JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 96/94

COR: THE HON. MR. JUSTICE CAREY JA.
THE HON. MR. JUSTICE GORDON J.A.
THE HON. MR. JUSTICE PATTERSON J.A.

BETWEEN	**LEMUEL GORDON (Administrator Estate Desmond Gordon, dec'd)**	**APPELLANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**RESPONDENT**

Colin Henry for Appellant

Audley Foster & Cordel Green for Respondent

4th, 5th, 6th & 20th December, 1995

CAREY, J.A.

On 3rd October 1991 Desmond Gordon was shot in the head at close range by a police officer. He died. On 7th May 1993 the appellant as administrator of the estate of the deceased, who was his son, filed suit against two police officers and the respondent under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act arising from his son's untimely death. An application was made by the respondent on30th August, 1993 to strike out the action because it was statute-barred by reason of section 2(1)(a) of the Public Authorities Protection Act and for another reason which is no longer relevant for the purposes of this appeal. On 30th

September, 1994 Bingham J in a reserved judgment, struck out the statement of claim with costs.

A number of grounds of appeal were filed and argued before us, but the real question which falls to be determined is whether the learned judge was correct in striking out the statement of claim on the basis he did. The action was brought against two police officers who, in the event, have never been served and the Attorney General by virtue of the Crown Proceedings Act. The allegations with respect to the incident are set out in paragraphs 4, 5 and 6 of the statement of claim as under:

> "4. On or about the 3rd day of October, 1991, the deceased and his friend, Marlon Stubbs, were lawfully walking along Royal Avenue from Banbury towards Linstead in the vicinity of the Wesleyan Church in the parish of Saint Catherine. The deceased and Marlon Stubbs saw the 1st Defendant dressed in plainclothes, and the 1st Defendant who at all material times was acting in the course of his duties as servant and/or agent of the 3rd Defendant pulled out his gun and pointed it at the deceased and Marlon Stubbs and he then ordered them to cross the road to where he was. The deceased and Marlon Stubbs crossed the road as they were ordered to do by the said policeman who then ordered them to walk towards King Street in Linstead while he walked behind with his gun pointed at them.
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> 5. In the vicinity of Courts Furniture Store on King Street in Linstead, the First Defendant was joined by the Second Defendant who had been standing in front of the Credit Union building across from the said Courts Furniture Store. The first Defendant then ordered the deceased and Marlon Stubbs to cross the street to Ken's Bread Shop and to sit down on the sidewalk. The first and/or Second Defendant, while acting in the course of their duty as servants and or agents of the Third Defendant, maliciously, intentionally,

> oppressively, arbitrarily and unconstitutionally and without reasonable or probable cause, assaulted and shot the deceased through the top of the head, killing him.
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> 6. By reason of these premises, the deceased, a healthy young man aged 20 years, was killed and thereby lost his normal expectation of life, lost income for the lost years and his estate and his dependents have thereby suffered loss and damage."

Mr. Henry contended as follows: that the malicious act of a public official does not enjoy the protection of the Public Authorities Protection Act and that it was the nature of the act to which enquiry should be directed and not the character of the actor. A public servant such as the police officers in the instant case , while acting in the course of their employment, engaged in an act which although otherwise authorised, is executed out of malice or other improper motive, and thus unlawful, removes himself from the Public Authorities Protection Act. Despite this, however, because they act in the course of their employment, although maliciously and unlawfully, their employer remains vicariously liable for the act committed. He cited **Bryan v. Lindo** (unreported) delivered 5th May 1986 where Carberry J.A. delivering a judgment in which Ross & Wright JJA concurred, said at page 8:

> "This brings us to the second question: Was the act complained of one that fell within the protection of the Act? It is not every act which a public authority does that is protected by the Public Authorities Protection Act. The Act protects only acts done in pursuance, or execution, or intended execution of any law, or public duty, or authority."

I will return to this case later in this judgment. He also relied on **Racz v. Home Office** [1994] 1 All E.R. 97 as the basis for urging that the nature of the act was an important consideration in determining whether the Public Authorities Act could be invoked. Central to this submission was the point that facts needed to be adduced to determine the nature of the acts. A resolution of the facts, he said, would determine whether the Public Authorities Protection Act was applicable.

Mr. Green for the Attorney General made the point that there was no dispute that the policemen were acting in the course of their employment and performing a public duty, pursuant to a statute, that is, the Constabulary Force Act. He developed his argument in this way: no defence had been filed and accordingly no issue arose as to the relationship between the policemen and the Attorney General. Since there was no issue in that regard, the court was not required to go beyond the allegations contained in the statement of claim in determining whether to give effect to the protection provided by the Public Authorities Act. The Act applied where the activity was an exercise of public authority albeit exercised improperly. In the circumstances, he maintained, no evidence was required. He referred us to **Bryan v Lindo** [supra] and **Abrahams v Attorney General** [unreported] 31/83 delivered 4th April, 1984 where at pages 8-9, I stated:

> "The Crown is not responsible for acts of his servants unless the servant is acting as such and an action under the Crown Proceedings Act could not be otherwise maintained against the Attorney General. In any action in which the Crown is sued in virtue of the Crown Proceedings Act, arguments such as those successfully employed in Bradford Corpn. v Myers ; Hawkes v Torquay Corp., really have no place. There are two situations when an action is taken against the Crown, either the servant or agent is in fact acting as an

> agent of the Crown in executing some public duty or in pursuant of some authority or he was acting in a private capacity. If the former is the case, then the action must be commenced within twelve months if the latter the Crown has no liability and the Public Authorities Protection Act necessarily plays no part. If on the pleadings there is a question of fact to be determined by evidence at trial as to whether the tortfeasor is a servant or agent of the Crown or whether or not the tortfeasor was acting in the lawful execution of his public duty, then those issues cannot be determined without trial. Those triable issues do not arise on these pleadings.
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> The plaintiffs themselves allege that the second defendant, was at the material time a servant or agent of the Crown acting as such. The Attorney General and second defendant admitted that allegation. In those circumstances, I hold that there is no need to adduce evidence to show that in addition to his acting as a servant or agent of the Crown, that the servant in so acting was performing a public duty."

There is little doubt that where the Attorney General by virtue of the Crown Proceedings Act is joined in an action against police officers, the underlying thesis is that the Crown is vicariously liable for the actions of its agents performing some statutory duty or power or the like. The averments against the servants must necessarily be that they acted unlawfully or maliciously or without reasonable and probable cause. The principle is that these servants are carrying out functions they are authorised to do but in a wrongful way or a highhanded manner or in a violent or brutal way. Where the act complained of is one done in pursuance or execution or intended execution of any law or public duty or authority, the Attorney General is entitled to invoke the protection of the Public Authorities Protection Act. Where the police officer

acts outside the authority of the law for example, it is clear that the Attorney General is not vicarously liable. **Attorney General** v. **Engerbretson** (unreported) 107/92 delivered 30th May, 1994 is a good example of this sort of situation. There Mrs. Engerbretson, a tourist was brutally assaulted and robbed by a police officer who was assigned to the hotel at which she was a guest in order to provide protection against such criminal eventuality. It was held that he was acting as an independent agent and accordingly the Crown was not liable. Plainly where the Crown cannot be held vicariously liable, the Public Authorities Protection Act has no relevance. Nevertheless, there are circumstances in which the police officer acting hardly pursuant to his duty may fix the Attorney General with liability. As Carberry J A pointed out in **Bryan v. Lindo** (supra) page 14:

> "A master may be liable for the wrongful act of his servant, though clearly the servant was not acting in execution of his duty or intended execution of his duty."

Having carefully examined a number of cases, the learned Judge of Appeal then expressed himself in these words (page 18):

> "What these cases do illustrate is that depending on how closely connected the wrongful act is with the servant's employment, a master may be held liable, though it is clear that the wrongful act could in no way be regarded as being done in the execution of the servant's duty, or the intended execution of that duty."

Bryan v. Lindo is a case of great value and in demonstrating the immense research skills of the late Judge of Appeal, expounds the law in this regard, with clarity. This case shows that there is no necessary inconsistency between holding that a defendant is not entitled to the protection of the Public Authorities Protection Act, and a finding

that his employer or master would or might be liable for the act with which he has been charged. So while it is perfectly true that **Engerbretson v. Attorney General** (supra) was correctly decided on its facts, it is not to be assumed that because the Crown servant, such as a police officer, does not act within the scope of his authority, the Attorney General cannot be liable. The Attorney General may be liable depending on how closely connected the illegal act is to the duty the servant is employed to perform.

The Public Authorities Protection Act however, may only properly be invoked, by the Attorney General where the servant can be said to be acting within the scope of his authority. The point at issue in the instant appeal is whether the Act can be invoked not whether the Attorney General is vicariously liable for the acts of the Crown's servants. Mr. Green was correct in saying that on the pleadings, there was no issue as to any relationship between the police defendants and the Attorney General as representing the Crown. But that may only answer the question regarding liability as master, that is, vicarious liability. What determines the applicability of the limitation statute is acts done in pursuance or execution or intended execution of any law or public duty or authority.

In the instant case, the allegations contained in the statement of claim which have not been denied and must therefore be regarded as admitted, amount I suggest to acts done in pursuance of their lawful duty; the police officers were executing an arrest, albeit they did so in a manner that was plainly unauthorised. But It is just such conduct which brings the Public Authorities Protection Act into play. No triable issue therefore arises: no evidence need be led: the facts are all one way. As was said in **Abrahams v. Attorney General** (unreported) delivered 4th April 1984:

> " Seeing that the plaintiffs allege that the second defendant was a servant or agent of the Crown and that this relationship was admitted by the Attorney General, no evidence is required on this point for the reason that the

> act which was the genesis of the action must have been done in execution of a public duty."

and again:

> " If on the pleadings, there is a question of fact to be determined by evidence at trial as to whether the tortfeasor is a servant or agent of the Crown or whether or not the tortfeasor was acting in the lawful execution of his public duty, then those issues cannot be determined without trial. Those triable issues do not arise on those pleadings."

The position is the same in the present case. There is no need to adduce evidence when the allegations are clear and no issue arises on the pleadings with respect to the nature of the acts done by the defendants. I cannot therefore agree with Mr. Henry that evidence in this regard needs to be adduced to allow the appellant his day in court. Once it is shown that the Public Authorities Protection Act is applicable, then it follows that the judge was entitled to dismiss the action.

Mr. Henry produced what he labelled his piece de resistance, namely, the Public Authorities Protection (Amendment) Act 1995 - Act 9/1995 whereby section 2(1)(a) of the principal Act has been repealed. The effect of this repeal is that the period prescribed in the Limitation Act for torts viz, six years now applies. He argued that the Act, being procedural has retrospective effect. He referred us to Halsbury (4th edtion) paragraph 925 where the learned editor stated:

> "The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.
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> Moreover, it is presumed that procedural statutes are intended to be fully retrospective in their operation, that is to say, are intended to apply not merely to future actions in respect of existing causes, but equally to proceedings instituted before their commencement. ... and the repeal of a procedural provision constituting a defence to an action has been held applicable to pending

> proceedings on the ground that it did not affect any vested right."

Adopting those views as his own, Mr. Henry argued that the repeal had retrospective effect and accordingly the court should set aside the order of Bingham J and allow the appellant to proceed to judgment.

Mr. Foster who argued this part of the appeal for the respondent, called attention to section 25 (2)(c) of the Interpretation Act which provides as follows:

> " (2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not-
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; "

He said that no contrary intention appeared in the enactment and accordingly the Act had no retrospective effect as contended for by the appellant. He derived support, he said, from a decision of the Privy Council **Yew Bon Tew v Kenderaan Bas Mara** [1982] 3 All ER 833 and submitted it was on all fours with the instant case.

Whether a statute has retrospective effect depends on the intention of the legislature as expressed in the wording of the statute and having regard to the canons of construction and the relevant provisions of the Interpretation Act. At common law the rule was stated thus by A L Smith LJ in **The Ydun** [1899] P. 236 at page 245:

> "The rule applicable to cases of this sort is well stated by Wilde B, in **Wright v. Hale** (1860) 6H & N 227 at 232, 158 ER 94 at 95), namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only."

Vaughan Williams L.J. at page 246 agreed, saying:

> "I also agree that the Act is retrospective ... and there is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts."

The modern approach to this question however, was expounded in the opinion of Lord Brightman in **Yew Bon Tew v. Kenderaan Bas Mara** (supra). It is conveniently expressed in the headnote at page 833:

> "The proper approach to determining whether a statute had retrospective effect was not by classifying it as procedural or substantive but by seeing whether, if applied retrospectively to a particular type of case, it would impair existing rights and obligations; and an accrued right to plead a time bar, which was acquired after the lapse of the statutory period, was in every sense a right even though it arose under a statute which was procedural. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give a potential defendant who was not possessed of an accrued limitation defence on the coming into force of the 1974 Act a right to plead such a defence at the expiration of the new statutory period; it was not to deprive a potential defendant of a limitation defence which he already possessed."

In that case the Board had to consider an amendment to the Malaysian Public Authorities Act which extended the limitation period from 12 months to 36 months. Immediately before the coming into force of the amending Act, the appellants cause of action had been statute-barred for 14 months. Nine months later, i.e. 36 months less three weeks after the accident, the appellants issued a writ against the respondents claiming damages for injuries caused by the negligence of the respondents' servant.

The respondents contended that the claim was statute-barred. In the result, the Privy Council upheld the objection and dismissed the appeal, thus affirming the decision of the Federal Court which had allowed the judgment of the High Court. We are of course, bound by this authority, both statutes being in pari materia.

Applying this modern approach to the amending enactment, the question that is to be asked is not whether the enactment is procedural but to see whether if applied retrospectively, it would impair existing rights. As the Board emphasized, "an accrued right to plead a time bar which is acquired after the lapse of the statutory period, is in every sense a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable." The Crown's agents who acted in execution of their duty, have acquired a vested right by reason of the expiry of the statutory limitation period of 12 months, and should be able to assume that they are no longer at risk from a stale claim. The same consideration applies to the master, in this case, the Crown as represented by the Attorney General. "An accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a "right" as any other statutory or contractual protection against a future suit" per Lord Brightman op. cit. The modern approach is thus consistent with the statutory provision, section 25(2)(a) of the Interpretation Act. The amendment does not, in my judgment, have restrospective effect.

Before parting with this case, I desire to pay tribute to all counsel who argue this matter before us. They were all lucid, succint and relevant.

In the result, I would affirm the judgment of Bingham J and dismiss the appeal with costs to the respondent to be taxed if not agreed.

GORDON JA

I agree entirely.

PATTERSON JA

I have read in draft the judgment of Carey JA. I agree with it, and for the reasons he has given, I too would dismiss the appeal with costs.