

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B334 OF 1977

BETWEEN

ALEXANDER BYFIELD

PLAINTIFF

AND

THE ATTORNEY GENERAL

DEFENDANT

Mr. D. Daly and Mr. Roy Fairclough for Plaintiff.

Mr. K. Harrison instructed by Director of State Proceedings for Defendant.

Heard: 13th and 14th October 1980
and 17th November 1980.

J U D G M E N T

GORDON J: (Ag.)

The Claim as disclosed by the Statement of Claim alleges an assault and/or Negligence. The defendant the Attorney General is joined pursuant to the Crown Proceedings Act.

In paragraph 4 of the Statement of Claim filed in this action the plaintiff alleges:

" On or about the 25th of August, 1976 the plaintiff was in the yard of his home at 30 Ashoka Road, when the said Constable Boyd, acting maliciously and without reasonable or probable cause assaulted the plaintiff by discharging a firearm at the plaintiff and/or so negligently discharged the said firearm, that the plaintiff was struck by a bullet discharged therefrom thereby receiving severe injuries with consequent loss and damage."

The defendant in paragraph 3 of the defence admitted "the plaintiff got shot in the vicinity of Ashoka Road" but denied the other allegations of paragraph 4 of the Statement of Claim:

" The defendant will say that on the 25th August 1976 Constable Boyd was on patrol in the vicinity of Ashoka Road. Three men who were wanted by the police were accosted and one of these men pulled a revolver from his waist and fired at the police. The police acted in self defence by shooting at this man but he and the other ran and made their escape through nearby premises."

The plaintiff duly filed an amended Statement of Claim alleging in paragraph 4:

" On or about the 25th of August, 1976 the plaintiff was in the yard of his home at 30 Ashoka Road, when the said Constable Boyd, or other member of the Constabulary Force, acting maliciously and without reasonable or probable cause assaulted the plaintiff by discharging a firearm at the plaintiff and/or, so negligently discharged the said firearm, that the plaintiff was struck by a bullet discharged therefrom, thereby receiving severe injuries with consequent loss and damage."

The defendant obtained leave and filed an amended defence stating:

"The defendant will further say that if which is denied Constable Boyd or other Police Officer shot the plaintiff he was shot accidentally and without negligence on the part of Constable Boyd or other Police Officer while lawfully executing their duty. "

On the 25th August 1976 the plaintiff Alexander Byfield lived in a house at 30 Ashoka Road, Kingston 11. A fenced lane led from Ashoka Road to the middle of plaintiff's house which was about 1½ chains from Ashoka Road. The house had one front and one back door. Another lane led from Ashoka Road and ended on the left side of plaintiff's premises. This lane was also fenced. The fence was 4' - 4½' high.

The plaintiff a fisherman testified that he was sitting to the side of his house mending his oars when he heard a shot coming from Ashoka Road. He then saw 3 men running from Ashoka Road direction to the premises before his. One of the 3 men entered his premises and went over the fence to the premises behind his. Shortly after that he saw a man in the lane next to his yard. He "got up to reach a piece of wire hanging on the house to fix (the) oar. I heard a shot. This man had a gun in his hand. Man held gun pointing before him and I received a shot. Shot sound came from direction of man with gun."

"Gun in man's hand was on top of fence. Gun was pointed towards me. At that time I was reaching for wire."

He identified Constable Boyd as the man who fired the shot and further said "When shot was fired man who had run into my yard was no longer there he had gone."

After he was shot he fell to the ground, his daughter came to his assistance, an alarm was made and he was taken in a police vehicle to the University Hospital where he remained for about one month and was transferred to the Mona Rehabilitation Centre. As a result of the injury he sustained from the gunshot he is now paraplegic confined to a wheel chair.

His daughter Enid Bygrave he said was "outside in the yard a few yards from me when shot was fired." In cross examination he repeated this assertion and added "Enid was about 3 yards from me on my right at time I got shot. I think she was standing up. She was standing up."

Plaintiff further said only one policeman was by the fence "I say the policeman wilfully shot me. I am certain Constable Boyd shot me."

Plaintiff further gave evidence in support of his claim for special damages and insisted that his minimum weekly earning was \$145.00. A medical report by Dr. Golding was admitted by consent.

Enid Byfield, plaintiff's daughter said she was in the yard washing a pot when -

" I heard a whole heap of shots fired outside, I saw men running in different directions.....
I saw about four men running through premises.....
I was frightened. I rushed and picked up baby and dashed to the back door. While I was rushing to pick up baby I heard gunshot firing."

She stood at the doorway with the baby in her arms and saw a boy run in the yard and jump over the other fence. This man she said had nothing. She saw Detective Boyd come to the fence with a gun in his hand she heard the sound "Boi" from the policeman's gun. When she heard this shot she heard her father say "Lord" and she made an alarm because the policeman shot her father. She admitted she gave a statement to the police at Hunts Bay of what she remembered happening. Some suggestions were put to her but her memory was of no assistance.

She admitted in cross-examination:

"When I saw police at fence and heard shot 'Boi' by that time other man who ran through was going over fence. Man ran close to where my father was."

She later asserted. "I say Detective Boyd was responsible for shooting my father."

"Is him shoot my father."

She went with her father in the police car to the hospital. Constable Mohammed she said came in the car to take her father to hospital.

Detective Constable Roy Boyd was the sole defence witness. He and Constable Mohammed, on mobile patrol with Corporal Moore, were dispatched along Ashoka Road by Corporal Moore. They entered a lane off Ashoka Road and saw a man whom he knew was wanted at Olympic Gardens Police Station for offences of Robbery, Shooting with Intent etc. Boyd called to this man "Police don't move". This man spun around and sped up the lane. Boyd and Mohammed pursued him. Further along the lane Boyd observed 5 other men running 2 of whom he recognised as men wanted for similar offences. One of this group drew a revolver and fired 2 shots in Boyd's and Mohammed's direction as they sped away jumping fences and entering premises nearby. The constables continued the pursuit remaining in the lane as the men were still in sight. By this time the man with gun was on plaintiff's premises. He discharged another shot while on plaintiff's premises, continued running and spun around and pointed his gun as if to fire again at the constables who at this stage had reached the end of the lane which was fenced.

The gunman at this stage was running towards the side of a house - (plaintiff's) and Boyd said he drew his service revolver and fired one shot at this gunman who was an unobstructed but moving target. Mohammed who was an arm's length from him he said also fired a shot. Shortly after he heard a voice saying he was shot.

"When I heard the voice I saw a man lying on the ground. On seeing this, looking at this man I realised that he was not one of the men we were chasing."

"From where I saw the injured man he would have been very close to where man with gun spun around and pointed gun at us.

When I fired shot I did not observe anyone else beside the man who had fired at me", he said.

He continued:

- (a) "I fired shot because I knew that those men were wanted for various felonies.
- (b) Secondly my life was in danger.
- (c) Thirdly they were at that stage committing another offence namely shooting with intent."

The men escaped but warrants were issued for the 3 he knew.

In cross examination he said he did not fire at the men before as it would have been useless because of the terrain. When he fired the man was on ground which made it favourable for him to return fire. He concentrated on the man with the gun. The house towards which this gunman was running would be a partial cover for him. But for the fact that they were shot at he believed they might have been able to apprehend 2 of the men as they could have jumped the fences.

He denied that plaintiff was clearly in view when he fired his shot. He also denied that in his anxiety to fire he took no care whether innocent people were shot or not.

It is the plaintiff's case that the men who ran on to his premises entered from the front. One ran close by him where he was at the side and went over the fence to premises behind. It is also agreed that the man ran quickly, the whole incident happened quickly. Enid Byfield on her evidence heard gunshots regularly, she responded speedily on this day undoubtedly because of the proximity of the shots she heard. Plaintiff was to the side of his house and about to take something hanging on the house. Enid Byfield was at the back door of the house, it is questionable how much she did see.

I accept as a correct statement of the law the dicta of Carberry J.A. in Supreme Court Civil Appeal case No. 43/78 delivered 12th June

1980 in the Attorney General for Jamaica vs. Miguel Green at page 8:

"It seems to us that if A deliberately fires at B, misses and hits C standing nearby or behind B, that A is liable for assault unless there are circumstances which justified his original firing at B, and it is also shown that he was not negligent. We would agree that the onus of proof as to negligence, if A justifies the original shooting at B, would rest upon the plaintiff C".

Plaintiff and his witness were emphatic in asserting only one constable came to the fence. That constable fired one shot. That shot was aimed and fired at plaintiff. That shot hit plaintiff and injured him. That constable was Constable Boyd. This is the basis of plaintiff's case in assault.

It is not plaintiff's case that Boyd mistook plaintiff for one of the men he was chasing and shot him. This was suggested as a probability by Mr. Daly in his final submissions. It would indeed defeat plaintiff's claim in assault if it were suggested that plaintiff stretched his hand to, as he said, reach for wire, at a time when gunmen were running through his premises and Boyd and Mohammed mistook him for one of the men they chased, or mistook his action for that of one who had joined forces with the others and shot him. If these were the circumstances and Boyd and or Mohammed in the honest belief that the plaintiff was a gunman about to shoot at them, shot plaintiff, then their act would be justified and neither assault nor negligence would lie. It would be an accidental shooting.

The plaintiff's case however does not admit the presence of Mohammed at the fence or the discharge of two shots therefrom. It is the defence's case that Mohammed was at the fence with Boyd and he discharged a shot from his gun in the circumstances disclosed by Boyd.

There were areas of conflict and contradictions in the plaintiff's case.

- (1) Plaintiff said one man entered his premises. He later admitted in cross examination "after I heard first shot I saw 3 men run into my yard."

- (2) Plaintiff said his daughter was three (3) yards from him on his right standing in the yard when he was shot. Enid Byfield said she was at the back doorway of the house holding her baby when shot was fired by Constable Boyd.
- (3) Plaintiff said the man who ran through his premises was long gone when Constable Boyd came to the fence and shot him. His daughter said this man was in the yard going over the fence when the shot was fired.
- (4) Plaintiff said 2 shots were fired that day. His daughter heard several shots even when she was running to gather her baby she heard shots being fired.

The defence, Mr. Harrison submitted, relied on the case of Robley vs Placide 11. W.I.R. P. 58 The head note to this case is:

" The respondent while standing on the road-way sustained a wound to her left leg by a bullet from a .25 police colt automatic discharged by the appellant who, fearing an attack from a group of men each of whom was armed with a cutlass, fired at one of the men at knee level. The shot missed its mark and struck the respondent but it had the effect of making all the men desist from their clearly demonstrated intention of attacking the appellant. On a claim in the petty civil court the respondent was awarded \$240 as damages for negligence against the appellant. On appeal,

Held: (i) that no legal duty to retreat could arise in circumstances where a police officer acted in the execution of his statutory duty to arrest persons who were, prima facie, committing within his view the offence of being armed with offensive weapons;

(ii) that legally the situation remained unaffected (rather the contrary) by the fact that the holders of the weapons clearly displayed their intention of attacking the appellant and thus to embark upon the commission of a more serious crime;

(iii) that the necessity of saving life and limb justified the appellant in taking the risk of possibility of injury to the respondent;

(iv) that an action for trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part. "

In Robley's case (supra) the constable was aware of the presence of the plaintiff but said he:

" I was not concentrating on the plaintiff. When I fired the shot the plaintiff was not in my view."

In this case Constable Boyd's evidence is "when I fired shot I did not observe anyone else beside the man who had fired at us". He later in cross examination said "I was concentrating on man with gun".

It must be recognised that the gunman was in 1976 an entity in the society and a force to be reckoned with. The police in execution of their duty often come under fire from this force, yet despite the fearful odds the police have continued to do their duty even at great personal risk.

Plaintiff was in his home and a man's home is his castle. He is entitled to be secure in the safety of his home and to the protection of the law. Were the constables negligent having regard to all the relevant circumstances?

In considering this question it is desirable to refer to the definition of negligence given by Alderson B. in Blyth vs Birmingham Water Works Co. (1856) 11 Ex. 781 at P. 784.

" 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 and reasonable man would not do."

There is no duty on the police to retreat. These constables were acting in the execution of their duty in "hot pursuit" to arrest a gunman who was prima facie in their view committing other offences viz: illegal possession of a firearm and shooting with intent. They were, at the time they fired their guns, the target of the gunman about to shoot again. They were entitled to defend themselves. Section 33 of the Jamaica Constabulary Force Act requires the plaintiff to allege and prove that the defendant acted maliciously, or without reasonable or probable cause.

I find the following facts:

- (1) Constable Boyd and Mohammed were on foot patrol when they were shot at by a man who in company with others fled.

- (2) Among the men were 3 persons wanted by the police for felonies allegedly committed by them.
- (3) Constables Boyd and Mohammed pursued these men and some of them entered plaintiff's premises.
- (4) The gunman fired again at the constables from plaintiff's premises.
- (5) The constables continued the chase.
- (6) The gunman turned in flight and pointed his gun in the direction of the pursuing constables.
- (7) The constables who had by then come to the end of the lane each fired a shot at the gunman.
- (8) Constable Boyd at the time he fired his gun did not see the plaintiff and was not aware of his presence.
- (9) The circumstances in which the constables fired were the same i.e. to avoid being shot by the gunman.

I pray in aid, mutatis mutandis, the words of "Holmes J. of the U.S. Supreme Court namely, "detached reflection cannot be demanded in the presence of an uplifted knife."

Robley v Placide (supra) P. 62

- (10) The plaintiff received a gunshot wound and sustained injuries but I am unable to say from whose gun the shot was discharged.
- (11) There is no proof of malice and there is no lack of reasonable or probable cause.

I further find that the reason given by Constable Boyd for discharging his firearm into plaintiff's premises just and, on the assumption that the bullet which struck plaintiff came from either Boyd's or Mohammed's gun, the defendant is not liable to the plaintiff in assault.

In my view the decision in the case of Robley vs Placide (supra) is applicable to this case. The defendant was not in breach of his duty of care, the plaintiff has failed to establish negligence

in the defendant hence the claim in negligence also fails.

I found Detective Constable Boyd a frank and honest witness. I was not impressed by the plaintiff and his witnesses. The plaintiff failed to prove items of his special damage. Nevertheless before parting with this case I must observe that the plaintiff suffered severe permanent injuries and it is only fair to recommend that consideration be given to offering him some compensation from these injuries he accidentally sustained.

For the reasons I have given, there will be Judgment for the defendant with costs to be agreed or taxed.

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