IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C L 2001 B 088

BETWEEN	**DEVON BRYAN** (Administrator of the estate Ian Bryan, Deceased)	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**DEFENDANT**

Mrs. Antonette Haughton-Cardenas for Claimant

Mr. Kevin Powell instructed by the Director of State Proceedings for Defendant

Heard: 5th April and 29th June 2007

Sinclair-Haynes, J

On June 6 1996, Ian Bryan (the deceased) attended a fete at the Donald Quarrie High School. As he danced, he held his friend, Damian Nelson's walking stick. A young lady soon joined him. This period of mirth was to end fatally.

Portentously, an argument with a man interrupted their dancing. However, he resumed dancing and expressed the view that everything was alright. Sometime later, the man with whom he argued apparently stealthily approached him from behind, stabbed him and ran off. Ian chased him. The man ran past the police officers who were securing the gate. Ian continued what turned out to be a fatal chase. Upon nearing Constable Murray he, Constable Murray, pointed a gun at him and told him to stop. He stopped, but alas, the officer discharged his firearm and Ian fell backwards. Sadly, he was later pronounced dead at the hospital.

The Claimant's claim

The administrator of the deceased's estate instituted proceedings against the defendant to recover damages for assault and battery, and alternatively, damages for negligence pursuant to the Law Reform (Miscellaneous Provisions) Act.

The claimant further claims that the shooting was without reasonable and probable cause. Exemplary damages are also sought.

The Claimant's version of the facts

The claimant's witnesses testified that Ian Bryan held a walking stick in his hand and that he complied with the officer's command. Upon being shot, he immediately got up and enquired of the officer why he had shot him and if he had not seen that a man had stabbed him and he was chasing him. Ian fell backwards. Constable Murray wept and enquired where he was shot.

A crowd gathered and shouted at the officer. The officer offered to assist Ian to the hospital. Ian was placed into a truck. The officer also went to the truck. However, the crowd became hostile and began throwing missiles at the officer. The officer then pointed his gun at the crowd and asked "Who next?" Police officers fired shots in the air in order to disperse the hostile crowd.

The Defence

The defendant's version of the facts is that the deceased ran towards Constable Murray with a knife raised in his hand. Constable Murray ordered him to stop but he continued to run

towards the officer. Fearing for his life, the officer pulled his firearm and shot the deceased who fell.

The defence contended that the officer was neither negligent nor malicious. Rather, he acted in self defence and the force employed was no greater than was necessary. The defence also contended that the deceased assaulted Constable Murray.

Submissions by Mr. Kevin Powell on behalf of the defendant

Mr. Powell submitted that the claimant's witnesses, Shawn Bryan and Damian Nelson are unreliable for the following reasons:

1. Shawn Bryan's evidence is that he saw no pushing between the unknown assailant and the deceased. Damian Nelson stated that there was pushing.

2. Shawn Bryan stated that no one ran; the crowd shifted. Damian Nelson stated that there was a chase.

3. Damian Nelson stated that the deceased dropped the stick when he was shot whilst Shawn Bryan stated that the deceased fell.

4. Shawn Bryan stated that he was the first person to reach the deceased whilst Damian Nelson testified that he was right beside him and it was he who lifted him after he fell and hit his head.

5. Shawn Bryan stated that three shots were fired while Damian Nelson's evidence was that only one shot was fired.

Mr. Powell also submits that because the witnesses were drinking beers and dancing for several hours before the incident, their powers of observation and recollection were diminished.

He further contends that Constable Murray had reasonable and probable cause to shoot the deceased and is neither liable for assault and battery or negligence because he was put in fear by the deceased. Constable Murray's account is that he saw the deceased running towards him with a knife in an upraised position. He fired his gun because the deceased disobeyed his command and in those circumstances, his actions were reasonable. Further, there is also no proof of malice. The evidence indicates that the officer was regretful. He wept and assisted the deceased to the vehicle.

Mr. Powell further submits that in his certificate, the doctor stated that the cause of death was a result of shock and loss of blood from both injuries. Relying on **Wilsher v Essex Area Health Authority** [1998] 1 All ER 871, he posits that the claimant must prove specifically which injury resulted in the death of the deceased.

Submissions by Mrs. A Haughton-Cardenas

Mrs. Haughton-Cardenas submits that the officer could not have acted in self defence. The deceased had a walking stick that he could not have held high because he was injured in his back. There was no blackening around the gunshot wound. Thus, the deceased could not have been very close to the officer. It should follow that the deceased was not close enough for the Constable to have reasonably feared for his life.

First Issue - whether the shooting was an act of self defence, accidental or negligent.

Lord Griffiths in **Beckford v the Queen** (1987) 24 JLR 242 outlined the law regarding self defence with such clarity that I shall quote extensively from his judgment at page 249:

> "The common law has always recognised as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.
>
> It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fails to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

According to Constable Beurille Robinson, the sole eyewitness for the defence, the deceased held a knife in an upraised position. However, the witnesses for the claimant stated that he had a walking stick in his hand. Assuming that the defendant indeed held a knife, it would have been reasonable for the officer to believe that he was being attacked. And if the deceased disobeyed his order to stop, the officer would have been justified in shooting. Even if he held the walking stick in an upraised position and the defendant mistakenly but honestly felt it was a lethal weapon or a weapon that could cause him serious bodily harm he would have been entitled to shoot. He was under no duty to retreat or to wait for his assailant to strike the first blow. The defendant must, however, have held an honest belief.

Lord Griffiths in **Beckford v the Queen** continued as follows at page 249:

> "If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine

belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully. Their Lordships therefore approve the following passage from the judgment of Lord Lane in Gladstone Williams at p.281 as correctly stating the law of self-defence:-

> 'The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not.'

In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it."

The virtual defendant, Constable Murray has not testified. There is therefore no evidence that he honestly felt he was being attacked or that another person was being attacked. The pertinent question is whether his action was reasonable or whether he was negligent. Can it be deduced from the circumstances that Constable Murray was indeed in the throes of danger and hence responded reasonably? I will now examine the evidence carefully in order to test the

surrounding circumstances so as to determine on a balance of probabilities whether the shooting of the deceased was reasonable.

Assessment of the evidence

Having listened to the witnesses and having observed their demeanour, I find Damian Nelson to be most forthright and on a balance of probabilities most believable. He testified that Ian ran and he caught up with him. He could actually touch him. The officer told Ian to drop the stick and he told him it was a walking stick, showed it to the officer and dropped it. He told the court that Ian never held the stick up in the air as if to move towards the officer. In a split second he heard an explosion. He held his head down and partially stooped beside Ian. Ian fell. He recounts that Ian said something and fell again. He caught Ian the second time. He insisted that the walking stick was on the ground at the time Ian was shot.

Kevin Bryan's evidence is that after he, Ian, was stabbed, some people were 'shifting.' No one ran towards the exit. It was only Ian and the man who stabbed him who ran to the exit. However, after Ian was shot, people began running. It was, however, Damian's testimony that after the stabbing incident, persons were "running up and down". The court does not deem that a significant discrepancy. Shawn ran off immediately after witnessing his brother, Ian Bryan, being stabbed. His attention might have been concentrated towards his brother and his brother's assailant. In any event, on Shawn's evidence, there was movement by the people after the stabbing occurred. However, I accept Damian's evidence that after the stabbing, persons not only shifted but were running. Damian was also supported by Constable Beurille Robinson who testified that he observed persons running from inside to the main entrance. On a balance of probabilities I accept that there was some movement by the crowd after Ian was stabbed.

It was also Shawn's evidence that the deceased was almost touching the officer when he stopped. Damian, however, testified that he was about two arms lengths away when he was shot. Constable Robinson's evidence is that Ian was about nine to ten feet away when he was shot. I reject Shawn's evidence in that regard as being unreliable. Indeed, my rejection of his evidence is supported by the post mortem report which stated that there was no blackening present around the deceased's wound. Absence of blackening indicates that the deceased was shot whilst he was at least two feet away from Constable Murray.

Shawn testified that he heard the conversation between the officer and Ian whilst he, Shawn, was about ten feet away. On a balance of probabilities I reject Shawn's evidence in this regard because music was playing. It was a public dance and hence it is not unreasonable to assume that the music was being played quite loudly.

It was Shawn's evidence that after his brother was shot he was the first person to hold him. In fact, Shawn testified that he was outside when the shot was fired. However, Damian's evidence was that he actually caught the deceased who fell into his arms. I accept Damian as a more reliable witness.

Shawn's testimony is that he did not see any earlier pushing between the deceased and his unknown stabbing assailant. However, Damian, who was standing about six feet from the deceased, stated that there was some pushing and that he then went over to where the men were pushing each other. However, it was Shawn's evidence that he, Shawn, was 20 feet from the deceased and his assailant at that point. It was also his evidence that the dance was very packed. Damian's vantage point was therefore superior to Shawn's in the circumstances. I therefore

accept Damian as a more reliable witness than Shawn. Wherever his evidence conflicts with Shawn's I accept his evidence and reject Shawn's.

I had the opportunity to observe Constable Beurille Robinson's demeanour and to listen to him as he testified. He was not very forthright and did not inspire confidence. His evidence is that he saw Constable Murray pull a gun from his waist but he never saw him discharge the gun. He did not even see which direction the explosion came from. He does not know who fired the shot. Further, in cross-examination he said upon hearing the explosion, the accused stopped immediately and he saw him fall to the ground and told the officer that a man had just stabbed him. Ian turned and showed Constable Murray the stab wound. Whilst in conversation with Constable Murray, Ian fell. It is his evidence that Constable Murray was about five to ten feet away. According to him, he was looking in the direction of Ian and Constable Murray. He testified that the deceased had a knife which he held in an upraised position. However, under cross-examination he testified that it 'happened quickly, in seconds,' yet, he claims to have seen the deceased in conversation with Constable Murray before he fell. In the circumstances I do not accept his evidence on a balance of probabilities that he never saw where the explosion came from.

My lack of confidence in the officer's evidence was further compounded by the inordinately long delay upon being asked if the deceased refused to drop the knife. I reject his evidence that the deceased held a knife in an upraised position and was advancing towards Constable Murray. I reject his evidence that the deceased refused to stop.

I accept that it was a walking stick which the deceased held. The forensic report stated that a walking stick was allegedly taken from the deceased. This information would have come

from the police. Yet, Constable Robinson emphatically stated that he never had a walking stick. The forensic report also stated that a knife was also handed over for testing. There was no allegation made by the police that that knife was taken from the deceased. It should be noted that blood was found on the knife which was of the same blood group as that found on the shirt of the deceased. No blood was found on the walking stick.

Mrs. Haughton-Cardenas submits that the knife which was referred to in the forensic certificate could have been the knife used by the deceased's assailant. She submitted that in the circumstances it should have been tested for finger prints. On a balance of probabilities I accept Mrs. Haughton-Cardenas' submission that the knife could have been the knife which was used to inflict the stab wound on the deceased by his assailant, since the blood on the knife was human blood of the Group A which was the same as that found on the shirt of the deceased. I accept the evidence of the witnesses for the claimant that Ian never had a knife. I reject the evidence that he held a knife in an upraised position.

Constable Robinson was vascillatory. At one point he testified that Constable Murray and citizens took the deceased outside to the vehicle and later he said citizens assisted him. Soon after he said a man he did not know took him outside. His various versions of such a simple matter engender grave uncertainty as to his reliability and credibility.

First Issue

Alderson B in **Blythe v Birmingham Water Works Co.** (1856) 11 Ex 781 at page 784 defined negligence as follows:

> "Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct

> of human affairs would do, or doing something which a prudent or reasonable man would not do."

There is no evidence from the officer that he honestly believed that he was being attacked. The surrounding circumstances do not lead me to believe that Constable Murray could honestly have believed he was being attacked. I accept on a balance of probabilities that the deceased was running with a walking stick. He was told to stop and obeyed, but was shot by the officer. Constable Murray was not in imminent danger.

I appreciate that the prevailing circumstances in our society that of utter lawlessness on the part of some of our citizens, require police officers to be vigilant in order to protect their lives and the lives of others. Nevertheless, that fact does not remove from police officers the responsibility to act in a manner that a prudent and reasonable man would in the circumstances. I find that Constable Murray discharged his firearm in circumstances in which he had ample time to assess the situation but negligently failed to do so. In the circumstances, the officer discharged his firearm hastily, carelessly and without reasonable and probable cause.

Second Issue - whether the claimant has failed to show that the gun shot wound was the cause of the deceased's death

I will now examine Mr. Powell's submission that the claimant's claim must fail because the deceased death could be attributable to the stab wound; that the deceased died as a result of the gun shot wound and not the stab wound. In support of this proposition, he relied on **Wilsher v Essex Area Health Authority** [1988] 1All ER 871.

The Law

The relevant law for consideration is that of causation. In **Leyland Shipping Company Ltd. v Norwich Union Fire Insurance Society Limited** [1918] AC 350, at page 369 Lord Shaw of Dunfermline stated the governing principle to be applied:

> "Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause."

Mr. Powell submitted that that the claimant's claim must fail because the court is unable to determine which wound resulted in the death. Mr. Ian Powell's submission has not found favour with the court. The post mortem certificate reveals that "death was due to hypovolemic shock as a result of gun shot and stab wounds to the chest. Hypovolemic shock is defined by the **Webster's New World Dictionary** as shock due to a decrease in blood volume. This is the number one cause of shock. It can be due to loss of blood from bleeding, loss of blood plasma through severe burns or dehydration.

The evidence is that both stab and gun shot wounds caused his death. The court is of the opinion that the case of **Wilsher** is distinguishable. Mr. Powell graciously conceded.

In **Wilsher v Essex Area Health Authority**, the plaintiff, a premature infant was given excess oxygen as a result of a catheter which was inserted twice in his vein instead of his artery. The plaintiff became blind in one eye and almost totally blind in the other.

His blindness could have been caused by excess oxygen as a result of the negligent insertion of the catheter. However, it could also have been caused by five other conditions which had afflicted the plaintiff. The plaintiff failed to conclusively prove that the excess oxygen had caused or materially contributed to the plaintiff's condition. The House of Lords held that where the plaintiff's injury could have been attributed to more than one possible cause including the defendant's negligence, the plaintiff retained the burden of proof to establish that the defendant's negligence resulted in his injury. In that case the defendant was unable to discharge the burden of proof on a balance of probabilities that the defendant's breach of duty caused or materially contributed to his injury.

In the instant case, the forensic certificate stated that death was as a result of both injuries.

Bonnington Castings Ltd. v Wardlaw and Nicholson v Atlas Steel Foundry & Engineering Co. Ltd. [1956] 1 All ER 615; [1957] 1 All ER 776 1957 SC (HL) 44 settled the principle that the plaintiff must establish on a balance of probabilities that the cause of death was due to the act or default of the defendant [That principle was applied in the **Wilsher** case].

Even if the degree of contribution has not been established, it cannot be seriously argued that the gun shot wound to the deceased did not substantially contribute to his death although the stab wound was also a cause.

The facts of **Bonnington Castings Ltd v Wardlaw** are instructive. The pursuer was exposed by his employer to invisible particles of silica dust from two sources. One source that is, pneumatic hammers was considered an innocent source because the pursuer could not

complain that his exposure involved any breach of duty by his employers. The second source (swing grinders) arose as a consequence of the employer's breach of duty.

Lord Reid stated at pages 617 and 618:

> "The Lord Ordinary and the majority of the First Division have dealt with this case on the footing that there was an onus on the defenders, the appellants, to prove that the dust from the swing grinders did not cause the respondent's disease. This view was based on a passage in the judgment of the Court of Appeal in *Vyner v Waldenberg Bros., Ltd.* ([1945] 2 All ER 547 at 549, [1946] KB 50 at 55) per Scott, L.J.:
>
> > "If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that the principle lies at the very basis of statutory rules of absolute duty."
>
> ...Of course the onus was on the defendants to prove delegation (if that was an answer) and to prove contributory negligence, and it may be that that is what the Court of Appeal has in mind. But the passage which I have cited appears to go beyond that and, in so far as it does so, I am of the opinion that it is erroneous. It is seems obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury."

Lord Tucker said of Scott L. J.'s dictum in **Vyner v Waldenberg Bros Ltd.:**

> "... I think it is desirable that your Lordships should take this opportunity to state in plain terms that no such onus exists unless the statute or statutory regulation expressly or impliedly so provides, as in several

> instances it does. No distinction can be drawn between actions for common law negligence and actions for breach of statutory duty in this respect. In both, the plaintiff or pursuer must prove (a) breach of duty, and (b) that such breach caused the injury complained of (see *Wakelin v London & South Western Ry. Co.* (1886) App Cas 41), and *Caswell v Powell Duffryn Associated Collieries, Ltd* [1939] 3 All ER 722, [1940] AC 152)). In each case, it will depend on the particular facts proved, and the proper inferences to be drawn therefrom, whether the respondent has sufficiently discharged the onus that lies on him.'

Lord Keith said ([1956] 1 All ER 615 at 621, [1956] AC 613 at 625):

> 'The onus is on the respondent [the pursuer] to prove his case, and I see no reason to depart from this elementary principle by invoking certain rules of onus said to be added on a correspondence between the injury suffered and the evil guarded against by some statutory regulation. I think most, if not all, of the cases which professed to lay down or to recognise some such rule could have been decided as they were on simple rules of evidence, and I agree that *Vyner v Waldenberg Bros.*, Ltd ([1945] 2 All ER 547, [1946] KB 50), in so far as it professed to enunciate a principle of law inverting the onus of proof, cannot be supported.'

Viscount Simonds and Lord Somerville agreed.

Their Lordships concluded, however, from the evidence that the inhalation of dust to which the pursuer was exposed by the defender's breach of statutory duty had made a material contribution to his pneumoconiosis which was sufficient to discharge the onus on the pursuer of proving that his damage was caused by the defenders' tort.

In the instant case, the doctor's statement in the forensic certificate that the deceased died as a result of both wounds has sufficiently discharged the onus which rests with the claimant that the gun shot wound materially contributed to the death of the deceased.

I am fortified in my view by the statement of Lord Bridge of Harwich in **Wilsher** at 879:

> "A distinction is, of course, apparent between the facts of *Bonnington Castings Ltd v Wardlaw*, there the 'innocent' and 'guilty' silica dust

particles which together caused the pursuer's lung disease were inhaled concurrently and the facts of *McGhee v National Coal Board* where the 'innocent' and 'guilty' brick dust was present on the pursuer's body for consecutive periods. In the one case the concurrent inhalation of 'innocent' and 'guilty' dust must both have contributed to the cause of the disease. In the other case the consecutive periods when 'innocent' and 'guilty' brick dust was present on the pursuer's body may both have contributed to the cause of the disease or, theoretically at least, one or other may have been the sole cause. But where the layman is told by the doctor that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in *McGhee's* case."

In support of this view, I refer to the following passages. Lord Reid said 1 WLR 1 at 3 - 4):

> 'The medical witnesses are in substantial agreement. Dermatitis can be caused, and this dermatitis was caused, by repeated minute abrasion of the outer horny layer of the skin followed by some injury to or change in the underlying cells, the precise nature of which has not yet been discovered by medical science. If a man sweats profusely for a considerable time the outer layer of his skin is softened and easily injured. If he is working in a cloud of abrasive brick dust, as this man was, the particles of dust will adhere to his skin in considerable quantity and exertion will cause them to injure the horny layer and expose to injury or infection the tender cells below. Then in some way not yet understood dermatitis may result. If the skin is not thoroughly washed as soon as the man ceases work that process can continue at least for some considerable time. This man had to continue exerting himself after work by bicycling home while still caked with sweat and grime, so he would be liable for further injury until he could wash himself thoroughly. Washing is the only practicable method of removing the danger of further injury. The effect of such abrasion of the skin is cumulative in the sense that the longer a subject is exposed to injury the greater the chance of his developing dermatitis; it is for that reason that immediate washing is well recognised as a proper precaution.'

He concluded:

> "The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why that is so. Plainly that must be because what happens while the man remains

unwashed can have a causative effect, although just how the cause operates is uncertain. I cannot accept the view expressed in the Inner House that once the man left the brick kiln he left behind the cause which made him liable to develop dermatitis. That seems to me quite inconsistent with a proper interpretation of the medical evidence. Nor can I accept the distinction drawn by the Lord Ordinary between materially increasing the risk that the disease will occur and making a material contribution to its occurrence. There may be some logical ground for such a distinction where our knowledge of all the material factors is complete. But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury.'

Lord Simon said ([1972] 3 All ER 1008 at 1014, [1973] 1 WRL 1 at 8):

'But *Bonnington Castings Ltd. v Wardlaw and Nicholson v Atlas Steel Foundry & Engineering Co. Ltd.* establish, in my view, that where an injury is caused by two (or more) factors operating cumulatively, one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so concurrently or successively.'

Our Court of Appeal in **Administrator General (Administrator of the estate of Moses Maragh, Deceased) v Alcoa Minerals Inc. Ja. and PAHC Engineering Ltd.,** 26 JLR 47 considered as settled, the principles enunciated in **Bonnington Castings Ltd., v Wardlaw and Nicholson and Wilshire**.

In that case above, **Maragh** died whilst engaged in work at the premises of the defendant Alcoa Minerals: the said defendant admitted he was an employee. The deceased was working more than six feet above the ground on Alcoa's premises. The deceased was found dead on the

floor of the premises. A witness for the appellant testified that he was last seen sitting on the pipe adjusting the hangers on the said pipe. He was not wearing his safety belt and there was no scaffolding. There was no witness who actually saw Mr. Maragh fall. The applicant was unable to prove that it was the defendant's negligence or breach or duty that caused his death.

Ian Bryan sustained two injuries to his chest, a stab wound and a gun shot wound. There is no evidence as to which injury was more severe. Dr. Bhatti stated in both the post mortem report and the death registration form that he died as a result of hypervolemic shocks as a result of both injuries.

The post mortem certificate states as follows:

> "Firearm entry wound .... ins. in diameter in 3 RICS in RAAL situated 53 ins. from toes and 6 ins. from midline of the body. Skin surrounding the wound was not burnt blackened or tattooed. On dissection projectile was seen to pass through intercostals space and lower lobe of right lung. Projectile was seen embedded under skin at T 12 level on right side of back ½" from midline projectile recovered was a bullet handed over to police."

With regards to the stab wound the forensic certificate stated:

> "Stab wound 1"x ½" on midial baeder of scapular situated 56" from toes and 2.5" from midline of the body. It was seen to pass through 3rd RICS and upper lobe of right lung. It was about 2.5" deep and was directed downward, forward and medially."

In the circumstances it is just and equitable to apportion damages equally between the defendant and the unknown assailant. I am fortified in my view by the decision of our Court of Appeal in the case of **Attorney General and Evelyn Simpson (Substituted for Harold Simpson by order dated February 16, 2004) and Joseph Thorpe and Derrick Russell and Estate: Ernest Clarke (Represented by the Administrator General, by Order of the Court**

dated 24th September 2002) SCCA No. 116/04 delivered 22nd June 2007. In that case, Mr. Harold Simpson was a victim of two motor vehicle accidents on the same day. The first accident involved a motor bus and a motor car driven by Mr. Simpson. As a result of that accident he sustained injuries. Whilst Mr. Simpson was being conveyed to the hospital in an ambulance, the second accident occurred. Ill-fatedly, the ambulance collided with a vehicle causing the ambulance to overturn. Consequently, the stretcher on which Mr. Simpson was placed was not secured properly and became dislodged. Mr. Simpson sustained further injuries. Harris J. A. was of the following view:

> "The learned trial judge also held that of the 50% apportionment of liability imposed on Mr. Clarke and the Attorney General, a contribution of 60% of that 50% should be paid by the Attorney General. It appears to me that the learned trial judge erred in this regard as the imposition of a 60% of 50% contribution is disproportionate."

She continued at page 17:

> "She held that the Attorney General is liable for 60% of one half of the assessed damages. As I pointed out earlier, the extent of the apportionment to which the Attorney General should contribute as stated by the learned trial judge is incorrect. The Attorney General and Mr. Clarke had materially contributed to Mr. Simpson's injuries and resultant disabilities. It is not possible to definitively establish what injuries emanated from their negligence. So far as the apportionment of contribution on the part of the Attorney General is concerned, it would be just and equitable that 50% of the general damages be shared equally between the Attorney General and Mr. Clarke's estate."

Pain and Suffering

This is a claim pursuant to the Law Reform (Miscellaneous Provisions) Act. Section 2 (1) of the Law Reform Miscellaneous Provisions) Act states:

> "Subject to the provisions of this section, upon the death of any person after the commencement of this Act, all causes of action subsisting against

or vested in him shall survive against, or as the case may be for the benefit of his estate."

It is axiomatic that the personal representative of the deceased is entitled to recover damages that the deceased could have recovered and which were a liability on the wrong doer at the date of death. (See **Rose v Ford** (1937) 3 All ER 259)

Ian Bryan succumbed to his injuries shortly after they were inflicted. After the infliction of the gun shot wound he spoke to the officer. Both Shawn and Damian testified that he was alive up to the point he arrived at the hospital. Damages for pain and suffering must be confined to the few hours he remained alive. The sum awarded cannot be more than a nominal amount (see **Rose v Ford** and **Inez Brown (near relation of Paul Andrew Reid deceased) v David Robinson and Sentry Service Co. Ltd.** P C appeal no. 27/2004 dated 14th December 2004.

An award of $50,000.00 was made in October 2004 in the case of **Elizabeth Morgan v Enid Foreman and Owen Moss** HCV 0427 2003. That complainant survived for a day. However, he had a very limited degree of consciousness. Applying a CPI of 2495.3 for June 2007 and 2482.6 for October 2004, One Hundred Thousand Dollars ($100,000.00) translates to $125,879.00 which is rounded at $130,000.00. The claimant in the instant case survived for a shorter period, however, he was conscious.

In the circumstances, the sum of $130,000.00 is a reasonable figure for pain and suffering. That figure must be apportioned equally between the unknown assailant and the defendant. The defendant is therefore liable to pay the claimant the sum of $65,000.00 with interest at 6% per annum from the date of service to the 21st June 2006 and thereafter at 3% per annum to the 26th June 2007.

Loss of Expectation of Life

It was exhorted in **Rose v Ford** that "a very moderate figure should be chosen," as this head of claim does not really justify a large award. In that case in the year 1937, the House of Lords reduced an award of £1,200.00 to £200.00 for an infant.

In the case of the **Administrator General for Jamaica (Administrator for the estate of Dereck Grant deceased) v The Shipping Association and Jeffery Gentles and Edgar Morris Brown,** an award of $2,000.00 was made on the 11th November 1983. On the 30th June 1985 in the case of **Fakhourie (Kathleen) v Linden Green and the Attorney General** 22 JLR 353, **Bingham** J (as he then was) in applying the principle enunciated in **Benham v Gambling** noted at page 356 that the figure ought to take into consideration the continuing 'slide in the value of the local currency.' He increased the sum from $2,700.00 which was awarded by Ellis J in **Wensley Johnson v Selvin Graham and Another** (1983) 20 JLR to $3,000.00. In November 1988, an award of $3,000.00 was made in the case of **Rhona Hibbert v the Attorney General**. The Court of Appeal in 1990 in the case of **Clarendon Parish Council and Stanley Ewan v Junie Gouldbourne (Administratrix of the estate of Earnold Gouldbourne)** (1990) 27 JLR regarded the sum of $3,000.00 as being the conventional figure. However, approximately twelve years after Justice Dukharan in **Odemay Bartley v Errol Walters and Another** CL 1999 B226 unreported, awarded the sum of $70,000.00. Today that sum translates to $118,984.88 applying the CPI of 1468.01 for February 2002 and a CPI of 2495.3 June 2007.

A perusal of the English Authorities cited in (**Kemp and Kemp the Quantum of Damages)** Volume 3 for the period 1983 to 1991, the British Courts considered the sum of £1500.00 as the conventional sum for loss of expectation of life. Applying an exchange rate

$143.30 to £1 translates to $214,950.00. Seventeen years have elapsed since the Court of Appeal stated $3,000.00 was the appropriate conventional figure and 16 years since the British Court awarded £1,500.00. It should be noted that this head of damage has been abolished in England. The conventional figure, however, must be a moderate figure which ought to take devaluation into consideration; it is not a nominal one. Considering the massive devaluation in the Jamaican dollar, a sum of $250,000.00 can be considered a moderate figure.

In the circumstances an award of $250,000.00 is made. This sum is to be apportioned equally between the defendant and the unknown assailant. The defendant is therefore liable to pay the claimant the sum of $125,000.00.

The Lost Years

The deceased was 20 years old at the time of his death. He was employed as an assistant steel man. He earned approximately $20,000.00 per month. Kevin Powell has urged the court to apply a multiplier of 14 while Mrs. Haughton-Cardenas has argued that 16 is an appropriate multiplier. In **Gammell v Wilson** [1981] 1 All ER 578, the English Court of Appeal considered a multiplier of 16 to be appropriate for a 16 year old boy. In the case of **Elizabeth Morgan v Enid Foreman and Owen Moss** HCV 0427 2003 delivered on the 15th of October 2004 I applied a multiplier of 16 for a 16 year old boy who intended to enter the building industry. The Court of Appeal in **Maurice Francis** which was referred to in **Ursula Khan's Recent Personal Injury Awards Made in the Supreme Court Volume 5** approved a multiplier of 15 for a 22 year old apprentice tailor. The occupation of steel man is more hazardous than that of a tailor. However, Ian Bryan was two years younger. In the circumstances I consider 14 a reasonable multiplier.

His monthly income of $20,000.00 multiplied by 12 months equals $240,000.00 which was his annual income. The annual tax threshold is $115,000.00 and must be deducted from his annual income. Upon that deduction he was left with $125,000.00. From this $125,000.00, Income Tax of $33,750.00 must be deducted. The remaining figure was $91,250.00. To this figure, the sum of $115,000.00 must be added. His net annual income is therefore $206,250.00 multiplied by 14 equals $2,887,500.00. No evidence was elicited as to the deceased's expenses and what contribution if any he made to the household. The Court of Appeal in the case of the **Jamaica Public Service Co. Ltd v Elsada Morgan** 23 JLR 143 was of the following view which was expressed by Carey J A at page 143.

> "The experience in the United Kingdom has plainly led the courts to adopt this mathematical formula. But we are not dealing with English conditions in this jurisdiction and I would be slow until we had gained more experience in this field to adopt a formula suited to English conditions but not yet tested in the Jamaica milieu. We have no statistical accumulation of data in this country to show what percentage of salary or wages, young apprentices spent on themselves, or for that matter settled married men with families. Plainly we have not yet arrived at a percentage to which the courts may resort as is suggested in the case cited."

I am mindful of the view expressed by the Court of Appeal. However in the absence of any evidence, I am obliged to estimate a sum which would represent his probable living expenses. In the case of **Gammell v Wilson** substantial evidence as to the deceased's way of life was presented to the judge from which he was able to assess the deceased's probable living expenses, both for the immediate future and in the longer term. The trial judge was of the view that the deceased who was 15 years old would have spent two-thirds of his income whilst he remained at home and three-quarters after he left home. The House of Lords did not interfere with the judge's finding.

In **Wesley Johnson v Selvin Graham and Another** (1983) 20 JLR 124 the deceased was 19 years old. She was a student but she worked during the holidays and on Saturdays. Evidence was elicited that she contributed two-thirds of her earnings to her mother and brother. In the case of **Elizabeth Morgan**, the 16 year old deceased was still a student. There was evidence that he would have pursued studies in building technology. I was of the view that immediately after his graduation he would have remained at home and would have spent two thirds of his income on himself. He would have graduated at 18. I also surmised that he would have remained home for four years after his graduation. Thereafter on a balance of probabilities, he would have left home and would probably spend five-sixths of his earnings on himself.

In the instant case, the deceased resided at home at the time of his death. This evidence was derived from the post mortem report and his death certificate. No evidence was adduced by Mrs Haughton-Cárdenas as to how the deceased's income was spent. In the circumstances, I am forced to assume that he would have spent about one-third on himself and two-thirds on his estate. An error was made in calculating this head of damages which Mrs Haughton-Cárdenas has agreed. The equivalent fraction for one-third should have been applied in the calculation; however, one-sixth was used instead. The sum of $1,925,000 which represents the two-thirds portion of his income which he would have spent on himself must be subtracted from his net income of $2,887,500.00. The sum of $961,537.50 remains. This figure represents the one-third portion which he would have spent on his estate. The defendant is liable to the claimant for a half of that sum which is $480,768.75.

Special Damages

Receipts have been tendered for $56,000.00 for funeral expenses. That figure has not been challenged by the defendant. In the circumstances, the sum of $56,000.00 is awarded. This sum is to be apportioned equally between the defendant and the unknown assailant.

Exemplary Damages

The claimant has failed to justify this claim.

Accordingly judgement for the claimant as follows:

1. **General damages awarded**

   (a) in the sum of $480,768.75 in respect of lost earnings with interest at 6% per annum in respect of the pre-trial years from the 4th December 2001 to the 21st June 2006 and thereafter at 3% to 29th June 2007;and

   (b) in the sum of $65,000.00 which represents the award for pain and suffering with interest at 6% per annum from the 4th of December 2001 to the 21st of June 2006 and thereafter at 3% to the 29th of June 2007.

2. **Loss of Expectation of Life**

   One Hundred and Twenty Five Thousand dollars ($125,000.00)

3. **Special Damages**

Twenty Eight Thousand dollars ($28,000.00) with interest at 6% per annum from the 4th of December 2001 to the 21st of June 2006 and thereafter at 3% to the 29th of June 2007.

4. **Costs**

Costs to be agreed or taxed.