[2013] JMSC Civ 151

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005HCV 01141

BETWEEN	**CARL BROWN**	**CLAIMANT**
A N D	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**CONSTABLE CLIVE NICHOLSON**	**2ND DEFENDANT**

Judith Brown – Ramanand, instructed by Judith Brown-Ramanand & Company for the Claimant

Cheryl-Lee Bolton, instructed by the Director of State Proceedings for the Defendants

HEARD: June 17, 18, 2013 and October 18, 2013

ASSAULT – BATTERY – SHOOTING BY POLICE OFFICER – SELF DEFENCE – BURDEN OF PROOF IN RESPECT OF SELF DEFENCE IN CIVIL CASES – TRESPASS TO GOODS – CONVERSION – DETINUE – NEGLIGENCE – SELF DEFENCE – ASSESSMENT OF DAMAGES

Anderson, K., J.

[1] By this claim, the claimant is seeking to recover compensation by order of this court, from the Crown, arising from certain events which he has alleged, occurred on April 25, 1999, along West Road, Port Antonio, in the parish of Portland, involving in particular, himself and a police officer who was serving in that capacity at the material time and who is, as such, an admitted servant or agent of the Crown, for the purposes of the events which have given rise to the claimant's claim.

[2] There are, as is typical in court cases of this nature, both accepted, as well as disputed matters of fact, between the parties to this claim. That which is not disputed is that the relevant events occurred during the night of April 25, 1999, along West Road, Port Antonio, in the parish of Portland and that those events began whilst the claimant was driving a motor car with licence number – 5790 BS, this being a motor vehicle which was, at that time, unregistered and uninsured. The second defendant had also been driving a marked police vehicle that night and at some point in time, the claimant stopped the vehicle in which he had, up until then on that night, been travelling and got out of said vehicle, in the immediate vicinity and in full view, of the second defendant. At some point in time thereafter, the second defendant with a firearm, shot the claimant in the upper left side of his left buttock. Thereafter, the claimant ran away, even though he was, at no time, being physically chased by anyone and reached his home via a taxi. Later that night, he was seen by the second defendant at the police station where the second defendant was then stationed for work. The claimant had gone there and was then accompanied by relatives of his, who complained about his having been shot by the second defendant. The second defendant transported the claimant to the hospital in Port Antonio, where he was treated and later released. The claimant incurred expense for the treatment which he received as an in-patient, as well as an out-patient, at the hospital and also, incurred expense, for, the medical advice which he thereafter received from various medical doctors and also, for the preparation of a medical certificate in respect of the injury which he suffered. The claimant was assessed as having suffered, as a consequence of the gunshot injury to his left buttock, a temporary partial disability, to the extent of 25% over three months. The claimant was earning $7,800.00 per week and has claimed loss of earnings for the period of time during which he was temporarily disabled. At the time, the claimant used to work with a building contractor, as a mason. In addition, the claimant's vehicle was seized by the second defendant, purportedly in proper pursuit and carrying out his duties as a police officer.

[3] This court accepts as truthful and accurate in all respects, the evidence which has not been disputed – as set out above. The factual issues which are in dispute however, need to be resolved by this court, not only for the purposes of enabling this

court to conclude on exactly what transpired between the claimant and the defendant during their interaction on the relevant night and also on the sequence thereof, but also, for the purpose of enabling this court to conclude on one of the most important issues in this case, at least insofar as the claim for damages for assault and battery and/or negligence, is concerned, this being, as first raised by the second defendant in the joint defence as filed by the defendants and thereafter, responded to at trial, by the claimant, that being:- Whether or not the second defendant, when he shot the claimant, was then acting in self defence. For present purposes though, insofar as the defence of self defence as has been put forward on behalf of the defendants, is concerned, it is to be noted that there was no evidence placed before this court by anyone, that on the questioned night, the claimant had ever, in fact, had any weapon in his possession. There was also no evidence presented to the court on behalf of the defendants, as could even remotely suggest that the second defendant was physically attacked in any way. The evidence as presented to this court by both the claimant and the second defendant, makes it clear that there never was any physical attack committed by the claimant in relation to the second defendant. As will clearly be understood from this judgment at a later juncture though, the absence of such evidence, or of evidence that on the questioned night, the claimant had in fact had in his possession, a weapon or even, for that matter, any object readily capable of being utilized as a weapon in such a manner that serious harm or injury could have been caused to the second defendant, thereby having justified the second defendant, in defence of himself, to have fired the shot towards the claimant and thus, to have injured the claimant by means of a bullet which was thereby lodged in his left bullock, does not, in and of itself, deprive the second defendant, of the defence of self defence. This will be addressed in greater depth, later on in this judgment.

[4] Apart from the issue of whether or not, at the material time, the second defendant had acted in self defence, there are other issues of factual dispute as between the parties. One of these is as to the precise concatenation of circumstances which eventually led to the claimant having stopped the vehicle which he had, up until then on that night, been driving and having thereafter, exited the said vehicle.

[5] The disputed evidence as between the claimant and the defendants in that regard, is as follows:- According to the claimant, he was driving the vehicle which is his, albeit registered in the name of his brother – Christopher Brown. This was at about 10:30 p.m. on April 25, 1999. Upon reaching the intersection of West Street and Boundbrook Crescent, he saw two cars coming in his direction and he stopped and allowed them to pass. He identified one of those vehicles to be a taxi and the other, as being a police vehicle. There was only one person who was in the police vehicle at that time and that was, of course, the driver thereof. After these vehicles had overtaken his vehicle, the claimant then proceeded to drive his vehicle behind the police vehicle. The taxi and the police vehicle were, at that time, driving only about a chain apart from one another. The police vehicle thereafter came to a stop, not far away from where the claimant's vehicle had, on that night, been overtaken by the police vehicle - At that stage, according to the claimant, he put on his vehicle's indicator light and passed the police vehicle. While passing the said police vehicle, the claimant's evidence is that he then looked at the person then driving the police vehicle and that person is the second defendant. After having driven his vehicle past the police vehicle, the claimant drove on for about another minute and had just reached the Singer store, when he saw the blue flashing lights of the police vehicle in his rear – view mirror. The claimant's further evidence is that he then immediately put on his vehicle's indicator and came to a stop in the vicinity of the Navy Island gate, which is across from ('opposite' was how the claimant termed it) the Esso gas station.

[6] The claimant has further alleged and given evidence in support of the allegation that having stopped his vehicle, the police car then drove up and stopped right beside his. The second defendant, according to the claimant, then said to him – 'Hey blood cloth bwoy, you neva see police a blood cloth stop you!' The claimant then said 'good night' to the officer, but that gesture was seemingly ignored by the second defendant and thus, the claimant said 'good night' to the second defendant again. The claimant also gave evidence that the second defendant then said to him, 'Mi notice say unno a gwan like say unno a bad man.' To that, the claimant then responded for a third time

with the salutation – 'good night,' to which the second defendant responded by saying – 'Come out of the blood cloth car, mi notice say unno a gwan like say unno a bad man, but mi deh yah fi unno.' It was at that point in time, after having heard of all this from the second defendant, that the claimant then came out of his vehicle. The claimant also gave evidence that when he came out of the vehicle which he was driving on that night, he came out with a coconut cake in one hand and his key in the other and raised his hands high in the air. This court finds it strange that he would have come out of the said vehicle with coconut cake in one of his hands. Why would he have taken the coconut cake out of the car, in one of his hands, when he exited the car? This particular aspect of the claimant's version of events, seems highly improbable to this court.

[7] The claimant also, testified that after he had exited the said vehicle, he told the second defendant that he was going to stand over by a nearby gas station, where there were then some people standing. According to the claimant, he did this because he thought that the second defendant, who was then visibly armed with a handgun, would not harm him in full view of so many persons. He went on to testify that he had walked away about 15 yards and had just reached the gas station compound when he heard a loud explanation and felt a burning sensation at what then seemed to him, to have been the back of his leg near his bottom. He pointed out to this court exactly where on his body, he received injury, which was later confirmed by a doctor, as being a gunshot injury. In that regard, he showed this court that he had been injured in his upper left buttock. As a result of that injury, he says that he stumbled forward and the cake and his vehicle keys fell out of his hands, while he used his hands to prevent himself from falling flat on the ground. He says that he then cried out for help, but no one came to help him. At that time, the second defendant was still seated in the police vehicle. According to the claimant, he felt sure that the second defendant was then going to kill him and realizing that the persons who were then nearby, could not prevent him from being harmed by the second defendant, he (the claimant), then got up and ran and scaled a wall in the process. The claimant has made it clear though, it should be noted, that at no time while he was lying on the ground, did the second defendant even so much as approach towards him. The claimant was taken home by a taxi and thereafter,

at about 11:20 p.m., his brother-in-law and other family members, accompanied him to the Port Antonio Police Station. It was from there that he was, on the direction of the officer in-charge at that police station at that moment in time, escorted, either by the second defendant or by another officer than the second defendant (the identity of the officer who escorted him, is in dispute) to the Port Antonio Hospital, where he was eventually admitted to the surgical ward after having received initial medical treatment from Dr. Kenneth Williams – Consultant Surgeon – whose expert report in relation to the claimant's diagnosis, treatment and medical prognosis, as dated April 14, 2005, was admitted into evidence.

[8] In that expert report, it is stated, *inter alia*, that :

> *'... Significant findings were confined to left buttock where there was an entry wound to the upper lateral aspect. There was no exit wound and bleeding was minimal... A diagnosis of gunshot wound to the left buttock with little associated injury was made. An X-ray of the area confirmed the presence of a warhead in the soft tissues of the left buttock.'*

[9] The second defendant's defence is one of self defence. If the claimant's claim is not proven, because this court believes that at the material time, the second defendant was acting in self defence, then this would mean that the claimant's claim as against both defendants, fails in its entirety.

[10] This is so because, by law – **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. As a matter of law, self defence can only properly exist and be established in circumstances wherein there exists, on the relevant defendant's part, an honest belief that he or she needed to take action in order to defend himself/herself, but also, that the extent of the action taken, in defending himself/herself, was reasonable, as distinct from excessive – See: **Beckford v R** – [1988] AC 130.

[11] Thus, even if a defendant who is a police officer, is determined by a court, in a claim for damages for either assault or battery, or assault and battery (being as such, a claim in tort), as having acted in self defence at the material time, this should not be equated with the court also inevitably concluding that the defendant acted, at the material time, with 'reasonable or probable cause.' The test of whether the relevant actions of the defendant were committed without reasonable or probable cause, is purely an objective test. As regards the law of self defence though, it has evolved from that which was once based on solely objective considerations, to one of, the subjective consideration of whether, at the material time, he or she acted on an honest belief, that it was then necessary to defend himself or herself. As such, if one acts in self defence, this does not mean that one must have acted with either reasonable or probable cause.

[12] In the case at hand, the claimant has contended, in his statement of case, that the second defendant had, at all material times, while acting as a servant or agent of the Crown, acted maliciously and without reasonable and probable cause, or in the alternative, negligently. Of course, the claimant need not establish both malice and reasonable and probable cause, in addition to proving the tort of assault/battery as having been committed in relation to him by the second defendant, in order to succeed in respect of his claim. The proof of either malice or absence of reasonable or probable cause will suffice in terms of the requirements of **Section 33 of the Constabulary Force Act**. In any event though, the claimant had, at no time during the trial, even remotely, through his counsel, so much as suggested any basis upon which malice could even so much as have been inferred by this court. As things turned out in fact, at trial, during the oral closing submissions which were presented to this court by the claimant's counsel, it was then made perfectly clear to this court by her, that her client was relying on the limb – absence of reasonable or probable cause.

[13] Of course too, the alternative claim of damages for negligence can only succeed, if the relevant defendant is proven by the claimant, to have, at the material time, acted without reasonable or probable cause. This is so because, the very essence of a claim

for damages for negligence, requires that the claimant prove that the impugned actions or inactions of the defendant, were 'committed' without reasonable or probable cause.

[14] There does exist in this case, disputed evidence as to certain things allegedly stated by the second defendant at the Port Antonio Police Station and also, allegedly stated by the second defendant when he was escorting the second defendant to the Port Antonio Hospital, either later that night, or very early the following morning. There is even dispute as to whether the second defendant had, at any time, escorted the claimant to the Port Antonio Hospital, or any other hospital for that matter, arising from the relevant shooting incident.

[15] For this court's part, it is not believed to be necessary to determine who is telling the truth in respect of any of those matters referred to in paragraph 14 of this judgment, since, in order to make a determination as regards whether, at the material time, the second defendant was acting in defence of himself or not, which is undoubtedly, one of the most central issues to be resolved by this court for the purposes of this claim, this court prefers to rely on the objective evidence, which is also impartial in nature, as provided to this court in the expert report of Dr. Kenneth Williams as dated April 14, 2005, as the primary basis for that determination.

[16] The second defendant's version of events on that fateful night, is quite different, in material respects, from the version provided to this court by the claimant. In his version of events as testified to, only by him, he stated that on April 26, 1999, at about 11:15 p.m., he was on duty in the Boundbrook area of Portland. He was then driving a marked police vehicle and was heading towards the Port Antonio Police Station. He was alone in that police vehicle at the material time. According to him, based on the intelligence gathered on the car which was then driven by the claimant and which drove from Boundbrook Road onto West Palm Avenue, whilst the second defendant was then in the police vehicle, at the Boundbrook wharf gate, he then used his vehicle's revolving light, horn and siren, in order to then try to cause the vehicle which was then being driven by the claimant, to stop. The second defendant says though, that the said vehicle

did not stop, but instead, sped off. According to his account, he then drove behind the car in which the claimant was then travelling, with the blue revolving light of said police vehicle flashing and the siren of same, sounding at intervals. He has further alleged, in his testimony, that despite this, the car did not stop and instead, continued at high speed along West Palm Avenue.

[17] The second defendant further testified that he eventually forced the car in which the claimant was then travelling, to stop at West Street, in the vicinity of the Esso petroleum station. According to him, he then saw the claimant, whom he did not know before, open the right front door of the vehicle in which he had been travelling, and get out of the said vehicle. The second defendant gave no evidence that he asked the claimant to get out of the said vehicle. Equally too, the second defendant gave no evidence as regards the exact proximity of the police vehicle which he was then in, in relation to the vehicle which the claimant was in, when he (the police officer) was eventually, according to his account of events, able to force the claimant's vehicle to stop. The second defendant did testify though, that he was able to see because of the headlights of the police vehicle and also street lights which were then on, in the immediate vicinity. The second defendant testified, during cross-examination, that the lighting was good at that time and that when the claimant exited his vehicle, he (the second defendant) does not know what he had in his hand at that time. He also testified that he (the claimant) was eight to ten feet away from him when he exited his vehicle and that when he so exited, he (the claimant), did not have both of his hands in the air. He further testified, while under cross-examination, that the claimant did not, at any time, point anything towards him.

[18] According to the second defendant, he saw the claimant hold on to his waist and he saw light reflect off of a metallic object in the claimant's hand. On seeing that, he then pulled his service pistol and fired one shot 'in his direction' or in other words, in the direction of the claimant, who then ran across the road, onto the gas station grounds and then up Baptist Avenue. The second defendant later that night/early next morning, had the claimant's vehicle towed away and searched. No item which is unlawful to be

possessed, was ever found in said vehicle. On the other hand though, it was made clear in evidence, orally provided to this court by the second defendant at trial and indeed, not at all disputed by the claimant, that at the material time, said vehicle was unlicensed and uninsured. The claimant in fact, at trial, as part and parcel of his evidence-in-chief, expressly gave evidence of said vehicle having been both unlicensed and uninsured at the material time. Interestingly enough also, the claimant accepted during his evidence as given while under cross-examination, that at the material time, he was driving his vehicle without a driver's licence. The defendants though, at no time during the trial, challenged the claimant's evidence that he was, at the material time, the owner of the motor vehicle which was seized by the police after he had run away from the scene, subsequent to his having been shot by the second defendant.

[19] This court finds the failure of the defendants to challenge the claimant's claim of ownership of said vehicle, to be not only interesting, but rather surprising. It is true that in their defence, the defendants put the claimant to proof of that assertion of ownership, but having not expressly challenged the claimant on said issue while cross-examining him, in circumstances wherein the claimant had, over and over again, described the relevant vehicle as his vehicle, is to this court, surprising. It is surprising because, insofar as the said vehicle was neither licensed nor insured at the material time, albeit that it did have on it then, a licence plate – No. 5790 BS, there is a likelihood that said vehicle was then registered. This must be so, since, in Jamaica, a vehicle cannot have a valid licence plate, unless it has been registered. Of course though, from time to time in Jamaica, persons have been arrested and charged for driving vehicles with fake licence plates! If the said vehicle though, was lawfully registered, it would be registered in the owner's name. In order for the vehicle to be licensed and insured, proof of ownership must be shown. The said vehicle would then be both licensed and insured in the name of the registered owner of said vehicle, as detailed in registration papers for same. As such, where a vehicle is both unlicensed and uninsured, it is distinctly possible and perhaps even distinctly probable, that a person claiming ownership of said vehicle, may not in law be recognized as the owner of same. This is also because, ownership and possession are, of course, in law, by no means the same.

[20] As things now stand in this case however, insofar as the claimant's claim for detinue and trespass to goods, in respect of said vehicle is concerned, the claimant's evidence as to ownership of that vehicle having, at no time during trial, been expressly challenged by the defendants, this court accepts that ownership of same by the claimant, has been proven to the requisite standard, that being a balance of probabilities, by him.

[21] Insofar as the claimant's claim for damages for detinue is concerned, it is clear to this court that said claim must fail. The claimant has contended that he made several demands, to police personnel, for the return of his vehicle to him but that said vehicle was not returned to him until on or about one year after the relevant shooting incident occurred. No evidence was provided by the claimant, as would serve to even remotely suggest that any such demand for the return of said vehicle to him, was ever made in writing. Equally too, no evidence was ever provided to this court by the claimant – he being the only witness who testified in support if his claim, as could even remotely serve to satisfy this court that there was ever any demand made for the return of his vehicle to him, which was unconditional in nature. Furthermore, no evidence had been provided to this court, nor any specific averment made anywhere in the claimant's statement of case, as to when such 'demands' were made.

[22] All of these averments which the claimant has wholly failed to prove and in fact, has wholly failed to place any evidence before this court on, can lead to nothing other than judgment in favour of the defendants on the claim for damages for detinue. This is because, as stated in another judgment of mine- **Kirk Lofters and Attorney General and Deputy Superintendent Cleon March** – Claim No. 2006 HCV01625, at para. 14 – '... in order to prove a claim in detinue, the claimant must prove that there was an unconditional demand for the return of the relevant property to him and that there was a refusal, after a reasonable time, to comply with such demand.' There must also be proven, that at the material time, the Crown's servants or agents, acted either with malice or without reasonable or probable cause. See: **George and Branday Ltd v**

Lee – [1964] 7 W.I.R. 275, at p. 277, per Waddington, J.A.; and **Hosiery v Brown** – [1970] 1Q.B. 195; and **Rushworth v Taylor** – [1892] 3 Q.B. 699.

[23] In the case at hand, not only has the claimant failed to prove that he had made, at any time, an unconditional demand to servants or agents of the Crown, for the return of his vehicle to him, but he has also failed to prove that there was a refusal, within a reasonable time, to return said vehicle to him, bearing in mind of course, that such 'reasonable time', is to be considered in the context of the date when the unconditional demand for the return of the relevant item to its owner, is first made. In other words, the unconditional demand for the return of the said item, is a condition precedent to a claim for damages for detinue being successfully proven in court. Time therefore, does not and cannot begin to run, for the purpose of determining the length of time which is 'reasonable', from the date/time when the vehicle is first detained. 'Reasonable time' is to be determined, starting from the date/time when the unconditional demand for the return of the detained item, is first made by a person/entity lawfully entitled to the return of the detained item, to him/her or them and the date/time when such vehicle is either returned to such person or entity, or if not returned, when that person or entity claims damages for detinue arising from the failure to have returned the same, within a, 'reasonable time.'

[24] It should be noted that the second defendant had every lawful right to remove the claimant's vehicle from the road where it had been abandoned by the claimant and to detain it until its owner made an unconditional demand for its return to him. The second defendant acted lawfully in exercise of his police duties, in having so done. **Section 22(1) (iv) of the Constabulary Force Act**, provides that:

> *'Whenever in the opinion of the Commissioner, a street is liable or likely to be thronged or obstructed it shall be lawful for him and for any constable acting under his authority – generally to do all that is necessary to prevent a congestion of the traffic, and to provide for the safety and convenience of the public.'*

[25] In the matter at hand the claimant's vehicle was abandoned by him, on a main road and in the circumstances, it could properly have been considered by the second defendant, as being likely to obstruct traffic and in the circumstances, it was not only the second defendant's lawful right, but also, his duty to remove said vehicle, so as to thereby better ensure the safety and convenience of members of the public traversing that road, particularly those doing so by means of vehicles.

[26] The claimant has, as part of his statement of case, contended that when his vehicle was returned to him approximately one year after it had been detained, it was then, extensively damaged thus causing a diminution in value.' Said alleged damage to the relevant motor vehicle, has been particularized in the claimant's statement of case. In that regard, the claimant has also particularized, in his statement of case, his alleged loss arising from same, as being a total of $127,500.00 – this comprised of cost of parts - $77,500.00 and cost of materials for body work and labour - $50,000.00.

[27] Interestingly enough though, although having apparently carefully particularized such loss, in his particulars of claim ('statement of case'), the claimant has provided no evidence to the court, even to so much as remotely suggest that his vehicle was ever damaged whilst being detained by servants or agents of the Crown (police personnel), much less, what the nature of any such damage was, or even, what the cost to repair any such damage was. This court is thereby forced to conclude that the claimant is not seeking any relief for such initially alleged loss arising from the initially alleged damage to his vehicle, whilst said vehicle was being detained in police custody.

[28] The claimant though, has throughout proceedings leading up to the trial of this claim and during the trial itself, always maintained his claim for trespass to goods, with said 'goods' in this particular case, being his motor vehicle which was detained by police personnel, in conjunction with the 2nd defendant.

[29] As has been stated in the text – **Salmond on the Law of Torts** (13th ed.) [1961], pp. 253 -254 in reference to the tort of 'trespass to chattels', which is the other terminology sometimes used to describe the same tort of 'trespass to goods':

> *'...The tort of trespass to chattels consists in committing without lawful justification an act of direct physical interference with a chattel in the possession of another person – that is to say, it is such an act done with respect to a chattel as amounts to a direct forcible injury within the meaning of the distinction drawn in the old practice between the writ of trespass and that of trespass on the case...Thus it is a trespass to take away a chattel or to do wilful damage to it... Physical interference usually consists in some form of physical contact – some application of force by which the chattel is moved from its place or otherwise affected... A trespass to chattels is actionable per se without any proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues.'*

[30] For this court's part, it must though, be made clear at this juncture, that if such unauthorized touching, moving, or other physical interference with the relevant chattel, was done pursuant to lawful authority, whether such lawful authority be derived from common law or statute, then clearly, a claim for damages for trespass to goods/chattels, cannot be successfully made out, since otherwise, it would make a mockery of the law.

[31] It must therefore follow, from my conclusion in the last preceding paragraph of these reasons for judgment, that since this court has already concluded that the removal of the relevant vehicle at the material time, was done lawfully, no claim for damages for trespass to goods, can be successfully made out, based on the law and relevant evidence, in relation to that specific aspect of the claimant's overall claim.

[32] Even if this court is wrong in respect of its conclusion that the claimant must prove that the physical interference with his vehicle was done unlawfully, not to mention, also without reasonable or probable cause, nonetheless, this court takes the view, for yet

another compelling legal reason, that the claimant's claim for damages for trespass to goods, must fail.

[33] This is because, an action for trespass to goods, as stated clearly in the text – **Clerk and Lindsell on Torts** (15th ed.) [1982], at para. 21-02, p.1019) –

> *'The action of trespass has always been a remedy affording compensation for injury to a chattel in the plaintiff's possession. The sole question is whether the defendant has directly interfered with the plaintiff's possession. Trespass remedies any damages thus caused; it is also actionable per se, that is, without proof of actual damage to the chattel.'*

One can readily recognize from this last quoted textual extract, that the tort of trespass to goods is comprised of injury to a person's possession to goods/chattels, as distinct from ownership of same. Thus, as stated in the text – **Salmond on the Law of Torts** (*op. cit.)*, at p.255 – 'Trespass to chattels, like trespass to land, is essentially an injury to possession and not to ownership. The plaintiff therefore, in an action for trespass must have been in actual possession at the time of the interference complained of.' See: **Ward v. Macauley** [1791] 4 T. R. 489. To this, there are only four exceptions. Suffice it to state though, in the present claim, the claimant's situation both legally and factually, as at the material time, does not enable him to rely on any of those four exceptions.

[34] The inability of the claimant to properly rely on any of those exceptions, disentitles him from being successful in respect of his claim for damages for trespass to goods. This is so because, at the material time, which is the time when the physical interference with his vehicle would have taken place, the claimant then had only a right to possession of the said vehicle, this insofar as it has not been disputed, that he was then the lawful owner of same. A mere right to possession would not though be enough, in law, to properly entitle the claimant to even be a proper party to claim for damages for the trespass to goods. Actual possession at the time of the physical interference by police personnel with his vehicle is what the claimant needed to have proven as regards his claim for damages for trespass to goods. The claimant has given uncontradicted evidence which, when taken along with the equally uncontradicted

evidence of the defendant in that regard, has made it pellucid to this court, that at the material time when the vehicle was removed from the relevant scene, the claimant was not, at that time, in possession of same. He had, by then, abandoned his actual possession thereof, whilst no doubt seeking safety. As such, the claimant would, even if the said vehicle was physically removed from the scene unlawfully and even if such was done without either reasonable or probable cause, have failed to prove his claim for damages for trespass to goods, and therefore, that claim, just as his claim for damages for detinue, must fail.

[35] The claimant has also claimed for damages for conversion in respect of his motor vehicle. The claimant though, has given unchallenged evidence, which is accepted by this court, that said vehicle was returned to him approximately one year after he had first abandoned same, whereafter it was removed by police personnel from the main road on which he had left it, abandoned.

[36] This court has already addressed the issue as to whether or not such vehicle was lawfully removed from the main road on which it had been abandoned by the claimant and as such, will not reiterate the views and conclusions as earlier expressed in that respect, at this juncture. Suffice it to state though that insofar as this court has concluded that the Crown's servants and/or agents acted lawfully in having removed and retained temporary custody of said vehicle, it inexorably follows, that the claimant has been unable to prove, to the required standard of balance of probabilities, this meaning of course - more probable than not, that even if there was the tort of conversion committed by the Crown's servants or agents, in relation to the relevant vehicle, nonetheless, that such tort was committed in the absence of either reasonable or probable cause, as is being contended by the claimant. In that circumstance, in accordance with the provisions of **Section 33 of the Constabulary Force Act** (as earlier referred to in the judgment), the claimant having failed to prove either malice or absence of reasonable or probable cause, in respect of the seizure and removal of said vehicle from the road where it was left abandoned, must result in the defendants being awarded judgment in their favour, on the claim for damages for conversion. This is so

because the principle of vicarious liability (employer's liability for actions of employee), cannot be applied so as to affix liability upon the Crown, in circumstances wherein the law, as per **Section 33 of the Constabulary Force Act**, does not enable tortious liability on the part of a constable, to be properly adjudged by this court.

[37] In any event though, has the claimant been able to establish to the requisite standard of proof, that the tort of conversion was committed by either or both of the defendants in relation to him? The learned author of the text – **Winfield on the Law of Tort**, 7th ed., at p. 518, defines conversion:

> *'As any act in relation to the goods of a person which constitutes an unjustifiable denial of his title to them. Conversion involves two concurrent elements (a) a dealing with goods in a manner inconsistent with the right of a person entitled to them and (b) an intention in so doing to deny that person's right or to assert a right which is inconsistent with such a right.'*

In a case of this nature, where the essence of the complaint is the wrongful seizure of a good/a chattel, it is open to the claimant to institute a claim based on either or both of the torts – conversion and/or detinue. This was what was held by Jamaica's Court of Appeal , in the case – **Attorney General and Transport Authority v Aston Burey** – [2011] JMCA Civ 6, at para. 6. This legal point was reiterated in a judgment of **Jamaica's Supreme Court – Trevor Wright v Det. Sgt. Yates**, **Inspector Canute Hamilton and The Attorney General of Jamaica** – [2012] JMSC Civ 52, at paragraph 20, per Campbell, Q.C., J.

[38] It follows from the definition of what constitutes conversion in law, as set out in the previous paragraph of this judgment, that the claimant has wholly failed to prove conversion, just as he has wholly failed to establish malice or absence of reasonable or probable cause. This is so because, firstly, the car was not dealt with by the police officers responsible for the removal of the same and subsequent detention by them until the same was later returned to its owner, in a manner which was inconsistent, with the right of the owner (claimant) to same. The owner had abandoned the same and his

whereabouts and even his identity, was unknown to any police personnel, until later on that fateful night, when he and family members of his, went to the Port Antonio Police Station and there demanded that he be taken for medical treatment, which was in fact done, early the following morning. There is no evidence that at any time during the night when the vehicle was seized, the claimant made any demand, much less, any unconditional demand for the return of same to him. As earlier mentioned in this judgment, there is in fact, no evidence whatsoever, that the claimant has ever at any time, at all, made any such unconditional demand. Accordingly, the claimant has also failed to prove an intention on the part of any of the Crown's servants and/or agents, to deny his right to retrieve said vehicle, or to assert a right which is inconsistent with the claimant's right to retrieve same. In order to have properly established this, it would have had to have been proven by the claimant, that there had been made by him, an unconditional demand for the return of his vehicle to him and also, the unconditional refusal of police personnel or, at the very least, the second defendant, acting solely in his personal capacity (as distinct from acting as a Crown servant or agent), to have returned the same to him within a reasonable time thereafter. In this regard, see: **Rushworth v Taylor** – [1842] 3Q.B. 699**; Mires v Solebay** – [1678] 2 Mod. 242; **Clayton v Le Roy** [1911] 2 K.B. 1031; **Pillott v Wilkinson** – [1864] 3 H. & C. 345; **Alexander v Southey** – [1821] 5 B. & A. 247; **Clerk and Lindsell on Torts**, 16th ed. [1989], at paras. 22-24 - 22-32.

[39] There is just one more matter of law which should briefly be addressed, for the purposes of this judgment, insofar as the claimant's claim for damages for conversion is concerned. This is that the claimant's counsel had submitted, during oral closing submissions, that the conversion claim could not succeed, since the relevant vehicle was in fact returned to the claimant. This however, reveals a misunderstanding of the law, by the claimant's counsel, as regards what constitutes conversion. The return of the vehicle in and of itself, does not negate the claim for conversion being a valid one. This must be so, since, if said vehicle was not lawfully in the possession of police personnel and an unconditional demand for the return of same, had been made to them by the claimant, then the only other legal element to be proven by the claimant, in order

for the tort or conversion to be successfully proven, is whether said vehicle was therefore returned to the claimant within a reasonable time. The mere return of the wrongfully detained chattel after, an unconditional demand for the return of same has been made by a party who is lawfully entitled to possession of same, would not suffice to exempt a defendant from liability for conversion, if said defendant had failed to return said chattel, within a reasonable time after that unconditional demand was first made. The case law as cited immediately above this paragraph of these reasons for judgment, makes this clear.

[40] This court must now return to what is certainly the most difficult and important factual/legal issue to be addressed by this court, for the purpose of resolving this claim, which is whether or not, at the material time, when the second defendant admittedly shot and injured the claimant, he did so in defence of himself.

[41] There exists other evidence given by the parties who gave evidence during the trial, which will be of importance for the purposes of this court's determination of the important issue of self defence, and therefore, let me refer to same at this juncture.

[42] The claimant gave evidence during cross-examination, that the police car in which the second defendant was then seated and driving, stopped beside his car, when his car stopped. According to the claimant, at that time, when facing frontwards, the police car was to his right when it stopped. The claimant also testified that his vehicle was a right hand drive vehicle. This would therefore no doubt mean, that if these aspects of the claimant's evidence are accepted by this court, as being truthful, when the claimant exited his vehicle , he would have exited same, facing where the second defendant would then have been seated in the police vehicle. This is so whether the police vehicle is a right or left hand drive vehicle (in respect of which, no evidence was given by anyone, at trial). According to the claimant therefore, as per his evidence at trial, as expressly stated by him in response to questioning by defence counsel, the vehicles were then parallel to each other and were then both facing in the same direction, which is, towards town. This was, of course, when both vehicles had stopped.

[43] The claimant also gave evidence that he noticed, while coming out of his car, that the second defendant then had a gun in his right hand, albeit that said gun was not then being pointed at him, but instead, was being pointed at, 'the little middle section of the car, with the a/c and the radio'. This court understood the claimant as using the acronym 'a/c' in his evidence, to refer to his car's air condition unit. According to the claimant, when the second defendant was so holding and pointing the gun, it was being held sideways – as demonstrated by the claimant.

[44] Furthermore, the claimant has testified that the keys which he had in one of his hands at the material time, was metallic looking. The claimant however, has categorically denied that, having exited his car, he ever reached down with his hands, towards his waist.

[45] For his part, the second defendant when he testified, during cross-examination, expressly denied that when his vehicle came to a stop, after the claimant's vehicle had stopped, the same was either beside the claimant's vehicle, or in other words, parallel to the claimant's vehicle. To the contrary, he then testified that the police vehicle in which he was then seated as the driver thereof, was, when it stopped, positioned behind Mr. Brown's vehicle, to the right of his rear fender.

[46] If therefore, this court were to accept the second defendant's evidence as to where the police vehicle came to a stop, after the claimant's vehicle had came to a stop, it inexorably follows that when the claimant exited his vehicle, the second defendant would then have been positioned, seated in the police vehicle, behind the claimant. In fact, if such account in that specific respect, as provided to this court by the second defendant, is true, then the claimant's back would have been turned towards the second defendant as at the time when he exited his (the claimant's) vehicle. Interestingly enough though, the second defendant went on to testify, during cross-examination, that when the claimant was coming out of his vehicle, his right side was then facing the second defendant and also that, when he had fully come out of his vehicle, he was then fully facing the second defendant, as 'he was face to face with me.' (These were the

exact words used by the second defendant in answer to the question –'when he had fully come out, how was he positioned?' In answer to this question, the second defendant also said – 'When he had fully come out of the vehicle he was fully facing me.' Clearly though, the only means by which it would have been physically or humanly possible for the claimant, when he come out of his vehicle, to have been then, fully facing the second defendant, is either, if the vehicle in which the second defendant was then seated, had stopped in a position wherein the front of the police vehicle was facing towards the front of the claimant's vehicle, but in that regard, the police vehicle was slightly to the right of the claimant's vehicle (when looking towards the police vehicle from the claimant's vehicle). Alternatively, it would have had to have been that the police vehicle had stopped to the right of the claimant's vehicle and that the two vehicles were then parallel to one another. This is in accord with the account as given by the claimant in that specific respect. This court accepts that account, in that specific respect.

[47] The second defendant has also given other evidence which this court considers surprising, which is, that he never spoke with the claimant that night, until the claimant appeared at the police station. This would have been, as it may be recalled, after the claimant had, earlier that night, been shot by the second defendant. This court finds this surprising because, having not spoken with the claimant at any time before then on that night, could it seriously be argued that proper police procedure and/or reasonably careful and/or appropriate police procedure would have been carried out by the second defendant, when, the first primary step that he took, upon the claimant having exited his vehicle, fully facing him, undoubtedly in close proximity to one another , with the claimant allegedly then having reached towards his waist with his hands and in one of those hands, the claimant then had a metallic – appearing object (which in fact were keys) was to shoot at the claimant? Surely this cannot be and certainly ought never to be considered to be, reasonably appropriate police procedure to adopt in such a circumstance. The second defendant ought to have told the claimant, before he (the claimant) had exited the vehicle which he was, up until then, the driver of, to exit that vehicle with his hands in the air, or better yet, not to exit that vehicle at all and to keep

his hands on the steering wheel. This needed to have been done, since, instead of having so done, what transpired was that, when the claimant was exiting the vehicle which he had previously been driving, he was told nothing by the second defendant and then, upon having exited that vehicle, the claimant, as he has suggested in his statement of case, reached down towards his waist to pull up his pants. Following on his having reached down, allegedly with a metallic object then in one of his hands, the second defendant contends that he then believed that his life was in danger as a result of which, he shot and injured the claimant and now, after having been sued, is relying on the defence of self defence. That defence though, may very well be negated because, by virtue of the failure of the second defendant to follow any reasonably appropriate police procedure, either prior to, or during the claimant's exiting of the vehicle, in informing him as to what he (the claimant) then could or could not do, it may be concluded by the court, that at the material time, the second defendant acted using excessive force, albeit that he then did so in the honest belief that he then needed to do so in defence of himself.

[48] This court accepts that it is now undisputed law as regards self defence, that the defendant ought to be assessed, for the purposes of such defence, based on what the tribunal of fact, considers to have been this honest belief at the material time. For this purpose of course, the material time is the time when the alleged threat or danger first exists in the mind of the second defendant. Therefore, this court must first assess what was the defendant's honest belief at the material time. Then though, this court must assess whether the defendant's actions as taken, were such as were reasonably necessary for the purpose of defending himself, based on the facts as he honestly believed them to be at the material time.

[49] It must always be recognized and properly understood, that there are, two segments to the defence of self defence. In all cases, the first of these segments as set out in this paragraph, must be carefully considered and determined. It is only though, in some cases, that the second of these segments will require serious consideration for the purpose of determination. These segments are:

(1) Whether the defendant honestly believed that it was necessary to defend himself, based on the facts as he honestly believed the same to be, at the material time. It is to be carefully noted at all times, that even if the defendant's honest belief is unreasonable in nature, the defendant is nonetheless entitled to the benefit of such honest belief and in the circumstances, providing that the second segment of this defence is also made out; and

(2) Whether the actions of the defendant, as taken in defence of himself, based on the facts as he then honestly believed the same to be, were reasonably necessary, in response to the threat which he then believed, existed in relation to him.

[50] This court states though, that this is only a general rule and that such general rule would be applicable where a claim is made for damages for either assault or battery or damages for assault and battery. In the present claim, the claimant has expressly sought damages for assault. In addition, with respect to this claim, the claimant has claimed damages for negligence. The general rule that if, in respect of the first – mentioned of the two segments of self defence, the defendant honestly believed that it was necessary for him to defend himself, but such honest belief was unreasonably held by him at the material time, he (the defendant) can nonetheless successfully rely on such defence even in a civil claim for damages, is inapplicable to a claim for damages for negligence. This must be so, since it must be realized that the primary test for determining whether a defendant in respect of a claim for damages for negligence which has been brought against him, has been negligent or not, is whether, in the circumstances which actually prevailed at the material time, the defendant acted in a reasonable manner. Thus relating that to a defence of self defence which is raised by a defendant, in response to a claim for damages for negligence, it is clear that an honest belief which is unreasonably held, cannot avail the defendant in such a circumstance. This view of mine, is one which is expressly shared and which was, in fact, earlier than this, expressed by the learned authors of the text – **Clerk and Lindsell on Torts** (16th ed.) [1989], at para. 8-02 (pp.352-353).

[51] As stated earlier in this judgment, there are two segments constituting a valid defence of self defence. The second of these segments, is that the defendant, based

on the facts as he honestly believed them to have at the material time, acted only as was reasonably necessary, in response to the threat as he honestly then believed, was posed either to himself/another/others. Whilst the first segment is, as a general rule therefore, both in a criminal and a civil law context, entirely a subjective test, this is not so with respect to the second segment thereof, which is partially subjective and partially objective, this meaning that, it will be assessed, on the basis of what a defendant or accused honestly believed to be reasonably necessary in a given circumstance as he honestly believed to have existed at the material time, and as such, it will be for the relevant fact-finding tribunal, applying its mind objectively to the proven facts, to make the determination as to whether the defendant or accused had done no more than he honestly believed to be reasonably necessary in order to defend himself.

[52] The expression by the defendant or the accused that he has done no more than that, in defence of himself, whilst worthy of consideration, cannot be determinative of the question as to whether or not, at the material time, the accused or defendant had acted with the use of excessive force whilst purportedly (*op. cit.)* then acting in defence of himself. Equally too, a defendant or accused's expression to the court, as to what was his honest belief at the material time, cannot, in that court, be taken as being determinative of whether or not he did in fact hold that honest belief at the material time.

[53] The caselaw as to what is to be considered as constituting self defence, both in civil as well as criminal cases, has, in large measure, become clearly established primarily by means of criminal caselaw, wherein self defence features frequently and prominently. As stated earlier, the only clear distinction in that regard, between the approach as regards how the law of self defence is applied in civil cases as against criminal cases, is to be found in civil claims for damages for negligence, in response to which, the defence of self defence is raised. As earlier stated, this is because, to put it simply, self defence in law at present, ought to be considered by the adjudicator(s) from a partially subjective and partially objective standard, whereas, in a claim for damages for negligence, the standard for consideration is purely an objective one, for the purpose of determining whether, at the material time, the defendant was negligent or not. As

regards what constitutes the defence of self defence, see: **Beckford v R** – (*op. cit.)* A.C. 30. **R v Owino** – [1996] 2 Cr. App. R. 128, **R v Williams (G)** 78 Cr. App. R. 367, **Palmer v R** – [1971] A.C. 814; and **R v. Clegg** – [1995] 1 A.C. 482. In law, there exists no rule requiring that a person must wait to be struck first, before they may defend themselves. As such, a pre-emptive strike does not negate the defence of self defence. See: **R v Deana** - 2 Cr. App. R. 75. Equally too, there is no duty to first retreat before one can successfully rely on the defence of self defence. Thus, the failure to retreat when attacked and when it is possible and safe to do so, is not in and of itself, conclusive evidence that a person was not acting in self defence. It is simply a factor to be taken into account for the purpose of determining whether or not the defence has either been successfully established, or successfully refuted (as the case may be).

[54] The next legal issue to be considered as regards the defence of self defence which has been raised in defence of the claim by the claimant for damages for assault, is firstly, who has the burden of proof in that regard? Secondly, who has the evidentiary burden? It is easiest to answer the latter question, first. Since it is the defendants who have raised the defence of self defence, there exists an evidentiary burden on them to bring forth sufficient evidence before this court in order to enable that defence to be considered for the purposes of this claim. There is no doubt, in my mind, that such evidentiary burden has been met by the defendants in respect of this claim. Accordingly, self defence is a very live issue in this claim.

[55] Insofar as the burden of proof is concerned, at common law, the legal position is that in civil cases, the burden of proof rests squarely on the defendant's shoulders in circumstances wherein the defence of self defence is raised. See: **Murphy on Evidence 11th ed.** [2009], at p.83 and **Ashley v Chief Constable of Sussex** – [2007] 1 W.L.R. 398.

[56] In Jamaica however, it can never be forgotten that **Section 33 of the Constabulary Force Act** requires that in order for a claim in tort to be successfully proven as against a police constable, the claimant must not only successfully prove the

commission of the relevant tort (wrong), but also, must prove that such tort was either committed maliciously, or without reasonable or probable cause. When civil claims in which the defence of self defence is properly raised on evidence led before the court, are being tried by a court in Jamaica, it is clear to my mind therefore, that since self defence, if able to be successfully relied on as a defence, undoubtedly would negate an allegation of malice, as well as any allegation of absence of reasonable or probable cause, for the commission of the relevant tort by a police constable, it must follow that, if a claim for tort is to be successfully proven against a constable in Jamaica, the statutory provision – **Section 33 of the Constabulary Force Act**, requires that the claimant disprove self defence. As such, in the case at hand, this court has taken the view that it is for the claimant to disprove the defence of self defence as raised by the defendants in response to the claim for damages for assault and that such burden to disprove (being the equivalent of the burden of proving that self defence should not avail the defendants), requires that the claimant disprove same, on a balance of probabilities. In the case at hand therefore, this court has determined and applied, that the burden of proof has rested on the claimant from the beginning until the end thereof, in respect of each and every aspect of his overall claim for damages, arising from that which he alleged, was the commission of various torts in relation to him, by the second defendant, whilst acting in the course of his duties as a police officer and thus, as a servant or agent of the Crown.

[57] There are still yet, other important pieces of evidence which have been taken careful note of by this court, for the purpose of these reasons for judgment. These are as set out in Latin numerals in this paragraph, immediately below:

(i) The second defendant testified that at the time when he stopped the claimant's vehicle, he did not, at that time, have any particular reason to believe that any threat then existed.

(ii) The second defendant testified that if there is no threat of harm or injury, there should not be a bullet in the chamber of any handgun being held by a police officer at that time.

(iii) When asked by the court as to what was the Jamaica Constabulary Force's use of force policy in April of 1999, the second defendant's response was – 'To use as much force as necessary to bring the situation under control and for protection of life and property.'

(iv) When asked by the court as to what was his objective when he shot at the claimant on that night, the second defendant's response was – 'To neutralize the threat.'

(v) The second defendant testified that before he saw the flashing metallic – appearing object in the claimant's hand, he already had a bullet in the gun's chamber and that the type of handgun which he then had with him and which he used to shoot the claimant, was a 9 mm. semi-automatic pistol.

(vi) The second defendant further testified that in order to have a bullet go into the chamber of that firearm which he had with him on that eventful night, one has to pull back the barrel of same and that, in doing that, that is, pulling back the barrel and thereby loading a bullet into that gun's chamber, you can then make that weapon safe by, 'having the hammer in the off cock position.'

(vii) Prior to the one to two seconds which he testified to, as being the period of time that elapsed between when he saw the flashing metallic – appearing object in the claimant's right hand and when he fired the gun which he then had in his possession, according to the second defendant, that gun was, even from then, (that being therefore, even prior to an alleged threat having first been recognized by the second defendant as existing), half – cocked and therefore, was not only then unsafe, but, contrary to required police procedure, there was also then, already a bullet loaded in that gun's chamber.

(viii) When asked by the court, just prior to the close of his testimony at trial, whether he thinks that there is any good reason behind the force's policy that he shouldn't, in the absence of any threat of personal harm or threat to personal safety, have a bullet loaded in the chamber of the type of weapon which he had in his possession on that fateful night, the second defendant responded – 'Yes. It would prevent accidental discharge of that firearm, or unnecessary shooting.'

(ix) When asked, during re-examination, as to why he turned on the police vehicle's flashing lights after the claimant's vehicle had overtaken the police vehicle which he was then the driver of, the second defendant responded – 'I was signalling the vehicle to stop

to detect any breach of the Road Traffic Act, or any other Act.' This specific answer, it should be noted, since given during re-examination, was therefore provided, in response to 'friendly' questioning of the second defendant, by defence counsel. His answer, as thus given to this court during re-examination, is directly contrary to his evidence-in-chief on the same point, as per the first sentence of paragraph 4 of his witness statement, wherein he stated in reference to the claimant's car – 'Based on intelligence gathered on this car, I signalled the car to stop by means of revolving light, horn and siren.'

(x) When asked, in cross-examination, whether he was one of those officers who carried his gun between his legs in his lap (this being a question which this court considered as relating to periods when driving or being driven in a vehicle), the second defendant answered casually – 'sometimes.' The next question then asked of the second defendant during cross-examination, was – 'On that particular night, isn't that where your gun was, in your lap?' Answer – 'Yes maam.'

(xi) When asked by the court as to which hand of the claimant did he see that flashing object in on that night, the second defendant answered – 'the right hand.' The court then next asked him which hand he had fired at, in trying to neutralize that threat (as he – the second defendant, had earlier described such). To that question, the second defendant's response was – 'I didn't actually aim. I was just firing in his direction.'

[58] From all of the evidence as given in this case, by the only two witnesses who testified, namely, the claimant and the second defendant, this court has no doubt, that at all material times on that eventful night, in relation to the claimant, the second defendant acted contrary to proper police procedures, contrary to law and at the very least, manifestly carelessly.

[59] This court so concludes because, firstly, this court accepts that the reason why the second defendant, using the police vehicle's horn, flashing lights and siren, signalled the claimant's vehicle to stop on that night, was because he wanted to determine whether any breaches of the Road Traffic Act, or any other Act were committed by the claimant. This was not, a lawful basis upon which the second defendant could have stopped the vehicle then being driven by the claimant, since at

that time, from the evidence which was provided to this court by the second defendant himself, it is clear that the second defendant did not, when he caused the relevant vehicle to stop, then have reasonable cause to suspect that an offence of any nature whatsoever, either had been committed, or was being committed by the claimant, either with the use of that vehicle, or otherwise. Thus, to this court's mind, the stopping of the relevant vehicle was, in and of itself, careless at the very least and perhaps even, worse yet, carried out in reckless disregard of the law. Whilst though, I take this as impinging negatively on the second defendant's credit as a police officer, this insofar as it goes towards showing, as did other evidence in this case, that the second defendant, from time to time, acted in disregard of well-established and undoubtedly, thoughtfully established, police procedures and also, of laws to which such police procedures may relate. For the purposes of this case though, I but do not wish to be considered as utilizing this judgment for making any reasoned judgment as to police personnel's powers of stop and search. Such a judgment would not be necessary for the purpose of a final adjudication being made in relation to this claim and accordingly, the legalities or illegalities of the stopping of the claimant's vehicle in this case, was never argued before the court by either counsel herein. This court will therefore go no further than already expressed, with respect to same.

[60] Following on the claimant's vehicle having been stopped, this court accepts the claimant's evidence that the police vehicle which the second defendant was then driving, dove up to and stopped parallel to the claimant's vehicle. I do not accept the second defendant's evidence that he stopped the police vehicle behind the claimant's vehicle, to the right of the claimant's vehicle's rear fender. This cannot be true, since if it were, how then could it have been, as both the claimant and the second defendant have testified, that when the claimant exited his vehicle, he was then directly facing the second defendant?

[61] In any event, having stopped the claimant's vehicle, it was incumbent on the second defendant to have said something to the claimant while he was exiting his vehicle, to inform him either not to move at all, or at least, not to exit his vehicle and to

keep his hands on the steering wheel, where they could thereby readily be seen. This is important, since otherwise, a regular civilian who is not used to potentially dangerous interaction with police personnel, would not likely be aware that if he puts his hand or hands near his waist, especially if he is then outside of his vehicle, he should then expect to be shot by the police officer who stopped him and his vehicle! It is all the more important also, bearing in mind that in the present case, the second defendant is clearly someone who does not, in general, believe in following proper police procedures designed for greater safety for others, as regards the use by police personnel, of firearms issued to them. Thus, the second defendant had a bullet loaded in the firearm chamber and the semi-automatic pistol half- cocked, even before he had recognized, as he has testified that he did, that any threat whatsoever, existed!

[62] It must be stated at this juncture, that this court readily recognizes that it is not reasonable, in all circumstances, to expect that police personnel, when stopping a vehicle on a road, will be able to be in a position whereby they can properly speak to the driver of that vehicle, without thereby putting themselves in danger, since, in order to do so they would likely, not only have to be in close proximity to, but likely also, in full view of that driver. As such this court believes that it would be prudent for all police vehicles to carry in them, a small portable loudspeaker. This would, to my mind, be a fairly cost effective way of not only assisting in the safety of police officers when stopping vehicles, but also, would assist in ensuring that when doing so, police officers can best ensure the safety of persons who wish to safeguard themselves and that such can be done in a reasonable and responsible manner. Regrettably, nothing such transpired in the events which have led to this claim.

[63] Having allegedly recognized, at least in his mind, that a threat existed, because the claimant, as alleged by the second defendant, reached towards his waist, whereupon the second defendant saw a flashing metallic – appearing object in his right hand, the second defendant then determined that he would fire the firearm which he then had with him, in order, ‘to neutralize the threat’ – this being the threat of the claimant endangering his (the second defendant’s) life. In firing at the claimant in such

a circumstance, what should a reasonable and responsible officer have done? To this court's mind, he should not, as he did, just have fired randomly towards the claimant. He should instead have, yes, tried to neutralize the threat, but should have sought to do so, using only such force as was reasonable. Random firing at someone's head and/or body in such circumstances as existed on the relevant night, even if the claimant's account of those circumstances as they allegedly existed in his mind at the material time, were to be accepted by this court as being truthful, cannot be taken as constituting a reasonable response to the threat which then allegedly existed to his life – in the mind of the second defendant. Instead, the right hand of the claimant should have been fired at by the second defendant, since it was allegedly the claimant's right hand which was specifically being utilized as the means to both pose and potentially carry out such alleged threat. Furthermore, when his right hand was allegedly seen by the claimant with the flashing metallic – appearing object in it, which he then considered as being a threat to his life, the next course to be taken by the second defendant, should have been to order the claimant to drop whatever was then in his hand. This clearly was not done. Remember, it is the second defendant's evidence, that he did not say anything at all to the claimant that night, until the point in time when, after the claimant had been shot and had run away from that scene, he later showed up, accompanied by relatives, at the Port Antonio Police Station.

[64] There is thus, overall, in this court's mind, even if the second defendant's version as to what he honestly believed to have been the threat which he faced from the claimant's actions on the relevant night, were to be accepted by this court, still no doubt whatsoever, that the claimant has proven his claim for damages for negligence with respect to the injury caused to the claimant as a consequence of his having been shot by the second defendant. This would be so because, even if this court were to accept the second defendant's assertion as to what was his honest belief at the material time, nonetheless, it is this court's considered opinion, that in response to such alleged perceived threat to his life, the second defendant acted negligently. In any event though, for reasons earlier provided, when considering the defence of self defence in the context of negligence, the defendant's honest belief is not a pertinent consideration.

Instead, it is the objective consideration of the prevailing circumstances, from the viewpoint of those who would have been directly involved with those circumstances at the material time, that ought to be first considered by the adjudicating tribunal. Thereafter, that adjudicating tribunal must consider whether, in response to how a reasonable person would have reacted to the then prevailing circumstances, the defendant acted in a manner which was reasonably appropriate, given those circumstances.

[65] This court, in any event, does not at all accept the second defendant's evidence that he ever perceived any threat whatsoever, to his life or safety, on the relevant night. Furthermore, this court accepts, from the evidence which it finds to have been proven on a balance of probabilities by the claimant, that the defence of self defence has been entirely disproven by the claimant and that what transpired in relation to the claimant, 'at the hands' of the second defendant on that fateful night, was undoubtedly, the tort of battery, committed negligently, or in other words, without either reasonable or probable cause.

[66] My considered view as to what transpired on the relevant night, as between the claimant and the second defendant, between the time when the claimant's vehicle was stopped by the second defendant and when the claimant, after having been shot by the second defendant, ran away from that location, is that from the time when he exited his vehicle, the claimant was facing the second defendant. The police vehicle which was then being driven by the second defendant had stopped, such that it was then parallel to the claimant's vehicle. Having stopped his vehicle, the claimant did not wait to hear anything from the second defendant. He got out of his vehicle in order to run away from there. He did so out of fear that he would have been arrested and detained on that night, since he was the driving both an unlicensed and uninsured motor vehicle and was then, also driving without a valid driver's licence. The claimant did though, before he had run away, see the second defendant with a gun in his hand. The claimant did not however, run away because he was then fearful that he would have been shot by the second defendant. He did not exit his vehicle with his hands in the air. Instead, as he

exited the vehicle, he quickly began to run away. It was during his initial attempt to run away, that he was shot by the second defendant and he was then shot in his upper left buttock.

[67] The defence counsel, at trial, during her oral closing submission, when asked by this court, whether she could offer any credible explanation as to how it was that the claimant was shot in his upper left buttock, quite properly conceded that she could offer no explanation for this, bearing in mind no doubt, that the evidence of the second defendant was that, at the material time when the claimant had exited his vehicle and thus, at the time when he fired the shot which hit and injured the claimant, he and the claimant were then, 'face to face.' It was when the claimant ran away and thereby turned his back towards the second defendant's face, that the second defendant, who was still then seated in the police vehicle decided, unfortunately for both he and the claimant, to shoot the claimant by firing one shot towards him. That shot did in fact enter the claimant's upper left buttock and thereby injured him, as a consequence of which he has, by means of this claim, claimed for damages (monetary compensation). I do not hold the view of the facts, that the claimant ran after having exited the vehicle, because he was then fearful of the infliction of a battery (unlawful use of force) upon his person, by the second defendant. Actually, the claimant testified that he had no fear at the time when he began walking away (as he alleged), after having exited his vehicle. After the claimant had been shot, I do accept though, the claimant's evidence as given, that he then ran away because he then feared that the second defendant would either kill him, or cause him further harm. Accordingly, I do accept that the claimant was assaulted by the second defendant at that stage.

[68] I find that said shooting of the claimant by the second defendant was committed without either reasonable or probable cause and unjustifiably and unlawfully and manifestly not either in defence of himself, or for that matter, for any lawful reason whatsoever. Police personnel have no legal right whatsoever, to shoot and injure a person who is running away from them and who, at that moment in time when shot, poses no threat to the safety of those officers, or anyone else.

[69] As such, it is this court's considered conclusion that the claimant has successfully established, on a balance of probabilities, his claim for damages for assault – as specifically claimed for, in the claimant's statement of case. Even though, in the claimant's statement of case, or in other words, his claim form and particulars of claim, he has not claimed specifically for damages for battery, nonetheless, this court is entitled to award damages for battery, since the nature of that battery – being the unlawful shooting of the claimant by the second defendant is set out in the claimant's statement of case and constituted, at all times, one of the main aspects of same. Accordingly, the defendants are not being taken by surprise.

[70] **Rule 8.7 (1) (a) and (b) of the Civil Procedure Rules (CPR)**, provides as follows:

> *'The claimant must in the claim form (other than a fixed date claim form) - (a) include a short description of the nature of the claim (b) specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled.'*

Based on **Rule 8.7 (1) (b)** in particular, as above – quoted, this court holds the view that the claimant should also recover damages for battery, even though the same was not specifically claimed for by the claimant.

[71] Based on this court's view as to what are the facts surrounding this claim, this court cannot award damages for negligence, which is an alternate claim being pursued by the claimant. If though, this court had been more inclined to accept, at least for the most part, the second defendant's version of the relevant events, nonetheless, for reasons earlier provided in this judgment, this court would have concluded that the first defendant is liable for damages for negligence. Since this court though, has not, for the most part, accepted the second defendant's version of events and instead has, to the contrary, at least to a much greater extent, accepted the claimant's version of events, in the circumstances, the claimant has proven his claim for damages for assault and battery. For reasons earlier provided though, this court has concluded the claimant has

wholly failed to prove his claim against either defendant, for either of the torts of trespass to goods, detinue or conversion.

[72] Before addressing another primary legal issue which must be adjudicated upon by this court in order to resolve this claim, which is the issue of the amount of compensation to be awarded to the claimant arising from the torts of assault and battery committed in relation to him, this court must, prior thereto, determine whether it is one or both of the defendants who ought, in law, to be held liable, based on the claim as filed, to the claimant for damages for assault and battery.

[73] There are two defendants in this claim. The first defendant is, according to paragraph 2 of the claimant's particulars of claim, sued by virtue of **Section 13 (2) of the Crown Proceedings Act** and as a representative of the Crown. In paragraph 3 of the said particulars of claim, it is contended that – 'The second defendant was at all material times a member of the Jamaica Constabulary Force in the employment of the Government of Jamaica and was at the material time acting in the execution of his duty.' In the defendants' defence, paragraphs 2 and 3 of the claimant's particulars of claim were, properly and understandably, admitted.

[74] Since therefore, it was alleged by the claimant, and at all times accepted by the defendants, that at all material times, the second defendant was acting in the execution of his duty as a member of the Jamaica Constabulary Force and thus, as an employee of the government of Jamaica at that time, there is no doubt in this court's mind, that the second defendant cannot be held personally liable arising from this claim. It is equally clear, that as alleged in the claimant's particulars of claim, the claimant is never alleged to have acted solely on his own behalf. Instead, it is alleged and indeed accepted that the second defendant was, at all material times, acting in the capacity of an employee of the Government of Jamaica. In the circumstances, if, as this court has determined, he had, while acting in that capacity, committed the torts of assault and battery in relation to the claimant and did so without reasonable or probable cause, he then did so, not while acting on his 'own behalf' – as the law understands such quoted term, but rather,

while then acting as a Crown 'servant'/employee. As such, the principle for joint and several liability does not arise in the case at hand. That principle could only have arisen and been applied by this court, if it had been alleged by the claimant that, at the material time, the second defendant had either been acting on his own behalf, or alternatively, as a servant or agent of the Crown. This is in fact how claims such as this, ought, as a general rule, to be particularized, in a circumstance wherein the claim is being maintained against both the Crown and the individual defendant whose actions are impugned. In the case at hand, the second defendant is not alleged to have, at the material time, acted on his own behalf. Accordingly, he cannot properly be held by this court, as being personally liable for either of the torts found successfully proven. Thus, all aspects of the claim as against the second defendant, fail. The claim for damages for assault, as against the Crown, as represented in this claim, by the first defendant, succeeds. For reasons already given, the same would apply as to the tort of battery. The first defendant is thus the only defendant held liable, in this claim, for the commission of those torts in relation to the claimant.

[75] This court must therefore now address the matter of damages or in other words, compensation to be awarded to the claimant, for assault and battery. In that regard, the special damages claimed for, in respect of the cost of medical report - $2,000.00 and registration fee - $100.00 and dressing- $130.00, have not been challenged and receipts pertaining to each of these expenses as were incurred by the claimant, were agreed on and admitted into evidence at trial. This court finds such special damages as claimed for in those respects, proven on a balance of probabilities. Two other receipts were admitted into evidence, by agreement between the parties, during trial. Those receipts were as follows: (i) Receipt from Dr. Carl Bruce, dated January 4, 2011, in the sum of $10,000.00 and; (ii) Receipt from Dr. Kenneth Williams, dated April 29, 2010 in the sum of $5,000.00. The claimant though, did not, at any time either during trial, or prior to the commencement of trial, seek the court's permission, or prior to case – management conference, amend his particulars of claim, to specifically claim for these two other expenses, in respect of which, there were receipts admitted into evidence at trial. It is undoubtedly, an accepted general rule of law and practice in Jamaica, that

special damages ought to be specially pleaded and specially proven. See: **Murphy v Mills** – [1976] 14 J.L.R. 119. In the case at hand, since the defendants' counsel had, at no time, taken issue with the admission into evidence at trial of those two receipts pertaining to expenses which were not at all set out by the claimant in his particulars of claim and since this court concludes that such expenses were undoubtedly in fact incurred by the claimant, the justice of this case demands that the claimant be compensated for same. Accordingly, in respect of out-of-pocket expresses incurred by the claimant as a consequence of the injury unlawfully inflicted upon his person by the Crown, this court awards same as special damages to the claimant in the aggregate sum of $17,230.00.

[76] Since this court has not determined either defendant as being liable for any trespass, detinue or conversion, in respect of the claimant's vehicle, the claimant's claim for special damages in respect of the claimant's seized vehicle, which was in the sum of $127,500.00, cannot be awarded. The claimant has wholly failed to prove that he is entitles to any damages at all, in that regard.

[77] The claimant has also claimed special damages for loss of earnings for the period of April 26, 1999 to December 31, 1999, at $7,800.00 per week, this being the aggregate sum of $280,800.00. The claimant has contended that he was employed as a mason at the material time. This court accepts his evidence in that respect. The claimant has further alleged that he was employed as a mason by one Mr. Dennis Brown, who is a contractor and that, up to the time of the relevant incident, he had been working with Mr. Dennis Brown for about four years and that at that time, in each week, he was earning $1,300.00 per day, for each of six days per week that he worked. Thus, he was allegedly earning as his net income at that time - $7,800.00. According to his evidence as given at trial and also, as a consequence of his having been shot in his upper left buttock, unable to work for a period of eight months.

[78] This court did not receive, through the claimant at trial, any documentary evidence in proof of his earnings. This court knows though, that this is by no means

unusual in Jamaica, particularly in a circumstance where one is working for a sole contractor in the capacity of a mason. The insistence on the production of documentary proof of earnings would, in such a circumstance as this, be pedantic and contrary to common-sense, in light of the customary Jamaican experience in similar circumstances. This is the exact approach adopted by Jamaica's Court of Appeal in a similar – type situation, in **Desmond Walters v Carlene Mitchell** – Supr. Ct. Civil Appeal No. 64/91 and **Attorney General of Jamaica and Tanya Clarke** – Supr. Ct. Civil Appeal No. 109/2002. In the only expert report which was admitted into evidence at trial, Dr. Kenneth Williams had, in that report which is dated April 14, 2005, made it clear that as a result of the injury received by him, the claimant suffered a partial disability of 25% and that such disability was only expected to have lasted for about three months.

[79] The other material aspects of said expert report, can be summarized as follows: The claimant was first seen at the Port Antonio Hospital on April 25, 1999 at 2 a.m. He was then noticed as having an entry wound to the upper lateral aspect of his left buttock. There was no exit wound and bleeding was minimal. A diagnosis of gunshot wound to the left buttock with little associated injury was made. An x-ray of the area confirmed the presence of a warhead (another name used to describe a 'bullet'), in the soft tissues of the left buttock. The claimant was treated with IV fluids, antibiotics, tetanus toxoid and started on a regular diet. He was admitted to the surgical ward and on April 29, 1999, he was discharged. On May 7, 1999, the claimant was seen in the Port Antonio Hospital's surgical clinic and he then complained of bleeding from the rectum over a five day period. Examination of him at that time though, then revealed, 'a fully healed gunshot wound' and vague lower abdominal tenderness. A diagnosis of colitis was 'entertained.' The claimant's last visit to the Port Antonio Hospital was on June 18, 1999 and at that time, he still complained of left lower quadrant pain. An ultrasound was then ordered however and that ultrasound did not reveal any physical cause for the claimant's complaints. Based on these findings therefore, it is entirely understandable and is accepted by this court that the claimant was, at all material times after his injury, temporarily and partially disabled, to the extent of 25% over a period of three months.

[80] This court therefore, does not accept the claimant's evidence that he was unable to work for a period of eight months. If may be that the claimant did not in fact resume work until eight months after he was unlawfully injured by the Crown –acting through its employee – the second defendant, but when he resumed work is not what this court must now consider. Instead, this court must determine when the claimant should have resumed work as usual and therefore, should have resumed earning as usual. That would have been, according to the material evidence in the form of Dr. Kenneth Williams 'expert report as dated April 14, 2005, by three months after April 25, 1999, or in other words, twelve weeks thereafter.

[81] The burden of proving the claimant's failure to sufficiently mitigate his loss, rested on the shoulders of the defendants, as has been laid down by the Privy Council, in **Geest Plc. Lansiquot** – [2002] 61 W.I.R. 212. The defendants' burden in that regard was, of course, entirely relieved by the claimant in this case, insofar as the claimant had, through evidence adduced on his own behalf, as set out in the said expert report, expressly proven that he had failed to sufficiently mitigate his loss, in returning to work after three months post injury, had expired.

[82] In the circumstances, this court concludes that the claimant is to be awarded special damages for loss of earnings, in the sum of $93,600.00 ($7,800.00 per week x 12 weeks). As such, this court awards special damages to the claimant in the aggregated sum of $110,830.00 ($93,600.00 and $17,230.00). This court accepts April 25, 1999, as being the date when the relevant incident occurred. As regards such date, this court does not accept the second defendant's evidence that the relevant incident took place on April 26, 1999 and also, does not accept it as being accurate, that the claimant was first seen at the Port Antonio Hospital, at 2 a.m. on April 25, 1999 (as the relevant medical report which was exhibited into evidence at trial has suggested). This court believes such date as given in that respect, to be an error of fact. In any event, even if such were evidence of opinion, it would be entirely open to this court, in its role as the tribunal of fact herein, to decide whether to accept or reject it, either in whole, or in part. See: **Jennifer Swamy v The State** – [1991] 46 W.I.R. 194.

[83] As regards general damages, this court takes into account that the claimant has undoubtedly endured pain and suffering and was temporarily disabled for a period of three months. The claimant has given evidence-in-chief, as per paragraphs 2 & 3 of his amended supplemental witness statement, to the effect that up to June 17, 2013 – which is the date when said amended supplemental witness statement of the claimant, was certified by him as being true, he was, even then, experiencing pain and suffering. This court though, as received no independent expert evidence from any doctor, which would serve to suggest that such alleged present pain and suffering has arisen as a consequence of the unlawful injury which was inflicted upon the claimant's person, by the Crown's employee, acting on the Crown's behalf. Actually, the expert evidence adduced on the claimant's behalf makes it clear that after three months post-injury, the claimant would have fully recovered from that injury. As such, this court has not taken into account, for the purpose of assessing the claimant's pain and suffering, the pain and suffering which were alleged being experienced the claimant, up until June, 2013.

[84] This court relies on the two cases as referred to it, by counsel, during closing submissions, for the purpose of assessing general damages. These cases are respectively – **Neville Howitt v Vanguard Security Co. Ltd and Andrew Francis** – Suit No. C.L.H. 194 of 1992; **Pansy McDermott v Garnett Lewis and The Attorney General** – Suit No. C.L.M. 328 of 1998. Other cases were cited to the court by counsel, as regards the sum to be awarded to the claimant as general damages in respect of this claim, but I will not refer to either of those other cases, as I do not believe that the facts of either such case, are sufficiently proximate to those of the claim at hand, to provide any useful guidance to this court, in this case.

[85] In the two cases cited in the last paragraph of this judgment, the claimants had suffered gunshot injuries to the leg, in one case and to the thigh, in the other case. In the **McDermott** case, the wound fully healed and left no permanent disability, but instead, did leave a scar. In the **Howitt** case, the claimant endured pain and suffering for seven years. In the **McDermott** case**,** the sum awarded as general damages, was

$418,853.00. Judgment in that that claim was awarded in May of 2002. In the **Howitt** case, the sum awarded as general damages, for pain and suffering and loss of amenities, was $400,000.00. In the case at hand, no sum is to be awarded as general damages for loss of amenities, this because, there exists no evidence from any medical expert which suffices to establish, on a balance of probabilities, that the claimant has in fact, lost any amenity. In the **Howitt** case, judgment was rendered on May 20, 1999. The Consumer Price Index (C.P.I.) in May, 1999 was: 49.542. Whilst the C.P.I in May, 2002, was: 61.6. The damages award in the **Howitt** case was made in May, 2002. Accordingly, the updated **McDermott** award, as at September, 2013, would be: $1,704,427.85, bearing in mind that the C.P.I. for August, 2013 (this being the last published C.P.I) is 201.6. The updated **Howitt** award is: $1,311,219.51.

[86] This court has discounted the award in the **Howitt** case, as updated, by 30%, bearing in mind that no award is being made in this claim, for loss of amenities and also, that in that case, the pain and suffering endured by the claimant was for a much longer period of time, than that endured by the claimant herein. By virtue of such discount, the sum remaining, would be: $917, 853.66.

[87] Also, this court has discounted the award as made in the **McDermott** case, as updated, by 20%, bearing in mind that no award for loss of amenities is being made as part and parcel of this court's award for general damages in respect if this claim. By virtue of such discount, the sum remaining would be: $1,363,542.28.

[88] Applying a median (average) of the updated awards as so discounted, this court determines that the sum which should be awarded to the claimant as general damages herein, is: $1,140,697.97. The claimant is entitled to interest on general damages, at the rate of 6%, with effect from April 25, 1999 and to interest on special damages, at the rate of 6% with effect from the date of service of the claim form and accompanying

particulars of claim, on the defendants, this being, according to this court's record – May 10, 2005. To reiterate, the sum awarded as special damages, is $110,830.00. Costs of claim are awarded to the claimant, as against the first defendant only, with such costs to be taxed if not sooner agreed. The claimant shall file and serve the Judgment Order.

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Hon. Kirk Anderson, J.