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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: C.L. 2002/ C- 186

BETWEEN LEROY CHIN CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

Heard: October 24 and 25, 2005

Dennis Daly Q.C instructed by Daly, Thwaites and Co. for the Claimant; Mr. Peter Wilson and Mrs. Amani Maknoon instructed by the Director of State Proceedings for the Defendant.

ANDERSON J.

This is a singularly unfortunate case. The Claimant, Mr. Leroy Chin of Buck’s Heights, May Pen in the parish of Clarendon, seeks damages for negligence against the Attorney General of Jamaica in respect of injuries received and loss and damages suffered as a result of a gunshot wound suffered in October 1998.

The Claimant’s Case

The Claimant’s case is that in October 1998 he was a thirty four year old jerk chicken vendor plying his trade in Bucks Heights, May Pen, Clarendon. According to his Witness Statement, on the night of the 9th October 1998 he was a patron in the “Starlight City” Night Club to which he had gone at about 10:30: p.m. Sometime after midnight and before 1:00 am on the 10th October, he heard an explosion from outside of the building and felt a burning sensation and a cramp to the right side of his hip. He put his hand down his trousers and discovered that he was bleeding. He had apparently been shot. Very shortly after hearing the first explosion, he heard several more explosions coming from outside the club building. He went outside and said he saw a policeman whose face he recognized but of whose name he was unaware. He called the attention of this officer to his injury and was advised to wait beside one of three “unmarked” police cars parked on the road in front of the club. He was subsequently taken to the May Pen Hospital in a police car by Detective Sergeant Graveney and four other police officers. At the hospital, one of the officers pointed out a man “suffering from several gunshot injuries to his side and shoulder and arm and told me that it was he who had shot me”. He later learned that

this person was a man named Omar Miller. Miller, though now deceased, is to feature significantly in this case.

The Claimant's statement of claim states that he was shot by one of three policemen who were in the premises on the night in question. The "acts complained of were committed maliciously and without reasonable or probable cause by one or all" of the three policemen "purporting to act in the execution of their duties as members of the Jamaica Constabulary Force".

In his particulars of negligence, he alleges that the police discharged their firearms in a public place where a crowd of persons could be expected to be and where the plaintiff was; discharged their firearms while they were pointed at the plaintiff; failed to take care to avoid hitting innocent persons in discharging firearms, and unnecessarily and recklessly discharging firearms in a public place. There is regrettably, nothing in his witness statement which is able to support any of these allegations.

According to the Medical Report, signed by Dr. Percival Duke on the 15th December 1998, Mr. Chin's injuries at the time of his examination on admission in October 1998, "consisted of one penetrating laceration on the superior lateral area of the buttocks. No exit wounds were evident. Patient's general clinical condition was stable and X-ray showed a missile from firearm lodged posterior to the sacral bone. There was no clinical evidence of harmful internal injuries or debilitating neuromuscular damage". The report continued with a statement that: "After an uneventful hospital stay, Mr. Chin was discharged on October 12, 1998."

An undated report from Dr. E.G. Munroe, a radiologist at the same hospital indicated that on an examination of the Claimant's pelvis there was "no bony lesion. There are multiple small metallic density fragments in the right buttock." According to Claimant's witness statement there were two unsuccessful attempts to remove the projectile from his buttocks but the "bullet fragments" were only removed from the Claimant's body over a year later, in December 1999 in an operation performed by Dr. Kenneth Baugh, consultant surgeon.

The Claimant in his Witness Statement gives no indication of any personal knowledge of how he was shot. He does not say where in the club he was in relation to the direction from where he heard the explosions coming; he does not say where the shot that hit him may have entered the building so as to indicate why it was probable that the shot came from the police. However, he states that he was “told” by the said Omar Miller referred to above, who was injured and under Police Guard in the May Pen Hospital, when Mr. Chin was taken there that, he Mr. Chin, had been shot by the police. Regrettably, Mr. Miller is now deceased and so not available to give oral evidence although a statement and further statement which he gave were tendered into evidence under Section 31 of the Evidence Act without objection. These statements by the deceased Miller are central to the Claimant’s case and I advert to them later.

The Defendant’s Case

Detective Sergeant Dolphie Graveney gave evidence for the defendant. He testified that on the night in question, along with three (3) other police officers, in response to a report that there were armed men in the premises of the Starlight City Night Club, he went to the Starlight Club in an unmarked police car. Mr. Graveney alleges that he and two of the other officers went along the left side of the building, while one officer was left at the front of the building. They saw a group of men at the side of the building milling around. He states that as they approached, two of the men ran towards an opening in the perimeter fence at the rear of the building. One of the men had a sawn-off shotgun and the other a handgun. They chased the men and Sergeant Graveney said he shouted “Police! Stop!” He said that the men “turned around pointed their guns in our direction and fired gunshots”. He said he crouched down and returned fire from his service pistol in the direction of the men but they ran through the opening at the rear of the premises. After they went through the opening, the two men with guns continued firing at the Police as the police gave chase and returned the fire but the men managed to escape into the darkness of the night.

In answer to Claimant’s counsel on cross examination, he said that he had fired five shots and that he knew that Blair who was carrying an M-16 rifle had also fired shots. Further,

in answer to the Court, the witness also said that the building is about 80-90 feet long and when he along with his colleagues first saw the men at the side of the building, they were about twenty-five feet (25ft) from the main road.

Detective Sergeant Graveney confirms that he along with the other officers took the Claimant to the May Pen Hospital when it became apparent that he had been injured. He says further that after he had returned to the station, another person who claimed to have been a patron at the Starlight City club came to the station to report that he had also been injured, He was also taken to the Hospital and while there, the witness says that he saw another man being treated for gunshot wounds and whom he recognized as being one of the men who had fired shots at the police that morning, He said he confronted him with the accusation but the man denied that he was at the club. This person who was then arrested and placed under police guard at the hospital, was Omar Miller.

Submissions for the Defendant.

Mr. Wilson, counsel for the Defendant, submitted that the Claimant had failed to establish on a balance of probabilities that a servant or agent of the Defendant had so unnecessarily, recklessly and/or negligently discharged their firearms in a public place as to cause injury to the claimant. Indeed, there was no direct or circumstantial evidence that the source of the injury suffered by the Claimant was a bullet from the firearm of the police. But even if it had been so shown, he submitted that the Defendant still must succeed on the basis of the law and the authorities he would cite.

Firstly, he cited **Section 13** of the **Constabulary Force Act** which outlines the powers and duties of the police officer. He submitted that under that section, the police were duty bound to investigate the reports which they had received concerning armed men at the Starlight City Night Club. He also cited **Section 33** of the same Act which states that in any action against an officer of the constabulary force, it must be expressly alleged that the act was done either maliciously or without reasonable probable cause and that at the trial, it shall be the duty of the plaintiff to prove these averments. The Claimant must therefore show that there was a want of reasonable care in the act complained of. He cited

Lord Denning's now famous dictum in LeTang v Cooper 1965 1QB, 232 to the following effect:

If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. "The least touching of another in anger is a battery," per Holt C.J. in Cole v. Turner. If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff to plead that "the defendant shot the plaintiff." He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.

He invited the Court to accept the evidence of Detective Sergeant Graveney that there was an exchange of gunshots between the police and fleeing armed men and that, assuming the Claimant had been injured by a police bullet, then on the authority of Blythe v Birmingham Waterworks Co 1843-60 All E. R. 478 per Alderson B., there was no negligence.

Negligence is the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do.

In the Trinidadian case, Robley v Placide (1966) 11 WIR 59, the Court of Appeal of Trinidad and Tobago considered whether an innocent bystander accidentally shot by a police officer who, fearing an attack upon himself, fired his pistol at knee level at a group of men, each armed with cutlass, could succeed in an action for negligence. In that case it was held that the Plaintiff could not since:

1. 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;
2. that the necessity of saving life and limb justified the appellant in taking the risk of possibility of injury to the Respondent.

Phillips J.A. in this case, cited with approval the dictum of Alderson B. in Blythe v Birmingham Waterworks Company, set out above.

Counsel for the Defendant also referred the Court to the local decision of **Byfield v The Attorney General for Jamaica, [1980] 17 JLR 243**. (Incidentally, counsel for the Claimant in this case also appeared for the plaintiff there). The head-note is instructive.

The plaintiff was accidentally shot on the 25th August 1976 when a Constable Boyd discharged his firearm in the plaintiff's yard. The constable and another were on foot patrol when they were shot at by a man and three others who fled. They pursued these men who then ran onto the plaintiff's premises. The gunman fired again at the constable; when he turned to fire again each constable fired a shot at he gunman. Constable Boyd was not aware of the presence of the plaintiff's presence at the time of the shooting and both officers acted in self defence. Held: The constable was justified in discharging his firearm i.e. self-defence, nor was he in breach of his duty of care. Therefore, both claims of assault and negligence fail. In a case where the constable fired to avoid being shot by the gunman "detached reflection cannot be demanded in the presence of an uplifted knife".

In further support of the proposition that the Claimant, even if he was struck by the police could not succeed in negligence, Mr. Wilson cited the Case of **Joseph Andrews v The Attorney General of Jamaica 1981 18 JLR at page 434**. In that case, the facts were that on the 23rd April 1978 at about 11:30 a.m. the plaintiff was on Bread Lane in the Parish of Kingston standing by his bicycle selling ice-cream when a motor vehicle entered Bread Lane, was parked and the driver ran away. A jeep marked "Police" then stopped at the corner of Charles Street and Bread Lane and a number of policemen who were members of the Jamaica Constabulary Force came from the jeep and started firing. As a consequence the Plaintiff was hit by a bullet. In that case it was held that the duty of the police is, *inter-alia*, the apprehension of wrong doers with a view to bringing them to justice. Police are also empowered to carry firearms and to use them when necessary both in the apprehension of a suspected wrongdoer and protecting themselves serious attack from any quarter. Thirdly the police were acting in the course of their duty in trying to apprehend a fleeing felon. Fourthly, however, the police ought not to proceed to extremes without reasonable necessity, and members of the public ought to be considered in the execution by the police of their duty.

Mr. Wilson submitted that the proposition of the Robley and Byfield cases cited above was applicable here. It should be noted, *en passant*, that in the Andrews case, based upon the evidence, the learned judge found as a matter of fact that the police had acted negligently. Moreover, there was evidence from the plaintiff's own observation to support the finding that the bullet which struck the Plaintiff was in fact fired from one of the police guns.

Indeed the learned judge states the following:

“Was the force necessary? The answer lies in the fact that whether or not the fugitive was armed, and if armed, did he present force which the police was obliged to repel with force of arms. It is good law that an officer may repel force with force where his authority to arrest or imprison is being resisted and even if death should result yet this consequence would be justifiable by law, but he ought not to proceed to extremes without reasonable necessity and the public has to be considered if he proposes to discharge a firearm where other persons than the fugitive may be located. In the instant case the Plaintiff and his witness state and this I accept that the fugitive was gone when the police arrived on the scene, and immediately they came they started firing.”

The principles set out in Byfield and Andrews was again the subject of the court's consideration in Finn v The Attorney General 1981 18 JLR page 120. In that case the learned judge Wolfe, J., (as he then was) stated:

“It is settled law that an officer may repel force by force where his authority to arrest or imprison is resisted and will be justified in doing so even if death should be the consequences, yet he ought not to proceed to extremities upon every slight interruption nor without reasonable necessity.”

In that case the judge held that the use of force was unnecessary and excessive and the Plaintiff succeeded. The principle however, was reaffirmed as to the right of the police to use force in chasing and seeking to apprehend a fleeing felon.

In conclusion, Counsel for the Defendant submitted that the Claimant had failed to show the Court that he was in fact shot by the police officers. Further, and in any event, if the court were to find that the Claimant was shot by the police officer or one of them as outlined in the statement of claim, it was submitted that the Claimant would in law have

been in the position of an innocent bystander and subject to the same rules of law as applied to protect the Defendant in the case of Byfield.

Submissions by Counsel for the Claimant

Counsel for the Claimant, Mr. Daly Q.C. in a brief closing address conceded that the Claimant's case would stand or fall on the value of the statement and further statement of Omar Miller now deceased. This is because there is no other evidence to support the allegations contained in the statement of claim. In those statements Mr. Miller states that he was at the Starlight City Night Club on the early morning of October 10, 1998. He said he was alone when the police came into the premises and that Detective Sergeant Graveney shouted to him to come to him. He said he ran towards the rear of the premises and that while he was running he was shot by the police. He however made his escape and was taken to the May Pen Hospital by a motorist. It is common ground that Mr. Miller was later that same morning pointed out by Detective Sergeant Graveney as one of the men who had shot at the police party at the Starlight City Night Club, and he was arrested and charged with illegal possession of firearm and shooting with intent.

Mr. Miller's statement avers that he was tried in the Gun Court in May Pen, but was acquitted on a no case submission. He also alleges that one of the police officers at the scene, a Mr. Blair, had testified at his trial that it was only the police who were firing guns and no one else. Mr. Daly submitted that based upon this evidence, if it is to be accepted, the police were the only ones firing guns and therefore they must have been the ones who shot the Claimant. If however, that evidence is not accepted, then there is no basis upon which to conclude that the Claimant was in fact shot by the police and as Mr. Daly had conceded, the case would have to fail.

Court's Reasoning

A Claimant in seeking redress for injuries purportedly caused by a Defendant must show, if his case is to get off the ground, that his injuries and losses were caused by the wrongful act of the Defendant or the Defendant's agent or servant. This is the test of causation. There is absolutely no direct evidence as to what is the origin of the missile which hit Mr. Chin on the night in question.

There is the evidence from Detective Sergeant Dolphie Graveney of an exchange of gunshots between the lawmen and the alleged gunmen. I accept the evidence of Detective Sergeant Graveney as being credible. In such circumstances it would appear that even assuming, Mr. Chin's injuries were caused by the bullets from the police weapons, there would be a good defence available to the Defendant by virtue of cases cited by Mr. Wilson and in particular, the decision of Gordon, J in Byfield v. The Attorney General (1980) 17 JLR, 243, (supra) and the other cases referenced above, given what a claimant in these circumstances must prove.

It seems to me that, that alone would be sufficient to dispose of the issue of liability and put an end to this case, but in the event that such a view is incorrect, I should state that in any event the Claimant has failed on a balance of probabilities to establish a wrong done to him by the Defendant, its servants or agents. A Claimant must establish on a balance of probabilities that the wrong of which he complains, was the cause of his loss and damages and that the source of that wrong was the Defendant its servants or agents, the principle of causation referred to above. Regrettably there is no credible evidence which can link the injury received by Mr. Chin to the Police officers. There was no forensic evidence which was available to the Court. Indeed, according to the Medical Report of Dr. Kenneth Baugh, when he operated to retrieve the bullet lodged in the Claimant's buttocks, he handed over what he recovered to the police. The Claimant has made no attempt to use this recovered missile to support his case.

But there is an even more serious lack of evidence whether direct or circumstantial. This relates to the absence of any evidence whatsoever as to where the claimant was in relation to where the alleged gunfire took place on the night in question. There is no suggestion that the police by virtue of the position in which they were at the time of the alleged exchange of gunfire were likely to have bullets from their firearms enter the club. There was not even a suggestion as to this possibility. Indeed the evidence of Sergeant Graveney, which I accept has the police chasing towards the perimeter fence at the back

of the building while the gunfire from the alleged gunmen would have been directed back towards the building which housed the club.

Given the significant lack of any evidence, the Claimant relies upon the statements of Mr. Omar Miller and counsel for the Claimant accepts that without it the Claimant has no case. Mr. Miller's statement is to the effect that he, Miller, was arrested at the hospital as being one of the men who shot at the police. He was subsequently charged with illegal possession of firearm and shooting with intent.

According to the Medical Report produced by Dr. Duke dated May 25, 2004. Miller was in fact admitted to the Hospital on October 10, 1998 for treatment of "gunshot wounds to the right side of the upper third of the chest and including the right shoulder. The injuries consisted of multiple small superficial and some deep penetrating wounds caused by embedded small pellets from a gunshot." According to Miller's statement of the 2nd June 2004, he was at the club when the police men walked passed him and Detective Sergeant Graveney ordered him to come to him Graveney. For some reason which he did not explain, he turned and started running towards the back of the premises at which time he heard shots and felt a stinging sensation in his right arm, and he also felt a blow in his back. He said he was taken to the hospital as he was "bleeding a lot from the bullet injuries." He said that he was eventually acquitted in a trial at the Gun Court in May Pen, and he says that one of the Police Officers named Blair, gave evidence and admitted that no one else had fired any shots, other than the police.

Mr. Daly invites the Court to accept this as evidence that no one else fired any shots that night apart from the police. I hold on the authority of **Subramanian v Public Prosecutor [1956] 1 WLR 965** that this assertion is totally inadmissible to prove the fact asserted. It is not even clear to me that it is evidence of what Blair might have said in Court, if anything. It certainly cannot be proof of the truth of Blair's statement, if indeed he did make it. Blair is not being called as the Claimant could have done. Miller who makes the allegation of what Blair says is not here to be cross-examined, and I say that this would be a case of hearsay upon hearsay and inadmissible. Even if it were admissible, the

weight which is to be given to it must be minimal or even negligible. I say this having regard to Miller's statement in paragraph seven of the same witness statement that of the three policemen he saw, two had pistols and one had an M16 rifle. Neither of them had a shotgun. In fact the only averment in any of the evidence of the existence of a shotgun, is the evidence of Detective Sergeant Graveney who said that one of the gunmen used a shotgun to fire at them. I believe that the court can take judicial notice of the fact that pellets are discharged from a shotgun. It must be a clear inference taking the evidence in its totality that there was at least one other person apart from the police who was firing a weapon as the injuries which Mr. Miller received are, upon the totality of the evidence, only consistent with bullets fired from a shotgun. There is absolutely no evidence anywhere of the existence or use of so called frangible bullets to which Mr. Daly referred and which he suggested could produce the same effects as shotgun pellets. The only direct evidence about that possibility was given by Detective Sergeant Graveney a veteran of over twenty (20) years in the police force, and he stated in answer to Mr. Daly's question, that he was not aware of the use of frangible bullets in his experience. In the absence not only of any credible evidence but of any evidence at all, I am prepared to accept that there was a shoot-out involving men, at least one of whom was in possession of a shotgun.

Mr. Daly submitted that the Defendant's case was a weak one and the defence had failed to call Mr. Blair who apparently was still in the police force. But as I have sought to bear in mind, the burden of proof lies upon the Claimant. He who alleges must prove. It is only when the Claimant has established at least a prima facie case that the evidential, but not the substantive, burden shifts. Counsel for Mr. Chin also puts a lot of store by the statements of Omar Miller and I have already indicated my view of that "evidence". Even if it were admissible, the fact that Miller himself says he saw no policeman with any shotgun would raise credibility issues, (given his own injuries), which in my view, are impossible to overcome.

In the circumstances, I regret that the Claimant has failed to make out a case of negligence and I find for the Defendant. I award costs to the Defendant to be agreed or taxed

As I indicated when I gave my decision, I am of the view that this unfortunate matter ought to have been disposed of short of a two-day trial. Given the competing claims upon the state's resources, every thought must be given to ensuring the most efficient use of those resources, including the personnel of the Attorney General's Department. It seems to me that a settlement ought not to have been beyond the creative expertise and good faith efforts of counsel.

In this case, we have had a young man, on the evidence a productive member of the society, injured and prevented from making his contribution, however small, to the national weal, through no fault of his own. I believe that this is the kind of case where, as Karl Harrison J, (as he then was) said in **Dwight Burgher v The Attorney General and Another, Suit No: C.L. 1995 B - 169** , an *ex gratia* payment to assist the Claimant to get back on his feet would not be out of place and I recommend this for consideration.