



[2014] JMSC Civ 53

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2009 HCV 05110**

<b>BETWEEN</b>	<b>TROY HUGGINS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>DEFENDANT</b>

**CONSOLIDATED WITH:**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2009 HCV 05109**

<b>BETWEEN</b>	<b>URCELINE DONEGAL (Mother and Near Relation of the Late RALSTON EASY, deceased)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>DEFENDANT</b>

Marvalyn Taylor-Wright instructed by Taylor-Wright & Company for the Claimants  
Hazel Edwards instructed by the Director of State Proceedings for the Defendant

*Negligence - Fatal Accidents Act - Law Reform  
(Miscellaneous Provisions) Act -  
Shooting Death and Injury by Police*

**Heard: March 4, 5, 6, 7, 11, 12, 2013 and April 24, 2014**

**Lawrence-Beswick J**

- [1] Troy Huggins and Ralston Easy were brothers. Both were injured by gunshots fired by a police officer. Mr. Huggins, who was then 18 years old, survived but Mr. Easy subsequently died as a result of the injury. Their mother, Ms. Urceline Donegal has letters of administration empowering her to administer the estate of the late Mr. Easy.
- [2] Mr. Huggins and Ms. Donegal each filed suit against the Attorney-General claiming damages for negligence, including exemplary damages, and the suits were consolidated. The Attorney General was sued as the legal representative of the Government of Jamaica and as being liable under the Crown Proceedings Act for the acts and omissions of the police officer. Both suits were consolidated.
- [3] Mr. Huggins claims to have suffered personal injuries, psychological disability and a loss of income. Ms. Donegal claims under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act for the loss and damage suffered by Mr. Easy's relations, dependents, and estate resulting from his death.

### **Background**

- [4] Mr. Troy Huggins testified that at about 10:00 p.m., on November 17, 2006, he was with his brother Mr. Ralston Easy at the gateway of their aunt's house in Shenton, St. Catherine. They were under a street light, alongside the road waiting for a taxi to go to nearby Bog Walk to buy food. He noticed an unmarked car coming from the direction of Bog Walk. It passed them, then turned and came back towards where he and his brother were and stopped a little distance from them. Both the car and the young men were on the right hand side of the road, as one faces towards Bog Walk. Mr. Huggins disagreed with the defence's account that the car did not turn back, but maintained that it had swung to the left of the road.
- [5] The road was bright but the car had stopped by the potholes and it was dark in that area. He could not see who was/were in the car but he heard a male voice coming from the car saying: "Police" and asking where they were going. Mr.

Huggins said that he answered "Bog Walk" and the voice then asked them why they did not go and then told them to put up their hands. He could not see that the person in the car was wearing a police uniform. He thought it was a gunman. It was, however, Constable Hector Clarke.

- [6] According to him, by the time he was able to pull his hand from where he had had it behind him, to put it up, the person in the car pointed a gun and he heard a sound like a gunshot. He heard his brother exclaim and he himself felt his side burning. He ran back towards his yard. He heard about three more gunshot sounds and realised that they were being shot at by the person(s) in the car. Both young men had been shot. He testified that the shots that did not hit him and his brother went into his neighbour's wall.

#### **Negligence concerning Mr. Troy Higgins**

- [7] In claiming that he was injured by the negligence of the police officer, Mr. Huggins particularises the negligence as being:

- "Using force against him where it was unreasonable and unnecessary so to do.
- Failing to use proper police procedure (which was to interrogate him if found suspicious and not discharge his firearm) in approaching him or at all.
- Arbitrary excessive and or unlawful use of a firearm by a policeman causing injury to him
- Discharging a firearm when it was unsafe and dangerous so to do."

#### **Negligence concerning the late Mr. Ralston Easy**

- [8] The particulars of the negligence which Ms. Donegal alleges caused Mr. Easy's fatal injuries are:

- "Using force against the deceased Ralston Easy where it was unreasonable and unnecessary so to do.

- Failing to use proper police procedure (which was to interrogate the deceased Ralston Easy if found suspicious and not discharge his firearm) in approaching the deceased Ralston Easy or at all.
- Negligent, arbitrary, excessive and or unlawful use of a firearm by a policeman causing the death of Ralston Easy.
- Discharging a firearm when it was unsafe and dangerous so to do.”

### **Defence**

[9] The Attorney-General states that the officer was executing his duties as a member of the Jamaica Constabulary Force (JCF) and was acting as a servant and/or agent of the Crown. According to the pleading he was fully dressed in the uniform of the JCF and was not negligent.

[10] The defence is multipronged. One limb of the defence is that the officer acted in necessary self defence. The defence further or in the alternative is that Constable Clarke acted as a consequence of being provoked by and/or as a result of and/or at the same time as or immediately after the unlawful acts of the claimant and/or the deceased. The third limb of the defence is that the claimant’s injuries were caused and/or contributed to, by his own actions and fault. Further, the defence relies on the concept of *ex turpi causa haud oritur actio* and states that the claimant Huggins with the deceased, by their own illegal acts and/or conduct created a dangerous situation with the knowledge of the risk of injury or damage to themselves. The injuries sustained were caused by their involvement in a joint criminal enterprise and therefore the police officer owed no duty of care to them.

[11] The Police Officer, Constable Hector Clarke, testified that he was alone in his private car driving slowly along the Knollis main road on the night in question, shortly before midnight. There was a poorly lit section of the road where there were potholes which caused him to slow down the vehicle. According to him, as he did that, he saw two men approach the car. One approached the left

passenger side of the vehicle. Another stepped in front of the vehicle at the front left side. That latter man was armed with what appeared to him to be a shotgun, and from almost touching distance, he pointed it at him and fired a shot.

- [12] Constable Clarke's evidence continued that he swung his vehicle at the man and then heard an explosion which he took to be a gunshot. He dived onto the passenger seat, pulled his service weapon and fired two rounds in the direction of the men. He lost control of the vehicle and it hit into an embankment after which he saw one of the men approach the vehicle and he heard another explosion which he believed was a gunshot. In fear of his life, he discharged more rounds in the direction of the men. When he believed the men had retreated, he drove to the Bog Walk Police Station and reported the incident.

#### **Defendant's submissions**

- [13] Counsel for the defence relied on **Blyth v Birmingham Waterworks Co.**<sup>1</sup> and submitted that the test enunciated there was that in determining negligence, the question is, "what would a reasonable and prudent man have done or would not have done in the circumstances?" According to Crown Counsel, Constable Clarke had only fired his weapon after seeing an armed attacker and after having heard what he perceived to be a gunshot. He therefore had good reason to apprehend that his life was in danger and his actions were objectively not negligent. His response was that which a reasonable and prudent man would have had in the circumstances.
- [14] Counsel for the defendant relied further on the established requirements of negligence<sup>2</sup> and submitted that in the circumstances of the attack, the constable had no duty of care to either man and it would not be just, reasonable or equitable to impose such a duty of care on him. Counsel stated that in any event, he would not have breached any duty of care, if it did exist, because he was acting in self-defence.

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1. [1856] 11 Exch 781 [1843-60] All ER 478

2. Clerk and Lindsell on Torts 18th Edition 7-04

[15] Counsel argued that if a duty of care were imposed in these circumstances, then any police officer who fired at an armed attacker whilst under threat to his life, would have to concern himself not only with acting in lawful self-defence, i.e., using reasonable and proportionate force to defend himself, but would also be burdened with the possibility of being liable in negligence for his actions, though he was defending his life. Counsel's further submission was that it is an established principle that when investigating and suppressing crime, the police are generally immune from actions for negligence concerning those activities.<sup>3</sup> Here, since Constable Clarke was suppressing the crimes of illegal possession and use of firearm and shooting with intent, he would be immune from actions for negligence.

[16] In further defence to the tort of negligence, Counsel submitted that the evidence was that Constable Clarke intentionally shot the men, and therefore the proper cause of action must therefore be in assault and battery. She argued that it would only be by an unintentional act, done unreasonably, that negligence might arise.<sup>4</sup> Hence negligence would not arise here.

### **Analysis and discussion**

[17] In the analysis of the merits of this claim it is essential to determine if the defendant's agent was negligent towards Mr. Huggins and Mr. Easy.

### **Negligence**

*"Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or something which a prudent and reasonable man would not do."<sup>5</sup>*

[18] It has long been established that there are four requirements which must be established to amount to negligence viz.:

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3. Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238

4. Letang v Cooper [1965] 1 QB 232

5. Blyth v Birmingham Waterworks - supra per Alderson B

- “1 The existence in law of a duty of care situation, i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
2. Breach of that duty of care....
3. A causal connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.”<sup>6</sup>

### **Was there a duty of care?**

[19] Interactions between persons are many and varied. The approach to take in determining whether a duty of care exists between particular persons has been the subject of conflicting opinions. In **Caparo Industries v Dickman and Others**,<sup>7</sup> the various approaches adopted by the Courts to determine the existence of a duty of care were discussed. Lord Bridge of Harwich referred to the traditional approach where the existence of the duty was identified in specific situations.<sup>8</sup>

[20] His Lordship referred to the comment of Lord Atkin in **Donoghue v Stevenson** where he said:

*“The result is that the Courts have been engaged upon an elaborate classification of duties as they exist ... and yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.”*<sup>9</sup>

Lord Bridge saw in the last sentence, the introduction of the more modern approach of seeking a single general principle to be applied to determine if a duty

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6. Clerk and Lindell on Torts 18th Edition para. 7-04

7. [1990] 1 All ER 568

8. Supra at page 6

9. [1932] AC 562 at 579 - 80

of care exists, and regarded Lord Wilberforce as having “the most comprehensive attempt to articulate a single general principle.”<sup>10</sup>

[21] It was in **Ann v Merton London Borough** that Lord Wilberforce had opined:

*“... the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”<sup>11</sup>*

### **Relationship between the Claimants and Constable Clarke**

[22] In my view Constable Clarke must have had it within his reasonable contemplation that the careless discharge of his firearm may be likely to damage civilians. This must mean therefore that the relationship between him and Mr. Huggins and Mr. Easy would be “a sufficient relationship of proximity or neighbourhood” to create in Constable Clarke a *prima facie* duty of care towards Mr. Huggins and Mr. Easy as civilians.

[23] The next consideration is to determine whether there are factors removing or reducing the scope of the duty owed or class to whom it is owed or damages which may arise. Here, as between the civilians and the police officer, the

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10. At page 573

11. [1977] 2 All ER 492 at 498



evidence to my mind discloses no such factors and in my view Constable Clarke owed a duty of care to Mr. Huggins and Mr. Easy as described in **Anns** case.

[24] Lord Bridge in **Anns** reviewed further a series of decisions of the Privy Council and the House of Lords and concluded as to the law concerning the existence of a duty of care:

*“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.”<sup>12</sup>*

[25] The duty of care which must be shown by a firearm user and by a police officer must be great if ordinary citizens are to be assured of living a peaceful life, free of unlawful interference and injury from firearm users or the police. Certainly, the imposition of such a duty of care on the armed police officer towards the citizens must be considered as fair, just and reasonable in order to ensure stability in our society. On that night of November 17, 2006, Constable Clarke, in addition to being an ordinary citizen, fell into those two special categories – a firearm holder and a police officer. In my view he had a duty of care towards the two civilian young men. A firearm holder and a police officer must have a duty to the public to refrain from causing injury to persons or to the property of persons, except under circumstances allowed by law.

[26] I am fortified in my view by the fact that injuring persons or things can properly result in criminal prosecution. Indeed, a licenced firearm holder is even prohibited from discharging his firearm, without more, within 40 yards of any public road or in any public road.<sup>13</sup> Further, if a person has in his possession a firearm

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<sup>12</sup> Op Cit

<sup>13</sup> S.23 (1) Firearms Act

intending, by that means to endanger life or cause serious injury to property such a person is criminally liable whether or not the injury has in fact been caused.<sup>14</sup> These offences show the onerous responsibility placed on firearm users to limit the circumstances in which a firearm is used, regardless of how innocuous the circumstances may seem.

[27] A police officer also has prescribed duties to the public. He is:

*“... to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence...”<sup>15</sup>*

[28] If Mr. Huggins and Mr. Easy were law abiding citizens standing along the road, Constable Clarke's duty to them would be to refrain from injuring them in any manner whilst, at the same, he executed the abovementioned statutory duties of a police constable. If, however, the brothers were not abiding by the law at the time of the incident, and this was detected by the constable, then his duty as a police officer would be to apprehend them and place them before a Court.

[29] In my view therefore, at the time of the incident, Constable Clarke had a duty of care towards both Mr. Huggins and Mr. Easy and that duty was two-pronged, as a firearm user and as a police constable.

### **Was there a breach of duty?**

[30] The onus of proof of the breach of duty rests upon the claimants. Though the evidence from the claimants does not identify a particular moment when Constable Clarke fired a shot, the inference to be drawn is that he pointed the firearm somewhere in the direction of the men because they were both shot, and on the claimants' case Constable Clarke was the only armed person there that night. Constable Clarke's evidence is that he fired intentionally at the men in

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<sup>14</sup> S.24 Firearms Act

<sup>15</sup> S.13 Constabulary Force Act

order to preserve his life. Counsel for the claimants submitted that their case is that Constable Clarke negligently fired at the men, not that he intentionally fired at them. In order to determine if there were a breach of duty I now consider additional factors.

#### **Was there a lawful reason to shoot?**

[31] The claimants say that whilst proceeding on the roadway Constable Clarke deliberately interrupted his passage and shot both men for no lawful reason, whilst they were engaged in lawful activity. The defence indicates the contrary and states that the men were either committing an offence or were reasonably suspected of doing so.

[32] In determining if there were a breach of duty resulting from the unlawful discharge of the firearm, I consider the evidence of all the witnesses and also the documentary evidence to assess if there had been a lawful reason for the constable to have discharged the firearm. The claimant's evidence that his brother and he were both lawfully standing by the roadway waiting for a taxi to go to purchase food in Bog Walk was challenged by the defendant as the defendant's evidence is that he was attacked by both men.

[33] Counsel for the defendant submitted that Constable Clarke had reasonable grounds to believe that his life was in danger and ought not to be held liable in negligence because he was acting in self-defence, using necessary, reasonable and proportionate force to repel the armed attack. Counsel for the defence noted that although Mr. Huggins knew that several police officers were at his gate shortly after the incident, he made no report of the incident to the officers there. Implied by this submission is the suggestion that he did not make that report because of his guilty mind.

#### **Post Mortem Report**

[34] The port-mortem report exhibited indicates that the cause of Mr. Easy's death was a gunshot wound to the shoulder involving the chest. Mr. Easy was shot in

the right posterior shoulder and I infer from that, that he was shot when his back was to the shooter. Counsel for the defence urged me to accept that he was shot whilst taking flight, after the constable discharged the second set of rounds. However, not only is there no evidence to support that submission, but in any event, counsel's submission would mean that Constable Clarke shot the deceased while the deceased was running away from him. Counsel for the Crown further submitted that Constable Clarke has not said that he took aim at his attackers. However it was also her submission that the constable had shot deliberately in order to preserve his life.

- [35] The post mortem report states that there was no gunpowder deposit on the body of Mr. Easy. There were no indicators of the shooting having occurred at close range. The scientific evidence and the absence of it have satisfied me on a balance of probabilities that Mr. Easy was shot when his back was towards the officer and not at close range.

#### **Scientific Evidence**

- [36] The undisputed evidence is that Constable Clarke was not injured and his car was not damaged, neither on the exterior nor the interior. There is no scientific evidence of gunshot residue in the car. The Ballistics Report states that Constable Clarke discharged at least five (5) rounds from his firearm and Mr. Huggins' evidence is that the officer discharged at least four (4) rounds in the direction of the deceased and himself. No firearm casings were recovered from the car nor from the surroundings despite a search by the police.
- [37] There is no scientific evidence to support any assertion that Mr. Huggins or Mr. Easy fired a gun during the incident. Constable Clarke's hands and the hands of both men were swabbed to detect gunpowder residue. There is no evidence as to any results of the swabbing procedure. There is no scientific evidence to support a finding that the late Mr. Easy or Mr. Huggins was firing a firearm during the incident. There is no evidence of firearm or ammunition being recovered from either man. Further, there is no evidence of either Mr. Huggins or Mr. Easy being

charged for any offence. I find on a balance of probabilities that neither man was a gunman and that neither had been involved in any criminal activities which would cause Constable Clarke to lawfully discharge his firearm.

- [38] In my view there is insufficient evidence to support the defence that Constable Clarke's life was in danger from an attack by one or both of the men causing him to discharge his firearm.

#### **Varied Accounts of Incident**

- [39] There is exhibited some correspondence concerning the incident, which casts some doubt on the credibility of Constable Clarke. One such is a letter from the Bureau of Special Investigations dated July 23, 2007. In it the Assistant Commissioner of Police responded to correspondence from Counsel for the claimants. He outlined the police officer's account of the incident. According to that account after the officer shot at the men, they ran in different directions and the officer called for assistance. The area was searched and Mr. Easy was found suffering from gunshot wound and was taken to the hospital where he was pronounced dead.

- [40] However, in his *viva voce* evidence, the officer testified that he quickly left the scene, went to the station and waited for some time for assistance to arrive to accompany him back to the scene. The differences in accounts call into question the credibility of Constable Clarke.

#### **Injury of Mr. Huggins**

- [41] In an exhibited letter from the Jamaica Constabulary, the Assistant Commissioner of Police also stated that the claimant, Mr. Huggins attended the station and reported that he was grazed on his right side by a gunshot from the same incident. The report from the hospital showed that Mr. Huggins had a small abrasion to the lower right abdominal wall. The treatment was cleaning and dressing with tetanus injection. He was sent home. In my view, a gunman

suffering from such a minor injury would not attend at a police station to report that he had been grazed on his right side by a gunshot.

#### **Unlawful possession of firearm**

- [42] In the absence of scientific evidence to support the submission that Constable Clarke acted in self-defence and coupled with the absence of evidence of any criminal proceedings against the men, I find on a balance of probabilities that there was no firearm in the hand of either of the men. I therefore reject the defence that Constable Clarke was defending himself from an attack by the brothers necessitating the discharge of his firearm.

#### **Breach of Duty - Conclusion**

- [43] Counsel for the claimants submitted that their case is that Constable Clarke negligently fired at the men, not that he intentionally fired at them. Mr. Huggins' evidence had been that it appeared that the gun went off when the Constable pointed it at his brother and himself or that he was trigger happy. He could not explain. Counsel for the defendant urged the court to accept that Mr. Huggins could not explain because his account was untrue and further, that, had Constable Clarke's gun "gone off" as alleged, several rounds would not have been discharged. The scientific evidence that several rounds were fired by Constable Clarke supported the case for the defence that the discharge was intentional and that the gunshots were deliberately fired in self defence.

- [44] In my view, there is no evidence that Constable Clarke had a lawful reason to fire any shots that night. There being no lawful reason to discharge the firearm in the presence of the brothers, it means that Constable Clarke breached the duty of care he had towards the men by discharging his firearm. He had no need to use any force whatsoever against the brothers.

### **Causal connection between conduct and damage**

- [45] Another element of negligence which must be proved is the causal connection between conduct and damage. Here there is no dispute that the discharge of the firearm caused the death of Mr. Easy and the injury to Mr. Huggins.

### **Foreseeability**

- [46] The issue of whether the result of the action could be foreseen must also be resolved. Here there is no dispute that injury and death are the foreseeable consequences of firing a gunshot.

### **Provocation**

- [47] In the defence it was pleaded that Constable Clarke was provoked into shooting at Mr. Huggins and the deceased, in response to their unlawful actions. It was pleaded that the constable acted as “a consequence of being provoked by and/or as a result of and/or at the same time as or immediately after the unlawful acts of the claimant and/or the deceased ...”. Counsel submitted that consequently, the defendant would rely on what she termed as the defence of “*ex turpi causa haud oritur actio*”, arguing that the men were participating in a criminal activity and therefore were consenting to any assault and battery to which they would thereby become victims. This would be a bar to a civil action on the grounds of public policy.
- [48] Counsel argued additionally that provocation was not being used in the sense of being a partial defence to murder, but rather, in its ordinary sense, that is, that Constable Clarke was reacting to the unlawful acts of the deceased and his brother. She urged that weaknesses in the drafting should not be a proper basis to reject Constable Clarke’s evidence that he was the victim of an armed attack.
- [49] In my view these defences raised in civil pleadings are novel and unsupported by authority, and even if they did exist, could not be applicable.

### **Finding of Negligence**

[50] The claimants' pleadings had particularised Constable Clarke as also being negligent by failing to use proper police procedure in approaching the men. There was no evidence as to what constitutes proper police procedure in the circumstances of this case and I therefore consider that negligence in that regard has not been proved.

[51] Defence Counsel submits that the officer is immune from action in these circumstances based on the **Hill** case (supra). The **Hill** case was concerned with the duty the police owed to individual members of the public in respect of damage caused to them by a criminal whom the police failed to apprehend in circumstances when it was possible to do so. This is not applicable here and the submission is without merit.

[52] In my view, the four requirements of negligence have been established as regards the discharge of the firearm. Constable Clarke, both as a police officer and as a firearm holder, had a duty of care to the men. He breached that duty of care by firing the shots causing injury and death to the men. The damage he did was foreseeable and he must be held liable for it. He has acted maliciously and without reasonable and probable cause.

### **Quantum of Damages**

[53] I consider now the assessment of the quantum of damages due.

#### **Special Damages**

##### **Troy Huggins**

Mr. Huggins lost income as a result of this incident. It is not challenged that he was a casual labourer and had been employed for about 18 months before the incident. He worked an average of four (4) days per week at \$800.00 per day, that is, \$3,200.00 per week. Dr. Aggrey Irons, consultant psychiatrist, had indicated that Mr. Huggins would not be able to work for three years from the date of his June 2009 medical report. The uncontradicted evidence was that Mr.



Huggins had not been able to work from the day following the incident. The period for **loss of income** is therefore from November 18, 2006 to May 31, 2012 a period of 288 weeks and the earnings lost in that period would be **\$921,600.00**.

[54] As it concerns **transportation**, Mr. Huggins' evidence is that he travelled three times to "downtown" to visit with Dr. Irons and his attorney and claims \$15,000.00 for that. Counsel for the defence urges that the receipts exhibited to support that expense should be disallowed as they indicate Mr. Huggins went to Linstead and the only evidence concerning Dr. Irons' office is that it is in Kingston. The exhibited receipts support Counsel's submission. The defendant does not know the purpose of Mr. Huggins's visits to Linstead and ought not to be made to pay for them.

[55] The unchallenged evidence of Dr. Irons is that Mr. Huggins visited him on four occasions. This means therefore that Mr. Huggins has claimed for fewer trips to the doctor than the number the doctor testified that he actually made. I am prepared to award a reasonable amount for his transportation to Dr. Irons. I accept the amount pleaded of \$7,500.00 as being reasonable for 3 round trips from St. Catherine to Kingston. The evidence is that he also visited his lawyer. The three other receipts exhibited are for transportation to Linstead and are for the same amount as transportation to Kingston. I take judicial notice of the fact that Counsel has chambers in St. Catherine. From Mr. Huggins home in St. Catherine the cost to Linstead must be less than the cost to reach Kingston. I therefore reduce that amount sought for transportation to Linstead by 20% and award \$6,000.00 for transportation to the lawyer. Total for transportation is therefore \$6,000.00 and \$7,500.00, being \$13,500.00.

[56] The other special damages are for the medical report for \$1,000.00 and for the psychiatric evaluation and report of \$13,000.00 totalling \$14,000.00.

## **Ralston Easy**

[57] The **Special Damages** claimed for Mr. Easy are \$450,000.00 for burial related expenses and \$150,000.00 for the legal costs for the procurement of letters of administration totalling **\$600,000.00**. Defence Counsel submits that the receipts attached to the witness statement of Ms. Donegal show special damages of \$451,000.00, not \$600,000.00 and therefore that is the sum to be recovered. I agree.

## **General Damages**

### **Troy Huggins**

[58] Counsel for Mr. Huggins describes his physical injuries as being minor. Interestingly, that description she ascribed not only to a small abrasion to the lower right abdominal wall and other soft tissue injury but also to a gunshot injury to the abdomen. Counsel relied on **Pansy McDermott v Garnett Lewis and the Attorney General**<sup>16</sup> to support her submission that an award of \$14,760,582.56 would be appropriate for general damages for Mr. Huggins. Ms. McDermott had suffered from two wounds from a gunshot, scarring on her thighs, the inability to endure prolonged standing and other injuries. She was kept away from normal activities for three months. Ms. McDermott was awarded the updated amount of \$1,324,204.10. I agree with Defence Counsel that the physical injuries in the **McDermott** case were more serious than were those of Mr. Huggins.

[59] Defence Counsel relied on **Reginald Stephens v James Bonfield et al**<sup>17</sup> as being more relevant where the updated amount of \$188,292.45 was awarded for an abrasion, a bruise and pain for four weeks. This latter case did not involve gunshot injuries. In my opinion an appropriate award for the physical injuries is \$400,000.00.

[60] As it concerns non-physical injuries, Dr. Irons, diagnosed Mr. Huggins to be suffering from a 50% psychological disability, requiring treatment over “the next

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16. CL 1998 M328 (unreported)

17. CL 1992 S230 (unreported)

few years,” and regarded his prognosis as being poor. The unchallenged evidence is that Mr. Huggins suffers from, *inter alia*, flashbacks, depression, fear, insomnia and post-traumatic stress disorder which cause him to be unable to cope with the demands of life. He will be dependent on his family for an “indeterminable amount of time (at least three years).”

[61] Counsel for the defence urged the court to accept \$4,065,154.11 as an appropriate award for the psychological disability based on the authority of **Joan Morgan and Cecil Lawrence v Ministry of Health, University of the West Indies and The Attorney General**,<sup>18</sup> an unreported case where Ms. Morgan was awarded the updated sum of \$5.8 million for the psychiatric damage arising from a misdiagnosis. Counsel submitted that **Joan Morgan** was peculiar whereas Mr. Huggins’ case was not unusual.

[62] In cross-examination, Dr. Irons testified that he had diagnosed Mr. Huggins’ psychiatric condition after one or two examinations. It is of interest that at the request of the defence, another consultant psychiatrist of its choice, Dr. Oo, had also examined Mr. Huggins and he too had concluded that Mr. Huggins met all criteria required for the diagnosis of post traumatic stress disorder, and also severe to extreme depression though he could not conclude that the depression was due to the incident. I accept on a balance of probabilities that the Post Traumatic Stress Disorder (PTSD) resulted from the incident because the evidence is that at the time of the incident Mr. Huggins was relatively young and there is no evidence of any other traumatic incident in his life.

[63] I increase the amount awarded in the **Joan Morgan** case because in that case Ms. Morgan suffered because she had been incorrectly informed that she was HIV positive when she was not, whereas in this case the stressful incident was real and Mr. Huggins will have a constant reminder of that reality because his brother died as a result of the incident. I regard \$6 million as appropriate damages for the psychiatric damage Mr. Huggins has suffered from this incident.

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18. 341HCV2005 delivered Dec. 19, 2007

## **Exemplary Damages**

### **Troy Huggins**

[64] Counsel for Mr. Huggins seeks an award of exemplary damages in accordance with **Douglas v Bowen**.<sup>19</sup> There, the Court of Appeal reviewed the law concerning exemplary damages and concluded that the categorisation decided in **Rookes v Barnard**<sup>20</sup> ought to be adopted and applied in Jamaica. In **Rookes v Barnard**, the House of Lords stated that exemplary damages would be awarded where there were oppressive, arbitrary or unconstitutional acts by government servants, including police officers.

[65] Counsel also relied on **Keith Bent v The Attorney General**,<sup>21</sup> where exemplary damages of \$100,000.00 were awarded where the police officer had pointed a firearm at the head of the claimant and had beaten him with a baton and kicked him. Here Counsel for the claimants has stated that she is not alleging that Constable Clarke intentionally pointed the firearm at the men and shot them, but rather, that he was negligent in shooting in their direction. In such a situation, therefore, the actions of the officer would not, in my view, be oppressive and arbitrary. In the circumstances of this case, I think that an award of exemplary damages for Mr. Huggins is not appropriate and I will make no award under this head.

### **The late Mr. Ralston Easy**

#### **Fatal Accidents Act**

[66] Mr. Easy's mother, his personal representative, has brought this action under the Fatal Accidents Act. The provision is:

*Whensoever the death of a person shall be caused by wrongful act, neglect ...., and the act, neglect... is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then ... the person who would have been liable, if death had not ensued, shall*

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19. [1974] 12 JLR 1544

20. [1964] 1 All ER 367

21. 1998/B330 unreported delivered Dec. 19, 2006

*be liable to an action for damage notwithstanding the death of the person injured....*<sup>22</sup>

[67] Damages under this Act seek to compensate the near relations of the deceased for the pecuniary loss which they suffer because of the deceased's death. It is computed in two components: losses between (1) the date of death and the date of judgment and (2) the date of judgment and thereafter.<sup>23</sup> The Court must calculate the annual dependency on the deceased by all those near relations and then determine the estimated years that the deceased would have supported that dependency (used as the multiplier). In determining the damages under this Act, the earnings of the deceased less his personal and living expenses (the dependency or multiplicand) are multiplied by the multiplier. The further calculation of the appropriate award under the Fatal Accident Act was discussed in **Dyer** (supra).

### **Multiplier**

[68] Mr. Easy was 32 years of age at the time of the incident. I regard a multiplier of 12 as being appropriate, having considered **Dyer and Dyer v Stone** (supra) where the multiplicand of 11 was applied where the deceased was 35 years old and **Barrett v Thomas and V.W. Lee**<sup>24</sup> where the Court of Appeal regarded 11 years as appropriate where the driver was 35 years old.

### **Income Lost – Pre Trial**

[69] Firstly, I consider what the net annual income of the deceased was. The evidence is that in 2006 Mr. Easy earned \$720,000.00 per annum from selling of coconut water at \$250.00 per bottle and \$268,800.00 as a poultry farm attendant totalling \$988,800.00. The defendant accepts the earnings as a poultry farm attendant but challenges the veracity of the earnings of \$720,000.00 from selling of coconut water at \$250.00 per bottle because of the evidence of the

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22. Fatal Accidents Act S.3

23. *Cookson v Knowles* [1979] AC 556

24. Unreported SCCA 14/80 dated October 8, 1981

deceased's mother and brother that his attendant job was full time and extended into the afternoon.

[70] Defence Counsel submits further that that price for a bottle of coconut water in 2006 must be exaggerated. That may well be so, but there is no evidence concerning the size of the bottle being sold, to assist in a determination, nor is there any evidence to challenge that of the claimants. Defence Counsel also submits that no income tax returns have been filed despite what she describes as "the significant earnings made by the deceased." In my view it would be the exceptional coconut water vendor who would file income tax returns from that activity. Despite the absence of evidence which might have helped in my determination of the net earnings of the deceased, I must make such a finding.

[71] I agree that the earnings from the sale of coconut water appear to be exaggerated. If Mr. Easy's earnings from his part time job of selling coconut water (\$720,000.00) were almost three times the earning from his full-time employment (\$268,800), then it is likely that he would have abandoned the latter for even greater returns from a full-time sale of coconut water. At the same time it is likely that he must have earned sufficient from the coconut water sales to make it worthwhile to pursue that job after a full day's work. There is no evidence of even the most basic type of accounting to indicate the cost of selling the bottled coconut water and any other relevant information to allow for an accurate estimate of the net income from the coconut water sales.

[72] In the circumstances I find on a balance of probabilities that he earned half of what he earned from his full time employment, that is, \$268,800.00 divided by 2, being \$134,400.00. This means that I regard his gross annual income in 2006 as \$268,800.00 plus \$134,400.00 totalling \$403,200.00. There is no evidence as to the deductions due for income tax or any other statutory deductions. In the absence of any contrary submission, I utilise the submission of Counsel for the Defence concerning all deductions. She submits that in 2006, the annual

personal income tax allowance was \$193,440.00<sup>25</sup> and that the statutory deductions were 6.5% of gross earnings at that time.

[73] By that calculation, Mr. Easy's taxable income was \$403,200.00 less \$193,440.00 as allowance, equalling \$209,760.00. Income tax payable on that would be 25% of \$209,760.00 being \$52,440.00. The 6.5% deduction for other statutory obligations amounts to  $0.065 \times 403,200$  equalling \$26,208.00.

[74] To determine his net annual salary at the time of his death, I subtract from his gross salary of \$403,200.00, the sums of \$52,440.00 being income tax payable and \$26,208.00 being statutory deductions. That amounts to \$324,552.00. I multiply that amount by 6.25 for the 6.25 years of income lost before trial. That totals \$2,028,450.

### **Dependency**

[75] There is no evidence of the portion of his income that Mr. Easy spent on himself in the year of his death. It is unchallenged that he lived with his aunt and that he bought furniture and clothing. In the absence of any evidence of the extent of this expenditure I estimate that for his personal expenses which would include food, transportation, medical bills, among other necessities, he would spend 25% of his earnings, amounting here to \$100,800.00. Deducting that from his net annual income of \$324,552.00 would have left Mr. Easy with \$223,752.00 available for his dependents in that year. I round that up to \$225,000.00 for ease of calculation. That represents the annual dependency of his near relations at the time of his death.

[76] The evidence is that his annual expenditure on each of his dependents was:

Mother	-	\$ 144,000.00
Father	-	40,000.00
Sister Veronica	-	130,000.00
Sister Cherene	-	40,000.00
Sister Shantel	-	40,000.00
Brother Rovaine	-	<u>40,000.00</u> = \$434,000.00

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25. [www.tax administration Jamaica.com](http://www.taxadministrationjamaica.com)

[77] The amounts spent on Mr. Easy's dependents was not challenged, but the figures show that he would not have had sufficient funds to pay the stated amounts to the dependents, even if he did not pay any of the taxes due on his wages, or any of the statutory deductions. I therefore do not rely on them to calculate dependency but I use the evidence of the amounts paid to determine the percentage of the award to be paid to each dependent. His mother and his sister Veronica each received approximately three times the amount he gave to each of his other dependents. I therefore apportion the award as 3/10 each for mother and for Sister Veronica, 1/10 for each of the remaining four dependents.

### **Wages at Time of Trial**

[78] I now consider the evidence to assist in the determination of Mr. Easy's income at the time of the trial. Here again, the evidence is sparse. There is no evidence as to what Mr. Easy or someone pursuing his occupations might have been earning at the time of trial. However, the calculation of loss of future earnings requires an estimate of the deceased's income at the time of the trial. It has been held that there is no basis to correlate level of income to the cost of living index. No account of inflation can be taken in calculating his salary at the time of the trial [**Dyer v Stone** (supra)].

[80] The evidence is that Mr. Easy did not attend high school and has not passed any examinations. I therefore accept as reasonable, Defence Counsel's submission that by 2013, the time of trial, Mr. Easy would not have substantially altered his financial position. In the absence of evidence of what his income would be at the time of trial, I use his income as at the date of the death, that is, \$403,200.00.

[81] The personal income tax threshold applicable for 2013 is \$441,168.00.<sup>26</sup> He would therefore pay no income tax. The statutory deductions payable at 6.25% of the gross income would amount to 6.25% of \$403,200.00 being \$64,512.00.

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26. [www.taxadministrationjamaica.com](http://www.taxadministrationjamaica.com)



[82] His remaining net disposable income at the time of the trial, after payment of taxes would be \$ 338,688.00 (\$403,200.00 - \$64,512.00). Seventy-five percent (75%) of that amount would be spent on his dependents, i.e. \$254,016.00, at the time of the trial [see para. 75 supra].

[83] I then average the dependencies at the dates of death and at trial. That I calculate as \$225,000.00 + \$254,016.00 being \$479,016.00 divided by 2 equalling \$239,508.00. I now use this figure as the multiplicand to determine pre-trial loss.

[84] Between Mr. Easy's death in November 2006 and the date of trial in March 2013,  $6\frac{1}{3}$  years have passed. This I use as the multiplier. The pre-trial loss of the dependents is thus \$1,516,085.64 ( $\$239,508.00 \times 6.33$ ).

#### **Post Trial or Future Loss – Fatal Accidents Act**

[85] In calculating this amount, I use as the multiplicand the annual dependency at the date of the trial, i.e. \$254,016.00. The multiplier I apply is 12. Of that amount I used 6.33 in calculating the pre-trial loss. I therefore use the balance,  $5\frac{2}{3}$  ( $12 - 6\frac{1}{3}$ ) as the multiplier for the calculation of the post trial loss. The total post trial loss I therefore calculate as  $\$254,016.00 \times 5\frac{2}{3}$  being \$1,437,730.56. The total pre and post trial loss of dependency is \$1,516,085.64 plus \$1,437,730.56 being \$2,953,816.20

#### **Law Reform (Miscellaneous Provisions) Act**

[86] The claim is also under the Law Reform (Miscellaneous Provisions) Act (LRMPA) which I now consider. Section 2 of the Act provides that on the death of a person, all causes of action vested in him shall survive for the benefit of the estate of the deceased. This means that damages for pain and suffering are recoverable, as are damages for loss of expectation of life, loss of earnings and special damages including funeral expenses. In **Rhona Hibbert (Administrator of the estate of Matthew Maxe Morgan deceased v the Attorney General)**<sup>27</sup>

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27. [1988] 25 JLR 429

the court noted that although, in that matter, the deceased had died less than a day after being injured, it was reasonable to assume that he suffered before dying and made an award for pain and suffering.

### **Pain and Suffering**

- [87] Counsel for the claimants submitted that reasonable compensation for the pain and suffering Mr. Easy endured would be \$750,000.00. Mr. Easy's injuries, according to the post mortem report included a shot in the right posterior shoulder involving the chest. She relied on **Maxwell Russell v the Attorney General and another**,<sup>28</sup> and **Donovan Clarke v D.C. Clive Scott and the Attorney General**<sup>29</sup> to support that submission.
- [88] In **Maxwell Russell**, the updated amount of \$811,557.79 was awarded as damages for assault where there was a gunshot injury to Mr. Russell's scapula. He was hospitalized for one week. In **Clarke**, the updated amount of \$767,886.71 was awarded for damages for assault where there was an injury caused by a single gunshot wound to the elbow and superficial laceration to the chest. The injuries were not considered serious. He was incapacitated for four weeks.
- [89] Counsel for the Defence submitted that the appropriate sum to be awarded should be based on **Rhona Hibbert** (supra) where the updated award of \$19,849.24 was made to compensate for the pain and suffering a 13 year old boy endured for about 18 hours after being shot by a police officer.
- [90] In my view, whatever pain Mr. Easy endured was exacerbated by his circumstances immediately after being shot. Constable Clarke's evidence is that he left the scene and reported the incident at the police station and then waited for assistance. It was only then that he returned to the scene and saw the injured man. At that stage he was taken to the hospital.

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28. 2006HCV4024 (unreported)

29. CL 1990/337 (unreported)

[91] Troy Huggins' account is that his cousins searched for Mr. Easy and could not locate him until they made enquiries for him at the police station. The post-mortem report indicates that the deceased was found lying in bushes near the road and had been moved to the Spanish Town Funeral Home on the instruction of the police.

[92] On any account, Mr. Easy lay injured by the roadside, for a relatively short time, near to his house, but in such a condition that he could not seek or receive assistance. He had to lie injured and alone in bushes until the police eventually arrived.

I regard \$100,000.00 as an appropriate award for Mr. Easy's pain and suffering.

#### **Loss of Expectation of Life**

[93] Also included under the Law Reform (Miscellaneous Provisions) Act are damages for loss of expectation of life. This head of damages seeks to compensate for the loss of a predominantly happy life which it is assumed that the deceased would have enjoyed had he lived. This is an amount which is difficult to quantify and courts have decided that a conventional, not nominal sum is to be awarded.

[94] Counsel for Ms Donegal, mother of the deceased, submitted that an amount of \$356,250.00 should be awarded for loss of expectation of life, based on the fact that \$150,000.00 was awarded in **Elizabeth Morgan v Foreman and Moss**<sup>30</sup> which was determined in 2004 when the Consumer Price Index was 81.6.

[95] In **Attorney General v Devon Bryan**,<sup>31</sup> the Court of Appeal, referred to the applicable principle concerning loss of expectation of life as being that an award under this head should be a very moderate figure or sum. The amount awarded on 8 February 2013 was \$120,000.00.

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30. 2003HCV1427 delivered October 15, 2014

31. [2013] JMCA CIV3 delivered February 2013

This must therefore be taken as the appropriate amount to be awarded under this category of damages at this time.

### **Lost Years – Law Reform (Miscellaneous Provisions) Act**

[96] To assess this amount, I consider firstly that the late Mr. Easy's net income at the time of death was \$324,552.00 and the average net income between his date of death and the date of trial is \$331,620.00 ( $\$324,552.00 + 338,688.00 \div 2$ ). This I consider as the average annual net income of the deceased for the pre-trial years. The next calculation is the expenditure on himself. There is no evidence of joint living expenses and I have already accepted that the deceased spent 25% of his net income on himself at the time of his death. [para. 75 supra]

[97] I therefore reduce the average net income for each of the pre-trial years by that amount i.e. by \$82,905. The lost earnings for the pre-trial years would be \$248,715 for each year.

[98] For the post-trial computation for lost years of earnings, the 25% living expenses are deducted from the actual estimated net income at the date of trial i.e.  $\$338,688 - \$82,905$  being \$255,783. There is no evidence of shared expenses so I deduct only the 25% spent on himself.

[99] The lost earnings for the pre-trial period is therefore 75% of \$331,620 being  $\$248,715.00 \times 6 \frac{1}{3}$  totalling \$1,574,365.95 and for the post trial period the lost earnings is  $\$338,688 \times 5 \frac{2}{3}$  totalling \$1,916,974.08. Total lost earnings for the lost years is \$3,491,340.03.

### **Conclusion**

[100] In the circumstances of this case, it is my view that Constable Clarke negligently caused injury to Mr. Troy Huggins and death to Mr. Ralston Easy. The defendant, the Attorney General, was sued as the legal representative of Constable Clarke and I **therefore enter judgment for the claimants against the defendant**. Damages are assessed for Troy Huggins as follows:

**Special Damages**

Loss of Income	-	\$921,600.00
Transportation	-	\$13,500.00
Medical Reports	-	<u>\$14,000.00</u>
Total	-	\$949,100.00

**General Damages**

Pain and Suffering	-	\$400,000.00
Psychological Disability	-	<u>\$6,000,000.00</u>
Total	-	\$6,400,000.00

[101] Interest on Special Damages at 3% per annum from November 17, 2006 to today.

Interest on General Damages at 3% per annum from date of service of the claim form to today.

[102] **Damages are assessed concerning the late Mr. Ralston Easy as follows:**

**Under the Fatal Accidents Act**

Pre-trial Loss of Dependency	-	\$1,516,085.64
Post-trial Loss of Dependency	-	<u>\$1,437,730.56</u>
Total	-	\$2,953,816.20

The apportionment (as calculated in paragraph 77 supra) is:

Veronica	3/10	-	\$886,144.86
Sherene	1/10	-	\$295,381.62
Shantel	1/10	-	\$295,381.62
Rovanne	1/10	-	\$295,381.62 = \$1,772,289.72
Mother Donegal	3/10	-	\$886,144.86
Father	1/10	-	\$295,381.62

[103] Mr. Easy's parents derive total benefit of his estate since he died intestate without a spouse or children [S.4 Intestates' Estate and Property Charges Act]. Their awards under the Law Reform (Miscellaneous Provisions) Act far exceed their awards under the Fatal Accidents Act. The amount awarded under the Fatal Accidents Act is therefore reduced by their portions, i.e. \$886,144.86 + \$295,381.62 being \$1,181,526.48.

[104] Damages under the Fatal Accidents Act are therefore \$1,772,289.72 apportioned as in paragraph 102 above among the siblings.

[105] Interest on pre-trial loss of \$1,516,085.64 at 3% per annum from date of death of November 18, 2008 to today to be apportioned among the siblings.

[106] Under the Law Reform (Miscellaneous Provisions) Act

Lost earnings – Pre-trial	-	\$1,574,365.95
Post-trial	-	<u>\$1,916,974.08</u>
Total	-	\$3,491,340.03

Expenses for Funeral and Letters of Administration	-	\$451,000.00
Loss of Expectation of Life	-	\$120,000.00
Pain and Suffering	-	<u>\$100,000.00</u>
Total	-	\$4,162,340.03

[107] Judgment under the Law Reform (Miscellaneous Provisions) Act is \$4,162,340.03. Interest at 3% per annum on expenses for funeral and letters of administration, pain and suffering from date of service of claim form to today.

Costs to the claimants to be agreed or taxed.