

IN THE SUPREME COURT OF BELIZE A.D. 2019

Claim No. 278 of 2019

(JESSIE LOPEZ

CLAIMANT

(

BETWEEN:

(AND

(

(

(ATTORNEY GENERAL OF BELIZE

1ST DEFENDANT

(COMMISSIONER OF POLICE

2ND DEFENDANT

(PC WYNMARK ALVAREZ

3RD DEFENDANT

Before: The Hon Justice Westmin R.A. James (Ag)

Date: 13th August 2021

Appearances: Mr Anthony Sylvestre for the Claimant

Mr Kileru Awich and Ms Kimberly Wallace for the 1st and 2nd Defendants

No appearance of the 3rd Defendant

JUDGMENT

1. This case raises the issue as to the circumstances in which the State may be liable for the actions of an off-duty police officer, who discharged his personal firearm resulting in injury to a citizen.
2. The Claimant's Amended Claim Form and Amended Statement of Claim seeks damages, including aggravated and exemplary damages, for grievous harm and personal injuries caused to the Claimant as a result of the assault and battery committed on the Claimant by the 3rd Defendant, as agent of the 1st and 2nd Defendants, on the 22nd day of April 2018. The Amended Claim arises out of the shooting of the Claimant by the 3rd Defendant on the 22nd April 2018 in Dangriga Town, which caused the Claimant to be hospitalised at Southern Regional

Hospital, Karl Heusner Memorial Hospital and later at a hospital in Chetumal. The Claimant's leg was amputated in Chetumal.

3. The Claimant has filed an affidavit of service indicating the service of the Amended Claim Form and the Amended Statement of Claim on the 3rd Defendant. The 3rd Defendant has failed to file a Defence. The 3rd Defendant failed to enter an appearance at the trial of the Claim. The Claimant has also filed a Notice of Application for the Entry of Default Judgment against the 3rd Defendant. The 3rd Defendant has not filed any objection to that Notice of Application for the Entry of Default Judgment.
4. The 1st and 2nd Defendants filed an Amended Defence wherein they denied liability as tortfeasors, for the assault and battery committed against the Claimant by the 3rd Defendant. The 1st and 2nd Defendants also defend the Amended Claim on the basis that they are not vicariously liable for the assault and battery committed against the Claimant by the 3rd Defendant. The 1st and 2nd Defendants maintained that at that time the 3rd Defendant was not acting in the discharge of his duties, but rather were engaged in acts which were outside the scope of his employment, not authorized by the 1st and 2nd Defendant, not closely connected to nor incidental to the 3rd Defendant's employment and was acting on a frolic of his own.
5. The 1st and 2nd Defendants has also contended alternatively that the deceased was contributorily negligent for any loss and or damage suffered by the Claimant because of the amputation that occurred after the Claimant's self-discharge against medical advice 30th April 2018.
6. There being judgment in default against the 3rd Defendant the main issue that is before this Court between the Claimant and 1st and 2nd Defendants were whether the 1st and 2nd Defendants are vicariously liable for the actions of the 3rd Defendant in respect of his assault and battery of the Claimant? The other issue is damages that the Claimant is entitled, even if as against the 3rd Defendant alone.
7. The approach in *Lister v Hesley Hall Ltd.* [2002] 1 AC 21, adopted in subsequent cases such as *Dubai Aluminium Co. Ltd. v Salaam and Others* [2003] 2 AC; *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273;

Brown v Robinson and Another (2004) 65 WIR 258 and *Clinton Bernard v Attorney General of Jamaica [2005] 2 LRC 561*, provides the framework for deciding cases in the Caribbean where employees commit intentional torts without the express or implied authorization of the employer.

8. The recent developments in vicarious liability as described by Fraser J in *Arden Clarke v Security Innovations Ltd [2016] JMJC Civ 145* reflects the policy and legal attempts to balance the aim of providing innocent victims of torts with legal/financial recourse, against the desirability of protecting employers from having the net of responsibility for the consequences of their employees' unauthorised unlawful conduct, being cast too widely.
9. In the House of Lords decision of *Lister and others v. Hesley Hall Limited (supra)* it was held that in determining whether an employer should be held vicariously liable for an employee's wrongful act, the court ought to focus on the relative closeness of the connection between the nature of the employment and the particular tort. Essentially, a broad approach was required as it related to the nature of the employment by asking, what was the job on which the employee was engaged for his employer. In delivering his judgment, Lord Steyn stated as follows:-

"[14] Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment..."

[15] For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master": Salmond on Torts, 1st ed (1907), p 83; and Salmond and Heuston on Torts, 21st ed (1996), p 443... He said (Salmond on Torts, 1st ed, pp 83-84) that "a master ... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them" ..."

10. In his judgment in *Lister (supra)*, Lord Millett put it this way:-

“[65] Vicarious liability is a species of strict liability... The theoretical underpinning of the doctrine is unclear. Glanville Williams wrote (“Vicarious Liability and the Master’s of Indemnity” (1957) 20 MLR 220, 231):–

“Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends”.

... Atiyah, Vicarious Liability in the Law of Torts wrote to the same effect. He suggested, at p 171:–

“The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on”. These passages are not to be read as confining the doctrine to cases where the employer is carrying on business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer’s objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.”

[66] While this proposition has never, so far as I am aware, been adopted in so many words as a test of vicarious liability in any of the decided cases, it does I think form the unspoken rationale of the principle that the employer’s liability is confined to torts committed by an employee in the course of his employment. The problem is that, as Townshend-Smith has observed ((2000) 8 Tort Law Review 108, 111), none of the various tests which have been proposed to determine this essentially factual question is either intellectually satisfying or effective to enable the outcome of a particular case to be predicted. The danger is that in borderline situations, and especially in cases of intentional wrongdoing, recourse to a rigid and possibly inappropriate formula as a test of liability may lead the court to abandon the search for legal principle.”

11. In *Lister* it was held that having regard to the circumstances of the warden's employment, including the close contact with the pupils and the inherent risks that it involved, there was a sufficient connection between the work that he had been employed to do and the acts of abuse that he had committed for those acts to be regarded as having been committed within the scope of his employment.
12. The cases of *Clinton Bernard (supra)* referred to by Counsel is also instructive. I note however that when a Court is to assess whether a close connection exists between an employee's tortuous act and that which he is employed to do, is not simple its application. Each case has to be assessed on its own facts in order to determine whether the act complained of is one which satisfies the 'close connection' test as set out in the authorities. This exercise, as the cases demonstrate require the Court to examine a variety of factors which may impact on the particular circumstances.
13. A case close to the facts to the instant matter is that of *Attorney General v Craig Hartwell (supra)*. In that case, a police constable had accidentally shot a British citizen while the police constable was using his police issued firearm to further a personal grouse against his girlfriend and her male associate. Armed with a police service pistol, left his post and journeyed to the bar where she was working. Without warning he fired a number of shots causing minor injuries to Ms. Lafond and a tourist and serious injuries to the Claimant, Craig Hartwell. Laurent was prosecuted and pleaded guilty to charges of unlawfully and maliciously wounding Mr. Hartwell and Ms. Lafond and having a firearm with intent to do grievous bodily harm. He was sentenced to five years' imprisonment and dismissed from the police force.
14. The test of whether the Attorney General was vicariously liable was stated at paragraph 16 of the judgment:

"The applicable test is whether PC Laurent's wrongful use of the gun was so closely connected with acts he was authorized to do that for the purposes of liability of the government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of his employment".

15. Applying this test their Lordships in *Hartwell* found Laurent to be acting on a frolic of his own as from when he left his post until he fired the shots at the bar, Laurent's activities had nothing whatsoever to do with any police duties either actually or ostensibly.

16. In *Allan Campbell v National Fuels and Lubricants Ltd et al C.L. JM 2004 SC 92* referred to *Arden Clarke v Security Innovations Ltd (supra)* the Court had to decide whether an employer was liable for fire damage caused to a building at a location to which his employee had diverted. He had gone there to unlawfully sell some of the petrol which should instead have been delivered to a particular petrol station. Sykes J after conducting an extensive review of the development of the law on vicarious liability distilled six principles to guide the application of the principle in Jamaica, though noting that they were not exhaustive. They are:

- (a) what is the duty to the claimant that the employee broke and what is the duty of the employee to the employer, broadly defined;
- (b) whether there is a serious risk of the employee committing the kind of tort which he has in fact committed;
- (c) whether the employer's purpose can be achieved without such a risk;
- (d) whether the risk in question has been shown by experience or evidence to be inherent in the employer's activities;
- (e) whether the circumstances of the employee's job merely provided the opportunity for him to commit the tort. This would not be sufficient for liability;
- (f) whether the tort committed by the employee is closely connected with the employees duties, looking at those duties broadly;

17. The issues relative to this case was also looked at in *Lanzie Brown v Det. Corp Wayne Clarke and The Attorney General of Jamaica JM 2007 SC 19* where the Claimant a policeman acting as a baliff, went to the home of one Ms. Kellyman to repossess a refrigerator as she was in arrears. Det Corp Clarke who was also at the premises denied the Claimant access to the premises. While the Claimant was in the process of calling for assistance from the police, Det. Corp Clarke pulled a

firearm issued to him by the police services and shot the Claimant. Sykes J held the Attorney General was not vicariously liable as there was no evidence, as there had been in *Clinton Bernard*, that the policeman was purporting to exercise his authority as a policeman at the time of the shooting.

18. In *Arden (supra)* another case similar to the case at bar, the Second Defendant, was engaged as a Security Guard by Security Innovations Limited (SIL) which provided security services to a number of clients. The security guard had a Firearm User's (Employee's) Certificate issued by the police which authorized him to use particular firearms owned by SIL in the discharge of his duties and a licence issued to him by the Private Security Regulation Authority. On April 1, 2008 the security guard reported to work at one of the 2nd Defendant's clients to carry out duties as a security guard pursuant to the contract which SIL had in respect of those premises. He was provided by SIL with a shot gun. During his tour of duty, he left the client's premises armed with the shotgun and went to the vicinity of Omega Manufacturing Company Limited (which is located approximately 180 feet). He shouted something to the Claimant who was a security guard stationed at Omega and then fired shots at him. The Claimant sustained several injuries. Mr. McNamee returned to his work place. He left shortly afterwards leaving the shot gun behind. It was recovered by the police and later handed over to the 1st Defendant. The 2nd Defendant has not been located since. The Claimant sought damages for assault and battery and/or negligence from the 1st Defendant alleging it was in the course of his employment.

19. Fraser J relying on the Jamaican authorities and Hartwell held the action of the Second Defendant was not be in any way related to his duties as a security guard and had nothing to do with him taking any measures in furtherance of guarding the premises he was assigned to secure. He also held that the Second Defendant in order to achieve its objective of providing security services would not have expected that security guards will leave their posts and use the firearms with which they are issued to carry out their duties, to carry out personal vendatta and intentionally and unlawfully shoot persons. The risk of what happened to the Claimant was therefore not inherent to the provision of armed security services. Fraser J said that at the point the First Defendant left his assigned premises he was

just a man with a gun on a mission to commit an unlawful act. His employment as a security guard only provided the opportunity in terms of his assigned location and the assigned firearm for him to carry out his tortious act.

20. I proceeded to apply the test to this case and consider whether the 3rd Defendant's reckless and malicious shooting of the Claimant was *"so closely connected with acts he was authorized to do ... that his wrongful use may fairly and properly be regarded as made by him while acting in the course of his employment."*

Factual Background

21. The Claimant's evidence was that he was at Roxy's Club in Dangriga the morning of the 22nd April 2018 with his friends Mark Chaneb, Jaheel Brackett and Michael Estero. They left the club and he said his friends had walked ahead of him and upon reaching Rice Street he threw a bottle in their direction to get their attention. When he did that the 3rd Defendant turned around and shouted *"bwai."* He saw the 3rd Defendant crank a firearm and pointed it at him and shot him in his left leg. He plead with the 3rd Defendant not to shoot him again. The 3rd Defendant then walked up to him and told him *"you don't know who me?"* and from a distance of about 5 feet fired another shot into his leg and he fell to the ground. While bleeding on the ground the 3rd Defendant came up to him and his friends and brother-in-law step in between the 3rd Defendant and him and pleaded with the 3rd Defendant after which the 3rd Defendant left. The Claimant was taken to the Southern Regional Hospital then later to the Karl Huesner Memorial Hospital. He had surgery to try to repair his left leg. The Claimant was at the KMHM for 8 days where he indicated that there was no improvement and so he discharged himself and went to Clinica Carranza Chetumal, Quintana Roo in Mexico where his leg was amputated.

22. Michael Estero giving evidence for the Claimant testified that the shooting occurred near the Kids First School on Rice Street on the morning of the 22nd April 2018 at around 2:30 am. He said that that they had gone to Roxy Club nightclub and left. Upon reaching a point on Rice Street, where it was dark, they were approached by the 3rd Defendant who he said he knew as PC Bishop. He said that

the 3rd Defendant asked if it was one of us who had stoned him. He responded that he did not know what he was speaking about. He said that the 3rd Defendant responded *"I just checking cause long time I noh shot a man."* He said that the Claimant was behind them and saw that a pint bottle came from that direction. He then said the 3rd Defendant took out the firearm he had and fired a shot on the ground. The bullet ricocheted and the Claimant fell to the ground. The 3rd Defendant then walked over to where the Claimant was and fired another shot at him in his leg. He testified that he then walked over to where the Claimant was and fired another shot at him in his leg. He testified that he then intervened. He then said that the 3rd Defendant told him to take the Claimant to the hospital.

23. The Claimant during cross-examination said the 3rd Defendant was not wearing a police uniform at the time but dressed in civilian clothing. According to the Claimant, the 3rd Defendant did not tell the Claimant at any time that the Claimant had committed any criminal offence. The Claimant said that at no point in time did the 3rd Defendant make any attempt to arrest the Claimant or anyone else that was present, that the 3rd Defendant did not call for police back up on a phone or walkie talkie, and that at no point in time did the 3rd Defendant identify himself to the Claimant or anyone else as a police officer. The Claimant also stated in cross-examination that it was only days later that the Claimant got to know that the 3rd Defendant was a police officer.

24. In cross-examination Michael Estero said that the 3rd Defendant was in 'normal clothes;' long sleeved buttoned up shirt and long jeans pants, and that he did not see the 3rd Defendant with any handcuffs or a walkie talkie. Michael Estero importantly states in his cross-examination that the 3rd Defendant did not identify himself as police officer to anyone.

25. The evidence for the Defence in respect of the 3rd Defendant's work comes from Sr. Superintendent Leslie Wade. Superintendent Leslie Wade was the Officer in Charge at the Dangriga police station in April, 2018 and who the 3rd Defendant was working under.

26. Superintendent Wade's witness statement stated the practice in place at Dangriga Police Station for the operation of night clubs and bars where alcohol was sold

after midnight. Sup Wade states the bar or club required a license from the Liquor License Board and was required to have police presence. He says in 2018 Dangriga Police Station had in place a standard procedure for the deployment of police officers from Dangriga Police Station on special or extra duties at bars and nightclubs within Dangriga Town and surrounding areas. A list of police officers required to work special or extra duties on weekends is prepared on Wednesdays of each week. Those officers were required to be in their police uniform. He testified that Dangriga Police Station does not have a copy of any Licence granted to Roxy's Bar and Club for the 21st or 22nd April 2018. He said there is also no record in the Station Diary at Dangriga Police Station stating that police officers from Dangriga Police Station were detailed to work special or extra duties at Roxy's Bar and Club on the night of the 21st April, 2018 and or the morning of the 22nd April, 2018. He also testified that the 3rd Defendant's working hours at Crimes Investigation Branch Dangriga Police Station was 8 am to 5 pm which are the normal working hours for Crimes Investigation Branch at Dangriga Police Station. He said that he never authorized the 3rd Defendant to work any special duties that night nor was the 3rd Defendant asked to respond to any incident as a police officer at that location that night.

27. In cross-examination he testified that as a result of the incident, the 3rd Defendant was investigated criminally and internally but only disciplinary proceedings were initiated against the 3rd Defendant and testified that from his knowledge, the 3rd Defendant was convicted in the disciplinary proceedings. He also admitted that some officers do private work for establishments but do not record it in the diary.
28. Inspector LeRoy Hernandez also gave evidence for the 1st and 2nd Defendant. He was responsible for investigating the shooting of the Claimant by the 3rd Defendant. Inspector Hernandez was attached to the Professional Standards Branch of the Belize Police Department for over 19 years. He detailed his investigation of the incident and recording of statements and the fact that the 3rd Defendant was charged with "*discharging a firearm without just cause*" and "*engaged in conduct determined by the Commissioner of Police to be of major consequence*" contrary to section 24(4)(q) and 24(4)(z) of the Police Act, Chapter 138 read along with Act No. 7 of 2018. In relation to the first charge, the particulars were that "*you Wynmark Alvarez, PC 939, being a member of the Belize Police Department and attached to the*

Dangriga Police Station, in the Stann Creek Judicial District, on the 22nd April, 2018, discharged your personal firearm, a 9 mm Glock pistol, SN EXC404 without just cause.”
In relation to the second charge, the particulars were that “*for that you Wynmark Alvarez, PC 939 being a member of the Belize Police Department and attached to the Dangriga Police Station, in the Stann Creek judicial District, on the 22nd April, 2018, you shot Jessie Lopez in his leg causing him to lose a portion of the same left leg, which constitutes engaging in conduct determined by the Commissioner of Police to be of a major consequence.”*

29. He gave evidence that the 3rd Defendant was convicted of both charges and was suspended from the police service. He also detailed that it was recommended that the 3rd Defendant be charged with one count of aggravated assault, one count of discharging a firearm in public and use of dealing means of harm but no criminal prosecution has to date been instituted against the 3rd Defendant. In answer to questions by the Court Inspector Hernandez said that his investigation suggested that the 3rd Defendant was ‘*working sort of security*’ that night.
30. The 1st and 2nd Defendants in submissions stated that the Court cannot rely on Inspector Hernandez’s evidence where he stated that his investigation suggested that the 3rd Defendant ‘*was working sort of security*’ as inadmissible hearsay. This is strange since it is the 1st and 2nd Defendant themselves who called Inspector Hernandez to give the results of his investigation which would have been based on hearsay statements and subsequent police proceedings against the 3rd Defendant. The 1st and 2nd Defendant can’t have their cake and eat it too. Further, I do not think that Inspector Hernandez’s statement means what the 1st and 2nd Defendant thought it meant but in fact supports its contention that the 3rd Defendant was not acting in the course of his duties as a police officer.

Analysis of Evidence/Findings of Fact

31. At the material time the 3rd Defendant was not on duty as a police officer if anything he was working as a private security for Roxy’s Bar that night and not even on authorized extra duties. He was not even at the club when this incident occurred but some distance away. Unlike the policeman in *Clinton Bernard* who purported to be acting in his capacity as a policeman, the 3rd Defendant was not

acting or purporting to act in his capacity as a police officer like in *Lanzie Brown* and not even as a security guard like in *Arden*. He was not in police uniform nor identified himself as a police officer or security guard during the incident or arrested anyone. The closest to anything like that was when he said “*you don’t know who I be*” which I can’t hold to mean that he identifying himself as a policeman as it could mean so many things. Even more removed from *Hartwell* (supra) the 3rd Defendant recklessly and unlawful used his own personal firearm not one supplied to him by the State so he wasn’t even provided the opportunity for him to have the gun to commit this offence. Like Laurent in *Hartwell* there the 3rd Defendant set out with the intention of settling a vendetta. While he has not been prosecuted criminally that is not for the 1st and 2nd Defendant as it relates to determined vicarious liability but an independent arm of the State, the DPP’s office and nevertheless the police department has recommended that the 3rd Defendant be prosecuted which this Court also recommend should happen.

32. Accordingly in this regard it is in my view and I hold that the 3rd Defendant's shooting of the Claimant was both reckless and malicious but his actions were not so closely connected to those that he was authorised to do that the 1st and 2nd Defendant should be held vicariously liable.

33. Accordingly I enter judgment for the Claimant as against the 3rd Defendant and dismiss the claim against the 1st and 2nd Defendant. I however direct that the costs of the 1st and 2nd Defendant be paid by the 3rd Defendant whose malicious actions were the cause of the claim and failure to participate in these proceedings contributed to why the 1st and 2nd Defendant were sued.

Damages

34. As it relates to the 3rd Defendant judgment having been given in default, he is unable to address the issue of damages. The 1st and 2nd Defendant’s objections to the medical evidence is not applicable as it relates to the 3rd Defendant and having regard to leave being granted to adduce the medical evidence of Dr Mario Alberto Perez and Dr Jose Moguel.

35. General damages are awarded as compensation for past and future pain, suffering, disability and loss of enjoyment of life. The Court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim. In arriving at an award under this head, the law and other general principles were laid down in the case of *Cornilliac v St. Louis (1965) 7 WIR 491* as well as comparative and recent cases in our jurisdiction. These considerations include: (1) the nature of the injuries sustained; (2) the nature and gravity of the resulting physical disability; (3) pain and suffering which has been endured; (4) the loss of amenities suffered; (5) the extent to which the Claimant pecuniary prospects have been materially affected.

36. Even if I am wrong on this issue as I held recently in *Claim 91/2020 Isabel Bennett v James Henry Alexander Jr dba James Bus Line et al* the failure of the Claimant to call expert medical evidence is not a bar to prove damages under this head of general damages. I relied on the Canadian authorities including *Jalava v. Webster and Planet Café Inc* 2017 BCCA 378 Mr. Jalava, a self-represented litigant, obtained a default judgment against the Respondents. Over the years, Mr. Jalava made a number of attempts to proceed with the assessment of damages. The chambers judge expressed concern that Mr. Jalava had not complied with Harvey J's earlier order, and then turned to the topic of the assessment of damages. The judge advised Mr. Jalava that it was legally impermissible for the Court to assess damages for personal injuries without a medical-legal report. Mr. Jalava obtained legal Counsel and appealed.

37. The Court of Appeal in setting aside the judgment held:

"[11] First, there is no legal rule to the effect that in order to have damages for personal injury assessed, a plaintiff must adduce a medical-legal report into evidence: see Reible v. Hughes 1980 CanLII 23 (SCC), [1980] 2 S.C.R. 880. There is no doubt that such reports are very helpful and that without one, it is difficult for a judge to assess damages. In this case, for example, Mr. Jalava told the Court that he had suffered a broken clavicle and a "banged up knee" as a result of the assault, but had no details of the injuries or the financial consequences he had suffered. At this point in time, several years after the assault, it would appear no further information is likely to be brought forward.

[12] However, since the plaintiff obtained judgment for assault, an intentional tort, it was open to the Court to award a nominal sum. Even if the tort had been

negligence, the Court could have given an award of damages that would at least give some recognition of Mr. Jalava's injuries."

38. In *Pringle v. Pringle*, 2020 BCSC 75 the Court relying on *Jalava v. Webster* (*supra*) held at para 59 that there is no legal rule requiring a Plaintiff to put forward expert opinion evidence to substantiate a claim for damages for personal injuries. They said that Defendants do not dispute that Mr. Pringle suffered a significant injury in the form of a badly broken wrist. The Court said that he must do the best it can to assess its effects on the evidence before the Court. Likewise, in *Saadati v Moorhead*, (2017) 2017 SCC 28 (CanLII) confirmed at para 38 that expert evidence can assist in determining whether or not mental injury has been proven; it is just not a requirement. It is important to note that the Supreme Court in this case was only answering the "*narrow question of whether it is strictly necessary... for a claim to adduce expert evidence or other proof of a recognized psychiatric illness.*" The answer to which was no.

39. I am in agreement with the authorities from Canada that not every injury requires expert medical evidence. This is not to say that expert medical evidence is not required or without it the Claimant's damages will not be limited, it means I have to evaluate the evidence and determine what evidence of damage I can accept.

Nature and extent of injuries sustained

40. The Claimant was shot in the leg twice in his left leg by the 3rd Defendant causing him to be hospitalized, rendered unconscious and later he lost sensitivity and movement in his left leg and his ankle and toe had speared to be rotting and later he lost his leg which had to be amputated.

Nature and gravity of resulting physical disability

41. The Claimant has lost his left leg and he is unable to move as freely as he did before. He now has to use a prosthetic leg however his mobility is not the same and he is physically disabled. The amputation has caused discomfort to the Claimant's everyday life as simple walking is a task.

Pain and suffering endured

42. The Claimant explained how he was in terrible pain when he was shot. He explained while at the Southern Regional Hospital he was in agonizing pain and eventually went unconscious. He was in severe pain throughout his hospitalization at KHMH from the 22nd April to 30th April 2018 and had to be administered pain killers after his left leg was amputated in order to subside the pain. The Claimant explained the recovery was painful and was a difficult experience for him. He had to undergo therapy to enable the muscles in his left thigh to regain strength.

Loss of Amenities

43. The Claimant deposed as a result of the injuries sustained and amputation of his left leg, he has been unable to do the about intensive work that he did before being injured when he worked at Quality Poultry Limited and earned \$250.00 weekly. He also explained that he was a football player professionally with a football team in Dangriga before the incident. He also detailed that he was an athlete doing other sports like volleyball, swimming and running which, he could not do anymore and that has been distressing for him. Since the amputation he said he was unable to be intimate with his wife for about six months as it was painful for him to move his left thigh. The Claimant also explained that when he was able to regain strength in his left thigh, he had to use a prosthetic leg which he now uses and that even with the use of the prosthetic leg, he is not able to do the fun things that he took for granted such as walking exercises in the morning.

Loss of pecuniary prospects

44. The Claimant is unable to do labour intensive work which has resulted in a drop in his earning potential. There wasn't very much evidence about the actual loss in earnings as the Claimant admitted that his employment with Poultry Works was part time and not weekly earnings. I do not have much evidence save that obviously his earning potential is weakened by his disability.

45. I considered the following authorities

- a. *BZ 2012 SC 43 Bainton v AG and Commissioner of Police* where the Claimant was suffered two gunshot wounds to her left leg, and one to her right leg by the police. 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. The learned judge looking at authorities awarded the Claimant the sum of BZD \$30,000.00.
- b. *Claim No 74 of 2014 Albert Idelfonso v Ercelia Wagner et al* the injury was a serious injury to the leg with shortening to the leg, and a 20% residual disability to total person. The Court awarded general damages in that case of BZD \$50,000.00
- c. *Claim No 550 of 2014 Kelvin Aguilar v David Wang* where as a result of a vehicular accident the Claimant suffered an open fracture to his left wrist with resulting minor disability on flexion and extension; a comminuted fracture to his right thigh bone with resultant disability evidenced by a noticeable limp. The Claimant required three surgeries, and requires further surgery to remove the rod placed in his leg and corrective surgery to improve the appearance and alignment of his wrist and forearm. The degree of pain and suffering as a result of the surgeries, nature and extent of injuries is assessed as severe at least for the two months following the accident, diminishing to a point that the Claimant was able to return to work after four months. The Claimant was assessed as 20% disability. An award of BZD \$82,000.00 was made for general damages.
- d. *Claim No 4 of 2015 Francis Gill v Devon Dale Jones* where someone pushed him into an oncoming vehicle which struck him, pinning him against the wall. He felt terrible pain and screamed but that was the last he knew. When the Claimant next became aware it was midmorning, he was in a bed at the Karl Heusner Memorial Hospital with needles in him and bandages around him and on his leg. The Claimant sustained a 'crushed injury to his lower limb with an open fracture to the proximal tibia gutillo' which could not

be repaired thus an above the knee amputation was performed. The Report concluded that the Claimant had physiotherapy and assistance for a prosthesis for his lost lower right limb. The Court awarded the sum of BZD \$100,000.00 as general damages for pain and suffering and loss of amenities.

- e. *Claim No. 577 of 2001 Castanaza v Oscar Tzib & Plastic World Ltd* the case arose out of a motor accident in 2000. The Claimant who was riding a bicycle was knocked down by a motor vehicle driven at the time by the first Defendant. The Claimant therein had surgery and was hospitalized for over one month after the initial injury to his leg. Six months thereafter, as a result of his worsening condition, he was flown the United States for further treatment and amputation. There was a below knee amputation of the leg and general damages were quantified by the then Chief Justice of Belize in the sum of BZD \$180,000.00.
46. Having regard to the authorities and the injuries suffered here and the deliberate nature of the act and the amputation of the leg after two surgeries I would assess general damages in the sum of BZD \$150,000.00.
47. I agree with the Claimant that this case is ripe for exemplary damages as the act of the 3rd Defendant was callous, deliberate, unlawful, oppressive and deserving an award of aggravated and exemplary damages. The 3rd Defendant shooting the Claimant multiple times without justification should be punished for his actions criminally, internally as he was done and as it relates to the Claimant financially. I would award the sum of BZD \$50,000.00 in aggravated and exemplary damages.

Special Damages

48. As stated by me recently in *Bennett v James (supra)* the position adopted by courts with respect to the proof of special damages by an aggrieved party is clear. Special damages incurred as a result of an accident, such as loss of earnings, must be specifically pleaded and proved and in fact rule the Civil Procedure Rules mandates a Claimant to include or attach to the Claim Form or Particulars of Claim, a schedule of any special damages claimed. In order to do so the pleadings must be supported by evidence, such as receipts, evidence from a Claimant's

employer is also required to confirm the loss of earnings incurred. In *Anand Rampersad v Willies Ice-Cream Ltd* Archie JA (as he then was) stated “The rule is that the Plaintiff must prove his loss. The correct approach is as stated by Lord Goddard, CJ in *Bonham-Carter v Hyde Park Hotel* [1948] 64 Law Times 177: “Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court saying: “This is what I have lost; I ask you to give me these damages. They have to prove it.” He also noted that the degree of strictness required by the law appears to be less certain since it depends on “what is reasonable in the circumstances” and he offered a word of caution to judicial officers in conducting such an exercise “not to assume the role of adjuster or estimator. The Plaintiff/Respondent cannot simply present a list of prices; it must show the basis upon which the figures are established.”

49. In the current claim, the Claimant pleaded special damages for treatment at the KMHM in the amount of BZD \$1,824.50. This is allowed. The costs of the police report of BZD \$8.00 are allowed. There was no pleaded case in the Amended Statement of Claim for loss of earnings so no award is made in this regard.

50. In relation to Medical Expenses, Transportation and Boarding Costs the Claimant and his family in Chetumal is not allowed. This is where medical evidence was important. There is no evidence before the Court that there was any medical reason for the Claimant to have sought treatment abroad. There is no referral by any doctor in Belize to seek medical attention in Mexico or from any medical person that the Claimant’s injuries could not be done in Belize for this to be reasonable. The evidence was that the Claimant discharged himself against medical advice and so I cannot award this special damage.

51. I will award the sum of BZD \$1,832.50 in special damages.

52. My orders are as follows:

1. Judgment for the Claimant against the 3rd Defendant.
2. Special Damages assessed BZD \$1,832.50 with interest at a rate of 6% from 22nd day of April 2018 to the date of the judgment.
3. General Damages assessed at BZD \$150,000.00.00 with interest at a rate of 6% from 22nd day of April 2018 to date of judgment.

4. Aggravated and Exemplary Damages is awarded to the Claimant against the 3rd Defendant in the sum of BZD \$50,000.00;
5. The Claim against the 1st and 2nd Defendant is dismissed;
6. Prescribed costs is awarded to the Claimants against the 3rd Defendant; and
7. Costs is awarded to the 1st and 2nd Defendant to be paid by the 3rd Defendant.

/s/ WJames
Westmin R.A. James
Justice of the Supreme Court (Ag)