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HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

DOUGLAS SANDFORD, EDWIN J. KELLOCK AND ROY C. HILKER } DEFENDANTS.

Crown—Information—Liability of police officer for damages resulting from shooting of passenger in a car—Shooting done in attempt to stop driver of car fleeing from arrest—Criminal Code, R.S.C. 1927, c. 36, ss. 35, 41, 648—Police officer negligent in acting without due care for passengers.

Action by the Crown to recover damages resulting from injuries caused a member of the Royal Canadian Air Force when he was wounded by a pistol bullet which the Court found had been fired by the defendant Hilker. The firing of the pistol was done by Hilker in attempting to arrest one McDonald, the driver of a car in which the wounded man was a passenger. Hilker sought to justify the shooting under sections 35, 41 and 648 of the Criminal Code, R.S.C. 1927, c. 36, in effect when the incident occurred, and the Court found that the preliminary conditions provided by section 41 to justify the use of force were satisfied with respect to McDonald but not with respect to the passengers in the car. The Court found that the defendant Hilker was a peace officer acting in his own right or assisting a senior police officer in endeavouring to effect the arrest of McDonald without a warrant for dangerous driving when he was in flight to escape arrest.

Held: That the onus lies on the defendant Hilker to establish that the shooting was done without intention to injure and without negligence and though he had a right to use force to stop the driver of the car it was 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.

2. That the course pursued by the defendant Hilker was not a reasonable means of stopping the car nor did it offer any but a very remote chance of accomplishing its purpose.

3. That defendant Hilker was negligent towards the passengers in the car in firing under the conditions then existing and the defence of justification fails and he is liable for the consequences of his action.

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INFORMATION exhibited by the Deputy Attorney General of Canada.

The action was tried before the Honourable Mr. Justice Thurlow at Vancouver.

J. M. Streight and *H. C. MacKay* for plaintiff.

A. Gordon MacKinnon for defendants.

THURLOW J.:—This is an information by which the Crown seeks to recover damages resulting from injuries caused to Ronald G. Byers, a member of the Royal Canadian Air Force, when he was wounded by a pistol bullet at New Westminster, British Columbia on July 27, 1954. The claim is for medical and hospital expenses incurred by the Crown in treating Byers and for loss of his services from the date above mentioned until August 12, 1954, when he died. The defendants are constables of the Police Department of the city of New Westminster, and in the statement of claim it is alleged that they, or one of them, wrongfully and negligently fired the bullet which injured Byers. On their part, the defendants deny the allegations of the statement of claim and say that, in the circumstances, the use of pistols to stop the vehicle in which Byers was a passenger when he was injured was justified.

When the shooting occurred, Byers was in a 1950 Chevrolet coach, sitting on the right-hand side of the back seat. On his left, and directly behind the driver, was another passenger, Charles Calbick. The driver was Ronald McDonald, and with him on the front seat were Herbert LaSalle in the middle and Jack Delaney on the right.

At about 3 a.m. on the morning in question, Constable Charles Keary of the New Westminster Police Department was on patrol duty near the corner of London and Eighth Streets in New Westminster and was driving police car No. 41. With him and also on duty was the defendant Kellock. Constable Keary was the senior and was in charge of the patrol. The constables observed the Chevrolet car driven by McDonald proceed southwardly along Eighth Avenue and stop near the gasoline pumps of a service station at the corner above mentioned. The service station was not open at the time. Suspecting some illegal purpose in the presence of the car on the service station

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grounds, Constable Keary drove onto the grounds and drew up beside the Chev car to investigate. Constable Kellock shone a flashlight on the driver of it, but neither he nor Constable Keary recognized the driver or any of the passengers. Kellock, however, did observe that there were a number of persons in the car besides the driver. At this point someone in the car made an uncouth remark which might be regarded as insulting to and indicating contempt for the policemen, and thereupon the lights of the Chev car were turned off and the car was driven away. The constables gave chase. The Chev car proceeded southwardly on Eighth Street for one block, turned westwardly and proceeded along Dublin Street for two blocks at high speed, turned southwardly and proceeded on Henry Street for two blocks, and then turned westwardly again on Eighth Avenue for twelve blocks. In the distance last mentioned, its speed at times exceeded 60 miles an hour. The police car driven by Constable Keary was close behind throughout this distance and, indeed, throughout the whole of the chase. At no time was it more than a block behind the Chevrolet car, and throughout most of the chase the distance between the cars was a matter of three or four car-lengths. The police car was equipped with a flashing red light on the roof, which was operating, and with a siren which was also operated almost continuously throughout the chase. While proceeding westwardly along Eighth Street, Kellock fired one or two pistol shots in the air, but the Chev car did not stop. On reaching the intersection of Eighth Street and Twenty-Third Street, it turned southwardly on Twenty-Third Street and proceeded for three blocks to Marine Drive. In following the car over this distance, Kellock fired several more shots, aiming at the rear tires of the Chev car. On reaching Marine Drive, the Chev car turned eastwardly and proceeded at high speed along it and its extension known as Sixth Avenue. In doing so, it passed Twentieth Street, crossed the B.C. Electric Railway line, and continued along Sixth Avenue to its intersection with Tenth Street. The whole distance travelled along Marine Drive and Sixth Avenue is about one and one-third miles. The first portion—that is, from Twenty-Third Street to Twentieth Street—is about a third of a mile. The B.C. Electric Railway crossing is one block east

of Twentieth Street, and Sixteenth Street (which is of importance in the events which occurred) crosses Sixth Avenue about a third of a mile east of the railway crossing. In the distance between Twenty-Third Street and the railway crossing, Kellock fired his last round. His pistol had been loaded with five or six cartridges at the outset. He had emptied the pistol, reloaded a single round, and fired it. He did not fire after crossing the railway crossing and probably not after crossing Twentieth Street.

Police car 41 was also equipped with a radio transmitter and receiver, and in the meantime Kellock had been in communication with the other two defendants, Douglas Sandford and Roy C. Hilker, who were on duty in police car No. 40. On receiving word by radio that Constables Keary and Kellock were pursuing the Chev car Sandford, with Hilker, proceeded to the intersection of Sixth Avenue with Sixteenth Street, where, observing the approach of a car without lights and of another car with a flashing red light following it, Sandford hastily parked police car No. 40 in the northern lane of Sixth Avenue, facing westwardly, with its right rear wheel close to the north curb and with the front of the car some three feet from the curb. The headlights were left burning and shone at an angle across Sixth Avenue. Both constables got out of the car, Sandford taking up a position in line with the front of the car and three or four feet to the southward of the centre line of the pavement, and Hilker taking up a position fifteen to twenty feet in front of the car and about three feet to the northward of the centre line of the pavement. The lights of the car were playing on Hilker. Both officers had flashlights and, by waving them, endeavoured to halt the approaching Chev car. The car approached them at high speed, veered for a moment or two to the north of the centre line of the street and then to the southward again, and narrowly missed colliding with police car 40. As the Chev car approached, Constable Sandford shouted to Constable Hilker, who jumped to the north side of the road. Constable Sandford moved to the south side of the road, and the Chev car passed between them. Both constables, Hilker and Sandford, drew their pistols and fired at the car, each of them firing two shots.

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The Chev car continued further along Sixth Avenue for approximately half a mile, passing through an intersection against a red traffic light, turned northwardly on Tenth Street for one block and thence westwardly on Nanaimo Street for one block, when it stopped. By this time, having been informed by radio of the course the car was taking, Constables Sandford and Hilker had proceeded to and reached the intersection of Twelfth and Nanaimo Streets and were blocking the Chev car's passage into it. At about the same moment, an R.C.M.P. car drove up, completing the road block at that intersection. The total distance covered from the service station to the intersection last mentioned was 3.7 miles.

During the chase Byers had been wounded by one of the bullets, and when it ended he was taken to Royal Columbian Hospital at New Westminster, where he was treated until he died. There is no evidence that any charge was laid against him or that he had committed any offence whatever. Nor does the evidence show any reasonable or probable grounds for believing that he had committed or was about to commit any indictable offence.

McDonald, the driver, was arrested and subsequently was convicted of and fined for dangerous driving contrary to the *Criminal Code* and for driving without a licence. LaSalle, Delaney, and Calbick were detained overnight and released without any charge being laid against any of them. There is no evidence as to whether or not any of them was taken before a magistrate, and the only ground for their detention suggested in the evidence is that they were material witnesses in respect of the offence of dangerous driving committed by McDonald.

The first problem is to determine whose bullet injured Byers, as in the circumstances I am of the opinion that no case has been made out for holding any one of the three defendants liable for the consequences of firing by any other of them. Each of them was a constable acting in the discharge of his duty. If anyone was their superior, it was Constable Keary, who is not a defendant. At the time when Byers was injured, all four constables were engaged in a lawful common purpose of stopping the driver of the Chev car, who was committing the offence of dangerous driving. In so doing they were acting in concert. But neither Sand-

ford nor Hilker had any connection whatever with the shooting done by Kellock. And while Constable Keary knew that Kellock was going to fire and apparently acquiesced in his so doing, there is no evidence that either he or Kellock directed or counselled Sandford or Hilker to fire or had any reason to anticipate that either of them would do so. Moreover, neither Sandford nor Hilker had anything to do with the firing by the other. Neither counselled or directed the other to fire. While Sandford was senior to Hilker and in a position to exercise control over him to some extent, he had no reason to anticipate that Hilker would act unlawfully, nor had he any opportunity to restrain him when the occasion arose. On getting out of police car 40, both Sandford and Hilker used flashlights in their effort to flag down the Chev car. When it did not slow down, each of them independently drew his pistol and fired. Each made his own decision to do so, without direction or urging from the other. In my opinion, in these circumstances the defendants cannot be treated as joint tort feasors and, as it is clear and indeed undisputed that one of them wounded Byers, it becomes necessary to determine which of them did so.

On reviewing the evidence, in my opinion it is possible to determine on a balance of probabilities whose bullet struck Byers. It will be recalled that the defendant Kellock fired his last round after coming onto Marine Drive, but somewhere in the distance between Twenty-Third Street and the B.C. Electric Railway crossing, a matter of at least one-third of a mile from the point from which the defendants Sandford and Hilker fired. Neither Sandford nor Hilker speaks of hearing or seeing any firing from the pursuing car. Moreover, on examination next day no bullet holes were found in the back of the Chev car. With these and the facts to be mentioned, it is in my opinion improbable that it could have been any of Kellock's bullets which struck Byers. It will also be recalled that the defendant Sandford was on the south side of the road when the Chev car passed him going eastwardly. The right side of the car was thus nearest to him. Byers was struck on his left side. Two of the witnesses spoke of a bullet striking the right portion of the hood but, whether it did so or not, the windshield was not broken, and none of the three per-

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sons occupying the front seat was struck. It is, therefore, almost inconceivable that that bullet, even assuming it to have been fired by Sandford as the car approached him, could have found its way to the back of the car and struck Byers. Nor was there any bullet hole on the right side of the car through which the bullet which struck Byers might have entered the car. Consequently I think it is also improbable that it could have been any bullet from Sandford's pistol which struck Byers.

On the other hand, it is, in my opinion, highly probable that the fatal bullet was one of those fired by the defendant Hilker. Adverting to the time when Byers was injured, the witness LaSalle gave the following evidence:

Q. You turned left and carried on on Marine Drive or Sixth Avenue back to New Westminster?
A. Yes.
Q. Then what happened?
A. There must have been three or four blocks from where we turned on to Marine Drive, a partial road block.
Q. What do you mean?
A. We seen a car partially blocked across the road.
Q. What kind of car?
A. A police car.
Q. Did you see any policemen?
A. Yes.
Q. Where were the policemen?
A. Standing by the car.
Q. They were by the car?
A. Yes.
Q. Can you say anything about the policemen, what were they doing?
A. I am not too clear on that point.
Q. Did they have lights?
A. I don't remember.
Q. Then what happened?
A. When we passed them there were shots fired.
Q. How many shots?
A. I couldn't say.
Q. One, two, ten?
A. Two—I couldn't say for sure.
Q. Do you know who fired the shots?
A. No.
Q. Was the other police car still following you at this time?
A. Yes.
Q. These shots that were fired at that point by the policemen following you or the policemen standing there?
A. I believe by the policemen standing there.
Q. Did anything else happen at that time?
A. I got down under the dash board.
Q. What caused you to duck?

A. The gunfire I suppose, and when I looked up the back window caved in, the side lefthand rear window and that is when Byers said, "I'm hit, stop the car".
Q. Were there any other bullets hit the car?
A. I believe so, I am not sure.

* * *

Q. Did you examine the vehicle after the accident?
A. Yes.
Q. Did you see any marks on it at all?
A. I believe there was three or four.
Q. Where were they?
A. The one window was shot out and there was a bullet hole in the side of the door and one on the hood of the car.
Q. Where on the hood?
A. The right front of the hood.

Speaking of the condition of the Chev car, the defendant Sandford said:

Q. You didn't observe that; did you examine the McDonald car after the incident?
A. I did.
Q. What did you notice?
A. I noticed the left rear window was smashed out, shattered.
Q. Was there any glass there?
A. There was glass on the rear seat, fragments of glass, a quantity of it on the sill, shatterproof type windows, and also there was a mark on the left rear fender.
Q. The left rear fender?
A. Yes.
Q. Did it indicate to you that it was a bullet mark?
A. It could have been, it was a groove mark.
Q. Did you check anything else on the car?
A. I examined the rest of the vehicle and found the gas meter showed approximately a quarter of a tank of gas; I observed no other marks.
Q. Did you look at the hood?
A. I looked at the hood.
Q. Did you not see any markings?
A. I didn't see any markings.

THE COURT: Q. Constable, was there what appeared to be a bullet hole in the window?
A. No, I couldn't tell that, sir, it was just shattered out, there was nothing to suggest any one particular area of glass, that there was a direct hole, in other words the whole of the window itself was shattered, just small pieces, nothing on the sills themselves to show any indentation that I noticed.

There is no evidence of any bullets having been found inside the Chev car or of any holes by which bullets which entered might have passed out of the car. Nor is there evidence as to which of the windows of the car were up and which were down.

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As the Chev car approached him, the defendant Hilker was standing fifteen to twenty feet in front of police car 40, which, as previously mentioned, was parked at an angle in the north lane of the road and was occupying most of that lane. Hilker says that when the Chev car veered to the north side of the centre line he jumped to the north curb and that he fired from a kneeling position at the Chev car after it had passed police car No. 40. This would mean that he fired either over or through the police car or behind it. And in the latter case the Chev car would necessarily have to be a considerable distance beyond the police car before Hilker would be able to see it from his position. Constable Keary's evidence is as follows:

> Q. Will you continue, what happened to the car that you were following as it approached the road block?
>
> A. It didn't slacken speed and as it went through this police car and the two officers standing there, the officers fired two or three shots each at the car, you could see the flash from their pistols; the car still speeded on four blocks where there is a traffic light showing red for eastbound traffic; . . .
>
> * * *
>
> Mr. McKINNON: Q. Constable, possibly you can clarify or give a definition of when the shots were fired by the police constables on the road, you stated "as it went through"; did you see any fire arms being shot while the car was approaching that road block and the police constables?
>
> A. No, sir.
>
> Q. Where was the pursuing car in relation to the road block when you first noticed the use of fire arms by the peace officers there?
>
> A. Were about five car lengths back, were approaching the road block and the chased vehicle was just going through it.
>
> Q. Had it got by the road block?
>
> A. It had just gone through, I imagine the officers were firing at the rear tires, I am not sure, sir.
>
> * * *
>
> Mr. STREIGHT: Q. . . . Do you know which way the police officers jumped at the time these boys passed?
>
> A. I saw one jump toward the police vehicle, which way the other officer jumped, I don't know.
>
> Q. And as far as you know the shots came from the north side of 6th Avenue at the time of the partial block?
>
> A. I know *the flashes came from between the two vehicles,* whether there were any other flashes on the other side or not, I couldn't say, sir.

I think it is obvious that the Chev car could not have actually passed police car 40 when the flashes occurred. They must have occurred just as the Chev car was passing

the police car or a fraction of a second earlier, for from the time police car No. 40 was passed it would obscure the Chev car from Hilker's view.

The bullet which wounded Byers struck him on the left side of the chest under the left arm but somewhat to the front. It passed between the third and fourth ribs, through the left lung, on a course slightly upward and somewhat towards the back. It ruptured a blood vessel leading from the heart and apparently also penetrated the left wall, but not the right wall, of the oesophagus. Obviously, it was a spent bullet. Byers was operated on at the hospital, but the bullet was not found. This could be explained on the theory that it had been expelled by Byers in vomiting but there is no evidence establishing what became of it.

In my opinion, it was one of Hilker's bullets which smashed the rear window as the Chev car was approaching and passing police car 40, and it was very probably the same bullet which, spent from smashing the window, struck Byers. In my view, it is infinitely more probable that this, rather than any other, was the fatal bullet. To have come from Sandford's gun, the bullet, whether fired before or after the Chev passed him, would have to be travelling on a widely different course from its initial one. Coming from Hilker's gun at the time the car passed Hilker, it would take but minor deflections to direct it to Byers' left side. Accordingly, I find that it was the defendant Hilker who shot Byers.

The next question is whether or not the firing by the defendant Hilker was justified in the circumstances. All of the defendants sought to justify under ss. 35, 41, and 648 of the *Criminal Code,* R.S.C. 1927, c. 36, which was in effect when the incident occurred. These sections are as follows:

35. Every Peace officer is justified in arresting without warrant any person whom he finds committing any offence.

41. Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

648. (1) A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.

(2) Any person may arrest, without warrant, any one whom he finds committing any criminal offence by night.

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The contention advanced by counsel on behalf of all the defendants is that McDonald, the driver of the Chev car, was committing a criminal offence, namely dangerous driving contrary to s. 285(6) of the *Criminal Code*, that the offence was being committed in their presence, and that accordingly each of them was entitled to arrest the driver without warrant, that as the driver was in flight to escape arrest each of them was entitled to use force to prevent his escape, that firing at the car was no more force than was necessary to prevent the escape, and that the escape could not be prevented by reasonable means in any less violent manner. Counsel for the plaintiff submits that there was no justification for arresting anyone but the driver, that there were other less violent means of preventing the escape, and that no justification for the firing was established.

In *Robertson v. Joyce* (1) Laidlaw J.A., in delivering the judgment of the Ontario Court of Appeal, said at p. 701:

> I turn now to s. 41 of the *Code*. That section is the same in substance as s. 43 of the draft *Code* submitted with the report of the Royal Commission appointed in England in 1878 to consider the law relating to indictable offences. It is founded in part on the principle of the common law that what the law requires it justifies *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.* The provisions of the section are applicable whenever the following conditions exist, namely: where a peace officer is proceeding lawfully to arrest a person; where the offence for which a person is to be arrested is one for which the offender may be arrested without warrant; and where the person to be arrested takes to flight to avoid arrest. Those requisites to the applicability of the section are unquestionably satisfied in the present case. The principal question in issue and to be determined by the Court is whether the defendant was justified in what he did under the particular circumstances of this case.
>
> A peace officer is not empowered to employ whatever means in whatever manner he pleases to prevent the escape of an offender who takes to flight to avoid arrest. He is not free to use force of whatever kind or extent he may think fitting to the circumstances. A statutory defence against liability of a peace officer for what he has done is not available to him under s. 41 if he has used an excess of force to prevent the escape by flight of a person to be arrested by him or if such escape could have been prevented by reasonable means in a less violent manner. The question whether he used an excess of force and the question whether the escape could have been prevented by reasonable means in a less violent manner are questions of fact for determination upon the evidence and in the circumstances of each particular case under review.

(1) [1948] O.R. 696.

In my opinion, the defendant Hilker may be regarded as acting either in his own right as a peace officer or as a person assisting Constable Keary in endeavoring to effect the arrest of McDonald for dangerous driving. In either case, the arrest by Hilker of McDonald for that offence without a warrant could be justified. The first two conditions for the application of s. 41 may thus be taken as satisfied.

And I think, too, that the third of the conditions, namely that McDonald was in flight to escape arrest, sufficiently appears from the evidence. McDonald says that his reason for leaving the service station as he did was that, as he had no driver's licence and as he was to some extent under the influence of liquor, he wanted to get far enough ahead of the police to change drivers and that, when the firing began, he became scared and would not stop. Whether the reasons so given are the correct ones or not, when the chase began McDonald was not fleeing from arrest for dangerous driving, but I think he must have realized, when committing that offence with the police in close pursuit, that he would be arrested for it, and by the time the defendant Hilker came into the situation I think McDonald was fleeing from arrest for that offence as well as for any other reasons he may have had in his mind. The preliminary conditions for the application of s. 41 are thus satisfied with respect to McDonald.

They are not, however, satisfied with respect to any of the other occupants of the car, and in my opinion the matter must be dealt with on the basis of the other occupants being innocent parties. There is no evidence that any of the constables had reasonable or probable grounds for believing that any of the passengers had committed an offence for which he could be arrested without warrant. Nor were the passengers in flight to escape arrest. While it was their duty to endeavor to get McDonald to stop and they, or some of them, asked him to do so, I do not think their failure to take further steps to stop the car is sufficient to make them parties to McDonald's offence. The use of force to arrest them cannot be justified under s. 41, and the injuring of any of them by force used for the purpose of arresting McDonald can be justified, if at all, only by showing not merely circumstances justifying the use of

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such force upon McDonald but also that such force was exercised reasonably and with due regard for the safety of the passengers.

The evidence, in my judgment, falls far short of establishing such a defence. Under s. 41 the force used can be justified as against McDonald only if his escape could not be prevented by reasonable means in a less violent manner. In *The King v. Smith* (1) Perdue J.A., directed the jury as follows:

". . . The grave question here is, what is the degree of force which Smith should have used, and the first thing for you to consider is, could Smith have apprehended the man by any other means than by shooting him. If you find he could have apprehended him by any other means then Smith was not justified in shooting him. Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person who is attempting to escape by flight.

"A man who is fleeing from lawful arrest may be tripped up, thrown down, struck with a cudgel and knocked over if it is necessary to do so to prevent his escape, and if he strikes his head on a stone and is killed the police officer is absolved because the man was fleeing to escape lawful arrest and the means taken to stop him were not dangerous and not likely in themselves to cause his death. But firing at a man with a revolver may result in the death of the man, as it did in this case, although the intention was only to wound and so prevent his escape." (His lordship then reviewed the evidence of the chase, and proceeded.) "It is the duty of every citizen to assist in the pursuit and capture of a criminal who is fleeing from arrest, when such citizen is called upon to do so by a peace officer". (His lordship described what was meant by a hue and cry, which the Crown counsel said should have been raised.)

Passing on he said: "You will have to consider whether Smith, if he had not had that revolver or had kept it in his pocket, might not have called to his assistance persons on the street, who would have joined him in the pursuit and have prevented Gans' escape. You will consider whether firing with the revolver did or did not deter them from rendering assistance. You will also have to consider whether Smith should have abandoned the pursuit of Gans at that time. He says his breath failed, his wind was gone; but should he have called upon some of the other persons who were running behind him, and have asked them to follow Gans and keep him in sight until another policeman came up? You will have to consider if the escape of Gans could have been prevented by such means".

His lordship further said they would have to consider whether the men who said they went round to Frances Street to head off the pursuit, and arrived there only to see the man lying on the ground dead, could not have overtaken him if called upon to do so. These were questions strictly for the jury. They would also bear in mind that the accused heard the clatter of a horse and buggy following him and also that there were several other persons running behind, including Wootton and the young man Ludwig.

(1) 13 C.C.C. 326.

On the facts in evidence, I am not satisfied that the escape of McDonald could not have been prevented without firing at him or at the Chev car. Constable Keary's evidence makes it clear that he had not exhausted all other means at his command to prevent the escape. He thought he could apprehend McDonald without calling upon the R.C.M.P. for assistance, and he did not ask the third New Westminster police patrol to help him. Moreover, it is apparent that McDonald was not succeeding in eluding him. Nor am I satisfied, viewing the matter solely from the point of view of the defendant Hilker, that all other means of preventing McDonald's escape had been exhausted. He and Sandford had a police patrol car in working order, with which they could give chase. It was equipped with a radio with which they could keep in contact with Constable Keary. Hilker knew that the chase had been going on for some time and that Constable Keary had been and still was in close pursuit; he knew that Constable Keary had radio communication at hand with which he might summon further assistance; he must have known that police car 41 was equipped with a siren which could be used to warn the drivers of other vehicles and thus minimize the danger at intersections. He does not suggest in his evidence that his firing was the only means left of stopping the Chev car but says he felt the possibility of hitting a tire and thus stopping the car was very good. In my opinion, his firing was done without regard to the question whether or not there were other less violent means available for preventing McDonald's escape and when there were, in fact, other means for accomplishing that purpose in a less violent manner.

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.

In *Cook v. Lewis* (1), Cartwright J., in delivering the judgment of the majority of the court, said at p. 839:

> . . . While it is true that the plaintiff expressly pleaded negligence on the part of the defendants he also pleaded that he was shot by them and in

(1) [1951] S.C.R. 830.

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my opinion the action under the old form of pleading would properly have been one of trespass and not of case. In my view, the cases collected and discussed by Denman J. in *Stanley v. Powell,* [1891] 1 Q.B.D. 86, establish the rule (which is subject to an exception in the case of highway accidents with which we are not concerned in the case at bar) that where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault". In my opinion *Stanley v. Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

In my opinion, the position in this case is that, it being established that Byers was shot by the defendant Hilker, the burden lay upon him to establish the absence of both intention and negligence on his part. 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.

The standard of care to be expected of persons using firearms for lawful purposes is stated as follows in *Charlesworth on Negligence,* 3rd Ed., p. 329:

> Loaded firearms must be used with the greatest caution. "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons". [*Per* Erle C. J. in *Potter v. Faulkner* (1861) 1 B. & S. 800, 805.]

There is evidence suggesting that the defendant Hilker knew that there were persons in the Chev car besides the driver, but whether he knew or not the evidence does not show that he had any reason to assume that the driver was alone in the car. To fire at the Chev car involved the risk that the bullet might strike the driver or a tire and thus put the vehicle out of control when it was moving at high speed. It also involved the risk that the bullet might strike a passenger. In any of these events, injury to a passenger was a likely consequence. Yet in the brief time that elapsed from the time the Chev car veered to the north of the centre line until it passed police car 40 Hilker jumped to the north curb, stumbled, recovered, drew his gun, which was in a holster under his jacket, and fired twice in quick succession at a fast-moving target. It is, of course, easy after the event to criticize a decision made and an act done pursuant to it on the spur of the moment by an officer engaged in the discharge of his duty, but making all due allowance for the difficulties of the situation I do not think

that the course taken by Hilker was a reasonable means of stopping the car or that it offered any but a very remote chance of accomplishing his purpose. Even more remote was the chance that his purpose could be achieved without injuring passengers in the car. He had no exceptional skill at pistol-shooting, yet he attempted from his position to hit the tire of a car moving past him at a speed of fifty miles an hour or more. And he made this attempt by firing twice in quick succession when he had insufficient time or opportunity to take a proper aim.

I find that the defendant Hilker was negligent towards the passengers in firing when the conditions involved so great a risk of injury to them. I also find that he was negligent in firing when he had insufficient opportunity to take a proper aim and in so firing when there was little likelihood of bringing the car to a stop by that means, either with or without injury to the passengers. The defence of justification accordingly fails, and the defendant Hilker must be held liable for the consequences of his act.

On the evidence and admissions, the damages sustained by the Crown as a result of the shooting of Byers amounted to $1,097.12, made up of $690 for physicians' and surgeons' fees, $330 for nursing services, $17.05 for hospital expenses, and $60.07 for loss of Byers' services, calculated by reference to his pay for the period from July 27, 1954 to August 12, 1954.

The plaintiff's claim against the defendants Douglas Sandford and Edwin J. Kellock will be dismissed but, as these defendants were represented by the same counsel as the unsuccessful defendant and made common cause with the unsuccessful defendant both in defending the action and in seeking to justify the shooting by all of them, and as the unsuccessful defendant would, in the circumstances, be ordered to pay any costs the successful defendants may recover, the dismissal of the claim against them will be without costs. The plaintiff will have judgment against the defendant Roy C. Hilker for $1,097.12 damages and costs.

Judgment accordingly.