

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO.C.L.D.044OF 1999

BETWEEN	MYRTLE DALEY	1ST CLAIMANT
	(Near Relation of CLEVE SCOTT-deceased)	
AND	THE ADMINISTRATOR GENERAL	2ND CLAIMANT
AND	THE ATTORNEY GENERAL	1ST DEFENDANT
AND	SPECIAL CONSTABLE URCEL BUNDY	2ND DEFENDANT

Miss Gillian Mullings, instructed by Patrick Bailey and Co. for the Claimants.
Mr. Curtis Cochrane , instructed by the Director of State Proceedings,
for the Defendants.

Heard-25 and 27 October 2004, and January 25 2005

MANGATAL J :

1. This is a claim brought by Myrtle Daley, mother of the deceased Cleve Scott, as a near relation of the deceased under the Fatal Accidents' Act on behalf of the dependants of the deceased.
2. The claim is also brought by the Administrator General under the Law Reform(Miscellaneous Provisions) Act on behalf of the deceased's estate.
3. On the 11th of April 1996 Cleve Scott was shot and injured by the Second Defendant Constable Urcel Bundy whilst on the campus of the University of the West Indies "the University". Cleve Scott later succumbed to his injuries and died at the University Hospital of the West Indies.

4. The main issues that arise in this case are as follows:
 - (a) Did Constable Bundy negligently, and/or maliciously and/or without reasonable or probable cause unlawfully discharge his firearm and kill the deceased , or, did Constable Bundy discharge his firearm in lawful self-defence, using no more force than was reasonable in the circumstances?
 - (b) If the Defendants are liable, what is the proper measure of damages?

5. The Claimants called one witness with regard to liability, Mr. Ruel Rainford, a Budget Coordinator attached to the Administrative Department of the University Hospital of the West Indies. In his witness statement Mr. Rainford stated that in April 1996 he was a student at the University. On Thursday (he did not say what date) in April 1996 at about 3: 15 p.m. he was on the University Campus. He stopped at the Taylor Hall Canteen and had a conversation with 3 persons there, including the deceased , known to him as “fruity”, a campus fruit vendor.

6. The group had a long discussion and then disbursed. Mr. Rainford walked unto the corridor of the hall and had reached almost to the Taylor Hall study room when he heard a commotion coming from the Taylor Hall canteen. He then saw Cleve Scott walking towards the corridor on which he was standing with a policeman, who Mr. Rainford later learned was the Second Defendant Constable Bundy, following him closely. Scott and Constable Bundy were moving quickly. Scott’s back was turned to Constable Bundy. Occasionally, Scott turned his head and body slightly to say something to the Constable who looked upset. Scott had a slight grin on his face. Rainford said that he heard Scott say “Wha yu wan mi fah boss, wha yu wan mi fa?”

7. Scott was gesticulating with his hands in the air. His hands were empty. He was not advancing towards Constable Bundy but rather was trying to get away from him.

8. Constable Bundy pulled out his firearm. At that time, two girls who were standing beside Mr. Rainford on the corridor, ran into the study room. As Scott came onto the corridor and headed in Rainford's direction, Rainford saw Constable Bundy raise his firearm and shoot at Scott who was at the time four feet away from Rainford. The bullet went through Scott then past Rainford and later lodged in the door of the Taylor Hall Study Room. Constable Bundy went to the porter's lodge to make a phone call. Some persons carried Scott to the car park and he was carried to the hospital.

9. Mr. Rainford denied that the incident happened in the manner described by Constable Bundy. In particular, he denied seeing Constable Bundy holding on to Cleve Scott's pants' waist, or seeing Cleve Scott grab on to Constable Bundy's shirt. He did not at any time see Scott standing beside a delivery truck or Constable Bundy questioning him. He never saw Scott with a knife, never saw Constable Bundy with any cut or blood coming from any cut. He also did not observe Constable Bundy removing any knife from Scott's hand or from anywhere in Scott's vicinity. In cross-examination Mr. Rainford stated that Scott was about seven feet from Constable Bundy when Constable Bundy discharged the firearm. At the time when Constable Bundy discharged the firearm Mr. Rainford says that Scott's body was facing him, Rainford, and he insisted that at the time when Mr. Bundy discharged the firearm Scott was running away from Constable Bundy. He said that at the time of discharge of the firearm he Rainford was three to five feet from the door of the study room. He said that he said to Constable Bundy after the shooting "suppose you shoot me too?" because he was so close, and was really shocked that Constable Bundy had discharged his firearm. He indicated that he knew Cleve Scott by the nickname "Fruity", and did not know him as "Puss".

10. The Second Defendant, along with Detective Sergeant Glasspole Brown gave evidence for the Defendants.

Constable Bundy in his witness statement of 17th May 2004 stated that he is a Constable attached to the Denham Town Police Station in the Parish of Kingston. In April of 1996 he was attached to the Mona Police Post on the Mona Campus of the University of the West Indies. On Thursday the 11th of April 1996 at about 7a.m., he was dispatched on duty to the Maintenance Section of the campus. He was dressed in uniform and armed with his service revolver. His tour of duty was 7a.m. to 3 p.m. At about 1:30 p.m., he was released for lunch. He went to purchase lunch at Taylor Hall. After purchasing lunch he went to the rear of Taylor Hall where he saw a man known to Constable Bundy as "Puss". He said that he had known him about four months before as he had seen him on campus. He was aware that "Puss" was a suspect in relation to robberies and break-ins that took place on campus.

11. Constable Bundy states that when he saw "Puss" the latter was standing beside a truck that was delivering goods at Taylor Hall. Constable Bundy says that he told "Puss" that he is wanted at the station and that he was going to take him, "Puss" there. "Puss" then asked him why he was going to take him there and Constable Bundy says that he told him that he was wanted for questioning in relation to break-ins and robberies that occurred on the University Campus.

12. "Puss" told him that he was not going. Constable Bundy held "Puss" by his pants waist and he resisted. He grabbed the Constable in his shirt front. Constable Bundy pushed him, but he still held on with his left hand. Constable Bundy says that "Puss" pulled an open shine knife from his waist and stabbed at him cutting his shirt and cutting his skin below his left breast. Constable Bundy states that he pushed "Puss" away and he "Puss" stepped backwards, then rushed at him. Constable Bundy pulled his firearm and fired one shot in the direction of Puss. "Puss" fell to the ground and the knife fell from his hand.

13. Constable Bundy says that he took up the knife and with the assistance of a doctor placed "Puss" in a vehicle to go to the University Hospital where

he was admitted. Constable Bundy claims that he also received medical attention for his injuries. He later reported the matter to the station. He learnt that "Puss" died later that day.

14. In cross-examination Constable Bundy indicated that he was no longer a member of the Jamaica Constabulary Force as he has migrated and is living abroad now. He said that that after he tried to apprehend Cleve Scott in the delivery area, he and Cleve Scott had a tussle. He claims that Cleve Scott pulled him through the canteen with students in there. Cleve Scott kept pulling him away and Constable Bundy claimed that Cleve Scott was much bigger than him. Cleve Scott was fighting him off right through the canteen. Constable Bundy was holding onto Cleve Scott, and Cleve Scott was pushing him off, and they passed through the canteen back into Taylor Hall. He said that the strip in front of the study room is where they were when Cleve Scott pulled the knife and started stabbing at him. Constable Bundy stated that the time which elapsed between when Cleve Scott stabbed at him and the time when he pulled his firearm was split seconds. He says that he stepped away, pulled out his firearm, and discharged a round in Scott's direction. Constable Bundy gave a demonstration which indicated that at the time when he shot at Cleve Scott he Bundy was no longer facing Scott.

15. He denied that he shot at Cleve Scott when his back was turned to him, or that Cleve Scott got shot in his back. He said that Cleve Scott cut him with the knife, and that a medical report was on the criminal file. He did not have it here with him. There was, he admitted, no medical evidence in this case to show he had been injured.

16. Detective Sergeant Glasspole Brown in his witness statement of the 18th of May 2004 indicated that he is a Detective Sergeant of Police stationed at the Office of Professional Responsibility, 34 Duke Street, Kingston.

17. In April of 1996, he was stationed at the University Hospital of the West Indies, Mona Campus Police Station.

On Thursday the 11th of April 1996 at about 3:30 p.m. he was on duty at the Campus Police Station when he received certain information. As a result of this information he proceeded to the front of Taylor Hall Study Room where a crowd was gathered. He observed a small pool of blood on the concrete pavement . He made certain enquiries and a hole in the wooden front door of the study room was pointed out to him. From this hole he dug out the war head of a bullet which appeared to be a .38 calibre.

18. He then went to the University Hospital where he saw and spoke to Constable Bundy. He says that he observed several cuts to the front of Special Constable Bundy's uniform shirt and also bruises and a small wound from which blood was coming on Special Constable Bundy's chest. In examination –in-Chief, Detective Sergeant Glasspole stated that at the hospital Constable Bundy handed over to him one .38 Smith and Wesson Revolver and 11 rounds of .38 cartridges and 1 .38 spent shell.

19. Mr. Glasspole claims that he left Constable Bundy at the said hospital where he was being treated for his injuries. Having received certain information, he subsequently arrested and charged Cleve Scott o/c "Puss" for (1) Assaulting Police, (2) Resisting Arrest, (3) Malicious Destruction of Property, and (4) Unlawful Wounding. According to Detective Sergeant Brown, no court action was taken because Cleve Scott was "beyond the reach of justice". The post-mortem report, exhibit 9, indicated that Cleve Scott died that same afternoon of the 11th April 1996. Detective Sergeant Brown goes on to describe in some detail the firearm and the steps taken to secure and test the firearm.

In cross-examination Detective Sergeant Brown stated that both he and Constable Bundy were stationed at the campus Police station at the time of the incident. He said that he did see blood coming from a chest wound which Constable Bundy had.

19. In response to a question from the Court, Detective Sergeant Brown now for the first time indicated that what he collected from Constable Bundy was not only the .38 Service revolver, 11 rounds of .38 cartridges and spent shell, but he now said that he had also collected one sharpened stainless steel knife from Constable Bundy and also the shirt which Constable Bundy was wearing, which he says Constable Bundy gave to him when he came from the hospital. Cross-examined by Miss Mullings Sergeant Brown denied that the reason he did not mention any knife in his witness statement was because there was in fact no knife, and he claimed to have made honest omissions from his witness statement.

21. The post mortem report indicated that the point of entry of the bullet wound was the left loin, 7.5 centimetres lateral to the spinous process of the third lumbar vertebra. The bullet exited the abdominal wall, 1.5 centimetres above and 1.5 centimetres lateral to the umbilicus. Miss Mullings, Counsel for the Claimants, handed up an extract from Volume 5 of Mrs. Ursula Khan's work on Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, page 5, where a diagram of the Spinal and Vertebral Column of a human being appears. Miss Mullings urged me to accept that the entry wound was somewhere in the middle of the left lower back and the exit wound was near the umbilicus, i.e. the belly button. Mr. Cochrane, on the other hand, Counsel for the Defendants, referred to the Oxford Dictionary of Nurses, new edition, where loin is defined as "the region of the back and side of the body between the lowest rib and the pelvis."

22. I have looked at the evidence carefully, and make the following findings of fact:

- (a) At the time of the incident, and just before Constable Bundy shot Cleve Scott, Cleve Scott did not have a knife in his hand. He did not stab, or stab at Constable Bundy.

- (b) Constable Bundy shot at Cleve Scott whilst Cleve Scott was trying to run away from him, and while Cleve Scott's back was to him.
- (c) The bullet from Constable Bundy's firearm entered Cleve Scott's body in the region of the left lower back.
- (d) Cleve Scott did not inflict any injuries to Constable Bundy.

23. I found the witness Mr. Rainford to be a credible and truthful witness, who gave his evidence in a clear and forthright manner. On the other hand, I was not impressed with the demeanour of the Second Defendant or Detective Sergeant Brown, and I did not find them to be witnesses of truth. I found Constable Bundy's account of the tousing quite incredible, and incapable of belief. Indeed, as Miss Mullings pointed out in her closing submissions, in his witness statement Constable Bundy only mentions the delivery area of the Taylor Hall car park as the place where the incident takes place. He for the first time in cross-examination mentions this tousing from the delivery area, to the canteen, through the canteen and unto Taylor Hall in the vicinity of the study room.

24. In my view the entry and exit wounds indicated on the post mortem report are more consistent with a shot to the back than with the type of manouvre which Constable Bundy described for the first time in cross-examination, and by which Constable Bundy would have me believe that he was no longer facing Cleve Scott directly.

25. In addition, I found it remarkable that Detective Sergeant Brown could have given the detailed witness statement which he did, including a thorough description of collecting the firearm, rounds of ammunition and spent shells from Constable Bundy, yet fail to mention the collection of the knife, the weapon allegedly used by Cleve Scott, and the shirt with blood stains which he says that Constable Bundy gave him after Bundy came from the hospital. I do not find this to be a minor inadvertence, I consider this to be a major omission which goes to the root of Detective Sergeant Brown's credibility. It seems clear to me that this

evidence was given in an effort to support Constable Bundy's assertion that he was attacked by Cleve Scott with a knife and to bolster the claim of self-defence.

26. I find on a balance of probabilities that Constable Bundy did not discharge his firearm in lawful self-defence, using no more force than was reasonably necessary in the circumstances. I find that Constable Bundy discharged his firearm negligently, maliciously and without reasonable or probable cause.

27. I have therefore determined liability in favour of the Claimants. The remaining issue is therefore **what is the proper measure of damages?**

28. At the time of his death, Cleve Scott was twenty-five years old. His mother Myrtle Daley and his brother Howard Scott gave evidence in relation to the claim for damages.

Funeral expenses

29. A sum of \$90,000.00 is claimed in the Amended Statement of Claim in respect of funeral expenses. Howard Scott in cross-examination claimed that funeral expenses amounted to \$135,000.00. He said that he assisted financially with these expenses and his mother paid what she could manage. However, exhibit 2, which was the only documentary evidence in proof of the funeral expenses, amounted to \$58,100.00. I award the sum of \$58,100.00 under this head, and I so award that sum under the Fatal Accidents Act in favour of the mother Myrtle Daley.

Inter-relationship of the Law Reform Miscellaneous Provisions Act (L.R.M.P.A.) and the Fatal Accidents Act (F.T.A.)

30. The Claim under the F.T.A. is brought for the benefit of the deceased's mother Myrtle Daley and the deceased's son Michael Scott. The deceased died intestate and Letters of Administration in respect of his estate were granted to the Administrator General for Jamaica on the 19th of November 1999-exhibit 3. The

Distribution table set out in section 4 of the Intestates Estates and Property Charges Act indicates that the deceased's residuary estate goes solely to his issue Michael Scott. Michael was born on the 10th of June 1995-birth certificate-exhibit 4. The law does not permit a dependant who is a beneficiary of the deceased's estate to "double recover". Any award for Michael Scott under the F.T.A. would therefore be completely merged in the benefit he derives under the L.R.M.P.A. as the sole beneficiary of the deceased's estate. In that regard, I rely upon the judgment of Campbell J.A. at page 277 of our Court of Appeal's decision in **Godfrey Dyer & Derrick Dyer v. Gloria Stone** 27 J.L.R. 268.

The claim under the L.R.M.P.A.-the Multiplier

31. The first matter that I deal with is the multiplier. An appropriate multiplier for the deceased must be selected once and for all as at the date of death. At that date Cleve Scott was twenty-five years old. In my view, an appropriate multiplier would be 15. I rely upon the judgment of Justice Karl Harrison(Ag), as he then was, in **Doris Fuller v. The Attorney General** Suit No. C.L. 1993/ F 152, handed down July 15 1995, and the cases there discussed at pages 4-5.

The multiplicand

32. As to the multiplicand, this aspect of the claim is for prospective loss of earnings, or what is commonly referred to as "the lost years". Howard Scott gave evidence that the deceased was a "B" grade mason and he, Howard Scott is a carpenter. In 1994 Cleve Scott had worked for Paul Johnson Construction Limited. Letter dated 18 March 2002, exhibit 5, from Paul Johnson Construction Limited indicates that Cleve Scott's last pay cheque was for \$6,118.72 for the fortnight ending 5/10/94, however, he had during an earlier period earned as much as \$12,112.02 for a fortnight.

33. Howard Scott gave evidence that his brother left Paul Johnson Construction in 1994 and started to work on various jobs with him as a sub-

contractor. He said that on an average his brother earned \$1,500.00 per day and they both worked four days per week for 8 hours per day. Howard Scott also claimed that he and his brother were usually paid at the approved rate given by the Master Builders. The Labour Management Agreement 2003-2005 for the Building and Construction Industry was admitted in evidence as Exhibit 8. By virtue of that Agreement the current rate of pay for a Grade B mason, which according to Howard Scott is a Grade 2 mason, would be \$984.01 per 8 hour day.

34. Howard Scott further stated that in addition to working as a mason, his brother also sold fruits to students on the University Campus on weekends and on public holidays. He said that his brother earned a good living from selling fruits and had been so engaged for more than three years before his death. He said that since he Howard Scott owned a motor car, he would take his brother to the campus to sell fruits at times and to the Coronation market to purchase fruits. He said that his brother would spend an average of \$4,000.00 per week at the market purchasing fruits and he would resell the fruits and make about \$13,000.00 per week from these sales. Howard Scott said he would walk around the market with his brother, check his money with him, and if Cleve Scott was short of some of the money, he Howard would pay. He said Cleve Scott showed him what he made from the fruit vending.

35. In cross-examination Howard Scott said that the four days per week that his brother worked as a mason were Saturday, Monday, Tuesday, and Thursday. His brother sold fruits on Fridays and Saturdays on the Campus. He said that Cleve Scott went to the market four days per week to purchase fruits. Howard Scott would take him to Coronation market to purchase fruits on a Monday, Wednesday, and a Friday morning, and sometimes even on a Thursday too. Howard Scott kept neither a record of what Cleve Scott spent or made from the fruit business but he says he was able to recall the sums involved.

36. I am prepared to accept that the deceased earned prior to his death \$1,500.00X 4 per week, i.e.\$6,000.00 per week from his work as a mason. I am prepared to accept this evidence even though it is not without interest that the current rates for Grade 2 masons according to the Labour Management Agreement 2003-2005 appear to be considerably lower than the sums which Howard Scott claimed that Cleve Scott was earning from as far back as 1996. However, the evidence put forward with regard to the earnings from fruit vending leaves a lot to be desired. Miss Mullings asked me to accept that the deceased made an estimated average net profit of \$8,000.00 per week from selling fruits, a sum in excess of his earnings from masonry work. The deceased only sold fruit on weekends and public holidays, yet, according to Howard Scott , Cleve Scott would be purchasing these fruits, which are perishable items , throughout the week. In addition, the sums Cleve Scott is alleged to have spent on purchasing these fruits, equate to a sizeable chunk of his earnings from his masonry work. Howard Scott was not able to say what sorts of fruits were bought, or in what general quantities and he had no records of what was spent, sold, bought, or earned from the enterprise.

37. There are a number of cases, including **Lawford Murphy v. Luther Mills** 14 J.L.R. 119, and **Hepburn Harris v. Carlton Walker** S.C.C.A 40/90, in which Courts have made the point that Claimants ought not to be encouraged to throw up figures at trial, make no effort to substantiate them and then rely upon logical arguments to say that specific sums must have been earned. It is also clear that special damages must be specifically proved. In the **Hepburn Harris** case, the Court of Appeal appeared to accept that the Court may use a reasonable figure. However, there must be some reasonable evidentiary basis on which the Court can act.

38. In this case, I am being asked to accept that from his weekend fruit sales Cleve Scott earned more than his four days working as a mason. Also, he was buying fruits in the week, even though not selling them until the weekend. I do

not find this evidence credible. In addition, although I believe that Cleve Scott was a fruit vendor and must have earned something from that pursuit, there is no acceptable basis upon which I can assess that loss. I do not know for example what fruits he bought, in what quantities, what he sold, unit prices and other relevant information. I cannot speculate or pluck any figures out of the air. There is no proper evidentiary basis and I therefore reject the claim with regard to loss of earnings as a fruit vendor.

39. I will accept that, as Miss Mullings submitted, since the sum pleaded as Mr. Scott's earnings was \$5,250.00 per week, and it was also pleaded that the deceased before his death contributed a total of \$4,000.00 towards the maintenance of his mother and child, it is reasonable and not inconsistent with the evidence to accept that Cleve Scott spent \$1,250.00 per week on his own upkeep. Before the deduction for his own living expenses is made, we have to see whether the deceased's income exceeded the non-taxable income tax threshold. I will take the yearly income tax threshold in 1996 as \$ 50,544.00(see Mrs. Khan's Volume 4, Work on Personal Injury, page222). I am also prepared to take the income the deceased would have been earning at trial as \$6,000.00 per week as it is difficult to accept that he would now be earning less than he was in 1996, particularly if he had continued to work as sub-contractor to his brother. The income tax threshold at trial is \$120,432,00.

40. The Pre-trial period of time is approximately 8 years and 9 months or 8.75 years.

\$5,250 per week or \$273,000.00 per year(52 weeks)

After income tax of 25% on (\$273,000 - \$50,544.00) , tax= \$55,614.00, leaving a yearly net income of \$217,386.00. Deduct \$1,250.00 for deceased's own expenses = \$65,000.00 per year.

Multiplicand = \$152,386.00.

Therefore damages pre-trial = \$152,386.00 X 8.75= **\$1,333,377.50.**

41. The Post-trial period is approximately 6 years and 3 months or 6.25 years.

\$6,000.00 per week or \$312,000.00 per year.

After income tax of 25% on (\$312,000.00-\$120,432.00), tax=\$47,892.00, leaving a yearly net income of \$264,108.00. Deduct for deceased's own expenses =\$65,000.00 per year.

Multiplicand =\$199,108.00.

Therefore post-trial=\$199,108.00X 6.25=\$1,244,425.00.

Under the F.T.A.

42. I am prepared to treat the mother's dependency as continuing for the full period of Cleve Scott's lifetime, although he had a child, given that Cleve Scott continued to live with his mother and given the relatively low income level at which the parties subsisted. Up to the date of his death the fact that he had a child did not appear to affect his level of contribution towards his mother. It is true that this could have changed over time, however, that does not appear to me to have been a likely outcome given the factors outlined above.

I will use the figure of \$2,500.00 per week which the mother said the deceased contributed to her expenses.

That is equivalent to \$130,000.00 per year

Pre-trial = \$130,000.00 X 8.75=\$1,137,500.00

Post-trial=\$130,000.00X 6.25=\$812,500.00

43. There will therefore be judgment in favour of the Claimants against the Defendants, with damages assessed as follows:

For the 2nd Claimant:-

Under the L.R.M.P.A.

Loss of expectation of life-\$10,000.00

Pre-trial :\$1,333,377.50

Post-trial :\$1,244,425.00

For the 1st Claimant:-

Under the F.T.A.(the mother)

Pre-trial \$1,137,500.00

Post-trial \$812,500.00

Funeral expenses-\$58,100.00

Interest on the pre-trial damages under the F.T.A. i.e. interest on the sum of \$1,137,500.00 and on the funeral expenses of \$58,100.00 at the rate of 6 per cent per annum from the 11th day of April 1996 to 25th January 2005.

Costs to the Claimants to be taxed if not agreed or otherwise ascertained.