CASE and COMMENT

Beim v. Goyer [1]

Robert Leclerc *

Beim v. *Goyer* was a decision of the Supreme Court on an action in damages taken by the Appellant Ralph Beim (through his tutor) against Respondent and the City of Montreal, for injuries he sustained as a result of a gunshot fired by Respondent, a police officer of the City of Montreal. Officers Ménard and Goyer saw Appellant driving an automobile, which they knew to be stolen, in the wrong direction on a one-way street. They pursued Appellant, signalling him to stop; young Beim ignored this direction, accelerated and sped in flight from the policemen. He soon abandoned the car and took to a nearby field. Constable Ménard was the first to leave the police car and gave chase on foot; he called out to Beim and in urging him to stop, fired four warning shots from his revolver. Out of breath, Ménard gave up pursuit and Respondent Goyer left the car to continue in the attempts to apprehend Appellant. As he ran across the snow-covered field, Goyer fired two warning shots and, since the fugitive had given no indication that he would stop running, prepared to fire a third shot into the air. Unfortunately, Officer Goyer fell, striking his right elbow on the ground. A shot was discharged accidentally which struck Appellant in the back, injuring him seriously.

At trial Charbonneau, J., in accordance with the verdict of the jury, dismissed the claim against the City but maintained the action against Goyer to the extent of some $32,000. In the Court of Queen's Bench [2] this judgment was affirmed regarding the City but reversed with respect to the claim against Constable Goyer. The Supreme Court, by a 6-3 majority, reversed the latter judgment (the only one on appeal), restoring the decision of first instance.

This recent holding of the Supreme Court raises some most interesting questions as to the liability of a police officer for acts done in the exercise of his duty to attempt to apprehend someone

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[1] [1965] S.C.R. 638.

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[2] *Gordon* v. *Goyer* [1964] B.R. 558.

whom he reasonably believes to be committing a criminal offence. It is proposed that two of these questions be discussed, the standard of conduct and the nature of the duty of care which is demanded of the police officer in such circumstances, and the significance of the distinction between an accidental and an intentional wound which a policeman may inflict on the individual whom he so pursues.

On the first question (the conduct and care criterion) Abbott, J., in speaking also for the Chief Justice and Cartwright and Hall, J.J., found that there was fault and negligence on the part of Constable Goyer. In allowing the appeal he adopted primarily the words used at trial, to the effect that Respondent's negligence consisted in "carrying a revolver with finger on the trigger while running over rough and stony ground, after having previously fallen a number of times." Mr. Justice Ritchie, while concurring in this opinion, gave further reasons for allowing the appeal, which included among others his application of the foreseeability test set out in the *Priestman*[3] case by the Court of Appeal of Ontario. There, Laidlaw, J. A., dissenting, stated that:

> In order to find that he [Officer Priestman] was negligent I think it would be necessary to find that he ought reasonably to have foreseen that his arm might be jolted at the instant he fired, and that the injuries that resulted were such as a reasonable man would contemplate.

Thus, this rule, which was approved by the Supreme Court, meant that a police officer who injured someone while performing the duties for which he was employed, would be excused from liability as long as he could not reasonably be expected to have foreseen the cause of the injurious act (the jolting of his arm) and, whether he foresaw this or not, he would have to have reasonably foreseen the particular damages which resulted.

Although Laidlaw, J. A. felt that Priestman had passed the foreseeability test, Ritchie, J. concluded that Constable Goyer had not. As he had already fallen twice on the snowy field, he should have been aware of the likelihood of a third fall.

Assuming that the foreseeability test is proper and relevant to the examination of the standard of conduct and the duty of care demanded of the police officer, it is difficult to appreciate why Mr. Justice Ritchie could come to the conclusion that he did on the basis of the rule as framed by Laidlaw, J. A. in *Priestman*. In the latter case, one of two police officers in a patrol car, after having fired a warning shot into the air, of which the driver of the pursued stolen

[3] [1958] D.L.R. 7 at p. 15; rev. by [1959] S.C.R. 615.

car took no notice, sought to shoot at one of the rear tires. At that instant, the patrol car struck a bump in the road and the officer missed his mark. Instead, he hit the rear window and the bullet ricocheted and struck the driver of the car, who then lost control of the vehicle which mounted the sidewalk and killed two pedestrians. The Supreme Court by a majority (3-2) exonerated Officer Priestman from liability to the estates of the deceased third parties. In view of these circumstances, would it not seem more consistent with *Priestman* if the Supreme Court had dismissed the appeal in *Beim* v. *Goyer?* As Martland, J. points out in his dissenting opinion (at p. 646, S.C.R.), the shot in *Priestman* was fired "deliberately... on a city street in a populated area, and set in motion events which resulted in the deaths of two innocent people". In *Beim* v. *Goyer,* there was no chance of injury to a third party from the relationship between the police officer and the fugitive Beim. Furthermore, there was no intention to arrest the movement of the fugitive, either directly (by shooting at him) or indirectly (by shooting in a way analogous to the conduct and purpose which governed the officer's action in *Priestman*). On the contrary, the intent was not to use force of any description against the accused, but merely to fire a warning shot into the air. One such warning shot unfortunately hit Beim — an occurrence that would hardly seem likely considering that the bullet discharged from the gun at the time of the third fall could have followed many lines other than the one leading to Respondent's spine.

In regard to the distinction between the accidental and the intentional wound which a police officer may inflict while attempting to apprehend someone whom he has reason to believe to be committing a criminal offence, it was the opinion of Spence, J. that because of this the only issue before the Supreme Court was that of negligence. In his view the accidental character of the discharging of the shot precluded discussion of the application or effect of S. 25(4)[4] of the *Criminal Code.* As there was no intent, there could be no question of measuring the degree of force that was permissible in the circumstances. Thus Justice Spence was content, as were the other judges of the majority opinion, to proceed directly to the "pure question of negligence". Abbott, J. described the issue as "... whether the re-

[4] S. 25(4) states that "A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and everyone lawfully assisting the peace officer, is justified, if the person to he arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner."

spondent was at fault, in failing to exercise proper care in the use of firearms when pursuing the appellant" (p. 642) and concluded that Constable Goyer was at fault for the reason that he carried a revolver with his finger on the trigger "while running over rough and stony ground after having fallen a number of times."

It is submitted that while Respondent might not have been able to invoke s. 25(4) of the *Criminal Code* in his defence (for the reason set out by Spence, J.) it would have been more consistent with *Priestman*, and the foreseeability tests approved by the Supreme Court in that case, to approach the question of negligence by first examining closely the relationship between the two parties before the Supreme Court in 1965. At trial, the jury answered that the discharge of the revolver occurred through improper handling by the Respondent, and to elaborate on this finding gave the reason cited by Mr. Justice Abbott in the preceding paragraph. On this matter the trial judge charged the jury as follows:

> ... in my opinion if the revolver was discharged accidentally it would be through the fault and negligence of Defendant Goyer. He had tripped twice before. He was running with a cocked revolver.

In the light of this view, might one conclude that if the officer had only had his finger on the trigger when he was about to fire the third warning shot he would have been excused from liability? If the fault existed in that Goyer was "carrying a revolver with finger on the trigger ..." then perhaps the constable would have been a free man had he been careful to put his finger on the trigger only when he was about to fire the first, second or third warning shot.

Unfortunately, *Beim* v. *Goyer* does not provide us with an answer to such questions, as the relationship between Plaintiff and Defendant was never fully explored at trial. One is left wondering exactly what a police officer may do in attempting to apprehend someone whom he has reason to believe to be committing or to have committed a criminal act. It would seem that, as Martland, J. suggests in his dissenting opinion (at pp. 650-651) the real issue in this case was not met, grasped and determined at trial:

> The issue which the jury should have been asked to determine was whether the conduct of the respondent, during his pursuit of the appellant, was negligent, and, in determining that issue, they should have been instructed that such conduct had to be considered in light of the fact that the appellant was seeking to escape arrest, and that the respondent was a peace officer, with the rights defined in S. 25(4) of the *Criminal Code*. They should have been asked to determine whether, under those circumstances, it was negligent for the respondent to carry his revolver in his hand, and whether it was negligent for him to fire a warning shot in the course of pursuit without coming to a halt.

Rather than explore the context of the events, the trial judge found that there was fault on Respondent's part because of something antecedent to the actual time and circumstances in which the wound was inflicted. There was no real consideration of the fact that Respondent was not just any other citizen but, on the contrary, a peace officer, in pursuit of someone seeking to escape arrest, and who in so doing is justified "in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner." In this context, Respondent carried a revolver and fired a number of warning shots, both with the object of performing his legal duty to arrest. It was left undecided as to whether Respondent could proceed in this fashion. Instead of being able to appreciate the nature of the duty of care owed by Respondent to young Beim in the light of his duty to make an arrest, the circumstances were reduced by the trial judge to a pure consideration of conduct accidental to the true question as to what action the policeman was allowed to take in this particular situation.