**[2023] JMCA Civ 17**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA**
**THE HON MR JUSTICE D FRASER JA**
**THE HON MISS JUSTICE SIMMONS JA**

**SUPREME COURT CIVIL APPEAL NO 79/2015**

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| **BETWEEN** | **THE ATTORNEY GENERAL OF JAMAICA** | **APPELLANT** |
| **AND** | **LATOYA BROWN** | **RESPONDENT** |

**Ms Christine McNeil instructed by the Director of State Proceedings for the appellant**

**Michael Hylton QC and Ms Shanique Scott instructed by Lightbourne & Hamilton for the respondent**

**14 December 2020 and 31 March 2023**

**P WILLIAMS JA**

[1] I have read in draft the judgment of my brother D Fraser JA. I agree with his reasoning and conclusion. There is nothing that I wish to add.

**D FRASER JA**

**Background**

[2] On 9 July 2001 the world of Latoya Brown ('the respondent') went dark. She was instantly blinded by a bullet that pierced and exited her head destroying both eyes in the process. This tragic incident occurred during operations being carried out by the security forces in West Kingston on that day. On 9 May 2006, by claim form and particulars of claim, the respondent commenced suit against the appellant Attorney General of Jamaica for damages, pursuant to the Crown Proceedings Act. She alleged that her injuries were

due to assault and battery and negligent discharge of firearms by members of the security forces, namely the Jamaica Defence Force ('JDF') and the Jamaica Constabulary Force ('JCF').

[3] On 12 May 2015, by a decision contained in his written judgment **Latoya Brown v The Attorney General for Jamaica** [2015] JMSC Civ 89, E Brown J (as he then was) ('the learned judge') gave judgment for the respondent. He found that the security forces were in breach of their duty of care to the respondent, by negligently discharging their firearms in the direction of the respondent. He awarded general damages to her in the sum of $45,000,000.00 with interest at the rate of 3% per annum from the date of service of the claim, being 10 May 2006, to the date of judgment. He also made an award to her of $2,000,000.00 for the cost of future care, as well as costs to be agreed or taxed.

## The appeal

[4] On 8 July 2015 the appellant filed a notice of appeal which challenged both liability and quantum and contended that the learned judge erred in finding the security forces negligent and that the damages awarded to the respondent were excessive.

## The grounds of appeal

[5] The grounds of appeal filed by the appellant are as follows:

> "1. The learned judge erred in law in finding the appellant liable in negligence in the absence of evidence that the claimant was shot by servants or agents of the Crown.
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> 2. The learned judge erred in law in finding the appellant liable in negligence in the absence of evidence from the claimant establishing that the servants or agents of the Crown breached the duty of care owed to the claimant.
>
> 3. The learned judge erred in fact and in law in finding that the claimant was shot by a member of the security forces; a finding that is inconsistent with his findings that:

a) the claimant was thoroughly discredited under cross-examination as to the identity of who shot her (paragraphs 23 and 24); and

b) it cannot be ruled out that the security forces were shooting criminals at the material time having regard to the prevailing atmosphere (paragraph 25).

4. The learned judge erred in law and misapplied the principle of proportionality when he held that 'when members of the security forces propose to discharge their firearms where persons other than armed criminals are, the law constrains them not to injure these innocent bystanders'.

5. The learned judge erred in finding the appellant liable in negligence as there was no evidence before him that 'they discharged their firearms without first having taken the greatest care and exercised the greatest pain to avoid the infliction of injury, fatal or otherwise', and 'that they did not consider the public' and 'that the security forces were negligent in the discharge of their firearms which resulted in injury to the claimant' as found by him in paragraph 28 of the judgment.

6. The learned judge erred in making the award of general damages as the amount is so extremely high as to be an erroneous estimate of the damages to which the claimant is entitled.

7. The learned judge erred in making the award of general damages as the medical evidence did not substantiate injuries of such severity as to attract such a high award of general damages.

8. The learned judge erred by finding that the claimant had diminished marriage prospects/diminished prospects of an intimate relationship in circumstances where there was no evidence to support such a finding and where no submissions had been made by the claimant or defendant in that regard.

9. The learned judge erred in the circumstances in using the finding of diminished marriage prospects/diminished prospects of an intimate relationship as a basis for the award of general damages.

10. The learned judge erred in making an award for future help in circumstances where it had not been pleaded and where there was no evidence to support such an award.

11. The learned judge erred in making an award for future help without making an express finding regarding the need for any such help.

12. The learned judge erred in making an award for future help without indicating the basis of the computation of such an award and therefore made an arbitrary award."

[6] Though in his written submissions Queen's Counsel for the respondent sought to support the award of $2,000,000.00 for the cost of future help, in his oral submissions he indicated that, based on an absence of evidence, he would not seek so to do. There was accordingly no need for the court to consider or hear arguments on grounds 10, 11 and 12.

[7] Counsel for the appellant and the respondent advanced arguments by grouping and approaching the grounds as follows:- grounds 1, 2, 4 and 5; ground 3; grounds 6 and 7; and grounds 8 and 9.

**Ground 1** **The learned judge erred in law in finding the appellant liable in negligence in the absence of evidence that the claimant was shot by servants or agents of the Crown.**

**Ground 2** **The learned judge erred in law in finding the appellant liable in negligence in the absence of evidence from the claimant establishing that the servants or agents of the Crown breached the duty of care owed to the claimant.**

**Ground 4** **The learned judge erred in law and misapplied the principle of proportionality when he held that "when members of the security forces propose to discharge their firearms where persons other than armed criminals are, the law constrains them not to injure these innocent bystanders".**

**Ground 5** **The learned judge erred in finding the appellant liable in negligence as there was no evidence before him that "they discharged their firearms without first having taken the greatest care and exercised the greatest pain to avoid the infliction of injury, fatal or otherwise", and "that they did not consider the**

**public" and "that the security forces were negligent in the discharge of their firearms which resulted in injury to the claimant" as found by him in paragraph 28 of the judgment.**

Submissions

*Counsel for the appellant*

[8] Counsel for the appellant relied on the classic definition of negligence given by Alderson B in **Blyth v Birmingham Waterworks Co** [1843-60] All ER 478 (Reprint). She argued that the court may, in assessing the standard of care expected of a defendant, take into account the risk factor, which entailed four elements; the most significant of which in this case, was the importance and utility of the conduct of the security forces. She submitted that the security forces were, at the time of the respondent's injury, engaged in a gun fight with armed civilians and acting in self-defence to protect their own lives.

[9] She maintained that the learned trial judge had misconstrued the contention of members of the security forces that the respondent was "not in contemplation" when they fired. She advanced that the only reasonable interpretation of that evidence was that the respondent was not contemplated as a target to be engaged and not that, as the learned trial judge found, the security forces had no regard for the respondent, and fired in her general direction without any care for her presence, or in wild abandon.

[10] Counsel further submitted that there is no evidence that the respondent was shot by a member of the security forces. She emphasised that the evidence was that the members of the security forces and armed civilians were engaged in an ongoing gun fight. She highlighted that in the respondent's statement to the police given a month after the incident, the respondent had stated that she did not see who shot her, but that Daleth told her it was one of the policemen. However, when she gave her witness statement in this matter almost 13 years later, she said she saw the police firing at her and she was sure she was shot by the police. Further, when she was challenged about her previous inconsistent statement, the respondent maintained that she was telling nothing but the truth now. Consequently, she maintained that the learned trial judge's finding at para.

[21] of his judgment that "[the] unchallenged evidence was that at the material time only members of the security forces fired their weapons" is not supported by the evidence.

[11] Counsel also argued that there is no evidence upon which the learned trial judge could reasonably have found that the members of the security forces breached the duty of care owed to the respondent. In support of this submission, she relied on the cases of **Robley v Placide** (1966) 11 WIR 58, **Watts v Hertfordshire CC** [1954] 2 All ER 368, **Byfield v Attorney General** (1980) 17 JLR 243 and **Blyth v Birmingham Water Works Co**.

*Queen's Counsel for the respondent*

[12] Queen's Counsel, in response, submitted that the question of who shot the respondent was entirely a question of fact and there were numerous authorities concerning the difficulties associated with seeking to set aside findings of fact made by a lower court. He argued that the evidence before the court, and accepted by the learned trial judge, was that the respondent was injured by a member of the security forces. He pointed out that the evidence of both the respondent and her witness Daleth Smith was, that, at the material time, only members of the security forces were seen discharging weapons in the respondent's direction. He maintained that the learned trial judge justifiably accepted the evidence of Daleth Smith, who was facing the members of the security forces at the time of the incident, that there were only police and soldiers in the vicinity of North and Regent Street (and that they were the only shooters) at the material time. He highlighted that this evidence was unchallenged by the appellant.

[13] Queen's Counsel, while accepting the classical definition of negligence coined by Aldeson B in **Blyth v Birmingham Water Works Co**, rejected the argument that the learned trial judge misconstrued the contention of the members of the security forces that the respondent was "not in contemplation" when they fired. Rather he contended that the learned trial judge, at paras. [28] and [29] of his judgment, being guided by the principles emanating from the cases of **Lynch v Fitzgerald** [1938] I.R. 382 and **Joseph Andrews v The Attorney General of Jamaica** (1981) 18 JLR 434, concluded that the

members of the security forces "discharged their firearms without having first taken the greatest care and exercised the greatest pain to avoid the infliction of injury, fatal or otherwise". Further, that their conduct was not that of reasonable and prudent security forces.

[14] Regarding the cases relied on by counsel for the appellant in challenging the findings of the trial judge on the issue of negligence, Queen's Counsel submitted that **Robley v Placide** and **Byfield v Attorney General** could be distinguished on their facts from the instant case. He also cited the case of **George Finn v The Attorney General for Jamaica** (1981) 18 JLR 120 and argued that the learned trial judge had not, as submitted by counsel for the appellant, misapplied the proportionality test.

[15] He emphasised that the absence of any evidence of imminent threat or the need for the force used in the security forces defence to the claim, meant that the learned trial judge's assessment and finding of negligence based on his reasoning at paras. [27] - [29] of his judgment, and based on his judgment in its entirety, were within his remit and sound in law.

Analysis

[16] These grounds relate to two of the three questions Queen's Counsel for the respondent identified as the issues in the appeal and with which submission we agree. Those two questions are: 1) did a member of the security forces shoot the respondent? and 2) if so, was the shooter negligent?

[17] Concerning question 1, at paras. [21] to [22] of his judgment the learned trial judge found as follows:

> "[21] [W]as it a member of the security forces who shot and injured the [respondent]? The unequivocal answer to that question is yes. The unchallenged evidence was that at the material time only the members of the security forces fired their weapons. Secondly, I accept the evidence that the discharge of their weapon was in the direction of the [respondent] and her friend Ms Daleth Smith.

> [22] Ms Smith was turned upon her heels by a hail of bullets as she walked towards members of the security forces. As she fled in the direction of the[respondent], she came upon the claimant on the ground, suffering from a gunshot wound. That evidence constrains me, rather, its logic impels the mind to the only reasonable and inescapable inference that the [respondent] was shot by a member of the security forces."

[18] It is manifest that the question of who shot the respondent, is entirely a question of fact. An appellate court will not lightly disturb a trial judge's findings of fact. It will not intervene on matters of fact, unless satisfied that the judge is plainly wrong: **Watt (or Thomas) v Thomas** [1947] AC 484.

[19] The evidence from the respondent is that between 8:15 and 9:00 am on 9 July 2001, the respondent and her friend Daleth Smith set off from the home of the respondent heading to Regent Street, so Ms Smith could go home to her son. When they reached the corner of Regent and North Streets they both saw members of the JDF and JCF at the corner of Bond and North Streets armed with guns. The respondent decided that she would turn back and Ms Smith should continue on her own. The respondent turned back along Regent Street. She heard gunfire coming from North Street from the direction of Kingston Public Hospital. The respondent was shot and fell to the ground sightless, after which Ms Smith came to her aid. She was taken to the Kingston Public Hospital where she was admitted for four days. In cross- examination, she indicated that she did not see any gunmen there and that she had not heard any shooting that morning until she got shot.

[20] A serious inconsistency was revealed in cross-examination between the statement she initially gave to the police about a month after the incident and her witness statement in this matter, given almost three years later. In her statement to the police, she said she did not see who shot her, but in her witness statement, she indicated that she saw the police firing at her. When pressed, she maintained that what she was saying at trial that she saw the police firing at her was the truth. To the court, she indicated that "when

[she] turned to go back along Regent Street [her] left side was towards the Soldiers at North and Bond Street intersection".

[21] After the respondent and Ms Smith separated, Ms Smith in her evidence indicated that she was walking along North Street towards Bond Street when she heard several gunshots being fired from the direction towards which she was walking. She also stated that she saw no one else walking along North Street, nor did she see anybody with guns, other than the soldiers and police standing at the corner of Bond and North Streets. In cross-examination, she testified that she heard gunshots coming from the direction in which she was going and ran back in the opposite direction. It was while running she saw the respondent, who had already been shot, on the ground. Ms Smith noted that she did not see when the respondent received the gunshot. To the court she stated that, "[b]efore I heard the gunshots I was walking towards the police and soldiers".

[22] Superintendent Warren Turner, in his evidence on behalf of the security forces, spoke to security activities he conducted and things he observed in the Denham Town area from 7 – 9 July 2001. He, however, gave no evidence concerning the events surrounding the shooting of the respondent on the morning of 9 July 2001.

[23] The serious inconsistency in the respondent's evidence did not ultimately affect the findings of the learned trial judge. The unchallenged evidence before the court was that the respondent and Ms Smith saw members of the JCF and JDF at the corner of Bond and North Streets armed with guns. No one else was seen on the street. No one else was armed with guns. The shots that were fired came from the direction where the security forces were, towards the direction where the respondent was. It was never suggested to the respondent or her witness either that a) members of the security forces did not fire shots in her direction; b) the shot she received was not from the gun of a member of the security forces; or c) the respondent was shot by someone other than a member of the security forces. The witness for the security forces gave no evidence in relation to the incident.

[24] Accordingly, the findings of the learned trial judge at paras. [21] and [22] of his judgment, extracted above, are entirely in keeping with the evidence. On the evidence, it is difficult to see how the learned judge could have reasonably come to any other conclusion, than that the respondent had been shot by a member of the security forces.

[25] Question 1 having been settled, the next question is, was the member of the security forces who shot the respondent negligent?

[26] The concept of negligence involves the assessment of what is reasonable conduct in a particular circumstance or situation, where there is a duty of care owed by the actor to a person or persons who may be adversely affected by his action or inaction.

[27] The classic statement of Alderson B in **Blyth v Birmingham Water Works Co** at page 479 expressed it in this way:

> "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."

[28] The learned trial judge noted and relied on the standard of care expected of those who carry arms on behalf of the state, contained in instructions issued to Civic Guards in Ireland on the use of firearms, dated November 24th, 1932. These instructions were accepted by Hanna J in **Lynch v Fitzgerald** at pages 404 – 405 as a correct statement of the law and were in these terms:

> "[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."

[29] The key consideration arising from that statement of principles is that the actions of members of the security forces must be proportionate to the circumstances that exist. Further, that given the inherent danger of firearms and the possibility that harm may result to innocent bystanders from their use, they should only be utilised to resist violent crime when undoubtedly necessary and then only with the greatest care taken in their use. The question of proportionality is therefore at the heart of all the cases cited in the argument on this point.

[30] In **Joseph Andrews v The Attorney General of Jamaica** police officers were chasing a fleeing felon. The felon was driving a motor car and the police were pursuing him in a jeep. Having turned a corner onto a lane out of the sight of the pursuing police party, the felon abandoned the car and made his escape on foot. The police party then came upon the abandoned car and not knowing that the felon had exited the car, opened fire at the car. During the salvo of gunfire, the plaintiff who was trying to extricate 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 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.

[31] In **George Finn v Attorney General**, 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 men 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. The trial judge found as a fact that, contrary to the defence case, the police did not come under gunfire from the fleeing men on the bike. At page 125 Wolfe J (as he then was) noted 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 extremeties upon every slight interruption, not without reasonable necessity."

[32] Relying on dicta of Hanna J in **Lynch v Fitzgerald** referred to earlier, Wolfe J found that, the fleeing felons being unarmed, the degree of force used was in the circumstances, "excessive and wholly disproportioned to the injury or mischief it was intended to prevent".

[33] The striking feature of the cases of **Joseph Andrews v The Attorney General of Jamaica** and **George Finn v Attorney General** is that in both matters the police were legitimately seeking to apprehend fleeing felons, but the force used was excessive and negligent in the circumstances, as the police were not exposed to any imminent danger justifying the use of the deadly force deployed.

[34] In the instant case the action of the police is even more unreasonable and indicative of gross negligence than the actions of the police deprecated in the **Joseph Andrews v The Attorney General of Jamaica** and **George Finn v Attorney General** cases. Whatever may have been the general prevailing atmosphere in the area during the period 7 – 9 July 2001, there was no evidence that, at the material time of the shooting, the security forces were engaged in repelling any attack or seeking to effect

any apprehension. The respondent going about her lawful business was shot without any provocation.

[35] Accordingly, the relevant circumstances in the instant case are even moreso, wholly distinguishable, from those in the cases of **Robley v Placide** and **Alexander Byfield v The Attorney General**. In both of those cases, the respective plaintiffs were accidentally shot by police officers who fired in self-defence, in the case of **Robley v Placide**, at machete-wielding men advancing to attack, and in the case of **Alexander Byfield v The Attorney General,** at a fleeing felon who was firing at the police.

[36] In all the circumstances, therefore, the complaint that the learned trial judge misconstrued the contention of the members of the security forces that the respondent was "not in contemplation" when they fired, can be given short shrift. It is, as submitted by learned Queen's Counsel, that the learned trial judge, in assessing that assertion, was guided by the principles emanating from the cases of **Lynch v Fitzgerald** and **Joseph Andrews v The Attorney General of Jamaica**, in concluding that the members of the security force "discharged their firearms without having first taken the greatest care and exercised the greatest pain to avoid the infliction of injury, fatal or otherwise". Consequently, they failed in their duty of care to the respondent. As the learned trial judge found "their conduct was not that of reasonable and prudent security forces".

[37] The challenges on grounds 1, 2, 4 and 5 therefore fail.

**Ground 3 The learned judge erred in fact and in law in finding that the claimant was shot by a member of the security forces; a finding that is inconsistent with his findings that:**

**a) the claimant was thoroughly discredited under cross-examination as to the identity of who shot her (paragraphs 23 and 24); and**

**b) it cannot be ruled out that the security forces were shooting criminals at the material time having regard to the prevailing atmosphere (paragraph 25).**

Submissions

*Counsel for the appellant*

[38] Counsel submitted that, based on the learned trial judge's findings at paras. [23] – [25] of his judgment, the learned trial judge was under a duty to explain how he concluded that the injury to the respondent was caused by a bullet fired by a member of the security forces. Counsel maintained that the finding by the learned trial judge, that the respondent was shot by a member of the security forces, cannot stand and ought to be set aside.

*Queen's Counsel for the respondent*

[39] Queen's Counsel submitted that the learned trial judge did not err in fact or in law in finding that the respondent was shot by a member of the security forces. Further that this finding is not inconsistent with his findings at paras. [23] and [24] of his judgment, or at all. He advanced that having found at para. [21] on the unchallenged evidence that the respondent was shot by a member of the security forces, the learned trial judge's assessment of the intentionality of the shooting had no bearing on that finding of fact.

[40] In response to the appellant's assertion that the learned trial judge's reasoning at para. [25] of his written judgment is inconsistent with his finding that a member of the security forces shot the respondent, Queen's Counsel submitted that the learned trial judge's reasoning in that paragraph was *obiter dictum,* given that it was not essential for the decision reached, as there was no evidence from the appellant that the security forces were shooting at criminals at the material time.

[41] Accordingly, the appellant had failed to prove ground 3 of its appeal.

Analysis

[42] At paras. [23] – [24] of his judgment, the learned trial judge reasoned that the shooting of the respondent by a member of the security forces was not intentional as 1) the respondent was thoroughly discredited on the point during cross-examination and 2) based on her positioning at the time of the shooting, she would have been unable to

make the detailed observations which grounded her assertion of the intentionality of the shooting.

[43] At para. [25] the learned judge however went further to say that:

> "…Although no evidence came from the [appellant] that the security forces were shooting at guntoting criminals at the material time, that they were, cannot be ruled out, having regard to the prevailing atmosphere."

[44] The challenge on this ground can be shortly addressed. I agree with the submission of Queen's Counsel for the respondent. The reasoning and finding of the learned trial judge that the shooting of the respondent was unintentional, was in no way inconsistent with the finding that the respondent was shot by a member of the security forces. The additional observation of the learned trial judge was *obiter dictum* and speculative. The bald reality is that there was no evidence advanced on which a finding could be supported, that, at the time the respondent was shot, the security forces were engaging gun-toting criminals, or that anyone else other than the security forces fired shots.

[45] Accordingly, as there is no evidential basis on which the finding of the learned trial judge that the respondent was shot by the security forces may be impugned, his *obiter dictum* is irrelevant and the challenge on this ground fails.

**Ground 6 The learned judge erred in making the award of general damages as the amount is so extremely high as to be an erroneous estimate of the damages to which the claimant is entitled.**

**Ground 7 The learned judge erred in making the award of general damages as the medical evidence did not substantiate injuries of such severity as to attract such a high award of general damages.**

**Ground 8 The learned judge erred by finding that the claimant had diminished marriage prospects/diminished prospects of an intimate relationship in circumstances where there was no evidence to support such a finding and where no submissions had been made by the claimant or defendant in that regard.**

**Ground 9 The learned judge erred in the circumstances in using the finding of diminished marriage prospects/diminished prospects of an intimate relationship as a basis for the award of general damages.**

[46] Though grounds 6 and 7 and grounds 8 and 9 were argued separately by both counsel, in light of the learned trial judge's analysis in arriving at the award, it is convenient to treat with them together.

Submissions

*Counsel for the appellant*

[47] Concerning grounds 6 and 7 learned counsel submitted that where liability has been established, general damages normally flow. However, she argued that the learned trial judge did not demonstrate how he arrived at the global figure of $45,000,000.00 for general damages. She complained that the figure was arbitrary, not supported by established principles and entirely out of proportion with the injury.

[48] Regarding grounds 8 and 9, counsel submitted that, in the absence of any evidence or pleadings on marriage prospects or prospects of intimate relationship stymied by the injury, the consideration by the learned trial judge of diminished marriage prospects/diminished prospects of an intimate relationship, in his awarding of general damages was misplaced. Counsel argued that a woman living all her life without marrying, or entering into any intimate relationship, is not at all uncommon. She contended that the learned trial judge's reasoning and conclusion as paras. [42] and [43] therefore amounted to mere speculation and were at best charitably fanciful.

*Queen's Counsel for the respondent*

[49] In introducing his submissions on grounds 8 and 9, Queen's Counsel noted that the assessment of damages is not a perfect science, but that the learned trial judge was guided by the authorities submitted in arriving at his award of general damages in the matter.

[50] He pointed out that at paras. [35] to [43] of the judgment, the learned judge outlined the factors he considered and explained his assessment of the injuries of the respondent and damages awarded, by conducting a comparative assessment with the authorities submitted: **Linden Palmer v Neville Walker and ors** consolidated with **Linden Palmer v Donald Mendes** (unreported), Supreme Court of Judicature of Jamaica, Suit No CLP 072/1990 & CLP 176/1990, judgment delivered 20 March 1997; and **Owen Small v United Estates Ltd** (unreported), Supreme Court of Judicature of Jamaica, Suit No CLS 415/1993, judgment delivered 10 March 1998.

[51] In respect of grounds 8 and 9, Queen's Counsel argued that, in assessing the respondent's loss of amenities, it was open to the learned trial judge to consider that her being so significantly injured at the age of 19 would affect her marital prospects. He submitted that loss of marriage prospects was an objective loss (for both men and women) and did not have to be specifically pleaded: Halsbury's Laws of England/Damages (Volume 29 (2019)/7. Measure of Damages in Tort/(3) Personal Injury/(ii) Heads of Damage/A. Non-pecuniary Loss para. 437 Loss of amenity and **Simpson and Gentles et al** (unreported), Supreme Court of Judicature of Jamaica, Suit No CL S116/1980, judgment delivered 12 July 1982. He further maintained that, even if that consideration was in error, it cannot be determined what portion of the award of damages was made to compensate for this perceived loss.

[52] However, he advanced that, as the learned trial judge found the respondent's age at the time of injury to be a significant factor in assessing the award of damages and at para. [41], held that the respondent would suffer the blight occasioned by her disability longer with her youth obscuring the distant horizon of old age, those two factors would have supported the award of damages made, with very little emphasis being placed on diminished marital prospects.

[53] Consequently, he submitted that the award was not arbitrary but supported by the cases submitted and these grounds of appeal should fail.

Analysis

[54] The classic statement of the approach to be taken by an appellate court, when an award of damages made in a trial court is challenged, was made in the case of **Flint v Lovell** [1935] 1 KB 354 by Greer LJ. At page 360 he said:

> "…I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

[55] It is with that guidance in mind that the complaint of the appellant and justification of the respondent, in relation to the award of general damages, will be assessed.

[56] The learned trial judge clearly acknowledged in his reasons that the aim of compensatory damages is, as far as possible, to put the claimant back in the position as if the injury never occurred: Remedies for Torts and Breach of Contract 3rd Ed page 269. He also recognised that, while comparable injuries should be compensated by comparable awards, allowance must be made to address the nuances of new cases: **Beverley Dryden v Winston Layne** (unreported), Court of Appeal Jamaica, Supreme Court Civil Appeal No 44/1987, judgment delivered 12 June 1989 (para. 35).

[57] In his assessment of the quantum of the award for general damages, the learned trial judge considered and professed to be guided by two cases relied upon by both the appellant and the respondent. In **Owen Small v United Estates Ltd** a young man lost sight in both eyes due to chemical burns. He spent a few days shy of two months in the hospital. He was awarded the sum of $7,000,000.00, for pain and suffering and loss of amenities which, using the March 2015 Consumer Price Index ('CPI'), updated to $33,394,357.10. In the other case, **Linden Palmer v Neville Walker and others**, a

59-year-old Deputy Commissioner of Police on the cusp of retirement suffered permanent blindness through the loss of both eyeballs in a motor vehicle accident. In addition, he suffered other injuries, including: an 8 cm laceration from the medial aspect of the left eye to the cheek; a 4 cm laceration over the right upper eyelid; a 3 cm laceration across the right eye; bilateral corneo-scleral laceration; split septum of nose; dislocated left hip with fracture of the acetabulum, comminuted fracture of the proximal third of the left femur; and fracture of the orbit. He was awarded the sum of $8,000,000.00 for pain and suffering and loss of amenities which, using the March 2015 CPI, updated to $41,528,005.62.

[58] The learned trial judge used both cases to inform the award he arrived at and disclosed his mind in the manner that he did so. He observed that in both cases the bulk of the award was for the loss of sight. He also specifically noted that, although **Linden Palmer v Neville Walker and others** was used as a guide in **Owen Small v United Estates Ltd**, it was unclear in the latter case how much weight was given to the disparity in ages between the two plaintiffs. The learned trial judge went on to opine that the age of the respondent in the instant case, a nubile young woman of 19 on the "cusp of adulthood", was a relevant factor compared to the age of the plaintiff in **Linden Palmer v Neville Walker and others** who was 40 years her senior and stood on the "threshold of retirement". On that basis, the learned trial judge reasoned that the updated award in **Linden Palmer v Neville Walker and others** should be undiscounted for application to the instant case, as the youthful age of the respondent "trumped" the absence of the other injuries evident in **Linden Palmer v Neville Walker and others**. There was in the words of the learned judge "a blight upon [the respondent's] life…to the end of her days.".

[59] The learned trial judge then turned to considering the loss of marriage/intimate relationship prospects as one manifestation of the "blight". The authorities cited by learned Queen's Counsel show that he was entitled so to do. Halsbury's Laws of England/Damages (Volume 29 (2019)/7. Measure of Damages in Tort/(3) Personal Injury/(ii) Heads of Damage/A. Non-pecuniary Loss para. 437 Loss of amenity states that:

> "In addition to damages for the subjective pain and suffering sustained by a claimant by reason of his injuries, damages are awarded for the **objective losses** thereby sustained by him. These may include the loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, **loss of marriage prospects** and loss of sexual function. Damages under this head will be awarded whether the claimant is aware of the loss or not: damages are awarded for the fact of the deprivation, rather than the awareness of it. **While the award of damages itself under this head is objective and its calculation proceeds on the basis of previous similar awards, the precise quantum is subjective: the courts must assess the effect of the loss on the particular claimant**. Previous awards, updated to allow for inflation where appropriate, provide the starting point for the calculation of damages." (Emphasis supplied)

[60] In **Simpson and Gentles et al** Ellis J (Ag) (as he then was) considered the effect of the injury suffered by the plaintiff on her prospects for marriage. He stated at para. 33:

> "The plaintiff is now aged 24 and her expectation of life is obviously high. She will have to live with the loss of her right leg for a considerable time. I have seen the plaintiff and there is no doubt that she is an attractive young lady for whom the prospects of marriage must have been good. From Dr. Doorbar's certificate and an objective assessment, her injury and loss of leg have substantially reduced her prospects [of] marriage. She should be compensated for that reduction."

[61] In that matter, as in the instant case, the loss of marriage prospects was not specifically pleaded. However, the plaintiff was compensated for that loss based on an objective assessment. Unlike in the instant case, Ellis J (Ag) in **Simpson and Gentles et al** specifically included loss of marriage prospects in the order outlining the award of general damages.

[62] I am, however, unable to agree with learned Queen's Counsel that the learned trial judge placed very little emphasis on the diminished marital prospects of the respondent. The learned trial judge firstly noted that, subject to the vicissitudes of life,

the respondent based on her youth faced a generally blighted future for a number of years. That fact was balanced against the greater number of injuries in the **Linden Palmer v Neville Walker and others** matter, and used as the basis to apply the updated figure in that case undiscounted to the instant case.

[63] Thereafter, the learned trial judge specifically highlighted the loss of marriage prospects as "one manifestation of the blight". He selected and analysed that factor as distinct from any of the others listed in the extract from Halsbury's Laws of England cited above. While he expressed the difficulty to "dollarize this loss", it seems clear from the above analysis that the learned trial judge's movement from the updated figure of $41,528,005.62 in **Linden Palmer v Neville Walker and others** to $45,000,000.00 in the instant case, was due to the respondent's loss of marriage/intimate relationship prospects. No authority was cited which quantified the percentage of an award of general damages that was attributed to loss of marriage/intimate relationship prospects. However, given the objective importance of such relationships in human life, it does not appear that a contribution of less than 10% to the overall award, as occurred in the instant case, could be said to be unreasonable or excessive.

[64] For the above reasons, it is clear that the award of general damages made by the learned trial judge was anything but arbitrarily arrived at. In a methodical manner, the learned trial judge compared and contrasted earlier cases with the instant case, while assessing the particular effect of the loss on the respondent. In what is admittedly not an exact science the learned trial judge weighed the relevant factors and demonstrated how he sought to and did arrive at a fair compensation for the unfortunate loss suffered by the respondent. Money can never suffice to assuage such loss; but whatever amelioration is possible, was achieved by the balanced award made by the learned trial judge. It should not be disturbed.

[65] The challenge to grounds 6, 7, 8 and 9 therefore fails.

[66] In the premises, the appeal should be allowed in part. The appeal against the award of $2,000,000.00 for future care should be allowed and that award should be set aside. In all other respects, the judgment of Brown J should be affirmed. The appellant has been successful on one issue; however, the respondent conceded at the outset so the issue did not require oral arguments. Also, the portion disallowed amounts to only 4.26% of the entire award. Accordingly, the respondent should be entitled to 90% of her costs to be agreed or taxed.

**SIMMONS JA**

[67] I too have read the draft judgment of my brother D Fraser JA and agree with his reasoning and conclusion.

**P WILLIAMS JA**

**ORDER**

(1) The appeal is allowed in part.

(2) The appeal against the award of the cost of future care in the sum of $2,000,000.00 is allowed and the award is set aside.

(3) In all other respects the judgment of E Brown J is affirmed.

(4) 90% costs to the respondent to be agreed or taxed subject to paras. (5) and (6) below.

(5) If any party is of the view that a different order as to costs should be made in respect of the proceedings in this court, that party shall, within 14 days of the date of this order, file and serve written submissions requesting such different order(s) to be made.

(6) If no submission is filed and served within the time stipulated at para. (5) of this Order, the order at para. (4) shall take effect as the final orders of the court in relation to costs of the appeal.