JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 33/95

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE PATTERSON JA

BETWEEN	**JENNIFER EBANKS**	**APPELLANT**
AND	**SPL. CPL. AGGREY CROOKS**	
AND	**THE ATTORNEY GENERAL**	**RESPONDENTS**

Walter Scott & Mrs. Sharon Usim for Appellant

Lennox Campbell, Senior Assistant Attorney General and Cordell Green for respondents

5th , 6th February & 25th March, 1996

CAREY JA

The appellant who was the plaintiff in the action went shopping on 28th September, 1991, in the Coronation Market in Kingston. She felt, she said, a shot in her right hand and woke up in the Kingston Public Hospital. In fact, she had been shot in the head. The bullet came from a policeman's gun. Her lawyers sued the police officer and the Attorney General in negligence. They alleged as follows in their statement of claim:-

> "That on the 28th of September, 1991, at approximately 11:00 a.m. the First

> Defendant wrongfully and negligently shot the Plaintiff in the Head, while she stood in a crowd at the coronation market in the parish of Kingston."

The Government side put up defences one of which is the concern of this appeal and as pleaded stated thus:

> "Further that the Writ of Summons and/or Statement of Claim discloses no cause of action against the Defendants by virtue of Section 33 of the Constabulary Force Act."

It is a very technical defence but it cannot be dismissed on that ground.

Section 33 of the Constabulary Force Act provides as follows:

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause, and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

This provision affects the pleadings in actions brought against police officers for acts done in the execution of their office. It also affects the burden of proof in such actions as the plaintiff must prove that the act of the officer was done maliciously or without reasonable or probable cause.

In the present case the learned judge upheld the objection to the appellant's pleadings and dismissed the action. He did not enter a non-suit

because that is impermissible in regard to actions in the Supreme Court but gave judgment for the respondents. The effect of this judgment is that in actions for negligence against police officers, a plaintiff would be obliged to plead and prove that the "act" i.e. negligence was done maliciously or without reasonable or probable cause. I must confess that I would entertain considerable difficulty in conceiving of the possibility of such proof for I cannot envisage negligence being committed either maliciously or without reasonable or probable cause. Leading counsel for the respondents did acknowledge that it was not possible to prove "malice" in regard to negligence, a concession which, plainly, would considerably weaken his arguments in support of upholding the objection he successfully maintained before the learned judge. Such an admission, I incline to think, must lead to the conclusion that his construction of the section leads to an absurdity. The matter becomes curiouser and curiouser in the light of counsel's argument that, nevertheless, it was possible to prove negligence without reasonable and probable cause because it would mean that "maliciously" was surplusage.

So far as I am aware, this matter has not before been considered by this court and it thus comes before us "tabula rasa." It is tolerably clear that section 33, apart from the obligatory pleading requirement imposes a burden of proof on a plaintiff which, but for the enactment would not exist. But it is equally plain that the provision does not create any sort of defence for police officers exclusively nor does it provide some new ingredients for tortious acts committed

by police officers. The object of the legislation, it can be said with some certainty was to protect police officers from frivolous and vexatious actions. A similar provision exists in the United Kingdom Justice Protection Act 1848 with respect to Justices of the Peace. The protection given is effected by placing a greater burden of proof on the part of the plaintiff than would normally be the case. It is not for the police officer to justify his action: it is for the plaintiff to prove that the officer's act was not justified.

In construing the provision it is necessary to look at its wording. It seems to me that the section treats an action "for acts done by police officers in execution of their office" as an action on the case. It can thus be regarded as a deeming section. Historically, the remedy for acts which involved the direct application of force was by writ of trespass. Where the force was indirect, then the remedy lay in an action on the case. Bramwell B in **Holmes v Mather** LR 10 Ex 261 explained the distinction thus:

> "If the act that does the injury is an act of direct force, vi et armis, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons no action is maintainable though trespass would be the proper form of action if it were wrongful."

Maitland in his lectures, on the Forms of Action at Common Law pointed out that case becomes a sort of general residuary action. All the modern varieties of tort which would not have been actionable under the writ of trespass itself, arose

within the sphere of case. The modern law of negligence developed within the writ of case. The well known case of **Scott v Shepherd** 2 W.Bl. 892 turned on the distinction between trespass and case. In those by-gone days success depended on the correct choices being made. This archaic procedure was not abolished finally until the Judicature Acts 1873-5 when forms of action ceased to exist. Maitland spoke truly when he asserted that the forms of action though dead still rule us from the grave. One would expect that statutes passed before the enactment of the Judicature Acts would necessarily recognize the difference between these forms of action. Thus the United Kingdom Constables Protection Act 1750 and the Justices Protection Act 1848 both have provisions the ipsissima verba of section 33 of the Constabulary Force Act. Those statutes I have little doubt, were the source of our provision in the Constabulary Force Act. En passant I would suggest that the time is long past when such antediluvian provisions should remain in the statute books. The rationale for treating trespass as case may well have been because the writ of trespass derives from penal stock, the defendant was liable to imprisonment and in the Middle Ages covered all crimes short of felony. See Maitland The Forms of Action at common Law - Lecture VII. Howsoever that might be, the section is concerned with the direct acts of the police in the execution of their office and it has created a special writ on the case for actions brought in respect of those acts. In relation to those direct acts, the averments in the section must be pleaded. In my judgment, on the true construction of section 33, only direct acts of police

officers in the execution of their duty or office come within its purview. Indirect acts would thus be outside the provision. Plainly, there would be no need to deem indirect acts because the writ of case was already the remedy and the only appropriate remedy.

Negligence in point of law, is not an act, but a failure to act, to be more precise, it is the breach of a duty of care imposed by law while it is perfectly true that we speak of acts of negligence that however is a compendious way of saying that a defendant has departed from the standard of care imposed by law, that is, the standard of the reasonable man. In my judgment, in actions on the case such as negligence, no averment of "maliciously or without reasonable or probable cause" need be pleaded; section 33 is not applicable.

Mr. Campbell did submit that the section when properly construed created an additional element of proof in the tort of negligence in the case of police officers. It is a well known canon of construction that express and unambiguous language is needed to confer legal rights. Plainly, the enactment confers no legal right on police constables. They are not at liberty to be "negligent with reasonable or probable cause" or for that matter "maliciously". Further, as it seems to me, the constable logically can only act maliciously or without reasonable and probable cause, towards some person in whom he is in direct contact. He could scarcely act maliciously or without reasonable and probable cause towards some person in respect of whom he is not in direct contact. For this additional reason, I would conclude that "acts" in the execution of his office

means the direct tortious acts of the police officer in the execution of his office: no more and no less.

The learned judge from the note of his judgment gave a very literal interpretation to the section. He noted that the enactment uses the words:

> " 'every action' not 'every action other than negligence'. Pleadings are clear 'in execution of his office.' Yet do not expressly allege malice or absence etc. Preliminary point could have been upheld but since Section 33 says 'if at the trial' I decided to hear the evidence and clearly the plaintiff failed to prove such allegation and non-suit not applicable I accordingly entered."

It is plain that the learned judge did not construe the provision in its entirety. He ascribed absolutely no meaning to the words - "an action on the case as for a tort." These words were treated as without any significance and thus mere surplusage. In that, he fell, with all respect to him, into error.

In my opinion, if the construction contended for by Mr. Campbell and which I understand has the approval of one of my brothers, is correct, it would lead to this absurd situation. A police officer could drive his police vehicle while escorting a fire engine to the scene of a fire, quite negligently but the driver of the fire engine could not. The police officer could plead that he had reasonable or probable cause to drive negligently but the fire engine driver could not. Police officers while on duty could never be successfully sued in negligence. In order to confer such an exemption, what amounts to a legal right,

plain and unambiguous words would be essential. The wording of the section does not, in my view, plainly and unambiguously confer any rights upon police officers to act contrary to law. Any interpretation which leads to such a incongruous situation, cannot be correct, and Parliament cannot be taken to have intended such an absurd result.

For my part, I would allow the appeal, set aside the judgment of the court below and remit the case for the action to be tried on its merits. The appellant is entitled to costs both here and below to be taxed if not agreed.

FORTE, J A

The appellant brought this action in negligence against both defendants, arising out of personal injuries received by her, when she was shot by the first defendant, a corporal in the Island Special Constabulary Force. The second defendant the Attorney General was sued by virtue of the Crown Proceedings Act. At the end of the evidence, the learned judge entered judgment for the defendants on the sole basis that the plaintiff failed to aver in her statement of claim, that the first defendant acted maliciously or without reasonable or probable cause, and in any event failed to prove those requirements. In raising this issue which found favour with the learned judge, the respondents relied on section 33 of the Constabulary Force Act which reads as follows:

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suit or a verdict shall be given for the defendant."

The appellant, now challenges that finding of the learned judge and so the question for determination in this appeal remains the same as below i.e.

> "In an action founded in negligence, brought against a Constable acting in the execution of his office, does the plaintiff in order to succeed have to plead and prove that he either acted maliciously or without reasonable or probable cause, in accordance with section 33 of the Constabulary Force Act."

There is no dispute that the officer was acting in the execution of his office when the incident occurred - the details of which have been described in the judgments of my brothers, and which need not be recited here.

In the course of the argument, an analysis of section 33 which occupied most of our time, was undertaken by both sides, and I am grateful for the learning that came from counsel in that regard. The peculiar wording of the section was the basis of counsel's contention. Unfortunately, so many years after the old forms of action have been abolished [1873], the section still contains a reference to "action on the case" which having regard to the arguments, necessitates the examination of exactly what is the true construction of these words, and indeed the section as a whole. Having addressed my mind to the issue with great difficulty, I am consoled by the following words of Lord Denning M.R. in the case of **Letang v. Cooper** [1964] 2 All E.R. 929 at page 931 letter G which are most appropriate:

> "The argument, as it was developed before us, became a direct invitation to this court to go back to the old forms of action and to decide this case by reference to them. The statute bars an action on the case, it is said, after three years, whereas trespass to the person is not barred for six years. The argument was supported by reference to text-writers, such as **Salmond on Torts** (13th Ednt.) p.790. I must say that if we are, at this distance of time, to revive the distinction between trespass and case, we should get into the most utter confusion. The old common lawyers tied themselves in knots over it, and we should find ourselves doing the same. Let me tell you some of their contortions. Under the old law, whenever one man injured another by the direct and immediate application of force, the plaintiff could sue the defendant in trespass to the person, without alleging negligence (see **Leame v. Bray** [1803], 3 East. 593), whereas if the injury was only

> consequential, he had to sue in case. You will remember the illustration given by Fortescue, J., in **Reynolds v. Clarke,** in [1725] 1 Stra, 634 at p. 636.
>
> > 'If a man throws a log into the highway and in that act it hits me, I may maintain trespass because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case because it is only prejudicial in consequence'."

Diplock J (as he then was) in the case of **Fowler v Lanning** [1959] 1 All E R 290 at page 293 offers some assistance as follows:

> "I am much indebted to counsel on both sides for their diligence and erudition in tracing the history of the distinction between trespass vi et armis and trespass on the case before the passing of the Supreme Court of Judicature Act, 1873. I do not think it necessary, however, to examine in detail the earlier controversies alluded to by Lord Ellenborough in **Covell v. Laming** (1808), 1 Camp. 497) whether trespass lay at all when the injury was unintentional, even although it was direct. That it did must be regarded as settled in 1803 by **Leame v Bray** (1803), 3 East, 593), which decided that trespass vi et armis could lie wherever the personal injury complained of arose directly from the act of the defendant himself. The converse proposition that trespass on the case did not lie where the injury was direct, even although it was unintentional, which at first sight appeared to be established in 1794 by **Day v Edwards** (1794), 5 Term Rep. 648), had been swept away at least by 1833 when the Court of Common Pleas in **Williams v Holland** (1833), 10 Bing. 112), distinguishing - if not riding roughshod over **Day v Edwards** held that an action on the case was an available remedy in such a state of facts. Pausing, therefore, at the

> convenient date of 1852, when the Common Law Procedure Act was passed, it was well established that where personal injury was caused to the plaintiff by the direct act of the defendant himself, alternative remedies in trespass to the person and in negligence were available."

Subsequently, sitting in the Court of Appeal, Diplock L J (as he then was) uttered again the same opinion in **Letang v Cooper** (supra) at page 934:

> "If A., by failing to exercise reasonable care, inflicts direct personal injury on B., those facts constitute a cause of action on the part of B. against A. for damages in respect of such personal injuries. The remedy for this cause of action could, before 1873, have been obtained by alternative forms of action, namely, originally either trespass vi et armis or trespass on the case, later either trespass to the person or negligence."

The words of the above cited dicta certainly indicate that prior to the abolition of the forms of action, where personal injuries were caused to the plaintiff by the direct act of the defendant, then the plaintiff could bring suit either in trespass or case, the latter being the vehicle where the act of the defendant was unintentional but negligent.

With this background, I turn now to an examination of section 33 which is worded in like form as section 1 of the English Justices Protection Act, 1848 which provides:

> "Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable

> cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be non-suited, or a verdict shall be given for the defendant."

In **O'Connor v Isaacs** [1956] 1 All E. R. 513 Diplock J (as he then was) after a detailed examination of the common law position in so far as Justices were concerned concluded as follows at page 524:

> "I therefore reach the conclusion that the position at common law was that a justice acting without jurisdiction was liable in trespass for all wrongful acts done pursuant to his order. When a justice was acting erroneously although within his jurisdiction, no action against him lay, unless malice was alleged and proved. The action being akin to malicious prosecution was not an action of trespass. Although it started originally, I think, by a writ of malicious prosecution, it was in the nature of an action on the case."

Then in commenting on section 1 of the Justices Protection Act 1848 he stated:

> "It is therefore, plain that, whether or not this was declaratory of the common law in respect of judicial acts (as I think it probably was), after 1848, an action against a justice for an act done within his jurisdiction, although it would in other circumstances have amounted to trespass, could not be brought in trespass, but could be brought in case only, and malice was a necessary ingredient of the action."

The section referred to was obviously dealing with acts done by the justices which were within their jurisdiction and which were direct acts/orders which caused the injury to the persons to whom and in respect of whom they were aimed e.g. an order for the imprisonment of a plaintiff, done within the exercise of the justices' jurisdiction.

Section 33 of the Constabulary Force Act, no doubt had its genesis in the English Acts which began with the Constables Protection Act 1750, culminating with the Justices Protection Act of 1848. These Acts were geared at preventing vexatious actions against police officers and justices of the peace for acts done in the execution of their duties, and consequently required that so long as the act complained of was done within that scope, then it became necessary for the plaintiff, if he is to succeed, to aver and prove the elements of either malice or reasonable and probable cause. But the section also enacts that any action brought in those circumstances, shall be an action on the case as for a tort. Impliedly therefore the section is referring to those acts which could only have in the past, been sued in trespass, and provides that all such actions would thereafter be brought as case, requiring the proof of malice or reasonable or probable cause. In other words, the section refers to direct acts done by a constable in the execution of his office, and not to personal injuries which are the consequential effect of his acts, or put another way it does not apply to unintentional acts of the constable which amount to negligence.

In my view, any other interpretation, would result in the sanctioning by the Legislature of conduct of police officers in the execution of their offices, which disregards the standard and duty of care, which they owe to citizens in the exercise of those functions in the public domain. An allegation of negligent conduct, which is really an allegation of an omission to exercise the required standard of care where a duty of care is owed, cannot require for its proof, evidence whether express or implied, that the negligent conduct occurred in circumstances where the guilty party was not acting maliciously or without reasonable or probable cause. These latter factors are strangers

to the law relating to negligence, and consequently any interpretation of the section as that advanced by the respondents, in my view, would lead to absurdity.

Perhaps a practical illustration may be useful. Assuming for the purposes of argument that these factors had to be proved, the appellant who alleges that he was shot, as a result of the negligent action of the constable, would also have to prove either (i) that the constable was acting maliciously - which would be impossible, there being no allegation that the constable had any knowledge of the appellant or even had any specific intention of shooting the appellant, when his firearm was discharged; (ii) that the constable acted without reasonable and probable cause. In the circumstances of this case, it is arguable that the constable at the time the shot was fired was acting with reasonable and probable cause, chasing as he was, a "pick-pocket" who was attempting to escape. That, of course would be applicable if the constable had shot the "pick-pocket" whom he was chasing for that would have been in the old forms of action, an action in trespass. In the case of the bystander, who is shot, as a result of the negligent discharge of the firearm by the constable, causing as a consequential effect injuries to the bystander, it would be absurd to require that bystander to prove that the constable acted without reasonable or probable cause in respect to him.

For the reasons given herein, I would conclude that the contention of the respondents cannot be sustained as acceptance would give protection from civil liability to constables who act negligently in the exercise of their office, though acting without malice and with reasonable and probable cause. This in my view would be inconsistent with the fact that depending on the degree of negligence those same acts could be the result of criminal action against the Constable, yet leaving him free from civil liability.

I would allow the appeal, set aside the judgment of the Court below, and order that the matter be returned to the Court below for trial on its merits.

PATTERSON, J.A.: (Dissenting)

The issue raised on this appeal lies in the true construction of section 33 of The Constabulary Force Act. When that section is construed, it is plain that the learned judge came to the correct decision.

On the 26th June, 1992, the appellant commenced an action against the respondents by a generally indorsed writ of summons. The statement of claim was filed on the 7th August, 1992, the relevant paragraphs of which are as follows:-

> "1. That the Plaintiff was at all material times a self employed shop owner, and resides at 6 Harding Road, Passage Forte in the parish of St. Catherine.
>
> 2. That the First Defendant was at all material times acting in the performance of his duties as the servant and or agent of the Second Defendant.
>
> 3. That the liability of the Second Defendant arises by virtue of the Crown's Proceedings Act in that the First Defendant is a Special Corporal in the Island Constabulary Force which falls under the Jurisdiction of the Ministry of National Security and Justice which is a Department of the Government of Jamaica.
>
> 4 That on the 28th of September, 1991, at approximately 11:00 a.m. the First Defendant wrongfully and negligently shot the Plaintiff in the Head, while she stood in a crowd at the Coronation Market in the parish of Kingston.
>
> 5. That as a result of the aforesaid acts the Plaintiff has suffered severe head injuries, neurological damage, has lost materially the ability to support herself has suffered loss and damage and has been put to expense."

PARTICULARS OF NEGLIGENCE

"1. Discharging a firearm in a manner and under circumstances in which it was manifest unsafe to do so.

2. Failure to properly handle and control the firearm in his possession.

3. Discharging a firearm reckless as to the possibility of causing injury and damage to persons and or property.

When the matter came on for hearing before Theobalds J. the respondents were granted leave to amend their defence, and the hearing proceeded. The relevant paragraphs of the defence are these:

"1. Paragraph 1 of the Statement of Claim is not admitted.

2. Paragraphs 2 and 3 of the Statement of Claim are admitted.

3. Save that it is admitted that the Plaintiff was shot on the 28th day of September, 1991, at the Coronation Market paragraph 4 of the Statement of Claim is denied. The Second Defendant will contend that on the date and place aforementioned the First Defendant while in the process of giving chase to an alleged robber, tripped over some rubbish in the market and fell face down. On falling one shot went off from his firearm and the Plaintiff was hit.

4. Paragraph 5 of the Statement of Claim is denied for reasons aforesaid. Further that the Writ of Summons and/or Statement of Claim discloses no cause of action against the Defendant by virtue of Section 33 of the Constabulary Force Act."

The learned trial judge found for the respondents, holding that neither "malice" nor "without reasonable or probable cause" had been alleged or proved by the appellant as is required by section 33 of the Constabulary Force Act. ("section 33").

Counsel for the appellant contended that the learned trial judge erred in the interpretation of section 33. He argued that "it is manifestly absurd for a plaintiff in a case of alleged negligence against a police officer, whether in the discharge of a firearm or the driving of a motor vehicle, to have to plead and to prove that the policeman was actuated by malice in his negligent conduct or acted without reasonable and probable cause." This argument is flawed in my opinion. The test lies not in the result, but in the true construction of section 33, the meaning of which seems quite plain and unambiguous. "If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity, or manifest injustice from an adherence to their literal meaning" (Per Jervis C.J. in **Abley v Dale** (1850) 20 L.J.C.P. 33, 35).

Counsel submitted that the cause of action is in negligence which is today regarded, when it causes damages, in itself an action in tort. He said the development of negligence as a tort in itself may be said to have commenced with the celebrated case of **Donoghue v. Stevenson** [1932] A.C. 562. He then referred to the present Constabulary Force Act which came in force in 1935, and argued that the fact that section 33 describes the action to be brought against the constable as an action on the case is in large measure immaterial and irrelevant to an action in negligence against a

constable. He concluded by submitting that "on a proper construction of the Act in its full 'context' it is clear that section 33 applies to acts of a constable which are voluntarily, deliberately and intentionally carried out by him in the execution of his duty and not to acts of negligence attributed to him during the execution of his duty and that to construe otherwise as the learned trial judge did would lead not only to manifest absurdity and repugnance, but to injustice."

Mr. Campbell, on the other hand, submitted that it is material to allege malice or lack of reasonable or probable cause in all actions brought against a constable for any act done by him in the execution of his duty. He argued that there is nothing unreasonable or absurd about the words used in section 33, and accordingly, they should be given their ordinary meaning.

I think I ought to examine the historical background to section 33 before attempting to construe its provisions. Section 33 reads as follows:-

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

It is not drafted in today's statutory language. This is so because it has its genesis in the nineteenth century when the language used was quite appropriate. On the 8th March, 1861, The Police Act 1861, was promulgated. It had as its object the maintenance of a general police force. It seems quite logical that some measure of protection from actions should be provided for the members of the force while acting in

the reasonable execution of their duties. The fifty-first section of the 1861 Act was one section that provided such protection. In 1867 The Police Act, 1861 was repealed and replaced by the Constabulary Force Law, Law 8 of 1867. The protective provisions of the Police Act 1861 were re-enacted in similar terms in the Constabulary Force Law, 1867; the thirty-first section reads:-

> "Thirty-first - Every action to be brought against any officer, sub-officer, or constable of this force, for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously, or without reasonable or probable cause; and if, at the trial of any such action, the plaintiff shall fail to prove such allegation, he shall be non suited, or a verdict shall be given for the defendant."

In my view those clear and unqualified provisions remain unchanged in meaning and effect up to the present day. They regulate procedure and pleadings in every action against a constable for acts done in the execution of his duties. The Judicature (Civil Procedure Code) Law (the CPC), which came into force on the 1st June, 1889 made provisions for the modern rules of civil pleading. According to those rules only material facts are to be stated in the particulars of claim, but "wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred" (section 185).

It is my opinion that in the instant case, it was material for the appellant to adhere to the plain provisions of section 33. "The fact that by virtue of the passage of time since a statute was passed, the enacting words on their plain construction may lead to absurd and inconvenient results is no reason why the court should depart from

the ordinary canons of construction and give the enacting words some other construction" (See **Attorney General v Prince Ernest Augustus of Hanover)** [1957] A.C. 436). It is a rule of construction that the language used by the legislature must be construed in its natural and ordinary sense which the words used ordinarily bore at the time when the statute was passed. In **Simpson v Teignmouth and Shaldon Bridge Company** [1903] 1 K.B. 405, the Earl of Halsbury L.C., when considering the meaning of the word "carriage" as used in a statute of 1825, (5 Geo. 4 C. CXIV.) said at 413:

> "The broad principle of construction put shortly must be this: What would, in any ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed? If the thing so sought to be brought within the Act would substantially correspond to what the Legislature meant by a carriage (called by whatever name you please), I think that the tax would apply; but if not, it is not for the Court to make any effort by ingenious subtleties to bring within the grasp of the tax something which was not intended in substance by the Legislature at that time to be the subject of taxation".

That observation was referred to with approval by their Lordships Board in **Kingston Wharves Ltd. v. Reynolds Jamaica Mines Ltd.** [1959] A.C. 187, 195 (per the Rt. Hon. L.M.D. DeSilva).

The rule as to contemporanea expositio has been applied in a vast number of cases, and I see no reason to depart from it. It is the intention of the Legislature expressed in the words used that must be ascertained in order to give a statutory provision its true meaning and effect. In this regard Counsel for the appellant thought

it would be useful to rehearse the history of the old forms of action, since section 33 refers to "an action on the case as for a tort" as well as "the declaration" in such an action.

In the middle ages, all wrong doings by a person were classified as a trespass. From these trespasses emerged civil actions arising from wrongs committed against a man's person, to his land and to his goods. By about the thirteenth century, the civil action of trespass was firmly established. Writs of trespass were divided into three kinds, trespass to the person (assault and battery) trespass to land and trespass to goods. They all alleged breaches of the King's peace, and therefore were triable only in the King's Court - (the Curia Regis). The various forms of actions crystallized and became stereotyped, and were issued from precedents kept in a Register of Original Writs by the clerks of Chancery. Unless there was such a precedent, there would be no remedy, regardless of the wrong suffered. The statute In Consimili Casu of Edward I gave the clerks of Chancery authority to frame new writs that would give remedies similar to those given by the existing writs. It is interesting to see a translation of the provisions of that statute:

> "And whenever from henceforth it shall happen in the Chancery that in one case a writ is found, and in similar case (in consimili casu) falling under similar law and requiring a like remedy none is found, the clerks of the Chancery shall agree in making a writ; or adjourn the complaint until the next Parliament and write the cases in which they cannot agree and refer them to the next Parliament and by consent of men learned in law a writ shall be made, lest it happen that the Court should for a long time fail to give justice to complaints."

The upshot of this was that a vast number of new writs and new forms of action developed; among which were the actions of trespass on the special case. In later years these were referred to simply as "actions on the case" or just "case", separate and distinct from the old actions of trespass.

Most of our modern law of contract and tort emerged from these new writs and new forms of action. The modern law of contract developed from the action of assumpsit, which was an action on the case. The law of torts developed from several forms of actions on the case; malicious prosecution, conversion, nuisance, libel, are but a few. They were founded on the common law or on Acts of Parliament, their object being generally to recover damages for torts which were not committed with force, actual or implied, or although committed with force, the matter affected was not tangible, or the injury was not immediate but consequential; or where property is involved, the interest was only in the reversion. Trespass would not be sustainable in such cases, since for it to lie, the injury must be forcible and occasioned immediately by the act of the defendant. An action in trespass to the person would fail if the plaintiff could not prove an intended invasion to his person. The plaintiff need not prove damage, nor need show that the defendant's action was unreasonable, but if the trespass was forcible and direct the plaintiff would recover for any damage he may have suffered. But case will lie if the plaintiff proves damage, that the damage suffered was the foreseeable consequence of the defendant's act, and that such act was unreasonable. If the plaintiff's injury was only consequential, then the case would lie. Whenever an injury to a person was occasioned by a constable or by a justice of the peace in the lawful and regular execution of his duty but maliciously, an action on the

case would be the proper remedy. Malice or lack of reasonable or probable cause is a necessary ingredient in every such action on the case.

It is not unknown for a statute to provide that the remedy to an aggrieved party shall be an action on the case. Its adoption has both advantages and disadvantages. The generality of the pleadings, and the usual pleas being the general issue, not guilty, puts the plaintiff on proof of the whole of the allegations in his declaration, and leaves the defendant at liberty to avail himself of any matter of defence at the trial, without disclosing to the plaintiff the circumstances on which it is founded. The declaration in an action on the case must specify, in a methodical and legal form, all the circumstances which constitute the plaintiff's cause of action. Today, the statement of claim supersedes the declaration, and the defence supersedes the plea of the general issue, (per the CPC).

Lord Denning M.R. in **Letang v Cooper** [1965] 1 Q.B. 232 expressed the view that "these forms of action have served their day" and that "the distinction between trespass and case is obsolete". But we are not here concerned with the forms of action. There is no dispute as to the form adopted by the plaintiff. Lord Denning M.R. expressed the modern thinking on the division between trespass and case when he said in **Letang v. Cooper** (supra):

> "Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage) we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. 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** [1704] 6 Mod. 149; 87 E.R. 907). 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 intentionally, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence."

The plaintiff's claim is that her injuries were caused by the negligent action of the constable, and no issue arises from such cause of action. It is the pleading contained in the statement of claim, the modern "declaration", which must be considered. The modern tort of negligence as a separate tort may be said to be a recent development. Injury arising from negligent conduct, however, has given rise to actions in tort from as early as the fourteenth century, and whereas the modern tort of negligence is firmly established with fixed principles, it has not replaced actions for negligent conduct. Negligence as a separate tort may be said to be the child of an action on the case in tort where negligent conduct was the main complaint. An intentional act or a negligent act, may be actionable as a trespass or nuisance, but not necessarily as the tort of negligence. Lord Wright, in **Lochgelly Iron & Coal Co. v M'Mullan** [1934] A.C. 1 (at 25,) gave the classical constituents of the tort of negligence when he said:

> "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered

> by the person to whom the duty was owing."

But the "duty" concept did not commence in 1932 with **Donoghue v Stephenson** (supra) as Counsel seems to suggest. In the development of the tort of negligence, judges perceived the concept, and Brett, M.R. recognised the principle when he said in **Heaven v. Pender** [1883] 11 Q.B.D. 503:

> "... whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

The injury or danger which results from a breach of the duty to use ordinary care and skill to avoid such injury or danger, is analogous to a trespass, and would be actionable by an action on the case long before the emergence of negligence as a separate tort.

So I return now to the construction of section 33, bearing in mind the principle enunciated by Viscount Simon, L.C. in **Barnard v Gorman** [1943] A.C. 378 (at 384):

> "Our duty is to take the (statutory) words as they stand and to give them their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but nonetheless always giving the word its appropriate construction according to the context."

it seems quite plain to me that when section 33 was originally enacted, the Legislature intended that the words should be given their ordinary meaning, and only the Legislature is empowered to alter its meaning and effect. The Legislature must have realized that a constable while zealously performing his statutory duties, may nevertheless overstep his legal bounds and infringe upon the rights of others, thus becoming open to an action in tort. The Legislature seems to have taken the view, as section 33 strongly suggests it did, that it was necessary, therefore, to balance the interest of the individual who may be unfortunately injured against the interest of the general public on whose behalf the constable acts in the execution of his office. The express provisions are intended to protect constables, who are servants of the Crown, from vexatious proceedings for acts done without malice, or with reasonable or probable cause, in the due execution of their public duties. It is important to note that the protection is limited to acts done by the constable in the execution of his office. Where the injury arises from the want of care or negligence of a servant, case was always the remedy. Such acts may be done maliciously or without reasonable or probable cause, and section 33 places the onus on the plaintiff not only to allege such a condition of mind of the constable, but also to prove it, whenever the plaintiff alleges that the acts were done by the constable in the execution of his duty. The rights of a person injured by the act of such a constable are not taken away; "an action on the case as for a tort" is expressly provided. It has its merits, for the injured party is at liberty to frame his action on the special circumstances of his case, whether it be for misfeazance, malfeazance or nonfeazance. A marked disadvantage though, is that he will not succeed in his action if he fails to specifically plead in his statement of claim and prove either that the constable acted maliciously or without reasonable or probable cause. That is the protection given to the constable. He is liable only for acts done

maliciously or without reasonable or probable cause whenever he is acting in the execution of his office. If he acts fairly within the confines of his statutory powers, mere negligence, even if established, would not alone create any liability.

It was contended that in the instant case which alleges that the plaintiff was injured as a result of negligence on the part of the constable, it would be absurd to plead "malice" or "without reasonable or probable cause" since the plaintiff would not be able to prove either. I can see no difficulty. In the statement of claim, the plaintiff has particularized the acts and omission which gave rise to her claim for negligent conduct. It does not appear that the plaintiff would allege "malice", though malice may be implied from the want of probable cause, but certainly the want of "reasonable or probable cause" could be pleaded. My view is that paragraph 4 of the statement of claim should reflect the express requirement of section 33, and should, therefore, read as follows:

> "4. That on the 28th September, 1991, at approximately 11:00 a.m. the First Defendant, without reasonable or probable cause, wrongfully and negligently shot the Plaintiff in the Head, while she stood in a crowd at the Coronation Market in the parish of Kingston."

Evidence could then be led of the circumstances surrounding the shooting to satisfy the judge that the action of the constable was inconsistent with the existence of reasonable or probable cause. The proof will lie in the inference to be drawn from the proven facts; the question of reasonable or probable cause is for the judge.

I find support for the views I have expressed in the judgment of Diplock, J. in **O'Connor v. Isaacs & ors.** [1956] 1 All E.R. 513. The learned judge was there considering an action against justices for damages for false imprisonment and for sums

paid by a husband to his wife under an order of the justices. Section 1 of the Justices Protection Act, 1848 (U.K.), which is in pari materia to section 33, fell to be construed, and this is how it reads:

> "Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be non-suit, or a verdict shall be given for the defendant."

Diplock, J. (at p. 527) said: "...for the purpose of construing it I would look at it as on the day on which it was passed", and further on, are these important words:

> "It is, therefore, plain that, whether or not this was declaratory of the common law in respect of judicial acts (as I think it probably was), after 1848, an action against a justice for an act done within his jurisdiction, although it would in other circumstances have amounted to trespass, could not be brought in trespass, but could be brought in case only, and malice was a necessary ingredient of the action."

I would add that want of reasonable or probable cause is also a necessary ingredient of the action, in appropriate cases.

An action such as this is usually brought against the Crown, in virtue of the Crown Proceedings Act, and the constable as joint tortfeasors. The reason seems to be that because the Crown is vicariously liable, it will usually be in a better position to