

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 443 of 2020

BETWEEN:

[1] ZUNER HERNANDEZ

Claimant

and

**[1] ATTORNEY GENERAL
[2] COMMISSIONER OF POLICE
[3] ALVIN CAIN PC #2169
[4] GEORGE LESLIE CPL #171**

Defendants

Appearances:

Paulette V. Elrington-Cyrille for the claimant
Imani Burgess and Alea Gomez for the defendants

2023: June 15th

July 28th

December 18th

JUDGMENT

[1] **CHABOT, J.:** Mr. Hernandez was on his way home from work when he was pulled over by PC Cain and CPL Leslie in the vicinity of Mile 1 on the George Price Highway in Belize City. Mr. Hernandez was driving a gold Dodge Ram pickup truck, which the defendants say matched the description of a vehicle that had been involved in a

shooting incident earlier that day. PC Cain and CPL Leslie ordered Mr. Hernandez to get out of the vehicle, and then searched Mr. Hernandez's person and vehicle. What happened during the search is at the center of the present claim.

- [2] Mr. Hernandez alleges he complied with PC Cain and CPL Leslie's orders at all times. He immediately pulled over and got out of his vehicle with his hands in the air as ordered by the officers. The officers had firearms pointed at him. The officers searched his person but found nothing. They then informed Mr. Hernandez they would search the vehicle. CPL Leslie instructed Mr. Hernandez to shut off the engine. As he moved towards the front of the vehicle, he was then told by PC Cain not to move. CPL Leslie thereafter repeated his instructions that he shut off the engine. Mr. Hernandez was confused as to what they wanted him to do. As he moved again towards the front of the vehicle, CPL Leslie grabbed him and slammed his face against the back of the pan of the vehicle, and PC Cain hit him in the left eye with the butt of his machine gun, causing injuries. Mr. Hernandez was handcuffed and brought to the Raccoon Street Police Station. Upon arrival at the Police Station, the officers were instructed to take him to the Karl Heusner Memorial Hospital where he was treated for a laceration to the corner of his left eye. Mr. Hernandez was charged with using insulting words, driving a motor vehicle without licence plates, and failing to provide a urine sample.
- [3] Mr. Hernandez seeks general, special, aggravated, and exemplary damages against the defendants for the assault and battery he says were perpetrated on him by PC Cain and CPL Leslie.
- [4] The defendants deny Mr. Hernandez's allegations. They say the officers had a reasonable cause to pull Mr. Hernandez over because the vehicle he was driving matched the description of a vehicle used in a shooting incident earlier that day. They admit to ordering Mr. Hernandez to get out of the vehicle with his hands in the air, but deny pointing any firearms at him at any time. The defendants allege that Mr. Hernandez was belligerent and cursed at the officers. They admit to searching Mr. Hernandez's person and that nothing was found on him. They however deny ordering Mr. Hernandez to shut off the engine of his vehicle because it had already been shut

off at the time he was pulled over and was ordered to exit the vehicle. The defendants admit that Mr. Hernandez moved towards the front of the vehicle but deny it was done upon the officers' instructions. Both officers ordered him not to move. The officers thereafter apprehended Mr. Hernandez to prevent him from moving towards the front of the vehicle as they were fearful he would retrieve a weapon to assault them. Mr. Hernandez was belligerent, which required the officers to use force to restrain him. The defendants allege that by his own actions, Mr. Hernandez's face hit the back of the pan of the vehicle, causing the laceration. They deny that PC Cain hit Mr. Hernandez's eye with the butt of his machine gun. They ask the court to dismiss the claim.

Issues

- [5] The following issues must be determined:
1. Whether PC Cain and CPL Leslie assaulted and battered Mr. Hernandez;
 2. Whether Mr. Hernandez is entitled to special and general damages and if so, to what extent;
 3. Whether Mr. Hernandez is entitled to aggravated and/or exemplary damages.

Analysis

Whether PC Cain and CPL Leslie assaulted and battered Mr. Hernandez

[6] I find that, while PC Cain and CPL Leslie had a reasonable cause to pull Mr. Hernandez over, they subsequently assaulted and battered Mr. Hernandez and are liable in damages.

[7] I accept that PC Cain and CPL Leslie had a reasonable cause to pull Mr. Hernandez over. PC Cain testified to having received a bulletin through the Gang Suppression Unit's WhatsApp group chat describing a vehicle similar to the one Mr. Hernandez was driving, which had been involved in a shooting incident earlier that day and was suspected of carrying firearms. PC Cain testified that the vehicle Mr. Hernandez was driving had heavily tinted windows and no licence plates, which heightened his suspicion. That the windows of the vehicle were tinted and the vehicle had no licence

plates was not denied by Mr. Hernandez or his brother, Roger Hernandez, who is the owner of the vehicle and a witness in this matter.¹

[8] While the bulletin itself was not entered into evidence, I find there is sufficient evidence to support the officers' allegation that a bulletin had been issued. Both Mr. Hernandez and his brother testified that CPL Leslie told Mr. Hernandez at the scene that they had received a report that a vehicle fitting the description of the vehicle he was driving had been involved in a shooting incident earlier that day. I find it unlikely that CPL Leslie would have had time to fabricate a story about the existence of a bulletin at the scene of the incident. I also give no weight to the fact that the bulletin had only been seen by PC Cain and not CPL Leslie himself. Officers cannot be expected to spend their days on their phones. It does not strike me as unreasonable for CPL Leslie to have relied on information relayed to him by his patrol partner without needing to check for himself whether a bulletin had, in fact, been issued. I also do not find it unreasonable for the officers not to have enquired if the bulletin was still active before acting upon it. The officers had not been advised that the bulletin was no longer active and had no reason to believe that to be the case.

[9] Sections 22 and 23(1) of the Firearm Act² empowered the officers to stop and search Mr. Hernandez and the vehicle because, based on the bulletin, the officers had reasonable grounds to suspect the driver of the vehicle to be in possession of a firearm or ammunition. The officers' suspicion was heightened by the tinted windows and the absence of licence plates. That Mr. Hernandez was not, in fact, in possession of a firearm or ammunition is immaterial as it is the belief of the arresting officers at the time the powers are exercised that is relevant.³ I am satisfied that, at the time Mr. Hernandez was pulled over, PC Cain and CPL Leslie had reasonable grounds to suspect the vehicle to have been carrying a firearm or ammunition and to have been involved in the commission of a crime.

¹ In her closing submissions, Mr. Hernandez's counsel argued that Mr. Hernandez denied that the windows of the vehicle were heavily tinted as alleged by PC Cain. However, there is no evidence of this denial as the issue was not addressed in Mr. Hernandez's witness statement or in cross-examination.

² Cap. 143, Rev. Ed. 2011 (in force at the time of the incident).

³ O'Hara v Chief Constable of the Royal Ulster Constabulary, [1997] 1 All ER 129 at 298.

[10] It is common ground that, after being pulled over, Mr. Hernandez complied with the officers' instructions and got out of his vehicle. I find that, based on the evidence, Mr. Hernandez was then given conflicting orders by the officers and, in an attempt to comply with CPL Leslie's order to shut off the vehicle's engine, moved towards the front of the vehicle and as a result was subjected to excessive force by the officers. The following elements ground my finding.

[11] First, I am not convinced that the evidence provided by PC Cain and CPL Leslie is the product of their own recollection of the events. Both officers recorded statements on 15th August 2019, approximately a month after the incident. Both statements were recorded by PC Cain within minutes of each other. Both statements use practically identical language, except that they are stated from the standpoint of their respective author. The statements appear to have been written by the same author and to essentially consist of a "cut and paste" of each other. For example, PC Cain describes Mr. Hernandez's arrest as follows:

Upon bringing the vehicle to a stop, I ordered the driver out of the vehicle and a clear skin male person about 5' 6" in height wearing a grey shirt and a green long pants exited the vehicle. I then asked the male person to open the back door and walk away from the vehicle while at the same time, asked him if anyone else was in the vehicle. That was when he replied 'nobody nuh deh inna di vehicle asshole, you deaf or what!' and he then walked back towards the front driver side door where I immediately grabbed him to prevent him from entering the vehicle after which he was restrained, subdued and placed in handcuffs by myself & Cpl. Leslie.

[12] CPL Leslie describes Mr. Hernandez's arrest as follows:

Upon bringing the vehicle to a stop, myself and DC Cain exited our mobile and DC Cain then ordered the driver out of the vehicle and a clear skin male person about 5' 6" in height wearing a grey shirt and a green long pants exited the vehicle. DC Cain then asked the male person to open the back door and walk away from the vehicle while at the same time, asked him if anyone else was in the vehicle. That was when he replied 'nobody nuh deh inna di vehicle asshole, you deaf or what!' and he then walked back towards the front driver side door where DC Cain immediately grabbed him to prevent him from entering the vehicle after which he was restrained, subdued and placed in handcuffs by DC Cain and myself.

- [13] Similarly, the witness statements filed by both officers in support of their defence to this claim are nearly identical. Both were clearly drafted using as their source material the officers' statements referred to above. It is therefore not surprising that both witness statements are also essentially the same. I draw an adverse inference from the fact that the officers did not provide independent police and witness statements.
- [14] Second, there is no evidence that the engine of the vehicle had been turned off before Mr. Hernandez got out. Neither officer stated in their police or witness statement that they ordered Mr. Hernandez to shut off the engine of the vehicle prior to exiting, or that Mr. Hernandez shut it off on his own. In cross-examination, PC Cain admitted to not asking Mr. Hernandez to turn off the engine. When asked if the vehicle was still running, PC Cain stated that he could not recall. While CPL Leslie testified that he would normally ask a driver to shut off the engine before exiting a vehicle, he could not say with certainty that Mr. Hernandez had, in fact, turned the engine off. Mr. Hernandez was not cross-examined on this point, and therefore his evidence that the engine was still on stands.
- [15] Third, in light of my finding that the engine of the vehicle was still running after Mr. Hernandez was ordered to get out of his vehicle, I find Mr. Hernandez's testimony that he was asked to go back to shut the engine off to be credible. All witnesses agree that Mr. Hernandez moved towards the front of the vehicle. Both PC Cain and CPL Leslie testified that Mr. Hernandez reached for something under the front driver's seat, and that because they were afraid for their safety they ran towards Mr. Hernandez, grabbed his hands in an attempt to restrain him, and subdued him. However, PC Cain and CPL Leslie also testified that a later search of the vehicle revealed nothing; no weapons, ammunition, or drugs were found in the vehicle. As such, there would be no reason for Mr. Hernandez to reach for something under the front driver's seat. I find that, if Mr. Hernandez reached for something, it is likely that he reached for the keys, which were still in the ignition at the time, in compliance with CPL Leslie's order to shut off the engine.

[16] Fourth, I find it highly unlikely that PC Cain, who is 5' 11" and was 180 pounds at the time of the incident, and CPL Leslie, who is 5'10" and 185 pounds, would struggle to subdue Mr. Hernandez, who is 5' 1". I find their explanation that Mr. Hernandez was belligerent and difficult to subdue to not be credible. Other than the fact that Mr. Hernandez moved towards the front of the vehicle, the only evidence put forward by the officers in support of their assertion that Mr. Hernandez was belligerent is that Mr. Hernandez allegedly shouted that "*nobody nuh deh inna di vehicle asshole, you deaf or what*". Mr. Hernandez admits to shouting these words, but disputes the timing. Mr. Hernandez alleges that he shouted these words after he was assaulted and battered by the officers, not before as asserted by the officers. I find that, regardless of when these words were shouted, they were not sufficient to cause the officers to fear for their safety such that they had to restrain and subdue Mr. Hernandez.

[17] Finally, I find PC Cain and CPL Leslie's evidence that Mr. Hernandez's injuries were self-inflicted to not be credible. It bears repeating that Mr. Hernandez is significantly smaller than both officers, and was handcuffed. It strains credulity to believe that Mr. Hernandez was so difficult to subdue that he would slam his own face into the side of the vehicle in such a manner as to cause him injuries. I also find it improbable that the specific injuries he suffered would result from slamming his face on a flat surface. Mr. Hernandez entered into evidence pictures showing injuries to the left side of his face. The pictures, as well as a medico-legal form, show that Mr. Hernandez sustained a black eye and a cut at the corner of his eye which required stitches. I find it more likely than not that this type of injury would be caused by a sharper object such as the butt of a machine gun as asserted by Mr. Hernandez.

[18] I note that PC Cain admitted to having a rifle strapped to his chest during the incident. PC Cain testified that the rifle was strapped so tightly he could not move it at all, and could therefore not have hit Mr. Hernandez with it. Given that the officers pulled over a vehicle suspected of carrying firearms and to have been involved in a shooting incident earlier that day, I find it unlikely that PC Cain would not have had his rifle at the ready once the vehicle was pulled over and Mr. Hernandez was ordered to get out

of it. On the evidence, I am satisfied that Mr. Hernandez was hit by the butt of the rifle as alleged.

[19] I found Mr. Hernandez to be a credible witness. His testimony was corroborated by his brother, Roger Hernandez, who also testified at trial. The only questions asked of Roger Hernandez in cross-examination revolved around his specific location at the time of the incident. Roger Hernandez was driving a motorcycle in front of his brother. He testified to pulling over just in front of the gold Dodge Ram and to have witnessed the incident. He resisted any suggestion that he was so far away that he did not see anything. Since it is not disputed that Roger Hernandez also pulled over when his brother was pulled over by the officers, I find it more likely than not that Roger Hernandez was close enough to the gold Dodge Ram that he was able to observe it being pulled over. Roger Hernandez testified to getting off of his motorcycle and walking towards the truck. The officers saw him at the scene. His evidence as to what he saw, which corroborates his brother's, was not challenged in cross-examination. I therefore accept Roger Hernandez's testimony and find that it supports Mr. Hernandez's.

[20] In light of the above, I find that PC Cain and CPL Leslie used excessive force on Mr. Hernandez. I find that Mr. Hernandez was tackled by PC Cain and CPL Leslie, that his face was slammed on the side of the truck, and that he was hit in the face, at the corner of his left eye, by the butt of a rifle.

[21] The torts of assault and battery, in the context of a police arrest, were described by Abel J. in **Thomas Greenwood Jr. v Attorney General et al.**⁴ as follows:

[64] An assault is the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact.

[65] Battery is intentional or reckless use of unlawful force on another person, resulting in harmful or offensive contact.

"A person who is sued for an assault or battery may justify the act on the ground that it was committed in the defence of his own

⁴ Claim No. 611 of 2013 ("Greenwood").

person and that he used no more force than was reasonably necessary or at least avoided force that was grossly disproportionate....

[66] As has been observed

“if an assault is threatened, as by raising a hand within a distance capable of the latter being struck, the latter may strike in his own defence to prevent it...”

[22] I do not find that Mr. Hernandez’s conduct called for the use of such excessive force on his person. Mr. Hernandez complied with the officers’ orders and got out of his vehicle. Given my findings as to the reason why Mr. Hernandez moved towards the front of the vehicle, I find that the officers had no reason to fear for their lives as alleged in their submissions. Even if Mr. Hernandez used insulting words, this would not justify such a violent subjugation of Mr. Hernandez. I therefore find that PC Cain and CPL Leslie used more force than was reasonably necessary in the situation and are liable in damages for assault and battery.

Whether Mr. Hernandez is entitled to special and general damages and if so, to what extent

[23] Mr. Hernandez is entitled to general damages for his injuries and the embarrassment he endured during the incident. He is also entitled to special damages for medical expenses he incurred as a result of the incident.

[24] Mr. Hernandez entered into evidence pictures and a medico-legal form showing that he suffered abrasions, a bruised lip, a black eye, and a laceration at the corner of his left eye which required stitches. The injuries did not have a lasting impact on Mr. Hernandez’s vision, but left a small scar near his eye. In **Greenwood**, the court awarded the claimant BZ\$5,000 (in 2014 currency) for assault and battery which resulted in bruises and inflammation, as well as headaches and a blurring of the claimant’s vision years later. In the recent case of **Benjamin Cantun et al. v PC 1870 Roje Espinosa et al.**,⁵ Farnese J. awarded each claimant BZ\$3,000 in general damages for assault where the claimants were hit by rubber bullets and pepper-

⁵ Claim No. 603 of 2021 ("Cantun").

sprayed, and suffered bruises and abrasions. I find that an amount of BZ\$4,000.00 is appropriate in this case in regards to the injuries suffered by Mr. Hernandez.

[25] Mr. Hernandez alleges he was embarrassed to be seen by passersby “as if he was a criminal”. The incident occurred on a Friday evening on the George Price Highway, a busy road. As noted by Farnese J. in **Cantun**, “damages for physical injury are calculated as they would be in any other action for personal injury, but the tort of assault also attracts damages for any insult, (i.e. injury to feelings, indignity, mental suffering, humiliation) that may accompany the injury”.⁶ It is likely that the incident and its aftermath were witnessed by some people, although the evidence does not establish the number. Mr. Hernandez offered very little particulars as to the depth of his feeling of embarrassment. I find that a nominal amount of BZ\$250.00 is reasonable to compensate Mr. Hernandez for the embarrassment he felt on that day.

[26] Mr. Hernandez claims BZ\$175.00 in special damages for medical expenses incurred to conduct examinations on his eye. I find that Mr. Hernandez is entitled to BZ\$100.00 in special damages to cover the cost of one eye examination at the Hoy Eye Center. Mr. Hernandez went for another eye examination at the Belize Vision Center on the same day at a cost of BZ\$75.00. I agree with the defendants that because neither eye examination concluded in any injury to Mr. Hernandez’s eye, Mr. Hernandez has not established why it was necessary to incur the cost of two eye examinations.

Whether Mr. Hernandez is entitled to aggravated and/or exemplary damages

[27] In **Shane Harris v Attorney General of Belize et al.**⁷ James J. summarized the law in relation to aggravated and exemplary damages as follows:

32. In **Thaddeus Bernard v Quashie**, CA No 159 of 1992 de la Bastide C.J. stated the following in relation to aggravated damages;

“The normal practice is that one figure is awarded as general damages. These damages are intended to be compensatory and include what is referred to as aggravated damages, that is, damages which are meant to provide compensation for the mental

⁶ Cantun at para. 59.

⁷ Claim No. 90 of 2020 (“Harris”).

suffering inflicted on the plaintiff as opposed to the physical injuries he may have received. Under this head of what I have called 'mental suffering' are included such matters as the affront to the person's dignity, the humiliation he has suffered, the damage to his reputation and standing in the eyes of others and matters of that sort. If the practice has developed of making a separate award of aggravated damages I think that practice should be discontinued."

33. Exemplary damages are awarded in cases of serious abuse of authority. The function of exemplary damages is not to compensate but to punish and deter. The case of **Rookes v Barnard** (1964) AC 1129 established that exemplary damages can be awarded in the following three types of cases;

- i. Cases of oppressive, arbitrary or unconstitutional action by servants of the Government;
- ii. Cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
- iii. Cases in which exemplary damages are expressly authorized.⁸

[28] Based on **Harris**, I decline to award aggravated damages to Mr. Hernandez because the general damages I awarded already factor in the mental suffering inflicted on Mr. Hernandez in the course of the incident.

[29] I do, however, see fit to award Mr. Hernandez exemplary damages as an expression of the court's disapproval for the abusive manner with which PC Cain and CPL Leslie conducted themselves on 19th July 2019. As noted above, I do not believe the incident happened as described by the officers. While I found that the officers were justified in stopping the vehicle, the evidence shows they subsequently abused their authority and used excessive force on a citizen who was compliant with their orders. Police officers yield enormous powers, which, if used to their fullest, can lead to injuries and even death. These powers come with the responsibility to use them only if reasonably necessary in the circumstances. These powers were clearly misused in this case, and a story was fabricated to cover up the illegal actions of the officers. The officers' conduct is deserving of reprobation.

⁸ Harris at paras. 32-33.

[30] In **Harris**, James J. awarded BZ\$2,000.00 in exemplary damages in a case where the claimant had been wrongfully arrested and falsely imprisoned for three days. I find this amount to be appropriate in this case as well.

IT IS HEREBY ORDERED THAT

- (1) The claim is granted;
- (2) The defendants shall pay Mr. Hernandez BZ\$4,350 in general damages and BZ\$2,000 in exemplary damages;
- (3) Mr. Hernandez is awarded prescribed costs.

Geneviève Chabot
High Court Judge