

- [1] Unforeseen circumstances created various challenges which prevented the timely delivery of this judgement. The Court regrets this inordinate delay and sincerely apologizes for their part played in the delay.

- [2] This matter concerns a Claim in negligence brought by the Claimant, Mr. Junior Minott, against the Defendant, the Attorney General of Jamaica, for gunshot injuries inflicted upon him by the service weapons of members of the Jamaica Constabulary Force (hereinafter referred to as "JCF" and who will also be referred from time to time as the police) while they were pursuing a "suspect" on the 6th day of December 2005 in the August Town area, more specifically in the community of Goldsmith Villa.

- [3] The Court wishes to make it clear that the Defendant named in this matter did no wrongdoing. The Defendant was sued by the Claimant pursuant to the Crown Proceedings Act which allows for claims to be made against the Crown for torts by its agents. For clarity, the members of the JCF are deemed to have been agents of the Crown at the time of the incident which is the subject of this claim. Further, the Defendant, The Attorney General of Jamaica, is the body or office which represents the Crown in civil proceedings.

- [4] The Court will not embark upon a journey, at this point, to detail the evidence in toto of the Claimant or the Defendant, but will instead, highlight the salient features of both sides.

THE CLAIMANT'S CASE

- [5] The matter was initiated through the filing of a Claim Form and Particulars of Claim on the 31st day of July 2008. Mr. Minott alleges that, on the 6th day of December 2005 at Goldsmith Villa, Kingston 7, he was shot by one (1) or more of the members of the JCF while he was standing in front of his home servicing his Mazda motor vehicle.

- [6] The Claimant alleges that the members of the JCF negligently discharged their service weapons while pursuing a man only known to him, at the time of the incident, as “Fire” who was running away from the police. The shots from the service weapons were fired in the general direction of the Claimant as that is the direction in which “Fire” was running toward. From the evidence presented by the Claimant, it is alleged that “Fire”, whom the police were chasing, did not have any weapon in either of his hands while running away from the police.
- [7] The Claimant alleges that shortly thereafter he noticed that he was shot in his left hand and he informed the police on the scene. The Claimant was taken to the University Hospital of the West Indies (“UHWI”) by the members of the JCF in a marked service vehicle. Whilst in the marked service vehicle, the Claimant noticed that he was also shot in the foot. The Claimant alleges to have suffered loss and damage as a result of the injuries inflicted on him by the negligence of the police.
- [8] The Claimant particularized the negligence of the police in the following way:
- a. Discharging firearms in an area where people were standing, walking or moving about.
 - b. Discharging firearms at a person who was running away from them and who did not pose an immediate threat to them or to anyone.
 - c. Failing to take any or adequate precautions to ensure the safety of the Claimant in discharging the firearm.
 - d. Failure to take aim in discharging of firearm and thereby minimizing risk of injury to the Claimant.

THE DEFENDANT’S CASE

- [9] In their Defence filed on the 10th of September 2008, the Defendant denied inter alia the Particulars of Negligence and stated that, on the 6th of December 2005 members of the JCF were on patrol in marked service vehicles in August Town in the parish of Saint Andrew. While patrolling, they noticed a group of about six (6) men. The men discharged firearms that were on their person in the direction of the

police. The police stopped and one (1) of the men discharged a firearm in the direction of the police while attempting to flee.

[10] In response to this, the Defendant alleges that, the police discharged their service firearms at the men who dispersed in various directions. Shots fired by the police had injured one (1) of the men in the group, who was later identified as Mr. Omeco Henclewood. The Defendant alleges that Mr. Henclewood was found injured with a firearm in his hand and was later positively found to have traces and elevated levels of gunpowder on his right hand. Therefore, the crux of the Defence is that the police were acting in the lawful execution of their duties on the said date and time of the incident which is the subject of this claim.

[11] The Defendant further alleges through their evidence that at no time during the incident did a chase ensue between them and Mr. Henclewood or any of the other five (5) men. Further, after the shooting subsided, the Claimant indicated to members of the JCF that he had received gunshot injuries and was taken to the UHWI.

UNDISPUTED FACTS

[12] The following are facts that are not in dispute:

- a. Members of the JCF were in the August Town area and discharged their weapons at a man who was running away from them on December 6, 2005.
- b. The man who was running away from the members of the JCF was Mr. Omeco Henclewood otherwise called "Fire".
- c. The Claimant was shot by at least one member of the JCF while standing in front of his gate.
- d. The Claimant reported to the members of the JCF that he received gunshot injuries and was taken to the UHWI by the police on the said date.

SUBMISSIONS

[13] The Parties made oral and written submissions on liability which the Court has duly considered in delivering this judgment. Their submissions, however, will only be referred to as is necessary to explain the position of the Court on a particular issue.

THE ISSUES

[14] The main issue which falls to be determined in this case is whether the police officers in shooting Mr. Minott breached the duty of care they owed to him. In order to determine this issue, the Court must discuss:

- (a) Whether Mr. Henclewood was armed and discharged a firearm at the police while fleeing; and
- (b) Whether the discharge of the service weapons by the police were done in lawful self-defence and or the lawful execution of the police's duty.

LAW & ANALYSIS

[15] The case of **Blyth v Birmingham Waterworks Co.** [1856] 11 Ex. 781, 784 is instructive in providing a definition for negligence, and is a starting point for the determination of this case. Alderson B opined that:

"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 doing something which a prudent and reasonable man would not do."

[16] It is trite law that in order for a Claimant to succeed in a claim for negligence, he must prove that the following elements exist:

- (i) that there was a duty owed;
- (ii) that the duty was breached; and
- (iii) as a result of the breach, the Claimant suffered damage.

These elements are conjunctive. This means that the Claimant must satisfy the Court that all three (3) elements existed in the circumstances.

[17] There is no dispute that there was a duty of care owed to the Claimant by the police. Additionally, there is no dispute that the Claimant was shot by the police and suffered damage. The Court is of the view that this case is about whether the

police shooting Mr. Minott was a breach of the duty of care which they owed him. Answering this question in the affirmative will mean that the police officers were negligent and as such the Defendant is liable to pay damages to the Claimant.

Breach of Duty of Care

(a) Whether Mr. Henclewood was armed and discharged a firearm at the police while fleeing?

- [18] In order to determine this factual issue, the differing evidence provided by the Parties would need to be carefully scrutinized, as their credibility is pivotal to dispensing this issue.
- [19] The Claimant's evidence, simply put, is that at the material date and time while the police was chasing Mr. Henclewood, they saw no gun in either of Mr. Henclewood's hands. The witnesses for the Claimant, that is the Claimant himself, Mr. Peter White and Miss Joan Davis, indicate that they saw a police officer with a short gun in his hand firing several shots in the general direction of the Claimant, who was standing at his gate front near his Mazda motor vehicle, where Mr. Henclewood had ran past. It was noted by the witnesses, that they had a clear and unobstructed view of the shooting and that several pedestrians were on the road at the material time who had to run to take cover.
- [20] It is interesting to note however, that only the Claimant indicated that he heard three (3) shots before Mr. Henclewood ran past him and before he observed the police officer with the short gun firing the several shots. The other witnesses for the Claimant only made mention of the several shots that they observed being fired while Mr. Henclewood was being chased by the police.
- [21] The factual witnesses for the Defendant, that is Mr. Brian Henry and Mr. Gavaskar Adams offer different versions of what took place at the material time. Their evidence is summarized accordingly.

Mr. Brian Henry's Evidence

[22] Mr. Henry indicated that while he and other members of the JCF were driving in Goldsmith Villa in their marked service vehicles, he observed a group of about six (6) men who he perceived as acting suspicious. Mr. Henry indicates that these six (6) men fired approximately (2) shots at the marked service vehicles. Mr. Henry described Mr. Henclewood and that he saw him with a handgun in his right hand which Mr. Henclewood, as Mr. Henry indicates, discharged at him and/or the other police. Mr. Henry avers that he fired four (4) shots at Mr. Henclewood and that no member of the JCF chased Mr. Henclewood as he did not run. Mr. Henry notes, that Mr. Henclewood fell as he was shot in the buttocks and another police officer picked up a hand gun that was one (1) meter away from where Mr. Henclewood fell.

[23] Mr. Henry noted that he heard explosions in hills above and shortly after he saw the Claimant with a cloth wrapped around his bleeding hand along with other members of the community advancing towards the police. At this point, he notes that the Claimant indicated that he was shot in the hand. Mr. Henry declared that this was the first time he saw the Claimant and that he had no conversation with the Claimant during the shooting.

Mr. Gavaskar Adams' Evidence

[24] Mr. Adams indicated a slightly different story than the one advanced by Mr. Henry. Mr. Adams noted he was driving in the marked service vehicle behind the one that Mr. Henry was driving, and that he saw a group of six (6) men and heard explosions. He noted that both service vehicles stopped. Mr. Adams indicates that he noticed that the explosions were gunshots and that they were coming from the direction of the six (6) men toward the direction of their service vehicles.

[25] Mr. Adams indicated that the five (5) of the men ran straight ahead, but Mr. Henclewood went right and was firing behind him while he ran. He notes that he saw Mr. Henclewood getting shot. Mr. Adams also notes that Mr. Henclewood was

the only one he saw with a gun, so he thought it was important that Mr. Henclewood be apprehended. In order to do so, Mr. Adams said he ran onto an adjoining road to try and cut Mr. Henclewood off, but Mr. Henclewood fell face down and the firearm fell from his right hand.

- [26] Mr. Adams noted that he did not discharge his weapon, and that no member of the JCF chased the men who ran or Mr. Henclewood. He indicated that he took up the firearm that Mr. Henclewood allegedly had in his right hand and examined it. Mr. Adams noted that the police left the scene with Mr. Henclewood and the Claimant because gunshots were firing in the hills, but that the first time he saw the Claimant was at the hospital. He indicates that he never observed the Claimant at the crime scene or during the shooting and that he was the driver of the service vehicle that brought Mr. Henclewood to the hospital.

Forensic Certificate

- [27] Further to this, the independent evidence contained in the forensic certificate dated the 30th day of August 2006 completed by Miss Marcia Dunbar is also important evidence. Swabs were taken from the back and palm of the right and left hands of Mr. Omeco Henclewood, Mr. Brian Henry and two other police officers who had possibly discharged their firearms – Mr. Ker-Patrick McCalla and Mr. Peter Smith.
- [28] The certificate made the following findings:
- (a) **Re Mr. Omeco Henclewood** – The presence of elevated gunshot levels on the back of his right hand, the presence of trace levels of gunshot residue on the back of his left hand, and no gunshot residue on the palms of his left and right hands.
 - (b) **Re Mr. Brian Henry** – The presence of elevated gunshot residue on the back and palm of his right hand, intermediate levels of gunshot residue on the palm of his left hand and no gunshot residue on the back of his left hand.

- (c) **Re Mr. Ker-Patrick McCalla** – The presence of gunshot residue at elevated levels on back of his left hand with only trace gunshot residue on the back of his right hand and the palms of his left and right hand.
- (d) **Re Mr. Peter Smith** – The presence of intermediate levels on gunshot residue on the palm of his left hand with trace amounts on the back of his right and left hands and the palm of his right hand.

[29] Miss Dunbar's oral evidence supplemented this certificate. She indicated that where there is an elevated reading of gunshot residue on the back of a person's hand, it is usually consistent with a person firing a firearm or being in the direct path of the gunshot being fired at a distance of at most nine (9) inches. Miss Dunbar also noted that gunshot residue cannot be transferred by touch for a person to get a reading that the gunshot residue is elevated, except where one person has elevated levels and the other has trace levels and the former is handcuffing or touching the hands of the latter. She disclaimed however, that this would require rigorous hand rubbing over an extended period of time between the two (2) persons.

Other Evidence Considered

[30] The Court also considered the ruling from the Office of the Director of Public Prosecutions in the letter dated the 20th day of March 2007 as exhibited in the Notice of Intention to Tender into Evidence Hearsay Statement made in a Document filed by the Defendant on the 10th day of August 2011. The letter indicated that no criminal actions were to be taken against the police involved in this matter. Further, the Station Diary Entry of the Saint Andrew Central Division was considered. It highlighted that in total twenty (20) bullets were discharged from the service weapons of four (4) police who were on the scene.

Factual Conclusions

[31] It is important to note, that the charges brought against Mr. Henclewood for illegal possession of firearm and ammunition were dismissed. However, the burden of

proof required in the criminal courts is different than that in the civil courts. Therefore, the Court may find that it was satisfied or that it is possible that Mr. Henclewood had a firearm at the material time, despite the charges being dismissed against him, as the level of proof need only be on a balance of probabilities in this court and not beyond a reasonable doubt.

- [32]** Accordingly, the Office of the Director of Public Prosecutions indicating that no criminal action should be taken against the police is not indicative that the police cannot or should not be brought before the civil court to answer to their liability under the tort of negligence. Therefore, while their ruling was considered it does not negate liability in this matter and is therefore immaterial to the resolution of the issues in the matter at bar.
- [33]** The Court notes the absence of evidence that it thinks would have been crucial to the Defendant's case such as fingerprints for the gun that was alleged to have been used by Mr. Henclewood, the production of any spent shells that were discharged from weapons not belonging to the police, and photographs of the locus which shows the area where the police purportedly arrested and shot Mr. Henclewood inter alia. The Court also highlights that the slight inconsistencies in the accounts given by Mr. Henry and Mr. Adams are not material in this matter. The substance of their evidence regarding what happened on that day is nonetheless similar.
- [34]** Considering the evidence on a whole, the Court is satisfied that Mr. Henclewood was amongst the group of men that fired at the police and either discharged a firearm or was near someone who discharged a firearm when the police initially encountered him. The Court makes this finding based on the independent evidence of Miss Marcia Dunbar. However, the Court is of the view that the police did indeed chase Mr. Henclewood and that at the time of the chase, Mr. Henclewood did not have a firearm in his hands or on his person.

[35] The argument of the Defendant that Mr. Henclewood was running really fast, was seen from behind by the Claimant's and his witnesses and was unrecognizable by the Claimant initially is accepted. However, the argument that this meant that neither the Claimant nor his two (2) witnesses noticed that Mr. Henclewood had a gun in his hand is rejected. The Court is of the view that the witnesses for the Claimant were unshaken and confident in cross examination and believed them to be credible witnesses. The Claimant's witnesses did not purport or assert that they had any knowledge as to why Mr. Henclewood was being chased nor did they propose to know what happened prior to the chase. Their evidence remained largely about the chase that ensued and what happened during and/or after the chase.

[36] The witnesses and the Claimant were paying close enough attention to notice that it was the police chasing Mr. Henclewood, that Mr. Henclewood was wearing a blue shirt and blue jeans, that the police who chased him had a short gun, heard words that the police were saying and even to the extent where one of the witnesses for the Claimant, Mr. Peter White, could have described the police who shot after Mr. Henclewood while chasing him. The Court also accepts that the witnesses had an unobstructed view of the scene. The Court believes that the witnesses would have been able to see whether Mr. Henclewood had a gun in his hand while he was being chased. Therefore, the Court accepts that Mr. Henclewood did not have a gun in his hands when he was being shot at and chased by the police near the Claimant's gate. Subsequently, the Court rejects all evidence of the Defendant that is contrary to this.

(b) Whether the discharge of the service weapons by the police were done in lawful self-defence and or the lawful execution of the police's duty?

[37] In the case of **Hill v Chief Constable of West Yorkshire** [1988] 2 WLR 1049, that is relied upon by Miss Dickens, Counsel for the Defendant, Lord Keith of Kinkel held that –

“... as a matter of public policy, the police are immune from actions for negligence in respect of their activities in the investigation and the suppression of crime...”

[38] This is in keeping with an expression of a police's statutory duty outlined under section 13 of the Jamaican **Constabulary Force Act** which, in so far as is pertinent, says –

“The duties of the police... shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or who may be charged with having committed any offence.”

[39] The law is abundantly clear that, in discharge of their statutory duties, police may meet force with force. However, the voluminous authorities dictate that such force must be reasonable in the circumstances to discharge those duties (see: **Namishy Clarke v The Attorney-General** (unreported), Supreme Court of Jamaica, Claim No. 2007HCV00031 (delivered on December 11, 2009) and Archbold, 1998 at paragraphs 19-39). Counsel for the Defendant has argued that the police did not discharge their weapons negligently, carelessly or recklessly at the material time as they were acting in lawful self-defence of themselves and other members of the JCF.

[40] The Court brings its attention to the standard of care expected of those who carry arms on behalf of the state. Hanna J in **Lynch v Fitzgerald and Others** [1938] IR 382 accepted the instructions issued to Civic Guards in Ireland on the use of firearms, dated November 24th, 1932 to be a correct statement of the law. It was stated on page 404 – 405 of the judgment that –

“[I]t is an invariable rule that the degree of force to be used must always be moderated and proportioned to the circumstances of the case, and the end to be attained. Hence it is that arms—now at such a state of perfection that they cannot be employed without grave danger to life and limb even of distant and innocent persons—must be used with the greatest of care, and the greatest pains must be exercised to avoid the infliction of fatal injuries, but if in resisting crimes of felonious violence, all resources have been exhausted and all possible methods employed without success, then it becomes not only justifiable but it is the duty of Detective Officers, or other members authorised to carry arms, to use these weapons according to the rules just enunciated, and, if death should unfortunately ensue, they will, nevertheless, be justified...”

A gun should never be used, or used with any specified degree of force if there is any doubt as to the necessity.”

[41] Therefore, it is paramount consideration that the actions of police should match the circumstances which exists. Additionally, it is manifest that firearms are

inherently dangerous and with the possibility that innocent bystanders may be harmed from their use, **police should take care to only utilise them to resist violent crimes when absolutely necessary and in these circumstances with the greatest care.** The question of proportionality will therefore be important in determining whether the discharge of weapons was done in self-defence and/or the lawful execution of the police's duty.

[42] The Court is of the view that the facts of **Joseph Andrews v The Attorney General of Jamaica** [1981] 18 JLR 43 are important to the examination of this issue. In the case, the police were chasing a fleeing felon. The felon was driving a motor vehicle and the police were pursuing him in a jeep. Having turned a corner onto a lane out of the sight of the pursuing police, the felon abandoned the car and made his escape on foot. The police then came upon the abandoned car and not knowing that the felon had exited the car, opened fire at the car. During the barrage of gunfire, the plaintiff who was trying to remove his motorcycle from where it had been trapped against the sidewalk by the abandoned car was wounded by the gunfire. On the question of whether the actions of the police were negligent, it was held by McKain J (as she then was) that, while the police were acting in the course of their duty to apprehend a fleeing felon and may use firearms where necessary to apprehend a suspected wrongdoer or to protect themselves from serious attack from any quarter, they ought not to proceed to extremes without reasonable necessity, and members of the public ought to be considered by the police as they execute their duties. She concluded that the police were negligent concerning the welfare of members of the public in firing as they did and there was no duty on members of the public to take evasive action or cover whilst going about their lawful business.

[43] Similarly, in **George Finn v Attorney General** [1981] 18 JLR 120, the police on mobile patrol received a report from a girl that she had just been robbed of jewellery at gun and knife point, by two (2) men who she pointed out to the police riding away on a motorcycle. The police went in vehicular pursuit of the men and fired at

them killing one and injuring the other, the plaintiff. The stolen items were recovered from the body of the deceased and a knife from the plaintiff. Wolfe J (as he then was) found as a fact that, contrary to the defence's case, the police did not come under gunfire from the fleeing men on the bike. The learned judge further opined that:

"It is settled law that an officer may repel force by force where his authority to arrest or imprison is resisted, and will be justified in so doing even if death should be the consequence, yet he ought not to proceed to extremities upon every slight interruption, not without reasonable necessity."

- [44] Wolfe J, commenting and relying on the dicta of Hanna J in **Lynch v Fitzgerald and Others** (supra), held that where the fleeing felons were unarmed, the degree of force used by the police was in the circumstances "...*excessive and wholly disproportioned to the injury or mischief it was intended to prevent...*" (see: **George Finn v Attorney General** (supra)).
- [45] In **Joseph Andrews v The Attorney General of Jamaica** (supra) and **George Finn v Attorney General** (supra), it is noted that the police were lawfully executing their statutory duty to apprehend fleeing felons. However, in both cases the force used to execute this duty was excessive, disproportionate and ultimately negligent in the circumstances since the police were not exposed to any imminent danger which required the use of deadly force.
- [46] Miss Dickens relied on various cases which she argued, were important to prove that the police officers were not negligent. Reliance was placed on **Namishy Clarke v Attorney General of Jamaica** (supra), **Hill v Chief Constable of West Yorkshire** (supra), **Hyacinth Lawrence v Constable Richard Davis and Others** (unreported), Supreme Court of Jamaica, Claim No. CL.1996 L-00103 (delivered on March 30, 2007); **Robley v Placide** [1966] 11 WIR 58; and **Alexander Byfield v the Attorney General** [1980] 17 JLR 243. The Court does not believe that the circumstances of the relied upon cases are similar to the case at bar and as such they must be distinguished.

- [47] In the cases being relied upon by Miss Dickens, it is important to note that the men being pursued by the police were armed and in some cases actively engaging the police while fleeing. Therefore, in those cases, the respective Claimants were accidentally shot by police officers who fired in self-defence and/or the lawful execution of their duties.
- [48] In this case, the Court is of the view that upon the group of men opening fire on the police officers, that it was reasonable for the police to seek to repel them using deadly force as they were in imminent danger. However, the Court, having already accepted the Claimant's evidence that the police did chase Mr. Henclewood and that Mr. Henclewood was unarmed at the time of the chase, is firmly of the view that the actions of the police during the chase were unreasonable and disproportionate in the circumstances.
- [49] Mr. Henclewood no longer had the gun he possibly might have had during the initial shooting nor was he in the company of the other men who were present and engaging the police at the time of the initial shooting. Mr. Henclewood was fleeing the police, unarmed and into an area that had various pedestrians on the road. Therefore, the police were no longer under any imminent danger of threat and/or injury which required any one of them to discharge their service weapons in any area that lawful citizens were traversing without due regard for the safety of these citizens. The Court believes that there were other methods or means which could have been employed by the police to apprehend Mr. Henclewood in the circumstances.
- [50] Subsequently, the argument by Miss Dickens that the police officers were acting in lawful self-defence and/or the lawful execution of their duties must fail. This was not a case where the Claimant and other citizens present in the area could not have been in the contemplation of the police. The police in this matter were not in imminent danger, and as such the Court is guided by the principles emanating from the cases of **Lynch v Fitzgerald and Others** (supra) and **Joseph Andrews v The**

Attorney General of Jamaica (supra). The Court is therefore of the belief that the members of the JCF discharged their weapons without first exercising the standard of care necessary to avoid injury to innocent bystanders lawfully traversing the area.

- [51] Miss Dickens submitted that the police could not have carelessly or wantonly discharged their service weapons so as to be negligent if only one person, that is the Claimant, was injured. This argument must be rejected, as the amount of individuals injured is immaterial to a case of negligence. What is paramount is that the standard of care required was not upheld and it resulted in injury and loss to any person, specifically, the Claimant. Further, it is not abnormal that one person is injured in circumstances like these. There are various cases in which the police have been found to be negligent where only one person was injured when the police discharged their weapons in areas that had multiple citizens lawfully traversing.
- [52] The Court is cognizant of the fact that the August Town area may have been volatile at the time of the incident. However, it believes that in all the circumstances, there was nothing which required the police to discharge their service weapons while pursuing Mr. Henclewood who was fleeing unarmed. Hence, the police failed to uphold the duty of care the Claimant and as such the duty of care owed was breached in the circumstances.
- [53] Consequently, the Court is satisfied that a duty of care was owed, the duty was breached and that he received damage and/or sustained loss as a result of that breach. Therefore, judgment must be entered for the Claimant against the Defendant for this claim of negligence

ASSESSMENT OF DAMAGES

[54] Upon a finding that the police officers were negligent, the Court must now assess the damages to be awarded for the Claimant. The Parties made submissions on the quantum of damages which the Court duly considered in arriving at the award.

General Damages

[55] It is widely accepted and well understood in law that when judgment is made in favour of a party, and damages are due, that party should be compensated so as to put them back in the position that they would have been in had the tort not been committed so far as money can do so. The case of **Cornilliac v St. Louis** [1965] 7 WIR 491 remains instructive on this point. Wooding CJ in this case provided the following guidelines for assessing general damages:

- (a) the nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability;
- (c) the pain and suffering which had to be endured;
- (d) the loss of amenities suffered; and
- (e) the extent to which pecuniary prospects have been materially affected.

These guidelines will be duly considered in this matter to determine the appropriate award.

[56] The Claimant provided to the Court two (2) medical reports. The first being the Medical Report of Dr. Russell dated the 29th day of September 2006. It was gleaned from the medical report that the Claimant was seen on the 7th day of December 2005 and released on the 8th day of December 2005. The relevant portions of the medical report are recounted below –

“ ...

HISTORY:

Patient referred from the University Hospital of the West Indies with gunshot wound to abdomen and left wrist.

FINDINGS ON EXAMINATION:

1. *Normal vitals*
2. *Normal cardiovascular and neurological status*
3. *Through and through entry and exit wounds to the suprapubic region just superior to base of penis, appears superficial with no corpora caremosal injury or peritonitis*

4. *Gunshot wound to the left wrist – entry and exit*

INVESTIGATIONS:

X-Rays of left wrist – distal radioulnar disruption with possible triquetral and hamate fracture.

TREATMENT:

*Admitted to Urology for observation.
Left wrist injury was treated by Orthopaedic team (UHWI).*

DISPOSAL:

1. *Remained stable. Discharged on 8/12/05.*
2. *Followed up on 15/12/05 and 17/01/06.*
3. *Discharged from Urology Clinic on 25/05/06 with no permanent disability from Urology point of view.*
4. *Unable to comment re Orthopaedic injuries.*

...”

[57] The second medical report was that of Dr. Chambers dated the 14th day of March 2007 in which he indicates that the Claimant has healed fractured to the left carpus and a left ulnar nerve injury. Dr. Chambers further indicated that the Claimant’s fractures are clinically healed and that the Claimant’s neurological status has improved with time and continues to improve.

[58] From these medical reports it is understood that the Claimant suffered the following injuries from gunshot wounds:

- (i) Fractures to the left wrist;
- (ii) Left ulnar nerve injury; and
- (iii) Superficial injury to the pubic region just below the penis.

It is understood that injuries (i) and (iii) were healed at the time of trial. The Claimant indicates that he sometimes still feels pain and numbness in his hands up to the time of trial. However, there was no update or evidence provided at trial in the form of a further medical report to indicate whether the left ulnar nerve injury persists and is the reason or source for this numbness and pain complained of.

[59] Having considered the authorities presented by the Parties. The Court finds that the cases of **Leroy Robinson v James Bonfield & Conrad Young** and **Hubert Watson v Guy Fraser**, both of which are reported respectively at pages 99 and 101 of Khans Personal Injury Awards, Volume 4, are more instructive.

- [60] In **Leroy Robinson v James Bonfield & Conrad Young** (*supra*), the Claimant suffered multiple abrasions to the left hand, tender swelling to the left elbow, abrasions to eyebrows and fracture of their right wrist. The Court awarded the Claimant, in September 1966, the sum of Two Hundred and Sixty-Nine Thousand, Four Hundred and Thirty-Eight Dollars (\$269,438.00) as general damages. This updates to Two Million, Two Hundred and Thirty Thousand, Five Hundred and Thirty-Seven Dollars and Thirty-Seven Cents (\$2,230,537.37) using the most recent CPI of 130.8 for July 2023.
- [61] In **Hubert Watson v Guy Fraser** (*supra*), the Claimant suffered fractures with displacement of carpal bones of left wrist requiring bone grafting, multiple lacerations and bruises and a blow to the head. The Court awarded the Claimant, in January 1996, the sum of Three Hundred Thousand Dollars (\$300,000.00) as general damages. This updates to Two Million, Seven Hundred and Sixty-Three Thousand, Three Hundred and Eighty Dollars and Twenty-Eight Cents (\$2,763,380.28) using the most recent CPI of 130.8 for July 2023.
- [62] The Court considers that the injuries sustained by the Claimant in this case are not as serious as in the instructive cases. The Court also considered, as a mitigation factor, that the police brought the Claimant to seek medical attention. Therefore, the Court awards a sum of Two Million Dollars (\$2,000,000.00) as general damages for pain and suffering with interest thereon at a rate of three percent (3%) per annum from the 6th day of December 2005 to the 5th day of July 2013.

Special Damages

- [63] The general rule in relation to special damages is that it must be specifically pleaded and proven as it represents the actual quantifiable loss suffered by the Claimant as a result of the tort which was committed. However, there are exceptions to every general rule, as in some cases, documentary proof may not be provided for special damages but if they are reasonable in the circumstances it may be awarded.

[64] In this case the Claimant particularized his special damages in his Particulars of Claim filed the 31st day of July 2008 in the following –

“...
PARTICULARS OF SPECIAL DAMAGES”

I.	Medical Expenses	\$ 15,711.25
II.	Loss of Earnings on auto repair contracts	\$170,495.00
III.	Loss of Earnings on carriage contracts	\$ 98,880.00
IV.	Cost of Employment of labourer on farm	\$161,000.00
V.	Cost of transportation	\$ 10,500.00
VI.	Cost of medical report	<u>\$ 1,500.00</u>
		\$556,966.25

...”

[65] Considering the expenses, as itemized above, that the Claimant is seeking to recover, the correct total is Four Hundred and Fifty-Eight Thousand and Eight-Six Dollars and Twenty-Five Cents (\$485,086.25). However, at trial and with the production of various receipts and invoices this amount would have varied.

[66] The Defendant has indicated in their submissions that they take no issue with the medical fees which the Claimant is seeking to recover. These medical fees were evidenced by receipts being provided from the University Hospital of the West Indies (“UHWI”) and the South Eastern Regional Hospital Authority (“SERHA”) and an invoice from the Kingston Public Hospital (“KPH”). The following has been proven by way of documentary evidence provided in the Notice of Intention to Tender into Evidence Hearsay Statements Made in a Document filed on the 27th day of July 2011 –

(a) Medical Report from the UHWI	\$1,500.00
(b) Medical Report from the SERHA	\$1,000.00
(c) Medical Fees (UHWI)	\$10,440.00
(d) Medical Fees (SERHA)	\$1,300.00
(e) Medical Fees (KPH)	\$4,300.00
(f) Prescription payment to Liguanea Drug Centre	\$2,721.25

This totals Twenty-One Thousand, Two Hundred and Sixty-One Dollars and Twenty-Five Cents (\$21,261.25) and same is awarded to the Claimant with interest

thereon at a rate of three percent (3%) per annum from the 6th day of December 2005 to the date of this judgment.

- [67]** The Claimant has failed to provide any documentary proof or salient evidence which the Court can use to make a determination as to whether special damages should be awarded for loss for earnings on auto repairs and carriage contracts. Same has been submitted by Counsel for the Defendant, Miss Dickens. The Court is reminded that it is not in the habit of speculation. To make an award for these substantial sums claimed for loss of earnings on the testimony of the Claimant alone, without more, would be unreasonable. The Court is not satisfied that the Claimant's testimony alone has proven or can prove these losses. Therefore, in these circumstances, the Court cannot, without more, make an award for loss of earnings.
- [68]** The Defendant did not vigorously challenge whether the Court should award the transportation fees being claimed except to say that no proof was provided in support of this claim. The Court understands that not in all circumstances, a Claimant may get documentation related to their domestic travels. Even though the Claimant did not clarify the dates and/or times that he had travelled and what the travelling was for, the Court can deduce, but not with a high degree of certainty, that it is likely that these expenses are in relation to travelling done for his follow up consultations at the Urology Clinic at KPH (see: excerpt of Medical Report of Dr. Russell at paragraph [56] herein) and possibly when he was discharged from KPH.
- [69]** Nonetheless, the Court is of the view that there was insufficient evidence in this case for it to make a fair and reasonable award in this regard as salient information was missing such as, but not limited to, whether the amount included travels made to pay for medications, travels to his Attorney-at-law and the cost per round trip from each location when travelled. Though the sum being claimed is unsubstantial,

the Court will have to engage itself in much speculation. Therefore, the Court is unable to award the Claimant special damages being claimed for travelling.

[70] The Defendant's Counsel has taken issue with the Claimant claiming for a total of One Hundred and Sixty-Eight Thousand Dollars (\$168,000.00) for work done on his farm because he was injured. This sum is particularized as follows –

(a) Maintenance work on farm by Mr. Robert Menns	\$64,000.00
(b) Fertilization of farm by Mr. Albert Dixon	\$60,000.00
(c) Coffee Picking by Miss J. Wilson	\$44,000.00

[71] Majority of Miss Dickens' objections were about the payments made to Mr. Menns and Mr. Dixon. Miss Dickens argues that he would have engaged the services of these men in any event as these are usual expenses he would have incurred regardless of whether or not he was injured. Miss Dickens supported these submissions based on answers of the Claimant and both Mr. Menns and Mr. Dixon in cross examination where it was unveiled that the Claimant would employ persons to undertake these tasks prior to his injuries. Miss Dickens concluded that in light of this the Claimant has failed to prove that the services of Mr. Dixon and Mr. Menns were necessitated by his injuries and as such the Court should not make an award for same as special damages.

[72] Miss Dickens further buttressed her point by indicating that the jurat on the witness statements of Mr. Menns and Mr. Dixon indicates that their statement had to be read over to them which signifies that they are illiterate. However, Miss Dickens notes that in cross examination the men indicated that they prepared their own receipts as proof of payment by the Claimant. Further, it was argued that the Claimant has not even established that he is a farmer (or coffee farmer).

[73] The Court must disagree with Counsel that the Claimant has not established that he is a farmer (or coffee farmer). The Court believes that though no documentary evidence has been provided to prove same, the evidence provided by Mr. Menns

and Mr. Dixon along with the Claimant's own testimony satisfied the Court of this. The challenge to the authenticity of the receipts from Mr. Menns and Mr. Dixon by Miss Dickens is perhaps not unfounded considering that it would appear that these were invoices prepared by the Claimant that were signed by the men and the Claimant testified as such. Therefore, it was quite peculiar to the Court as well when the men said that they prepared receipts which perhaps was a misunderstanding. Nonetheless, the men gave evidence at trial and the Court accepts that they were indeed paid these sums. Whether or not they prepared the receipts are immaterial to the Court's determination as to whether the amount should be awarded.

[74] Notwithstanding the aforementioned, the Court agrees with the submissions of Miss Dickens that these were expenses that the Claimant would have had to incur regardless of his injuries. Even if the Court is wrong, and the Claimant would not have usually incurred these expenses, the Court is of the view that there was no evidence provided to indicate that the Claimant used to do these activities himself and was impaired at all or for any period where he would need the services of Mr. Menns for sixty-four (64) days (8 days per month for 8 months) or the services of Mr. Dixon on four (4) separate occasions. In light of this, the Court will not award as special damages, the monies paid over to neither Mr. Menns or Mr. Dixon for maintenance on the Claimant's farm.

[75] In relation to the monies paid over to Miss J. Wilson, there was no challenge by the Defendant's Counsel. The Claimant indicated that he usually pays one person to pick the coffee with him, but because of his injuries he could not pick the coffee and had to employ the services of Miss Wilson to assist the other person with the picking. Though the Court is of the view that the Claimant has not provided any evidence to indicate that he was impaired at all or for any period, it reminds itself that the Claimant was shot in the hand. This means, that an activity like picking would have been an impossibility in the early months following the incident. The Court therefore believes that the services of Miss Wilson was necessitated by the

Claimant's injuries. The payment for these services were evidenced by the invoices provided by the Claimant which were endorsed by Miss Wilson. Considering this, the Court awards the full Forty-Four Thousand Dollars (\$44,000.00) claimed in this regard with interest thereon at a rate of three percent (3%) per annum from the 17th day of April 2006 to the date of this judgment.

CONCLUSION

[76] Having found judgment in favour of the Claimant against the Defendant, the Court now makes the following orders:

1. General damages are assessed and awarded to the Claimant against the Defendant in the sum of Two Million Dollars (\$2,000,000.00) with interest thereon at a rate of three percent (3%) per annum from the 6th day of December 2005 to the 31st day of July 2013.
2. Special damages are awarded to the Claimant against the Defendant in the sums of –
 - (a) Twenty-One Thousand, Two Hundred and Sixty-One Dollars and Twenty-Five Cents (\$21,261.25) with interest thereon at a rate of three percent (3%) per annum from the 6th day of December 2005 to the date of this judgment; and
 - (b) Forty-Four Thousand Dollars (\$44,000.00) with interest thereon at a rate of three percent (3%) per annum from the 17th day of April 2006 to the date of this judgment.
3. Costs awarded to the Claimant to be taxed if not agreed.