IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 261 of 2011

LORNA BAINTON	**CLAIMANT**
AND	
THE ATTORNEY GENERAL **COMMISSIONER OF POLICE**	**DEFENDANTS**

Hearings
2012
14th June
27th July
17th August
29th August

Mr. Kareem Musa for the claimant.
Mr. Nigel Hawke, Deputy Solicitor General and Ms. Illiana Swift, Crown Counsel for the defendants.

LEGALL J.

JUDGMENT

1. On the 28th April, 2010, the claimant, a food vendor and babysitter, was at her home at 218 Patridge Street, Belize City, where she lived for about thirty years with her family. On the said date, the police

received a report that a criminal, well known to them by the name of Michael Arnold also known as Crazy Arnold, threatened to kill, with a knife, a resident of the area where the claimant lived. Three police officers, constables Steward, Sutherland and Garbutt responded to the report: two dressed in civilian clothes – Steward and Sutherland – and one in police uniform who was armed with a Mossberg 12 gauge shotgun. The police saw the suspect riding a bicycle on Patridge Street where the claimant lived and pursued him. In pursuing the suspect, Constable Garbutt claimed that the suspect turned around and faced him in a menacing manner with a large knife about twelve inches long. Constable Garbutt states that he cocked his shotgun, and as the suspect came towards him with the knife, about eight feet away, and in fear of his life, he fired his gun and hit the suspect in his left arm, whereupon the knife fell from his hand to the ground. There is no evidence whether the shot connected to the front or back of his left arm.

2. Just before the shooting, the claimant was in her bedroom in her home, which was about twenty feet from Constable Garbutt; and obliquely behind the suspect, when she heard the sound of gun fire and felt something warm running down both of her legs and realized, on seeing blood, that she was shot. The gun used by Constable Garbutt was a pump 12 scatter shot, which, as a single shot leaves the barrel of the gun, numerous pellets scatter in different directions from that single shot, and some of those pellets caused injuries to the claimant, and some lodged into the walls of her home. Constable Garbutt knew that his shotgun discharged scattered pellets.

3. The suspect was arrested by the police and taken into custody. The claimant was rushed to the hospital where she was diagnosed as having two gunshot wounds to her left leg, and one to her right leg. One gunshot wound entered and exited her left leg. About three weeks after sustaining the injuries, she underwent surgery to have the two other pellets removed from her legs; but the surgery was successful only in removing one pellet from the left leg, as the pellet in the right leg was in such a position that doctors could not remove it. That pellet is still lodged in the claimant's right leg.

4. The claimant states that she suffers from pain in her right knee, which emerges whenever she stands for more than half an hour. The claimant sought compensation from the Police Department for her injuries, but the police decided to pay only for her medical expenses in the amount of $4,310.00. The claimant therefore filed on 26th April, 2011 a statement of claim against the defendants. This statement of claim was amended on 28th February, 2012 to claim negligence and loss. This is how the reliefs claimed are drafted in the amended statement of claim:

> "And the claimant claims:
>
> 1. Damages.
> 2. Interest on such damages at such rate and for such period as the court thinks fit.
> 3. Costs.
> 4. Such further order."

Special damages are not specifically claimed; but the statement of claim gives particulars of loss, rather than particulars of special damages.

5. The defendants after resisting approaches to accept liability, and then contest damages, admitted in the amended defence that the police constable, though he did not fire the shot negligently or carelessly or indiscriminately, "a few pellets unfortunately hit the claimant when she was in her home." It is admitted that the pellets from the shot fired by the police constable hit the claimant while she was at home. But the defendants deny liability because, according to them, the constable in the execution of his duties of arrest for a breach of the peace and fearing an attack on him by the suspect, "was under no legal duty to retreat and for the purpose of saving life and limb the constable was justified in taking risk of possible injury to the claimant": The Retreat Point. Secondly, according to the defendants, considering the circumstances of this case, the constable had to take the action he took and therefore "acted like any reasonable man" would have acted: The Reasonable Point. Thirdly, the defendants submit that the injury sustained by the claimant "was too remote and not foreseeable": The Foreseeable Point. Fourthly the defendants submit that the injury to the claimant "was an inevitable accident": The Accident Point.

6. **The Retreat, Reasonable and Foreseeable Points**

There were three policemen at the scene on the date in question. The constable with the shotgun knew there were homes about 15 feet away

and ought to have reasonably foreseen that people may be in those homes. The suspect had a large knife, and accepting that he menacingly faced the constable about eight feet away with the attention of causing him harm and the constable feared for his life, the constable knew that he had a gun that discharged scattered pellets that scatter in different directions and there were houses nearby as close as fifteen feet away in which there might be occupants who could suffer injuries. Constable Garbutt had a shotgun, not a revolver, which because of the shape of shotgun which is well known, could be used, in the circumstances of this case as a baton for defensive purposes, apart from shooting, especially considering that his brother constables were in the area. But the defendants submitted that, on the evidence, the constable was not negligent because it was not reasonably foreseeable that injury would be caused to the claimant by the action of the constable. The defendants further submitted that "while there was a duty of care owed to the claimant the risk of the suspect not being apprehended and committing further offences out weighted the risk of injuries being caused to the claimant." Even if, according to the defence, the constable owed a duty of care or was careless, there were considerations such as preventing harm to himself, and arresting a suspect and preventing him from committing other crimes, which reduced or negatived that duty and therefore the constable was not liable. Learned counsel for the defendants relied in support of the above submissions on ***Anns and others V. London Borough of Merton 1977 2 AER 492***; ***Watt v. Hertfordshire County Council 1954 2 AER 368; Robley v. Placide 1966 111 WIR 58***, ***and Byfield v. The Attorney General JM 1980 SC 36***.

7. Let us examine the above authorities for the purpose of understanding the context in which the decisions and statements in them were made. In ***Anns v. London Borough*** the main question for the court was whether, under the building bye laws made under section 61 of the Public Health Act 1936 (UK), dealing with the supervision and control of the construction of buildings, the defendant, who had allowed building plans for the building of seven flats in which the plaintiffs were lessees, had a duty to ensure that the building was constructed in accordance with the plans and should have carried out inspections before the foundation was completed. The plaintiff claimed that had the defendant done so, it would have revealed a defective foundation which resulted in cracks in the walls, and sloping floors of the building; and therefore the defendant was negligent. In a nutshell, the main issue was whether a local authority had a duty of care towards owners or occupiers of the flats as regards inspection during the building process. The House of Lords held that the case had to be considered having regard to the relevant statutory provisions of the Public Health Act 1936 under which the defendant acted. Having considered that Act, the court ruled that the defendant was under a duty to take reasonable care to secure that a builder did not make a foundation which did not comply with the bye laws, and that that duty was owed to the plaintiffs, owners and occupiers of buildings who might suffer damage as a result of the construction of inadequate foundations. But the court in arriving in its decision says that if in the reasonable contemplation of the alleged wrong doer, carelessness on his part may be likely to cause damage to the victim, a prima facie duty of care arises; and if there is, on the evidence such a

duty, the second question to consider is whether there are any considerations which ought to negative, reduce or limit the duty of care or the class of persons to whom the duty is owed. Having considered the above questions, the court ruled that the defendant owed a duty of care to the plaintiffs.

8. On the facts of this case before me, including the evidence of Constable Garbutt, I think that the constable could have used the shotgun as a baton to defend himself; fire a warning shot in the air; call upon the suspect to halt; and call for help from his fellow officers. By failing to do so he was careless and did not conduct himself with reasonable care so as not to injure persons liable to be affected by his conduct. Had he done any or all of the above, to no avail, and then discharged the shot to an aggressive attacker he may have had good ground to argue for a removal or reduction of the duty of care owed to the claimant.

9. In ***Watt v. Hertfordshire County Council*** an emergency call was made to a fire station that due to an accident three or four hundred yards away from the station, a woman was trapped under a heavy vehicle. There was need for a jack capable of raising heavy weights to free the woman; and as there was such a jack, which had four wheels, two of which could turn around in a circle, at the station, an officer, sub-officer Richards, instructed that the jack be used and put on a lorry, as the appropriate vehicle to carry the jack was not available, which was done. The plaintiff and other firemen joined the lorry and they held on to the jack. The lorry proceeded to the

accident. On their way, the driver of the lorry had occasion to apply his brakes suddenly and the jack moved and injured the plaintiff's leg. The plaintiff brought an action against his employees – the defendants – for negligence. The court ruled that the defendants were under no duty to have a vehicle available at all times specially fitted to carry the jack; and that the risk taken by the defendants was such as would normally be undertaken by a member of the fire service, and was not unduly great in relation to the end to be achieved.

10. The court came to its conclusion on the basis that the fire service was a service which always involved risks for those who are employed in the service, and it was a question of balancing that risk against the result of not going immediately to rescue the woman. Singleton LJ states the issue this way: "Is it to be said that, if an emergency call reaches a fire station, the person in charge of the fire station has to ponder on the matter in this way: Must I send out my men with the lifting jack in these circumstances or must I telephone St. Albans seven miles away and ask them to undertake the task? …. Would the reasonably careful head of the station have done anything other than that which sub-officer Richards did? I think not." The court considered what a reasonable man would do, placed in those circumstances, and held that a reasonable man would have done what the defendants did. In this case before me, what would a reasonable man have done in the circumstances? What was reasonably foreseeable in those circumstances? I do not think that a reasonable man would fire scatter shots in the circumstances of this case; and in

my view, it was reasonably foreseeable that firing in those circumstances may cause injury to third parties.

11. In ***Robley***, a group of six men armed with sharpened cutlasses in their hands, started to advance menacingly towards two police officers, and at a distance of about 20 to 25 feet away from the police, after the police shouted to them, "This is the Police, drop the cutlasses," one of the policemen fired a single shot from his Colt 23 gun at one of the men at knee level which missed its mark, but injured the plaintiff who was standing about ten feet behind the armed six men when they advanced to the police. It was held, as learned counsel, Miss Swift for the defendants submitted, that no legal duty to retreat could arise in circumstances where a police officer acted in the execution of his statutory duty to arrest a person whom he saw committing the offence of armed with offensive weapons; and that the necessity of saving life and limb justified the appellant in taking the risk of possibility of injuring another person. But the facts of ***Robley*** are different from this case before me and each case has to be decided according to its facts. It is to be noted though that the court in ***Robley*** arrived at its decision after considering, firstly, that a police officer is not entitled to act in a "reckless or unreasonable manner or to take such steps for his protection as were not warranted by the necessity of the occasion": see Phillips JA at page 62. In ***Robley*** there were about six men attacking in a menacing manner the police with cutlasses which the police saw them sharpening. In this case before me, one man was involved in the alleged attack on the police. Secondly, the police in ***Robley*** told them before firing, "this is Police drop the cutlasses." In

this case before me, no such warning was made. In ***Robley*** a single pistol shot was fired. In this case before me there was a single shot with scattered bullets, a situation which the court in ***Robley*** thought might have warranted other considerations; for Phillips JA remarked in arriving at his decision "that this was a single pistol shot fired at knee level and not, for example, the discharge of several rounds of ammunition from a machine gun situation to which other considerations would no doubt be applicable: see p. 62.

12. ***Robley*** does not, in my view, lay down the rule, that regardless of the circumstances of the case, there is no duty of a police officer in execution of his duty to retreat so as to prevent injuries to third parties. Whether or not such a police officer in the execution of his duty, has a duty to retreat to prevent injury to third parties would depend on the facts and circumstances of each case. Suppose, for instance, a known criminal attacks a police officer with a knife in a street in Belize City with people or shoppers around; and two other policemen are in the area, should the police officer retreat, get support from the other policemen, and with their help try to succumb the criminal by using the shotgun as a baton, rather than as a gun? Or should the police officer stand his ground and fire scatter pellets at the suspect in the street with shoppers around? The latter option would, in my view, be unreasonable, reckless and negligent.

13. ***Byfield v. The AG JM 1980 SC 36*** is a remarkable case. The facts reveal that policemen chasing about four wanted criminals; and during the chase the criminals and the police exchanged bullets from guns in

their possession. One of the criminals, while in flight through the plaintiff's yard, pointed his gun in the direction of the police. The police, who did not see the plaintiff who was in his premises, fired a shot which hit the plaintiff grievously injuring him to such an extent that he became a paraplegic and confined to a wheel chair. The court found that when the policeman fired the shot, he did not see the plaintiff and was not aware of his presence. The court found the policeman who shot the plaintiff as a "frank and honest witness," but was not impressed with the plaintiff and his witnesses. The court therefore dismissed the plaintiff's case. In the course of his decision the learned judge seemed to have considered matters which may be considered as irrelevant. He said:

> "It must be recognized that the gunman was in 1976 an entity in the society and a force to be reckoned with. The police in the execution of their duty often come under fire from this force; yet despite the fearful odd, the police have continued to do their duty even at great personal risk."

The above may not be relevant to an issue the learned judge had to decide – whether the police negligently discharged the firearm injuring the plaintiff. In addition, that case differs from this case before me in that there was a gun fight between the police and more than one wanted criminal; and the court seemed to have credibility issues with the plaintiff and his witnesses.

14. I think the court for purposes of making a decision whether a police officer, in the execution of his duty to arrest persons who commit offences in his presence, is negligent in firing his gun ought to consider all the circumstances of the case, including a duty to retreat and ask itself the questions: Could the police officer, on the facts, have reasonably foreseen that firing his gun could cause injuries to innocent persons in the area; and did the police officer act reasonably in all the circumstances and was therefore justified in taking the risk of the possibility of injury to others? The answers depend on the facts of the case. The facts of this case have already been given above; and for all the above reasons, I am satisfied on a balance of probabilities that the constable in all the circumstances of this case was negligent and was not justified in taking the risk of injury to others.

15. Moreover, the claimant's husband testified, and though he may have an interest to serve, being the husband of the claimant, I saw him give his evidence and observed how he answered questions and his demeanour. I believe him when he said that Crazy Arnold was running away from the police and had jumped over a fence when he heard the gunshot, and as soon as the suspect jumped over the fence then is when he heard the gunshot. In those circumstances, a police officer, in my view, would be careless in firing scattered pellets in an area where people resided, rather than pursuing the suspect and calling for assistance from his fellow officers.

The Accident Point

16. The claimant says that in all the circumstance, the injury caused to the claimant was an inevitable accident. A "person relying on inevitable accident must show that something happened over which he had no control and the effect of which could not have been avoided by the greatest care and skill": see Lord Esher MR in the ***Albano 1892 P419*** giving a definition of "inevitable accident." P.C. Garbutt intentionally fired his scatter pellets from his shotgun at a suspect in an area where people lived in their homes and where two other policemen were present to whom he could have called for help before firing. On the facts, this was therefore not a situation over which he had no control, and which could not have been avoided.

Damages

17. I must now consider the question of damages. I must consider general damages which need not be specially pleaded. Then I have to consider special damages which must be specially pleaded. Under the heading general damages, much guidance has been given by ***Wooding C.J.*** in the hallmark decision of ***Cornilliac v. St. Louis 1965 7 W.I.R. p. 491***. The learned judge enumerated several considerations which a judge should bear in mind when making an assessment of general damages involving personal injuries as follows:-

> "(i) The nature and extent of the injuries sustained;
> (ii) The nature and gravity of the resulting disability;
> (iii) the pain and suffering which had to

be endured;

(iv) the loss of amenities suffered; and

(v) the extent to which consequentially, the appellants pecuniary prospects have been materially affected."

These are the items or heads which I have to consider in assessing general damages. I consider (v) above as meaning loss of earning capacity, because this loss is assessed under general damages. I must also consider, for convenience, the relevant facts under each item or head. I must, however, bear in mind that though it is convenient to itemize the different heads, in the end judgment is given for a single lump sum as damages for pain and suffering and loss of amenities.

18. But I observe in ***Johnson v. Sterlings Products Ltd. 1981 30 W.I.R. 155***, George CJ itemized the heads above and gave an amount under each head. Wooding C.J. in ***Cornilliac*** however, adopted a different approach and did not disclose an amount under each head above, but gave a total figure under all the heads as damages for pain and suffering and loss of amenities. The reason Wooding C.J. gave one figure for all the heads was because, according to him, **"**the nature and extent of the injuries inflicted cannot be disassociated from the physical disabilities which are their permanent result, nor are they unrelated to the pain and suffering which have had to be endured." This approach of Wooding CJ is supported by Lord Denning CJ in ***Fletcher v. Auto Car and Transportation Ltd 1968 2 A.E.R. 726***. Lord Denning expressed disagreement with arriving at a figure under each item and adding them

up, because of the risk of overlapping, a point which Wooding CJ clearly had in mind when he made the pronouncements above. For these reasons, I adopt the position of Wooding CJ and would give one total figure under all the heads as damages for pain and suffering and loss of amenities. But I must consider for convenience the relevant facts under each head. The facts under each head are as follows:

(i) Nature and gravity of the resulting injury.

(ii) Nature and extent of the injuries sustained.

Evidence of (i) and (ii) have already been given above. In addition, the claimant was after an operation incapacitated for about eight weeks.

(iii) Pain and suffering. After the surgery, the claimant had been suffering from pain in her right knee where one of the pellets is still lodged. The pain emerges whenever she stands for more than half an hour. Her injuries took fifteen days to heal. An x-ray revealed that the claimant suffered mild degenerative changes of both knees and they have 5% to 10% of total function.

(iv) Loss of Amenities

The term loss of amenities has been defined as a "loss of pleasure of life or a diminution of the injured person capacity to enjoy his accustomed lifestyle on account of his injuries which he has sustained": see ***Johnson v. Sterling Products above per George CJ at p. 158***. Apart from the pain and suffering mentioned above, there is no evidence of loss of amenities.

(v) Loss of Earning Capacity

Loss of earning capacity is an award or compensation made by the court because of the injured person disadvantage in the labour market. It is compensation for the diminution, due to the injury, of the earning capacity of the injured person. There is a difference between loss of earning capacity and loss of future earnings. In ***Fairley v. John Thompson Ltd. 1973 2 Lloyd's Report 40***, Lord Denning explains the difference –

> "It is important to realize the difference between an award for loss of future earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages."

19. The claimant is fifty-three years old, married and has one daughter. Prior to the injury she said that she carried on a business selling panades – a Spanish food made of flour, meat and vegetables – and swore that she earned, on average, two hundred and fifty dollars per week. She also swore that she sold other foods at weekends from which she earned an additional one hundred dollars a week. This evidence of the claimant is not supported by any other witnesses nor any other oral or documentary evidence. The claimant states in her witness statement that due to her injuries she had to discontinue these businesses. This evidence of the claimant has not been specifically denied by the defendants and the claimant was not cross-examined. I

do not know whether the amounts mentioned above are profits or gross amounts from the businesses. But the claimant also states that she does a babysitting job from which she earns about two hundred dollars a week. There is sadly no evidence of her educational and other skills, if any, and the other different kinds of employment which she could undertake bearing in mind her injuries. I must consider that the difference in the weekly earnings between the businesses and the babysitting is one hundred and fifty dollars weekly. I must also bear in mind the ordinary contingencies of life, such as sickness, accident, fluctuation in business and possible loss of the babysitting job. Considering all the evidence in this case, including the injuries, and doing the best I can, I reach a compensation figure of $6,000 for loss of earnings capacity. I have to make it clear though, that I do not suggest that these figures are mathematically correct. I am assessing loss of earnings capacity as part of general damages, not computing special damages. I am evaluating prospects and the amounts I award under this heading are a broad general estimate.

20. I must now assess and consider the other items or heads above and arrive at a final award as general damages. I consider the severe gunshot wounds, the nature and gravity of the injuries, the pain and suffering, the visits to the hospital and the x-rays. In order to arrive at an amount as general damages, I should also consider the amount of general damages awarded by the courts for similar injuries in order to understand the range of awards in this type of case. But I must bear in mind the reservations expressed by the Privy Council with respect to

comparing awards. ***Lord Carswell in Seepersad v. Persad and Another 2004 64 W.I.R. 378 at page 385*** said.

> "The Board entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms."

21. I now turn to comparable awards made in other jurisdictions:

1. In ***Stevens v. Dean Shanger Oxide Works 1981*** **(unreported)** ***Kemp & Kemp Revised Edition 1982 vol 2 para 12-305***, the injury was serious to the left foot of a male person aged 48 – general damages of £18,000.

2. ***Jones v. Houldar Marine Drilling July 1990 see Kemp & Kemp above para 13-014***. Fracture of left ankle – general damages – £16,000.

3. ***Morgan v. London Borough of Tower Hamlets, October 1988*** see ***Kemp*** above para 13-019. Fracture of left ankle – general damages £7000.

4. In ***Paterson v Rotherham Health Authority 1987***. See ***Kemp v. Kemp*** above para 12-406. Serious fracture of left tibia – general damages £18,500.

These cases were decided in England more than 20 years ago and the awards were made in British pounds.

5. In the Caribbean there is the Jamaican case of ***Gravesandy v. Moore 1986*** above – serious injury to his left leg – general damages $50,000.

22. There is an element of speculation in awarding general damages in this kind of case. **Canberry JA in United Diary Farmers *Ltd v. Goldbourne*** recognized the difficulty in making these awards. "In making awards," he said 'the courts do their part to measure the incomprehensible or the immeasurable (e.g. pain and suffering, or loss of amenities), but there is a stage at which this ends and sheer speculation begins": See ***Gravesandy v. Moore above at p 228***.

I bear in mind the above awards were made in a different currencies, and that the awards were made more than 20 years ago. I also consider the facts and circumstances of this case, and that I must award general damages that are fair and reasonable. Doing the best I can, bearing in mind the injuries suffered, I arrive at a figure for general damages in the amount of $30,000 for the claimant. This amount includes the amount awarded for loss of earning capacity.

Special Damages

23. Special Damages must be specifically pleaded. There is no specific pleading for special damages. It must be noted that the defendants paid medical expenses in relation to the claimant's injuries.

24. I therefore make the following orders:

(1) The defendants shall pay to the claimant the sum of $30,000 as damages for injuries suffered by the claimant as a result of negligence.

(2) The defendants shall pay to the claimant interest on the said sum at (1) above at the rate of 6% per annum from 26th April, 2011 until the said sum is fully paid.

(3) Defendant shall pay costs to the claimant in the sum of $7,500.00.

Oswell Legall
JUDGE OF THE SUPREME COURT
29th August, 2012