In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 265

BETWEEN:

JOSEPH REYNOLDS

Plaintiff

- and -

ATTORNEY-GENERAL OF BERMUDA
(AS THE RELEVANT ENTITY UNDER THE CROWN PROCEEDINGS ACT 1966)

Defendant

JUDGMENT

Trial on negligence, Occupational Safety and Health Act 1982, statutory obligations, safe planning for a police firearms training exercise, when to stop a training exercise in respect of a safety issue, personal injury, contributory negligence, Worker's Compensation Act 1965

Date of Hearing: **7, 8, 9 February 2022**
Date of Ruling: **26 May 2022**

Appearances: **Ben Adamson, Conyers Dill & Pearman, for Plaintiff**

Mark Chudleigh, Laura Williamson, Kennedys, for Defendant

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff PC Joseph Reynolds ("**PC Reynolds**") was employed by the Bermuda Police Service (the "**BPS**") as a police constable at all material times.

2. Pursuant to section 3(1)(a) of the Crown Proceedings Act 1966, the Defendant, on behalf of the Crown, is liable for torts committed by its servants or agents, in this case the BPS.

Background and Pleadings

The Writ and Statement of Claim

3. By a Specially Indorsed Writ of Summons ("**SIW**") issued on 13 August 2020, PC Reynolds commenced the present action for: (a) general damages, including damages for pain, suffering and loss of amenity; (b) special damages; and (c) compensation pursuant to the Worker's Compensation Act 1965 (the "**1965 WCA**"). The claim was in relation to an injury suffered during a police training exercise (the "**Exercise**") in 'Enforced Stop and Extraction' tactics on 30 October 2018 for a group of Authorised Firearm Officers ("**AFOs**"). The Exercise was for recertification for Level 2 AFOs who are required to undergo such training twice a year.

4. The Statement of Claim (the "**SOC**") set out that on the afternoon of 30 October 2018, PC Reynolds was assisting with the exercise for AFOs that was being conducted at a location in the City of Hamilton (the "**Location**"). The Exercise was designed to simulate the enforced stop of a suspect car with the AFOs extracting the occupants from it. PC Reynolds was assisting by playing the part of an occupant seated in the rear of the suspect car. People volunteering to play the part of suspects in training exercises are referred to as "stooges", thus for the Exercise PC Reynolds was a "stooge". PC Brady was the other stooge participating in the Exercise. For simplicity, I will refer to the points where PC Brady was to be extracted from the car as the "**Brady Extraction Point**" and to where PC Reynolds

was to be extracted as the "**Reynolds Extraction Point**", together the "**Extraction Points**".

5. The SOC set out that the BPS was under a duty to take reasonable care for the safety of its employees. This duty required the BPS to comply with the statutory obligations set out in the Occupational Safety and Health Act 1982 (the "**1982 OSHA**"). The SOC also set out that the instructors running the exercise, PC Marriott and PC Lewington (the "**Instructors**") were under a duty to take reasonable care for the safety[1] of all those participating in the exercise, including PC Reynolds. Also, PC Joell, one of the AFOs, was under a duty to take reasonable care for the safety of his fellow participants, including PC Reynolds. Thus the BPS was vicariously liable for the breaches of these duties that were committed by its employees during the course of their employment.

6. The SOC set out the Particulars of Negligence claiming that PC Reynolds' injury was caused by the negligence of the BPS and/or its employees including failing to safely plan for the exercise, failing to conduct an assessment, failing to ensure adequate first aid and medical equipment was available at the Exercise, failing to provide proper control measures, failing to provide adequate safety oversight during the exercise, PC Joell failing to use approved methods of control and restraint on PC Reynolds, PC Joell using unsafe, dangerous and untaught techniques on PC Reynolds, the Instructors failing to stop the Exercise as soon as PC Joell had grabbed PC Reynolds around the neck and when PC Joell placed PC Reynolds in a headlock, and failing to comply with statutory obligations set out in sections 3(1) and 3(2)(c) of the 1982 OSHA.

7. The SOC set out the particulars of injury to PC Reynolds' left ankle in detail. He suffered a tri-malleolar fracture and extreme dislocation of his left ankle requiring extensive surgical intervention, that is, three operations under general anesthetic. He has been receiving physiotherapy and plasma therapy, having been caused a great deal of pain and suffering with continuous pain and general weakness in his left ankle. His ability to walk has been

[1] The two Instructors were also the safety officers for the Exercise. I use the terms Instructors and safety officers according to the specific issue that is being dealt with although they are the same people.

restricted and he has been unable to return to work since the incident. He has had to stop running and other forms of impactful exercise.

8. The SOC set out that a Schedule of Loss was being prepared. In the alternative, and only in the event that the Court is not satisfied that the Defendant is liable to PC Reynolds in negligence, in accordance with section 24(2) of the 1965 WCA, PC Reynolds seeks compensation from the Defendant pursuant to the provisions of the 1965 WCA.

The Defence

9. On 28 September 2020 a Defence was filed by the Defendant. It admitted that the Defendant on behalf of the Crown was liable for torts committed by its servants or agents which included the BPS. However, it denied that it was in fact liable to PC Reynolds for a number of reasons and that the Instructors and PC Joell had breached any duties incumbent upon them, setting out that PC Reynolds was also obliged to comply with the 1982 OSHA to take reasonable care to protect his own safety as well as the safety of others. The Defence set out that PC Reynolds was given a standard written briefing used whenever this Exercise is performed which required him to offer no verbal or physical resistance and to allow himself to be taken to the ground and secured. Further, PC Reynolds was not instructed to try to escape in any circumstance.

10. The Defence set out that if PC Reynolds has suffered loss and injury caused by the Defendant's negligence, then any damages should be reduced to reflect the responsibility for his own loss and injury. Further, since these proceedings were commenced more than 26 weeks after the incident on 30 October 2018, a claim for compensation under the 1965 WCA is not maintainable pursuant to section 12. If it was maintainable then PC Reynolds' injury was attributable to his serious and willful conduct such that any compensation in relation to his injury is disallowed by section 4(1)(b) of the 1965 WCA. Further, if PC Reynolds was entitled to compensation, then it should be offset against the medical expenses paid by the BPS.

The Trial

11. The trial took place on 7, 8 and 9 February 2022 with evidence given by witnesses for the Plaintiff and Defendant, all employed by the BPS at the material time. Each party called one expert witness. In the following sections on the evidence I set out some of the most relevant parts of the evidence.

12. Counsel for the parties made opening remarks, referred to a diagram of the Location with the vehicles, officers and GoPros in place and took the Court in detail through a series of ten (10) still photographs which were in evidence (**"SP1" – "SP10"**).They also took the Court in detail through the evidence of video footage of the Exercise, in real time and in slow motion. The video footage was obtained from various camera devices as follows:
    a. Bodycam footage from the AFOs;
    b. Mobile phone camera footage shot by both PC Lewington and PC Marriott;
    c. GoPro cameras set up on the front and back of the suspect car; and
    d. A GoPro camera set up on a lamppost on the nearside of the suspect car, where PC Reynolds and PC Joell interacted.

The Evidence – The Plaintiff's Case

13. The Plaintiff called three witnesses – PC Bambury, the Plaintiff PC Reynolds and expert witness Mr. Eric Baskind.

Plaintiff's Case – PC Elliott Bambury

14. PC Bambury stated that he was employed as an Armed Response Officer in both Bermuda and the UK for several years. He did firearms training courses with the BPS. Also, he has acted as a stooge for the BPS courses with varying kinds of instructions.

Plaintiff's Case – PC Reynolds – Evidence-in-Chief

15. Mr. Reynolds made a witness statement dated 17 March 2021 which stood as his evidence in chief. He stated that he was employed as a constable with the BPS on a contract for the period July 2017 to July 2022. Prior to joining the BPS he had been a constable in the UK for 21 years. He is qualified as a British National Firearms Instructor and a qualified UK Counter Terrorist Specialist Firearms Officer. He had originally joined the BPS as an Armed Response Vehicle ("**ARV**") Officer in July 2017.

16. In essence his evidence was that:
    a. He was attached to the BPS Training School (the "**Training School**") as a firearms instructor with the BPS for about six (6) months but returned to operational duties as he was unhappy with the way training was being run. He did not leave on bad terms and he returned to the Training School from time to time to participate as an instructor and as a stooge.
    b. As physicality is a part of the training, the stooges wear protective gear including face mask, knee pads and gloves.
    c. He had instructed PC Joell many times before but was not impressed by his ability or understanding of taught tactics although he held nothing against him and would often talk socially with him.
    d. He stated that there was no written briefing for the stooges and he could not recall ever using a written briefing (the "**Role Player Brief**") as a stooge in Bermuda. He was given a verbal briefing. If the AFOs failed to take control of him, then he was to get out of the car and attempt to escape.
    e. At the Location once the ARVs arrived he then saw PC Joell open the front nearside door and then later open the rear nearside door without his weapon drawn. He thought that was sloppy based on the scenario of a hidden person in the backseat possibly with a firearm.
    f. PC Joell then leaned in to grab him which he also thought was sloppy. Therefore, he swung about in the seat, shouted "fuck off" and kicked (at under half of his full force) his right leg out towards PC Joell, the sole of his right foot striking the left

of PC Joell's body armour. He stated that this was the same level of resistance he would usually give as a stooge and that he was doing what he was asked to do. PC Reynolds stated that at that point, PC Joell stood still appearing startled, so he wriggled out of the car with the intention to run off, per his briefing. However, PC Joell reacted at that point, grabbed him and placed him in a headlock, gripping him around the neck very tightly.

Plaintiff's Case – PC Reynolds – Cross-Examination

17. PC Reynolds was extensively cross-examined by Mr. Chudleigh. His evidence in essence was that:
    a. He noted that the BPS did not have the same level of resources as the UK training schools but he was surprised that the training was not less rigorous than the UK with regular local training.
    b. In respect of realism of training, he noted that when he arrived the training was basic but it had become more realistic including training in public areas, with briefings, planning, body cams and resistance. He agreed that students could learn extraction without resistance. However, in respect of the Exercise he was briefed to offer resistance adding that officers should be capable of a passive extraction before conducting a dynamic extraction.
    c. He stated that he did not regard PC Joell as competent in firearms as he was not impressed by his understanding of taught tactics and he did not seem to understand the tactics. Additionally, PC Reynolds stated that although PC Joell was of a certain level before PC Reynolds arrived at the training school, he felt that PC Joell needed improvement in his tactical abilities and extra training in some areas. In a training course in December 2017/January 2018 PC Joell made some serious errors in training which he addressed in his debrief and reported to PS MacNab. PC Reynolds stated that his views remained the same now that he had been injured. He was angry with PC Joell about the incident which he felt was caused by PC Joell's recklessness.

d. In respect of the Exercise, PC Reynolds conceded that there was no mention of such instructions to kick out in his two statements. PC Reynolds agreed that in the Exercise he kicked out but that it was not in his statements that he was instructed to kick out. When it was put to him that it was not in his statement because he was never instructed to kick out, PC Reynolds maintained that he was instructed verbally to resist verbally and physically and that PC Marriott was aware that he would kick out.

e. PC Reynolds conceded that nowhere in his statements does he say that he was told to raise his arms towards the AFO's head or to fight in hand to hand combat, but he maintained that he was he was told to try to grab a weapon if an AFO got too close and to do aggressive actions.

f. In respect of the Exercise, he did as he was briefed to do which was to offer verbal and physical resistance. He denied that he deliberately ignored the instructions written in the Role Player Brief.

g. He denied that he was angry at the BPS for their standard of firearms training and that his views about training were being ignored. He denied that anger and sense of being ignored influenced his actions when PC Joell opened the door during the Exercise. He denied that when he saw PC Joell open the car door it affected him.

h. He felt that PC Joell had crossed the line as soon as PC Joell grabbed him in a neck-hold, which was when the Exercise should have been stopped. PC Reynolds stated that he didn't expect to be grabbed around his neck, he expected to run away noting that if PC Joell pulled out his firearm, Taser or Captor spray then he would have stopped and that would have been a fantastic end to the Exercise. PC Reynolds stated that AFOs have escalating measures that they can deploy.

18. PC Reynolds was cross-examined on the still photographs. In respect of SP2, PC Reynolds agreed that he had kicked out at PC Joell hitting him and that PC Joell had stepped back. PC Marriott was near. He expected that PC Joell would deploy a number of available tactics to subdue him starting with negotiations.

19. In respect of SP 3, PC Reynolds stated that he was then exiting the vehicle and PC Marriott was moving in.

20. In respect of SP 4, PC Reynolds agreed that PC Joell had stood back and so at that point he was trying to escape.

21. In respect of SP 5, PC Reynolds stated that he was not able to tell from the picture that his arms were going up to PC Joell. Rather he was trying to escape. He completely disagreed that at this point he was going to directly confront and engage PC Joell. He was swearing at PC Joell as part of his brief.

22. In respect of SP 6, PC Reynolds stated that the exercise should have been stopped at this point as soon as PC Joell grabbed him around the neck. He explained that in his first statement he said that PC Joell had him in a choke-hold. However, he now agreed that PC Joell did not put him in a choke-hold but rather it was a neck-hold.

23. In respect of SP 7, PC Reynolds agreed that he was not in a head-lock. He accepted that in a real life circumstance, PC Joell could have used a knee strike or an elbow strike against him but as this was a training exercise, PC Joell could have shouted "knee strike" or "elbow strike". He did not accept that in a fast moving scenario, the action was instinct against thinking, stating that in his experience he had never used untaught tactics, thus PC Joell should have used taught tactics. PC Reynolds did not accept that the Taser or Captor were not available for PC Joell's use, stating that PC Joell could have disengaged his hands from him, stepped back and got assistance.

24. In respect of SP 8, PC Reynolds did not agree that PC Joell did not have him in a neck-hold, stating that it did appear so as his hands were on his neck although it was not a complete hold.

25. In respect of SP 9, PC Reynolds did not agree that PC Joell did not have him in a neck-hold, stating that PC Joell did have his arm partially around his head and neck area. He noted that PC Joell was a big man who boxes. He did not agree that just half of PC Joell's forearm was near his neck, stating that he felt Pc Joell's arm around his neck.

26. In respect of SP 10, PC Reynolds did not agree that PC Joell's elbow appeared to be on his right shoulder, stating that PC Joell had his arm around his neck. He stated that he did not know if PC Joell was trying to unsettle his balance but that balance displacement was taught in the UK and Bermuda but it did not involve a neck hold. He maintained that he shouted "Stop" but maybe PC Joell's hold around his neck caused the words not to come out. He denied that he never said "Stop" to PC Joell, stating that he wanted him to stop as he did not want to be thrown to the ground.

The Defence Case

27. The BPS called seven witnesses and an expert witness, PC Sutherland.

Defendant's Case – Inspector Charlene Thompson

28. Inspector Charlene Thompson exhibited several documents that she compiled as part of her report. She stated that at the time she was the Office in Charge ("**OIC**") of the Training Unit. The firearms training packages were driven by PC Lewington, PC Marriott, PS MacNab and PS Thomas whom she considered to be subject matter experts. Her involvement was purely administrative and in the case of an injury during training she would secure video footage, conduct welfare checks and gather information to compile an injury report to submit to the Assistant Commissioner of Police. She was not present at the Exercise.

Defendant's Case – PC Lewington

29. PC Lewington stated that he was a member of the Emergency Response Team ARV and was seconded to the Training School as a Firearms Instructor. He has put together training packages for the recertification training every six (6) months. Once it is approved by the Chief Firearms Instructor ("**CFI**"), it is then rolled out for training. In respect of the Exercise he had submitted an initial report dated 5 November 2018 of PC Reynolds' injury.

At the time, it was not a litigation matter. His witness statement for these proceedings was a fuller account.

30. PC Lewington explained that for the Exercise PC Marriott was be at the location as Tactical Firearms Commander (the "**TFC**"). In the stationary suspect car at the Location, PC Brady was seated in the driver's seat and PC Reynolds was seated in the backseat. They had been given instructions not to resist per the written scenario attached to his statement.

31. PC Lewington was cross-examined extensively on a number of areas by Mr. Adamson. He was taken through the pictures which he stated show a progression of action at the passenger side rear door which includes: (a) PC Joell retreating from the suspect car (SP1); (b) PC Joell backing off from the suspect car (SP2); (c) PC Joell's right foot further back than the left indicating that PC Joell had taken a stance (SP3); (d) PC Reynolds emerging from the suspect car (SP4); (e) PC Reynolds and PC Joell moving towards each other (SP5); (f) PC Joell, whose legs are in a wide stance, with his left hand on PC Reynolds right shoulder; (SP6, SP7)); (g) PC Joell moving forward to PC Reynolds (SP8); and (h) PC Joell has his right arm around PC Reynolds neck, which he later said was not a neck-hold (SP9).

Defendant's Case – PC Marriott

32. PC Marriott exhibited his incident report dated 31 October 2018, two tactical training scenarios from the AFO Level 2 Recertification Package Oct-Dec 2018 of which one was the Role Player Brief and a four page Safety Brief. PC Marriott stated that he prepared a report of the incident the same day but in his witness statement for the case he provided more detail. PC Marriott explained what the AFOs were expected to do, what the learning outcomes were and that the Instructors were observing for the correct planning, approach, positioning, allocation of resources, extraction and subsequent handling of stooges.

33. PC Marriott stated that on 30 October 2018 both PC Brady and PC Reynolds were given the Role Player Brief which was the standard instruction for the exercise which is not

departed from and which was designed to achieve the learning objectives without undue risk to anyone. The stooges are told to comply with the instructions from the AFOs and to leave the suspect car and go the ground without resistance. He noted that they never instruct stooges to resist physically in training exercises as they are there to learn and practice techniques, not to fight. Sometimes they are instructed to offer verbal resistance. He recalled that he briefed PC Reynolds at the training office when he gave him a laminated copy of the Role Player Brief during the lunchbreak.

34. PC Marriott was cross-examined extensively on a number of areas by Mr. Adamson. He agreed his report did not mention that PC Reynolds had disobeyed the Role Player Brief as he explained that his report was a brief summary. PC Marriott stated that the first time he mentioned the cause of the accident was two and a half years after the incident when he put it in his witness statement.

35. PC Marriott stated that after the accident, he was directed by Inspector. Thompson to collect evidence on the training exercise. He had the lesson plan which remained a part of the training package for which the original hardcopy was given to Inspector. Thompson. He stated that the laminated briefing (the Role Player Brief) was a part of a ring binder which went back into the training package, like PC Reynolds did the previous week. That went to Inspector. Thompson also.

36. PC Marriott stated that sometimes stooges potentially run away if it was a part of the scenario. In the Exercise, PC Reynolds was not told to be verbally abusive. He referred to the Role Player Brief which stated "*Do not resist …*". PC Marriott stated that it was not correct that his evidence was based on reviewing documents two and a half years later rather than his memory as this was not a test of his memory. However, he wanted the Court to have the best evidence which was the Role Player Brief. He absolutely denied that he told PC Reynolds to be verbally abusive, to resist and to run away from the suspect car.

Defendant's Case – PC Brady

37. PC Brady stated that on 30 October 2018 he played the role of a suspect during the Exercise. At the beginning of the day he was handed the Role Player Brief by PC Marriott and PC Lewington. He explained that the Instructors always take the laminated brief out on exercises in case it is needed for refreshing memory. For the Exercise, his instructions were to be compliant when the officers approached the suspect car and to follow direct instructions that were given to him. PC Brady stated that he had never been instructed to physically resist or be violent towards the students when playing a stooge during a training exercise. He has been told to act up, carry a potential weapon, rant and rave a bit so that the AFOs would have to practice talking him down but the Instructors would give an indication when to start complying.

Defendant's Case – Acting Police Sergeant Smith

38. A/PS Smith stated that he was a participant on the training course and Exercise. On 30 October 2018 he was the driver of a police vehicle with AFOs on board and they proceeded to the Location. A/PS Smith stated that he had played a stooge in training exercises several times when he was provided with a brief that he had to stick to. He stated he has never been instructed to be violent or to offer significant physical resistance, other than refusing to move or not moving because he was wearing a seatbelt.

Defendant's Case – PC Joell

39. PC Joell stated that he has participated in various training exercises which included several extractions which he has also done operationally. He has also participated in training exercises using techniques for arrest, restraint and detention including straight arm bar take down, wrist lock take down, balance displacement. Knee/elbow/open hand strikes, and use of baton, Captor, and Taser. He has used these techniques operationally also.

40. PC Joell's evidence in essence was that:

    a. On 30 October 2018 he participated in the Exercise. When the ARVs arrived at the Location, he went to the passenger side, having glanced into the rear window and not seeing anyone he opened the front passenger door when he saw PC Reynolds seated in the rear seat. He opened the rear passenger door, ready to extract PC Reynolds, but as he reached for his arm, PC Reynolds leaned backed and kicked out at him in a hard and violent manner.

    b. He had not expected PC Reynolds to react that way as that was not the typical behaviour of a stooge and he had never experienced a stooge to behave violently like that. He was taken aback by PC Reynold's reaction so he stepped back to reassess the situation. As soon as he did so, PC Reynolds got out of the suspect car shouting "Fuck you" repeatedly and launched himself toward him.

    c. So he stepped towards PC Reynolds to try again to restrain and detain him when they ended up grappling each other. He noted that he could not use the standard way to take PC Reynolds down to the ground as he realized that he could not release his hold of PC Reynolds without losing control of him. Therefore, he performed a hip-toss on PC Reynolds taking him to the ground, noting he could not use any other procedure or safety equipment as PC Reynolds had a hold of him.

    d. He did not realise that PC Reynolds was injured as he proceeded to try to gain control of his hands to restrain him in accordance with the Exercise. At that point PC Reynolds was screaming at him words to the effect that PC Joell had broken PC Reynolds' ankle whilst punching out at PC Joell.

41. PC Joell was cross-examined on a number of areas. He stated that by the time he made his statement in this matter he had reviewed the video footage. However, he maintained that he recalled the incident, it was traumatic and he could replay it in his mind as his memory had not played any tricks on him and his recollection was reliable.

42. PC Joell was taken through the photos. He described that when he put his own arm up, he was not pushing PC Reynolds but he was grappling his shoulder. He denied that he was taking the fight to PC Reynolds but he was responding to him. He agreed that the photos

strongly suggested that when he had one foot extended forward he was using arm to arm combat techniques with PC Reynolds. He stated that as a trained AFO he did have options such as the Taser and Captor to use against PC Reynolds but there was not enough room to use them. However, he was stunned by PC Reynolds' actions but his plan was still to complete the extraction exercise using another method to take him down to the ground such as the one hand bar. Further, if he moved back he would have lost control of PC Reynolds.

Defendant's Case –PS MacNab – Evidence

43. PS MacNab was attached to the Training School at the time of the incident having been there since 2007. He was not present at the Exercise but he has had experiences with PC Reynolds. He stated that when PC Reynolds was instructing members of the ERT, his style was aggressive, demanding, often putting students in a position to fail then providing the learning by way of feedback. This worked for some but it failed to cater for officers who needed encouragement or who needed to learn a whole sequence of tactics.

Expert Evidence

44. By an order dated 28 January 2021 leave was granted as follows:
"For each party to adduce expert evidence from a suitably qualified expert in the field of physical interventions and restraints as used by police officers. For the avoidance of doubt, any such expert evidence is restricted to the issue of liability only and each party is limited to one expert each on the issue."

Joint Report

45. The Experts filed a joint report listing the areas where they agreed and disagreed as set out below in various categories. The joint report indicated that they had agreed on some issues but had not changed their minds after discussion, standing by their original views.

46. Risk assessment – The experts agreed that there should have been a written risk assessment. Mr. Baskind said that a dynamic risk assessment is not a substitute for a written risk assessment.

47. The Safety Briefing – The experts agreed that: (a) all officers should comply with instructions given by trainers/supervisors; (b) safety briefings need to be followed whether given orally or in writing; (c) If the Court finds that PC Reynolds was instructed to offer physical resistance then it was appropriate that he should have followed that instruction.

48. Realism – The experts did not agree on whether it was necessary for training to be realistic. Mr. Baskind said that training should be carried out with a degree of realism, subject to the confines of safety. Choreographed training without resistance did not provide officers with the appropriate level of experience needed to deal with violent and aggressive incidents and as a result will be pointless. PC Sutherland maintained that resistance is not necessary for a training exercise to be of value. There was much to be gained from an enforced stop and extraction training scenario without the stooge offering resistance.

49. Head-locks/neck-locks – The experts agreed as follows:
    a. A head-lock is a technique whereby a person places an arm around another person's head or neck. It is often but not always used to wrestle a person to the ground. The terms are often used interchangeably.
    b. Head-locks and neck-locks do not appear in the National Personal Safety Manual and are not taught during officer safety training. Neither are they practised during training.
    c. Head-locks and neck-locks can cause significant harm, including death. Risks include injuries to the spine, compression/restriction to the blood supply to the brain and restriction of air supply.

50. Mr. Baskind said that PC Joell grabbed PC Reynolds in a head-lock. PC Sutherland said that no injuries of this nature were reported by PC Reynolds and he did not complain of any injuries to his neck or spine. He maintained that the ankle injury could have been caused by any number of different takedown techniques.

51. Were PC Reynolds' actions reasonable? The experts did not agree on this matter. Mr. Baskind said: (a) If the Court finds that PC Reynolds was instructed not to use physical force to resist his arrest then his actions were not reasonable; (b) If the Court finds that PC Reynolds was instructed to offer verbal and physical resistance during his arrest then his actions were in accordance with such an instruction and were reasonable.

52. PC Sutherland said: (a) if the Court finds that PC Reynolds was not instructed to use physical force to resist his arrest then his actions in using such force were inappropriate; (b) if the Court finds that PC Reynolds was instructed to offer specified verbal and physical resistance during his arrest then his actions were appropriate, provided they were within the boundaries of his instructions, acting beyond the bounds of his instructions would be inappropriate.

53. Were PC Joell's actions reasonable? - The experts agreed that whatever PC Joell was trying to achieve during the Exercise he did not succeed. Mr. Baskind said that no discernible technique could be seen from PC Joell on the footage. PC Sutherland said that no discernible technique could be seen to be achieved on the footage. They were unable to agree whether PC Joell's actions were appropriate. Mr. Baskind said that although it was reasonable for PC Joell to use force to arrest PC Reynolds it was not reasonable to use a headlock as it was a training exercise and PC Joell was not in danger.

54. Supervision – The experts agreed that there was a need for a device such as a whistle, horn or claxon to stop the training immediately. Shouting a code word to stop the training was not adequate and it cannot always be heard. PC Sutherland did not agree that the availability of such a device would have made any difference in the case given the speed with which the incident unfolded and the injury occurred.

55. The experts were not able to agree in respect of the supervision of the exercise. Mr. Baskind said that one or more of the Instructors should have been positioned to oversee the impact points, that is, where the stooges were extracted. These were obvious in this case as the Vehicle was stationary. PC Lewington, as a safety officer, should have been at the point of

impact before the AFOs approached the car, not arriving with the AFOs. PC Marriott also missed the start of the extraction. Proper oversight could not be achieved if the Instructors, also having the role of safety officers, were filming the exercise, as they would be focused on filming. A safety officer had to be ready to halt the exercise if something went wrong. There was a gap of 6 seconds from when PC Reynolds started acting aggressively to when he screamed out in pain. There was ample time for a reasonably competent safety officer to have halted the exercise – at the earlier of either PC Reynolds becoming aggressive, if contrary to instructions, or when PC Joell grabbed him in a headlock.

56. PC Sutherland said the Instructors were positioned appropriately and safely with moving vehicles being used and could not anticipate where the vehicles would come to a stop. There were six (6) seconds from the opening of the rear passenger door to the injury occurring and there were two (2) seconds from PC Reynolds' complete exit to injury. PC Sutherland said that the rapidly unfolding events caused no officer present to respond outside of the scenario parameters but the incident was so rapid that no one could have been expected to react in the few seconds between initiation and injury.

Plaintiff's Case – Expert Eric Baskind – Cross-Examination

57. Upon review of the photographs SP1 – SP5, Mr. Baskind accepted that PC Reynolds kicked out at PC Joell hitting a part of PC Joell's body, PC Joell backed off, PC Reynolds exited the car and that he raised his left arm. However, he objected to the question that PC Joell was "mirroring" PC Reynolds, accepting that both PC Reynolds and PC Joell had their hands up. He further accepted that if a person put their hands up to another person, that person in return would put their own hands up. When asked if the Exercise should have been stopped at this point, Mr. Baskind answered that the Exercise could have been stopped at this stage on the basis that PC Reynolds was instructed not to resist. When the question was repeated Mr. Baskind stated that the Exercise should have been stopped at this point. He agreed that PC Joell still had work to do, although it was not an extraction.

58. Upon review of the photographs SP6 – SP8, Mr. Baskind agreed that from this point forward it was no longer an extraction exercise and that it should have been stopped. He accepted that there was no neck-hold at this point.

59. Upon review of the photograph SP9 – S10, Mr. Baskind agreed that there was no neck-hold at this point but that it was starting to be applied as PC Joell's left elbow was in the vicinity of PC Reynolds' shoulder and neck. He accepted that only part of PC Joell's forearm was beneath PC Reynolds' neck.

60. Mr. Baskind maintained that the Instructors, as safety officers, were focused on filming when they should have been near to and focused on the points of extraction. He maintained that whistles or klaxons are used universally in training exercises of this type and that the role of the safety officer is to ensure the Exercise is running safely and to stop it if necessary. Any filming could be done by someone else. Further, Mr. Baskind maintained that in the present case, a safety officer should have had the whistle to his lips, seen PC Joell engage a head-lock technique, process that information in one-half second (rather than 2 – 3 seconds as suggested) and blow the whistle to stop the Exercise.

61. On re-examination, Mr. Baskind maintained that:
    a. On a scenario that PC Reynolds was instructed to be compliant, the safety officer should have stopped the Exercise as soon as PC Reynolds became aggressive.
    b. On a scenario that PC Reynolds was instructed to run away if he could, the Exercise should have been stopped when PC Joell started to put PC Reynolds in a head-lock at SP9.

Plaintiff's Case – Expert PC Sutherland – Cross-Examination

62. PC Sutherland was cross-examined by Mr. Adamson. PC Sutherland was of the view that two seconds was not enough time for the safety officers to react to what was happening between PC Reynolds and PC Joell.

63. PC Sutherland maintained that PC Reynolds moved his arm out towards PC Joell's right shoulder at speed. He stated that in his view, PC Reynolds when he got out of the car, made the first contact with PC Joell and PC Joell then mirrored him. Further, he maintained that in his view, there was a tussle, instigated by PC Reynolds, which lasted two seconds before both PC Reynolds and PC Joell lost their balance and fell to the floor. During the tussle, PC Joell's arm did go around PC Reynolds' neck. The tussle was like what schoolboys would do as PC Joell attempted to get PC Reynolds to the floor. He maintained that PC Joell's attempt to use a 'hip toss' to force PC Reynolds over his hip was not successful because PC Reynolds' feet did not leave the ground at any point.

The Law

64. Section 3 of the OSHA states as follows:

"General duties of employers

3 (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

"(2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular—

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) ...

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of his employees;"

65. Section 5 of the OSHA states as follows:

"General duty of employees

5. It shall be the duty of every employee while at work—

"(a) to take reasonable care to protect his safety and health and the safety and health of other persons who may be affected by his acts or omissions at work;

"(b) as regards any duty or requirement imposed on his employer or any other person by or under this Act or the regulations, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with."

66. Section 4 (1) and (2) of the WCA 1965 states as follows:

"Employer's liability for compensation for death or incapacity resulting from accident

4 (1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with this Act:

Provided that—

(a) the employer shall not be liable under this Part in respect of any injury which does not incapacitate the worker for a period of at least three consecutive days from earning full wages at the work at which he was employed; and

(b) if it is proved that the injury to a worker is attributable to the serious and willful misconduct of that worker, any compensation claimed in respect of that injury shall be disallowed:

Provided that where the injury results in death or serious and permanent incapacity, the court on a consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit.

(2) For the purpose of this Act, an accident resulting in the death or serious and permanent incapacity of a worker shall be deemed to arise out of and in the course of his employment, notwithstanding that the worker was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the worker for the purposes of and in connection with his employer's trade or business.

67. Section 12 of the WCA 1965 states as follows:

"Requirements as to notice of accident and application for compensation

12 Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the worker as soon as practicable after the happening thereof and before the worker has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within twenty-six weeks from the occurrence of the accident causing the injury or, in the case of death, within twenty-six weeks from the time of death:

Provided that— ..."

The Issues

68. Mr. Adamson made a number of submissions in support of the Plaintiff's case which was brought in common law negligence and also under section 3 of the OSHA. In the alternative, if the Court was not satisfied that the BPS is liable to PC Reynolds in negligence, PC Reynolds seeks compensation under the Workers' Compensation Act. ("WCA 1965").

Contemporaneous Documents and Oral Evidence

69. Mr. Adamson noted that there were factual disputes that needed to be resolved. He noted that difficulties often arise in determining factual disputes years after the events in question when faced with the fallibilities of the human memory. He relied on the case of *Martin v Kogan* [2019] EWCA Civ 1645 where it stated that the case of *Gestmin SGPS S.A. v Credit Suisse* (UK) Ltd [2013] EWHC 3560 (Comm) was one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. *Martin v Kogan* also referred to Lord Bingham's discussions in his well-known essay "*The Judge as Juror: The Judicial Determination of Factual Issues*" (from the Business of Judging, Oxford 2000) where a proper awareness of the fallibility of memory does not relieve the judge of the task

of making findings of fact based on all the evidence. Where a party's sworn evidence is disbelieved, the court must say why that is; it simply cannot ignore the evidence.

70. Mr. Adamson's position was that the Court should consider all the evidence, in particular the contemporaneous documents and the oral evidence should be assessed against such documents. Mr. Adamson pointed to six pieces of contemporaneous evidence as follows:
    a. An undated written briefing drafted for participants in the Exercise;
    b. The video footage;
    c. A short email accident report dated 30 October 2018 from PC Marriott;
    d. A longer email accident report dated 5 November 2018 from PC Lewington;
    e. A formal investigation report dated 5 November 2018 by Inspector Thompson into whether PC Joell was guilty of misconduct; and
    f. PC Reynolds' voluntary statement dated 19 November 2018, that is three weeks after the accident.

71. Mr. Chudleigh submitted that the evidence shows that the BPS's initial concern was the serious injury sustained by PC Reynolds in the Exercise. Therefore, a report was prepared for consideration by the Commissioner of Police that focused on PC Reynolds' injury. Mr. Chudleigh argued that in employment settings when an accident happens there are accident reports filed but a few years later if there is litigation then witnesses have to prepare witness statements.

Expert Evidence

72. Mr. Adamson referred to the expert evidence in the case. He referred to the English Court of Appeal case of *Rogers v Hoyle* [2104] EWCA Civ 257 in which Sir Christopher Clarke stated that it was open to the Court to have regard to the opinions of the experts based on the facts as he understands or assumes them to be. However, Sir Christopher stated that it was not for the experts to express opinions on disputed issues of fact, which do not require any expert knowledge to evaluate. He noted that the judge in the case observed that it was common to find in many expert reports, opinions of that character which are not helpful

and to which the Court would not have regard. Mr. Adamson submitted that neither expert was an expert on accident reconstruction, the order allowing for expert evidence was fairly limited and both experts went beyond the terms of the order.

73. Mr. Chudleigh submitted that this case could have been tried without the evidence of experts both of whom made observations about the evidence.

74. In my view, there was a tremendous amount of evidence provided by the experts. Further, the Joint Experts Report has been helpful to the Court in assessing the evidence as it pared down where the experts were in agreement and where they had areas of dispute. I am of the view that some of those areas did not necessarily require expert evidence as they could properly be determined by the Court.

Negligence – Whether there was a failure to provide proper supervision of the Exercise

Plaintiff's submissions

75. Mr. Adamson submitted that the Court must determine whether the BPS is liable for the injuries to PC Reynolds approached by consideration of the two issues of firstly whether there was proper supervision of the exercise and secondly the actions of PC Joell.

76. Mr. Adamson submitted that the BPS failed to provide proper supervision and to comply with section 3 of the OSHA. The first element is whether the planning of the Exercise was carried out so as to comply with the broad duties imposed by the OSHA based on the evidence that the BPS did not carry out a formal risk assessment and they did not place the Instructors/Safety Officers in the most relevant place, that is, where the AFOs were going to extract the stooges from the car. Mr. Adamson says that the BPS did this for the extraction of the stooge PC Brady but not for PC Reynolds as stooge. He cited the case of *Russell v Stephenson Construction [2001]* Bda LR 59 where Meerabux J cited several authorities setting out that that it was the duty of the employer towards his servant to take

reasonable care for his servant's safety in the circumstances of the case. Further, the duty is to make the place of work as safe as reasonable care and skill will permit.

77. Mr. Adamson submitted that the evidence, including the evidence of the expert Mr. Baskind supports the position that the Instructors/Safety Officers were not in the correct position to cover the extraction of PC Reynolds. He submitted that the defence expert failed to deal with this significant point. Further, he submitted that it was obvious that a safety officer could have been at the impact point of the extraction of PC Reynolds. He argued that the four arguments put forward by the BPS on reasonable practicability as to why a safety officer was not at the Reynolds Extraction Point should be rejected as follows:
    a. It was not necessary to put a safety officer at the Reynolds Extraction Point because PC Reynolds was supposed to be compliant. Mr. Adamson countered that this was not the relevant test as the proper test was whether it was reasonably practicable.
    b. It was an unsafe place to be due to the police vehicles moving in. Mr. Adamson countered that the evidence showed that a GoPro camera was there on a lamppost at the point where the safety officer could have been.
    c. PC Lewington had stated that it was not practical to have a safety officer where the lamppost was as it would give away the position of the suspect car. Mr. Adamson countered that this point was undermined by PC Marriott who stated that a safety officer could walk to the extraction point once the ARVs had arrived, noting that a safety officer could be anywhere as the ARVs were arriving.
    d. BPS expert said that BPS did not have the resources. Mr. Adamson countered that Inspector Thompson had stated that they could get more safety officers if requested but none were requested. Thus, it was reasonably practicable for the BPS to have a safety officer at both points of extraction so that it could avoid a breach. In any event, there were two safety officers present.

78. Mr. Adamson submitted that in light of those reasons, the BPS cannot avoid a finding of a breach as it was reasonably practicable to have had a safety officer at the Reynolds Extraction Point.

79. Mr. Adamson submitted that the BPS case was really about causation with the key question being if a safety officer was at the point of impact, could he have called stop in time to prevent an injury. He noted that if the injury was inevitable then the Court would not be able to find causation. He relied on the case of *Hide v The Steeplechase Company (Cheltenham) Limited & Ors* [2013] EWCA Civ 545 where Mr. Hide, an experienced professional jockey, sustained a serious injury after a fall at the first hurdle of a race at Cheltenham Racecourse which was widely regarded as the best steeplechase course in England. The judge found that that it was a very unusual type of fall which would not have been expected or reasonably foreseen.

80. The Court found that the judge was incorrect to import into the applicable regulation (which provided that work equipment was to be so constructed or adapted as to be suitable for the purpose for which it is provided) the "classic common law phrase" of reasonable foreseeability and then dismiss the claim on the basis that the fall was unusual and that the defendant had abided by all the requirements of the horseracing authority. The Court stated that the primary purpose of the relevant regulations was to ensure that employers (and other defendants) take the necessary steps to prevent foreseeable harm coming to their employees in the first place and the defendant's obligation are triggered if it is reasonably foreseeable that an employee might injure himself. If it happens, it would be for the defendant to show that it was due to unforeseeable circumstances beyond his control or to exceptional events the consequences of which could not be avoided. Thus, Mr. Adamson submitted that it is incumbent for the BPS to show that the injury to PC Reynolds is inevitable.

81. Mr. Adamson also relied on the case of *Ghaith v Indesit Company UK Limited* [2012] EWCA Civ 642 where Mr. Ghaith was injured after a full day of lifting items on and off a company truck for stocktaking. His claim was for breach of Manual Handling Operations Regulations which set out duties of an employer in respect of measures which were reasonably practicable in order to avoid risk of injury to employees in manual handling operations. The Court stated that there was no doubt that the onus is firmly on the employer to show that he took all reasonable practical steps to reduce the risk adding that it is a burden that is inevitably difficult to discharge. In respect of causation the Court stated:

"It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the injury would still have occurred e.g. if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury."

82. Mr. Adamson relied on the case of *Goldscheider v Royal Opera House Covent Garden & Ors* [2019] EWCA Civ 711 which in turn cited *Ghaith* as set out above as well as *West Sussex CC v Fuller* [2015] EWCA Civ 189 which also commented on *Ghaith* saying: (a) the judge there had run together two separate concepts, breach of duty and causation; (b) it was one of the plain cases where the claimant demonstrates without more a prima facie causal connection between the inherently risky operation and the injury.

83. Mr. Adamson submitted that a proper approach would be to consider two scenarios on the basis that the safety officers had been properly positioned.

Scenario A – where the safety officer was expecting a compliant stooge

84. Mr. Adamson submitted that PC Marriott had accepted that if he had been at the Reynolds Extraction Point then he would have stopped the Exercise immediately upon Reynolds seeking to exit the car as this was not in accordance with the witness brief. He submitted that Mr. Baskind was of that same view also. On that basis, Mr. Adamson submitted that the BPS's safety officer has conceded that he would have halted the Exercise at SP2 or SP3 when PC Reynolds was in the process of exiting the car. Accepting PC Marriott's evidence on this point supports PC Reynolds' case that the accident would not have happened if a safety officer had been in position. Such a finding then extends to a finding that the Plaintiff would be successful on his case that the BPS had failed to supervise the Exercise to the required standard. On such a finding the Court would then be required to move to the issue of determining any contributory negligence on the part of PC Reynolds for exiting the car when he was supposed to remain there until extracted by an AFO.

Scenario B – where the safety officer was expecting the stooge PC Reynolds to make a run for it

85. Mr. Adamson submitted that the Plaintiff would still win his case on this scenario based on the witnesses for the Defence. He argued that the evidence showed that both PC Reynolds and PC Lewington would have stopped the Exercise at SP9. Mr. Baskind stated the same. Mr. Adamson submitted that this was the point when PC Joell had placed PC Reynolds in a neck-hold. As this was not a part of the written brief then the safety officer in the proper position at the Reynolds Extraction Point would have stopped the Exercise at this point. Mr. Adamson urged the Court to rely on this evidence to find that the Exercise should have been stopped at SP9 when PC Joell had placed PC Reynolds in a neck-hold.

86. Mr. Adamson submitted that the Court should disregard the BPS case that events were moving too fast between PC Reynolds exiting the car and then being taken to the ground by PC Joell. He relied on the evidence of PC Joell who said he would stop on hearing the order to stop and PC Marriott who said that he would expect a student to stop immediately on hearing the order to stop the Exercise. Mr. Adamson countered that in a training session such as this, where there was always a risk of injury as people react to other people's own reaction, the duty to supervise the Exercise was extremely important. It was inexcusable to have no one located at the Reynolds' Extraction Point.

Whether there was Negligence on the part of PC Joell

87. Mr. Adamson submitted that the Court had to determine whether PC Joell acted negligently. Mr. Adamson submits that PC Joell owed PC Reynolds a duty of care and the BPS is vicariously liable for any failure. He relied on the case of *Robinson v West Yorkshire Police* [2018] UKSC 4, at paragraph 45 where the English Supreme Court confirmed that the police, and individual police officers, owe a general duty of care to those whose injuries are foreseeable if the police fail to exercise reasonable care. Mr. Adamson submitted that the standard of care should not be unreasonable as not every error of judgment is negligent

and the circumstances must be taken into account. He relied on the *Robinson v West Yorkshire Police* case where Lord Reid cited several cases stating

> *"For example, in Marshall and Osmond, concerned with a police engaged in pursuit of a suspect, Sir John Donaldson MR stated, that the officer's duty was to exercise "such care and skill as is reasonable in all the circumstances". He went on to state that those "were no doubt stressful circumstances", and that although there was no doubt that the officer made an error of judgment, he was far from satisfied that the officer had been negligent."*

88. Mr. Adamson submitted that the requirement to bear in mind all the circumstances applied to training courses also as courses involve risk because of the need to replicate reality. He relied on the case of *Chief Constable of West Yorkshire Police v Hunter* [2009] EWCA Civ 1576 which was a case focused on planning. Mr. Adamson submitted that PC Joell did not apply "such care and skill as is reasonable in all the circumstances" as he did not follow his training and there was no objective justification for him reacting so violently. He submitted that the authorities emphasise, when dealing with mistakes in real life scenarios, how they are not being made in a training room, noting that the present case was in a training context. Mr. Adamson highlighted a number of points about the conduct of PC Joell as follows:
    a. He was an AFO level 3 officer with nearly a decade of experience, that is the highest level of training of any police officer in Bermuda.
    b. He was in possession of a Taser and a firearm.
    c. He did not follow his training in relation to dominating a stooge. If he had done so, then PC Reynolds would have of course complied.
    d. When PC Reynolds resisted, PC Joell did not react in accordance with his training. The BPS Use of Force Options contains a graduated escalation of force but PC Joell immediately moved to hand-to-hand combat.
    e. In regards to any claims by PC Joell that he was in fear, this was not a reasonable position objectively as PC Joell: (i) was in a training exercise with colleagues and observers; (ii) could have stopped if he did not know what to do; and (iii) he knew PC Reynolds.

f. The video footage and still photos show PC Joell pausing, then lunging forward with a large forward stride to grab PC Reynolds by the neck. He was on the "front foot" rather than the "back foot".
g. He used a neck-hold technique which was: (i) was inherently dangerous; and (ii) he was not trained how to use it.

89. Mr. Adamson submitted that the test of PC Joell's actions is an objective one – was his response a reasonable one in all the circumstances based on:
    a. The law of tort is based on an objective test;
    b. The associated law of battery is based on an objective approach. Mr. Adamson relied on the case of McCarthy v Chief Constable of Merseyside Police [2016] EWCA Civ 1257 where Burnett LJ stated "*What is reasonable in all the circumstances calls for evaluative judgment having found the facts … the defendant must show that he honestly and reasonably believed that it was necessary to defend himself or defend another, in addition to showing that the force was reasonable in all the circumstances.*"

90. Mr. Adamson submitted that PC Joell's actions could not be characterized as a momentary lack of judgment which can be reasonably excused primarily based on the evidence of PC Joell that at SP3 (when PC Reynolds had exited the car and was kicking out) he could have retreated, called stop, or deployed his taser/captor. Further, PC Joell had accepted that he did not need to stride forward as although he was reacting, he had options. Mr. Adamson argued that those options were to follow his training and to deploy his weapons. On the contrary, for PC Joell to stride forward, grapple with PC Reynolds and then take hold of his neck was not a reasonable judgment call. As this was a training exercise, PC Joell should have stopped. Mr. Adamson argued that PC Joell had simply 'seen red' which was why he had no memory. Thus, seeing red and losing control of judgment was never an excusable lapse, especially where the individual was a highly trained police officer.

The Conduct of PC Reynolds

91. Mr. Adamson submitted that a central issue was what PC Reynolds was instructed to do. He argued that the BPS claims on this point were difficult to maintain, namely: (a) the claim that stooges always comply; and (b) PC Reynolds was expressly told to comply.

92. To the first point, Mr. Adamson submitted that the evidence showed that it was broadly common ground that stooges are sometimes asked to run away although there is disagreement about how often, whether this is unusual, sometimes or fairly often. He relied on the following:
    a. A lesson plan from 2017.
    b. PC Lewington's evidence that he accepted that stooges did not always comply as they sometimes run away.
    c. PC Brady's evidence that he did not wear all the protective gear since he was a compliant stooge, thus making the point that stooges offered varying degrees of resistance and so wore varying degrees of body protection.
    d. PC Bambury's evidence that stooges sometimes did run away. Mr. Adamson pointed out that PC Bambury was never asked to kick or attack and noted that the Plaintiff's case had never claimed that PC Reynolds was told to kick and attack. However, it was clear that stooges were told they should look for a gap and run and that they should test the students.

93. Mr. Adamson submitted that general stooge behaviour was consistent with the conduct of PC Reynolds who had kicked out to give PC Joell a shock without an intention to hurt him when he then saw a gap and tried to run.

94. To the second point, Mr. Adamson submitted that the issue of whether PC Reynolds was on the day given an express instruction is framed by the contemporaneous reports, which the BPS cannot overcome. Those reports make no mention of failure to follow instructions. Further, PC Lewington's report emphasised how the Training School liked to use PC Reynolds due to his ability to tailor performance to the students, such tailoring being consistent with a verbal brief.

95. Mr. Adamson submitted that on cross-examination the defence witnesses explained that they did not think it was relevant to put in their report that PC Reynolds had not complied with his instructions. This was surprising in a case where the BPS's position is that the entire cause of the accident was PC Reynolds' breach of instruction. Mr. Adamson pointed to the evidence of PC Lewington and PC Brady that at the debrief, although there was discussion, no one raised that PC Reynolds had not followed instructions.

The Motivation of PC Reynolds

96. Mr. Adamson submitted that the BPS's theory was incredible that PC Reynolds was on a mission to teach the BPS a lesson about the standard of their training, thus intentionally attacking PC Joell and engaging him in combat. Further, if anyone had thought that was the case there is no suggestion of that in the contemporaneous documents.

The Role Player Document

97. Mr. Adamson submitted that PC Reynolds' evidence that he was given a verbal briefing is consistent with the evidence of PC Lewington stating that PC Reynolds could give a tailored performance. Mr. Adamson argued that the written Role Player Brief spoke of a motorbike that was not present. Further, he said the evidence shows that no one knows where the document came from although it was supposed to be a part of an exercise package which cannot now be found – in hard copy or electronically. He highlighted that PC Marriott stated that he gave the exercise package to Inspector Thompson and she in turn said that she does not remember the exercise training package or how she got the written brief. Mr. Adamson also made the point that the exercise package or a lesson plan are not documents mentioned on the list of documents. Mr. Adamson, argued that in light of these inconsistencies, the Court should find in PC Reynolds' favour on this point.

98. In summary, first Mr. Adamson argued that if stooges do sometimes run away then why should PC Reynolds have reasonably foreseen that it was dangerous for him to run this time. Second, how could PC Reynolds' refusal to follow orders be causative as PC Joell

had no idea what to expect? He would have done the same thing to a stooge who had been told to run. Mr. Adamson urged the Court to find that there was a breach of duty to supervise the Exercise and that was the cause of the accident. Further, the Court should find that BPS have not proven contributory negligence and the duty was on them to prove such.

Defendant's Submissions

99. Mr. Chudleigh submitted that in workplace environments accidents do happen that cause injury to employees. He stated that the employer had a duty to ensure safety but there was a limit to the amount of precautions that could be taken. In the present case, there was a limit to the number of safety officers available and a limit to how close the safety officers could be to the AFOs.

100. Mr. Chudleigh submitted that the Exercise was a training exercise and that the AFO's were participating in the Exercise to be trained. He also relied on the case of *Chief Constable of West Yorkshire Police v Hunter* in which in a training exercise there were no previous demonstrations of the tasks the students were learning. However, in the present case, Mr. Chudleigh noted that there were previous training exercises in the weeks leading up to the Exercise in this case in which PC Reynolds was involved. *Hunter* made reference to two Scottish cases: (a) *Brisco v Secretary of State for Scotland* [1997] SC 14 where an injury occurred in the course of a training session for prison officers; and (b) *Grant v Chief Constable of Grampian Police* [2001] Scot CS 1010 where an injury occurred to a police officer in a training session dealing with the defensive use of batons where Lord Johnston stated:

> *"I am satisfied that considerable care was put into the formulation of the course. The issue of volume of force was addressed, as was the question of technique, to a substantial if not total extent. I recognise that realism, so far as it could be reasonably achieved, was essential, and that therefore what had to be balanced was the sufficient degree of force to create a realistic position against the risk that extensive force might cause an excessive injury."*

101. Mr. Chudleigh submitted that the Exercise was a structured exercise, the approach was cautious and proper safety requirements were put in place. He noted that in the three cases cited herein the results were that the injuries were a result of unfortunate accidents in training. He also noted that the Learned Judge in Hunter had stated "*Both these Scottish judgments recognise that if a training exercise is to have any degree of realism, which it surely should, it cannot be demonstrated or structured in advance; a choreographed exercise would not be a useful one."*

102. Mr. Chudleigh drew some analogies to injuries suffered in contact sports making the point that despite the rules and the presence of referees, injuries and accidents still happen. In some cases, a player may commit a foul as a result of a serious lack of judgment but it would not amount to negligence. He argued that in such cases there is implied consent by the participants. He relied on the case of *Caldwell v Maguire* [2001] EWCA Civ 1054 which involved a jockey falling from a horse in a horse race as a result of the tactics used by other jockeys. That case cited the case of *Condon v Basi* [1985] 1 WLR 866 where a footballer sued an opponent who broke his leg with a foul tackle and an Australian case of *Rootes v Shelton* [1968] ALR 33 where a water-skier sued the driver of a boat who caused him to collide with another boat. In Caldwell after an analysis of those two cases, Lord Justice Judge found that "… *in the context of sporting contests, it is right to emphasise the distinction to be drawn between conduct which is properly to be characterized as negligent, and thus sounding in damages, and errors of judgment, oversights or lapses of attention of which any reasonable jockey may be guilty in the hurly burly of a race.*"

103. Mr. Chudleigh submitted that along the same line, some jobs carry an element of risk of danger including police officers, AFOs, firearm instructors, and like in this case stooges, as there is a need to inject realism in the training.

Conduct of PC Reynolds

104. Mr. Chudleigh submitted that the BPS case was that PC Reynolds was directed to comply per the Role Player Brief. Mr. Chudleigh noted that PC Reynolds made two

statements which were consistent but which were also deficient in several respects, namely (a) he does not state that he sought clarification of what his role was; and (b) he does not state that he was instructed to kick out or engage in combat with the AFOs. Mr. Chudleigh highlighted that on the evidence PC Reynolds stated that if he was instructed to do something that was ambiguous then he would seek clarification, but he never did because he had discussed his role with PC Marriott.

105. Mr. Chudleigh submitted that if the Court found that PC Reynolds was told to offer some physical resistance then the Court would have to consider the level of resistance given by PC Reynolds, whether it was passive or active. The evidence was that passive resistance would include remaining still and engaging the seatbelt. However, there was no way to justify PC Reynolds kicking, approaching the AFO with his hands raised and engaging in combat with the AFO as they were there to practice extraction skills and not to be fighting. The tactics involved planning, approaching, deploying, extracting the stooges and pacifying them.

106. Mr. Chudleigh challenged what could be the purpose of PC Reynolds kicking out and getting out of the car other than it would be denying PC Joell the training experience. Therefore, there was no basis to justify PC Reynolds' conduct. Mr. Chudleigh submitted that the evidence showed that PC Reynolds was angry before the fall causing the injury because he was upset at the training standards. Thus his aggression and force was reflective of his anger to the BPS and contributed to events. His anger after the injury was further demonstrated when he shouted out at PC Joell and tried to punch him.

Conduct of PC Joell

107. Mr. Chudleigh submitted that PC Joell found himself in a challenging position. In a real life situation, he would have been able to execute various tactics such as an elbow strike or a knee strike to the suspect. However, in the present case, PC Joell was presented with a confusing scenario which included being surprised by PC Reynolds kicking out at him then getting out of the car when he then jumped back and hesitated, all within

microseconds. Many things were going through his mind including he knew it was a training exercise on extraction, the stooge is an experienced police officer and he is before a group of other AFOs. As a result he did his best to deal with the stooge which unfortunately caused an injury.

108. Mr. Chudleigh submitted that PC Joell acted properly to continue once PC Reynolds was out of the car as the exercise was about extraction and pacification. Mr. Baskind had accepted that PC Joell still had work to do at this point. He was too close to PC Reynolds to deploy his other equipment so he tried to do a hip toss, his arms appearing to go around PC Reynolds' neck. Mr. Chudleigh pointed out that although the neck-hold was not approved, PC Sutherland stated that it was "not unapproved" either. He stressed that there was no suggestion that PC Reynolds suffered injury to his neck or that that the neck-hold led to his the fall.

Safety Issues

109. Mr. Chudleigh submitted that there were six (6) seconds from PC Reynolds exiting the car to being on the ground and two (2) seconds from the tussle to PC Reynolds being on the ground. He submitted that in the Exercise, there was a limit to the amount of safety officers that could be present noting that the experts agreed that there should be a safety officer at the impact points, that is, the extraction points.

110. Mr. Chudleigh dismissed any relevance of PC Brady not wearing protective gear as PC Brady had stated that it was on offer but he declined to wear it as he was playing a passive stooge. So too, he submitted that PC Reynolds wearing of protective gear was not indicative of anything.

111. Mr. Chudleigh submitted that in respect of a safety officer standing by the GoPro on the lamppost, it would have been dangerous to a safety officer as an ARV could have arrived there. Further, a safety officer in that position before the ARVs arrived would have diluted the Exercise part where the AFOs had to identify the suspect car.

112. Mr. Chudleigh argued that even if a safety officer was at the Reynolds Extraction Point, at SP9 it was not possible to stop the Exercise in the following two (2) seconds within which the fall had occurred. This was because PC Joell still had the Exercise task of pacifying PC Reynolds, PC Joell had to identify the situation, process it and then act. In that time, the tussle took place and within the two (2) seconds there was then a point of no return once the balance was lost. Thus, the two (2) seconds was not enough time to stop the Exercise.

Analysis

113. In my view. I should approach this aspect of the case on the following basis:

a. Did the BPS provide proper supervision of the Exercise?
b. What were the instructions given to PC Reynolds?
c. Did the actions of PC Joell amount to negligence or error in judgment?

Did the BPS provide proper supervision of the Exercise?

114. In my view, I find that the BPS did not provide proper supervision of the Exercise for several reasons. First, it is not in issue that the BPS had a duty pursuant to section 3 of the OSHA to ensure the health, safety and welfare of its officers. The duty is qualified by the words in the section "so far as is reasonably practicable". In this case I am guided by Meerabux J in *Russell v Stephenson Construction* that it was the duty of the employer in all the circumstances of the case. Further, I am satisfied that this duty extends to the Exercise which purpose was to train the AFOs in the extraction and arrest of the stooges.

115. Second, in respect of the whether there was a need to have a written risk assessment or whether it was acceptable to have a dynamic risk assessment, I am satisfied that I should accept the joint view of the experts that there should have been a written risk assessment. In his Supplemental Report, Mr. Baskind was of the view that a dynamic risk assessment ("**DRA**") was not a substitute for a risk assessment which is carried out in advance. A DRA was not written down but is conducted within a framework that enables a competent person to respond to changing (and often rapidly changing) circumstances. After an incident or if

the DRA identifies a significant residual risk, then good practice would be to record the details of the DRA information to be used as a basis for risk assessments in the future. Mr. Baskind stated that a risk assessment should have been carried out in relation to officer safety which would have identified the need for officer safety/use-of–force training and set out how that training should be risk assessed and delivered.

116. In light of these reasons, I find that the lack of a written risk assessment contributed to there not being proper supervision of the Exercise.

117. Third, I accept that training in the circumstances of firearms incidents needs to have a certain element of realism in it to best achieve a meaningful outcome for the AFOs' learning experience. However, the BPS had organized the Exercise to be on extraction and arrest. I am prepared to accept Mr. Baskind's view that training should be carried out with a degree of realism, subject to the confines of safety. However, I do not accept his views that training would be pointless if it was without resistance. In my view, the BPS were entitled to decide whether or not they wanted to have resistance in the Exercise and to what level. On this occasion, according to the evidence of the Instructors, there was to be no resistance by the stooges. Thus, it is not for the experts to opine on that decision. I note that PC Sutherland provides an opinion on this point also, albeit that resistance is not necessary for a training exercise to be of value. My view is consistent that it is also not for PC Sutherland to opine on this specific point.

118. Fourth, in my view the Instructors who were also the safety officers, should have had a whistle or a horn to stop the training immediately. The experts agreed on this and I accept their views that relying on a person to shout was not adequate and cannot always be heard. Of course, the AFOs themselves would not be carrying a horn or whistle as they were conducting the tactics. If the Instructors did hear an AFO shout to stop the Exercise then it follows that they would immediately sound the whistle or sound the alarm so that everyone would hear and stop what they were doing. In my view, this failure contributed to there not being proper supervision of the Exercise.

119. Fifth, I agree with Mr. Adamson that it was reasonably practicable to have a safety officer at the Reynolds Extraction Point when the extraction was to take place. Further I agree with the reasons countered by Mr. Adamson in respect of the BPS's reasons why it was not reasonably practicable to have a safety officer at the Reynolds Extraction Point.

a. In my view, a safety officer should have been at the extraction points whether PC Reynolds was directed to be compliant or to offer resistance. I accept Mr. Baskind's opinion on this point and I reject PC Sutherland's opinion on the basis that PC Marriott does not appear at the Reynolds Extraction Point or even on that side of the suspect car before the injury takes place.

b. I accept the BPS' evidence that they used the Location to make the Exercise more realistic. That realism involved the AFOs receiving information about the stooges in the suspect car and then the AFO team making a plan, approaching the vehicle, deploying and carrying out the extraction and arrest tactics. Further, I accept that there was risk to the Instructors if they were to be positioned at the Extraction Points before the ARVs arrived. However, it was proper for the safety officers to be at a safe distance from the suspect car until the ARVs came to a full stop. They could have then moved into a proper position as safety officers.

c. If the lamppost area was not a safe place to be then the safety officer could take up position elsewhere and then move to the Reynolds Extraction Point.

d. If more safety officers were required then the evidence of Inspector Thompson was that such officers would have been provided.

120. Sixth, the safety and control duties of the safety officer should have been a primary role of the officer assigned to the task. This was made difficult by the Instructors doubling up as safety officers but made further difficult by one of those safety officers being in one of the ARVs to oversee the AFO team planning part of the Exercise. In any event, a significant factor that detracted both safety officers from their primary duties was that they both were video recording the Exercise. I rely on the still photographs and the video-footage that showed that both Instructors were focused on video-recording and viewing the exercise through the lens of the cameras. A review of SP1 to SP5 shows PC Marriott in

motion but SP6 to SP10 shows PC Marriott in a stationary position at the front off-side position of the suspect car holding up the camera and looking into it.

121. I have considered the submissions of Mr. Chudleigh and I agree that the Exercise was a structured exercise with a degree of realism, the approach was cautious and the proper safety requirements were put in place in line with the case *Hunter, Brisco* and *Grant*. However, in my view, the attention required to video record the Exercise distracted the Instructors from their safety duties. If a video recorder was needed, then the BPS should have provided someone to do that. It was a significant risk to use the safety officers to do and be focused on the video recording rather than the safety and control of the Exercise.

Scenario A - where the safety officer was expecting a compliant stooge

122. I will consider this scenario on the basis that the safety officer was at the Reynolds Extraction Point. In my view, I accept the evidence of PC Marriott that he would have stopped the Exercise at SP2 or SP 3 when PC Reynolds was in the process of kicking out violently at PC Joell and then exiting the car as that conduct was contrary to his instructions. I also accept Mr. Baskind's opinion on this point. I agree with Mr. Adamson that based on this point, the Court would be obliged to find that the Plaintiff would be successful on his case that the BPS had failed to supervise the Exercise at this point in the Exercise.

Scenario B - where the safety officer was expecting the stooge PC Reynolds to make a run for it

123. I will also consider this scenario on the basis that the safety officer was at the Reynolds Extraction Point and that the safety officer would have been expecting that the stooge PC Reynolds was going to make a run for it. I accept the evidence of PC Lewington and PC Marriott that they would have stopped the exercise at SP9 which shows that PC Reynolds and PC Joell were involved in a tussle with both officers having their arms up and entangled with each other and both officers legs in a wide stance. At this point the

opportunity for PC Reynolds to run away has been lost and the officers were engaged in combat with each other.

Causation

124. In my view, had the safety officer stopped the exercise at SP9 then PC Joell would not have had the opportunity to displace PC Reynolds and throw him to the ground. Their failure to do so caused the accident to happen by allowing the Exercise to continue to the point where PC Joell was able to throw PC Reynolds to the ground. The reason why I come to this finding is because a safety officer who is normally an experienced firearms instructor, properly located at the Reynolds Extraction Point, armed with a whistle or a klaxon, focused purely on PC Reynolds trying to run away and the efforts of PC Joell to stop him, would realise that they had become engaged in hand to hand combat and would stop the Exercise before PC Joell could throw PC Reynolds to the ground.

125. I have considered Mr. Chudleigh's submission about contact sports and that despite the rules and the presence of referees, injuries and accidents can still happen. To that point, a referee on a football field may not be able to stop a player from committing a foul tackle. However, in a boxing match, a referee is often called upon to stop one boxer from continuing to punch his opponent when that opponent has lost his ability to defend himself. In the present case, the safety officer is somewhere between the two and as I have stated, in all the circumstances, he could have stopped the Exercise at SP9 when the officers were grappling each other.

What were the instructions given to PC Reynolds?

126. In my view, I find that PC Reynolds was told to comply and to not offer resistance for several reasons. First, the start point was that the purpose of the Exercise was to train in extraction and arrest tactics. I am satisfied of the evidence of PC Lewington and PC Marriott that there was a training package that existed for recertification training. PC Lewington stated that such training packages are approved by the CFI before being rolled out for training. To my mind, this makes complete sense as I am satisfied on the evidence

that this is what training schools do, they develop training programmes in writing with objectives, tactics, scenarios and role playing documents. It would be incredulous to think that a training school, let alone a police training school on the topic of firearms and tactics, would not have these documents in a written format when they teach the classes on a repeated basis with different instructors and different stooges.

127. Second, PC Reynolds was involved in the same training exercise the previous week as the training instructor when everything went smoothly. In the case of *Hunter*, there was no demonstration on the day of the Exercise but there were previous demonstrations of the tasks the students were learning. On that basis, I am entitled to infer that PC Reynolds knew how the Exercise was to be run.

128. Third, I am satisfied that when PC Reynolds arrived at the Training School he was given the Role Player Brief by PC Marriott. I am satisfied that PC Marriott did not give any instructions to PC Reynolds to resist or to depart from the standard brief. This particular training exercise had been run for several weeks and there is no evidence before the Court that during any one of those exercises the stooge had resisted, kicked out violently and tried to run away. On the contrary, I am not satisfied with the evidence of PC Reynolds that he was expressly told to resist.

129. Fourth, I have considered Mr. Adamson's submissions on the BPS assertion that PC Reynolds was expressly told to comply pointing to the lack of such assertions in the documentary evidence and the debrief. The evidence of the officers who wrote reports soon after the accident was that they were focused on the "injury on duty" to PC Reynolds rather than the litigation that came about a few years later. When the time came for them to write their statements, they focused more on everything that had happened during the Exercise. I am mindful of Mr. Adamson's opening submissions about the need for the assessment of the oral evidence against the contemporaneous documents. I have reviewed all of the contemporaneous documents and I am satisfied that they were focused on the injury and how it was caused. In light of the purpose of those reports, in my view I am not concerned in any way that those early reports did not try to apportion blame on PC Reynolds. In

applying the principles of *Martin v Kogan* and *Gestmin SGPS S.A.* I have reminded myself of the fallibility of the human memory after a passage of time. However, in my view, the contemporaneous documents, still photographs and the video-footage provided sufficient material for the witnesses to base their witness statements and oral evidence. In respect of any fault of PC Reynolds not being mentioned in the early reports but being mentioned in the witness statements, I have been satisfied of the evidence of the Instructors despite my awareness of the fallibility of the human memory.

130. Fifth, I have considered Mr. Adamson's submission on the assertion of the BPS that stooges always comply. I do not accept them. It may very well be that stooges sometimes run but in the present case I am not satisfied that either of the Instructors told PC Reynolds not to comply or to run away. Further the evidence that PC Brady did not wear protective gear since he was going to be compliant does not lead me to the conclusion that PC Reynolds wore it because he was going to be non-compliant. It appears to me on the evidence that the protective gear was made available and it was a personal choice of the stooges whether to wear it not.

131. Sixth, I have considered the submissions of Mr. Adamson that PC Reynolds was not given the Role Player Brief but was given a verbal briefing to offer resistance. I note that PC Lewington and PC Marriott stated that PC Reynolds was given the brief and that PC Brady stated that he was given it when he arrived in the morning. I also note that this practice is a standard practice of the Training School for stooges and that PC Reynolds assisted as an instructor in the previous week. For these reasons I am satisfied that PC Reynolds was given the Role Player Brief in line with the evidence of the BPS witnesses. I am not persuaded by Mr. Adamson's arguments about the impact of the lack of knowledge of how the Role Player Brief came to be disclosed. There may have been some confusion between Inspector Thompson and PC Marriott on this point but that does not mean that PC Reynolds was given verbal instructions rather than the Role Player Brief.

132. Seventh, in light of the above reasoning, I find no justification whatsoever for PC Reynolds kicking out at PC Joell in a violent manner and for getting out of the suspect car

on his own and confronting PC Joell. I have considered Mr. Chudleigh's submission that PC Reynolds had a motive for doing so based on his anger about the training methods as compared to the methods used in the UK. I am not satisfied with that submission because, in my view, if PC Reynolds was so despondent about that, he would most likely have refused to be involved in any further training as an instructor or as a stooge.

133. Eighth, however, I have given consideration to the views that PC Reynolds gave in evidence about PC Joell. To my mind he held a negative view of PC Joell related to the firearms experience of PC Joell. As he stated, he was not impressed by PC Joell's ability or understanding of taught tactics but he added that he did not hold anything against him. On cross-examination he stated that he did not regard PC Joell as competent and that he did not understand his tactics. Additionally, he denied that when he saw PC Joell open the car door it affected him. I have also considered the conduct of PC Reynolds after the injury was sustained when he shouted at PC Joell, called him an unkind name, and tried to lash out at him in anger. I have given consideration to whether when PC Reynolds recognised that PC Joell was the AFO who was to deal with him, he decided that because of his unfavourable views of PC Joell, he would not comply with PC Joell's orders, would resist and would run away – all designed to really show him up. In my view, in line with the cross-examination of PC Reynolds on this point, I am satisfied that PC Reynolds was affected by PC Joell being the AFO who would deal with him and in the moment, he formed his view to be non-compliant, to kick out violently at PC Joell and to run away thus showing up PC Joell to be the kind of officer he believed he was.

Did the actions of PC Joell amount to negligence or error in judgment?

134. In my view, PC Joell did not act negligently but rather his actions were the result of a momentary error of judgment for several reasons. First, as set out in *Robinson v West Yorkshire Police*, I accept that PC Joell owed a duty of care to PC Reynolds whose injury would be foreseeable if he, PC Joell, had failed to exercise reasonable care and skill in all the circumstances. In assessing all the circumstances, I have to take into account that the evidence shows that there was a period of six (6) seconds from the time the door opened to

the fall and a period of two (2) seconds from when PC Reynolds got out of the car and was put to the ground. In my view the shortness of time was a significant factor in this case.

135. Second, I accept that PC Joell was shocked at being kicked at and actually hit by PC Reynolds before he got out of the car and that as soon as he stepped back to analyse the situation PC Reynolds was out of the car and coming towards him. I accept that although the extraction part of the Exercise was now moot, there was still the arrest part to do as stated by the witnesses and Mr. Baskind. This was appropriate for PC Joell to continue his tactics to arrest PC Reynolds.

136. Third, I accept PC Joell's evidence that PC Reynolds had launched towards him so he stepped back towards PC Reynolds to try to restrain and detain him. He did not know what PC Reynolds' instructions were at this point so he continued with his tactics. In the circumstances, he ruled out using other equipment as he was too close to PC Reynolds to deploy them properly. He had given consideration to using the one hand bar technique but he also realised that he would lose control over PC Reynolds who was now grappling with him. Thus he performed a hip-toss. I have noted all the points made by Mr. Adamson in his submission about the conduct of PC Joell as set out above to make the case that PC Joell was negligent. However, in the time period in which all this occurred, I am not satisfied that PC Joell was negligent as he was processing the information that was before him and the situation that he was in. His explanation was that his reaction was instinctive to PC Reynolds actions of grappling with him.

137. Fourth, I have considered that PC Joell, knowing that this was a training exercise, at the point of grappling with PC Joell, could have stopped the exercise, thrown up his hands and retreated. In my view, PC Joell in that time frame just after PC Reynolds got out of the car, PC Joell was still on proper grounds to try to arrest PC Reynolds. Therefore, it was reasonable for him to continue with tactics to arrest him.

138. Fifth, I have considered the evidence of choke-holds, head-locks and neck-holds. The experts agreed that a head-lock (used interchangeably with neck-lock) is a technique

whereby a person places an arm around another person's head or neck and is often but not always used to wrestle a person to the ground. I recognise that head-locks and neck-locks can cause significant harm, including death as the risks include compression/restriction to the blood supply and restrictions of air supply. There is no evidence of such injury sustained by PC Reynolds.

139. Mr. Baskind stated in the joint report that PC Joell grabbed PC Reynolds in a head-lock. On cross-examination he stated that (a) a conventional head-lock is done sideways on with the arms squeezing the side of the neck affecting the main artery to the brain; (b) for a neck-hold, the arms are applied from the back going across the front of the neck affecting the wind-pipe; and (c) a choke-hold is where a person stands in front of another person and puts his arms around the back of the person. Further on cross-examination, Mr. Baskind said that in SP9 – SP10 there was no neck-hold but that it was starting to be applied as PC Joell's left elbow was in the vicinity of PC Reynold's shoulder and neck. He accepted that only part of PC Joell's forearm was beneath PC Reynolds' neck. PC Sutherland stated that when the two officers were tussling, PC Joell's arm does go around PC Reynold's neck and that it was like a school boy tussle where one boy tries to get the other to the ground. Further, he said that the hip-toss was not successful as PC Reynold's feet never left the ground. In my view, in light of these reasons, particularly the evidence of Mr. Baskind, I am not satisfied that in the timeframe of two (2) seconds that PC Joell did a head-lock, a choke-hold or a neck-hold on PC Reynolds. In my view, the evidence supports that as a result of the attempted hip-toss and PC Joell grappling PC Reynolds about the neck and shoulder, the fall occurred. Thus, PC Joell's actions were a result of a momentary lack of judgment which can reasonably be excused on the evidence.

140. In light of all these circumstances, I am of the view that the accident was caused by failure of the BPS to have a proper system in place at the Exercise to prevent the injury. The BPS could show that they took some reasonable steps to ensure the safety of its employees however, at the Exercise, they failed to engage the safety officers in the proper position at the proper time. I rely on *Hide v The Steeplechase Company (Cheltenham) Limited & Ors* where the court stated that the primary purpose of the regulations was to

ensure that employers take the necessary steps to prevent foreseeable harm coming to their employees. In my view, in the circumstances there was foreseeable harm in the Exercise and in particular at the Extraction Points. If the safety officer had been in the proper position at the proper time focused on his safety officer role, then in my view, the safety officer could have stopped the officers at the point when they were grappling with each other. On this basis, my view is that the accident was not inevitable as there was a chance to stop the Exercise before it got to that point.

Contributory Negligence

Plaintiff's Submissions

141. Mr. Adamson submitted that BPS claim that PC Reynolds was entirely to blame for the accident, as he did not follow orders, relying on the following evidence:

a. The oral testimony of the Instructors, three years after the event;
b. A written briefing which contains that instruction which PC Reynolds denies being given; and
c. The claim that, as regards customs and practice, stooges in BPS training are always told not to resist.

142. Mr. Adamson submitted however that PC Reynolds' evidence is that he was not given that instruction or the written briefing. As regards custom and practice, despite repeated requests for other written briefings from previous training sessions, the requests have been ignored. Further, given that the AFOs under training do not know what to expect, it is unclear how any of these factors excuse PC Joell's actions.

143. Mr. Adamson submitted that it is not enough for the BPS to demonstrate that PC Reynolds disobeyed orders. If he disobeyed clear instructions, this could amount to serious and willful misconduct and thus mean any claim under the Worker's Compensation Act could be disallowed pursuant to section 4(b) of that Act. He added that failing to follow instructions is not necessarily contributorily negligent.

144. Mr. Adamson submitted that contributory negligence is not '*did you do what you were told*', it is '*did you take reasonable care for your own safety?*' He relied on the case of *Rooney v De Frias* [2001] Bda L.R. 61 where Wade Miller J stated as follows:

> *"Contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if she ought reasonably to have foreseen that if she did not act as a reasonable prudent person she might be hurt and in reckoning must take into account the possibility of others being careless."*

145. Mr. Adamson submitted that PC Reynolds was in full protective gear, knew that the AFOs were experienced and knew that if the students were uncomfortable that they would surely just stop. Further, PC Reynolds could not reasonably have foreseen that PC Joell would not use his training, would not properly apply the BPS Use of Force Options and would use combat techniques which are not taught to police officers.

146. Additionally, Mr. Adamson submitted that PC Reynolds' case is that his actions were or would have been typical and standard practice in a UK police training exercise. If that was the case, how could it be contributorily negligent to test officers' reactions in Bermuda using methods which are standard practice in the UK? It would only be contributory negligence if PC Reynolds should reasonably have foreseen that Bermuda Police offices would be unable to cope with such a test, lose sight of the fact that this was a training exercise, actually believe that their lives were under threat and engage in actual combat. He concluded that this could not be right.

147. In summary, Mr. Adamson argued that the Court should find that BPS have not proven contributory negligence and the duty was on them to prove such.

<u>Defendant's Submissions</u>

148. Mr. Chudleigh submitted that the evidence of the Instructors was relevant to the issue of contributory negligence. Further, the determination of contributory negligence required an assessment of the roles of PC Reynolds and PC Joell. For PC Joell's part, he was a student on the Course, albeit a very experienced and highly trained AFO. Thus, in the training exercise, he was confronted by a firearms instructor acting as a stooge and he had no knowledge of the stooge's role. Therefore he had to make a lot of decisions on the back of being kicked at violently and being shocked at PC Reynolds' actions. This impaired his decision making to react quickly as he was trained to do. Once he was in the tussle with PC Reynolds then his instinct took over. However, in any event PC Reynolds was always the aggressor. He rejected Mr. Adamson's submission that PC Joell lunged at PC Reynolds stating rather that at best it was two people coming together, with PC Reynolds' hands going up first so then PC Joell's hands went up.

149. Mr. Chudleigh submitted that if the Court found any liability on the part of the BPS, then the Court would have to apportion liability as between the parties to take into account the negligence of PC Reynolds in causing or contributing to his own injury.

Analysis

150. In my view PC Reynolds has contributed to the cause of the accident in a significant way. First, in following *Rooney v De Frias*, I find that PC Reynolds ought reasonably to have foreseen that if he did not act as a reasonable prudent person in the Exercise he might be hurt as a result. PC Reynolds was an experienced firearms instructor, he had taught this training exercise previously and was aware that he was dealing with AFOs who had a level of training in extraction and arrest. He was well aware that an extraction and an arrest would involve a use of reasonable force in the training circumstances.

151. Second, if PC Reynolds was compliant and followed the Role Player Brief then in those circumstances he could argue that he could not foresee any harm coming to himself. However, once he made the decision to change his own conduct to being non-compliant and offer resistance, especially using violent kicks and grappling with the AFO, in my

view, it was reasonable for him to have foreseen that he might be hurt. PC Reynolds has argued that PC Joell could have deployed any of his other tactics to pacify him. As this was a training exercise, PC Reynolds should have been alive to the possibility that not everything would necessarily go according to plan – or to his plan.

152. Third, I have considered Mr. Adamson's submissions about comparing Bermuda with the UK. I disagree with those submissions. PC Reynolds may very well have held the view that his actions were typical and standard practice in a UK police training exercise. I do not find a comparison to what PC Reynolds may have thought about in a UK training exercise to be helpful. However, PC Reynolds was well aware of the training in Bermuda to the extent that he was not satisfied with it such that he left the Training School. On that basis, PC Reynolds should have been very aware of the possible outcomes if he acted as he did, including that he may very well have engaged someone who could be negligent or have an error of judgment in their response to his actions.

153. Fourth, I accept Mr. Chudleigh's submissions that PC Reynolds was always the aggressor. I have already reviewed the conduct of both PC Reynolds and PC Joell. PC Reynolds' actions instigated matters both when he sat in the car and kicked out and then when he got out of the car and tried to run away, grappling with PC Joell. In my view, PC Joell was reacting to the actions of PC Reynolds. I have already reviewed the actions of the safety officers.

154. In respect of apportioning liability as between the parties I note that there were two distinct parts to the Exercise, the extraction and the arrest. In both parts, I have found that PC Reynolds did not comply with the instructions that were given to him. Thus PC Reynolds had taken the Exercise off course such that for reasons already stated it should have been stopped on two occasions. PC Joell then reacted to his actions. In my view the starting point for the contributory negligence on behalf of PC Reynolds would be a 50% contribution. Further, I note that PC Reynolds kicked out violently at PC Joell striking him on the leg and then when he got out of the car he instigated the hand to hand combat. In my view this aspect causes the contribution to increase somewhat as the effect of PC

Reynolds' actions was to cause PC Joell to have an error of judgment. In the circumstances, I consider that an additional 10% contribution should be added to the 50% already assessed to give a total of 60% contributory negligence on behalf of PC Reynolds. Accordingly, an award to PC Reynolds should be reduced by 60% to reflect his responsibility for his own loss and injury.

Claim under the Worker's Compensation Act

155. In light of my findings above that PC Reynolds contributed to the accident, it follows that I find that he is not entitled to compensation pursuant to the WCA as follows:

a. Pursuant to section 4(1)(b) of the WCA 1965 – I have found that the injury to PC Reynolds was attributable to his own serious and willful misconduct. Thus any compensation claimed shall be disallowed.

b. Pursuant to section 24(1)(a) – I have found judgment against the BPS in this matter which is a bar to proceedings by PC Reynolds for his injuries under the WCA 1965.

c. Pursuant to section 12 of the WCA 1965 in that no claim has been made within 26 weeks of the accident. Further, there has been no grounds for extension up to three years. Thus the claim is not maintainable under the WCA 1965.

Conclusion

156. In summary I have made the following findings:

a. That the BPS failed to comply with the statutory obligations set out in the OSHA.

b. That PC Joell made an error of judgment in his response to the actions of PC Reynolds.

c. That PC Reynolds contributed to the cause of the accident in a significant way.

d. That PC Reynolds is not entitled to compensation under the WCA.

157. I shall hear the parties on costs.

Dated 26 May 2022

SIGNED

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT