

*Sup. Ct. Civil - Suit against Police Officer & Attorney General - Assault
Evidence - whether act committed by servant or agent of Crown - liability
R. cannot find evidence against first defendant at trial - Question of
damages - Did not find for plaintiff. Case referred to p. 6 para 1*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S056/1991

BETWEEN	DERRICK SADDLER	PLAINTIFF
AND	SENIOR SUPERINTENDENT MILLER	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. R. Smellie instructed by Daly Thwaites and Campbell for Plaintiff.

Mr. D. Higgins instructed by the Director of State Proceedings for 2nd Defendant.

Heard: October 4, 7, 13, 1993; April 6, 1994

Judgment

HARRISON J. (Ag.)

The plaintiff alleges in his Statement of Claim that on or about the 30th day of September, 1990 the first defendant maliciously or without reasonable and probable cause used a gun to strike him in the face thereby causing him injury, loss and damage.

Particulars of Injuries

- i) Fracture to the base of the nasal bones.
- ii) Swollen and tender nose.
- iii) 1/2 inch laceration to nose bridge.
- iv) Upper and lower left eye lid swollen virtually closing left eye.
- v) 1" laceration on the upper eye lid of the left eye.

The second defendant has denied however, that the plaintiff was assaulted as alleged or at all. At the trial, paragraphs 3 and 4 of the Defence were amended. Paragraph 3 now reads as follows:

"Save that it is admitted that the 2nd defendant is sued under and by virtue of the Crown Proceedings Act and that the police officer was at all material times acting or purporting to act in the execution of his duties as a member of the Jamaica Constabulary Force, paragraph 3 of the Statement of Claim is denied."

Paragraph 4 now reads as follows:

"The defendant denies that the plaintiff was assaulted as alleged in paragraph 4 of the Statement of Claim or at all. The second defendant will contend that on the 30/9/90 the first defendant led a party of men in the Cavaliers area and that a number of men were detained and that the plaintiff was not among them."

The plaintiff testified that on the 30th day of September at about 1.30-2.00p.m. he was in a grocery shop at Golden Hill, Cavaliers, playing a "Luck Line" machine when the police entered and told himself and others to go outside and sit down. He asked, "For what officer?" Immediately he asked the question the police officer used his gun and hit him in the face. The officer left him and the others and returned shortly with a line of men who were holding on to one another in the back of their pants. He turned to the plaintiff and said, "You won't take order from police?" He then left the scene with the men.

The plaintiff made a complaint to The Council for Human Rights and on the 1st October, 1990, he went to Dr. Patrick Robinson who treated him for the injuries he received.

Hopeton Smith was called as a witness for the plaintiff. He supported the plaintiff's case as to the manner in which the plaintiff said he was assaulted. He identified the policeman who hit the plaintiff as "Scorcher" and admitted that he did not know him by any other name. He went on to say however, that he saw when Asst. Supt. Miller hit Derrick. It was put to him that Asst. Supt. Miller was not in the shop and he responded by saying, "A him inside the shop."

The first defendant was called as a witness for the defence. He stated that he was a Detective Assistant Superintendent of Police stationed at the Special Operations Division. He recalled the 30th September 1990 and that he had led a party of policemen to Cavaliers in the Golden Hill area. He further stated that six men were detained and taken to Stony Hill Police Station and that the plaintiff was not one of those men. He denied going into a grocery shop on that date or that he used a gun to hit the plaintiff in the face. The very first time he was seeing the plaintiff was at the Revenue Court when the matter was called up on the 4th October, 1993.

Mr. Higgins submitted that the plaintiff had not proven that it was the first defendant who had assaulted him. He argued that the identity of this defendant had not been established because, when you examine the plaintiff's evidence in chief, he had given no physical description of his alleged tortfeasor. He further submitted that it was only under cross-examination that he gave a description which was not corroborated by his witness and which bears no resemblance to the first defendant.

Mr. Smellie countered this submission by saying that in light of paragraph 4 of the Amended Defence, the defendant was not entitled to raise this issue of identity because in saying there is no assault at all, it suggests that the defendant was present at the time and can testify as to the fact or otherwise of such assault.

He further submitted that it was correct to say that there was no evidence as to a description of the features of the first defendant but the record was quite clear that the plaintiff identified him as having seen him in Court. He therefore submitted that the question of identification ought not to be an issue in the case.

I had the opportunity of observing the witnesses as they gave their evidence and in doing so I had to consider the demeanour of each witness. There have been a few discrepancies in the evidence of the plaintiff and his witness but I nevertheless find them to be truthful witnesses. They have been very frank with the Court and I regard them as outright and honest witnesses.

I find that on the 30th September, 1990 both the plaintiff and his witness were at a grocery shop at Cavaliers at about 1.30 to 2.30 p.m. I also find that because the plaintiff had asked the police officer why he should go outside upon being ordered to do so, he was struck in the face with a gun by the said officer and this resulted in injury to his face.

The question left for me to determine is, who was it that committed this act of assault and battery? Mr. Higgins has submitted that the plaintiff failed to establish the identity of his assailant and further that he has not proved that it was the first named defendant who assaulted him.

As I have said before, I accept the plaintiff's story that he was assaulted by a police officer. The plaintiff did not proceed against the first defendant

at the trial. Possible reasons exist for this but it would not be prudent on my part to speculate. The second defendant, the Attorney General of Jamaica, is indeed the proper party against whom all actions are instituted where acts are committed by servants or agents of the Crown whilst executing their duty.

The first defendant was called however as a witness for the second defendant in the case. He testified that he was very much at Cavaliers on the day in question but he never struck the plaintiff. It was his evidence that he had led a team of policemen in that district to carry out an operation and that at its conclusion six men were detained and taken to Stony Hill Police Station. He placed himself at a nearby school at the time of the operation and has denied entering any shop at Cavaliers that day.

It is my view however, and I so hold that Assistant Superintendent Miller who has been erroneously described as Senior Superintendent Miller in the Writ, was in fact at the shop in Cavaliers on the 30th September, 1990. In my view he has not been frank with the Court. I reject his evidence that he never entered the grocery shop and find that he was in fact the person who was there and had ordered the plaintiff out. I further find that he used his firearm and struck the plaintiff in his face, maliciously and without reasonable and probable cause when he asked why he should leave the shop. I also find that he did say to the plaintiff upon leaving the scene with the detained men, "You won't take order from police?"

The plaintiff has made out a case on a balance of probabilities in my view and is therefore entitled to damages.

I shall now move on to quantify damages. I will deal firstly with General Damages.

Dr. Patrick Robinson who saw and examined the plaintiff said he observed where his nose was swollen and tender. There was a laceration on the nose bridge about 1/4" long. Both eyelids on the left eye were swollen and the eye was virtually closed. There was a 1" laceration on the left upper eyelid and the left eye itself was red. The wounds were dressed and he was given an antitetanus injection and antibiotics capsules.

An x-ray of the nose was done and the results showed a fracture of the nasal bones as well as some displacement of the bone fragment. Dr. Robinson was of the view that the injuries were consistent with a blunt instrument such as a gun, being used to inflict them. He referred the plaintiff to the University Hospital and had not seen him since. It was his view however that he did not know of any disabilities in so far as the injuries were concerned.

The plaintiff's evidence revealed that he bled from the nostrils immediately that he was hit. Both his nose and left eye were cut and swollen. He had to visit the Doctor three times for treatment and he had pain in the eye and nose which lasted for about one month.

Pain and suffering was the only head of General Damages I was addressed on. Two cases were referred to me for consideration. Mr. Higgins cited Geneive Wilborough and Hazel Turner v Ernest Redway and The Attorney General at page 192, Vol. 2 Khan's Personal Injury Awards. In that case the plaintiff sustained a laceration on the left side of her face leaving a scar. She also had a laceration of the right eyebrow; laceration under the left eye and a bilateral fracture of the zygomatic arches. She was awarded \$4,800.00 for pain and suffering and scarring on the 8th March, 1983.

Mr. Smellie cited Nevine Carr v Roderick Christie et al at page 186, Vol. 3 Khan's Personal Injury Awards. The plaintiff in that case sustained a fracture of the nasal bone with displacement. She lost the tip of her nose and also received a laceration of the upper lip and bruising of the nose bridge. On October 7, 1989 she was awarded \$30,000.00 in respect of pain and suffering. When you take inflation into consideration this award is now valued approximately \$109,000.00 as of May 1993. It is conceded that the injuries in the Carr case are more serious having regard that she had lost the tip of her nose. Of course a sum of \$19,000.00 was also awarded for reconstructive surgery. Nevertheless, the case is still helpful and is a useful guide when considering an award for pain and suffering.

Mr. Higgins submitted that an award of \$45,000.00 under this head would be reasonable. Mr. Smellie on the other hand was asking for an award of \$55,000.00. I must bear in mind that the plaintiff in the instant case sustained lacerations across the nose bridge and on the left upper eyelid and also a fracture of the nose.

His nose and left eye were swollen and he felt pain in those areas for about one month. In all the circumstances, it is my view therefore, that an award of Fifty Thousand Dollars (\$50,000.000) for pain and suffering would be reasonable.

I now turn to Special Damages. The following items have been proved:

a)	Cost of damaged pants due to blood stains	\$ 160.00
b)	Damaged shirt due to blood stains	30.00
c)	Cost of Medical Report	250.00
d)	Cost of X-Ray at Oxford Medical Centre	140.00
e)	Cost of transportation to Dr. Robinson (4 trips at \$8.00 per round trip)	32.00
f)	Cost of transportation to Oxford Medical Centre	10.40
g)	Loss of earnings (two weeks at \$250.00 per week)	500.00

The claim for cost of treatment by the Doctor has not been proved. Special Damages proved therefore amount to \$1,172.40.

The plaintiff is therefore entitled to judgment as follows:

General Damages:

Pain and suffering \$50,000.00 with interest thereon at the rate of 3% from the 5th day of March, 1991 to today.

Special Damages in the sum of \$1,172.40 with interest thereon at a rate of 3% from 30th September, 1990 to today.

There shall be costs to the plaintiff to be taxed if not agreed.

Costs ordered to

*① General & Special Damages as above plus interest
and The Attorney's Fees - \$10,000.00*

*② Kene's 30% share on charges paid by her mother
\$10,000.00*