1964

*Nov. 25

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May 17

RALPH BEIM (*Plaintiff*) .....APPELLANT;

AND

JOSEPH GOYER (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Damages—Negligence—Use of fire-arms—Fugitive shot accidentally by police officer—Responsibility.

The defendant, a police officer of the City of Montreal, saw the plaintiff, who was 14 years of age, driving a stolen automobile the wrong way on a one-way street. The plaintiff abandoned the car and ran off through a rocky, open, snow-covered field. He was not armed and had given no reason to suppose that he was. The defendant and the other police officer who was with him gave chase on foot. Several warning shots were fired by the two policemen. Owing to the rough terrain, the defendant fell twice while in pursuit. As the defendant prepared to

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

fire another shot into the air, he fell again, striking his right elbow on the ground, and the shot was discharged accidentally. The plaintiff was struck in the back and seriously injured. Through his tutor, he sued both the defendant and the City of Montreal. The action against the City was dismissed at trial and it was no longer a party to this appeal. The action was tried by a judge and jury. The jury found against the defendant for 60 per cent, and this verdict was affirmed by the trial judge. The Court of Appeal reversed the judgment and dismissed the action.

The plaintiff appealed to this Court.

Held (Fauteux, Martland and Judson JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Taschereau C. J. and Cartwright, Abbott, Ritchie, Hall and Spence JJ.: There was evidence upon which the jury could based its finding that the defendant was at fault for carrying a revolver with finger on the trigger while running over rough and stony ground after having previously fallen a number of times. This finding should not have been disturbed.

Per Ritchie J.: It is apparent that the defendant himself did not consider the circumstances to be such as to make it necessary to fire at the fugitive. In fact these circumstances were not such as to justify his taking the risk of firing at him accidentally. The case of *Priestman v. Colangelo,* [1959] S.C.R. 615, was distinguishable.

Per Ritchie and Spence JJ.: This case was not concerned with the provisions of s. 25 of the *Criminal Code* and the issue of justification. The defence was made upon the allegation that the plaintiff was shot accidentally. The matter was reduced to a pure question of negligence. On that question, the jury was entitled and probably should have made the inference that the defendant had his finger on the trigger throughout.

Per Fauteux, Martland and Judson JJ., *dissenting*: The defendant was entitled, by reason of s. 25(4) of the *Criminal Code,* to use as much force as was necessary to prevent the plaintiff's escape, unless the escape could be prevented by reasonable means in a less violent manner. Force was not intentionally applied, and, apart from the firing of warning shots, it was difficult to see how, on the evidence, the plaintiff's escape could have been prevented by any means less violent than actually shooting at him. Moreover the trial judge was wrong in law when, charging the jury as to the use of force within the meaning of s. 25(4), he suggested that it did not matter whether the shot was fired intentionally or by accident.

On the question of negligence, the finding of the jury that the discharge of the revolver, though accidental, occurred through improper handling by the defendant, was not supported by the evidence. At best, it was an inference drawn from an answer given by the defendant which was only partially translated to them. The real issue as to whether the defendant was negligent was never determined at the trial. To hold the defendant to have been negligent would be erroneous. He was properly entitled to have his revolver in his hands. It was proper to seek to prevent the escape, without the use of any force, by the firing of warning shots into the air. It was not negligent to fire those shots while running, for, if the defendant had a duty to stop before firing into the air, the chances of the plaintiff's escape were enhanced, if he failed to heed the warning, and the likelihood of an arrest being made without actually shooting at him was thereby diminished.

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Dommages—Négligence—Usage d'armes à feu—Fuyard atteint accidentellement par une balle tirée par un agent de police—Responsabilité.

Le défendeur, un agent de police de la cité de Montréal, aperçut le demandeur, qui était alors âgé de 14 ans, conduisant une automobile volée dans le sens inverse d'une rue à sens unique. Le demandeur abandonna la voiture et se mit à courir à travers un terrain rocailleux, ouvert, et recouvert de neige. Il n'était pas armé et n'avait donné aucune raison de laisser supposer qu'il l'était. Le défendeur et l'autre policier qui était avec lui se mirent à sa poursuite à pied. Les deux policiers tirèrent plusieurs coups de revolver en l'air. Le défendeur tomba deux fois sur ce terrain raboteux. Comme le défendeur se préparait à tirer un autre coup en l'air, il tomba une autre fois, heurta son coude droit sur le sol, et le coup partit accidentellement. La balle frappa le demandeur dans le dos et lui causa des blessures très sérieuses. Par l'entremise de son tuteur, il poursuivit le défendeur et la cité de Montréal. L'action contre la cité fut rejetée et elle n'est plus une partie dans cet appel. L'action fut entendue par un juge et jury. Le jury a tenu le défendeur responsable pour 60 pour cent, et ce verdict fut confirmé par le juge au procès. La Cour d'Appel renversa ce jugement et rejeta l'action. Le demandeur en appela devant cette Cour.

Arrêt: L'appel doit être maintenu et le jugement rendu au procès rétabli, les Juges Fauteux, Martland et Judson étant dissidents.

Le Juge en Chef Taschereau et les Juges Cartwright, Abbott, Ritchie, Hall et Spence: La preuve permettait au jury de trouver que le défendeur était en faute pour avoir eu un doigt sur la détente de son revolver alors qu'il courait sur un terrain raboteux et rocailleux, après qu'il eut tombé nombre de fois auparavant. Cette conclusion n'aurait pas dû être mise de côté.

Le Juge Ritchie: Il est évident que le défendeur lui-même ne considérait pas que les circonstances étaient telles qu'il était nécessaire de tirer sur le fuyard. En fait, ces circonstances n'étaient pas telles qu'elles le justifiaient de prendre le risque de tirer accidentellement sur lui. La cause *Priestman v. Colangelo,* [1959] R.C.S. 615, pouvait être différenciée.

Les Juges Ritchie et Spence: Cette cause ne porte pas sur les dispositions de l'art. 25 du *Code criminel* et la question de justification. La défense était basée sur l'allégation que le demandeur avait été atteint accidentellement. L'affaire était réduite à une pure question de négligence. Sur cette question, le jury avait le droit et probablement devait inférer que le défendeur avait eu tout le temps son doigt sur la détente.

Les Juges Fauteux, Martland et Judson, *dissidents*: En vertu de l'art. 25(4) du *Code Criminel,* le défendeur était justifié d'employer la force nécessaire pour empêcher la fuite du demandeur à moins que l'évasion puisse être empêchée par des moyens raisonnables d'une façon moins violente. La force n'a pas été employée intentionnellement, et, à part des coups tirés en l'air, il est difficile de voir comment, en se basant sur la preuve, l'évasion du demandeur aurait pu être empêchée par des moyens moins violents que de faire feu directement sur lui. En plus, le juge au procès a erré en droit lorsque, alors qu'il s'adressait au jury sur l'emploi de la force dans le sens de l'art. 25(4), il a suggéré qu'il n'importait pas que le coup ait été tiré intentionnellement ou par accident.

Sur la question de négligence, le verdict du jury que le revolver s'était déchargé, quoique accidentellement, parce que le défendeur l'avait manié improprement, n'était pas supporté par la preuve. Tout au plus, c'était une inférence tirée d'une réponse donnée par le défendeur et qui n'avait été traduite que partiellement au jury. La véritable question de savoir si le défendeur avait été négligent n'a jamais été déterminée au procès. Il serait erroné de dire que le défendeur avait été négligent. Il était justifié d'avoir son revolver à la main. Il était en droit d'essayer d'empêcher l'évasion, sans l'emploi de force, en tirant des coups dans l'air. Ce n'était pas une négligence que de tirer ces coups alors qu'il courait, parce que, si le défendeur avait un devoir d'arrêter avant de tirer dans l'air, les chances que le demandeur puisse s'échapper étaient augmentées si ce dernier ne s'occupait pas des avertissements, et les probabilités qu'il soit arrêté sans qu'il soit nécessaire de tirer directement sur lui étaient par conséquent réduites.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant le verdict d'un jury. Appel maintenu, les Juges Fauteux, Martland et Judson étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, province of Quebec[1], reversing the verdict of a jury. Appeal allowed, Fauteux, Martland and Judson JJ. dissenting.

S. Leon Mendelsohn, Q.C., and *Manuel Shactor, Q.C.*, for the plaintiff, appellant.

Philippe Beauregard, Q.C., and *Joseph St-Laurent, Q.C.*, for the defendant, respondent.

The judgment of the Chief Justice and of Cartwright, Abbout and Hall JJ. was delivered by

ABBOTT J.:—On July 9, 1957, appellant, then a minor and acting through his tutor, sued the respondent and the City of Montreal claiming damages for injuries sustained by appellant as a result of a shot fired by respondent, a constable of the City of Montreal.

The action was tried before Charbonneau J. assisted by a jury. He rendered judgment affirming the verdict of the jury, dismissed the action as against the city and maintained the action as against respondent for an amount of $32,036.80.

On appeal[1] the dismissal of the action against the city was confirmed and there is no appeal to this Court from that judgment. However the respondent's appeal was allowed

[1] [1964] Que. Q.B 558, 50 D.L.R. (2d) 550, *sub nom. Gordon v. Goyer.*

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and the action against him was dismissed, Montgomery J. dissenting. The present appeal is from that judgment. The quantum of damages is not now in issue.

The facts, which are fully set out in the judgments below, are not seriously in dispute. I need not recite them in detail.

The appellant, who in 1957 was 14 years of age, was driving a stolen car the wrong way on a one-way street. Stopped by two City of Montreal policemen, Roland Ménard and the respondent Joseph Goyer, he abandoned the car and ran off through a rocky, open, snow-covered field, pursued by the police. He was not armed and had given no reason to suppose that he was. After several warning shots had been fired by the two policemen, the respondent Goyer stumbled and fell, at the same time firing another shot which hit appellant in the neck, seriously injuring him.

The sole question in issue before this Court is whether the respondent was at fault, in failing to exercise proper care in the use of firearms when pursuing the appellant.

The jury found that he was at fault for the following reason: "Carrying revolver with finger on trigger while running over rough and stony ground after having previously fallen a number of times." There was evidence upon which the jury could base this finding and in my opinion it should not have been disturbed.

Each of the decided cases dealing with the use of firearms by peace officers, which were cited to us, turns largely on its own facts. Having considered the evidence, the arguments of counsel and the authorities to which they referred, I find myself in agreement with the conclusion and reasons of Montgomery J. I do not think that anything would be gained by attempting to summarize or restate those reasons and I am content to adopt them.

I would allow the appeal with costs here and below and restore the judgment at trial.

The judgment of Fauteux, Martland and Judson JJ. was delivered by

MARTLAND J. (*dissenting*):—This is an appeal from the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1], which, by a majority of four to one, allowed an appeal by the defendant, the present respondent, from a

[1] [1964] Que. Q.B. 558, 50 D.L.R. (2d) 550.

judgment which had been given at trial in favour of the plaintiff, the present appellant, for damages for personal injuries in the amount of $32,036.80, with interest and costs. The judgment at trial was based upon answers given to specific questions by a jury.

The appellant's injuries were sustained on January 22, 1957, when he was fourteen years of age. There is evidence that, in appearance, he looked considerably older. One independent witness who observed him on that date believed he was a young man of 22 or 23 years. The appellant was struck by a bullet fired from the revolver of the respondent, a police constable, who was pursuing him in order to effect his arrest. The respondent had been a member of the Montreal Police force since 1935.

The circumstances leading up to the shooting were as follows. Between eleven o'clock and noon on the morning of that day the respondent, with another police constable, Ménard, was driving in a police vehicle toward the north on Wilderton Street, in Montreal. The respondent was in uniform. Before leaving the police station they had been advised regarding certain automobiles reported stolen. As they approached the intersection with Goyer Street (a one way thoroughfare) they observed a Pontiac automobile travelling in the wrong direction on that street. The driver of that car, on seeing the police vehicle, effected a U turn at the intersection of Goyer and Wilderton and headed west along Goyer Street. The respondent was able to note the licence number of the Pontiac, and realized that it was one of the automobiles reported stolen. The respondent set off in pursuit.

The appellant ignored the respondent's signal to stop, proceeded at a high rate of speed, bumped into a stationary vehicle, and finally stopped to the left of and off the street, after mounting the sidewalk. He then leaped out of the car and ran across a rough, rocky field, partially covered with snow, where there were no roads or buildings.

The police car stopped and Ménard was the first to commence the pursuit. He ran after the appellant, calling out to him, in both French and English, to stop. When this had no effect, he fired four shots in the air from his revolver. He ceased the chase when he was out of breath.

The respondent, for a time, was able to follow, in his automobile, the course taken by the appellant. He then left

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the car and ran in pursuit of the appellant. He also called to him, in both French and English, to stop, and he fired two warning shots in the air from his revolver. The appellant continued to run. Owing to the rough terrain, the respondent fell twice while in pursuit.

The respondent than prepared to fire a third shot into the air, but fell again, striking his right elbow on the ground, and a shot was discharged accidentally. This shot struck the appellant in the back, fracturing his spine. As a consequence the appellant suffered partial paralysis.

The appellant, through his tutor, sued both the respondent and the City of Montreal, of whose police force the respondent was a member. The action against the City was dismissed at the trial and it is no longer a party to the appeal before this Court.

The questions submitted to the jury at the trial, which are relevant to this appeal, and the answers given are as follows:

Question Number One:

Was the minor Ralph Biem, on January 22nd, 1957, hit by a bullet fired by the Defendant Joseph Goyer?

Answer: Yes.

Question Number Two:

Was the said Ralph Beim then in flight in fear of arrest?

Answer: Yes.

Question Number Three:

If you have answered the preceding question in the affirmative, was Ralph Beim then in flight in fear of arrest because:

(*a*) he had contravened municipal bylaws; or

(*b*) he knew that he had been driving a stolen automobile?

Answer: (*a*) no and (*b*) yes.

Question Number Four:

Did the said Defendant Joseph Goyer shoot at the said Ralph Beim voluntarily, or was his revolver discharged accidentally?

Answer: Accidentally.

Question Number Five:

If you have come to the conclusion that the revolver was on that occasion discharged accidentally, state if that discharge occurred;

(*a*) by pure accident?

(*b*) through improper handling by Defendant Joseph Goyer?

Answer: (*a*) by pure accident? No.

(*b*) through improper handling by Defendant Joseph Goyer?

Answer: Yes.

And in the affirmative, give all details as to how the said handling was improper or negligent?

Answer: Carrying a revolver with finger on the trigger while running over rough and stony ground, after having previously fallen a number of times.

Question Number Six:

Was constable Joseph Goyer then attempting to arrest the said Ralph Beim,

(a) because the latter may have contravened a municipal by-law, e.g., by driving too fast or in the wrong direction or making a U turn?

Answer: No.

or (b) because he had reason to believe that the said Ralp Beim was committing a criminal offence driving an automobile which had been stolen?

Answer: Yes.

Question Number Seven:

If you have come to the conclusion either that the revolver was discharged voluntarily or accidentally through neglect or want of skill of Defendant Joseph Goyer, was the said constable using an excess of force, and could the escape of Ralph Beim have been prevented by reasonable means in a less violent manner?

Answer: Yes.

Question Number Eight:

Was the said Ralph Beim wholly responsible for the injury he suffered, and in the affirmative state in detail what fault or faults he committed?

Answer: No.

Question Number Nine:

Was the said Ralph Beim responsible in part for the injury he suffered, and in the affirmative state what fault or faults he committed and the proportion you ascribe to his fault?

Answer: Yes, with qualifications. Aside from traffic violations, knowingly driving a stolen car and failing to stop when called upon to do so by a police officer; Beim fault 60%.

On the basis of these answers, the learned trial judge gave judgment in favour of the appellant against the respondent in the amount assessed by the jury and applying the percentage of fault attributed by the jury to the respondent. The respondent's appeal to the Court of Queen's Bench (Appeal Side) was successful.

The only issue seriously contested in this Court was that of liability.

In considering that question, attention must first be given to the provisions of s. 25(4) of the *Criminal Code,* which provides:

(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,

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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.

The effect of that provision was considered by this Court in *Priestman v. Colangelo*[1]. In that case two police officers in a patrol car were pursuing the driver of a stolen vehicle. On three occasions, when trying to pass the stolen car, the driver of it cut off the police car. Thereafter one of the officers, after firing a warning shot into the air, which went unheeded, took aim at a rear tire of the stolen car. As he fired, the police car struck a bump in the road and the shot hit the driver of the stolen car. He lost control of the vehicle, which struck and killed two persons standing on the sidewalk. The issue in this Court was as to the liability of the police officer who fired the shot to the administrators of their estates.

Unlike the present appeal, in the *Priestman* case the shot was deliberately fired, on a city street, in a populated area, and set in motion events which resulted in the deaths of two innocent people. Nonetheless, the claim against the police officer failed.

Locke J., who delivered the judgment of Taschereau J., as he then was, and himself, said, at p. 620:

> Actionable negligence has been defined in a variety of manners. In *Vaughan v. the Taff Vale Railway Company,* (1860), 5 H. & N. 679 at 688, 157 E.R. 1351, 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.

At p. 624 he said:

> 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,* (1907), 13 C.C.C. 326, 17 Man. R. 282, 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

[1] [1959] S.C.R. 615, 30 C.R. 209, 124 C.C.C.1, 19 D.L.R. (2d) 1.

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 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.

Fauteux J., who also decided in favour of the appellant police officer, adopted the reasons of Laidlaw J.A. in the Court of Appeal[1]. At page 11 Laidlaw J.A. said:

If this Court cannot properly regard the conclusions of the learned trial Judge as including an inference of fact that the respondent Priestman was not negligent, and can properly reach its decision on the basis that no such inference was drawn from the evidence by the learned trial Judge, neverthless, I am not willing to draw that inference. I subscribe without reservation to the view expressed by the learned trial Judge that "it is easy now to sit and speculate in the calm of the Courtroom and say the defendant Priestman might have continued the chase and that eventually Smythson would have been apprehended and no one hurt, but this is not helpful." It is extremely difficult, if not impossible, after an unfortunate happening to blot out from one's mind the wisdom and sense of good judgment acquired from that happening. The tendency by reason of the happening, to criticize or find fault with one or more of the parties involved in it is natural and hard to overcome. A judicial finding as to whether or not there was negligence or misconduct of one or more parties involved in a happening of the kind in question in the instant case, requires that the happening and the unfortunate results therefrom be erased from one's mind as completely as possible. The judicial mind must be carefully directed to the time and place of the happening and the conduct of the parties in the circumstances then existing must be measured by comparing it with the conduct of that fictitious creature of the law,—the reasonable man. With that approach to the question I ask myself, what would a police constable, exercising reasonable care and placed in the position of the respondent Priestman, have done or omitted in the particular circumstances existing at the time of the happening in question?

At page 15 he also said:

Again, it appears to me that if Priestman's arm holding the revolver had not been jolted at the very instant he fired the revolver, by the uneven road surface, there would be no ground of complaint whatsoever as to his conduct. In order to find that he 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. I am not willing to make that finding. I refer to *Bolton v. Stone*, (1951) A.C. 850 at p. 856, referred to also by my brother Schroeder J.A.

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

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The dissenting reasons in the *Priestman* case, delivered by Cartwright J., were based mainly on the fact that the claims involved were by innocent parties, not by the wrongdoer, and that s. 25(4) would not serve as a defence to their claims.

In the present case the respondent was entitled, by reason of s. 25(4), to use as much force as was necessary to prevent the appellant's escape, unless the escape could be prevented by reasonable means in a less violent manner. He was equipped, for the carrying out of his duties, with an offensive weapon, which, within the limits defined in s. 25(4), he was lawfully entitled to use. In fact, as found by the jury, he did not voluntarily shoot at the appellant, but fired his weapon accidentally. As was pointed out by Rinfret J., in the Court below, there was no question of force being applied in the circumstances of this case, let alone excessive force, since the element of intention was wholly lacking.

This being so, I do not see how the jury's answer to question 7 can properly stand. The question, as framed, was a double-barrelled question, but, as pointed out above, force was not intentionally applied, and, apart from the firing of warning shots, it is difficult to see how, on the evidence, the appellant's escape could have been prevented by any means less violent than actually shooting at him.

In connection with this question it should be noted that there was what, in my opinion, was an error in law in the charge to the jury. When dealing with question 7, the learned trial judge read to the jury the headnote in the case of *Robertson v. Joyce*[1], which dealt with the meaning and intention of s. 41 of the old Code, the predecessor of s. 25(4). He went on then to say:

> This was also a case in which the officer claimed that he had stumbled and that his revolver had been discharged accidentally. But the liability, the civil liability would be the same whether he had shot intentionally or by accident through negligence. The criminal liability would be different but civilly the liability for damage done voluntarily or on account of negligence or mishandling of a firearm would be the same.

I think the learned trial judge was wrong, when charging the jury as to the use of force within the meaning of s. 25(4), in suggesting that it did not matter whether the shot was fired intentionally or by accident.

I now turn to consider the issue of negligence and the answer of the jury to question 5, in which the jury found

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

that the discharge of the revolver, though accidental, occurred through improper handling by the respondent. When asked to give details, the answer was:

> Carrying a revolver with finger on the trigger while running over rough and stony ground, after having previously fallen a number of times.

When charging the jury in respect of this question, the only instructions given by the learned trial judge were as follows:

> All I can say on this is that in my opinion—and again you do not have to follow it—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. That is my opinion. Do not follow me if you do not agree.

At the end of his charge, a question was asked by one of the jurors:

> Is there any way of establishing whether a gun can discharge itself accidentally with the finger not on the trigger of the gun?

The respondent was then recalled to the stand, and the following questions were asked by the learned trial judge and answers given by the respondent, all in the French language:

> D. Monsieur Goyer, le Jury veut savoir si votre revolver n'était pas parti accidentellement, auriez-vous tiré volontairement sur le jeune homme? R. Non.
>
> D. Combien d'années d'expérience avez-vous avec des revolvers? R. Depuis mil neuf cent trente-cinq (1935), Votre Seigneurie.
>
> D. Quelle sorte de revolver aviez-vous? R. Un Colt trente-huit (38), Votre Seigneurie.
>
> D. Ce revolver-là peut-il partir si vous n'avez pas le doigt sur le chien? R. Il faut avoir le doigt sur la gâchette pour le partir; lorsque le coup a parti là, j'avais le doigt sur la gâchette; en tirant en l'air . . .

The charge to the jury was all delivered in English and the learned trial judge interpreted the questions and the respondent's answers to the jury as follows:

> Q. How many years experience have you had with a revolver? A. Since 1935.
>
> Q. What kind of revolver did you have? A. A Colt 38.
>
> Q. Can that revolver go off if your finger in not on the trigger? A. I must have my finger on the trigger before it can go off.

It will be noted that the latter portion of the last answer was not translated, and this omission is of importance. The respondent was testifying that the shot which struck the appellant was being fired into the air. There was no evidence that the respondent had his finger on the trigger while

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running over the rough ground. The evidence shows that he had his finger on the trigger when about to fire into the air when he fell and the revolver discharged on his elbow hitting the ground.

In order to find liability on the part of the respondent, on the basis of this evidence, it was necessary to find that it was negligence, on his part, to carry his revolver in his hand when pursuing the appellant and to use it to fire warning shots into the air in the course of that pursuit. In considering whether or not that conduct was negligent, it is essential to consider the nature of the duty owed by the respondent to the appellant, and to bear in mind the relationship between them.

This is not a case of an ordinary citizen being struck by a bullet fired from a revolver carried by another ordinary citizen. It might well be negligent for an ordinary citizen to run with a loaded revolver in his hand when another person might be in the vicinity. This, however, is the case of a person seeking to escape arrest being pursued by a police officer fixed with a legal duty to arrest him and empowered by law to use as much force as necessary to prevent his escape, unless the escape could be prevented by reasonable means in a less violent manner.

The finding made by the jury in its answer to question 5 was not supported by the evidence. At best, it was an inference drawn from an answer given by the respondent which was only partially translated to them. The learned trial judge himself misunderstood this evidence, because, in his judgment given after the jury had answered the questions, he said:

> in addition, this point was later cleared by the constable, when he was reexamined at the request of the jurors and stated that he was carrying the revolver with his finger on the trigger while running over rough and stony ground, and it was precisely that fault which was found by the jurors.

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 negli-

gent 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. Instead of this, the jury was told, in terms, that, in the opinion of the learned trial judge, if the revolver discharged accidentally, it would be through the respondent's fault and negligence.

The real issue in this case was never determined at the trial, and, for that reason, at best, in my opinion the appellant should be entitled to no more than an order for a new trial. No request for a new trial was made by the appellant in this appeal.

In my opinion, however, a decision on the substantial issue holding the respondent to have been negligent would have been erroneous.

When pursuing the appellant, the respondent was properly entitled to have his revolver in his hand. Further, it was proper to seek to prevent the escape, without the use of any force, by the firing of warning shots into the air. I do not think it was negligent to fire those shots while running, for, if the respondent had a duty to stop before firing into the air, the chances of the appellant's escape were enhanced, if he failed to heed the warning, and the likelihood of an arrest being made without actually shooting at him was thereby diminished.

I agree with the views expressed by Rivard J. in the Court below when he said:

> Goyer avait le droit et le devoir de poursuivre le jeune Beim. Il avait également le droit d'être armé. Il avait le droit et le devoir de prendre les moyens nécessaires pour opérer son arrestation. Il avait le droit de tirer en l'air pour lui communiquer le sérieux de ses avertissements. La poursuite de Beim par Goyer, les coups de feu que ce dernier a tirés vers le ciel demeurent dans les limites des droits reconnus par l'article 25 du Code Criminel, à un constable lancé à la poursuite d'un fugitif.
>
> On lui reproche d'avoir couru sur un terrain glissant, rocailleux et partiellement recouvert de neige avec le revolver dans sa main. Si Goyer avait le droit de poursuivre Beim, il fallait nécessairement qu'il emprunte le chemin que Beim avait lui-même choisi. Beim se dirigeait vers un endroit où il y avait une voie ferrée et où il lui aurait été certainement facile de disparaître. Il n'y avait personne dans les environs que Goyer pouvait appeler à son aide. Rien dans la preuve ne suggère un autre moyen de réaliser l'arrestation de Beim. Si Goyer avait le droit de tirer en l'air, en poursuivant Beim, il fallait nécessairement qu'il ait son arme à la main. On ne peut prétendre qu'il devait s'arrêter chaque fois qu'il tirait en l'air, remettre son revolver dans sa gaine et repartir à courir. C'eut été assurer la fuite certaine du fugitif.
>
> Dans les circonstances, je suis convaincu que Goyer n'a pas usé de force excessive et a utilisé les seuls moyens qu'il pouvait prendre pour

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tenter d'opérer l'arrestation de Beim. Beim a été le malheureux artisan de son infortune.

Les faits rapportés par le Jury n'établissent aucune faute chez Goyer, et je crois qu'en conséquence, la motion pour jugement rejetant l'action, malgré le verdict, aurait dû être accordée.

For these reasons I would dismiss this appeal with costs.

RITCHIE J.:—The facts of this case have been thoroughly discussed in the reasons for judgment of other members of the Court and it would be superfluous for me to reiterate them.

I am in agreement with my brothers Abbott and Spence that this appeal should be allowed and only wish to add that the case of *Priestman v. Colangelo*[1] which is referred to in the reasons for judgment of my brother Martland is, in my view, distinguishable on the ground that in finding that under the circumstances there disclosed it was reasonably necessary for the policeman to fire at the tire of a fleeing car, Locke J. predicated his judgment on the fact that the person who had taken flight to avoid arrest was prepared, in order to escape, to jeopardize the lives of two policemen. In the course of his reasons for judgment, Locke J. said:

> 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 italics are my own.

No such danger existed in relation to Beim who was unarmed and running away on foot. The standard adopted by Laidlaw J. A. in the *Priestman* case in the Court of Appeal of Ontario[2], appears to me to be appropriate in the present case. Mr. Justice Laidlaw there said of the policeman:

> In order to find that he 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. I am not willing to make that finding.

In the present case, the fact that Goyer had already fallen twice in running over the rough ground in pursuit of the appellant in my opinion created a situation in which he "ought reasonably to have foreseen that his arm might be jolted at the instant he fired. . ." if he should fall again as he was likely to do, and that if he did so while firing a shot he might hit Ralph Beim.

[1] [1959] S.C.R. 615, 30 C.R. 209, 124 C.C.C. 1, 19 D.L.R. (2d) 1.
[2] [1958] O.R. 7 at 15, 119 C.C.C. 241, 11 D.L.R. (2d) 301.

It is apparent that Goyer himself did not consider the circumstances to be such as to make it necessary to fire at the fugitive and I do not think they were such as to justify his taking the risk of firing at him accidentally.

SPENCE J.: I have had the advantage of reading the reasons of my brothers Abbott and Martland and agree with those of the former. I wish to add, however, reference to certain submissions made to this Court.

This is an appeal by the plaintiff from the judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1] whereby that court by a majority allowed the respondent's appeal from a judgment given by Charbonneau J. after trial by jury. In the judgment at trial, the plaintiff Beim was allowed $32,036.80 against the respondent Goyer and the action was dismissed against the City of Montreal. The defendant Goyer appealed to the Court of Queen's Bench (Appeal Side) and the plaintiff appealed from the dismissal of the claim against the City of Montreal and against the quantum of the damages allowed but both the latter appeals were dismissed and the plaintiff has not further appealed from such dismissals.

The judgment at trial was rendered upon the findings of the jury in answer to certain questions. The important questions and answers are Nos. 5 and 7.

Question 5:

> If you have come to the conclusion that the revolver was on that occasion discharged accidently, state if that discharge occurred, (a) by pure accident, or (b) through improper handling by defendant Joseph Goyer?

The jury answered "No" to sub-part (a) and "Yes" to sub-part (b), and then added this explanation: "Carrying revolver with finger on trigger while running over rough and stony ground after having previously fallen a number of times".

Question 7 read as follows:

> If you have come to the conclusion either that the revolver was discharged voluntarily, or accidentally through neglect or want of skill of defendant Joseph Goyer, was the said constable using an excess of force, and could the escape of Ralph Beim have been prevented by reasonable means in a less violent manner?

The jury answered "Yes".

In argument in this Court, counsel for the respondent took the position that the answer to question No. 5 could

[1] [1964] Que. Q.B. 558, 50 D.L.R. (2d) 550.

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not have been made by a jury properly instructed as there was no evidence that the defendant kept his finger on the trigger of the revolver as he ran across this rough and stony field with the revolver in his hand. Counsel for the respondent objected to Question No. 7 having been put on the ground that the allegation that the arrest of the plaintiff could have been accomplished in a less violent manner was not made by the plaintiff in his pleading.

To deal with the latter objection, I am of the view that the issue dealt with in question No. 7 was sufficiently brought into the plaintiff's pleadings in paragraph 5 of the Declaration, and further that the defendant actually put that point in issue in his particulars to the defence, particularly paras. 29 to 31 of the Particulars.

I am of the opinion that there is a much more effective reply to the defence submission. We are not really concerned at all with the provisions of s. 25 of the *Criminal Code* and the issue of justification. The defendant has always sworn and made his whole defence upon the allegation that the plaintiff was shot accidentally and there was no question of justification for the use of any degree of force. The matter is reduced to a pure question of negligence.

The objection to question No. 5 and its answer seems to be base upon the submission that the trial judge mistranslated to the jury some questions and answers made by the defendant.

What occurred was this: When the judge finished his charge to the jury, juror No. 2 requested that a hypothetical question be put to the defendant. The defendant was asked to re-enter the witness box and was sworn in and asked that hypothetical question. Then juror No. 7 asked the question of the judge, "Is there any way of establishing whether a gun can discharge itself accidentally with a finger not on the trigger of the gun?" By the Court, "As to that I can tell you that there are many hunting accidents—how the gun goes off—if the bullet is in the gun there, a gun must be locked if you walk or run. I can ask the constable. Do you want me to ask the constable as to that particular gun?" By juror No. 7, "If he can give us an authoritative answer".

The questions of the Court to the defendant in the French language and his answers in the French language are set out in the record as follows:

D. Monsieur Goyer, le Jury veut savoir si votre revolver n'était pas parti accidentellement, auriez-vous tiré volontairement sur le jeune homme? R. Non.

D. Combien d'années d'expérience avez-vous avec des revolvers? R. Depuis mil neuf cent trente-cinq (1935), Votre Seigneurie.

D. Quelle sorte de revolver aviez-vous? R. Un Colt trente-huit (38), Votre Seigneurie.

D. Ce revolver-là peut-il partir si vous n'avez pas le doigt sur le chien? R. Il faut avoir le doigt sur la gâchette pour le partir; lorsque le coup a parti là, j'avais le doigt sur la gâchette; en tirant en l'air.

In the transcript of the charge, there is inserted the comment "here there were questions and answers in the French language which were then interpreted by the Court as follows:

Q. How many years experience have you had with a revolver? A. Since 1935.

Q. What kind of revolver did you have? A. A Colt 38.

Q. Can that revolver go off if your finger is not on the trigger? A. I must have my finger on the trigger before it can go off.

Counsel in argument in this Court pointed out that the actual questions put to the witness and his answers should be properly translated as follows:

Q. Mr. Goyer, the jury wish to know if your revolver had not gone off accidentally would you have fired voluntarily on this young man? A. No.

Q. How many years of experience have you with revolvers? A. Since 1935, Your Lordship.

Q. What sort of revolver had you? A. A Colt 38, Your Lordship.

Q. That revolver there, could it go off if you had not your finger on the trigger? A. It is necessary to have one's finger on the trigger for it to go off; when the shot went off there, I had my finger on the trigger; in firing in the air.

It will be seen that the learned trial judge failed to translate the last part of the witness's answer, i.e., "when the shot went off there, I had my finger on the trigger; in firing in the air". We are assured by counsel for the respondent, and counsel for the appellant does not suggest otherwise, that there was no evidence that as the constable ran across the field he had kept his finger on the trigger throughout, only that he had his finger on the trigger when the shot was accidentally fired.

Counsel for the respondent adds that if Goyer had admitted that he had his finger on the trigger as he ran across this rocky field then "he would not be here" which must mean that he would not have appealed to the Court of

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Queen's Bench (Appeal Side) as, of course, he is in this court as a respondent. I am of the opinion that there is no weight to the contention. Even granting that there was no evidence that the defendant constable kept his finger on the trigger as he ran across the rocky field, there was evidence that on two occasions as he ran across the field he fired shots in the air. There was evidence that he twice fell while running across that field before the fall which caused the injuring shot. There is no evidence that on the occasion of either of the previous falls the gun went off. However, a jury certainly was entitled and probably even should have made the inference that the defendant constable had his finger on the trigger throughout. There certainly was no evidence that he stopped on either occasion when he fired a shot in the air and therefore he would have had to have been running with his finger on the trigger when both of those previous shots were fired in the air. It would be foolish to imagine that he took his finger off the trigger and then, continuing to run, on three occasions, put his finger on the trigger and fired the fun. Further, even if the evidence had been that he did not put his finger on the trigger until he actually shot twice purposely in the air and the third time accidentally hitting the plaintiff, there was evidence, and the strongest evidence, of negligence. To have run across that field and then shot in the air while continuing to run was negligence even if he only put his finger on the trigger at the moment he fired the shot. The same result could have occurred on either of those first shots in the air as that which occurred on the third occasion, i.e., he might have fallen and the bullet which he had intended to fire into the air might have hit the plaintiff.

I would allow the appeal with costs against the respondent throughout and restore the verdict of the jury giving the plaintiff the damages as fixed by the jury, $32,036.80 with interest from the 27th of November 1958, the date of the trial.

Appeal allowed, Fauteux, Martland *and* Judson JJ. *dissenting.*

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