JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 67/2000

BEFORE:	**THE HON MR JUSTICE BINGHAM, J. A.** **THE HON MR JUSTICE WALKER, J. A.** **THE HON MR JUSTICE PANTON, J. A.**	
BETWEEN:	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT/APPELLANT**
AND	**CLINTON BERNARD**	**PLAINTIFF/RESPONDENT**

Curtis Cochrane instructed by the Director of State Proceedings for the Defendant/Appellant

Antonnette Haughton-Cardenas and Clyde Williams for the Plaintiff/Respondent

June 20 and November 9, 2001

BINGHAM, J A:

The facts and the submissions raised before us in this appeal are fully and clearly set out in the judgment of Walker JA. with whose reasoning and conclusions I am in agreement. In coming to this decision I do so with some degree of reluctance. That I find it necessary to express myself in such extreme undertones, is due in no small measure to the state of the law as it relates to vicarious liability which, on the uncontroverted facts in this case, now appears to be occurring with the most alarming regularity and cries out for justice to be done. Such a cry can only be answered by the state instituting some measure of

reform aimed at assisting the many innocent victims of the barbarous conduct of some agents of the state. The facts in this case are not too dissimilar to those which confronted the plaintiffs and this Court in ***Attorney General of Jamaica v Oswald Reid and Others*** [1994] 31 J.L.R. 237.

As the Court in this judgment is differing from the decision of the learned trial judge below, I am minded to add a few words of my own. The sole issue falling for determination before us arose in circumstances where the Constable, in shooting and seriously injuring the respondent, did so under the guise that as a Police Constable he had a lawful right to use force to achieve his objective of obtaining the use of the public telephone at the Central Sorting Office. The result was that a Constable sworn to uphold the law of the land and to "keep watch by day and night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence ..." used his service revolver, a lethal weapon, to commit a grievous wrong on one of the very persons whom it was his sworn duty to protect.

As the facts in this case establish, however, there can be no doubt that the Constable was here acting outside of the express or implied powers accorded to him by virtue of Section 13 of the Constabulary Force Act. As his conduct in this regard could not be seen as coming within a class of acts connected or closely connected with the authorized acts so as to be regarded as a mode of doing them, it was, therefore, an independent act. The state as his employer

was, therefore, not vicariously liable as the Constable was not acting within the scope or course of his employment, but had gone outside it.

The learned trial judge, in determining liability in favour of the respondent, accepted the submissions of learned counsel for the respondent, founded as they were on the decision of this Court in ***Hamlet Bryan v George Lindo*** [1986] 23 J.L.R. 127. Given the facts and circumstances of that case, that judgment was correct. The unlawful shooting of the plaintiff by the soldier, an agent of the state, while the plaintiff was in lawful custody being detained at a police station, was a sufficient basis on which to found liability in the state as employer. His tortious act, which was by the same token unauthorized, was a wrongful mode of doing something which the soldier was authorized to do.

In the instant case, the Constable was in possession of a service revolver issued to him by his superior officer which could be regarded as authorizing him to be at large in carrying out his sworn duty to uphold the law. By his unlawful action in shooting and injuring the respondent, the Constable could not be seen as acting in the lawful execution of his duty. His conduct was of such a nature as fell outside the class of acts authorized by Section 13 of the Constabulary Force Act, and did not render the state as his employer vicariously liable to the respondent.

In this regard he can be seen to be in the same position as the Constable in ***Attorney General v Reid and Others*** (supra). It was such conduct that prompted Forte, JA. (as he then was) to rely for support on the dictum of Lord

Thankerton in ***Canadian Pacific Railway Co. v Lockhart*** [1942] A.C. 5 41 at page 599. In delivering the advice of the Board of the Privy Council and citing with approval a passage from ***Salmond on Torts 9th Edition*** at page 95 he said:

> "The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles, their Lordships agree with the statement in Salmond on Torts, 9th ed. P. 95, namely:
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> > 'It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it. ... On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it.' " (Emphasis supplied)

This apart, as the circumstances of this case cry out for justice in whatever form it may take, I too share the view of my brethren that every effort

ought to be made by the state to effect an ex gratia payment of a reasonable sum by way of compensation to the respondent.

In making this recommendation, I wish to echo and adopt the words of Wright, JA in ***Attorney General v Reid and Others*** (supra) which apply with equal force in this case. He said (inter alia) (page 238 H):

> "I strongly endorse Forte, J.A.'s, suggestion that ex gratia payments be made to the plaintiffs/respondents. Indeed, I feel there is a moral responsibility to do so. But I go even further and say that it cannot be in the best interests of the country for vacationers to be induced to come to Jamaica and to end up without protection. A policy decision ought to have been taken which would have saved the country from ignominy of such a stance by the government."

On the facts of this case no less can be said than to urge the state to act with dispatch to redress a grievous wrong done to one of its own citizens while going about his lawful business.

In the result the appeal is allowed, the judgment entered below is set aside and judgment is entered for the defendant/appellant. Having regard to the circumstances giving rise to this suit, there ought to be no order made as to costs.

WALKER, J.A.:

This appeal is taken against a judgment of McCalla J given on June 9, 2000 in favour of the respondent (plaintiff) in the following terms:

> "1. General Damages in the sum of $2,230,000.00 with interest on $2,000,000.00 at the rate of 6% per annum from 1/2/91 to 9/6/2000;
>
> 2. Special Damages in the sum of $318,000.00 with interest at the rate of 6% per annum from 11/2/90 to 9/6/2000;
>
> 3. Costs to the Plaintiff to be agreed or taxed."

At trial the case for the plaintiff was short. It is conveniently summarized in the written judgment of the learned trial judge as follows:

> "Clinton Bernard, a Lithographic Printer aged 32 years, on 11th February 1990, accompanied by his parents, went to the Central Sorting Office in Kingston with the intention of making a telephone call. It was about 9:00 p.m. and on their arrival there about fifteen persons were seen standing in line. Plaintiff joined the line and awaited his turn to use the telephone. He testified that as soon as he took the telephone and dialled a number, 'out of the blue, out of nowhere' a man came up and said 'Police', and demanded the use of the telephone. Plaintiff protested and remarked that had it been a bank he would have had to join the line. He was greeted with the response 'boy me naw join no line, give me the phone'.
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> Mr. Bernard refused to give up the telephone whereupon he was slapped on his hand and shoved. He testified further that the first defendant then took two steps backwards, pulled a gun from under his shirt, pointed it at him and the next thing he heard was an explosion. He fell backwards and lost consciousness.

When he regained consciousness at the Kingston Public Hospital he found himself surrounded by men in uniforms. He was arrested for assaulting a police officer and handcuffed to his bed by the first defendant.

Mr. Bernard spent nearly a month in hospital, was in pain and unable to walk or move his left hand.

He was subsequently dismissed of the charges which had been laid against him.

At the time of the incident Mr. Bernard had been employed at a salary of about $2,000.00 per week but his doctors advised him that he was no longer fit to carry out the work which he previously did. He has secured no alternative employment as he is subject to having epileptic seizures at unpredictable times. He will have to take medication for the rest of his life.

Plaintiff testified that he spends $2,000.00 per month on medication to prevent epileptic seizures and about $800.00 per month on medication to alleviate pain. Prior to the incident he used to play football but no longer does so because of the possibility of seizures.

Under cross examination Mr. Bernard testified that on the night in question the first defendant was not dressed in uniform. At that time Plaintiff had not been committing any crime or disturbing the peace. Since his arrest he has not seen the first defendant nor has he ever been called to give evidence.

Plaintiff's mother Esmie Bernard gave evidence in support of his case. She testified that having witnessed the shooting of her son she spoke to the policeman who told her that her son was not dead as the bullet had only grazed his head. Cross-examined by Counsel for Second Defendant as to how she knew that the first defendant was a policeman she responded as follows:

> '... when Clinton held onto the phone he appeared from nowhere held on to the phone

> and said 'I'm going to make a long distance call!' He then said 'boy leggo this, police...'
>
> On the night that her son was shot she never saw him nor anyone else at the telephone booth creating a disturbance or committing any crime".

Even shorter was the case for the second defendant (appellant). Again, the judgment of the trial judge provides a useful summary in the following terms:

> "The second defendant called no witnesses as to fact, but Clive Blair, a Sergeant of Police in his capacity as Sub Officer in charge of the Police Registry produced records and gave evidence. His duties included the processing and storage of records relating to members of the Jamaica Constabulary Force, the Island Special Constabulary Force and District Constables.
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> The records showed that the First Defendant had been a member of the Island Special Constabulary Force, but with effect from the 17th March, 1990 had been dismissed for absence from work for over 48 hours. He has left the island for an unknown destination. Prior to his dismissal, he had been stationed at St. Andrew South from 15th September, 1987.
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> In response to Plaintiff's counsel he testified that in case of an emergency it would be considered normal for a police officer to go to the head of a line in order to use a telephone as a matter of urgency".

The issue on appeal is straightforward. It is whether on the evidence in the case the trial judge was correct in holding that the second defendant was vicariously liable for the action of the first defendant, Spl. Cpl. Morgan, it

having been admitted that the first defendant was at the material time a Corporal in the Jamaica Constabulary Force.

For the appellant Mr. Cochrane urged that the action of the first defendant did not fall within the purview of his official duties as prescribed in section 13 of the Constabulary Force Act. Section 13 provides as follows:

> "**13.** The duties of the Police under this Act shall be to keep watch by day and night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company".

Mr. Cochrane submitted that in finding and attributing vicarious liability to the second defendant in the circumstances of the present case the trial judge "created a duty and ascribed it to Spl. Cpl. Morgan". In argument Mr. Cochrane relied heavily on the case of **Attorney General v Oswald Reid and Others** [1994] 31 JLR 237. The headnote to that case is informative. It reads:

> "The plaintiffs brought an action against the Attorney-General as the representative of the Crown claiming damages based on the Crown's alleged vicarious liability for the acts of Constable Errol Thompson. The respondent Engerbretson was a visitor to the

island staying at a hotel in Ocho Rios. One night she was leaving the ladies' room at the hotel when she was pounced upon by Constable Thompson who demanded her valuables and severely injured her with a knife. Reid, a security guard on the premises rushed to her assistance and was shot by the policeman. At the time of the trial for damages, Constable Thompson was serving his sentence in prison for these acts. The trial judge found that Thompson had committed the acts while in the course of his duty as a constable and therefore the Crown was held vicariously liable for his acts. On appeal by the Attorney-General:

Held: that a master is liable for the wrongful acts of his servants, if the acts were authorized by him, or if unauthorized, they are modes of doing acts authorized by him; the unauthorized acts are considered modes of doing a class of acts authorized by the master if they are so connected with the acts which the servant is authorized to do, as to be regarded as a mode of doing them and in those circumstances the master will be liable for those acts; however if the unauthorized act is an independent act the master is not liable; in the instant case it is clear that the wrongful acts were not authorized; there is also no evidence to support the view that the acts were so closely connected with the class of acts which a police officer is authorized to do so as to render the Crown liable as though Constable Thompson was assigned to the hotel he was assigned to do acts in complete contradiction to the wrongful acts which he committed on the respondents; the constable was acting independently and was on a frolic of his own.

Per Curiam: though regrettably the cases do not permit of a finding in favour of the respondents it cannot be right for the Government to distance itself from their woes and it is strongly urged that an ex gratia payment be made".

Also, Mr. Cochrane drew the attention of the court to Salmond and Heuston on the Law of Torts 21st edn.; para 21.5 at p. 443 where in discussing the

meaning of the term "the course of employment" in the context of the legal concept of vicarious liability the learned authors state:

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. Although there are few decisions on the point, it is clear that the master is responsible for acts actually authorised by him; for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it".

For the respondent Mrs. Haughton-Cardenas submitted that the findings of the trial judge were supported by the evidence and should not be disturbed. She argued that in demanding the use of the telephone Morgan was asserting his position as a police officer, the reasonable inference to be drawn from such conduct being that the use of the telephone was "somehow connected to his

official duties". She said it was a significant fact that arising out of this incident the respondent was charged by Morgan with assault, conduct which justified the trial judge's finding that Morgan was at that time executing his duties as a police officer. In making this finding the trial judge laid great store on two pieces of evidence, namely:

(1) that in demanding the use of the telephone Morgan announced "police"; and

(2) following the incident Morgan caused the plaintiff to be arrested on a charge of assaulting a police officer.

To my mind, whether taken singly or together, these segments of the evidence are incapable of providing a sufficient basis for such a finding. Firstly, as to (1) above, the action of Morgan is at best equivocal, the probability being that he was asserting his status as a policeman for the sole purpose of obtaining the desired advantage. It had nothing to do with the execution of his official duties. Secondly, as to (2) above, the probability seems to be that the prosecution of the plaintiff was contrived in an attempt to cover up, or justify, the wrongful shooting of the plaintiff. It was not a genuine prosecution for an offence committed against Morgan qua police officer.

Accordingly, I would allow this appeal, set aside the judgment of McCalla J and enter a judgment for the appellant with no order as to costs.

Before parting with this matter, I desire to say that I consider this to be a proper case for a meaningful ex-gratia payment to be made by Government to the respondent.

I do hope that this final comment will not fall on deaf ears.

PANTON, J.A.

I agree and have nothing to add.

ORDER

BINGHAM, J.A.

Appeal allowed. Judgment of the court below set aside. Judgment entered for the defendant/appellant. No order as to costs.