



[2014] JMSC CIV 72

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 05735**

BETWEEN	MARIE LINDSAY ADMINISTRATRIX OF THE ESTATE OF LEON JOHNSON	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	THE COMMISSIONER OF POLICE	2ND DEFENDANT
AND	BERNARD COOMBS	3RD DEFENDANT

Fatal Shooting – Whether shooting malicious or negligent or without reasonable and probable cause – whether the Claimant entitled to damages in personal capacity as well as administratrix – measures of damages.

Mrs. Susan Reid-Jones instructed by Richards, Edwards Theoc & Associates for the Claimant

Mr. Nigel Gayle and Miss Cheryl Lee Bolton instructed by the Director of State Proceedings for the Defendants

HEARD: 17th December 2013, 18th December 2013, 19th December 2013,
20th December 2013, 30th January 2014 and 9th May, 2014.

CORAM: THE HON. MR. JUSTICE DAVID BATTS

[1] The Claimant, as administratrix of the Estate Leon Johnson commenced proceedings against the First Second and Third Defendants by way of Claim Form and Particulars of Claim. They were amended on the 2nd October 2012 and the Claimant now claims.

a. Damages for injuries suffered by Leon Johnson and loss suffered by the Claimant as a result of the death of Leon

Johnson when the 3rd Defendant in the execution of his duty as a policeman maliciously and/or negligently, without reasonable or probable cause shot the said Leon Johnson in the trunk of his body on the 2nd day of June 2005 at Hermitage Kingston 7 in the parish of St Andrew.

- b. Aggravated, General and Special Damages.
- c. Interest at a rate to be determined by the Court on all outstanding sums pursuant to the Law Reform (Miscellaneous Provisions) Act; and
- d. Costs.

- [2] The Claim against the Second Defendant has been discontinued, and properly, so because the "Commissioner of Police" is a rank and is not a Corporation Sole or legal person which may sue or be sued.
- [3] The only issues not disputed by the Defence were the presence of the Third Defendant and four other Police Officers in the Hermitage Community on the 2nd day of June 2005 and that the Leon Johnson was shot and killed by the Third Defendant. The circumstances and series of events which led to the shooting are matters of fact for my determination.
- [4] The Claimant gave evidence and her witness statement , dated the 3rd of December 2013, was allowed to stand as her evidence in chief. She recalls that on the afternoon of the 2nd of June 2005, her neighbour came with news that her son Leon had been shot by the police at the entrance to the Hermitage community in which she resides. Ms. Lindsay, who is disabled, recounts that she was unable to put on her prosthesis immediately. However her sister and nieces who were with her on that day went to see what had happened. Her nieces came back to confirm the news.
- [5] Ms. Lindsay states that she had become confused after receiving the news and that shortly after, her pastor and other members of her church came to her aid. They then provided, and continue to provide financial and emotional support. Her church also provided funding for all the funeral expenses which came to a total of \$227,850.00.

However she has been unable to repay this amount. She states that as a result she became depressed and still suffers from depression and has been diagnosed with high blood pressure and diabetes. The Claimant, however, has not submitted any medical reports in support of those claims.

[6] Since Leon's death, Ms. Lindsay has required and still requires assistance with household chores as a result of her physical disability. Her church continues to assist her weekly with \$1,200.00. She said she received in total about \$1,140,000.00 which she hopes to refund once financially able. No receipts have been provided in support of this amount.

[7] The following paragraphs of her witness statement are worth mentioning.

"2. Leon did not own a gun and he did not have access to one. If he did, I would have known because he lived with me and we were very close. We had a close mother-son bond.

7. Shortly after Leon was killed, a man came to my house who introduced himself as a police officer. This man came to my home who introduced himself as a police officer. This man offered me an undisclosed amount from his salary to assist with my living expenses. I refused to accept the money because I felt he had come to give me money so that I would not continue to insist that the police officer who killed my son should be charged.

8. ... If Leon was alive he would have been assisting me financially and I would not have incurred additional living expenses that I now have to pay because of my needs and physical disability.

9. I have been concerned and fearful about my survival and existence since the death of my only child. I am concerned about my life and the fact

that my son who I hoped will look after me especially when I am old had been killed. These thoughts often lead me to a state of depression."

- [8] When cross examined, the Claimant was asked if she knew Jungle 12, the community neighbouring Hermitage. The Claimant indicated that she did not know Jungle 12 she only heard about it. The following exchange occurred:

Q: "They get into gang feuds right?"
A: "Yes"
Q : "Gang feuds means get guns to defend turf?"
A: "I don't know, I mostly stay inside my house"
Q: "Do you know if they get into community war, Hermitage and Jungle 12?"

A: "Yes"
Q: "..... use guns?"
A: "Yes"
Q: "Have guns up in Hermitage?"
A: "Yes"

- [9] The Claimant was also questioned as to whether or not she was in her son's presence at all times, she indicated that she was not because she works. When asked if she had ever searched him in 2005, the Claimant indicated that she did not. The Claimant also agreed with Defence Counsel, that children could hide things from their parents and that a son would not tell his mother everything. The following exchange occurred:

Q: "Agree this is so if that son is doing something wrong and his mother would not like?"

A: Yes
Q: Agree that Leon would have known you would be disappointed if he told you he has access to a gun

A: Yes"

- [10] Counsel brought the Claimant's attention to paragraph 2 of her witness statement (mentioned above), and asked her to explain. The Claimant indicated that she did not know of Leon having a gun because she was mostly at work. However she agreed with Defence Counsel that if Leon did have a gun that he would have hid it.
- [11] The Claimant was questioned further as to whether Leon was right handed or if he could use both hands. She indicated that he was a right hander. It was suggested to the Claimant that Leon had a gun on the 2nd of June 2005 when he got shot but the Claimant insisted that she did not know of him having a gun. On re-examination, the Claimant indicated that in the 19 years she had known her son she had never seen him with a gun.
- [12] The Claimant called Conroy Lewis, Orlando King and Lorna Laidley as witnesses. Their witness statements were allowed to stand as their evidence in chief.
- [13] The evidence provided by Conroy Lewis and Orlando King coincided. In particular both witnesses contend that on the day in question, Leon Johnson was playing music on the side of the road in front of a cook shop which Leon managed for his friend. Both men stated that they only heard one gunshot. This appears to be consistent with the post mortem examination report dated 13th July 2005 which indicates there is only one gunshot wound to the trunk of the deceased's body.
- [14] Mr. Lewis in his witness statement dated 2nd December 2013 recalled that after hearing the gunshot he went to see what was happening and saw five men in plain clothes with guns in their hands, and Leon on the ground. One of the men retrieved a police vest from an unmarked vehicle at which time he concluded they were police officers. Two of the men then lifted Leon's body from the ground, placed him in the back seat of their vehicle and drove out of the community.
- [15] Mr. Orlando King alleged in his witness statement dated 2nd December 2013 he was present when the incident occurred. He stated that none of them had a gun and that he

was in close proximity to Leon so he would have known if he had a gun. He further asserts Leon was still sitting on the stool when the police officers disembarked the vehicle. None of the men moved at this point. He also stated that no one in the vicinity fired at the police and that the only persons in the vicinity with guns were the police officers that had just arrived. The policemen came closer to them and then Mr. King heard one gunshot and saw Leon stumble over. He claims the gunshot came from the police and that Leon was still sitting on the stool when he was shot. Mr. King was frightened and ran as he was not sure if he too would be shot by the police.

[16] Both Mr. Lewis and Mr. King, in their witness statements, indicate that they grew up in the Hermitage community with Leon Johnson and that they were very close friends. Both men contend that Leon was not a gun man, that he did not own a gun, and that he did not have access to one. Both stated that if Leon did have a gun they would have known as they were very close and that Leon was not in the company of, nor had friends who were of questionable character.

[17] Lorna Laidley stated that she is a church administrator with Christian Life Fellowship of Gordon Town Road in the parish of Saint Andrew. She alleged that Marie Lindsay and her son Leon Johnson were well known to her and that Marie Lindsay was a member of Christian Life Fellowship.

[18] The following paragraphs of her witness statement are worth mentioning:

“4. Marie Lindsay was not in a physical and mental state to deal with the circumstances surrounding Leon’s death so the church through the pastors and other members gave the necessary support and assistance to Marie including financial assistance. The church advanced all monies required for Leon’s funeral and related expenses. The church paid: \$45,000.00 to an independent pathologist to observe the post mortem examination, \$66,752.00 for legal fees and incidental cost in respect of the grant of probate, \$109,000.00 to Souls Funeral Home for burial expenses, and \$7,098.00 for funeral expenses.

6. The church continues to financially assist Marie weekly with \$1,200.00 and she also gets financial assistance from other members of the church. The church and its members have been advancing the money to Marie to assist with her living expenses since Leon died."

- [19] When cross examined as to the funds provided by the Church Miss Lindsay denied lending the money but described it as an 'advance' which indicated that the sums were recoverable. When asked if she had any documentary evidence of any of the sums disbursed or the total, Miss Laidley responded by stating that Miss Lindsay signs a voucher for the sums every week. She was not aware that she should have brought the said vouchers. There was no re-examination of this witness.
- [20] The Defence called Constables Bernard Coombs, Tyrone Dwyer, Stafford Aitcheson and Detective Sergeant Radcliffe Levy to give evidence. Their witness statements stood as their evidence in chief and bore a marked similarity.
- [21] It is their evidence that on the day in question, they entered the Hermitage community to assist in the capture of Aaron Chambers (o/c "Chilly") for whom there were outstanding warrants for murder and shootings. Upon arriving at the intersection of Escarpment Road from Warrander Place where they stopped, three men were observed standing on the right hand side of the road near to a set of music boxes. Upon seeing the men, Detective Sergeant Levy shouted "si Chilly deh". Both Detective Sergeant Levy and Detective Corporal Bonner, who was also in their company, were pointing at one of the three men. The three men then walked off. Two in the same direction and the third in another. As soon as the men stepped off, Detective Sergeant Levy shouted "*Police don't move*". Two of the men, who were hurrying towards a wall, then spun around, pulled hand guns from the front of their waist pants and pointed them in the direction of the Officers.

[22] Constable Coombs (the Third Defendant) stated that he took evasive action and in the process heard two loud explosions coming from their direction. In fear and necessary defence of his life and that of his colleagues, Constable Coombs recalls that he returned fire by “*discharging two rounds in quick succession*” from the service pistol he was armed with, in the direction of the two men. The following paragraph of his witness statement is worth quoting:

“8. The two men then ran off and after a short distance, one of the men fell and the gun he had in his hand fell on the ground. The other man quickly took up the gun and ran towards a wall. He then jumped over the said wall and made good his escape. I got up from the ground and moved towards the man who had fallen. I noticed that he was in a crouching position and that blood was coming from his left side. The injured man asked us to take him to the hospital. Detective Sergeant Levy and I lifted him up and in short order, took him to where the car was parked. We placed him in the back seat of the vehicle and rushed him to the University Hospital of the West Indies. While we were lifting him off the ground, Constable Dwyer called our attention to a .45 spent shell and a .45 live round that were on the ground in the vicinity where we were fired upon.”

[23] Constables Coombs, Dwyer and Sergeant Levy all state in their witness statements that they did not have any malice or ill-will towards Leon Johnson and that their actions were reasonable and with probable cause in the execution of their duties. Constable Dwyer and Sergeant Levy in particular indicate that though their lives and that of their colleagues were in danger they did not discharge their firearms because that would have endangered the lives of their colleagues.

[24] When cross examined the Third Defendant indicated that when the incident occurred he had been a member of the Constabulary Force, Narcotics Division, for approximately 2 years and agreed that at the time he was fairly new to the force. When asked if he was

nervous when Sergeant Levy asked him to assist in the capture of a person wanted for murder and shooting Constable Coombs responded by saying,

"I am a human. I would not say nervous or afraid and take necessary precaution. More alert"

When asked if he was excited, he said that excited was not the right word.

[25] It was suggested to the Third Defendant that on the day in question neither he nor his fellow officers had on any vests or other clothing to identify themselves as police officers. He denied this and stated that they were all dressed in plain clothes and two of them had on their police vests. When asked if all five police officers had already disembarked the vehicle at the point when the men allegedly pulled guns on them, he said that they had. The following exchange occurred,

“Q: Did they have gun in hand?

A: Yes

Q: So with Police with gun in hand they turned around and pointed guns at you?

A: Yes

Q: They fired twice at you?

A: Yes

Q: You fired back twice in quick succession?

A: Correct

[26] When asked what hand the deceased held the gun with, the Third Defendant stated that he held it with his right hand. He stated that the other man (Chilli) also held the gun with his right hand. When asked to describe the guns he stated that he was not able to see the guns. He stated that they were bigger than the one he had; a black one and one with a silver head on it.

[27] It was suggested to The Third Defendant that immediately he stepped out of the car his gun went off and hit the deceased injuring him seriously. He said that this suggestion was incorrect. It was also suggested to him that the deceased was sitting with his face turned to the music box and with his back to the car. He responded by saying he could not recall that. The Third Defendant also denied Counsel's suggestion that only one shot went off and that was from his gun.

[28] When asked why he did not pursue the other gunman who allegedly picked up the gun dropped by the deceased, he responded by saying,

"I was not in charge and got instructions that due to the volatile area we should take the injured in to seek medical attention. Also made contact with Police Control so they would send other officers."

The Third Defendant further stated that he did not fire at the other gunman because he was running away and that he was no longer a threat. Further, he stated that he was in pursuit but got instructions from Detective Corporal Bonner that they should not follow but rather they should seek medical attention for the injured gunman. The Third Defendant maintained that he thought seeking medical attention for the deceased was more important than capturing the other gunman.

[29] It was suggested to The Third Defendant that it did not take five persons to take someone to the hospital. In response to this, he stated that he was advised by a person with proper knowledge of the area that it was not safe to split the team. When asked again if he had any reason for not firing at the other gunman, he responded by saying that he did not want to injure any innocent bystanders. However when asked if he saw any bystanders he said he did not.

[30] Constable Stafford Aitcheson in his witness statement stated that on the day in question, at about 7:30 p.m, he was on duty at the Scenes of Crime Office at 34 Duke

Street Kingston. He received a call from the Papine Police Station regarding a fatal shooting. As a result, he along with another Officer visited the Papine Police Station where he met Detective Corporal Raymond Bonner, Detective Sergeant Radcliffe Levy, and Constables Tyrone Dwyer, Courtney Guy and Bernard Coombs. He swabbed the hands of all men for gunshot residue observing precautionary steps to ensure protocol and authenticity and non-contamination of the process.

[31] On the 3rd of June 2005 at about 7:20 a.m. Constable Aitcheson recalls that he visited the Kingston Public Hospital where the body of an unidentified male was pointed out to him. He then proceeded to put on clean latex gloves in order to swab the unidentified males' hands and labelled 4 transparent plastic bags for swabs taken of the right palm, left palm, back of the right hand and back of the left hand. The exhibits pertaining to Constable Guy and Coombs were taken by Detective Sergeant Harper (now deceased) to the Government Forensic Lab on the 6th of June 2005. The exhibits pertaining to Detective Corporal Bonner, Detective Sergeant Levy and Constable Dwyer were taken by Constable Aitcheson to the Government Forensic Laboratory on the 7th of June 2005. Certificates and Ballistics reports were prepared. These are at Exhibit 2, pages 91 to 99.

[32] When cross examined Constable Aitcheson, said that while he had performed the swabbing of the hands of the police officers on the same evening of the incident, the hands of the deceased was not swabbed until the day after, some 14 hours after he was called about the shooting. He agreed that the optimal time for swabbing the hands of a person who had discharged a firearm may be about 3 hours. When asked what would happen if the swabbing took place after 3 hours, he indicated that the elevation of the residue may not be as high. The following exchange occurred:

Q: Do you agree opportunity for others to have access to the body of the deceased?
A: I could not say
Q: why?

A: Because after the body was removed to the morgue I cannot give an account.

- [33] When questioned as to why the exhibits were not brought to the lab until 6 days after they were acquired, Constable Aitcheson responded that this was due to the nature of the duty and a shortage of personnel at the crime scene. He indicated that they tried to move it at the earliest possible date.
- [34] At the close of the case for the Defence the matter was adjourned to the 30th of January 2014 for submissions. Each party filed written submissions and were on that date allowed to submit orally in response to the written submissions of the other.
- [35] I have carefully considered all submissions and mean no disrespect to counsel by not repeating in this judgment the argument of each. Suffice it to say that having seen and heard the evidence, I accept the Claimants' witnesses as witnesses of truth. I find on a balance of probabilities that when the unmarked vehicle drove into the community, guns were pointed out the windows. The occupants were police officers one of whom was the Third Defendant. The police officers exited the vehicle and approached the deceased, who was sitting on a stool in front of the sound system he was playing. He was then talking to Orlando King and Andrew Campbell. I accept and find that all the firearms of the officers were at "ready". I find that the Third Defendant's firearm discharged, and hit the deceased. The deceased was unarmed and had not attacked the police nor was anyone in his company armed.
- [36] My finding is supported by the Ballistic Report found in Exhibit 1 at pages 24-28. Exhibit E of the report was a sealed brown envelope containing one 9MM .380 calibre Berretta semiautomatic Service Pistol taken from the Third Defendant, Constable Coombs. Exhibit H was a sealed envelope containing one 9MM .380 calibre expended 'WIN' automatic firearm cartridge case allegedly recovered from the scene of the crime. Ballistics tests conducted concluded that the cartridge case of Exhibit H was fired and ejected from Exhibit E. This is consistent with the statements of the witnesses for the Claimant that only one shot was heard. On the contrary, this is inconsistent with the

statement of The Third Defendant who alleged that he “*returned fire by discharging two rounds in quick succession*” from his service pistol (paragraph 27 of this judgment and paragraph 7 of witness statement).

[37] My finding is also supported by the Post Mortem Examination Report No. 1131/05 (Exhibit 1 at tab 14) which detailed the following evidence of injuries:

“There is one gunshot wound on the body (1). An entrance gunshot wound 1x10.7 on right lower posterior thorax 74cm below top of head and 13cm away from midline without gun powder deposition.....and exited on lower anterior chest 5cm below top of head and 9cm away from midline.

This further supports the account of the witnesses for the Claimant that they only heard one gunshot and that the deceased’s back was to the police.

[38] I reject the account of the incident given by the witnesses for the Defence. Firstly it is their evidence that they were being fired upon by the deceased and another male both of whom were fleeing. Further when the Third Defendant discharged his firearm in response the deceased fell and the gun he had in his hand fell to the ground. No weapon was recovered and the explanation given is that the other man who was fleeing with the deceased quickly picked up the gun, jumped over the wall they were running towards, and made good his escape. None of the other Officers discharged their firearm, nor did the Third Defendant discharge his firearm again. No one fired when the other gunman picked up the firearm which allegedly fell from the deceased. I find it improbable that the Third Defendant, who after allegedly being shot at, returned fire in the necessary defence of his life and that of his colleagues, would not have discharged his firearm again when he saw the other gunman pick up the firearm. Similarly it is improbable and bordering on the incredulous that none of the other four police officers either fired at this other gunman or gave chase. The reasons advanced for not doing so were unconvincing. The expressed fear of shooting bystanders for example ought to have prevented the Third Defendant from firing in the first place. Their very noble expression of concern for the injured gunman which concern was advanced as a reason for not pursuing the escaping gunman is in my view contrived.

[39] It is also the evidence of the witnesses for the Defence that after the deceased was shot and fell, he asked the officers to take him to the hospital. They therefore proceeded to lift him and take him to where the car was parked. It was at this time, while they were lifting him off the ground, that Constable Dwyer brought the attention of the other officers to a .45 spent shell and a .45 live round in the vicinity in which they were fired upon. Constable Dwyer picked them up and gave them to Sergeant Levy. I find it improbable that the officers who on their account were too afraid to give chase to the gunman who fled and who were concerned to rush the injured gunman to the hospital, had the time or presence of mind to locate spent shells on the scene. I reject as untrue the evidence that the spent shells from a .45 weapon were found on the scene.

[40] Quite curiously, Forensic Certificates F.L. 1469/2005-1442/2005-1523/2005, dated 7th December 2005, prepared by Mrs. Marcia Dunbar, Government Analyst, reveals that there were elevated levels of gunshot residue in the right palm and the back of the left hand of the deceased. It is further revealed that the gunshot residue present on the back of the right hand of the deceased was not at elevated levels, and there was the presence of gunshot residue at trace level in the palm of the left hand of the deceased. It was submitted by Counsel for the Claimant that the 14 hour period before the swabbing of the hands of the deceased could have rendered the body subject to tampering. Counsel cited the case of *Alva Miller and Karlene Sinclair v Lance Corporal Richard Maxwell and the Attorney General of Jamaica* Suit No. C.L.199/M-; Suit No. C.L.199/S-. In that case Mr. Fitzmore Coates, Government Analyst attached to the Government Forensic Laboratory explained that,

“Gun powder residue.... could be transferred if someone else held his hand. So too, if the hand with residue held on to something, residue could transferred , but when a firearm is fired most of the gun powder residue is deposited on the back of the hand.”

[41] Counsel also cited the case of *Doreen Spence and Calvin Spence v The Attorney General of Jamaica* Claim No. HCV 03384 of 2007 delivered on the 7th of November

2007. Mrs. Marcia Dunbar Government Analyst, in discussing the mechanics of gunshot residue reported that,

[51] *In the firing process an explosion occurs where it results in a fire that burns both primer and the propellant thus producing hot gasses..... The theoretical path that the gases will follow are the bullet and some will blow backwards. In blowing backwards some of the gases will get onto the back of the firing hand. Indeed some may be deposited on the palm if there are opening on the firearm”*

Mrs. Dunbar, in that case, testified that an elevated level indicates a large amount of gunshot residue and this would arise from firing a firearm or from being in the direct path (about 9 inches) of gunshot residue as it is emitted from a firearm. She further stated that trace level gunshot residue would indicate a small amount and it arises from, among other things,

“Secondary transfer, that is, a deposit which is not the result of being in direct path of gunshot residue but the gunshot residue comes in contact with a surface or something with gunshot residue.”

[42] Defence Counsel in response, argued that the Claimant, who had the burden to prove mistrust of source, or tampering or contamination of source, has presented no evidence in support. Defence Counsel further argued that the case of *Alva Miller* cited by the Claimant could not explain away the presence of gun powder residue at elevated levels on Leon’s hands. It is regrettable that the experts were not cross-examined. The Claimant’s counsel seemed content to ask this court to draw adverse inferences. I approach the matter with care. I, as stated earlier, was impressed by the evidence of the claimant’s witnesses as to fact. They were clearly speaking the truth. It is for this reason I reject the expert’s report. I agree with the submission by the Claimant’s Counsel and accept that the presence of gunshot residue found on the deceased’s hands was due to a secondary transference, either deliberate or accidental. The evidence of delay in doing the examination as well as the absence of any steps to

secure the body means there was ample opportunity for contamination. This would explain any divergence from the evidence of the Claimants witnesses. In any event it is well known that elevated gunpowder residue would be expected on the back of the firing hand. This is not what was found.

[43] Counsel for the Claimant argued that Leon's death was more as a result of carelessness rather than a malicious intent. Further, that The Third Defendant, Constable Coombs, owed a duty of care to Leon Johnson and other citizens within the vicinity at the material time, and submitted that this duty is even more pronounced when carrying a dangerous weapon. Counsel for the Defence on the other hand submitted that there is no evidence of carelessness and maintains that the Third Defendant fired in reasonable self-defence.

[44] It is manifest on the evidence which I have accepted that there was no act of self defence. Nor was there any other lawful reason for the discharge of the firearm. Indeed the Claimant's witnesses describe the firearm as "going off". It leads me to the conclusion that the discharge of the firearm may not have been deliberate. The relative youth and inexperience of the Third Defendant, and the fact that he was being asked to perform a duty to which he was not accustomed further supports my conclusion in this regard. The Third Defendant has a duty of care when handling such weapons, particularly when interfacing with the public. The evidence is that the weapon had a safety feature to prevent accidental discharge. It is reasonable to assume that this was not engaged hence allowing for a discharge which was not deliberate, and I so find. The Third Defendant was therefore negligent and hence acted without reasonable or probable cause when he caused his firearm to discharge by not engaging the safety feature and when he handled it in such a manner as to result in injury of a fatal nature to Leon Johnson.

[45] I therefore find the Defendants liable in Negligence .The claim filed is for malicious and/or negligent shooting. I have not found a malicious shooting. I note that the particulars of negligence contained in the Amended Particulars of Claim seem if read literally to plead a trespass to the person rather than negligence. However I appreciate

that paragraph 9 alleges the defendant acted in a “negligent” manner and the particulars must be read in that context. It is for this reason I find that the case as pleaded by Claimant’s counsel is adequate to embrace my findings and decision on liability.

[46] In respect of General Damages for Pain and Suffering, Counsel for the Claimant submitted that an award of \$800,000.00 is a reasonable sum. To this end she cited the case of *Mary Hibbert v Reginald Parchment* Suit No. C.L. 1986 H 129 reported in Volume 5 of Mrs. Ursula Khan’s Recent Personal Injury Awards made in the Supreme Court Judicature of Jamaica. However I did not find this case to be useful. Counsel submitted that as Leon Johnson died within an hour of being shot a reduction of the award in that case (\$900,000.00 which updates today to \$3,838,181.82) should be made. However the victim in that case survived, and in any event it has not been proved whether or to what extent the deceased underwent pain and suffering before he succumbed to his injuries. I will make no award for General Damages for Pain and Suffering.

[47] Counsel for the Claimant has submitted that an award of \$400,000.00 for aggravated damages should be made on the ground that the police officers deliberately lied about Leon Johnson being a gunman thereby besmirching his reputation. However no authority was cited in support of such an approach where an estate is the Claimant. I therefore make no award for Aggravated Damages. There was no claim for exemplary damages, however having regard to my findings of fact a punitive element would not be appropriate in this case.

[48] In relation to Special Damages, Counsel for the Claimant has submitted for an award of \$1,320,000.00 for household help on the basis that Ms. Lindsay is disabled and would therefore require assistance. Further, that the deceased used to do whatever chores Ms. Lindsay requested him to do. I accept that Ms. Lindsay may require assistance with household chores due to her physical disability. On the evidence I find that the assistance rendered to her by the deceased during his life, was that of a son caring for his mother, and might have been provided by him whether she was physically disabled or not. The claim in any event is by the estate Leon Johnson and not by Ms Lindsay in

her personal capacity. It would also be rather remote in that the third Defendant could not reasonably have foreseen that the deceased's mother was disabled. Nor could Marie Lindsay maintain a personal claim for this amount as there has been no breach of duty in relation to her. I decline an award for household help in this case.

[49] Counsel also sought to recover an award of \$1,516,669.33 for lost earnings under the deceased's estate. She relied on the case of *Doris Fuller (Administrator Estate Agana Barrett, dec'd) v The Attorney General Suit No. CL 1993/F152 delivered July 5 1995*. As was the case in the *Doris Fuller* case, there is no documentary proof of earnings and the Claimant's evidence on this proved inconsistent during cross examination. Furthermore, there was no evidence to show how often the deceased worked in the week or on weekends. There was also evidence that the deceased's did extra work with an electrician, but also no evidence to indicate what he was earning from this. Nevertheless it is clear that he earned something at the cook shop at which he worked from time to time. It is probable also that at some stage he would become a wage earner. Given the uncertainties I have decided to make an award using 50% of the National Minimum Wage as the multiplicand and a conservative multiplier of 8. I assume he would have spent one third of income on himself and therefore award the remaining two thirds as damages to his estate for lost earnings. The award therefore is \$416,000 (1,500 x 52 x 8).

[50] An award of \$120,000.00 was sought by the Claimant for loss of expectation of life. Counsel for the Defence submitted that this is an appropriate award and relied on the decision of the Court of Appeal in *Attorney General of Jamaica v Devon Bryan (Admin. Estate Ian Bryan) SCCA 88/2007 delivered February 8 2013*. In that case the Court of Appeal awarded \$120,000. Awards for lost expectation of life are conventional. That is it is the same for everyone. It does not mean that the award is nominal. It does mean that in real terms the award should be the same even after the passage of time. I hold therefore and respectfully so, that the award of the Court of Appeal is to be updated to take into account the change in purchasing power of the Jamaican dollar between the date of the Court of Appeal's decision and today.

\$120,000.00 today approximates to \$130,000 (March 2014 index of 214.3 ÷ 195 x 120,000).

[51] As regards funeral expenses and the legal costs of probate I accept that the church paid those expenses on behalf of the estate. I therefore award these as legitimate estate expenses and reasonably foreseeable and recoverable. I however decline to award damages for the weekly sums advanced to Ms. Lindsay. As stated earlier this relates to a personal claim and is any event not reasonably foreseeable. In any event it is not a loan by the church but is clearly support to a member by way of gift. It is not a claim that the estate can sustain.

[52] I therefore make the following award and give judgment accordingly:

i. For Special Damages:

-	Pathologist	\$45,000.00
-	Legal Fees for Grant of Probate:	\$ 66,752.00
-	Funeral Expenses:	\$116,098.00
-	Loss of Earnings:	\$ 416,000.00
		<u>\$643,850.00</u>

ii. For General Damages:

-	Loss of Expectation of Life:	\$130,000.00
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iii. Interest on Special Damages: 3% from June 2, 2005 up to the date of judgment.

iv. Interest on General Damages: 3% from December 17, 2013 up to the date of judgment.

v. Cost to the Claimant to be taxed if not agreed

David Batts
Puisne Judge
9th May, 2014