

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2012-02392**

BETWEEN

RAYMOND GARCIA

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Sookhoo holding for Mr. Murphy

For the Defendant: Ms. Alleyne instructed by Ms. Simmons (abs.) and Ms. Rampersad (abs.)

Date of Delivery: Thursday 6th October 2016

JUDGEMENT

THE CLAIM

- [1] The Claimant claims aggravated and exemplary damages against the Defendant for assault and battery arising out of an incident during which police officers allegedly shot at and wounded him during the course of a robbery at Goodwood Racing Club (G.R.S.), Arima where the Claimant was present.
- [2] By Claim Form and Statement of Case filed on 15th June 2012 he pleaded that on the 22nd September 2011 at about 7:00 am he went to the G.R.S. with his son in law Preetum Chablal. Preetum entered G.R.S. while he remained in the car. He further pleaded that he noticed a white car which stopped at G.R.S.; three men brandishing guns exited the car and advanced toward the building, their faces partially covered by caps.
- [3] The Claimant averred that he was ordered into the building at gunpoint by one of the men. Inside, he and the other persons in G.R.S. were robbed by the three men; five hundred dollars was taken from him at gunpoint. Shortly thereafter the Claimant heard the three robbers state that the police were outside the G.R.S. building. At they were saying this gunshots were heard.
- [4] The Claimant also pleaded that after a period of about 20 minutes he heard the police instructing everyone inside the building to exit with their hands in the air. In response, the Claimant began walking outside with his hands in the air. Suddenly and without warning the Claimant pleaded that he heard the 'cracking of guns' and felt a burning sensation in his abdomen and back. He then realized that he was bleeding and had been shot.
- [5] The Claimant pleaded that he was intentionally shot by the police and set out the following particulars:

- a) That the officers took aim at him and discharged their firearm without lawful reason or just cause;
- b) That they discharged their firearm when the Claimant was visually unarmed and walking towards them with his hand in the air in compliance with their instructions;
- c) They were reckless in shooting the Claimant;
- d) Alternatively the police were negligent in shooting the Claimant in these circumstances.

[6] The Particulars of Negligence pleaded were that the Officers:

- a) Failed to keep a proper lookout before discharging their firearm and/or firearms.
- b) Failed to confirm whether or not the Claimant was involved in the robbery of G.R.S. before discharging their firearm and/or firearms.
- c) Discharged their firearm and/or firearms in the direction of the Claimant.
- d) Failed to ensure that their firearms and/or firearms was/were not discharged except in a direction in which it was safe to do so.
- e) Failed to take the necessary precautions before discharging their firearm and/or firearms in the direction of the Claimant

[7] After being shot, the Claimant was instructed by the police to kick down the remains of the glass door and come outside which he did. He was then told to lie on the ground, at which time he heard one of the officers say that the wrong man was shot, 'look the bandit'. The Claimant, who was in severe pain was taken by the police to the Arima Hospital about 20 minutes later.

[8] The Claimant suffered gunshot injuries to his lower right abdomen, left flank and left upper lateral thigh with metallic fragments in the subcutaneous tissues of the abdominal wall, left lower back and left

thigh for which he was treated at the Eric Williams Medical Sciences Complex.

THE DEFENCE

- [9] The Defendant admitted that portion of paragraph 7 of the Statement of Case in which the Claimant pleaded that the police instructed everyone to exit with their hands in the air¹.
- [10] The Defendant denied, however, the Claimant's allegations that police officers intentionally shot at and wounded him. The Defendant pleaded that on 22nd September 2011, in response to a report of a robbery in progress, PCs Navin Haven, Aaron Persad and Corporal Damien Ali went to the G.R.S. building in Arima. Upon arrival, the officers observed a white vehicle parked outside the building with its rear door open and its engine running. Approaching the glass front door of the G.R.S., PC Ali observed a man with a high powered weapon and red bandana across his face. The officers took cover and radioed police command centre for backup.
- [11] A short while later the man with the red bandana approached the glass door whereupon Corporal Ali shouted "Police! Come out with your hands up!". The said man responded by approaching the said glass door and firing his gun at the officers who returned fire. The man ran to the white car parked on the roadside and entered the car where he continued shooting at the officers from the back seat until he slumped down on the seat.
- [12] The Defendant pleaded that at the same time another man emerged from inside the G.R.S. premises to the said glass door firing at the officers

¹ Paragraph 3 of the Defence

with a machine gun. The officers, strengthened by members of the Northern Division Task Force (NDTF) returned fire. This man stumbled outside the G.R.S. and fell. It was pleaded further that one of the officers then instructed persons inside the building to come out with their hands in the air and a number of persons exited the building including the Claimant who pointed to another man and identified him as one of the robbers. The Claimant appeared to be suffering from an injury to his stomach area.

[13] The Claimant and the other men were taken to the hospital while the officers conducted investigations into the incident. Statements were obtained from witnesses and entries were made in the station diary.

[14] The Defendant denied liability on the ground of negligence and indeed denied that the police officers shot the Claimant. Alternatively, the Defendant pleaded that if the Claimant was shot by the police, the injury was sustained at a time when the police was acting in necessary self defence and in direct response to an imminent threat against their lives. The Defendant pleaded further that the officers acted at all times in the *bona fide* belief that they were performing a public duty entrusted to them as police officers. The Defendant denied the Claimant's claim for aggravated and exemplary damages as a result of the injuries sustained by him.

[15] A careful analysis of the evidence is necessary in order to determine the issues raised by the parties' pleadings. I therefore set out in some detail the evidence adduced by the Claimant and the Defendant in this case.

EVIDENCE FOR THE CLAIMANT

Witness Statement of Raymond Garcia

- [16] In his witness statement the Claimant amplified the facts pleaded in his Statement of Case with respect to the events leading up to his injury. He testified that after he and other occupants were robbed he heard shooting which lasted for 10 minutes. When that spate of shots ended, he heard a man lying on the floor tell him not to sell him out to the police as a bandit. About 20 minutes later he heard the police call out saying, "All who in the building exit with allyuh hands in the air." In compliance with this order he got up and proceeded to the door after telling his son in law Randy that he was going outside.
- [17] Upon reaching the door and before the Claimant could open it, he heard gunshots coming from the direction of the police and immediately realized that he was shot in the left side of his belly and leg. He looked up at the front glass door which was shattered and saw about five to six police officers pointing their guns at him. They shouted at him to kick out the remaining glass on the door; he did so and exited with his hands in the air crying out to them that he was in an innocent man and a hostage.
- [18] This Claimant testified that the officers rushed him pointing their guns at him and ordered him down on the ground on his stomach; he did so even though he was bleeding and in agony. Whilst on the ground, the hostages began coming outside. The Claimant heard an officer then say that the wrong man was shot, the bandit was another man; they then put that man on the ground and handcuffed him. He was eventually taken to the hospital where he was treated.

Cross examination of Raymond Garcia

- [19] In answer to Counsel for the Defendant, the Claimant testified that when he was ordered inside the building by one of the gunmen, he was made to lie on the ground on his belly close to the door where he remained until he got up to exit the building. Whilst there he heard one of the robbers say that the police was outside; two of them stated that they were not giving up but were going out firing. Soon afterward he began to hear gunshots during which he remained on the ground. Shortly afterward a man lay down on the ground next to him and asked him not to tell the police that he was one of the robbers.
- [20] The Claimant heard the police order all persons to come outside whereupon he called out to his son in law who was further inside the building to exit pursuant to the police's command. Neither his son in law nor the hostages heeded his call to leave despite his repeated requests for them to do so. This witness also stated that the bandit next to him on the floor did not get up either.
- [21] The Claimant admitted that he was anxious and afraid during the ordeal but asserted that he did not misunderstand what the police said. This witness insisted that when he started toward the door he heard gunshots but did not see who was firing these gunshots. When he felt a burning sensation in his belly, left side and leg, he did not see the two bandits either.
- [22] While Mr. Garcia saw officers outside the building he did not actually see any police officer shoot him; he later stated that the police did not shoot at him while he was visibly disarmed and walking toward them. He also asserted that at no time was he shot by a bandit nor did he see any bandit at the time that he was shot.

Witness Statement of Preetum Chablal

- [23] Preetum Chablal also called Randy, the Claimant's son in law also gave a witness statement in support of the Claimant's case.
- [24] He testified that he was the manager of G.R.S., San Fernando branch and on the 22nd September 2011 he stopped at the Arima branch of the G.R.S. to pick up programmes for the San Fernando branch. He also stated that the Claimant was with him at the time.
- [25] This witness testified that he left the Claimant in the car and entered the building through its front glass door. Shortly thereafter he saw two men armed with long guns through the glass door; he attempted to escape by going to the toilet area but was ordered back by one of the men. He and another person were made to lie on the floor where they were both robbed. It was this witness' testimony that other persons in the building were robbed.
- [26] Mr. Chablal heard one of the bandits say that the police were outside and that they were going out firing. Shortly afterward shots rang out and Mr. Chablal hid in a corner. Silence followed during which he heard the police call out to "Surrender and come out with your hands up!"² He then heard the Claimant call out to him "Come out with your hands up. The police say it safe. Like allyuh eh hearing meh. It safe."
- [27] This witness testified that he ignored the Claimant because he wanted to confirm that the person who said this was the Claimant since he could not believe that the Claimant had left the car and come inside. The Claimant repeated himself a couple of times but Preetum did not move. However, when he saw two women emerge from the office and walk toward the front door with their hands in the air, he started to walk out as well. He saw the Claimant walking towards the front door with his

² Paragraph 10 of the Witness Statement of Pretom Chablal

hands in the air; as the latter was about to go through the door Pretom heard shots. He dropped to the ground and shouted to the Claimant “Why the police shooting and yuh say to come out?” He then heard the Claimant shout and kick the glass door and went out with his hands up. It was his testimony that shortly after the Claimant went outside the bandit on the ground told them that they had to say that he was one of the hostages.

[28] A short while later the police barged into the G.R.S. and arrested the bandit. On reaching outside, this witness observed that the Claimant was bleeding and begging the police to take him to the hospital. He too begged the police to take the Claimant to the hospital but he was ignored.

[29] This witness testified further that he was detained by the police to give a statement. He accused the police of shooting the Claimant in a five page statement. He also swore that the police never asked him who shot the Claimant; no one else was shot apart from the bandits and the Claimant. Chablal asserted that the robbers never fired their weapon prior to the arrival of the police. Mr. Chablal also asserted that the Claimant did not appear to be injured up to the time that he started to walk out of the G.R.S. building.

Cross examination of Preetum Chablal

[30] In answer to Counsel for the Defendant Chablal stated that the first time that he became aware that the Claimant was inside the building was when he told persons inside including himself to come out after the shooting. He stated further that when he heard one of the robbers say that the police was there and two of them indicated that they would go

out firing, he did not know where the robbers were or where the Claimant was.

[31] This witness testified that he heard shots ring out. Shortly after this conversation however, from where he was situated he could not see who was firing the shots. He testified that when he heard the police say “Surrender and come out with your hands up!” neither he nor the other persons in the G.R.S. went outside. The police called for everybody to come outside but he did not. He then heard the Claimant urge everyone to go out saying that the police said that it was safe. The Claimant spoke loudly so that everyone could hear and repeated this several times. He didn’t move because he was awaiting confirmation that the Claimant was inside the building; however, two women got up and started walking toward the door with their hands in the air.

[32] He followed and saw the Claimant for the first time; he was walking toward the door with his hands raised. The Claimant was still inside when he heard shots ring out; he could not see who was firing the shots nor could he say where the shots were coming from; neither did he see any of the robbers at this time.

[33] Mr. Chablal stated that when the shots were fired, the Claimant did not fall to the ground, however he did so upon hearing the shots. After the shots were fired, the police told everyone to lie on the ground. He only realized that the Claimant was injured when he went outside the building; he indicated that he did not see when the Claimant was injured.

[34] This witness stated to Counsel that when he was still inside the building one of the robbers told him that he should tell the police that the latter was a hostage when he was inside the building. He later stated that he was outside when the robber who was lying on the ground said this. He

contradicted himself again on this issue, stating that they were actually leaving the building when the robber said this.

- [35] This witness affirmed his evidence in his witness statement that he saw the Claimant bleeding outside; he also affirmed as correct his statement to the police that he saw no blood on the Claimant. He further testified that the police did not enter the building to arrest one of the robbers – he was arrested while walking outside. This evidence contradicted paragraph 15 of his witness statement where he had stated that the police barged into the G.R.S. and arrested the robbers.

EVIDENCE FOR THE DEFENCE

Witness Statement of Corporal Damian Ali

- [36] This witness testified that after arriving at the G.R.S. he saw a man armed with a gun through the glass door. He, PC Haven and PC Persad took up strategic positions. Shortly afterward the said man approached the glass door with the gun. He, Corporal Ali, shouted to the man to come out with his hands up, however, the man exited the building firing shots at the officers. They returned fire, fearful for their lives, while the man ran to the white car parked in front of the building. The officers returned fire until the man slumped on the back seat of the vehicle.
- [37] Soon afterwards another man started firing a high powered weapon at the officers. He too was ordered to come out of the building but approached the door while firing at the officers. They returned fire until he dropped the gun and stumbled outside the building and fell on the ground.
- [38] Following the exchange of gunfire this witness observed the glass doors to the front of the building were shattered. He then instructed the

civilians inside the building to exit in a single line with their hands in the air. He observed that two women emerged at the front of the line and that the Claimant was fourth in the line. He asserted that when the civilians were exiting the building no shots were fired at that time or at anytime thereafter.

- [39] This witness testified that the Claimant pointed to a man who had exited the building and identified him as one of the robbers. That man confessed to participating in the robbery and was arrested. The Claimant then informed Corporal Ali that he was shot; soon afterward he was taken to the Arima Health Facility by other police officers. This officer denied that the Claimant ever told him that the police had shot him; he also denied that any officer stated that they had shot the wrong men. The other civilians who left the building were taken to the Arima Police Station where they were interviewed and statements were recorded from them. The police conducted investigations at the scene recovering cash, firearms and ammunition.

Cross examination of Damien Ali

- [40] This witness testified that 15-20 minutes elapsed from the time he arrived on the scene to when the last robber was arrested. He stated that when he first arrived he was not aware that there were hostages inside the G.R.S. building. He had been of the view that only bandits and no civilians were inside the premises. He revealed that there was an exchange of gunfire within 30-40 seconds after his arrival and a one or two second delay between the first and second exchange of gunfire.
- [41] Corporal Ali also stated that the first burst of gunfire occurred when the first robber emerged from the doorway and ran to the car. It lasted from when the robber was at the entrance to G.R.S. until he went inside the

car. As soon as this first round of gunfire ended, about one to two seconds later, the second round of gunfire started. Mr. Ali estimated that seven to ten minutes elapsed from the first shot to the last.

[42] PC Ali testified further that he was 12-15 feet away from the front door, to the east of it with PC Persad, while PC Haven was positioned behind the police vehicle which was parked 20-25 feet to the west and behind him. He stated that when the civilians were coming out of the building he stood in front of the doorway, however, he did not know at that time whether any robbers were still inside. PC Ali noted that the body of the deceased robber lay about 2-3 feet in front of the doorway.

[43] Corporal Ali also stated that prior to the civilians coming out of the building, the glass door was shattered to the point that they could walk through. About two minutes after the second person was shot the civilians began exiting the building. PC Ali stated that his instructions to them were to come out with their hands in the air. He testified that he only became aware that there were civilians in the building when heard screams from inside the building during the shoot out.

[44] PC Ali said the Claimant was the fourth to the fifth person who came out and the fourth to fifth person that he interviewed. It was while PC Ali was shooting at the second robber that he heard the screams inside the building; before that he was under the impression that there were no civilians in the Racing Pool.

[45] This witness admitted that in his report to Acting Superintendent of Police he stated that the third robbery suspect was pointed out to him by victims while he stated that the Claimant did so in his witness statement. He affirmed that it was in fact the Claimant who had done so. PC Ali also stated that he only realized that the Claimant was shot when the latter told him so during an interview. He didn't see any blood when the Claimant raised his shirt to show him where he was shot. PC Ali

stated that he was the only officer to give instructions to the civilians to come out of the building with their hands in the air; prior to this he gave no instructions to come out.

[46] He testified that on three different occasions they shouted the following commands to persons in the building:

- a) "Police! Come out with your hands up."
- b) "Police! Come out with your hands up."
- c) "Come out with your hands in the air in a line."

PC Ali testified that he could see just inside and in front of the doorway.

[47] PC Ali asserted that the first robber stood up at the door firing at the police for 10 to 15 seconds before running to the car. The second robber also stood in the doorway shooting at the police. In answer to Counsel he agreed that he mentioned nothing about the Claimant in his report to the Acting Superintendent of Police. After a long pause the witness stated that he did not think it important to mention the Claimant in his report.

[48] He testified further that after the shooting, the top part of the glass door was intact – he could not recall however, asking any of the civilians to clear/kick out the glass from the door.

[49] In the Station Diary³ PC Ali stated that the third robber was pointed out while everyone was on the ground. He denied that the Claimant was shot after the two exchanges of gunfire that he described earlier. He also denied that the Claimant was shot after he came out with his hands in the air in compliance with his instructions. He could not remember that the Claimant told him that he was an innocent man and a hostage when he came out.

³ Page 4, lines 1-3

Witness Statement of PC Ragoobar

[50] PC Ragoobar also gave a witness statement on behalf of the Defendant but was not produced for cross examination. Accordingly I attached little to no weight to his evidence.

Witness Statement of PC Haven

[51] PC Haven's evidence in his witness statement was very similar to that of Acting Corporal Ali except for one or two items of evidence not included in Acting Corporal Ali's witness statement and which was adduced during cross examination.;

Cross Examination of PC Haven

[52] It was this witness' testimony that when he arrived on the scene outside the G.R.S. a police vehicle was parked about 15 feet away from the front door to the right, while the white car was parked directly in front of the G.R.S.'s doors. The police vehicle was less than 15 feet away from the white car. Corporal Ali left his vehicle and travelled 15 feet towards the front door while PC Haven and PC Persad remained outside their vehicle next door.

[53] PC Haven stated that he had a hand gun while PC Ali had an MP5 and PC Ragoobar had a Galil. There was rapid gunfire about every three seconds. He asserted that when the gunmen stopped shooting at PCs Persad and Ali he turned to PC Haven and shot at him. This witness testified that the second gunman fired at officers to the east and the west. This shooting lasted for 2 to 3 minutes – about 90 rounds were fired by the police at this man. After this man slumped to the ground no more shots were fired. Subsequently, a police officer shouted to the

persons inside, “Come out with your hands up!” with a loud speaker. He estimated that the confrontation with the two armed robbers lasted about five to eight minutes.

[54] PC Haven also stated that when he arrived at the G.R.S. he did not know how many perpetrators there were; after the two robbers were shot he still suspected that more robbers were in the G.R.S. He also admitted that he would have been cautious about anyone who left the G.R.S. at that time. The first person came out with their hands up. The officers who were there were some distance front the front doors and instructed everyone to lie down on their stomachs. The Claimant pointed to another man and said “Officer that is one of the men who robbed the place before he lay down.” PC Haven stated that the Claimant was not the first person to emerge from the premises.

[55] After the second gunman was shot this witness asserted that police gave instructions to exit the building about 3 to 4 minutes later and persons began exiting the building 3 to 4 minutes later. PC Haven asserted that he was suspicious about the persons exiting the G.R.S. building and was looking for other criminals coming out. He denied that the Claimant was shot when he emerged from the building with his hands raised.

Witness Statement of Acting Superintendent of Police Francis Joseph

[56] Acting Superintendent Francis Joseph also gave a witness statement relative to the investigation which followed the incident which gave rise to this claim. He was not a witness to this incident. He testified that he invited the Claimant to give him a statement on the 25th September 2011 but he refused.

Cross examination of Acting Superintendent of Police Francis Joseph

[57] This witness agreed that the MP5 is a semi high powered gun while the Galil is a high powered weapon. He asserted that when using an MP5 it is very important to ensure that civilians are not caught in the line of fire.

THE ISSUES

[58] The issues that fall to be determined are:

- i. Whether the Claimant has discharged his burden of proving that the Claimant was shot by the Defendant's agents*
- ii. Whether the shooting was intentional and if so, was it justified*
- iii. Whether the police officers were negligent*

ANALYSIS & CONCLUSION

Issue (i)

Whether the Claimant has discharged his burden of proving that the Claimant was shot by the Defendant's agents

[59] The Defendant submitted that the Claimant failed to discharge the burden of proving that he had been shot by police officers. They relied upon his evidence that he had not seen any police officer shoot him and his failure to adduce expert evidence to prove that police officers had in fact shot at him. The Claimant on the other hand submitted that given that the Claimant was shot on both sides of his body as well as in his

stomach, it was reasonable to infer that he was standing and had been shot by persons to the left and right of him as well as persons to the front of him. They contended that the gunshot injuries sustained by the Claimant accords with the positions taken up by the police officers outside the GRS building during the shooting.

[60] On this issue I agree with the submissions of the Claimant. From the totality of the evidence before me it is reasonable to infer that the Claimant was shot while he was in an upright position and walking toward the doorway as he has described. The evidence of all the witnesses clearly indicate that the two robbers shot at the police who were outside the building; the Claimant indicated that he was shot as he walked to the doorway of the GRS building. The only reasonable inference, in my view, is that he would have been shot by police officers who were firing directly into the GRS building and who were positioned to the east and west of the doorway as well as directly in front of the doorway. The fact that the Claimant did not produce any forensic evidence, such as bullet fragments to support his case, does not weaken this inference and the conclusion at which I have arrived.

Issue (ii)

Whether the shooting was intentional and if so, was it justified

[61] The Claimant submitted that it was not their case that the police intended to injure the Claimant at any time or that he was the intended target of the police. He submitted further that only one inference could be drawn from the evidence and that is that the police wrongly and negligently thought that the Claimant was a robber and intended to shoot that robber. They argued that in the circumstances of this case the

doctrine of Transferred Malice applied. They relied upon the case of **Livingstone v Ministry of Defence**⁴ in support of this contention. In that case it was held that when a soldier deliberately fires at a rioter intending to strike him and he misses and hits another rioter nearby, the soldier has **intentionally** applied force to the rioter who was been struck. Where the soldier fires at a rioter intending to strike him and the bullet strikes that rioter and passes through his body and wounds another rioter directly behind the first rioter, whom the soldier had not seen, both rioters have been intentionally struck by the soldier and, assuming that the force used was not justified, the soldier has committed a battery against both.

[62] The Claimant submitted further that the burden lay on the Defendant to justify the shooting of the Claimant. They argued that the shooting of the Claimant, on the facts of this case, cannot be justifiable in that at the time the Claimant was shot he was walking toward the exit in clear view of the police officers with his hands in the air as ordered by them, when all the shooting had already stopped; the two armed robbers had been killed and the police were all in safe strategic positions.

[63] The Defendant on the other hand submitted that the Claimant has not proved his case that the officers intentionally shot at him as he pleaded in his Statement of Case. They point to the evidence of the Claimant and his witness that they did not see who shot the Claimant and the Claimant's testimony that the first time that he saw the police officers was when he had exited the building. The Defendant relied upon the Jamaican case of **Byfield v The Attorney General of Jamaica**⁵ which held *inter alia*, that if police officers in the honest belief that the Claimant was a gunman about to shoot at them, shot the Claimant, then their act would be justified and neither assault nor negligence would lie. If the

⁴ 1984 N.I.L.R. 356

⁵ JM 1980 SC 36

police deliberately shot the Claimant with no such honest belief this would constitute an assault and liability would lie.

[64] The Defendant also submitted in the alternative that the Claimant may have been shot in the cross fire between the police and the robbers. They contended that the injuries that he sustained support their contention that he was shot as a bystander in the cross fire and was not the subject of a direct aim. They acknowledge that this alternative case satisfies the requirement of intention; however, they submitted that the action of the police was justified in that they were acting in self defence and in the belief that they were performing a public duty entrusted upon them.

[65] I have considered the evidence and the submissions of the parties on this issue. From the evidence on both sides, the Claimant emerged from the building with his hands in the air. He was clearly unarmed and posed no threat to the police officers. I do not accept that he stood up during the shooting between the police and robbers; I have come to the conclusion that he stood up and began walking out of the building after all the shooting had stopped and the police ordered persons inside the building to come out with their hands up. I take note of the fact from the evidence the police were able to see persons inside the building and as they were approaching the door. This was especially so after the shoot when most of the glass in the front door way had been shattered. In my view the Claimant was shot in circumstances that cannot be justified in that the police officers were no longer under threat from the robbers who had both been killed by the police and the Claimant was clearly unarmed.

Issue (iii)

Whether the police officers were negligent

[66] In **Balliram Ramdeen and Bisnath Singh v The Attorney General**⁶, a case where civilians were wounded during a police chase of a suspect Jamadar J (as he then was) considered various *loci classicus*, including **Ann v Merton**⁷ stated,

“...The Plaintiff must show that there was a duty of care owed to him by the police officers that morning, that a breach of that duty of care occurred resulting in damage to him and that the damage was foreseeable...”

...In short, a duty of care is owed only to those persons who are in the area of foreseeable danger in the particular circumstances of each case. In my opinion there can be no doubt that persons who are in the vicinity of a shootout, particularly if they are in the range of fire... are in an area of foreseeable danger. Not only was that objectively so in this case, but also, it was a fact actually known and/or reasonably to be anticipated...The police therefore owed a duty of care...

...The duty of care required in each case depends on the particular circumstances existing at the time. It is trite law that the standard of care is that of the reasonable man, that is of a person using ordinary care and skill...A person who holds a particular skill is required to show the skill normally possessed by persons doing that kind of work...In my

⁶ HCA No Cv 807/1995 pgs 15-18

⁷ (1978) AC 728

opinion, there is no reason why this principle should not apply to police officers acting in the discharge of their duty...In my opinion, the test to be applied in this case is that of the ordinary trained police officer exercising that special training in the carrying out of his duties...”

[67] Further on the issue of emergency Jamadar J opined⁸,

“Counsel for the Defendant has urged this Court to find that there was no negligence on the part of the police constables Richard and Baseano, largely because they found themselves acting in an emergency – that is, being fired upon with nowhere to take cover...”

...In my analysis, cases of emergency situations do not give rise to a new or different test for the standard of care, but merely take cognizance of the care that is required in the circumstances of each case – see Marshall v Osmond at p 227 c: ‘The vital words...are in all the circumstances.’ Thus, in an emergency, all that is necessary is that the conduct under review should not have been unreasonable, taking into account the exigencies of the particular situation. In this regard, material factors in emergencies, are whether the situation allowed time for reflection, whether the emergency was one which was not of the defendants making and the extent to which the emergency justified the risk taken...At the end of the day, even in an emergency, the test remains, whether the decision taken was a reasonable one in all the circumstances.”

⁸ Pages 18-19

[68] In the Jamaican case of **Latoya Brown v The Attorney General of Jamaica**⁹ the law regarding negligence with respect to police shooting of bystanders is succinctly stated at paragraphs 15-17 and 20 therein:

*“As I observed in **Namishy Clarke v The Attorney General 2007 HCV 00031** delivered 11th December 2009:*

*“An instructive starting point is the much venerated definition of negligence expressed by the venerable Alderson B in the case **Blyte v Birmingham Water Works Co (1856) 11 Ex. 781,784**: Negligence is the omission to do something which a reasonable man, guided upon those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”*

*Following on that, the standard of care required from those who bear arm on behalf of the state was articulated by Hanna J in **Daniel Lynch v Michael Fitzgerald et al (1938) I.R. 356 (Lynch v Fitzgerald)**. His elegant language at pages 404-405 bears repeating: “But it is an invariable rule that the degree of force to be used 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 stage of perfection that they cannot be employed without grave danger to life and limb even of distance and innocent persons – must be used with the greatest care, and the greatest pain 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*

⁹ [2015] JMSC Civ 89

justifiable but it is the duty of Detective Officers, or other members authorized to carry arms to use these weapons according to the rules just enunciated, and, if death should unfortunately ensue, they will, nevertheless be justified.”

*Those principles are compendiously captured in the judgment of McKain J in **Joseph Andrews v Attorney General of Jamaica (1981) 18 JLR 434, 438**: “It is good law that an officer may repel force where his authority to arrest or imprison is being resisted, and even if death should result, yet this consequence would be justifiable by law. But he ought not to proceed to extremes without reasonable necessity, and the public has to be considered if he proposes to discharge a firearm where other person than a fugitive may be located.”...*

They must take reasonable care to avoid discharging their firearms in circumstances where reasonable foresight telegraphs that injury would be likely to result to innocent bystanders. These innocent bystanders are the very persons who are so closely and directly affected by the officers’ discharge of firearms that they ought reasonably to have them in their contemplation as being so affected when they are directing their minds to the discharge of their firearms.”

[69] The Defendants have submitted that the Claimant must have been shot in the crossfire between the police and the robbers because he attempted to leave the premises or stood up near the glass door at sometime during the shootout between the police and the robbers. I do not accept that supposition for the following reasons:

- a) The police witnesses all testified that they had clear view of the front door of the premises from the time of their arrival. Corporal

Ali's evidence is that upon arrival at the G.R.S. he was able to see a man inside the building through the glass door; he then saw that man approach the glass door with the gun. He was also able to see the second robber at the door before the latter fired his weapon.

- b) The officers detailed the emergence of the first robber and the subsequent shoot out followed by the second robber and that shootout. Indeed it is the Defendant's evidence that they could see the first robber through the glass door.
- c) At no time did they ever speak of seeing a third person standing by the door. Indeed, it is implausible that the Claimant would stand and attempt to leave the building during the shootout between the police and the robbers, especially since both sides were using high powered weapons. Additionally, the Claimant positioned close to the front door, lying on his stomach, would have been sufficiently close to the shooting not to have been made that error.
- d) I note that the police officers were all at pains to assert that the Claimant was not the first civilian to exit the building. This contradicts the evidence of the Claimant and Mr. Chablal that the Claimant was the one urging the others to exit the building with their hands in the air and in fact he was the first to do so. I accept this evidence from the Claimant and Chablal.
- e) It was not disputed by the police that all the civilians who left the G.R.S. did so with their hands in the air in obedience to the officers' orders. In the circumstances, having come to the conclusion that the Claimant was the first civilian to emerge from the building with his hands in the air, it follows that he was shot by officers when it was clear that he posed no threat to them. I wish to point out here that the evidence of all the Defendant's witnesses was that they responded to the robbers' fire and that after the shootout with both gunmen all firing stopped. Indeed, Constable Haven in cross examination specifically stated that the

police issued instructions to persons inside the building to come out with their hands in the air about three to four minutes after the second robber had been shot by the police. I accept the evidence of the Claimant that that is when he got up and moved toward the door.

- f) I note the evidence of Corporal Ali and PC Haven that up to the time of their arrival at the scene, they were unaware that there were civilians inside the G.R.S. building. I have taken into account the estimated length of time that the exchange of gunfire between the officers and the two gunmen. The officers estimated that time to have lasted between seven to ten minutes. The Claimant testified that the gunfire lasted for 10 minutes. Given the circumstances under which the shooting took place the difference is understandable. PC Haven testified that persons began exiting about 3-4 minutes later. Corporal Ali testified that 15-20 minutes elapsed from the time of his arrival on the scene to when the last robber was arrested. It was also his testimony that within 30 to 40 seconds of his arrival the shooting started.
- g) The injuries sustained by the Claimant were to the front and side of his body. I conclude therefore that he was standing at the time he was shot. The Claimant was shot in his lower abdomen, left flank and left upper lateral thigh with metallic fragments in the subcutaneous tissues of the abdominal wall, left lower back and right thigh. From the evidence before me, none of the robbers fired a shot inside the G.R.S. in the direction of the hostages. The Claimant was shot standing up. The injuries to the left flank and thigh and metallic fragments in his left back and left thigh suggest that the person(s) who shot him were positioned to his front, left and right. This accords with the positions taken up by the police when they arrived outside the G.R.S. building.

h) Whilst it is understandable that from the officers' point of view the situation was fraught with danger, they having been shot at on two separate occasions by men exiting the premises, they owed a duty of care to every unarmed person not to cause him or her undue harm. Given PC Ali's repeated call to persons inside to come out with their hands in the air, they acted in breach of that duty by shooting at the Claimant when he stood up, hands in the air and started to come out of the building.

[70] I do not consider, on the facts before me, that the police willfully shot at the Claimant intending to do him harm. I believe that they shot him in the mistaken belief that he was one of the robbers at a time when he was unarmed, his hands in the air, walking toward the front glass door in obedience to their command. He posed no threat to them; their shooting him at this time is unjustified and amounts to a breach of duty of care owed to him. I therefore hold that the officers were negligent and the Defendant is liable in negligence for assault and battery against the Claimant.

[71] I therefore order:

- a) Judgement for the Claimant against the Defendant.
- b) Defendant to pay the Claimant's damages for assault and battery occasioned by the negligent shooting of the Claimant by police officers on 22nd September 2011 to be assessed by a Master in default of agreement.
- c) Defendant to pay two thirds of the Claimant's costs.
- d) Assessment of damages, costs and interest is transferred to a Master in Chambers.

e) Stay of execution of 28 days.

Joan Charles

Judge