J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 43/78

BEFORE: The Hon. Mr. Justice Zacca, P. (Ag.)
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A. (Ag.)

THE ATTORNEY GENERAL FOR JAMAICA v. MIGUEL GREEN

Mr. M. Saunders for the Defendant/Appellant.

Mr. W.K. Chin See and Mr. M.A. Morgan
for the Plaintiff/Respondent.

12th June, 1980

ZACCA, P. (Ag.):

This is an appeal from Malcolm, J. in which he awarded damages to the plaintiff Miguel Green against the Attorney General for Jamaica. The claim as disclosed by the statement of claim, alleged an assault, malicious prosecution and false imprisonment. The learned trial judge after hearing evidence from the plaintiff and the defendant, the defendant in this case being the Attorney General, joined pursuant to the Crown Proceedings Act, awarded damages to the plaintiff in the sum of three thousand three hundred and fifteen dollars, being five hundred dollars for the assault, fifteen hundred dollars for false imprisonment, one thousand dollars for malicious prosecution, and made an award of three hundred and fifteen dollars for special damages.

The appeal before us today relates primarily and specifically to the award of damages for assault.

The plaintiff's case was that on the 17th July, 1975, he was in his home at 3A Potters View in Kingston. He went out into the street because he said he heard a quarrel on Potters View and that having gone out there he saw two men holding up each other, i.e. fighting. He said he subsequently saw the two men running down Potters View towards his direction. He also saw three men, one with a gun, running behind these two men, that he turned - he the plaintiff turned - towards his gate and, as he put it, he heard a "bow" and felt a heavy feeling to his right foot and saw blood running down his foot. The evidence discloses that the plaintiff had been shot from behind. The entry wound was to the back of his thigh.

The defendant's case was that Constable McAnuff along with Acting Corporal A.S. Williams and Constable Newman were travelling in an unmarked police vehicle on that day, that on reaching the intersection of Windward Road and Potters View they saw a large crowd of people about twenty-five to thirty people making a lot of noise. They stopped. Constable McAnuff stated that he saw two men fighting and one of these men was the plaintiff, and he saw the plaintiff pull a ratchet knife from his back pocket, flashed it open, and then slashed at the other man across the region of his stomach. He shouted, "Police, drop the knife." He was then about two to three feet from the men. He then alleged that the plaintiff spun around in his direction and slashed at him with the knife and he jumped backwards pulled his service revolver. The plaintiff slashed at him twice again, and if he had not jumped back he said he would have been cut. He said he was threatened. He fired his service revolver in the plaintiff's direction.

It is clear that what Constable McAnuff was alleging was that he was attached by the plaintiff with a ratchet knife and that in order to defend himself he fired his service revolver. We note that the plaintiff received a gunshot wound and it is quite clear from the evidence, both from the evidence given by the plaintiff and the defendant that in fact the plaintiff was shot by Constable McAnuff. The judge after considering the evidence as it related to this incident came to certain findings of fact. In his finding, the learned trial judge stated that he accepted the plaintiff as a witness of truth and specifically found (1) that the plaintiff was not one of the two men fighting at the intersection of Windward Road and Potters View. (2) That the plaintiff did not pull a ratchet knife and slash at Constable McAnuff at this intersection. (3) That it was not then and under those circumstances that Constable McAnuff fired a shot which hit the plaintiff. (4) That the Plaintiff was shot by Constable McAnuff on Potters View in the vicinity of his gate.

As regards to finding (3), it seems quite clear that what the judge was there saying was that the plaintiff was not shot under the circumstances described or alleged by Constable McAnuff.

Now before us it has been argued that the pleading or the state of the pleadings does not disclose any cause of action, that in so far as the assault is concerned it does not allege an intentional shooting, nor does it disclose any other cause of action such as negligence. Learned attorney for the defendant appellant cited two cases, Fowler v. Lanning reported at 1959 1 Q.B. at 426, and specifically at page 440 and also Letang and Cooper reported at 1964 2 A.E.R. page 929. Paragraph four of the statement of claim states:

> " On the 17th day of July, 1975, a member of the Echo Squad of the Jamaica Constabulary Force a servant and/ or agent of the Crown assaulted the Plaintiff by shooting him in his right leg."

It is our view that paragraph four alleges a cause of action in assault, and that the allegation pleaded in paragraph four, discloses such a cause of action. It is true that the statement of claim does not go on to say that the shooting was intentional but having alleged an assault by shooting, we are satisfied that a cause of action in assault has been alleged and that the pleadings are not defective.

So far as negligence is concerned this has not been alleged by the plaintiff and does not form any part of the plaintiff's case. The plaintiff relies on a cause of action in assault and no other cause of action. It has also been urged on this Court by the attorney for the appellant that even assuming that the pleadings are in order, the evidence does not disclose an assault. The learned trial judge accepted the plaintiff's case that it was whilst these three policemen were chasing or running behind the other two men whom he said he had seen quarrelling - that it was whilst the policemen were running behind these two men that he received this gun-shot wound, the inference being that the policeman shot at or in the direction of these two men and hit the plaintiff who was standing at his gate. The learned trial judge having come to the conclusions that he did and having found for the plaintiff held that there was no reasonable or probable cause for the shooting by the policeman.

In our view, the findings of the learned trial judge suggest that the shooting by the policeman was an unlawful act, that there was no reasonable and probable cause on the part of the policeman in shooting at these two men, and therefore having shot at the two men unlawfully and without

reasonable and probable cause and having hit the plaintiff, plaintiff was entitled to damages in assault. We see no reason for disturbing the finding of the learned trial judge. We are satisfied that on these findings that the claim for assault had been established, and that the learned trial judge properly found on the claim for the assault. In these circumstances the appeal is dismissed with costs to the respondent to be agreed or taxed.

CARBERRY, J.A.

I would agree with the judgment of the President and have little to add. This was an unusual case and it had some curious features. The plaintiff did not know how he received his injuries, his back was turned to the policemen when the shot was fired by one of them and he does not know whether the men were aiming at him or whether they were aiming at the two other people who had been fighting and hit him accidentally. It is also not easy to see why the plaintiff did not, as a matter of ordinary prudence, allege negligence in the alternative.

On the police side, however, the defence attempted to be established was not "inevitable accident" but that: "we shot at the plaintiff, we hit the plaintiff, we were justified in doing so because the plaintiff was engaged in stabbing at another man in a fight with a knife, and he also slashed at us." That defence was not accepted, it was rejected. Nor was the shooting an acceptable and lawful method of apprehending either of the two men who were fighting and now running away.

We had, therefore, a situation in which the original shooting was unjustified. Where the original shooting cannot be justified by any defence such as self-defence or trying to effect a lawful arrest, then it seems, with respect, that the decision of the Trinidad Court of Appeal in Robley v. Placide, (1966) 11 W.I.R. p. 58 cannot apply, and cannot assist the police in these circumstances. It would have been otherwise, had the original shooting by the police

at the two persons they were chasing been found to be justified. If that had been the case then we would have had to consider whether there was any allegation and proof of negligence in the way the police had gone about their business and if there was no such negligence but simply a case of the plaintiff being shot accidentally by the police acting in the course of carrying out their lawful duty in a proper way, then it might have been a case in which no compensation would have been awarded: Robley v. Placide (supra).

That, however, was not the case here. The Trial Judge rejected the defence story entirely. This left a situation in which the plaintiff had been shot, and whether the shot was intended for him or for another person, it could not be said to have been innocently or lawfully fired and he had every right to succeed as he did.

Two other cases were mentioned and relied on by Mr. Saunders for the Attorney General: Letang v. Cooper, (1964) 2 All E.R. 929; (1965) 1 Q.B. 232 and Fowler v. Lanning, (1959) 1 All E.R. 290; (1959) 1 Q.B. 426.

Both cases are authority for the proposition that trespass to the person nowadays usually requires an allegation of negligence to sustain it or alternatively an allegation that it was intentionally done. Put another way, no action will lie for unintentional trespass to the person in the absence of the allegation and proof of negligence. Both these cases turned on pleading points.

> Fowler v. Lanning (supra) was a case of accidental shooting occurring at a (bird) shooting party. There was no allegation that the shooting was intentional, nor any that it was negligent. The Statement of Claim

was held to disclose no cause of action: but the plaintiff was allowed to amend it.

Letang v. Cooper (supra) was an attempt to avoid the Statute of Limitations period of 3 years fixed for negligence actions by pleading in trespass to the person (5 years). The plaintiff, sunbathing in a hotel car park, was run over by a motorist parking his car: he did not see her, and there was no allegation that the trespass was intentional.

Neither case is of assistance in the particular circumstances of our case.

It seems to us that if A deliberately fires at B, misses and hits C standing nearby or behind B, that A is liable for assault unless there are circumstances which justified his original firing at B, and it is also shown that he was not negligent. We would agree that the onus of proof as to negligence, if A justifies the original shooting at B, would rest upon the plaintiff C. Things did not reach that stage in this case; we have a simple, clear assault and battery on the plaintiff and it cannot be said to have been a case of "unintentional" shooting, even if it be assumed that A did not wish to shoot C. Such a shooting cannot be said to be "unintentional" or "accidental" within cases such as Stanley v. Powell (1891) 1 Q.B. 86 or Fowler v. Lanning (supra).

CAREY J.A. (Ag.)

I agree. It is still good law that to set out the bare allegation that "(A) shot at (B)" as an averment is defective in that it discloses no cause of action Fowler v. Lanning (1959) All E.R. 290. In the case before this Court that however was not the allegation in the plaintiff's statement of claim. Paragraph (4) so far as material is as follows:

> " On the 17th day of July, 1975 a member of the Echo Squad of the Jamaica Constabulary Force a servant and/or agent of the Crown assaulted the Plaintiff by shooting him in his right leg."

So that the argument of learned counsel for the appellant that there was no cause of action disclosed on the pleading is in my view misconceived.

The learned trial judge, in stating he accepted the plaintiff as a witness of truth found, therefore, that what he related were in fact the circumstances in which he got shot. He wholly rejected the defendant's story that the firing took place when the defendant was defending himself against an attack on himself by the plaintiff. On the facts, as the learned trial judge must have found, the plaintiff was near his gate when two men who had been fighting at some point on that street ran by him. He then observed three men who apparently were the defendant and his two colleagues pursuing these two men; one of the pursuers had a firearm. He heard a "bow". On the plaintiff's case, what had taken place on the road was a quarrel between these two men. It would seem, therefore, that there would be no justification for the police officers to resort to the use of firearm in apprehending persons engaged in a quarrel.

The learned trial judge must have concluded that the firing of that weapon was unlawful and unjustified. If, then, in

firing at those persons he missed and hit the plaintiff, that clearly was an assault. It was sought to be argued that there was some difference between the tort of assault and an assault as a criminal offence but there is no authority to support that proposition. The same ingredients constitute a criminal assault as it does the tort.

The plaintiff alleged an assault as a perfectly proper cause of action. He established that, and that the learned trial judge found to be the case. I would also dismiss the appeal with the consequences stated by the President (Ag.)