

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2001/0728

BETWEEN:

MITCHAM BLACK

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA
CPR. 451 BERNARD DARCHEVILLE

Defendants

Appearances:

Mr. George F. Charlemagne for the Claimant
Mr. René Williams for the Defendants

2003: October 3,10,15,21
2004: March 22

Tort – Battery – Shooting by Police – Defences – self defence – use of reasonable force – ex turpi causa – contributory negligence – defences not available without direct testimony of defendant seeking to rely on them.

Damages - Personal Injuries – General Damages –Fenton Auguste v Francis Neptune and Suzanna Jules v Long (unreported) (Saint Lucia) applied

Damages – special damages – cost of medical treatment abroad – duty to mitigate loss – need to prove that medical treatment unavailable locally

Damages – aggravated damages – need to prove malice on part of defendant – need to prove humiliation or disgrace suffered by claimant

JUDGMENT

Introduction

1. HARIPRASHAD-CHARLES J: On 22nd March 2001, Mitcham Black, a mentally unstable resident of La Clery was shot in his left leg by Corporal Darcheville in an attempt to apprehend him to take him to Victoria Hospital to seek medical attention. Mr. Black alleges that as a result of the unlawful and unjustified shooting, he suffered an injury to his leg. He now sues the Attorney General and Corporal Darcheville (the Corporal) for damages.

The Evidence

2. There are two inconsistent versions of the events. Mr. Black's version is that on the day in question, he went to Grass Street in Castries where he was seriously beaten by a number of individuals. He received cutlass wounds to his left arm and back and as a result, he lost a lot of blood. He went to the beach to soak his wounds. Then he returned home. He fainted several times due to loss of a lot of blood. His family called the ambulance. When he came from his little room downstairs to go to the ambulance, he realized that the place was swarmed with armed policemen. He then retreated to his room. His sister pleaded with him to go to the hospital with the policemen. He came out of the room and went into the balcony of the house. He sat there. The police asked him to come outside but he refused. He kept shouting responses at the police. He was careful not to arm himself as he had been shot by the police for no apparent reason prior to this incident. Later, he heard the police instruct members of his immediate family to go inside their house and to lock the door and stay inside. Then the Corporal came up to the balcony near to where he sat and pointed a gun at him. He heard two loud explosions. He felt extreme pain and realized that he had been shot in his left leg.
3. Mr. Black alleged that the armed police officers made no serious attempt to subdue him although they would have had no reason to do so since he was not behaving in a violent or threatening manner. He also alleged that after he was shot, he was dragged by the Corporal and other police personnel in full view of the public and thrown into the back of a waiting ambulance. He was taken to Victoria Hospital where he was treated for the gunshot injury. Three days after, he was admitted to Golden Hope Hospital.

4. Mr. Black called his brother David and sister, Mosa to give evidence on his behalf. Except for a few inconsistencies, Mosa's evidence more or less corroborated Mr. Black's account of what transpired on that fateful night in question.
5. David Black was not present throughout the incident. On his arrival, he noticed policemen running from the backyard of their house and his brother throwing objects. Although unable to see the objects, he was able to conclude that they were not dangerous. He felt that the police were determined to injure his brother despite his many warnings to them not to do so.
6. Mr. Black alleged that as a result of the gunshot wound, he is crippled for the rest of his life.
7. The defendants' version of events is significantly different. Their case is that Fireman Faucher received a call from a Control Room Attendant in respect of a mentally ill patient who was threatening persons in the La Clery area. He left the Fire Service Headquarters in an ambulance together with Fireman #341 Sidoine who was the driver. When they got to the area, Mr. Sidoine parked the ambulance on the La Clery main road while he walked down the lane to Mr. Black's house. Family members from the upstairs of the house indicated to him that Mr. Black was downstairs. He saw Mr. Black and identified himself to him as from the Fire Service. Mr. Black shouted back "all of you fellas is the same" and he started shouting things like "Selassie-I" and "Jah." Mr. Faucher concluded that Mr. Black was not normal so he sought police assistance.
8. About 20 minutes later, 3 police officers including P.C. Wilson arrived. Mr. Sidoine reversed the ambulance closer to the house. By then a crowd had gathered on the main road near the junction of the lane. They all proceeded to the house. P.C. Wilson spoke to Mr. Black in an attempt to convince him to go with him to the hospital for treatment but he was unsuccessful. Mr. Black got very agitated and violent when P.C. Wilson began to approach slowly. He began hurling objects at them and threatened the police officers with

violence. They all ran up the lane and out to the main road to avoid being hit. The Special Services Unit (SSU) was called for assistance. The Fire Service Personnel left when SSU arrived at about 11.00 p.m.

9. The team from the SSU was headed by the Corporal. P.C. Prospere was part of the team. The Corporal and P.C. Prospere made repeated attempts to persuade Mr. Black to accompany them to the hospital so that he would be treated. Instead, Mr. Black got more violent. The Corporal then ordered P.C. Prospere to fire rounds of rubber bullets at Mr. Black's legs in order to subdue him. P.C. Prospere fired about 5 rounds of rubber bullets at his legs but Mr. Black was unhurt. Instead, he retaliated by throwing the rubber bullets back at the officers.
10. When he had stopped throwing rubber bullets, the Corporal walked towards the balcony pleading with him to come with them to the hospital. The Corporal had his shotgun in his possession. Mr. Black then threatened the Corporal by saying "don't come any closer or else I will kill you." The Corporal then walked closer to the balcony railing. Mr. Black pushed his hand in his pocket and pulled out a knife. At this stage, the Corporal made his shotgun ready to fire at Mr. Black. Mr. Black suddenly leaned over the balcony and tried to stab the Corporal on his head. It is at that point that Corporal Darcheville shot him on his leg.

Findings of Facts

11. I am afraid that I could not rely on the evidence of Mr. Black or his witnesses where it conflicted with that of the officers. I did not believe the account given by Mosa or David. There were significant discrepancies in their evidence. David arrived at the scene late. He was unable to recognize the objects being thrown at the policemen but he was quick to say that they were not dangerous objects.
12. In contrast, the Defendants' witnesses gave their evidence in a clear, convincing and forthright manner. I believe them to a certain extent as to how the events unfolded themselves on the night of 22nd March 2001. As to the defences which they put forward, I

was unable to make a determination because the principal witness, Corporal Darcheville did not avail himself for cross-examination before the court.

13. Based on the evidence, I make the following findings of facts. On the night in question, Mr. Black was behaving violently and in a threatening manner. His family members were unable to contain him and take him to the hospital so they sought police assistance. An ambulance from the Fire Service Department arrived with two firemen on board. Fireman Faucher was unable to persuade Mr. Black to go with him to the hospital. He decided to seek police assistance. Police officers from Central Police Station arrived. P.C. Wilson who knows Mr. Black very well tried to persuade him to go with them to the hospital. Mr. Black greeted them with a barrage of obscenities. Coupled with that, he pelted objects at the officers and was behaving violently and disorderly. When P.C. Wilson and his team failed, they turned to the SSU for assistance.

14. The SSU came shortly after the distressed call for assistance. Mr. Black's threatening and violent behaviour did not subside when these lawmen arrived. He continued to spit obscenities and threaten them. After several failed attempts to persuade him to go with them, the Corporal ordered P.C. Prospere to fire some rounds of rubber bullets in order to subdue Mr. Black. The rubber bullets did not achieve the intended purpose. In fact, Mr. Black became more agitated. He became more violent and threatening. He began throwing the rubber bullets at the officers. After he had stopped throwing the rubber bullets, the Corporal walked towards the balcony where Mr. Black was. He continued pleading with Mr. Black to go with them. Mr. Black refused to and threatened him by saying: "don't come any closer or else I will kill you." The Corporal was not afraid of Mr. Black's threat as he kept on moving closer to the balcony railing, armed with his shotgun. Then Mr. Black put his hand in his pocket and pulled a knife. The Corporal fired a shot wounding Mr. Black in his leg.

15. Mr. Black was then handcuffed, strapped and taken to Victoria Hospital where he received medical attention. A few days later, he was taken to Golden Hope Mental Hospital.

The Defences

16. Mr. Black brought his claim under Article 985 of the Civil Code which states:

“ Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising.”

17. Mr. Williams, on behalf of the Attorney General raises the following answers to the claim namely:

- (i) That the shooting by the Corporal could be justified on the ground of self - defence.
- (ii) That the Corporal used reasonable force to subdue Mr. Black.
- (iii) That the claim is not maintainable because Mr. Black was injured as a result of his own criminal conduct.
- (iv) Even if the defendants are liable, damages awarded to Mr. Black should be reduced on the grounds of contributory negligence.

Self Defence/ Reasonable Force

18. The first and second issues are inextricably linked and could be dealt with together. Mr. Charlemagne submitted that the acts of the Corporal in the circumstances of this case were unlawful, unjustified, indiscriminate and totally unwarranted.

19. On the other hand, Mr. Williams argued that the actions of the Corporal could be justified on the ground that Mr. Black was armed and dangerous and that only when he attempted to stab the Corporal with the knife, that the Corporal opened fire at him and shot him.

20. Normally, where one person uses deliberate violence towards another and injures or kills him, he acts unlawfully. However, it is both good law and good sense that a person who is attacked or believes that he is about to be attacked may use such force as is reasonable necessary to defend himself. If that is the situation his use of force is not unlawful – he is acting in lawful self-defence.

21. The law is that a person only acts in lawful self-defence if in all the circumstances he believes it is necessary for him to defend himself and the amount of force which he uses in doing so is reasonable. So there are 2 principal questions to answer:

- (i) Did the Corporal believe or may he honestly have believed that it was necessary to defend himself?

If he was or may have been acting in that belief, then there is a second question to be answered:

- (ii) Taking the circumstances as the Corporal believed them to be, was the amount of force which he used reasonable?

22. It is my firm view that the Corporal is the only person who could provide these answers to the Court. Unfortunately, he has left the state and was not available to give evidence in chief or to be cross-examined. His unsworn witness statement has to be rejected in its totality. So even if the defendants have a good defence, the most vital witness was unavailable at the date of the trial.

23. Even if I were wrong to come to that conclusion, I think that the force used on the night in question seems unreasonable in the circumstances. I say so because the Corporal knew that he was dealing with a lunatic. There are a plethora of mind-boggling questions which are still unanswered because the Corporal was unavailable to give oral testimony. Some questions that deserves answers are: what was the nature of the attack on the Corporal bearing in mind that he was not there alone? Was his life in danger? Could he not have retreated instead of advancing when he saw the knife? Could he not have left the scene as others had earlier done? Where are the persons whom he claimed to be defending? Is shooting in the leg the sole method of disarming a mentally-ill person?

Ex turpi causa

24. The defendants relied upon the maxim *ex turpi causa non oritur actio* and submitted that Mr. Black's claim for damages is based on his illegal and unlawful actions on the night in question.

25. The doctrine of *ex turpi causa* was laid down in *Holman v Johnson*¹ where Lord Mansfield said:” No court will lend its aid to a man who founds his cause of action upon an illegal or immoral act.”
26. Mr. Williams relied on the case of *Cross v Kirkby*² where the English Court of Appeal seems to suggest that a man would be barred from claiming damages which arose out of his own serious criminal conduct. Shanks J. in the case of *Donovan Isidore v (1) Attorney General and (2) Francis Dariah*³ (which is now on appeal) went into a detailed analysis of the principle of *ex turpi causa* as it affects English Law as well as St. Lucian law in light of the recent judgment in *Cross v Kirkby*.
27. I agree entirely with the reasoning of Shanks J. But I will add that this defence is not available to the defendants due to the lacuna in their case.
28. The other defence of contributory negligence also fails because of the absence of a defence. The fact that Mr. Black was acting aggressively and in a violent manner does not necessarily mean that he contributed to the injury he sustained. The Corporal should have availed himself in order for the allegation of contributory negligence to be considered.

Damages

29. The Attorney General is vicariously liable for the torts of the police officers. On that footing, the conduct of the Corporal was not merely “overzealous”, as Mr. Charlemagne submitted: it was tortious.
30. The assessment of damages for injuries sustained as a result of an accident falls under two heads: general and special damages. In the case of *Cornilliac v St. Louis*⁴, it was stated that the factors which ought to be borne in mind in assessing general damages are:
- (a) The nature and extent of the injuries sustained;

¹ (1775) 1 Cowp 341

² (Court of Appeal Transcript 18.02.2000) unreported

³ High Court Civil Claim No. SLUHCV2002/0380 (unreported) (Saint Lucia)

⁴ (1965) 7 W.I.R. 491

- (b) The nature and gravity of the resulting physical disability;
- (c) The pain and suffering which had been endured;
- (d) The loss of amenities suffered and
- (e) The extent to which, consequently the injured person's pecuniary prospects have been materially affected.

General Damages

31. The evidence disclosed, that as a result of the shooting, Mr. Black sustained a gunshot wound to his left leg. Examination revealed an entry wound approximately 4 cm in diameter on the medial aspect of the midshaft of the leg with mascerated muscle tissue exposed. An exit wound was noted on the lateral aspect of the leg with a central bone of approximately 8 cm in diameter and laceration 15 cm extending longitudinally across with mascerated muscle exposed. Metal fragments from the bullets were noted in the wound. The tibia was intact. The medical report from Victoria Hospital annexed to Mr. Black's claim does not indicate whether Mr. Black's disabilities are permanent or a percentage disability. There is no evidence that the wounds require further surgery and that he is infirmed by the incident. In fact, when I saw Mr. Black on the few occasions in court, he was ambulant without the assistance of crutches.
32. As Mr. Williams so rightly pointed out, it is inevitable that Mr. Black would have suffered some degree of pain as a result of the shooting. Mr. Black stated that as a result of the injury, he suffered much pain and anguish up to one year after the incident.
33. In respect of loss of amenities, Mr. Charlemagne submitted that Mr. Black can no longer participate in sports or leisure activities which he enjoyed. He has not substantiated this allegation. I do not think it is wrong for me to conclude, in the absence of evidence, that a man of 42 years of age is likely to take part in sporting activities or activities of a highly physical nature.
34. Mr. Charlemagne next submitted that Mr. Black is an agriculturist. At the time of the incident, he was a beach vendor earning \$800.00 per month. No documentary evidence

was tendered in court. No bankbooks to show what his savings were over the years prior to the shooting. There is also no medical evidence to prove that the incident reduced his pecuniary prospects. One cannot resist the temptation that due to his mental illness, his job even as a beach vendor might have been unstable and irregular.

35. In my opinion, Mr. Black has not satisfied the test laid down in *Gravesandy v Moore*⁵ where the Jamaican Court of Appeal held that a plaintiff who seeks general damages for loss of earnings must show that there is a real or substantial risk that he might be disabled from continuing his present occupation and be thrown, handicapped, on the labour market at some time before the estimated end of his working life. The “risk” in such a case will depend on the degree, nature or severity of his injury and the prognosis for full recovery; and the evidence must be adduced as to these matters, and also as to the length of the rest of his working life, the nature of his skills and the economic realities of his trade and location.
36. A generous amount of judicial authorities were supplied by both Counsel on this aspect of the case. I have scrutinized them all. I am also fully cognizant of the Court of Appeal judgments in *Alphonso v Deodat Ramnath*⁶ and *Fenton Auguste v Francis Neptune*⁷.
37. There is no obligation on me to set out arithmetical calculations under the separate heads of damages provided that I took all the relevant facts into account, kept in mind the various heads under which damages might be awarded and apply the correct principles: Berridge J.A. in *Alfred v Thomas*.⁸ But Singh J.A. in *Fenton Auguste* case warned at page 7 of the judgment that “the practice of non-itemization should only be used where it is impracticable to itemize the awards under the different heads.” This is the position in the instant case.
38. I now turn to assess general damages that Mr. Black is entitled to having regard to the considerations adumbrated by Wooding C.J. in *Cornilliac v St. Louis*. In my judgment, Mr.

⁵ (1986) 40 WIR 222

⁶ (2000) 56 WIR 183

⁷ (2000) 56 WIR 229

⁸ 32 WIR 183

Black is not as seriously handicapped as Mr. Alfred in *Alfred v Thomas* or Ms. Jules in *Suzanna Jules v George Long et al.*⁹ In both those cases, the injuries sustained were more serious. Having regard to all of the authorities (supra) and making allowance for inflation, I will make an award of the sum of \$30,000.00 to Mr. Black.

Special Damages

39. Mr. Williams vehemently challenged the sum of \$5,900.00 which Mr. Black claims as special damages.

40. It is trite law that a claimant must prove his case. Mr. Black has not provided sufficient evidence to substantiate the claim. He claimed \$2,800.00 for air ticket to the UK. He has not provided any evidence to demonstrate that the medical treatment he received in England could not be obtained locally. In the Barbadian case of *Johnson v Browne*¹⁰, the plaintiff claimed the cost of medical treatment in Canada as a part of his future medical expenses. The same operations could have been performed in Jamaica at a significantly lower cost. Douglas CJ observed at page 391:

"In the absence of any reasons for holding that a Jamaica operation would constitute inadequate treatment, I must hold that any damages the plaintiff recovers for future medical treatment must be on the basis of the costs of the operation performed in Jamaica, as he is under a duty to mitigate damages."

41. Accordingly, Mr. Black will not be entitled to the cost of travel and medical treatment in England. I will make an award of \$2,000.00 under this head.

Aggravated Damages

42. Mr. Black alleged that he was dragged out of his balcony in full view of other persons in the area and thrown in the back of the ambulance. As a consequence, he is seeking aggravated damages.

⁹ High Court Civil Suit No. 50 of 1985 (Saint Lucia) [unreported]

¹⁰ (1972) 19 WIR 382

43. Mr. Black must not only allege. He must prove his allegation. It is a significant failure on his part not bring any of the persons in the area to support his allegation. He admitted under cross-examination that he was unconscious and as such, could not say whether he was dragged.
44. His witnesses did not provide any assistance in their testimony. David Black testified that his brother was carried down the steps to the balcony. Mosa gave no evidence that Mr. Black was dragged at all.
45. Mr. Black led no evidence of malice on the part of the SSU officers. On the whole, there is not an iota of evidence to prove that Mr. Black suffered any disgrace, humiliation or embarrassment as a result of the actions of the defendants.
46. As a result, this claim must fail.

Outcome

47. There shall be judgment for the Claimant in the following sums:
- (a) General Damages of \$30,000.00 with interest at the rate of 6% per annum from the date of the service of the claim form to the date of trial i.e. 21st October 2003.
 - (b) Special Damages of \$2,000.00 with interest at the rate of 3% per annum from the 22nd March 2001 to the date of trial i.e. 21st October 2003.
 - (c) There shall be interest at the rate of 6% per annum on the global sum of \$32,000.00 from the date of judgment i.e. 22nd March 2004 to the date of payment.
 - (d) Costs to the Claimant agreed at \$10,000.00.
48. Lastly, I thank both Counsel for their industry.

Indra Hariprashad-Charles
High Court Judge