BRUCE PRIESTMAN (*Defendant*) .....APPELLANT;

AND

ANTHONY COLANGELO and RALPH SHYNALL (*Plaintiffs*) ..... } RESPONDENTS;

AND

ROBERT SMYTHSON (*Defendant*) .....RESPONDENT.

1958
Dec. 10, 11, 12
1959
*Apr. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Police officer—Liability—Police car pursuing stolen car—Warning shot of no effect—Second shot aimed at rear tire—Uneven road causing shot to wound thief-driver—Stolen car going out of control and killing two pedestrians on sidewalk—Whether excessive force used—Whether negligence—The Police Act, R.S.O. 1950, c. 279—The Criminal Code, 1953-54 (Can.), c. 51, ss. 25(4), 230, 232.

Two uniformed police officers in a patrol car pulled alongside a stolen car at an intersection and ordered the driver, one S, to pull over. Instead he turned to his right and drove west at a high rate of speed along a residential street. The police car followed in close pursuit and on three occasions attempted to pass it, but each time S cut it off, and on the third occasion the police car was forced over the curb. Then P, one of the officers, fired a warning shot in the air, but S increased his speed. As the cars were approaching a very busy intersection, P fired a shot aimed at the left rear tire of the stolen car. As he fired this shot, the police car struck a bump in the pavement. The

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

bullet struck the rear window of the stolen car, ricochetted and struck S, rendering him unconscious. S's car went out of control, mounted the curb and hit fatally two student nurses standing on the sidewalk. The administrators of their respective estates sued P and S for damages, and S sued P for damages. The three actions were tried together.

The trial judge maintained the actions against S and dismissed them as against P. In the Court of Appeal, the appeal of the administrators was allowed and the appeal of S dismissed. In this Court, P appealed; and the administrators and S cross-appealed.

Held (Cartwright and Martland JJ. dissenting): The appeal of the police officer P should be allowed and the cross-appeals dismissed.

Per Taschereau and Locke JJ.: The evidence did not disclose a cause of action against P. The proximate cause of the fatal injuries sustained by the two nurses was the negligent and criminal conduct of S, the driver of the stolen car.

The officers were engaged in the performance of a duty imposed upon them by the *Criminal Code* and by *The Police Act*. In considering whether the firing of the second shot was a reasonable attempt by P to discharge his duty, it was to be borne in mind that S was a thief and had demonstrated that he was prepared to jeopardize the lives of both officers. The manner in which S had driven the stolen car constituted an indictable assault upon the officers: ss. 230, 232 of the *Criminal Code*. In deciding whether in any particular case a police officer had used more force than was reasonably necessary to prevent an escape within the meaning of s. 25(4) of the *Criminal Code*, general statements as to the duty to take care to avoid injury to others made in negligence cases could not be accepted as applicable without reservation unless full weight was given to the fact that the act complained of was one done under statutory powers and in pursuance of a statutory duty.

The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty is *damnum sine injuria*. Broom's Legal Maxims, p. 1; *British Cast Plate v. Meredith*, 4 T.R. 794 and *Fisher v. Ruislip-Northwood Urban District Council*, [1945] 1 K.B. 584, followed.

If the circumstances are such that the legislature must have contemplated that the exercise of a statutory power and the discharge of a statutory duty might interfere with private rights and the person to whom the power is given and upon whom the duty is imposed acts reasonably, such interference will not give rise to an action. In this case, the action of P was reasonably necessary and no more, both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car had reached the approaching intersection. So far as P was concerned, the fact that the bullet struck S was simply an accident.

Per Fauteux J.: The appeal of P should be allowed for the reasons given by Laidlaw J. in the Court of Appeal.

Per Cartwright and Martland JJ., *dissenting*: Assuming that S's escape could not have been prevented by reasonable means in a less violent manner and that P was therefore justified in using his revolver, the

question arises as to whether s. 25(4) of the Code applied not only as against S but also as against third persons. As a matter of construction, it should be taken in its restricted sense as applicable only against S. If Parliament intended to enact that grievous bodily harm or death might be inflicted upon an entirely innocent person and that such person should be deprived of all civil remedies to which he would otherwise have been entitled, in circumstances such as those of this case, it would have used words declaring such intention without any possible ambiguity. Section 25(4), therefore, afforded no justification to P for causing the death of the two nurses.

The duty to apprehend S was not an absolute one to the performance of which P was bound regardless of the consequences to persons other than S. In the circumstances of this case, P should not have fired as he did and was, therefore, guilty of negligence in so doing. If, as was contended, the continuation of the pursuit would almost inevitably have resulted in disaster, it was the duty of the police to reduce their speed and, it may be, to abandon the pursuit rather than open fire.

APPEALS and CROSS-APPEALS from a judgment of the Court of Appeal for Ontario[1], reversing in part a judgment of Barlow J. Appeals allowed and cross-appeals dismissed.

T. N. Phelan, Q.C., for the defendant, appellant.

J. W. Brooke, for the plaintiff Colangelo, respondent.

H. P. Cavers, for the plaintiff Shynall, respondent.

G. R. Dryden, for the defendant Smythson, respondent.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—In this matter I agree with Mr. Justice Laidlaw, who dissented in the Court of Appeal[1], that the evidence does not disclose a cause of action against the appellant Priestman by reason of the deaths of Columba Colangelo and Josephine Shynall. The proximate cause of the fatal injuries they sustained was the negligent and criminal conduct of the respondent Smythson.

It is to be remembered that the appellant Priestman and Constable Ainsworth, in attempting to effect the arrest of Smythson, were exercising powers conferred upon them by the *Criminal Code* and, at the same time, attempting to

[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

discharge a duty imposed upon them by *The Police Act,* R.S.O. 1950, c. 279 s. 45. That section, so far as it need be considered, reads:

> The members of police forces appointed under Part 11 shall be charged with the duty of preserving the peace, preventing robberies and other crimes and offences . . . and apprehending offenders.

Section 25 provides by subs. (1) that every peace officer who is required or authorized by law to do anything for the enforcement of the law is, if he acts on reasonable and probable grounds, justified in doing what he is required to do and in using as much force as is necessary for that purpose. Subsection (4) reads:

> 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 . . . is justified, if the person to be 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.

Smythson had stolen the car and was fleeing arrest and in the course of doing so committed other criminal offences to which I refer later, and for any of these was subject to arrest without warrant under the provisions of ss. 434, 435 and 436 of the Code.

The officers were thus not merely performing an act permitted by these statutes but engaged in the performance of what was a duty imposed upon them, a fact which, in my view, has a vital bearing upon the question of the liability of Priestman.

In *British Cast Plate v. Meredith*[1], an action was brought against the defendants who were acting under the authority of the commissioners appointed under a *Paving Act,* which authorized them to pave streets in the Parish of Christchurch in Surrey. In the course of doing so, the pavement was raised substantially which interfered with the user of the premises of the plaintiff which fronted on the street. Lord Kenyon C.J. said that it did not appear that the commissioners had been guilty of any excess of jurisdiction and, while some individuals may suffer an inconvenience

[1] (1792), 4 T.R. 794, 100 E.R. 1306.

under all such Acts of Parliament, the interests of individuals must give way to the accomodation of the public. Buller J. said in part (p. 797):

> There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the King's enemies. The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction: but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex.* If the thing complained of were lawful at the time, no action can be sustained against the party doing the act.

The *British Cast Plate* case was referred to with approval by the House of Lords in *Mersey Docks v. Gibbs*[1] by Lord Blackburn at p. 112. As is there pointed out, loss so sustained is *damnum sine injuria.* This does not, however, relieve those exercising such statutory powers of the duty to take reasonable care in exercising them. Lord Blackburn points out in the passage above referred to that, though the legislature has authorized the execution of the work, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done.

In *Geddis v. Proprietors of Bann Reservoir*[2], Lord Blackburn, referring to the exercising of statutory powers, said that it was thoroughly well established that no action would lie for doing what the legislature has authorized if it be done without negligence, although it does occasion damage to anyone, but that an action would lie for doing that which the legislature has authorized if it be done negligently.

There may, however, be duties imposed upon public officers and others for the protection of the public, the performance of which in many circumstances may involve risk of injury to third persons.

In a recent case in England, *Fisher v. Ruislip-Northwood Urban District Council*[3], Lord Green made an exhaustive examination of the cases dealing with the liability of persons exercising statutory powers and duties and, in the

[1] (1866), L.R. 1 H.L. 93. [2] (1878), 3 App. Cas. 430 at 455.
[3] [1945] 1 K.B. 584.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

course of his judgment after saying that undertakers entrusted with statutory powers are not in general entitled in exercising them to disregard the safety of others, said (p. 592):

> The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and, if so, how far the duty extends in any given circumstances. If the legislature authorizes the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons. So to hold would make nonsense of the statute.

Actionable negligence has been defined in a variety of manners. In *Vaughan v. the Taff Vale Railway Company*[1], Willes J. said that the definition of negligence is the absence of care according to the circumstances. The concluding words of this short definition are at times lost sight of and are those which must be kept most clearly in mind in considering an action such as the present, which is based on what is said to have been a negligent manner of discharging the duty which rested upon the constables.

It was at the corner of Donland and Mortimer Streets, where the traffic is controlled by lights, that the police car driven by Constable Ainsworth drew alongside the stolen car driven by Smythson and Priestman ordered the latter to pull in to the curb. Smythson, apparently appreciating that Priestman was a police officer, turned to his right and drove, at a rate of speed which apparently varied from 40 to 60 miles an hour, west on Mortimer Street. The police car followed in close pursuit, Ainsworth attempting to get his car ahead of the stolen car in order to stop it and, three times within a distance of 600 feet, Smythson cut in ahead of the police car, making it necessary for Ainsworth to check the speed to avoid a collision. The third time this was done the police car was forced up over the south curb of Mortimer Street where it narrowly escaped crashing into a telephone pole. It was not until after this had occurred that Priestman first fired the warning shot into the air and thereafter, at a time when the police car was again upon the pavement driving west in a position to the south of

[1] (1860), 5 H. & N. 679 at 688, 157 E.R. 1351.

the stolen car, no attention having been paid to the warning shot Priestman fired a second shot aimed at the left rear tire of the stolen car, in the hope of bringing the car to a halt or slowing it down by the blowing out of the tire.

According to Priestman, the complete face of the tire was fully exposed to him when he fired, evidence which is supported by the photograph of the car which forms part of the record. It was then approximately 40 feet distant. Priestman had spent two years in the army during the recent war and had been trained in the use of small arms and had received further training for some three weeks when he became a member of the police force and said that he considered himself to be a better than average shot with a revolver. Accordingly to the uncontradicted evidence, which was accepted by Barlow J., it was the fact that, just as he fired the second shot, the police car struck a bump in the pavement which elevated his aim and resulted in the bullet striking the rear window of the stolen car and Smythson received the wound which disabled him.

Both of the police officers say that as they drove west on Mortimer Street there was no traffic on the roadway in either direction and they saw no pedestrians upon the sidewalks. The speed of the cars up to the time that the police car was forced up on to the boulevard was estimated by Ainsworth at from 35 to 50 miles an hour, and thereafter had increased and both were travelling at a speed estimated at 55 to 60 miles an hour. Mortimer Street is intersected to the west of the place where the shot was fired by Woody Crest Street and Pape Avenue. The first intersection where traffic might have been encountered travelling from north to south was, as closely as can be determined from the evidence, some 250 feet from the place where the second shot was fired. The intersection with Pape Avenue was, according to the plan put in evidence, 550 feet further to the west. Pape Avenue, was a through street, said by the appellant to be the busiest street in the township and both constables say that they were conscious of the necessity of attempting to stop the fleeing car before it reached that intersection.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

In considering whether the action of Priestman in firing the second shot was a reasonable attempt by him to discharge his duty, it is to be borne in mind that, as the constables were both aware Smythson was a thief and he had demonstrated that he was prepared, in order to escape, to jeopardize both of their lives. The manner in which he had driven the car constituted an assault upon the officers, as defined by s. 230 of the Code. Assaults upon peace officers engaged in the execution of their duty are indictable under s. 232 of the Code. Forcing the police car over the curb was an attempt to cause the officers grievous bodily harm and, had the police car collided with the telephone pole at the rate of speed it was then travelling, the collision might well have been fatal to one or both of the constables and Smythson indictable for murder. Whatever may have been Smythson's previous record, he acted in a recklessly dangerous and criminal manner in his efforts to escape. The officers had made three determined efforts to halt the car by getting ahead of it, which had been frustrated. At the rate of 50 miles an hour the fleeing car would have reached the first of the two intersections in something less than four seconds and the second in about 10 seconds, travelling at a speed which would give no opportunity to Smythson to avoid cross traffic at the intersection or for such traffic to avoid a collision.

In deciding whether in any particular case a police officer had used more force than is reasonably necessary to prevent an escape by flight within the meaning of subs. 4 of s. 25 of the Code, general statements as to the duty to take care to avoid injury to others made in negligence cases such as *Polemis v. Furness Withey and Company*[1], *Hay or Bourhill v. Young*[2], and *M'Alister or Donoghue v. Stevenson*[3], cannot be accepted as applicable without reservation unless full weight is given to the fact that the act complained of is one done under statutory powers and in pursuance of a statutory duty. The causes of action asserted in these cases were of a different nature.

[1] [1921] 3 K.B. 560. [2] [1943] A.C. 92.
[3] [1932] A.C. 562 at 580.

The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty, is imposed by the statute and any resulting damage is, in my opinion, *damnum sine injuria.* In the article in the last edition of Broom's Legal Maxims, p. 1, dealing with the maxim *salus populi suprema est lex* where the passage from the judgment of Buller J. in the *British Cast Plate* case is referred to, the learned author says:

> This phrase is based on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.

Assuming a case where a police officer sees a pickpocket stealing from a person in a crowd upon the street and the pickpocket flees through the crowd in the hope of escaping arrest, if the officer in pursuit unintentionally collides with some one, is it to be seriously suggested that an action for trespass to the person would lie at the instance of the person struck? Yet, if the test applied in the cases which are relied upon is adopted without restriction, it could be said with reason that the police officer would probably know that, if he ran through a crowd of people in an attempt to arrest a thief, he might well collide with some members of the crowd who did not see him coming. To take another hypothetical case, assuming a police officer is pursuing a bank robber known to be armed and with the reputation of being one who will use a gun to avoid capture. The escaping criminal takes refuge in a private house. The officer, knowing that to enter the house through the front door would be to invite destruction, proceeds to the side of the house where through a window he sees the man and fires through the window intending to disable him. Would an action lie at the instance of the owner of the house against the officer for negligently damaging his property? If an escaping bank robber who has murdered a bank employee is fleeing down an uncrowded city street and fires a revolver at the police officers who are pursuing

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

him, should one of the officers return the fire in an attempt to disable the criminal and, failing to hit the man, wound a pedestrain some distance down the street of whose presence he is unaware, is the officer to be found liable for damages or negligence?

The answer to a claim in any of these suppositious cases would be that the act was done in a reasonable attempt by the officer to perform the duty imposed upon him by *The Police Act* and the *Criminal Code,* which would be a complete defence, in my opinion. As contrasted with cases such as these, if an escaping criminal ran into a crowd of people and was obscured from the view of a pursuing police officer, it could not be suggested that it would be permissible for the latter to fire through the crowd in the hope of stopping the fleeing criminal.

The difficulty is not in determining the principle of law that is applicable but in applying it in circumstances such as these, In *Rex v. Smith*[1], Perdue J. A., in charging a jury at the trial of a police officer for manslaughter, is reported to have said that shooting is the very last resort and that only in the last extremity should a police officer resort to the use of a revolver in order to prevent the escape of an accused person who is attempting to escape by flight. With all the great respect that I have for any statement of the law expressed by the late Chief Justice of Manitoba, in my opinion this is too broadly stated and cannot be applied under all circumstances. Applied literally, it would presumably mean in the present case that, being unable to get in front of the escaping car, due to the criminal acts of Smythson, the officers should have abandoned the chase and summoned all the available police forces to prevent the escape. This would have involved ignoring their obligation to endeavour to prevent injury to other members of the public at the intersections which would be reached within a few seconds by the escaping car.

Police officers in this country are furnished with firearms and these may, in my opinion, be used when, in the circumstances of the particular case, it is reasonably necessary to do so to prevent the escape of a criminal whose actions, as in the present case, constitute a menace to other

[1] (1907), 13 C.C.C. 326, 17 Man. R. 282.

members of the public. I do not think that these officers having three times attempted to stop the fleeing car by endeavouring to place their car in front of it were under any obligation to again risk their lives by attempting this. No other reasonable or practical means of halting the car has been suggested than to slacken its speed by blowing out one of the tires.

The reasons for judgment delivered by Schroeder J. A. make no mention of the fact that at the time the second shot was fired the stolen car was approaching the intersection of Mortimer Street with Pape Avenue. I do not assume from the fact that this was not mentioned that the matter was not considered by that learned judge but, with great respect, I think insufficient weight was given to this important fact as well as to the criminal nature of the actions of Smythson in forcing the police car off the roadway. Both Barlow J. and Laidlaw J. A. considered the bearing that the rapid approach of the vehicle to the intersection with Pape Avenue had on the issue of negligence. Both of these learned judges have referred in their reasons to the fact that the shooting of Smythson resulted from the police car striking a rough place in the highway and both considered that the constables had exhausted all reasonable means of stopping the car before the shot was fired. With these conclusions, I respectfully agree.

The pavement on Mortimer Street was 35 feet in width and the sidewalks on either side lay five feet distant from the curb. The houses on either side are set back at varying distances from the lot lines in the block to the east of Woody Crest, except at the intersection with that street. It is undisputed that there was no other vehicular traffic on the street to the west of the speeding cars that was visible to Priestman. Some little children were playing on the lawn at some place in front of the house on the southwest corner of Woody Crest and Mortimer, but the evidence does not show that they were in a position where they would be visible to the driver of a car going west. Miss Eileen Keating was standing on the sidewalk on the south side of Mortimer, opposite a bus stop placed some 35 feet west of the west curb line of Woody Crest, talking to Miss Colangelo and Miss Shynall. The latter two were sitting

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

on a stone step on the south side of the house built on the southwest corner, in a position where their presence was hidden from the view of a driver of a car approaching from the east by a hedge growing along the south side of the lot. Miss Keating was, however, in a position where she was in full view but Priestman did not see her. At the time the second shot was fired she was about 100 yards to the west of the police car. Priestman did not fire at Smythson. It was only the fact that the car struck a bump on the roadway, of the existence of which he was unaware, which elevated the revolver as the shot was fired that caused the bullet to pass through the rear window of the fleeing car and strike Smythson. Had the bullet hit the tire, presumably a blow-out would have resulted and the speed of the fleeing car reduced, so that the police car could have passed and then stopped it. There is no evidence that such a blow-out would have menaced the safety of persons 100 yards distant who were off the roadway, and I think this is not to be presumed.

The cause of action pleaded is in negligence which, in the case of an officer attempting to perform his duty in these difficult circumstances, is to be construed, in my opinion, as meaning that what was done by him was not reasonably necessary and not a reasonable exercise of the constable's powers under s. 25 in the circumstances. As Laidlaw J. A. has pointed out, to find the constable guilty of negligence in the manner in which the revolver was fired, as distinct from firing at all, would necessitate finding that Priestman should have anticipated that his arm might be jolted at the instant he fired. That learned judge was not willing to make that finding nor am I.

I consider that the statement in Broom to which I have referred accurately states the law and that it is applicable in the present circumstances. The powers exercised by the constable are, in this sense, of a similar nature to powers of the nature referred to by Lord Greene in the passage from *Fisher's* case. If the circumstances are such that the legislature must have contemplated that the exercise of a statutory power and the discharge of a statutory duty might interfere with private rights and the person to whom

the power is given and upon whom the duty is imposed acts reasonably, such interference will not give rise to an action.

In my opinion, the action of the appellant in the present matter was reasonably necessary in the circumstances and no more than was reasonably necessary, both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car reached the intersection with Pape Avenue. So far as Priestman was concerned, the fact that the bullet struck Smythson was, in my opinion, simply an accident. As to the loss occasioned by this lamentable occurrence, I consider that no cause of action is disclosed as against the appellant.

For these reasons, I would allow these appeals and set aside the judgments entered in the Court of Appeal. In accordance with the provisions of the orders granting leave to appeal to this Court, no costs should be awarded against the respondents Colangelo and Shynall. I would dismiss the cross-appeals without costs. The appeal of Smythson should be dismissed and without costs.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—These appeals arise out of two actions which, with another action, were tried together before Barlow J. without a jury. To make clear the questions raised for decision it is necessary to give a brief recital of the facts, which are fully stated in the reasons of the Court of Appeal[1].

On August 1, 1955, Smythson, then 17 years of age, stole a new Buick automobile, which was red in colour and bore dealers' licence plates, from a dealer's lot on Danforth Avenue in the township of East York. Priestman, the appellant, a police officer of the township, was in a police car driven by his senior, constable Ainsworth. They were on patrol duty when, shortly before 8.30 p.m. while it was still broad daylight, they received a message on the radio telephone reporting the theft and giving the description and licence number of the stolen car. Almost immediately they saw a motor vehicle which they believed to be—and which later turned out to be—the stolen vehicle, driven by

[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

Smythson. The stolen vehicle was travelling west on Cosburn, turned south at the intersection with Donlands and continued southerly on Donlands Avenue at about 20 miles an hour. It came to a stop about 2 feet from the west curb by reason of a red traffic light at the corner of Donlands and Mortimer Avenues. The police car pulled up alongside the stolen car and Priestman ordered Smythson to stop. Both officers were in uniform and Smythson, no doubt, realized that they were police officers. Instead of stopping he pulled around the corner quickly and drove west on Mortimer Avenue at a high rate of speed. The police car followed and on three occasions attempted to pass the stolen car in order to cut it off, but each time Smythson pulled to the south side of the road and cut off the police car. On the third occasion the police car was forced over the south curb on to the boulevard and was compelled to slow up in order to avoid colliding with a hydro pole on the boulevard. Following this third attempt and as the police car went back on to the road, Priestman fired a warning shot from his .38 calibre revolver into the air. The stolen car increased its speed and when the police car was one and a half to two car lengths from the stolen car Priestman aimed at the left rear tire of the stolen car and fired. The bullet hit the bottom of the frame of the rear window, shattered the glass, riocheted and struck Smythson in the back of the neck, causing him to lose consciousness immediately. The stolen car went over the curb on the south side of the road, grazed a hydro pole, crossed Woodycrest Avenue—an intersecting street—went over the curb on the south-west corner, through a low hedge about 2 feet high, struck the veranda of the house on the south-west corner a glancing blow and grazed along the side of the house, coming to a stop somewhere near the north-west corner of the house. On its course along the side of the house it struck and killed Columba Colangelo and Josephine Shynall, who were waiting for a bus.

On October 14, 1955, the administrator of Josephine Shynall commenced an action against Smythson and Priestman claiming damages under *The Fatal Accidents Act*. On November 8, 1955, the administrator of Columba Colangelo

commenced a similar action. On February 1, 1956, Smythson commenced an action against Priestman for damages for personal injuries. As mentioned above, these three actions were tried together.

The learned trial judge was of opinion that Smythson's action against Priestman failed on two grounds, (i) that the force used by Priestman was not more than was necessary to prevent Smythson's escape by flight and that Priestman was justified in firing as he did by the terms of s. 25(4) of the *Criminal Code,* and (ii) that the action, not having been commenced within six months of the act complained of, was barred by s. 11 of *The Public Authorities Protection Act,* R.S.O. 1950, c. 303.

Smythson's appeal in that action was dismissed. All members of the Court of Appeal agreed with the learned trial judge as to the second ground on which he proceeded. Laidlaw J.A. was also of opinion that Priestman was justified in using his revolver to prevent Smythson's escape and had acted without negligence. No appeal was taken by Smythson from the judgment of the Court of Appeal in that action.

In the Shynall and Colangelo actions the learned trial judge held (i) that the fatalities were caused by the negligence of Smythson, and (ii) that Priestman was justified in using the force he did use and that as against him the actions must be dismissed. In each action he assessed the damages at $1,250, and gave judgment accordingly against Smythson for that amount with costs, dismissed the action as against Priestman with costs and directed that the plaintiff should add to his judgment against Smythson the costs payable by him to Priestman.

From these judgments the plaintiffs and Smythson appealed to the Court of Appeal, the plaintiffs asking that Priestman also be found negligent and that the damages be increased, and Smythson asking that he be absolved from the finding of negligence made against him and that Priestman be found solely to blame for the fatalities.

The Court of Appeal[1] were unanimous in upholding the finding that Smythson was guilty of negligence causing the fatalities and in refusing to increase the damages awarded.

[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

The majority held that Priestman also was guilty of negligence and that the blame should be apportioned equally between Smythson and Priestman. Laidlaw J.A., dissenting in part, would have dismissed the appeal. In the result judgment was directed to be entered in each action against Smythson and Priestman jointly and severally for $1,250 damages, and providing that as between them each should be liable to the extent of 50 per cent.

From these judgments Priestman appeals to this Court, pursuant to special leave granted by the Court of Appeal, asking that the judgment of the learned trial judge be restored. The plaintiff in each action cross-appeals asking that the damage be increased. Smythson cross-appeals in each action asking that he be absolved from the finding of negligence made against him and that Priestman be held solely to blame.

At the conclusion of the argument of Smythson's counsel on his cross-appeal the Court was unanimously of opinion that the finding of negligence against Smythson should not be disturbed and counsel for the other parties were not called upon on that point.

Two main grounds are urged in support of Priestman's appeal: first, that Priestman in firing his revolver as he did, used only as much force as was necessary to prevent the escape of Smythson by flight, that his escape could not have been prevented by reasonable means in a less violent manner, that Priestman was therefore justified in acting as he did by s. 25(4) of the *Criminal Code*, that that justification relieved him from civil liability not only as regards Smythson but also as regards the plaintiffs, and that the Court of Appeal erred in holding that the question whether he was liable to the plaintiffs fell to be decided in accordance with the rules of the common law as to the duty of reasonable care: Second, that even if the Court of Appeal were right in holding that the last-mentioned question fell to be decided in accordance with the rules of the common law as to the duty of reasonable care, they erred in holding that Priestman had acted negligently.

In dealing with the first ground it is necessary to set out the terms of subss. (1), (3) and (4) of s. 25 of the *Criminal Code* which are as follows:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(*a*) as a private person,

(*b*) as a peace officer or public officer,

(*c*) in aid of a peace officer or public officer, or

(*d*) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

* * *

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) 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 every one lawfully assisting the peace officer, is justified, if the person to be 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.

It is clear that Priestman was a peace officer who was proceeding lawfully to arrest Smythson, without warrant, for an offence for which he might be arrested without warrant, and that Smythson had taken to flight to avoid arrest; Priestman was therefore justified in using as much force as was necessary to prevent the escape by flight unless the escape could be prevented by reasonable means in a less violent manner. When subs. (3) and subs. (4) of s. 25 are read together the conclusion is inescapable that if all the conditions prescribed in subs. (4) are present the officer is justified in using force that is intended or is likely to cause death or grievous bodily harm to the person in flight.

In the case at bar there existed all the conditions requisite to afford justification under subs. (4) with the possible exception of the one stated in the concluding words "unless the escape can be prevented by reasonable means in a less violent manner"; on the question whether that condition was fulfilled I share the doubts expressed by Schroeder J.A. and I agree with him that it is unnecessary to make a finding upon it. For the purposes of this branch of the matter, I

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

will assume, without deciding, that Smythson's escape could not have been prevented by reasonable means in a less violent manner and that as between Priestman and Smythson the former was justified in using his revolver as he did.

On this assumption the question arises whether the terms of subs. (4) afford a justification not only for causing the bodily injuries to Smythson but also for causing the death of the two young women. This is a question of construction. I agree with Mr. Phelan's submission that the word "justified" as used in the subsection means freed from civil liability as well as from criminal responsibility which might otherwise exist. The word "justified" is used in a number of sections in Part I of the *Criminal Code* in contradistinction from the phrase "protected from criminal responsibility" which is used in a number of other sections in the same part.

The question of difficulty is whether the justification afforded by the subsection is intended to operate only as between the peace officer and the offender who is in flight or to extend to injuries inflicted, by the force used for the purpose of apprehending the offender, upon innocent bystanders unconnected with the flight or pursuit otherwise than by the circumstance of their presence in the vicinity. The words of the subsection appear to me to be susceptible of either interpretation and that being so I think we ought to ascribe to them the more restricted meaning. In my opinion, if Parliament intended to enact that grievous bodily harm or death might be inflicted upon an entirely innocent person and that such person or his dependants should be deprived of all civil remedies to which they would otherwise have been entitled, in circumstances such as are present in this case, it would have used words declaring such intention without any possible ambiguity.

I am fortified in this view as to the true construction of the subsection by the judgment of Thurlow J. in *The Queen v. Sandford*[1], a case in which s. 41, the predecessor of s. 25(4) was invoked. That learned judge was clearly of opinion that although justification for a peace officer shooting exists as regards a fugitive offender that circumstance does not

[1] [1957] Ex. C.R. 220, 11 D.L.R. (2d) 115, 118 C.C.C. 93.

relieve the officer from the duty to use reasonable care for the safety of others. I refer particularly to the following passages:

At p. 223:

> Moreover, assuming that there were no other reasonable means of preventing the escape of McDonald and that the defendant Hilker could have justified shooting and injuring or killing him in the attempt to hit one of the tires, in my view the defendant Hilker was negligent in shooting as he did without due regard for the safety of the passengers in the car.

and at p. 224:

> Assuming Hilker's right to use force to stop McDonald, it was still his duty to have due regard for the safety of the passengers and other people and not to use force in such a way as to be likely to injure them.

While in *Robertson and Robertson v. Joyce*[1], to which extended reference is made in the reasons of the Court of Appeal, this question of construction did not arise directly as no one other than the fleeing offender suffered injury, there are a number of expressions in the judgment of the Court delivered by Laidlaw J.A. in that case which point in the same direction as the judgment of Thurlow J. above referred to.

I conclude that the first main ground upon which Priestman's appeal is based fails and pass to the second, which raises the question whether the two fatalities were contributed to by negligence on the part of Priestman.

Under s. 45 of *The Police Act,* R.S.O. 1950, c. 279, Priestman was charged with the duty of apprehending Smythson; it is not necessary to consider whether the duty imposed by that section differs from the duty which would have rested upon him at common law. A public officer who wilfully neglected to perform a duty imposed on him either by common law or statute was guilty of a common law misdemeanour. Prosecutions for offences at common law have now been done away with by s. 8 of the *Criminal Code* and while s. 164 of the *Criminal Code,* R.S.C. 1927, c. 36, made it an offence wilfully to omit to do any act required to be done by any act of any legislature in Canada that section has been repealed and s. 107 of the present Code, which replaced it, is limited in its application to Acts of Parliament; but these circumstances do not alter the fact that it

[1] [1948] O.R. 696, 4 D.L.R. 436, 92 C.C.C. 382.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

was Priestman's duty to apprehend Smythson, and the existence of that duty is one of the circumstances to be considered in determining whether his conduct was negligent.

This duty to apprehend was not, in my opinion, an absolute one to the performance of which Priestman was bound regardless of the consequences to persons other than Smythson. Co-existent with the duty to apprehend Smythson was the fundamental duty *alterum non laedere,* not to do an act which a reasonable man placed in Priestman's position should have foreseen was likely to cause injury to persons in the vicinity.

The identity of the persons likely to be injured or the precise manner in which the injuries would be caused, of course, could not be foreseen; but, in my opinion, that the car driven by Smythson would go out of control as a result of the shot fired by Priestman was not "a mere possibility which would never occur to the mind of a reasonable man" —to use the words of Lord Dunedin in *Fardon v. Harcourt-Rivington*[1]—it was rather a reasonable probability; that causing a car travelling at a speed of over sixty miles an hour on a street such as Mortimer Avenue to be suddenly thrown out of control would result in injury to persons who happend to be upon the street also seems to me to be a probability and not a mere possibility. To hold, as has been done by all the judges who have dealt with this case, that Smythson should have foreseen the harm which was caused and at the same time to hold that Priestman ought not to have foreseen it would, it seems to me, involve an inconsistency. In my opinion, Priestman's act in firing without due regard to the probabilities mentioned was an effective cause of the fatalities and amounted to actionable negligence unless it can be said that the existence of the duty to apprehend Smythson robbed his act of the negligent character it would otherwise have had.

The question which appears to me to be full of difficulty is how far, if at all, the duty which lay upon Priestman to apprehend Smythson required him to take, or justified him in taking, some risk of inflicting injury on innocent persons. Two principles are here in conflict, the one *alterum non*

[1] (1932), 146 L.T. 391 at 392.

laedere, above referred to, the other *salus populi suprema lex.* It is undoubtedly in the public interest that an escaping criminal be apprehended and the question is to what extent innocent citizens may be called upon to suffer, without redress, in order that that end may be achieved. In spite of the diligence of counsel, little helpful authority has been brought to our attention. I have already made it clear that for the purposes of this branch of the matter I am assuming that Priestman could not have prevented Smythson's escape otherwise than by firing his revolver, and, on this assumption, it appears to me that the question for the Court is: "Should a reasonable man in Priestman's position have refrained from firing although that would result in Smythson escaping, or should he have fired although foreseeing the probability that grave injury would result therefrom to innocent persons?" I do not think an answer can be given which would fit all situations. The officer should, I think, consider the gravity of the offence of which the fugitive is believed to be guilty and the likelihood of danger to other citizens if he remains at liberty; the reasons in favour of firing would obviously be far greater in the case of an armed robber who has already killed to facilitate his flight than in the case of an unarmed youth who has stolen a suit-case which he has abandoned in the course of running away. In the former case it might well be the duty of the officer to fire if it seemed probable that this would bring down the murderer even though the firing were attended by risks to other persons on the street. In the latter case he ought not, in my opinion, to fire if to do so would be attended by any foreseeable risk of injury to innocent persons.

In the particular circumstances of the case at bar I have, although not without hesitation, reached the conclusion that Priestman ought not to have fired as he did and that he was guilty of negligence in so doing.

In forming this opinion I have been influenced in particular by the following matters disclosed in the evidence. There was no suggestion that Smythson was armed. His crime, while serious, was not one of violence, although he was willing to resort to violent means to escape arrest. Mortimer Avenue is a residential street in a built-up area with single and semi-detached houses in close proximity to

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

each other on each side of the street. There is a bus-stop at the corner of Mortimer and Woodycrest. It was a holiday evening in summer time and in the ordinary course of events a number of the residents of the street would be expected to be in the vicinity. There were in fact three young women at the last-mentioned corner and some children playing close by. Priestman believed his skill with a revolver to be better than average, but he had never before fired a shot from a moving vehicle or at a moving target. If the revolver were accurately aimed at unintended elevation of the muzzle of a quarter of an inch at the instant of firing would be sufficient to cause the bullet to strike the Smythson car where it did instead of on the tire. Priestman says that before firing he saw no vehicles or persons but his own description of the way in which he looked is:—"I took a quick glance". I refer also to the two following passages in his examination for discovery read into the record at the trial:

315. Q. . . . You know that bullets ricochet if they hit a solid object?
A. Yes, sir. I do.

316. Q. You knew that at the time you fired the shot? Is that right?
A. Yes, sir. I guess it would. I did not realize that. I did not take that into consideration at the time of the accident.

* * *

374. Q. Well, what did you believe would happen if you did hit the tire, the rear tire?
A. At that time I never took that into consideration.

379. Q. Did you consider before or at the time you fired at the tire what would happen to the Buick car if you did in fact hit that tire?
A. No, sir. I did not.

I have not overlooked Mr. Phelan's submission that to pursue the car driven by Smythson into Pape Avenue at the speed at which it was travelling would have been attended with even greater danger to the public than firing at the car while still on Mortimer Avenue; the use of the siren might have reduced the suggested danger; but if, as it was put in argument, the continuation of the pursuit would almost inevitably result in disaster, it is my opinion that the duty of the police was to reduce their speed and, it may be, to abandon the pursuit rather than to open fire.

I conclude that the second main ground of appeal fails and that Priestman's appeal should be rejected.

There remains the question of the quantum of damages; as to this Laidlaw J.A. said:

> . . . I am disposed to think that a greater sum might have been properly allowed but nevertheless I cannot say that the learned trial judge erred in principle or that the amount assessed by him is so inappropriate as to be an improper assessment. There is no sufficient reason or ground to justify alteration by this Court of the award of damages as made by the learned trial judge.

A similar view was expressed by the other members of the Court. In my opinion no sufficient reason has been shown for interfering with the assessments made by the learned trial judge confirmed as they have been by the unanimous judgment of the Court of Appeal.

I would dismiss the appeals with costs and the cross-appeals without costs.

FAUTEUX J.:—For the reasons given in the Court of Appeal by Mr. Justice Laidlaw[1], I would allow the appeals entered by Priestman in both cases and set aside the judgments entered in the Court of Appeal. In accordance with the provisions of the orders granting leave to appeal to this Court, no costs should be awarded against the respondents Colangelo and Shynall. I would dismiss the cross-appeals without costs. The appeal of Smythson should be dismissed and without costs.

Appeals allowed without costs; cross-appeals dismissed without costs.

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Solicitors for the plaintiff Shynall: Cavers, Chown & Cairns, St. Catharines.

Solicitors for the defendant Smythson: Levinter, Grossberg, Shapiro, Mayzel & Dryden, Toronto.

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[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.