

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2012/CLE/gen/00414

BETWEEN

DARREN RUTHERFORD

Plaintiff

AND

**THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Donovan Gibson of Munroe & Associates for the Plaintiff
Mr. Kirkland Mackey of the Attorney General's Chambers for the Defendants

Hearing Dates: 4 April, 26 July 2017, 9 March 2018

Personal Injury - Negligence – Existence of a duty of care –Breach of duty of care – Conduct - Reasonable man test - Duty to ensure officers are competent to use firearm given to them – Duty to exercise reasonable skill, care and diligence as a law enforcement officer - Self-Defence – Accident - Contributory Negligence – Pleadings

The Plaintiff, a Corporal of Police was instructed by the servants and/or agents of the 1st Defendant to execute a search warrant on a residence in New Providence. During the process of executing the warrant, he was shot by another police officer who was also part of the team of officers instructed to execute the warrant. The Plaintiff sustained injuries and sued the Defendants for damages, alleging negligence and a breach of duty of care on the part of the 1st Defendant, his servants and/or agents.

The Defendants alleged that they are not liable. They say that the shooting was an accident and the officer who shot the Plaintiff was fearful for his life when he saw a handgun pointing in his direction. The Defendants did not plead contributory negligence. Instead, they made an offer to the Plaintiff that they will accept 75% liability if the Plaintiff will accept 25%. The Plaintiff countered and offered 10%. No agreement having been reached, the matter proceeded to trial.

HELD: finding that the Defendants are wholly liable for the injuries caused by the negligence and/or breach of duty of the Defendants and ordering that damages be assessed:

- (1) On a balance of probabilities, the evidence adduced by the Plaintiff and his witnesses is more plausible than that of the Defendants' witnesses. As such, the Court found that there was negligence and a breach of duty of care by the Defendants.
- (2) Negligence as a basis for liability is founded on the impersonal ("objective") standard of how a reasonable person should act in the circumstances. Shortfall from this standard does not always give rise to legal liability: per Lord Nicholls of Birkenhead in **Attorney General v Craig Hartwell** [2004] UKPC 12 at para. 20.
- (3) The Defendants owe a duty of care to the Plaintiff who was acting in the execution of his duty.
- (4) The Defendants breached the duty of care and were therefore negligent when they issued an Uzi sub machine gun to their servant and/or agent who was not competent to use it: **Attorney General v Craig Hartwell** applied.
- (5) The Defendants failed to exercise reasonable skill, care and diligence when their servant and/or agent ought to have known that three armed police officers were in the residence at the time that their servant and/or agent fired the shot which wounded the Plaintiff.
- (6) The Defences of self defence and accident relied upon by the Defendants have no place in this action.
- (7) The defence of contributory negligence relied upon by the Defendants was not pleaded and therefore, it cannot be relied upon, See Barnett JA in **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 at paras 39 and 40.

JUDGMENT

CHARLES J:

Introduction

[1] On 16 August 2011, Detective Corporal Darren Rutherford ("the Plaintiff"), while on duty along with a team of eight police officers, was instructed by the servants and/or agents of the Commissioner of Police ("the 1st Defendant") to execute a search warrant on a residence at McCullough Corner East, in the Island of New Providence. During the process of executing the warrant, the Plaintiff was unfortunately shot by a fellow police officer. He sued his employer, the Commissioner of Police and the Attorney General, pursuant to the Crown Proceedings Act, (collectively "the Defendants") for damages for personal injuries

which he suffered. The Plaintiff alleges that the 1st Defendant by his servants and/or agents was negligent and/or in breach of the duty of care in failing, among other things, to take reasonable care for his safety and failing to exercise reasonable skill, care and diligence commensurate with that of a law enforcement officer. The Defendants say that the shooting was an accident and that Officer Daniel Ford (“Officer Ford”) was acting in lawful self defence.

[2] Given the unfortunate circumstances in which this shooting took place and, in an effort to resolve this dispute amicably, the Defendants are prepared to accept 75% liability if the Plaintiff would accept 25%. The Plaintiff countered the Defendants’ offer stating that he is willing to accept 10% liability. No agreement having been reached, the matter proceeded to trial.

The issues

[3] There are two issues to be considered namely:

- (i) Whether the Plaintiff’s injuries were caused by negligence and/or breach of duty on the part of the Defendants and;
- (ii) Whether the injuries were caused wholly or contributed by the Plaintiff’s own recklessness or negligence?

Background facts

[4] Some background facts are agreed. To the extent that there is a departure from the agreed facts, then what is stated must be taken as positive findings of facts made by me.

[5] On 16 August 2011, the Central Intelligence Bureau (“CIB”) of the Royal Bahamas Police Force (“RBPF”) received information from a confidential informant that one T.B. (name withheld for anonymity), a robbery suspect who was alleged to be armed with an AK 47 assault rifle, was in a room attached to a blue wooden house situated at McCollough Corner East in the Island of New Providence. As a result of this information, a search warrant was obtained and a team of eight police officers including the Plaintiff, proceeded to that residence. On arrival there, ASP

Bevans, PC 1856 Kirkland Sands (“Officer Sands”) and the Plaintiff entered the main residence. ASP Bevans was armed with the search warrant. The other five officers remained outside and guarded the residence.

[6] Officer Sands was the first to enter the residence. He cleared the rooms as ASP Bevans and the Plaintiff followed. On the inside of the residence were two females and a male. The male was hiding in a closet. Officer Sands took hold of the male, cautioned and arrested him and then took him to the kitchen area where the Plaintiff and ASP Bevans were. The two females and the male were quickly secured. Officer Sands returned to the room from which he took the male. He was assisted by the Plaintiff.

[7] The search continued for the weapon which, it was alleged, was in the suspect’s possession. The Plaintiff then proceeded to break an entry access in the partition that divided the main residence from the attached room. Once he had gained entry into the attached room, the Plaintiff, armed with a gun, proceeded to kick down a door. Guarding around the area of the door on the outside was Officer Ford. On observing the door being kicked open, he fired a single shot wounding the Plaintiff. The Plaintiff was rushed to Doctors Hospital where he underwent immediate surgery.

The law on negligence

[8] In the British Virgin Islands case of **The Attorney General v Craig Hartwell** [2004] UKPC 12, Lord Nicholls of Birkenhead, in delivering the judgment of the Board, on negligence, said at para. 20:

“Negligence as a basis of liability is founded on the impersonal ("objective") standard of how a reasonable person should have acted in the circumstances. Shortfall from this standard of conduct does not always give rise to legal liability. In order to elucidate the circumstances in which shortfall will give rise to liability the courts have fashioned several concepts, such as "duty of care". This familiar phrase is legal shorthand. Expressed more fully, a duty of care is a duty owed in law by one person or class of persons to another particular person or class of persons. The duty comprises an obligation to take reasonable care to ensure that the person or

persons to whom the duty is owed do not suffer a particular type or types of damage. Thus drivers of cars owe, among other duties, a duty to other road users to take reasonable care to avoid inflicting personal injury on the latter.” [Emphasis added]

[9] Put another way, in the tort of negligence, liability is based on the conduct of the defendant and has three elements namely:

1. The existence of a duty of care situation (i.e. one which the law attaches liability to carelessness). There has to be a recognition by law that the careless infliction of the kind of damage complained of on the class of person to which the plaintiff belongs by the class of person to which the defendant belongs is actionable;
2. Breach of the duty of care by the defendant, i.e. he failed to measure up to the standard set by law; and
3. A casual connection between the defendant’s careless conduct and the damage.

Existence of a duty of care

[10] On the existence of a duty of care, Lord Nicholls in **Craig Hartwell** [supra], at para.21 said:

“Speaking generally, one of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of reasonable care, harm of the relevant description might be suffered by the plaintiff or members of a class including the plaintiff? “Might be suffered” embraces a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. Bearing in mind that the underlying concept is fairness and reasonableness, the degree of likelihood needed to satisfy this prerequisite depends upon the circumstances of the case. Reasonable foreseeability does not denote a fixed point on the scale of probability: see Lord Hoffmann in *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082, 1091. There must be reasonable foreseeability of a risk which a reasonable person would not ignore. The risk must be “real” in the sense that a reasonable person “would not brush [it] aside as far-fetched”: see Lord Reid in *Overseas Tankship (UK) Ltd v Miller Steamship Co*

Pty (The Wagon Mound No 2) [1967] 1 AC 617, 643. As the possible adverse consequences of carelessness increase in seriousness, so will a lesser degree of likelihood of occurrence suffice to satisfy the test of reasonable foreseeability.[Emphasis added]

[11] In short, a duty of care will be owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care the plaintiff will be harmed.

[12] In the present case, it can hardly be disputed that the Defendants owed a duty of care to the Plaintiff who was acting in the execution of his duty.

Breach of the duty of care/ Burden of proof

[13] A defendant will be regarded as having breached his duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In **Blyth v Birmingham Water Works** [1856] 11 Exch. 781 at 784, Anderson B said:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

[14] Whether the defendant’s conduct has been negligent is determined by the risk factor which takes into account:

- (i) the likelihood of harm;
- (ii) the seriousness of that;
- (iii) the importance and utility of the defendant’s conduct; and
- (iv) the practicability of taking precautions.

The evidence

[15] The evidence tendered on behalf of the Plaintiff came from three witnesses namely Officer Sands, Detective Corporal Rudolph Sweeting (“Cpl. Sweeting”) and the Plaintiff himself.

[16] The first witness to testify on behalf of the Plaintiff was Officer Sands. He stated that he was the first officer to enter the house. He knocked on the front door and

shouted “police” in a loud voice. Shortly thereafter, he heard movements in the house as if the occupants were trying to hide something or themselves. As a result, he forced open the door. On entering, he saw two females who stated that they resided there. He informed them of the reasons for being there and ASP Bevans showed them the search warrant which one of the females appeared to have read. She was asked whether anyone else was in the residence and she answered in the affirmative. Officer Sands proceeded to a southern bedroom with his service pistol drawn and shouted “police” at the top of his voice. He then pulled open an unpainted wooden door that led to the room which, during the police briefing, was said to belong to the suspect.

[17] On checking the eastern section of the bedroom, he observed a male hiding in a closet. The male fitted the description of the wanted suspect. He took hold of the male, cautioned and arrested him. He also conducted a search on his person and then took him to the kitchen area where ASP Bevans and the Plaintiff were.

[18] ASP Bevans placed a plastic string on the suspect’s hands and placed him on the floor. Officer Sands stated he then shouted to the officers who were outside that the inside was cleared and they only had to check for the weapon which, it was alleged, was in the possession of the suspect.

[19] He returned to the room in which he apprehended the suspect to make additional checks. He was assisted by the Plaintiff. While searching the room, he heard when the Plaintiff kicked open the northern door that led to the outside where some officers were positioned. Simultaneously, he heard a loud bang which sounded like a gunshot. He heard the Plaintiff said “Sands, I got shot.”

[20] Under cross-examination, Officer Sands was calm and collected. With the aid of photos, he was able to reconstruct the scene on that fateful day in question. He identified where he and the Plaintiff were as well as the open door that he looked through when he saw the officers outside. I found him to be a sincere and honest witness.

- [21] The next witness for the Plaintiff was Cpl. Sweeting. He stated that he, along with ASP Bevans, Inspector Fernander, the Plaintiff and a team of other officers proceeded to a white and blue house on McCullough corner area. Officers immediately surrounded the house and two males, who were in the premises, were immediately ordered to the ground.
- [22] Cpl. Sweeting said that he observed a male run into the residence and closed the front door. Officer Sands gave chase, took cover at the front door and identified himself as a police officer. Officer Sands breached the front door in order to gain entry. He followed the fleeing male while the Plaintiff backed him up in the chase. He remained on the outside with about six (6) other officers to cover the front area of the house. He said that he walked in the area of the unpainted wooden shack to take cover. He checked the door of the shack. It was locked.
- [23] Cpl. Sweeting further stated that one of the plain clothes officers reported hearing movements in the shack so he moved back towards the road area and took cover in front of the house. He was still in a position to see the officers and the shack. He said that he heard a voice saying "police, police." Then a few minutes later, he heard the same voice saying "this room is clear."
- [24] Shortly thereafter, one of the plain clothes officers, discharged one round from his firearm, an Uzi, at the shack. About a minute later, he saw Officer Sands with the Plaintiff. The Plaintiff was holding his right shoulder. He later learnt that the Plaintiff was shot by a fellow police officer. He said that the Plaintiff was quickly placed in a marked police vehicle and taken to Doctors Hospital.
- [25] Under cross examination, Cpl. Sweeting largely corroborated the testimony of Officer Sands. I also find him to be a credible witness.
- [26] The Plaintiff was the last witness to testify. He stated that, on 16 August 2011, he was detailed to work the 8.00 a .m. to 4.00 p.m. shift. Sometime around 2.30 p.m., he was instructed to assist ASP Bevans in executing a search warrant in the

McCullough Corner area. There was a 10-minute briefing coordinated by ASP Bevans during which he advised that the suspect was armed and in possession of an AK 47 rifle.

[27] On arrival at the location, he, ASP Bevans and Officer Sands approached the front northern door of the residence. ASP Bevans was armed with the warrant. Officer Sands, dressed in police uniform, was the first to enter the residence. Whilst inside, all persons in the house were instructed to assemble in the living room area. They complied.

[28] The Plaintiff stated that while standing in the kitchen, he saw Officer Sands walked towards the back rooms, while he stood and watched over the persons in the living room. At the same time, he heard an officer who was outside shouted that he heard noises coming from the room that they were concentrating on. He went outside and pulled the door. It was locked. He did not hear any movements on the inside at the time. He then went back inside of the residence. He noticed Officer Sands opening a secondary core door that led to the room that they were concentrating on. Then he heard Officer Sands shouted "police, police" and a few minutes later, he went to the same door and met Officer Sands taking the suspect out of the room. The suspect was subsequently secured to the kitchen floor. The Plaintiff said he heard when Officer Sands shouted to the officers who were outside that the room was cleared.

[29] The Plaintiff went back to the room and stood by the door. According to him, the room was very dark. He attempted to reach for a light switch but could not find one. He then went to ASP Bevans and told him that they will have to kick open the door. ASP Bevans said "fine, then breach the door." He went back into the room with his police service weapon in his right hand. He placed his right hand on the right door frame and his left hand on the left door frame. He knew that there were police officers behind the door and civilians were at the rear of those officers. He kicked the door. His first attempt was unsuccessful. He tried a second time and the door opened and closed very quickly as though something or somebody was behind it.

At the same time, his gun dropped. At first, he thought that it was the impact of the door that caused that but as he bent down to pick it up, his hand was limp. He realised that he was shot.

[30] With the assistance of other police officers, he was rushed to Doctors Hospital where he underwent immediate surgery.

[31] Under cross-examination, the Plaintiff struck me as a credible and frank witness. I accepted his evidence as a truthful account of what took place. During re-examination, he gave detailed testimony of where his gun was at the time of the kicking of the door which was authorized by ASP Bevans. It seems logical to conclude that, given where the Plaintiff's hands were, the gun could not be visible to anyone who was on the outside of the door.

[32] The Plaintiff also subpoenaed Superintendent Dexter Hanna who, in my opinion, was a crucial witness. Supt. Hanna is in charge of the police armoury. His duties entail cataloguing and maintaining all police firearms and to ensure firearms training of all officers in the RBPF. He confirmed that Officer Ford, who shot the Plaintiff, was not officially trained to use the Uzi firearm which was in his possession at the time. Supt. Hanna also described the protocol with respect to the distribution of the weapons by the officer in charge of that section. Each officer must have a firearm authorization card. Officer Ford did not have such authorization to use an Uzi and consequently, he should not have been issued one.

[33] The Defendants called four witnesses, namely ASP Bevans, Inspector Brian Fernander, Detective Constable Satchell A. Robinson and Constable 3063 Daniel Ford to testify on their behalf.

[34] ASP Bevans testified that, on the afternoon in question, he led a team of officers to the residence at McCullough Corner East. He said the information which he received was that the suspect was armed with an AK 47 assault rifle and he was in a room attached to the residence. He said that he was also informed that there

was only one entry/exit to the room in which the suspect was hiding. According to him, all officers were all briefed of this information.

[35] ASP Bevans said that he was armed with the search warrant. On arrival at the residence, he, Officer Sands and the Plaintiff entered the residence as the other officers remained outside. He stated that the Plaintiff, who was the first in, cleared the rooms as he and Officer Sands followed. In the residence were two females and a male. They were secured. He said that he heard the Plaintiff said "hold on." The Plaintiff then took a few steps and disappeared around a partition in the house. He stayed with the females and male in the front room. Shortly thereafter, he heard noise coming from the area of the targeted room and the sound of a firearm discharge. Not long after, he saw the Plaintiff holding his shoulder and saying that he was shot. He held on to the Plaintiff who then told him that his firearm was in the room. ASP Bevans said that he went into the room to retrieve the firearm as the Plaintiff was assisted by Officer Sands. He was later taken to the hospital.

[36] ASP Bevans said he then went outside and was informed by Officer Ford that the door to the room was kicked open from the inside. He saw a man armed with a firearm so he discharged a single shot from his police issued Uzi machine gun, not realizing that he had shot a fellow officer.

[37] Under cross-examination, ASP Bevans insisted that it was the Plaintiff who apprehended the suspect. He also stated that he did not hear Officer Sands or the Plaintiff saying that the scene was clear and the suspect was apprehended. He maintained that there is only one door to the house. I found him to be a hesitant witness.

[38] Police Officer Robinson was the next witness to testify on behalf of the Defence. In his Witness Statement filed on 7 July 2014, he stated that sometime around 2.25 p.m., they arrived at the residence. The residence was completely surrounded by officers. He and Officer Ford positioned themselves on the outside of the residence near to the room that the suspect was said to occupy. He said that there

were two males on the outside of the residence who were immediately taken into custody for questioning. He then went to the targeted location, banged on the door and shouted "police". Shortly thereafter, he heard movements on the inside. He alerted the other officers. He continued to bang on the door and, at the same time, shouting "police." He said that the movements on the inside moved towards the door followed by the kicking the door from the inside. He moved away and took cover near a garbage bin. Subsequently, the door flew open and he saw the barrel of a handgun pointing in the direction of Officer Ford who was standing in the open. Officer Robinson said that he shouted "gun, gun" which was followed by the sound of a single gunshot. Later on, he realized that the Plaintiff was the one who was shot by Officer Ford.

[39] The next witness to testify on behalf of the Defendants was Inspector Fernander. Like Officer Robinson, he too was positioned on the outside of the residence. He too heard a shuffling sound on the inside of the residence. He saw when ASP Bevans, Officer Sands and the Plaintiff entered the residence. He also saw ASP Bevans with a third young man who was later taken into custody, He then went to the western side of the house to seek protection. Suddenly, he heard a thump on the door as if someone was trying to get out. He heard the thump again, he saw when the door swung open. He then saw Officer Ford pulled his police issued Uzi weapon and fired a single shot at the person. Later on, he realized that the Plaintiff was shot by Officer Ford.

[40] Under cross-examination, Inspector Fernander confirmed that the door swung wide open and swung back in. It happened in a matter of seconds; not a minute. When the door swung open, he saw an image but he did not recognize the image. He was unable to state whether the image was a male or a female but he saw a silver gun. The image was holding it in his right hand. At the time that Officer Ford shot at the image, the door was in the motion of closing back.

[41] Police Officer Ford was the officer who shot the Plaintiff. He testified that he was issued an Uzi sub machine gun with 25 rounds of ammunition. He confirmed that

ASP Bevans, Officer Sands and the Plaintiff entered the house through the front door. A few minutes later, he heard Officer Robinson alerting officers that he heard a rumbling noise coming from the inside of the house which he was concentrating on. Officer Robinson continued shouting "police, come out". Officer Ford said that he also heard what appeared to be movements in the area of the room. Then, he heard a loud sound as if someone was trying to force the door open from the inside. The sound continued and suddenly the door opened and he saw a male holding a silver pistol in his hand pointing it in his direction. He was unable to identify the male because he could not see his face.

[42] Officer Ford said that he immediately became fearful for his life so he fired a single shot at the man. He later learnt it was the Plaintiff.

[43] Under cross-examination, Mr. Ford stated that he was trained by the Defence Force to use an Uzi sub machine gun. However, he was unable to state exactly when and who trained him to use such weapon. Nonetheless, he confirmed that he was not trained by the Armoury Department and he had no certificate.

[44] Under further cross-examination, Officer Ford stated that he did not hear Officer Sands shouted that the scene was clear. He confirmed that the door swung wide open and then closed. He was unable to see the face of the person from the angle that the person was standing but was able to discern that the person was a male by the body structure. He was convinced that it was a male because he saw the chest area and the hands. He said that the male figure had a silver hand gun pointing towards him but he was unable to say whether it was in his right or left hand. That aroused his fear for his life and he fired one shot at the male.

[45] Having had the opportunity of seeing and hearing the witnesses, on a balance of probabilities, I found the evidence adduced by the Plaintiff and his witnesses to be more plausible to that of the Defendants. I found the Plaintiff and his witnesses to be credible. In my opinion, they were sincere and honest in their respective testimony.

- [46] On the other hand, I found the Defendants' witnesses to be unreliable. In my opinion, ASP Bevans was evasive in his answers. He indicated that the Plaintiff apprehended the suspect when both Officer Sands and the Plaintiff testified that it was Officer Sands, the uniformed police officer, who apprehended the suspect. Like the Plaintiff, he confirmed that the room was dark. Notwithstanding, he said that he retrieved the weapon from the dark room in the face of Inspector Fernander's report stating that he (Inspector Fernander) retrieved the gun from the chair in the living room. When this was suggested to ASP Bevans, he then changed his story and said that he placed the gun that the Plaintiff had on the chair. Interestingly, he was not able to say where in the room he found the firearm, save for on the floor. Even with the aid of the photos, he could not state where in the room the gun was.
- [47] With respect to Officer Robinson, he indicated that when the door flew open, he saw the gun from an angle. He did not see who was holding it but he saw an extended hand. He saw the hand with the gun pointed at Officer Ford and, at that point, he shouted "gun, gun". He was unable to describe the colour or make of the gun. He however acknowledged that an AK 47 is longer than a handgun and on the briefing that they received, the alleged robber was armed with an AK 47 which he said, is still a gun. Like learned Counsel Mr. Gibson, I also am surprised that Officer Robinson, then a Corporal of Police, having seen a gun, was unable to say whether it was an AK 47 or a handgun. Overall, I did not find him to be a credible witness.
- [48] From the evidence, Inspector Fernander was the most senior officer guarding the outside of the residence. Inspector Fernander's weapon was not drawn as he did not see a threat. When the door swung open and closed back in a matter of seconds, he was able to see an image holding a handgun in his right hand. He did not see an AK 47 and he was aware that three of his colleagues were armed and were in the residence at the time.

[49] Now, to Officer Ford. He was the most junior officer on the outside. He was armed with an Uzi sub machine gun. He said that his life was in danger as the male, armed with a silver handgun, was pointing it in his direction. He was unable to say how wide the door swung open and then quickly closed. However, he agreed that the bullet hit the door first before hitting the person who was behind it. This also corresponds with the photographs. This meant that the door was either partially or fully closed.

Discussion

Issue 1: Breach of duty of care

[50] In paragraph 4 of his Statement of Claim filed on 11 May 2012, the Plaintiff pleaded that he was negligently/recklessly and in breach of duty of care shot by a servant and/or agent of the First Defendant namely a police officer. He particularized the negligence as follows:

“The First Defendant by its servant and/or agent was negligent and/or in breach of his duty in that he:

- i. Failed to take reasonable care for the safety of the Plaintiff during execution of the search warrant;
- ii. Failed to ascertain whether the Plaintiff was in fact a police officer or a suspect before firing his weapon;
- iii. Fired his weapon into a house which at the time was known to contain police officers; and
- iv. Failed to exercise reasonable skill, care and diligence while acting in his capacity as a police officer.”

[51] In their Defence, the Defendants denies the allegations in paragraph 4 of the Statement of Claim. In paragraph 4 of their Defence, the Defendants outlined their account of what happened (some of which I found to be incredulous) and stated at paragraph 4 (l) that one of the officers guarding the outside of the only known entry/exit to the attached room, observing that the door was knocked open by an

armed person and fearing that the suspect was about to fire on them, fired a single shot wounding the Plaintiff.”

[52] In paragraph 4(m), the Defendants further alleged that the Plaintiff was accidentally shot and there was no negligence on the part of the Defendants and/or their agents.

[53] In my opinion, self-defence and accident have no place in this action. Even if I am wrong to come to this conclusion, the law of self-defence is well settled and is derived from the leading criminal case of **Beckford v The Queen** Privy Council Appeal No. 9 of 1986 which learned Counsel Mr. Mackey heavily relied upon.

[54] With respect to accident, even though pleaded, no evidence was led by the Defendants to this effect. That said, I harbour great doubt as to whether you could plead accident as a defence in a civil case where negligence is alleged. Like self-defence, this defence does not warrant any further consideration.

[55] The more pertinent question is whether the Defendants, through their servants and/or agents were negligent and breached the duty of care which they owed to the Plaintiff.

[56] Firstly, I found as a fact that Officer Ford was not trained by the Police Armoury to use an Uzi sub- machine gun. I did not believe his account that he was trained by the Defence Force. He could not recall when and who trained him. He was therefore issued a firearm for which he was not competent to use. In **Craig Hartwell** [supra], Lord Nicholls at para. 33 to 40 alluded to the standard of care by police officers when dangerous weapons are issued to them. Undeniably, it is a very high standard. At para. 37, Lord Nicholls said:

“If police firearms are entrusted to police officers who are not competent to use them there is an obvious risk of danger to members of the public.”

[57] I therefore find that the Defendants breached the duty of care and were therefore negligent when they issued an Uzi sub machine gun to Officer Ford who was not competent to use it.

[58] Additionally, I found as a fact that Officer Ford ought to have known that three of his colleagues were armed and were in the residence at the material time. It was therefore incumbent on him to ascertain the identity of that male with a handgun before he discharged his firearm. He failed to do so. He also failed to exercise reasonable skill, care and diligence while acting in his capacity as a police officer.

[59] Even if the male had a gun pointing in Officer Ford's direction (which I do not believe), the door quickly closed whether fully or partially. The armed male had retreated. There was therefore no threat for his life. Actually, there was no threat to anyone's life. Inspector Fernander was comfortable to have his weapon not drawn.

[60] For all of these reasons, I find that the Defendants breached the duty of care which they owed to the Plaintiff.

Issue 2: Contributory Negligence

[61] This defence was not pleaded and therefore, it cannot be relied upon by the Defendants: see Barnett JA in **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 at para 39 where he said:

“The starting point must be the pleadings. In *Loveridge and Loveridge v Healey* [2004] EWCA Civ 173, Lord Phillips MR said at paragraph 23:

“In *Mcphilemy vs Times Newspapers Ltd.* [1999] 3 All ER 775 Lord Wolff MR observed:

‘Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties.’” [Emphasis added]

[62] At para [40], Sir Michael continued:

“It is on the basis of the pleadings that the party’s [sic] decide what evidence they will need to place before the court and what preparations are necessary before trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.”

[63] Since the Defendants did not plead contributory negligence and did not accept the 10% liability which the Plaintiff was prepared to bear, I have to determine this case on the strict letter of the law. I therefore find that since contributory negligence was not pleaded, the Defendants cannot rely on it to reduce the quantum of damages.

Conclusion

[64] The Defendants are wholly liable for the injuries caused to the Plaintiff who was gainfully employed by the 1st Defendant at the time of this incident. He was executing a warrant when he was shot by a fellow police officer. It is unfortunate that this matter was not settled out of Court.

[65] I will assess damages on Thursday, 17 October 2019 at 2.30 p.m. There will be a Directions Hearing on Monday, 23 September 2019 at 12.30 p.m.

Dated 31st day of July A.D., 2019

Indra H. Charles

Justice

