detail either the evidence in toto of the claimant or the defendants, but will instead, highlight the salient features of both sides. According to Miss Vernon (the Claimant), at about 5:30 in the morning of January 20, 2006, she went outside her house to make use of the bathroom facility when she saw police officers and soldiers all clad in their respective uniforms, enter the premises where she was the occupant of the second of 13 or 14 houses in that “big yard”. Colouring his instructions with expletives, Miss Vernon testified that one of the policemen told her to go back inside her house and she complied. She also said that they had told her that they were on a raid. Shortly after entering her living room, she said she heard “very loud explosions that sounded like gunshots to me and then I felt a very strong burning sensation in my left thigh”. She added that she heard another set of explosions and felt a second sensation to her right leg and she immediately fell to the floor.
- [4] Miss Vernon stated that her house, a wooden structure, was directly behind the large dwelling at the front of the property and there were five houses to the right of hers. She went on to say that when the explosions ceased, she opened her door, limped outside and upon stepping down from her verandah, she saw someone lying face down on the ground. She further alluded to that person as the “dead body lying down” at the front of her house.
- [5] Despite not being positioned at the time of the incident to say with certitude from whose weapon the bullets which injuries her thighs had come, Miss Vernon maintained that they were from the guns of the security forces because there was nobody besides security officers, armed with weapons, on the premises that morning.
- [6] She also testified that having observed that she was injured, members of the security forces transported her to the Kingston Public Hospital where she was treated and discharged the same day. The medical report for Miss Vernon- which

formed exhibit 1A- states the diagnosis as multiple gunshot wound to both thighs with soft tissue injury.

Case for Defendants

- [7] In advancing their case, the defendants relied on the evidence of Lieutenant Colonel Maxwell Gordon (the 2nd defendant), Sergeant Marlon Grant (3rd Defendant) and Lance Corporal Alvin Pryce (5th defendant). While each of these witnesses gave a different account as to where he had first encountered the gunman, Marcus Davis, on the marked premises, they all asserted that there were three houses in the yard- a large one to the front and two smaller ones behind it. They were also aligned in their testimonies that the said gunman was associated with the first dwelling and it was in fact the targeted house. All of these defendants contended that the said gunman had engaged the team in a shootout which resulted in his demise as the fatal bullets had struck him while he was in close proximity to the 2nd house. This 2nd house was identified as that of the Claimant's and that was accepted by all the witnesses.
- [8] Notwithstanding those concurrences on the part of the defendants, the variances in certain areas of their testimonies were palpable and thus whittled down the integrity of the case presented by them. I will now highlight the most obvious and material discrepancies in the evidence offered by the defendants. The first relates to the shots that floored the gun man. Lieutenant Colonel Gordon testified that having witnessed what resembled muzzle flashes around the assailant's thigh region simultaneously with explosions "as that of gunshots", he aimed and fired 12 rounds from his M16 carbine and the man fell to the ground. This version however, is not aligned with that of Sergeant Grant's whose evidence was that upon his entry on the premises with other members of the team, a man suddenly ran from a room on the said property, firing shots in his direction. He returned the fire from his M16 rifle and the man fell to the ground. Undoubtedly, it can be concluded that each of these witnesses was claiming responsibility for firing the bullets which brought the gunman to the ground, yet neither account made mention of shots being fired by

any other member of the team of security officers- other than himself- at the time when the gunman was shot down.

[9] Of significance too, is that the forensic evidence Exhibit 7A- (the forensic certificate) brings this aspect of the lieutenant colonel's testimony into question. This document pertains to the swabbing of the palms and back of the hands of both Lieutenant Colonel Maxwell Gordon and the 4th defendant Private Carneil Hylton who had put in no appearance at the trial. It discloses that an examination and analysis performed on the palms and back of the hands of the lieutenant colonel did not reveal the presence of gunshot residue. Notwithstanding that, Exhibit 6- the Ballistic Certificate- indicates that the M16 carbine bearing serial # L239748 which Lieutenant Colonel Gordon said he had fired, was in fact fired. No evidence was offered to explain the rare occurrence of the absence of gunshot residue on the hands of this officer who testified to having used his firearm on the morning of the incident. Therefore, when the disclosures of Exhibit7A and Exhibit 6 are juxtaposed, they provoke the thought that the firearm with which the Lieutenant Colonel said he was armed, was indeed fired, but not by him. Consequently, it hampers the acceptance of his evidence regarding his taking down of the wanted man Davis.

[10] Additionally, Lieutenant Colonel Gordon stated that when the man fell, he saw a 9mm pistol lying on the ground beside him. This evidence does not harmonize with that of Sergeant Grant's which was that after the man had fallen to the ground, he was searched and a 9mm Ruger pistol with one magazine and 9mm cartridges was taken from him.

[11] All the defendants spoke of the gunman Marcus Davis firing a barrage of bullets from the 9mm Ruger pistol with which he was armed, yet the ballistic evidence Exhibit 6, suggests that a bullet was fired from the said weapon which had 9 rounds capacity magazine. Moreover, the testimony of Lance Corporal Alvin Pryce that while chasing Davis, the latter had shot him in his left thigh and he (Pryce) had fallen to the ground, would further serve to contradict the evidence that a flurry of

gunshots was fired by the now deceased gunman. The logical conclusion would therefore be, that the bullet fired by the gunman Davis was the one that had struck the lance corporal.

- [12] An interesting observation of the defendants' case concerns the number of gunmen who had engaged the lawmen in battle. The penultimate sentence of the station diary – Exhibit 4- indicates: "It was further reported that at the time of the shooting Francis Williams o/c Killer known to the police and who was also on the same premises fired at the police, the fire was returned and he made good his escape, it is not known if he was hit." Despite that entry, there was not one scintilla of evidence from the defendants regarding this second man 'Killer'. None of them had made mention of him at all beyond stating in their evidence—in-chief that he was one of the two persons who the team had gone in search of at the 'target' premises. So, from the mouths of the defendants, it still remains unknown whether "Killer" had been present at the crime scene.

Findings of Facts

- [13] Cumulatively, the foregoing discrepancies coupled with the independent forensic and ballistic evidence, on a balance of probabilities, support a finding of fact that the bullets which wounded Marjorie Vernon's thighs were fired from the gun of one or more of the members of the joint police/military team. No dispute surrounds the Claimant's evidence that she was shot while inside her house, so I am bound to accept that too as a finding of fact. I must also take as a fact that Marcus Davis- the gunman - was shot down within the vicinity of the 2nd house which was the Claimant's, because that bit of evidence has not encountered a denial.

Issues for determination

- [14] Based on the aforestated, the issues that this Court must now resolve are:

Firstly, whether the joint police/ military team had assaulted Miss Vernon in the execution of their duties on the fateful day; and

Secondly,

- (a) whether the joint police/military officers had had a duty of care in respect of Marjorie Vernon during the execution of their duties at the 'target premises' on the day in question.
- (b) And if (a) is answered in the affirmative, whether they were in breach of that duty of care to this Claimant thereby causing her to sustain injuries.

Law and Analysis

Did the joint military / police team assault the Claimant on January 20, 2011?

- [15] In **Letang v Cooper** [1965]1QB 232 at page 239, Lord Denning M.R. captured the essence of assault thus:

If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or. If you please to describe it, in trespass to the person. If he does not inflict injury intentionally, but unintentionally, the plaintiff has no cause of action in trespass. His only cause is in negligence, and only on proof of want of reasonable care.

- [16] This tort was also given prominence in **Tuberville v Savage**- [1669] 1 Mod. Rep.3; and **Collins v Wilcock** – [1984] 1 WLR 1172, at 1178 where it was gleaned that an assault consists of placing a person in fear that an immediate, non-consensual and unlawful touching of her /his person would occur. Thus, placing an individual in fear of being killed can, in appropriate circumstances, constitute an assault, but in that respect, the Claimant must prove that she had the fear that she would have been killed, as a matter of immediacy after the threat became a reality for her – as a threat, or if a specific threat was issued, then, as a matter of immediacy after the threat was issued.

- [17] Apart from the foregoing, Section 33 of the **Constabulary Force Act** requires that in order for a claim in tort to be proven against a police constable, a claimant must

not only successfully prove the commission of the relevant tort (wrong), but must also prove that such tort was either committed maliciously, or without reasonable or probable cause.

[18] Now, in the case at hand, the claimant, Miss Vernon had neither particularized her claim for assault nor given any evidence of having been put in fear of being shot by the police/soldier team which had entered the location of her residence.

Although she testified to having complied with a policeman's instruction to go back inside her house, she was silent on the topic of any fear of being shot by the lawmen. Moreover, her narrative disclosed that she was unable to witness the battle that was ensuing outside and although she was shot, her testimony did not reveal that she had harboured any thought of being a victim of gunfire.

[19] The element of fear missing from Miss Vernon's testimony and her account regarding the instructions she had received upon her first encounter with the team of lawmen outside her house, would defy any proposition that the injuries inflicted from the weapon(s) of one or more of the lawmen was intended by them. And, being mindful of the pronouncement of Lord Denning aforementioned, it would be fair to say that the circumstances under which she was shot would not enliven any intentionality on the part of the security forces. As such, Miss Vernon's claim for assault for damages cannot be countenanced.

Did the joint police/military team have a duty of care in respect of the claimant in the execution of their operation at target premises?

[20] In resolving this question of negligence, the policy of the Jamaica Constabulary Force (JCF) regarding use of force in the apprehension of suspects in public places, gains relevance. Notably, The **Jamaica Constabulary Force Human Rights and Police Use of Force and Firearms Policy** provides useful insight on the subject and it highlights that the overall objective of the JCF is to uphold and protect the human rights of all the people in Jamaica. Whilst it gives recognition to the fact that situations may require the use of force by members in defence of self and others, it posits at paragraph 18, the following:

“When determining whether or not to apply any level of force and in evaluating whether an officer has used appropriate force, number of factors should be given consideration. These factors include, but are not limited to:

- *The conduct of the individual being confronted (as reasonably perceived by the officer at the time), ...*
- *Proximity of weapons, ...*
- *Availability of other options (What resources are reasonably available to the officer under the circumstances)*
- *Potential for injury to citizens, officers and suspects.*
- *Risk of escape.*

In addition to the above, paragraph 23 states:

“If members of the JCF do not take appropriate and proportionate action to protect others from harm they may be violating human rights and be in breach of their duty as a police officer.”

[21] Having brought to the forefront those principles of engagement - as I opt to call them- the question that looms is whether they were observed by the police/military team on the fateful day. A useful starting point is, in my view, the time of day when this incident occurred. The evidence suggests that it was before 6 o'clock in the morning when the police arrived on the premises of #1 Goodwin Park Road. Further to that, they had seen the Claimant outside one of the houses on the property. It was also the evidence of the defendants that three houses were in the yard, the first one being the subject of their interest. Having noted all those factors, it should have been foreseeable to the security officers that some, if not all, the occupants of those houses would have been within their dwelling at that time of the morning; therefore, engaging the wanted man in gun battle would have heightened the potential of injury to other persons besides the suspect. Although it was advanced that the lawmen were acting in self defence whilst they came under the gunfire of the wanted man, there was a no evidence as to whether any

strategies to safeguard the lives of the citizens housed on the premises, had been discussed in the team's briefings pertinent to this operation.

[22] Additionally, there was no evidence forthcoming which reflected that the team had given any thought to the JCF policy regarding the availability of other options than the use of force. Even an iota of testimony pertaining to that element of the policy, would have been essential to the defendants' case, since the evidence of each witness seemed to suggest that there may have been a slim window of opportunity to have pursued an alternative strategy. For instance, it was gleaned in cross-examination that Lieutenant Colonel Gordon had first seen the wanted man running from the target house to the rear of the premises, just west of the second house, then turning around and running across the northern side of the said house. At that time, this witness said he had seen "flashes resembling muzzle flashes and heard explosions." From that depiction, it is fair to say that in the moment when this man was running from the target house and prior to him reaching the northern side of the second house, he had not yet fired his weapon. As such, it could stimulate the argument that the security team would have been provided with the chance - even a remote possibility- of charting another course of action than the use of force to apprehend this wanted man.

[23] According to Sergeant Marlon Grant, upon the entry of the security team on the premises, the wanted man had run from a room from the right side of the front building and had continued in the direction of the house behind the one from which he had run. He stated that this man "did not fire while running across the 2nd building. He came back to the front of the second building then he started firing". Again it would seem that there was a period-even if very short- for a reassessment of tactics to be employed in apprehending the wanted man before he had used his firearm.

[24] In his testimony Lance Corporal Alvin Pryce said that whilst he and his team were in the vicinity of the first building, a man, who turned out to be the wanted man Davis, had jumped from the first building and had run down a passageway. He

indicated that the man did not fire before he had jumped, and neither did he, before running. In cross-examination he was asked: "Is it correct to say that the man fired at you, upon your pursuing him in the passageway?" The lance corporal responded in the affirmative. He reaffirmed this stance by agreeing to the suggestion that before he had pursued this man in the passage, no shots were fired at him (Pryce).

[25] When this aspect of each witness' evidence is assessed together, vis-a-vis evidence of the high probability of occupants within the wooden dwellings on the premises and the specific knowledge of the Claimant being inside the second house, what emerges, in my view, is a portal which would have facilitated the exploration by the security team of other methods of engagement with the wanted man besides returning gunfire. Moreover, the independent evidence in this case gives the indication that only one shot was discharged from the weapon associated with the wanted man, Davis. There was also no evidence which supported the existence of any spent shells on the scene to solidify the narrative that a barrage of shots had been fired by the said man. The evidence of the defendants was that the premises was cordoned off by members of the team, and in my view, this would have lessened the risk of the wanted man escaping. Thus it can be said that factors enumerated at paragraphs 18 and 23 of the JCF Human Rights and Police Use of Force and Firearm Policy were not given due consideration by the combined team of security officers in the execution of their operation on the day in question.

[26] As a result of the aforstated, the issue of negligence is enlivened. According to Halsbury's Laws of England (5th Edn) (2015) para 497)

97. Negligence is "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do" (Blythe v Birmingham Waterworks) (1856) 11 Exch 781, at p 784). It is accepted that the test for breach of duty is objective, in the sense that the individual character and mental and physical features of the particular defendant are usually irrelevant.

Negligence does not always consist of a positive act. It may also occur in the omission to take some action or other as result of which the claimant suffers damage. This something termed 'nonfeasance', as opposed to 'misfeasance' which is the term used to describe an act of negligence.

[27] In determination of the issue of negligence as it relates to members of the security force –whether JCF or Jamaica Defence Force (JDF) I heed the guidance offered in **Namishy Clarke v The Attorney General (supra)** where Brown E., J., citing Asquith, LJ in **Dabora v Bath Tramways Ltd.** [1946] 2 All ER 333, 336 affirmed that the standard of care required of the constable is that which “reasonably demanded in the circumstances”. Therefore, the question that looms is *whether a reasonable police officer or soldier would have acted in the same manner as the 2nd, 3rd and 5th Defendants.*

[28] In her written submission regarding the actions of the defendants, Counsel Miss Hall couched her argument within the ambit of self-defence and posited that the engagement of the wanted man in a shootout with the lawmen provided the justification for them to have returned the fire at the gunman, notwithstanding that Miss Vernon was shot.

[29] However, in his written argument, Counsel Mr. Nelson opined that “... there is a duty of care attached to security personnel, and owed to innocent civilians, when security personnel discharge their firearms even in response to a criminal aggression. This duty of care attached to the security is not dependent for its existence on whether the criminal does not repel or does repel the authority of the security personnel; rather this duty of care always subsists...”

[30] Notably, the Defendants’ narrative was that their intelligence had informed them that the deceased gunman had lived in the large house from which he had run and on the morning in question, he had run across the front of the Claimant’s house and that was where the exchange of gunfire had taken place. The gunfire took place in close proximity to the Claimant’s house. While there should be no diminishment of the evidence depicting that the defendants did encounter gun fire

at hands of the wanted man, the independent ballistic evidence would support the stance that the force used by the lawmen to repel the attack was excessive. This had caused the injury to the claimant whose presence the police/military team was aware of.

[31] Thus it was argued by Counsel Mr. Nelson that under the circumstances which prevailed at the time, the security officers use of force was unwarranted. He stated too, that the security forces were negligent in that they had failed to clear the premises of the Claimant and other residents before commencing their operations. His argument - with which I find resonance- is aligned with the position of the Court in **Joseph Andrews v Attorney General of Jamaica (1981), 18 JLR** where it was held that the duty of the police is the apprehension of the wrongdoers with a view to bringing them to justice. However, the police ought not to proceed to extremes without reasonable necessity and members of the public ought to be considered in the execution by the police of their duty.

[32] Having given careful consideration to the evidence offered in this case, I cannot resist the finding that the joint police/military team, in the method employed by them to apprehend the wanted man, had flouted their duty to take reasonable care to ensure that innocent bystanders, passers-by and/or persons in their homes were not harmed and more so, by lawmen's bullets. Consequently, on a balance of probabilities, I find that the joint police/military team was in breach of their duty of care in respect of Marjorie Vernon as they carried out their specific operation on the morning of January 20, 2006. Their negligence therefore caused the said Marjorie Vernon to have sustained gunshot injuries to both her thighs. As such she is therefore entitled to recover damages for negligence.

[33] It is worth mentioning that the Counsel Miss Hall did advance that the claim for negligence had not been pleaded by the Claimant. However, a careful review of the file revealed that upon a 'Request for Information' filed by the Director of State Proceedings on January 5, 2012, counsel for the claimant had filed 'Response to

Request for Information' on March 8, 2012. At paragraph 10 of that document the particulars of negligence alleged by the Claimant were stated as:

1. *failing to satisfy themselves that their operation targeted the correct house.*
11. *failing to inform the Claimant that an operation was taking place in her yard*
111. *failing to secure the Claimant before firing shots in her yard*
- 1v. *Accidentally shooting the Claimant.*

[34] Although the particulars of negligence did not form a part of the contents of the Particulars of Claim, it cannot be said that it was not given recognition by the Claimant and neither can it be denied that the defendants' counsel would have been in receipt of same and consequently aware of the pleadings pertinent to the negligence claimed.

General damages for negligence

[35] The Claimant, who was 47 years old at the time she was shot, was at trial, 62. She testified to still feeling a lot of pain in both legs if she stands for a long time or applies too much pressure on those limbs.

[36] She was taken to the Kingston Public Hospital where she was treated and released. Her injuries as detailed in the Medical Certificate prepared by Dr. Hugh Roberts are: 0.5-1 cm wound over anteromedial aspect of upper right thigh; 0.-1 cm wound over anteromedial aspect of left thigh; 3cm laceration over posteromedial aspect of upper right thigh; difficulty and pain to ambulate; tenderness and intermittent swelling with severe pain to her legs.

[37] Upon review in 2018 -some twelve years post injury- the following diagnosis were disclosed: Chronic soft tissue trauma to the right thigh secondary to gunshot wound; complex regional pain syndrome 2 (CRPS 2)/ causalgia right thigh;

secondary to gunshot; 2% impairment of the lower extremity or 1% impairment of the whole person.

[38] The parties have agreed that **Pansy McDermott v Garnett Lewis and The Attorney General** (Harrison pg. 271) ought to provide useful guidance to this Court. In that case, the plaintiff suffered a gunshot wound to the thigh; was treated conservatively and released from hospital the day of injury. An award of Four Hundred Eighteen Thousand, Eight Hundred Fifty-Three Dollars (\$418,853.00) was made for general damages. When updated, this amounts to One Million Eight Hundred Ninety-One Thousand Dollars (\$1,891,000.00). In relation to the case at bar, the Claimant's injuries were to both her thighs, hence more extensive than McDermott's and in addition to that, claimant at bar has a 1% impairment of the whole person. Hence her award for general damages must exceed that of McDermott's (the case offered by the parties). I am of the view that the sum of 2.4 million is an appropriate award.

[39] As regards the award for special damages the sum of \$54,220 has been proven and this figure was agreed by the defendant's counsel, albeit Counsel Mr. Nelson's indication of the sum of \$50,000.

[40] Notwithstanding a claim for aggravated and exemplary damages, no evidence was led by the Claimant in support of those, hence no consideration will be given in respect of them.

[41] Based on the foregoing, the awards are as follows:

- i. General damages in the sum of \$2,400,000.00 at a rate of 3% interest per annum from the date of service of the Claim Form to the date of judgment.
- ii. Special damages in the sum of \$54,220.00 at a rate of 3% interest per annum from the date of the incident to the date of judgment.
- iii. Costs to the Claimant to be taxed if not agreed.