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Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL H-167 OF 1982

BETWEEN	RHONA HIBBERT (Administratrix of the estate of MATTHEW MAXE MORGAN, deceased)	PLAINTIFF
A N D	The Attorney General for Jamaica	DEFENDANT

D. Daly instructed by Thwaites, Fairclough, Watson and Daly for Plaintiff.

E. Oniss and P. Foster instructed by the Director of State Proceedings for Defendant.

HEARD: March 2,3 & 5, 1987, April 24, 1987 and November 17, 1988.

GORDON, J.

Paragraph 3 of the statement of claim in this action alleges:

3. On or about September 29, 1981 at York Avenue, Kingston 13 in the parish of Saint Andrew the deceased was lawfully on the public road when Corporal Atkinson of the Hunts Bay Police Station or other policemen intentionally or negligently assaulted the deceased by discharging bullets which hit the deceased causing him injuries from which he died on September 30, 1981.

Particulars of Negligence

(a) Discharging firearm on a public road without taking any or any sufficient steps to avoid hitting innocent persons particularly the deceased.

(b) Discharging firearm aimed at the deceased.

(c) Failing to heed or observe the presence of the deceased along the said road in sufficient time or at all.

(d) Failing to give any or any sufficient warning of his/their intention to discharge his/their firearms.

Mr. Oniss submitted in limine that the allegation in paragraph 3 of the statement of claim was that a felony had been committed therefore the proceedings should be stayed pending the result of criminal proceedings or in the alternative the plaintiff should amend the particulars deleting the offending section. He relied on Smith v. Selwyn 1914 - 15 All E.R. (Reprint) p.229 - 1914 K.B. 98.

Mr. Daly said the act was done intentionally or negligently as pleaded and further that the statutory requirement in relation to the act done was pleaded in paragraph 4 viz:

"In acting as aforesaid the said members of the Jamaica Constabulary Force acted either maliciously or without reasonable or probable cause."

On plaintiff's application the case was adjourned until the 3rd March, 1987. Then Mr. Daly produced a letter from the Director of Public Prosecutions indicating that no criminal prosecution was advised in this matter. This letter was admitted by consent as exhibit 1. Mr. Daly submitted that the exhibit satisfied the rule in Smith v. Selwyn (supra). I ruled that the trial should proceed.

Matthew Morgan, aged 13½ years was brought to Kingston from Denbigh in Clarendon by his mother on Tuesday, 29th September 1981, he was left by her at her sister's residence 6 York Avenue, Kingston 11. Matthew should remain at his aunt's home and commence attending Edith Dalton James' Secondary School the following Monday. About 8 p.m., that night, the night of his first day in the city of Kingston, Matthew Morgan received gunshot injuries to his chest while on the road in the vicinity of his gate. He died next day in the Kingston Public Hospital from the injuries he sustained.

The plaintiff's case is based on the evidence of Daniel White, a mechanic, 27 years old who then resided at 6 York Avenue, Kingston 11. He was sitting on his verandah at about 8 p.m. There were a number of children on York Avenue taking turns at riding a bicycle, a normal activity among children. Among the children were Matthew Morgan and his cousin. A black and white Datson Pick-up came and stopped between premises 4 and 6 York Avenue. At that time the deceased Matthew Morgan had gained possession of the bicycle and was about to take his turn at riding. The witness recognised the vehicle as a police vehicle and the one man that alighted therefrom as a policeman. That man, the witness Underhill, had a short gun. The witness saw this from the verandah where he was sitting some forty feet from the incident. He said there was a street light at the gate

of No. 6 which illuminated the area. The man was in full blue (Denim) overall. Underhill, the witness said, pointed his gun at the youngsters who were on the road and said:

> "None of you don't move. We get to find out that thieves in the area and we come to investigate."

"After he spoke he fired two shots. Matthew and the bicycle went down on the sidewalk" and Matthew was calling "where is my mother? where is my mother?" The witness went on to say that the driver left the vehicle and went over to the fallen boy. "The one that did the shooting said 'whey the gun deh boy?' and to this the stricken boy replied "I don't have any gun officer." The driver, the witness said, lifted the left hand of the injured lad and said to his companion:

> "See how you kill off the woman pickney".

The witness and others with him went to the gate to go on the road but were prevented from so doing by Underhill who said:

> "Don't come outside because I don't want any crowd out here unless you want yours too."

The injured child was taken from the scene by the policemen and the witness with other citizens went to the Hunts Bay Police Station to report the matter.

The witness said he saw the incident clearly, there was a street light at the gate of his home and the shooting took place on the roadway before his home. The policeman's gun was pointed at Matthew when the shots were fired. Only two shots were fired in the incident. Both came from Underhill's gun, there were no other shots fired there and there was no "shoot-out" between other men and the police. He denied that there was a crowd of men on the road and one shouted on the approach of the police "Babylon to Rasta" and started shooting. Mr. Kenneth Morgan, father of the deceased child, told of visiting his son in hospital on the 30th September, 1981 and remaining there until 2 p.m., when he was pronounced dead.

Acting Corporal Clifton Underhill said that on the night of the 29th September, 1981 he was on duty at Hunts Bay Police Station. One Devon Reid came to the Police Station and made a report to Corporal

Atkinson in his presence. Corporal Atkinson, Reid and himself left the Police Station in a marked Toyota Pick-up driven by Constable Wallace. They went in search of one Coolie Paul and their destination was York Avenue.

The police vehicle was parked on Hagley Park Road some ten chains below the intersection of Hagley Park Road and York Avenue and from that point they proceeded on foot. The witness and Corporal Atkinson were dressed in civillian garb - not police attire, he was armed with a .38 revolver, and Corporal Atkinson had a Sterling Submachine Gun. Six chains along York Avenue he saw a group of men. When he got to within 15 - 20 yards from them one exclaimed "Babylon to ---". He heard gunshots coming from the direction of the group. They took cover and returned the fire, he discharged two shots; he can't recall how many shots Corporal Atkinson fired. The men ran in different directions and he saw a little boy, later identified as Matthew Morgan, saying "O God! O God! me get shot." He observed wounds to the right side of his chest and left side of his belly. This lad was lying on the sidewalk, midway between where he was and where the group of men had been. This child he did not see before the shoot out. Matthew Morgan he said was about one chain from premises 6 York Avenue where he was taken first then to the Kingston Public Hospital.

He did not report the incident to his superior officers, this he said was done by Corporal Atkinson the following morning. The witness denied the plaintiff's case as put to him. He said York Avenue was dark, where he was at the time of the incident was dark. The witness Daniel White did not see him fire any shots that night, he said. He saw about fifteen men in the group and no object between himself and the group of men.

In cross examination he said he did not know if the witness White was on the verandah of premises No. 6 York Avenue, he cannot say how far he was from No. 6 York Avenue when the shots were fired. He later said "nobody know what took place". In further cross examination directed to the lighting in the area he said:

"I don't know if there is a street light in front of No. 6."

later

"Can't recall if there was a street light near to where I was or where men were when shots were fired."

I saw and heard the witnesses in this case. The defence witness, Acting Corporal Underhill, did not impress me as a witness of truth and I am not persuaded as Mr. Oniss sought to urge I should be, that the witness Underhill was acting in self-defence and the principle enunciated in Robley v. Placide 11 W.I.R. P.58 should apply to this case. In Robley's case the police officer discharged his gun in self-defence and an innocent bystander was injured. The court held no civil liability attached.

The sole witness for the plaintiff I find was truthful. He gave his evidence in a frank, convincing manner and I am satisfied that the plaintiff has proven her case and is entitled to the judgment of the court.

The claim under the Fatal Accidents Act is in respect of the plaintiff Rhona Hibbert and the father of the deceased Kenneth Morgan. No evidence has been led to support a claim for an award under this head. The deceased at thirteen lived at his mother's house. She does not and never did know where the father lived. She always contacted him at his work place. The evidence that the father had arranged to have the deceased admitted to the Edith Dalton Secondary School is of no assistance under this head of damages. I therefore make no award under the Fatal Accidents Act.

Under the Law Reform (Miscellaneous provisions) Act, the claim for funeral expenses of $2,303.00 is not challenged. For loss of expectation of life I award the sum of $3,000.00. The evidence indicates the deceased was injured and was aware of his injury at about 8. p.m on the 29th September, 1981 he was admitted to hospital and he died about 2 p.m. on the 30th September, 1981. There is no evidence of how long he remained concious after injury and before death but it

is reasonable to assume he must have suffered before death supervened. I therefore award $5,000.00 for general damages for pain and suffering.

Mr. Daly submitted that there should be an award for loss of earnings during the lost years. The deceased is a child of thirteen who had not yet begun to earn a living. His mother said he was good at woodwork. He had not been successful in either the Common Entrance Examination or the Eleven plus Examination.

In Gammell v. Wilson & Ors. and Furness & Anor v.B.S. Massey Ltd. [1982] A.C. 27, [1981] 1 All E. R. 578. Guidelines were suggested for the assessment of damages under this head by Lord Scarman. He said at pages 593, 594 (p.78 A. C.)

> "The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence. A teenager boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man, well-established in life, like Mr. Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it." (emphasis mine)

I have not been favoured with evidence which shows "actual employment or real prospect". The plaintiff has failed to establish an assessable claim under this head.

There will therefore be Judgment for the plaintiff for

Special Damages	$2,303.00
Loss of expection of Life	$3,000.00
General Damages	$5,000.00
	$10,303.00

Interest at 3% on Special damages from 29th September, 1981 to date.

Interest at 3% on General damages from 12th October, 1982 to date.

Costs to the Plaintiff to be taxed if not agreed.