JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 95 OF 1997

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	THE ATTORNEY GENERAL	2ND DEFENDANT/ APPELLANT
A N D	GLADSTONE MILLER	PLAINTIFF/ RESPONDENT

Lennox Campbell, Senior Assistant Attorney-General, and Miss Cheryl Lewis, instructed by the Director of State Proceedings, for the appellant

Colin Henry, instructed by Henry and Malcolm, for the respondent

March 18, 1999 and May 24, 2000

BINGHAM, J.A.:

This appeal concerned an order made in Chambers by McCalla, J. (acting) on 10th April, 1997. The learned judge, exercising her powers under section 238 of the Judicature (Civil Procedure Code) Law, ordered that the defence of the second-named defendant/appellant be struck out on the ground that "it discloses

no reasonable answer and/or is frivolous and/or vexatious and/or an abuse of the process of the court."

Judgment was also entered for the plaintiff/respondent with an order for costs to be agreed or taxed.

After hearing the submissions of counsel, at the end of these arguments, we allowed the appeal and ordered that the order of the court below be set aside. The court also made an order for costs to be in the cause. We promised then to put our reasons into writing. This is a fulfilment of that promise. We wish to tender our profound apology for the long delay in preparing these reasons.

The Factual Background

The action in this matter was brought on the 25th November, 1994, by the respondent/plaintiff claiming damages arising out of a motor vehicle accident that occurred on the 26th day of July, 1994. The respondent alleged in the endorsement to the writ of summons that the first-named defendant Charles B. Walters was an agent and/or servant of the second defendant. (This allegation was, however, omitted from the statement of claim). The second-named defendant/appellant was sued as the owner of the said vehicle through the Ministry of National Security and Justice, Department of Correctional Services.

The second-named defendant/appellant entered an appearance on its behalf on the 21st June, 1995. The plaintiff/respondent obtained a judgment in default of appearance against the first defendant/appellant. The judgment in default was not served on the second defendant/appellant.

On the 22nd August, 1995, pursuant to a consent to file a defence out of time, the second defendant/appellant filed their defence and served it on the plaintiff/respondent on the 23rd August, 1995.

On the 24th May, 1996, the plaintiff/respondent filed an amended statement of claim and served the second defendant/appellant on the 18th June, 1996. The amended statement of claim sought to include an allegation that the first defendant was a servant and/or agent of the second defendant/appellant.

On the 17th January, 1997, the plaintiff/respondent filed a summons and affidavit in support to strike out the defence which was served on the second defendant/appellant on 3rd April, 1997. On the 7th April, 1997, a supplemental affidavit in support of summons to strike out defence, which indicated that judgment in default of appearance was obtained against the first defendant was filed and served.

On the 10th April, 1997, the defence of the second defendant/appellant, the summons to strike out the defence, was heard and the defence was ordered struck out.

The order made below has been challenged on the following grounds:

> "1. The learned judge erred in law in finding that the defence of the Defendant/Appellant was frivolous and/or vexatious and/or an abuse of the process of the court.
>
> 2. The learned judge erred in finding that the issue of liability against the Defendants had been determined for the reason that Interlocutory Judgment had been entered in Default of

Appearance against the First Defendant and had not been set aside by the Defendant/Appellant.

3. The learned judge erred in law in acting on the basis of the validity of the Interlocutory Judgment in Default of Appearance entered against the First Defendant which was an irregularly obtained Judgment.

4. The learned judge erred in finding in the circumstances that the entering of a Default Judgment against the First Defendant, the servant, rendered the Defendant/Appellant as his master who had filed a Defence, liable without more."

The Submissions

As structured and presented, the arguments of learned counsel for the appellant sought to encompass grounds 1, 2 and 4. He submitted that by striking out the defence of the second-named defendant the court was seeking to tie the hands of the Attorney-General (the second defendant) despite the requirements of section 13 of the Crown Proceedings Act. He cited sections 11(a) and 72 of the Judicature (Civil Procedure Code) Law in contending that it was impermissible for the learned judge to use the default judgment entered against the first defendant as a bar to the action proceeding against the second defendant/appellant. As there was nothing stated on the Endorsement to the Writ to indicate that the respondent intended to proceed against the second defendant, this was procedurally irregular and in contravention of section 13(2) of the Crown Proceedings Act.

Counsel further submitted that the interlocutory judgment entered against the first defendant cannot operate to estop the second defendant/appellant or operate to determine the issues between the respondent and the appellant as such a judgment is not final.

Counsel submitted, therefore, that the learned judge erred in determining that the default judgment entered against the first defendant was a determination of liability against both defendants. The issue of liability against the second defendant/appellant and the respondent was not determined. The authority of ***Dummer v. Brown and another*** [1953] 1 Q.B. 710, cited by counsel for the respondent and relied on by the learned judge, was not applicable to the instant case. The cited authority related to proceedings under Order 14 Summary Judgments which is different from Order 13 Default Judgment Proceedings.

Learned counsel for the appellant relied in support on the following:

> ***Halsbury's Laws of England***, Third Edition, Vol. 15, paragraphs 358-360, paragraph 393
>
> ***Re Greaves exparte Whitton*** [1880] 43 L.T. 480
>
> ***Parr v. Smell*** [1922] All E.R. Rep. 270.

Ground 3

Learned counsel for the appellant submitted that the learned judge erred in law in acting on the basis of the validity of the interlocutory judgment entered in default of appearance against the first defendant as this judgment was irregularly obtained.

Counsel contended that where a plaintiff makes a claim against the Crown for the torts of its agents and/or servants the proper and only party is the Attorney General and therefore a judgment entered against its servant is irregularly obtained.

Counsel relied in support on the following:

1. Section 3(1)(b) of the Crown Proceedings Act
2. Section 13(2) of the Crown Proceedings Act
3. Section 11(a) of the Judicature (Civil Procedure Code) Law
4. ***Gordon v. Attorney General*** [1960] 2 W.I.R. 235
5. ***Attorney General v. Desnoes and Geddes Limited*** [1970] 15 W.I.R. 492
6. ***Lewis v. Ministry of Labour and National Insurance*** [1966] 9 W.I.R. 459.

Learned counsel for the plaintiff/respondent identified two real questions for the court's determination of the matter, viz.:

1. Is the judgment in default obtained against the servant (first defendant) referable back to the question of the master and servant relationship?
2. Where the master denies liability in the case of negligence, can that default judgment make the master liable?

Learned counsel for the respondent submitted that pursuant to the Crown Proceedings Act the master is liable for all tortious acts committed by his servants or agents. The plaintiff could have brought the action against the servant alone. If

he discovered subsequently that the servant was a Crown servant, the plaintiff could have sued the Attorney General.

Counsel contended that the reason why the learned judge found herself bound to strike out the defence of the second-named defendant (appellant) is because, as the matter stood, the default judgment is at present a barrier in the way of the second defendant. The liability of the servant has not been determined in a contested suit.

Counsel argued that it is a fundamental principle of law that so long as the default judgment remains against the first defendant the second defendant would still be liable as the master.

The amendment having been made to the statement of claim and the defendants having done nothing about the matter, the judgment against the first defendant still stands. The second defendant/appellant having been given leave to amend the defence nothing was done about the matter.

The relationship of master and servant has not been altered since the default judgment was entered in the matter.

Learned counsel for the appellant drew the court's attention to the failure on the part of the respondent's attorneys to serve a copy of the order entering judgment in default of appearance on the Attorney General. This resulted in that Department not being aware of this situation until the hearing of the summons to strike out the defence of the second defendant.

This observation by learned counsel for the appellant in substance has some merit. Had there been service of the default judgment effected it would be reasonable to expect that on the summons to strike out the defence being taken out that the defendants would have responded by taking out a summons seeking leave to set aside the default judgment. In that event, the common practice is that both summons would be listed together and set down for hearing in Chambers at the same time. This not being the case here, clearly supports the contention that the defendant/appellant was not notified of the entry of the judgment in default. As the proper defendant to the suit, it was necessary for the Attorney General (second defendant) to be served with all such documents relating to the proceedings of which entry of a judgment in default would have been one.

For a proper appreciation of the issues raised in this matter, the reason the second defendant/appellant ought to have been served with the default judgment is not difficult to envisage. Whereas the second defendant would be liable for all torts committed by his servant or agent in the course or scope of his employment, should the facts show that the servant or agent was not so engaged at the time of the act, the master (in this case the appellant) may well seek to avoid liability by contesting the suit. In the alternative, if on the instructions of the servant (employee), negligence is denied, to deny the master (employer) this course would clearly be unjust.

The Law

A convenient starting point is by reference to the statutory provisions which govern the matter ,which were canvassed below, and rehearsed before us on appeal.

Sections 3(1)(a) and (13)(1) of the Crown Proceedings Act read:

> "3.--**(1)** Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject--
>
> **(a)** in respect of torts committed by its servants or agents;..."
>
> "13.--**(1)** Civil proceedings by the Crown shall be instituted by the Attorney-General." [Emphasis supplied]

The Crown Proceedings Act was passed into law in England in 1947. It was brought into operation in Jamaica on February 1, 1959. It made the Crown liable for the tortious acts of its servants or agents done in the course of their employment. In so doing, it extended the principle of vicarious liability as between private persons falling into the category of master and servant or employer and employee. Prior to this, for one to proceed against the Crown in a civil suit had to be by way of a petition of right. Although claims in tort could still be brought against the Crown - servant or employee alone, once it was established that he was acting within the course or the scope of his employment, the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or

employee alone therefore would be meaningless, as the Attorney General could enter an appearance and take over the defence of the suit. It is in this vein that section 13(2) of the Crown Proceedings Act mandates that "Civil Proceedings against the Crown shall be instituted against the Attorney General."

Turning now to this matter, it is of note that the Endorsement to the Writ of summons filed in the action makes it plain that the suit was being instituted against the Crown of whom the Attorney General, by virtue of his office, is the proper defendant and so liable for the alleged tortious acts of its servant, the first-named defendant.

The statement of claim filed subsequent to the writ appears to have made an attempt to circumvent this and to alter the nature and character of these proceedings by excluding at paragraph 4 the words "while acting as the servant and/or agent of the second defendant" which had been alleged in the indorsement to the writ. Curiously, while doing so the statement of claim at the same time did not exclude the name of the second defendant (the Attorney General) as a party to the suit. This omission was later corrected by the filing of an amended Statement of Claim.

When on the 21st June, 1995, the interlocutory judgment was entered against the first-named defendant for failure to enter an appearance this would have had no legal effect. This was so as the proper defendant was the Attorney General and as leave was a conditional requirement before judgment could be

entered against the Crown, no leave having been obtained the order made was bad for irregularity. This was also so as:

> **1.** Sections 3(1) and 13(2) of the Crown Proceedings Act applied and the defence filed by the Attorney General with the consent of the respondent's attorney-at-law was sufficient to amount to an appearance and a defence in respect of both defendants.
>
> **2.** The defence filed by the second defendant sought to answer the allegations of negligence against the first defendant in keeping with that official being the primary defendant.

This defence raised issues which could only be determined by a hearing on the merits. Even if the judgment in default could be regarded as an interlocutory judgment in default of appearance against the first defendant it could not bind the second defendant as the issues raised by the defence of the second defendant remained to be determined. Sections 11(a) and 72 of the Judicature (Civil Procedure Code) Law provides that:

> **"Endorsement of claim in proceedings against the Crown.**
>
> **11A.** Notwithstanding anything contained in sections 10 and 11 the endorsement of claim in proceedings against the Crown shall contain information as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the Government departments and officers of the Crown concerned. In such proceedings if the defendant considers that the endorsement of claim does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the Writ of Summons for appearance has expired, by notice in writing to the plaintiff request further information as specified in the

> notice. Where such a notice has been given the time for appearance shall expire four days after the defendant has notified the plaintiff in writing that the defendant is satisfied, or four days after a court or a judge has, on the application of the plaintiff by summons served on the defendant not less than seven days before the return day, decided that no further information as to the matters aforesaid is reasonably required."
>
> **"Interlocutory judgment for damages.**
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> **72.** If the claim indorsed on the writ is, as against any defendant, for unliquidated damages only, and that defendant fails to appear, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

I now turn to consider the authorities relied on by counsel.

Learned counsel for the respondent relied on ***Dummer v. Brown and another*** (supra), a majority judgment of the English Court of Appeal.

As the facts in the case show, the circumstances leading to the application for summary judgment under Order 14 of the Supreme Court Practice was of an exceptional nature. Given the fact that the claim was launched under the Fatal Accidents Act and the deceased was a passenger in the coach owned by the second defendant (the employer) and driven by the first defendant driver (the employee), there was no issue that the vehicle was being used in the course of the defendant's employment at the time of the collision resulting in the deceased's death. The driver pleaded guilty to causing death by dangerous driving. Irrespective of the defence put in by the defendants denying negligence, the issue

of liability on the principle of vicarious liability meant that there was no defence to the claim.

The Court of Appeal held (by a majority) that the procedure under Order 14 would, therefore, be permitted as to do so would allow for judgment to be entered in the matter with damages to be assessed. This would result in the saving of costs and unnecessary delay.

On the facts in the instant case, it would not have been possible to resort to that procedure followed in ***Dummer v. Brown and another*** (supra) as the defence pleaded by the second defendant (the Attorney General) had put in issue both the issue of liability as well as damages. These issues would, therefore, have to be determined on the merits of the case.

Learned counsel for the respondent has also conceded that the default judgment entered against the first defendant could not operate as a bar to the claim against the Attorney General that claim still having to be determined.

In the light of the above concession and having regard to the effect of the provisions of sections 3(1)(a) and 13(2) of the Crown Proceedings Act, the defence put in by the second defendant is decisive of the matter now before us. The Attorney General being the proper party to the suit, for the respondent to proceed to take out a summons to strike out the defence in such circumstances without notifying the Attorney General of the default judgment entered against the first defendant, was irregular and thereby vitiated the proceedings before the learned judge below. What further compounded the course taken by counsel for the

respondent was that the procedure adopted was resorted to after there had been a hearing of the summons for directions.

Such being the case, there is no need to resort to the authorities relied on by learned counsel for the appellants. Suffice it to say that these cases all make it abundantly clear that where suits are brought against the Crown or Crown servants, the proper defendant is the Attorney General. Once the pleadings indicate that the claim is directed against the Crown or a Crown servant the Attorney General, by virtue of his office, is entitled, if not named as a party to the suit, to put in a defence and take over the proceedings on behalf of the Crown.

What was attempted by the respondent's counsel in this matter was to attempt to proceed against the Crown servant alone by the manner in which the statement of claim was originally worded.

The effect of this was to render the summons taken out by the respondent's counsel and the hearing before McCalla, J., founded as it was upon a procedure that was entirely irregular, null and void. This resulted in the order which is set out at the commencement of this judgment.