

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2004/HCV 2536

BETWEEN ASTON BARROWS CLAIMANT
AND THE ATTORNEY GENERAL FOR JAMAICA DEFENDANT

Miss Marvalyn Taylor-Wright for Claimant instructed by Taylor-Wright & Company.

Mr. Brian Moodie for Defendant instructed by the Director of State Proceedings.

HEARD: June 24, 25, 26, July 9 and September 12, 2008

McDonald J

The claimant is seeking to recover damages for assault and battery arising as a result of his being shot either maliciously and/or without reasonable and probable cause by police officers acting in the course of their duties and as servants and/or agents of the Government of Jamaica.

In the alternative, the claimant states that his injuries were caused by the negligent shooting of the police officers.

The Particulars of Negligence pleaded are:-

- (a) failing to identify themselves as police officers
- (b) failing to make reasonable enquiries as to the identify of the claimant and/or other young men in the group
- (c) failing to in any way signal to the claimant or at all if the imminent discharge of their firearms so as to prevent injury to him.
- (d) Failing to take any or any sufficient steps to prevent injury to the claimant.

- (e) Discharging a firearm/firearms into the group in which the claimant was standing.
- (f) Discharging a firearm/firearms when it was unsafe and dangerous to do so.
- (g) Shooting the claimant in the right upper back
- (h) The claimant will also rely on the doctrine of *res ipsa loquitur*.

The claimant also claims exemplary damages for that the said actions of the said police officers were arbitrary, oppressive and unconstitutional.

The court has to decide on a balance of probabilities whether the claimant has proven the allegations of assault and battery or in the alternative negligence against the defendant.

Credibility is one of the factors to be taken into account in this exercise.

The claimant's case is that in April 2003 he was a fourth form student at the Denham Town Comprehensive High School. According to his witness statement on 13th August 2003 before returning home from purchasing cash pot, he stopped under a tree. Nine other boys including Andre Taylor were standing under the said tree all of them were awaiting food to be cooked by Mr. Mitchell. The tree was in front of Mr. Mitchell's yard.

Whilst there he saw a Grey Toyota motorcar slowly coming towards London Avenue. It was swinging from one side of the road to the other. It had tinted windows.

He saw at the left-rear side of the car, as it came closer what looked like the mouth of a gun pointing in the air.

When the car reached the light post on London Avenue it started speeding towards where he was standing.

He heard two loud explosions and saw the gun pointing in the air. In cross-examination he said that it was the nozzle alone which was out the left back window of the car. The

window was barely wound down. He knew where the shots came from because he saw smoke come from out the car. He heard the sounds and then he saw the gun pointing in the air.

After the two shots the car came to an abrupt stop about 18' from where he stood.

He saw all the doors swing open and four men and a woman came out of the car; all with guns in their hands. He noticed they were all in plain clothes and were wearing white plastic looking gloves.

The claimant said that it was only two shots he heard up to the time they got out of the vehicle. He said that from the first two shots started everybody started to run. He was on his way running when the car stopped after the two shots. He said that without any reason whatsoever they opened fire at them.

He said that when he heard the two shots, he started to run very fast towards the lane for cover. He ran and looked around "fi see a who" he barely looked sideways to the left.

While running he felt a sting to "the upper left shoulder part of his back".

The force from the bullet "shoved him in a wall" he spun around and ran through the lane.

He heard shots being fired all around him and looked back to see the young men that were standing with him all running for cover.

He continued running until he reached the main road, where he ran into a bar, spoke to one Mr. Hinds who took him immediately to the Spanish Town Hospital.

He spent nine hours there before being discharged.

Whilst in hospital two policemen visited him.

The claimant said that when he heard the shots and started to run the only guns he saw were in the hands of the persons who came from the Toyota motorcar.

He did not see any of the young men he was standing with carrying guns.

He said none of the persons who were shooting identified themselves as police officers nor were they wearing any police attire.

He said that when the vehicle had come to a stop Andre Taylor had run off already.

Andre Taylor a witness for the claimant said that the claimant himself and about eight other young men were standing up under an evergreen tree in front of his uncle Pete Mitchell's gate.

He saw a grey Toyota motorcar with tinted windows slowly driving down London Avenue. It started speeding up on reaching the light pole and then suddenly stopped a little way from the gate.

Mr. Taylor said that before the car stopped he heard two shots fire in the air. The car window was rolled down and a gentleman's hand was outside when the shot fired. He is certain that the man was in the front of the car but he doesn't remember if he was to the left or right side. He said that from his side he could see the front and back windows rolled down partway.

Next, from the same front seat after the car stopped he saw a man point his gun directly at them and fire from the car after it stopped.

He started running towards his uncle's home. While running he heard several bullets dashing past his head from the direction he was running from the car. He did not see anyone get out of the car, because he had run in the yard and he couldn't see them from inside the yard.

He ran through the front gate and around the house. He spoke to his uncle

He continued running over to his cousin's yard next door and hid in his cousin's house.

Specifically he jumped onto a table which was at the fence.

When he came out he saw two men searching his uncle's house. He saw this from where he was standing in his cousin's yard as the fence at the back was low. He described the fence as reaching up to the top of his head.

He saw them throwing out his uncle's personal belonging. One of them used a machete to chop the boxes and connecting wires of his uncle's sound system

He said that the man who was cooking the food was taken inside by one of the men with the guns and was told to sit on the edge of the bed, and he saw them use a piece of board to beat the man.

The man was then taken back outside ordered to wash his face and lie on the ground on his stomach along with the other young men that were waiting for the food with him and who were all already on their stomachs. He said that he left his cousin's yard went through the lane to the front of the road in front of Mr. Mitchell's house where he saw policemen taking up spent shells. However he agreed with defence counsel that the front fence of this house was too high for him to see over.

He said at that point he realized that they were police officers and it was confirmed when he heard one of the men saying "we a police, lay dung pon unuh blood cloth belly." He heard one of the policemen telling another one to pickup the shells that were on the ground and that they were not to leave any behind.

He identified Mr. Lawrence as one of the policemen out there, and as the policeman who fired at them from the front seat of the car.

Mr. Taylor said that the last time he saw the claimant was when the shots were firing and he ran off.

He said no shoot out took place and that the only persons who were firing shots were the police officers. He saw no one else with any guns.

Defendant's Case

The defendant denies that the claimant was shot by any of the police officers or that they observed that anyone had been shot.

In his witness statement Detective Inspector Carl Malcolm said that on the 13th August 2003 he led a police party on special operation in the Portmore area of St. Catherine.

Some of the officers were in uniform and others in plain clothes.

Whilst there based on a report of gun shots being fired in the Pig City area of Passagefort, he dispatched police personnel to proceed to the area. Seven officers all armed left in two vehicles an unmarked grey car and a Pajero jeep.

He recalled that Cpl. Lawrence, Johnson and Bainbridge were the three police officers in the grey car when he displaced them. He does not recall the name of the four who were travelling in the jeep.

Ten minutes after he sent them to Pig City he went to the area and eventually saw the contingent of seven he had sent out and the two vehicles he had sent ahead.

He saw Cpl Lawrence dressed in plain clothes, with a red and black police vest.

Constable Bainbridge was in red seam uniform and Cons. Johnson in blue denim with a bullet proof vest.

This evidence was challenged in cross-examination as to how the police were dressed.

He left Pig City and went to the Waterford Police station where he heard that a young man had been shot and taken to the Spanish Town Hospital. He said that Cpl. Lawrence made a report to him and gave him a Beretta 9mm pistol bearing serial number TN188536 and four rounds of 9mm cartridges.

He instructed Sergeant Whyte and Detective Constable Blake to make checks into this report.

Detective Corporal Lawrence said that he was dressed in plain clothes and wearing a marked police vest with his registration number. He was the driver of the grey unmarked motorcar accompanied by Corporal Johnson and Constable Bainbridge. In his witness statement he makes no mention of Constable Bainbridge being present. He said that he carried a 9mm weapon and Cpl. Johnson a 9mm weapon and a M16 rifle.

When he stopped the vehicle all the policemen alighted carrying their firearms. He saw about 9 or 10 men between the ages of 15 and 19 under a tree. He did not say anything when he came out of the vehicle. Corporal Johnson shouted "police nobody move."

He said two of the men pulled guns from their waist and opened fire at him. He hid behind the open car door and returned the fire at the two men. After he took cover he heard further shots; but was unable to say from which direction they were coming. The men shot at him for between 5 to 10 seconds and he returned the fire for about the same time span. Corporal Johnson also returned gun fire.

The men ran away from them towards a wall which leads to a passageway and the canal. He had no knowledge of spent shells being picked up from the scene. He handed over something to Inspector Malcolm. Later that day at the Waterford police station he learnt that the claimant had been shot.

He did not go to the hospital.

He had knowledge that residents of Pig Pen City demonstrated about the shooting of the claimant. He was aware that the BSI investigated the shooting and that he was taken off front line duties for a period of time.

Corporal Ainsley Johnson's account is that he was wearing blue denim and carrying a M16 colt rifle only. On the 13th August 2003 whilst at Pig City he was not wearing gloves. Corporal Lawrence was carrying a 9mm browning semi-automatic pistol and he cannot recall what weapon Constable Bainbridge was carrying.

All windows of the car were up. When the car stopped all the policemen came out of the car, he was the one closer to the men.

Two of the young men moved away from the group in which they were, they pulled hand guns, and opened fire at the police and ran.

When they opened fire he threw himself to the ground and returned the fire. He could not see Cpl. Lawrence or Constable Bainbridge from where he took cover; but he could see the young men.

He was not in a position to say whether Cons. Bainbridge returned any fire.

He said a number of shots were fired by these young men. The men ran in different directions. He only noticed where two of the men ran.

Cpl. Johnson was asked if after the shooting he saw any of the other five young men. He replied 'yes', they were under the tree, they were searched by other policemen who arrived at the scene. He observed the search.

He said that he retrieved a firearm that fell from one of the young men and handed it over to Corporal Lawrence who handed it over to Inspector Malcolm.

Cpl. Johnson said that when he left the scene he went to Portmore police station where he was stationed along with Corporal Lawrence and Constable Bainbridge.

He did not receive any information that the claimant was shot until he learnt via a telephone call from the Ministry about a year ago that someone was suing.

Analysis and Findings

In my opinion there are several material discrepancies in the evidence of Cpl. Lawrence and Constable Johnson which affect their credibility.

Corporal Lawrence said Constable Johnson carried a M16 rifle as well as a 9mm weapon that day. Whereas Corporal Johnson's evidence was that it was Lawrence alone who carried the 9mm weapon and he had only the M16 rifle.

If Corporal Lawrence's evidence is truthful, then the court must ask itself why was this 9mm firearm not handed over and subjected to ballistic testing. The first mention of it was at trial.

It is also important because the claimant and his witness testified that none of the young men who were standing under the tree that day had a gun yet the bullet fragment which was recovered by the doctor from the claimant's body was fired from a 9mm weapon.

If in fact Corporal Johnson hid the fact of his being armed with a 9mm weapon, the question posed by Mrs. Taylor-Wright and which the court must address is whether the bullet could not have come from that 9mm or whether the 9mm allegedly retrieved by him at the shooting scene did not belong to him and was planted on the young men.

Assuming the court was to accept Corporal Lawrence's evidence the second 9mm is unexplained.

Corporal Lawrence's evidence is that after the 5-10 seconds shooting period he never saw any of the boys again. The men ran away from them towards a wall. On the other hand Cpl. Johnson's evidence is that after the 10 -15 seconds he saw only two of the young men run in different directions.

He said that after the shooting he saw the other young man (excepting the two) under the tree and they were being searched by other police personnel.

It was only in cross-examination that Cpl. Johnson for the first time said that two young men moved away from the group they were in and pulled hand guns and opened fire at the police and ran.

This was never put to the claimant or his witness. Rather the case which was put suggested that they were both part of a group of men two of whom fired at the police and that all of them ran in different directions upon being fired on by the police.

The evidence of Cpl. Johnson that he only learnt of the shooting of the claimant in 2007 is incredulous.

This is against the background that the claimant having been shot was known to both Inspector Malcolm and Corporal Lawrence from the day of the shooting - all of whom were stationed at Portmore police station along with Corporal Johnson.

In addition Corporal Johnson's firearm was tested in connection with the shooting and it is undisputed that both himself and Corporal Lawrence were later taken off front line duties in connection with the shooting.

The claimant in proving his case must show that the injuries and losses were caused by the wrong act of the defendant's servants or agents.

What was the origin of the missile which hit the claimant? The guns of Cpl. Lawrence and Cons. Johnson were ballistically tested as well as the firearm allegedly recovered from the fleeing gunmen.

The ballistic report exhibit 24 reveals that 5.56mm colt m16 A2 carried by Cons. Johnson and the 9mm Luger Browning pistol carried by Cpl. Lawrence and the 9mm Luger Taurus pistol allegedly carried by one of the fleeing gunmen were fired and this could have been on the 13th August 2003.

The ballistic tests carried out on the piece of lead core removed from the claimant's shoulder could not be identified with a specific firearm.

However microscopic examination of the piece of lead core revealed that it was from a 9mm Luger copper jacketed lead bullet.

In my opinion the ballistic report is inconclusive in determining the origin of the missile. In passing I note that the ballistic report makes reference to unparcelled and labelled F received 1st October 2004 one 5.56 colt m16A2 serial no. A0045106 which on testing showed no indication that it was recently fired. There is no evidence before the court as to the origin of this firearm and the court cannot speculate that this was the firearm carried by Constable Bainbridge.

In my opinion the evidence that the young men were fired upon without reasonable cause is consistent with:

- (1) Them moving away from the police
- (2) The claimant being shot in the back
- (3) The unchallenged evidence that two policemen Cpl. Lawrence and Cons. Johnson did fire at the young men.

- (4) There is no evidence that the young men were shooting at themselves or that any of them fired shots towards or in the direction from which the police were shooting so as to allow the claimant to be in the line of fire of "young men shooting."

Both the claimant and his witness agree that:-

- (1) Neither themselves nor any of the young men in the group had firearms.
- (2) That the police were the only persons who were firing and they saw no one else with any guns.
- (3) An occupant of the grey car fired two shots from the window of the car into the air before it stopped.

Having heard the claimant and assessed his demeanour I find him to be a witness of truth.

There are some discrepancies between the evidence of the claimant and his witness but I do not regard them as fundamental and fatal to the claimant's case.

In areas where the evidence of the claimant differs from that of his witness I accept the claimant's evidence as being the credible account.

On a balance of probabilities I find that:-

1. No shots were fired at the police by the group of young men standing up under the tree.
2. Two shots were fired in the air by the police from the grey motor vehicle before it came to a stop causing the young men to run Cpl. Johnson did not say to the group of young men "police don't move." The police alighted from the motor vehicle with their firearms and fired shots at the young men.

3. The claimant who was standing with the group of young men was shot in the back by the police deliberately and without reasonable and probably cause whilst running in a bid to escape.
4. Cpl. Johnson did not recover a firearm dropped by one of the fleeing young men.
5. Cpl. Lawrence carried a 9mm firearm and Cpl. Johnson a 9mm weapon and a m16 rifle.
6. there was no damage to the grey police motor car
7. I reject the evidence of the police that when they alighted from the vehicle two of the young men in the group opened fire at them and Cpl. Lawrence and Cons. Johnson defended themselves by discharging their firearms in the direction of the men who were firing at them.

The pointing of a firearm at the claimant and the subsequent shooting in his back was an act of assault and battery which satisfies the legal requirement of the tort. Judgment for the claimant.

I now turn to the question of damages

Special Damages

The claimant claim for special damages were particularized as follows:-

(a) medical report from Spanish Town Hospital	\$1,750.00
(b) medical expenses	
(i) Spanish Town Hospital	\$ 350.00
(ii) Kingston Public Hospital	\$2,350.00

(iii) Prescriptions

\$ 880.00

\$5,330.00

Receipts and other documentary evidence were exhibited in proof of these expenditures and I award the sum of \$5,330.00 for special damages. The claimant in his witness statement made reference to additional expenditure, but the pleadings have not been amended to reflect same, and the claimant cannot recover more than the amount pleaded and proved.

General Damages

The particulars of injuries pleaded read:-

- (a) gun shot wound to upper back
- (b) severe pain
- (c) pain and inability to sleep for several weeks
- (d) unbalanced gait.

Dr. Leroy Pottinger in his medical report dated 16th October 2003 (exhibit 2) stated inter alia that:-

“Aston Barrows was seen in the accident and emergency department of the Spanish Town hospital on August 13, 2003, with a history of gunshot wound to his back. On examination his vital signs were normal. He had no difficulty breathing and there were no evidence of circulatory failure, nerve or bone injury. The records confirm a wound to the back that is consistent with that caused by a gunshot.

An instant chest x-ray was normal

The second x-ray was also normal

- The expected period of incapacitation is fourteen days. No permanent injury is expected.”

It is the claimant's complaint that after the injury he spent 9 hours at the hospital. An x-ray was done and he was discharged. At a later date he returned to the hospital because of the pain he was feeling and was referred to the Waterford Clinic for the wound to be dressed.

He continued to experience severe pain because of the bullet lodged to his shoulder and returned to Kingston Public Hospital about four times until he was eventually referred to the Kingston Public Hospital where he underwent surgery on 26th January 2004 and the bullet removed.

Mrs. Taylor-Wright opined that it was difficult to find cases with gun shot wounds to the back resulting in serious pain and no resulting disability. She placed reliance on the case of Cordella Watson v. Keith Watson and Errol Ragbeen reported at page 256 Khan's Volume 5 in support of this head of damage.

In that case the claimant suffered injury to back causing severe lower back pain. On examination Doctor Rose found:-

- Discomfort on left lateral rotation and flexion of the lumbar spine
- Straight leg raising bilaterally at 90 degrees
- Blunting of the sensation along the left thigh and leg
- Mild tenderness on palpation of her midline of the lumbar spine. He reviewed the x-rays taken in 1992 and found no evidence of fracture. He diagnosed her condition as chronic mechanical back pain.

He assessed PPD as it related to the lumbo sacral spine at 5% equivalent to 3% of the whole person.

On 28th November 1997 she was awarded \$200,000.00 for general damages. Mrs. Taylor-Wright submitted that since the claimant in that case had a disability of 3% the damages could be similarly reduced and the sum of \$194,000 be awarded in this case which updated would be \$528,859.76(using CPI 124.8 April 2008).

I find this case to be a useful guide in computing the award.

Mr. Moodie urged the court to make an award ranging between \$350,00.00 \$400,000.00. He relied on two cases; Donovan Clarke v. Scott and Attorney General and Clandeth Deer v The Attorney General & DC Lyndale Evans both reported at Khan's Volume 5 page 129 and 131 respectively.

I do not find these cases useful as the injuries suffered by the respective claimants are not closely comparable to those suffered by Mr. Barrows.

In my judgment an award of \$465,000.00 is appropriate in this case.

I find that the circumstances of this case warrants an award for exemplary damages.

Mrs. Taylor-Wright has placed reliance on The Attorney General v. Delroy Parchment SCCA 7 of 2003 unreported delivered on July 30, 2004. She submitted that in 2008 an appropriate award today would be updated to about \$250,000.00.

Mr. Moodie referred the court to Rookes v. Barnard (1964) AC 1129 and Broome v Cassell (1972) AC 1027 in considering an award under this head.

He was of the view that no award ought to be made under this head in the instant case.

In coming to an appropriate award I have perused the following cases:-

Keith Bent et al v Attorney General Suit 1998/B330 (unreported)

Attorney General v Maurice Francis SCCA 13/95

Attorney General & Constable Burton v Leeman Anderson SCCA No. 76/2004

Attorney General v Delroy Parchment SCCA 7/2003

I award the sum of \$100,000.00 for exemplary damages.

Damages are assessed as follows:-

<u>Special Damages</u>	\$5,330.00
<u>General Damages</u>	
Assault and Battery	\$465,000.00
Exemplary Damages	<u>\$100,000.00</u>
Total General Damages	\$565,000.00

Interest is awarded on special damages in the sum of \$5,330.00 at the rate of 6% per annum from 13th August 2003 to 21st June 2006 and at the rate of 3% per annum from 22nd June 2006 to date of judgment.

Interest is awarded on the sum of \$465,000.00 (i.e. being general damages less the sum awarded for exemplary damages) at the rate of 6% per annum from 28th October 2004 (date of service of Claim Form) to 21st June 2006 and at 3% per annum from 22nd June 2006 to date of judgment.

Costs to the claimant to be agreed or taxed.