

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV2001/0108

BETWEEN

- (1) OWEN JOSEPH
- (2) FERGUSON JOSEPH
- (3) JONATHAN JOSEPH
- (4) MAGDALENE JOSEPH

Claimants

AND

RICHARD FREDERICK

Defendant

Appearances:

Dexter Theodore for Claimants
Alvin St Clair for Defendant

.....
2005: 4 April
10 May
28 June
22 July
.....

JUDGMENT

Introduction

[1] **SHANKS J:** The First Claimant lives in Corinth with his wife, the Fourth Claimant, and his sons, the Second and Third Claimants. The Defendant is an attorney and a former police officer. He too lives in Corinth, further up a rough road which at the relevant time was a dead

end. On Sunday 8 February 1998 at about 5 pm there was an incident at the Claimants' property in the course of which the Defendant fired two or three rounds from his licensed 9mm revolver. The Claimants seek damages (including aggravated and exemplary damages) for assault and trespass arising out of the incident. The Defendant says that he was acting in self defence and defence of his property when he let off his firearm, he denies that the Claimants suffered injury or loss and he counterclaims for the damage caused to his vehicle by stones which he says were thrown by the Claimants.

Facts

[2] Certain facts are not in issue. About half an hour before the incident there had been a fight involving the Second and Third Claimants (Ferguson and Jonathan) and the Defendant's nephew (Nigel Faisal). I do not think I need to make any detailed findings about this fight. It is sufficient to note that Nigel was 13 at the time while Jonathan was 18 and that Jonathan admitted pushing him from his bicycle and to the ground. There is no dispute that Nigel was very upset by this and that he was sitting by the road side crying when his uncle (Mr Frederick) drove by on his way home and stopped. Mr Frederick, with whom Nigel was living, was not pleased by what Nigel told him had happened and he told him to get in the car. Thaddeus Francois, who also lived with Mr Frederick, was in the car.

[3] A little further up the road they came to the Claimants' property, where Ferguson and Jonathan were sitting outside on a low flat roof. Mr Frederick stopped and got out of the car and approached the boys. At some stage they ran out of view and the First Claimant (Mr Joseph) came out of the house with only a towel round his waist. There was a heated exchange between the two men during which Mr Joseph told Mr

Frederick to get off his property and there was some “chucking” both ways. Mr Frederick fired at least two rounds within a few feet of Mr Joseph and in the presence of his wife and sons, one of which punctured a neighbour’s water tank which was about 10 feet above the ground. He then left in a vehicle being driven by Junior Goodridge who had chanced upon the scene. Thaddeus had already driven away with Nigel in Mr Frederick’s car.

- [4] But there are major discrepancies between the accounts given by the two sides.
- (1) Mr Joseph’s daughter Magdalene was walking along the road and saw Mr Frederick picking up Nigel: she says she heard him call out “Somebody is going to die today” as he drove off. Mr Frederick denies saying anything like this.
 - (2) The Claimants’ case is that Mr Frederick had his firearm out when he came onto their property and that he was the first to physically assault Mr Joseph. Mr Frederick denies this and says that Mr Joseph pushed him first.
 - (3) Mr Frederick and his witnesses say that all the Claimants hailed stones at him and his car and that the stones cracked the sunroof and dented the bodywork; he says that it was in order to stop the stone throwing that he drew his firearm (from his waist band: see para 13 of his witness statement) and fired it. The Claimants deny throwing any stones at all.
 - (4) Mr Frederick says that he fired two shots, both in the air to his left; he admits that one of them hit the neighbour’s water tank. The Claimants say that there were three shots fired in the direction of Mr Joseph and

in the direction of his wife and sons who were standing by the side of the house and that the lid of their own water tank sustained two gun shot holes and that a finger on Jonathan's left hand was also grazed by a shot.

(5) The Claimants say that Mr Goodridge was passing, stopped his car and got out and led Mr Frederick away; they also say that as he was being led away he spun his gun on his finger and said words to the effect of "This is not over yet". Mr Goodridge and Mr Frederick say that the Claimants were pursuing Mr Frederick with stones in their hands along the road, that Mr Goodridge stopped his car and Mr Frederick climbed in and they drove off. The gun spinning is denied by Mr Frederick.

[5] None of the witnesses to the incident itself who were called at the trial could be said to be independent. Mr and Mrs Joseph, Jonathan and Magdalene were the only witnesses on the Claimants' side and they are all members of the family. On the Defendant's side there was Mr Frederick himself, Nigel, his nephew, Thaddeus, who lived and still lives with Mr Frederick, and Mr Goodridge, who agreed in cross-examination that he has known Mr Frederick a long time and that they are friends. The only other evidence before the court (apart from that of Corporal Boodha, Paul Lector and Michael Descartes, none of whom witnessed the incident) came from a site visit which showed the layout of the Claimants' property and the two small holes in the lid of the Claimants' water tank alleged to have been made by Mr Frederick's gun shots, and a receipt dated 6 March 1998 for a sun roof for a Honda Accord which was produced by Mr Frederick.

[6] In the absence of an independent witness or some overwhelming piece of real evidence it is difficult for a court to come to a conclusion as to where the truth lies in a case like this. Having anxiously considered all the evidence and bearing in mind the seriousness of the allegations against Mr Frederick, however, I have come to the view that in general the Claimants' account of events is to be preferred. I rely in particular on the following points:

- (1) I found Mrs Joseph in particular an impressive and honest witness. She was prepared to concede that she had not actually observed certain parts of the incident, that what her son had done to Nigel was wrong and that an adult in Mr Frederick's position would wish to come and find out what was going on. She gave evidence which I am inclined to accept to the effect that none of the Claimants threw stones at Mr Frederick or his car, that gun shots were fired in her husband's and in her and her sons' direction (albeit this is not expressly stated in her witness statement), and that Mr Frederick was led away by Mr Goodridge and that he spun his gun and said "This is not over" as he left. I am also inclined to accept her evidence that she showed Corporal Boodha the holes in their water tank when he came an hour or so later and her explanation that she made no complaint about any injury to Jonathan's finger to Corporal Boodha because he had run away and she did not know he had sustained any injury at that stage.
- (2) I saw no reason to disbelieve Jacqueline Joseph's evidence about what Mr Frederick had said when he picked up Nigel: this was telling evidence as to Mr Frederick's state of mind when he arrived at the

Claimants' property. This state of mind was confirmed by Mr Frederick's own description in cross-examination of the two Joseph boys as "culprits".

- (3) Mr Frederick and Mr Goodridge's evidence to the effect that all four of the Claimants were following him with stones (and, in Mr Frederick's case, that they continued to throw stones) while Mr Frederick retreated with his gun pointing at them having already fired at least twice is quite simply incredible. It is also inconsistent with the fact (on which I am confident) that Jonathan (and possibly Ferguson) ran away as the shots were being fired, a point which I believe Mr Frederick accepted in cross-examination. It is also odd that the Claimants would have failed to hit Mr Frederick with even one stone if they were really trying to hit him, particularly in the case of Mr Joseph who was on any account only a few feet away from him. Although the evidence was that photographs were taken of the damage to the roof of Mr Frederick's Honda, no such photograph was produced in court.
- (4) It was quite evident from Mr Frederick's demeanour in the witness box that he is quick to anger and hot tempered. His and Mr Goodridge's insistent denials that this was the case undermined their evidence considerably in my eyes. It was also significant that Mr Frederick expressed uncertainty as to whether Corporal Boodha had been in the police force when he (Frederick) was in it from 1983 to 1988 while Corporal Boodha's evidence was that he knew Mr Frederick when he was in the force and that they are friends. On a similar theme I noted that the accounts given by Mr Frederick and Mr Lector as to the

circumstances in which Mr Loctor told Mr Frederick about a statement Mr Joseph had made about him (he had apparently called him a "vieux neige") were quite different and inconsistent.

- (5) The evidence of Mr Loctor and Mr Descartes, both of whom were called by Mr Frederick with a view to showing that there was existing ill will on the part of Mr Joseph towards him, added very little in my view. I do not doubt that Mr Joseph was highly indignant when he saw Mr Frederick on his property and that this reaction may have been stronger in view of their previous dealings. The fact is that Mr Frederick had no right to be on Mr Joseph's property and that it is not disputed that each of them "chucked" the other before the shots were fired.
- (6) Thaddeus's evidence was undermined by the fact that he denied ever having discussed the case with Mr Frederick (which I am sure is not the case) and by the fact that he gave categoric evidence (contrary to that of all other witnesses and inconsistent with the admitted damage to the neighbour's water tank) that Mr Frederick fired straight at the ground. He also stated in cross-examination that he had not seen Mrs Joseph throwing any stones although in his witness statement he expressly stated that the wife had thrown stones. Nigel was only 13 at the time of the incident and was no doubt already in a traumatized state. Although he spoke of stones coming from all directions he was unable to say who was throwing them.
- (7) I was presented with no evidence to suggest that the holes in the lid of the Claimants' water tank could not have been caused by a gun shot.

Likewise Jonathan's description of the injury he sustained to his finger sounded consistent with being grazed by a bullet and there was no evidence presented to suggest that the injury as he described it could not have been caused in that way.

- (8) Mr St Clair who appeared for Mr Frederick raised a number of rhetorical questions in his written submissions intended to demonstrate that the Claimants must have been throwing stones. First, he asked why Mr Frederick should discharge two rounds at all. My answer would be that in the light of his aggressive state of mind and the response he was getting from Mr Joseph, he may well have discharged them in anger and to demonstrate who was in charge rather than in response to any stone throwing. Second, he asked why Mr Frederick told Thaddeus to remove his car. The answer may be that he wanted the two boys to get well away from the scene as soon as possible for their own safety and so they did not witness anything more of an ugly scene, regardless of whether stones had been thrown. Finally, he asked why Mr Frederick took a ride with someone else and walked away from the scene backwards. This is just as consistent with the Claimants' account that Mr Goodridge got out of his car and persuaded Mr Frederick to leave the scene as with Mr Frederick's account that he was being pursued by the Claimants wielding stones.
- (9) When I questioned Mr Frederick at the end of his evidence about why he had felt the need to discharge his firearm at all he told me that he

felt in fear of his life. I am afraid to say that I simply did not believe that answer.

[7] For all these reasons I find on the balance of probabilities that the Claimants' account of events as set out in paras 4(1) and (3)-(5) above is true and I reject Mr Frederick's and his witnesses' evidence to the contrary. On para 4(2), the evidence about when Mr Frederick first drew his firearm and about who, as between him and Mr Joseph, was first to "chuck" the other, was not at all clear. On balance, it seems to me more likely that Mr Joseph was the one who first pushed Mr Frederick with a view to ejecting him from his property and that this led Mr Frederick to push him back and to draw his firearm for the first time. It was not disputed by Mr Frederick that Mr Joseph told him to get off his property before shoving him.

Conclusions on liability

[8] It follows from my findings of fact that I do not accept Mr Frederick's case that he was acting in self defence or defence of his property when he discharged his firearm. The discharge of the firearm must therefore have amounted to an assault not only against Jonathan assuming he was hit by a round but also against the other Claimants in so far as they apprehended immediate and unlawful personal violence against themselves (see Halsbury's Laws *Criminal Law, Evidence and Procedure* para 488). Further, there can be no doubt that Mr Frederick was a trespasser when he remained on the Claimants' property having been told to leave by Mr Joseph (whatever Jonathan and his brother might have done to Nigel). Mr Joseph was therefore entitled to use reasonable force to eject him and I find that the force used by Mr Joseph (a shove or

"chuck" which was in the event ineffective) was no more than reasonable. It also follows that Mr Frederick's "chuck" against Mr Joseph was itself an assault.

[9] Although I prefer the Claimants' account of events I should say that, even if I had accepted the Defendant's account, I would nevertheless have concluded that the discharge of a firearm in a residential area within a few feet of Mr Joseph's head and perhaps 15 feet from Mrs Joseph and her sons was an unreasonable and excessive reaction to the stone throwing which was described by Mr Frederick, Nigel and Thaddeus. As Mr Frederick must be well aware, a firearm discharged in such circumstances even into the air can kill or maim innocent people. Some damage to a car (or even some injury to the person caused by stones), actual or apprehended, cannot in my view justify that risk, particularly when it was clearly open to Mr Frederick to remove himself and his car from harm's way.

[10] In any event the Claimants are in principle entitled to damages for trespass and assault and I turn to consider the appropriate level of such damages.

Law on damages for assault

[11] Assault is a trespass to the person and is actionable without proof of actual damage. Thus nominal damages at least are recoverable, and substantial damages are recoverable for discomfort and inconvenience, or injury to dignity, even where no physical injury is proved. Where physical injury does result from the assault, the damages will be calculated as in any other action for personal injury. It appears to be the law and I hold that damages for emotional shock which does not result in physical illness can be recovered where there is other physical injury, and also in cases where

there is no physical injury, as in the case of an assault without any battery, provided it is substantial and not too remote (see: Halsbury's Laws *Damages* para 940).

[12] Further, in actions in tort where the damages are at large (which would include an action for assault or trespass to land), the court may take into account the defendant's motives, conduct and manner of committing the tort, and, where these have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded. The defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner. The court may consider the defendant's conduct up to the conclusion of the trial, including what he or his counsel may have said at the trial. Conversely provocation on the part of the claimant may reduce or eliminate aggravated damages for an assault (Halsbury's Laws *Damages* para 1114).

[13] Exemplary damages are dealt with at para 1115 of Halsbury's Laws under the title *Damages*. They are awarded to punish the defendant and vindicate the strength of the law. They may be awarded only in actions in tort, and only in three categories of cases. The first category is oppressive, arbitrary or unconstitutional action by servants of the government. It seems that this category is not confined to Crown servants but includes persons who are exercising functions of a governmental character, like the police. This category does not, however, ordinarily extend to oppressive action by private corporations or individuals. It seems clear that Mr Frederick did not come within the first category. The second category is cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. This category is not confined to money-making in

the strict sense but extends to cases (for example, libel or trespass) where the defendant is seeking to gain some object at the plaintiff's expense. Although Mr Theodore for the Claimants constructed an ingenious argument maintaining that Mr Frederick came within this category I do not think it will work. I do not think that his conduct on the day in question was calculated to do anything; it was rather the product of uncontrolled anger and lack of self-control. The third category is cases where exemplary damages are expressly authorised by statute: there was no suggestion that any such statutory provision applied here. I therefore reject any claim for punitive or exemplary damages and proceed to consider the damages, including aggravated damages, to which each of the Claimants are entitled.

Individual Assessments

[14] Mr Joseph is entitled to damages for the trespass to his land and for the assault by chucking; I would assess these at \$750. He gave evidence that his damaged water tank cost \$450; however, I do not believe that the two small holes in the cover which he appears to have lived with for over seven years justify the replacement of the whole tank and I will assess damages for the holes at \$100. His evidence (which I accept) was that a round fired in his direction only just missed his head and that Mr Frederick almost killed him. I think there can be no doubt that this amounted to an assault which must have caused him shock. But he also admitted that immediately after the shots were fired he invited Mr Frederick to put down his gun and fight, which would tend to indicate that he cannot have been too shocked. For this assault I would assess his damages at \$2,500.

[15] As for aggravated damages, there is no doubt that Mr Frederick behaved in a thoroughly high-handed and aggressive way which clearly damaged Mr Joseph's dignity and pride, not only by trespassing on his property and drawing a firearm and shooting towards him and his family but also in his final threat that the matter was not over yet. Mr Joseph states in his witness statement that he was unable to sleep for six months because of the threat issued by Mr Frederick but, again in light of his own invitation to Mr Frederick to fight and in light of his own rather insouciant demeanour in giving evidence, I think that is an exaggeration. Mr Joseph also admitted that he was angry when he found Mr Frederick on his property and he may bear some limited responsibility for provoking Mr Frederick. Taking account of all these matters I would assess aggravated damages in favour of Mr Joseph at \$5,000.

[16] Ferguson did not give evidence and in the circumstances I cannot find that there was any assault against him and do not see how I can award him any damages.

[17] As I have said Jonathan was 18 at the time of the incident. He gave evidence that Mr Frederick pointed at him and he heard a gun shot and immediately ran away thinking that he was trying to kill him. I accept that evidence and that he was so scared that he did not return home until 9.30 that evening. I also accept his evidence that something grazed a finger on his left hand which caused a superficial injury and an extreme burning sensation and I am prepared to infer that that injury was caused by a shot from Mr Frederick's gun. For these matters I assess his damages at \$5,000. In relation to aggravated damages I am also prepared to infer that Jonathan's dignity and pride were damaged by Mr Frederick's behaviour. He may also bear some limited responsibility

for provoking the assault by his own behaviour towards Nigel. Taking those matters into account I also assess aggravated damages in favour of Jonathan at \$5,000.

[18] Mrs Joseph's evidence in her statement is that she was fearful when she heard the shots and that she had many sleepless nights after the incident. I accept that evidence and assess her damages for assault at \$4,000. It was also clear that her pride and dignity were damaged by Mr Frederick's behaviour and she gave particularly telling evidence to the effect that she would never forget him spinning his gun and stating that it was not over yet as he left their property. Again I assess aggravated damages in relation to her at \$5,000.

Result

[19] I will award the First, Third and Fourth Claimants damages of \$8,350, \$10,000 and \$9,000 respectively with interest for seven years five months at 6% which gives total figures of \$12,065, \$14,450 and \$13,005 respectively. I will dismiss the Second Claimant's claim and the Defendant's counterclaim. Subject to any submissions on costs, I will order the Defendant to pay the Claimants' costs on the prescribed basis for a claim of \$39,520, the sum of the awards to the Claimants.

Murray Shanks

HIGH COURT JUDGE (Ag)