

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C. L 1992/W 034

BETWEEN                      WILTON WELLINGTON                      PLAINTIFF  
AND                              THE ATTORNEY GENERAL                      DEFENDANT

Mr. R. Smellie instructed by Daly Thwaites & Campbell for Plaintiff  
Miss Tai instructed by the Director of State Proceedings for Defendant.

Heard - September 22, November 28, 1997

HARRISON J.

Cause of Action and Defence

The Plaintiff brings this action against the Defendant and is seeking damages for an intentional assault. The Statement of Claim alleges that on the 18<sup>th</sup> day of March, 1991 the Plaintiff was lawfully at 223 Spanish Town Road when Cpl. Delroy Mitchell maliciously and without reasonable cause intentionally assaulted the Plaintiff by shooting him in the left leg whereby he received injuries and suffered loss and damages.

The Defence states inter alia:

"4. ....the defendant denies that he did the same intentionally or alleged in the Statement of Claim or at all. The said acts were done (if at all which is denied ) accidentally and without negligence or carelessness.

5. The Defendant will say that the Plaintiff was in the vicinity whilst there was

a chase being conducted by an officer in pursuit of two robbers, and that when cornered both fugitives advanced (sic) on the officer, with knives in a menacing manner, and the officer expended two shots in lawful self-defence.”

An application was made at the trial to amend the statement of claim in order to state that the plaintiff was shot intentionally or negligently. The plaintiff was not relying upon the tort of Negligence and neither was there any intention to plead particulars of this negligence. In the circumstances the application to amend was refused.

#### Evidence on behalf of the Plaintiff

The plaintiff testified that on the 18<sup>th</sup> March 1991 he was sweeping a Lane which runs off the Spanish Town Road. He was on the right side of the lane when he heard footsteps. He saw three men on the left side running very fast towards him. One of the men had a gun. They were running apart and the man with the gun was behind. When two of the men reached near to him he heard a shot fired. He felt a burning sensation in his left leg and he realised that he had been shot. He further testified that he knew that the man with the gun was a policeman and that he came up to him and said:

“Is because I was trying to save your life why the two men get away.”

He also testified that no one else had a weapon apart from the constable. He did not see the police officer corner any one and neither did he see anyone attacking him.

He was taken to the Kingston Public Hospital where he was hospitalized for three (3) days. He was treated for his injuries and after his discharge he saw the Doctor as an out-patient. His expenses included the costs for hospitalization, medical fees, medication, clothing and helper's assistance at home. He said he was a fish vendor earning \$1400 per week and

that he has not been able to work since the incident.

Under cross-examination he said the men were near to him when he heard the explosion and he never heard anyone shouting " police, stop". According to him, he was bending down at the time he got shot. He was not watching the men at all times and neither can he say what happened at all times.

The medical report of Dr. Trevor McCartney, Consultant General Surgeon and Senior Medical Officer was admitted in evidence by consent. It states inter alia:

"Mr. Wellington was admitted to the Kingston Public Hospital on March 18, 1991 after allegedly being shot in the left thigh. The injuries sustained were:

1. Entry wound left thigh, posteriorly
2. Exit wound left thigh, anteriorly.
3. Contusion to muscles and skin (L) thigh.

There were no neurovascular injuries and X-rays revealed no bony injuries. The condition of the left thigh improved steadily and he was discharged from Hospital on March 21, 1991 for out-patient follow up. His condition continued to improve and he was discharged from the Surgical Out-patients Clinic on May 21, 1991 in good condition. There will be no serious defects."

#### Evidence on behalf of the Defendant

Spl. Cpl. Delroy Mitchell testified that on the morning of the incident he was driving his private motor car along Spanish Town Road in a line of traffic. He saw two men held on to a mini-bus conductor with knives in their hands. One of the men pushed his hand in the

conductor's trousers pocket and was relieving him of what appeared to be cash. Passengers were shouting out for "thief, thief" so he pulled over to where the bus had stopped, alighted from his car and shouted "police don't move." He then noticed blood dripping from the conductor's hand. The men ran off and he gave chase. He shouted "police, stop" and both men spun around and began to advance towards him in a menacing manner. He became fearful for his life so he pulled his service revolver and expended two shots in their direction. The men then jumped a zinc fence and made good their escape. He said he did not see anyone else in front of him when the men were advancing towards him. He walked back to Spanish Town Road and whilst he was standing by the said mini-bus he saw three persons carrying a man and was told that he had shot him. He placed the injured man in his vehicle and took him immediately to hospital. The conductor was told to make a report at Hunts Bay Police Station.

Under cross-examination he said he chased the men for 15 - 20 ft up a Lane before they spun around. He was about 10 ft from them when they spun around. The men were apart, one to his left and the other to his right. He fired two shots to the left because he wanted to scare them so that they would drop their knives. He was unable to say if any of these men were shot. After he fired the shots the men jumped the fence with the knives in their hands. He said that "in all of this I never see the person who got shot." He denied that it <sup>was</sup> whilst the men were running away from him that he pulled his gun and fired.

In answer to the Court, he said that the men had advanced about 2 ft towards him and when they were about 8 ft away he fired the shots. He said further, that they held the knives as if they wanted to push them in him. He nevertheless fired the shots to their left.

### Submissions

Miss Tai submitted that the plaintiff has not proved that the shooting was intentional. She argued that even if the Court were to reject the Defence, the plaintiff could not succeed as he must prove that the assault was intentional. In relation to damages, she was of the view

that the plaintiff had not proved the special damages. She submitted that on the basis of Murray v Baker reported at Volume 3 page 105 of Khan's Personal Injury Awards, \$45,000.00 would be a reasonable award in respect of pain and suffering and loss of amenities.

Mr. Smellie on the other hand, submitted that the shooting took place whilst the constable was chasing the men so that shooting would have been intentional by way of transferred malice. According to him, more force was used in the circumstances than was necessary.

In relation to General Damages, Mr. Smellie relied upon the case of McEwan v The Attorney General and submitted that an award of \$120,000.00 would be appropriate. Under Special Damages he submitted that the plaintiff has proved the following:

1. Visit to the Doctor	\$300
2. Cost in hospital	\$900
3. Medical Report	\$150
4. Cost of medication	\$1000
5. Loss of clothing	\$250
6. Helper's fee	\$250
7. Cost of transportation	\$1800
8. Cost of crutches	\$1400
9. Loss of earnings	\$11,200

He conceded that the plaintiff ought not to be awarded for more than two (2) months loss of earnings having regard to the medical evidence. He also conceded that the plaintiff had not proved the claim for loss of fish.

#### The Law

A trespass to the person is not actionable if it is neither intentional nor the result of

negligence. This principle of law has been long established and was enunciated as early as 1891 in the case of *Stanley v Powell* [1891] 1 QB 86. The defendant in that case was a member of a shooting party who fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and accidentally wounded the plaintiff who was engaged in carrying cartridges and game for the party. The Court held that the defendant would not be liable in the circumstances.

There is also the case of *Robley v Placide* (1966) 11 WIR 58, decided by the Court of Appeal in Trinidad. The facts reveal that the respondent while standing on the road way sustained a wound to her left leg by a bullet from a .25 police colt discharged by the appellant who, fearing an attack from a group of men each of whom was armed with a cutlass, fired at one of the men at knee level. The shot missed its mark and struck the respondent but it did have the effect of making the men desist from their demonstrated intention of attacking the appellant. The Respondent brought a claim seeking damages for negligence against the appellant. The Court of Appeal held :

1. That no legal duty to retreat arise in circumstances where a police officer acted in the execution of his statutory duty to arrest persons who were prima facie, committing within his view the offence of being armed with offensive weapons.
2. That legally the situation remained unaffected (rather the contrary) by the fact that the holders of the weapons clearly displayed their intention of attacking the appellant and thus to embark upon the commission of a more serious crime.
3. That the necessity of saving life and limb justified the appellant in taking the risk of possibility of injury to the respondent.
4. That an action for trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally

and without negligence on the defendant's part.

#### Appraisal of the evidence

How is the plaintiff's injury to be explained in relation to the evidence? He testified that the men were running up the Lane on the left towards him whilst he was walking on the right hand side. Under cross-examination he said that the men were near to him when he heard the explosion and that he was bending down at the time he got shot. The medical evidence revealed that the bullet entered from the back of the left thigh and made its exit anteriorly on the left leg. He admitted that he was not watching the men at all times and neither can he say what happened at all times. He also said that no one else had a weapon apart from the police officer and neither did he see anyone attacking the constable. But how can one really reconcile the latter evidence in view of his earlier testimony that he was bending down at the very moment that he was shot and that he was not watching the men all the time? It was Mr. Smellie's view however, since the plaintiff got shot during the chase and whilst the men were running away, then the shooting would have been intentionally done by way of transferred malice.

The defendant on the other hand testified that he was under attack when he discharged his firearm. The men were advancing upon him in a menacing manner with knives in their hands. One was to the right and the other to the left and they were apart. They were but a few feet away and according to him he became fearful for his life so he pulled his revolver and expended two shots. In the circumstances, if he is to be believed, he would have been acting justifiably if they were hit. He said however, that he fired to their left in order to scare them and for them to drop their knives. He also said he did not see anyone else in front of him when the men were advancing towards him and "in all of this I never see the person who got shot."

#### Findings

I have had the opportunity observing the demeanour of the witnesses and have assessed

their credibility. I find the following facts:

1. Two men had held up a bus conductor with knives along Spanish Town Road and that the conductor was seen by Spl. Cpl. Mitchell bleeding on the hand.
2. Sp. Cpl. Mitchell alighted from his motor vehicle and shouted "police don't move" , whereupon the men ran off.
3. They were chased by the Corporal.
4. The men ran into a Lane off Spanish Town Road and whilst the plaintiff was on the right side of the Lane the men ran towards him.
5. Whilst Cpl. Mitchell was still chasing them, they stopped, turned around and moved towards him in a menacing manner with opened knives in their hands.
- 6.-The men were apart, one to the right and the other to the left and Cpl. Mitchell pulled his service revolver and fired two shots at the men in order to prevent them advancing any further and for them to drop their weapons.
7. After the shots were fired the men ran off, jumped a zinc fence and made good their escape.
8. The plaintiff was seen shortly after the shooting suffering from a gun shot injury to the posterior aspect of the left thigh.

#### Conclusion

Having considered the evidence as a whole, I conclude :



1. That the two men who were being chased by Cpl. Mitchell were fleeing felons and the officer was acting within his statutory duty to try and apprehend them.
2. The fact that the men had knives and clearly displayed their intention of attacking Cpl. Mitchell it was justifiable in the circumstances for him to have discharged his firearm at them, he having expressed that he had feared for his life.
3. That at the time he discharged his firearm he did not have the plaintiff within his view hence he was not aware of the plaintiff being shot until he was taken by persons to him when he returned to where the mini-bus was parked.
4. That it was quite unfortunate that the plaintiff was shot but the necessity of saving life or limb justified Cpl. Mitchell taking the risk of possible injury to an innocent bystander such as the plaintiff.

It is my considered view therefore, and I so hold, that the plaintiff has failed to discharge the onus of proving that this shooting was intentionally done. There shall be judgment for the defendant with costs to be taxed if not agreed.

In light of my conclusions above I would recommend that The Honourable Attorney General consider making an ex - gratia award to the plaintiff.