

C.A. Negligence - Plaintiff/respondent is assaulted and wounded by constable who posted a notice to the - liability of employer of constable (Governor of Jamaica) for conduct which caused injury to plaintiff/respondent - vicarious liability - whether acts committed in course of employment - whether acts authorized by employer or a mode of doing acts authorized by him. Test to be applied: Actual authority - order not possible. [Ex gratia payment recommended] (Amended 17/9/93)

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 107/92

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

BETWEEN	THE ATTORNEY GENERAL	2ND DEFENDANT/APPELLANT
AND	OSWALD REID	PLAINTIFF/RESPONDENT
AND	CONSTABLE ERROL THOMPSON	1ST DEFENDANT/RESPONDENT
BETWEEN	THE ATTORNEY GENERAL	2ND DEFENDANT/APPELLANT
AND	DONNA ENGERBRETSON	PLAINTIFF/RESPONDENT
AND	CONSTABLE ERROL THOMPSON	1ST DEFENDANT/RESPONDENT
BETWEEN	DONNA ENGERBRETSON	PLAINTIFF/RESPONDENT
AND	AMERICANA JAMAICA CORPORATION	DEFENDANT/RESPONDENT
BETWEEN	OSWALD REID	PLAINTIFF/RESPONDENT
AND	AMERICANA JAMAICA CORPORATION	DEFENDANT/RESPONDENT

Evan Oniss, Douglas Leys and Carlton Collman,
instructed by Director of State Proceedings,
for the appellant

Gordon Robinson, David Henry and Lowell Morgan,
instructed by Winsome Gordon-Somers of Nunes,
Scholefield, DeLeon & Co., for respondent Engerbretson

Jacqueline Cummings, instructed
by Gaymair & Fraser for respondent Reid

December 6, 7, 8, 1993 and May 30, 1994

WRIGHT, J.A.:

After reading the judgment in draft of Forte, J.A., I find myself painfully constrained to agree with his reasoning and conclusion. And thus is so because although I must abide by the governing principle and the force of precedents, I feel very strongly that the circumstances of the traumatic encounter out of which these cases arose cry out for justice which is not met

by a decision so constrained. The respondent Egerbratson, a resident of Maakato, Minneapolis, Minnesota, U.S.A., was lured by television advertisements to choose Jamaica for her vacation and while in a hotel she was brutally sex upon by a law-enforcement officer to whom she was entitled to look for protection had she been assaulted by any other person. She, like the respondent Reid, a security guard who went to her rescue and came close to losing his life, fell victim to the cocaine indulgence of a policeman who was posted at the hotel to render patrons safe from pimps, prostitutes and drug pushers. It cannot, to my mind, be right for the government in these circumstances to dislance itself from the woes of these unfortunate respondents by disclaiming liability. Accordingly, 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 any protection. A policy decision ought to have been taken which would have saved the country from ignominy of such a stance by the government.

This decision is based on the failure of the claims based on vicarious liability, but there was a claim in negligence by Egerbratson as appears at paragraph 4 of her Amended Statement of Claim as follows:

"Further or alternatively the Plaintiff says that the incident complained of was caused and/or contributed to by the negligence of the Commissioner of Police and/or other Officers of the Jamaica Constabulary Force the servants and/or agents of the second Defendant who negligently and without reasonable or probable cause permitted and/or allowed the first Defendant to become a member of the Jamaica Constabulary Force thereby entitling the first Defendant to the powers and protection conferred by law and easy access to a firearm thereby facilitating the commission of the first Defendant's crime against the Plaintiff. Further or alternatively the said agents of the second Defendant negligently failed to monitor or regulate the first Defendant's access to, possession or use of a firearm properly or at all.

PARTICULARS OF NEGLIGENCE OF THE
SERVANT AND/OR AGENT OF THE
SECOND DEFENDANT

- (a) Providing inadequate and/or unsatisfactory entry requirements for membership in the Jamaica Constabulary Force.
- (b) Failing to implement or satisfactorily implement the said entry requirements in the case of the first Defendant.
- (c) Failing to screen or satisfactorily screen applicants for membership in the Jamaica Constabulary Force.
- (d) Permitting the first Defendant to perform functions of a special and sensitive nature in a particularly sensitive area despite the fact that it was manifestly unsafe so to do.
- (e) Failing to or to properly supervise and/or monitor the actions of the first Defendant.
- (f) Failing to ensure that the First Defendant relinquished his service revolver when not on specific assignment.
- (g) Failing to so manage, administer and regulate the operations of the Jamaica Constabulary Force so as to avoid the assault and wounding of the Plaintiff by the first Defendant, a member of the said Force."

On this plea the respondent assumed a burden of proof which it was impossible to discharge. Such a plea certainly does not bear the hallmark of the draftsman's best endeavour and did not feature in the respondent's effort to prove her case. A plea that the Commissioner of Police, well knowing of Constable Thompson's cocaine penchant, was negligent in placing him on such an assignment which exposed him to temptation or that he was negligent in not knowing of the Constable's weakness of which evidence was available, if such, indeed, was the case, though onerous, would stand a far better chance of success than the negligence pleaded.

ORDER

In the result, therefore, the appeals are allowed and the judgment of the court below set aside. Having regard to the

court's view of the government's attitude, the plaintiffs/ respondents ought not to be required to pay any costs and, accordingly, there will be no order as to costs.

FORTE, J.A.

This is an appeal from the judgment of Bingham J sitting in the High Court in which, in consolidated actions claiming for assault and wounding and in the alternative in negligence, he made the following orders inter alia:

- "1. Suit No. C.L. E. 032 of 1985
Judgment for the Plaintiff
for:
 - i) Special Damages US\$ 142,276.00
(Subject to conversion
into Jamaican dollars
at the going market rate
at the date of delivery
of judgment.)
 - ii) Interest on Special
Damages of US\$142,276.00
at 3% per annum from
March 4, 1984 to October
16, 1992 amounting to US\$ 36,788.09
 - iii) General Damages J\$1,000,000.00
 - iv) Interest on General
Damages of J\$1,000,000.00
at 3% per annum, March 1,
1985 to October 16, 1992
amounting to J\$ 228,290.32
 - v) Costs to the Plaintiff
to be agreed or taxed.
2. ...
3. Suit No. C.L. R. 009A of 1985
Judgment for the Plaintiff
against both Defendants for
\$253,373.00 being:
 - i) Special Damages \$ 3,373.00
 - ii) Interest awarded on
Special Damages at 3%
from the 4th day of
March, 1984 to the
16th day of October
1992.
 - iii) General Damages for
pain and suffering and
loss of amenities 250,000.00
 - iv) Interest awarded on
General Damages at 3%
from the 1st day of
March, 1985 to the
14th day of January,
1992.

Costs to be agreed or taxed.

The awards were however made on the basis of the unlawful assault and wounding of the plaintiff by the defendant Thompson.

Having heard arguments over a period of three days we took time out to consider those arguments with a promise to deliver our judgment at a later date. The following are my conclusions.

As the outcome of this appeal will depend on the particular facts in the case, they are set out hereunder in summary form.

The case arose out of the conduct of Constable Errol Thompson, who though named at the trial, as a defendant, did not defend the action, and consequently is not a party to this appeal. It was his actions however, that resulted in the injuries to both plaintiffs/respondents and which resulted in these suits.

Mr. Thompson at the relevant time was a Constable employed by the Government of Jamaica as a member of the Jamaica Constabulary Force. On the night of the incident, he was assigned duties in the resort area of Ocho Rios in which is situated the Americana Hotel (as it then was) the site of the incident. His duties then, related to investigations concerning the harassment of tourists by persons desirous of selling drugs, and in any other way interfering with the quiet enjoyment of our visitors.

On the 4th March, 1993 the plaintiff Ms. Donna Engerbretson, an American on vacation in Jamaica, attended the Americana Hotel, for the purpose of watching a floor show. After she had enjoyed the show, she along with friends enjoyed the facilities of the Disco situated in the hotel. At about 3.00 a.m., on leaving the Disco, she went unaccompanied to the ladies room which was located just off the lobby of the hotel.

As she walked through the lobby, several persons were around, but she noticed, in particular, the other plaintiff, Mr. Reid, sitting at a desk. Mr. Reid was at that time employed as a security guard by the management of the hotel.

Ms. Engerbratson, having entered the ladies room, was subjected to a vicious attack by the defendant Cons. Thompson in the course of which he held her up with a gun issued to him by the Jamaica Constabulary Force, robbed her, and thereafter on her attempt to escape from him, wounded her severely with a knife. She was cut in her neck, right arm and left palm, and received lesser wounds all over her body. While this was taking place, Ms. Engerbratson was struggling and screaming in the hope that this terrible ordeal would come to an end. The screams attracted the attention of the security guard in the hotel. As she screamed, Mr. Thompson ran in his effort to escape, and on coming in contact with the plaintiff Mr. Reid who was coming to the assistance of Ms. Engerbratson, he fired shots at him which caught him in his buttocks. In that way, Mr. Thompson effected his escape, but was nevertheless later caught and arrested. Subsequently he was tried and convicted for offences arising out of his actions in relation to both plaintiffs. At the time of trial and of the appeal he was serving sentence in one of the Government's penal institutions.

As the action was brought against the Government of Jamaica in the name of the Attorney General, the vital question for decision both at trial and on appeal was whether the employer (The Government) of Cons. Errol Thompson is vicariously liable for his conduct which caused serious injuries to both plaintiffs.

In resolving this question the learned trial judge after reviewing the authorities stated:

"As the decided authorities show therefore, for a master (employer) to be held liable for a servants (employees) acts they do not have to be authorised. Provided they are closely connected to the acts which the servant is authorised to perform as to be an unauthorised mode of doing something

"which the servant is authorised to do then that is sufficient to found liability in the master. The policy of the law here can be seen as a situation in which the master (employer) is best able to stand up to the consequences of a successful claim for damages arising from the tortious act(s) of the servant (employee) and who can afford to pay compensation to the victim. Where the servant has the means to pay compensation the employer can resort to **recouping** himself for the damages he might pay to the successful plaintiff from the employee. Vide Lister v. Romford Ice and Cold Storage Limited [1957] A.C. 555. On the basis of the evidence as to the role of the first defendant on the night of the incident which account has not been countered by any evidence from the defence, I hold that there is credible evidence affording a basis for concluding that the first defendant committed these acts while in the course of his duty as a constable and on the issue of liability therefore the claims for assault succeeded against both defendants."

The appellant challenged this finding in the following ground of appeal:

- "1. The finding of the Learned Trial Judge that the First Defendant committed the acts while in the course of his employment as a Constable was wrong having regard to the evidence and the Learned Trial Judge ought properly to have found that the acts complained of were not done by the First Defendant in the **execution** of his duty as a Constable and was not within the scope of his employment and was wholly unauthorised by the Crown."

It is settled law that a master is liable for the torts of the servant so long only as they were committed in the course of the servant's employment (see Clark & Lindsell on Torts 38th Edition (page 328)). In determining whether a wrongful act is within the course of a servant's employment, all the cases cited, relied upon a passage from Salmond on Tort 9th Edition page 95 which was approved by the Board of the Privy Council in the case of Canadian Pacific Railway Co v. Lockhart [1942] A.C. 541 at page 599 where Lord Thankerton stated:

"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: '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 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 unauthorised 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 added]

Before this however in Poland v. John Parr & Sons [1927] 1 K B 236, at page 240 per Bankes L J the English Court of Appeal also cited the same principle as stated by Salmond J on Tort 6th Edition page 100 with approval. Concisely put per Bankes L J the principle is:

"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 (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master."

In 1948 in Warren v. Henlys Ltd [1948] 2 All E.R. 935 Hilbery J after referring to the above passage in Poland v. John Parr & Sons (supra) himself cited with approval the further passage underlined above in the speech of Lord Thankerton in The Pacific Railway Co case (supra) and which is of relevance to the circumstance of the instant case. And in 1993, in the case of Racz v Home Office [1994] 1 All E.R. the House of Lords, approved the principles as set out in Salmond and Henston on the Law of Torts 19th Edition [1987] pages 521-522 and 20th edition [1992] page 457 and which are consistent with earlier editions of the text to which reference has already been made.

In the case of Hamlet Bryan v. George Lindo (unreported) S.C.C.A. 22/85 delivered on the 5th May, 1986 this Court per Carberry J A (page 18) after an examination of many cases concluded:

"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."

The Judicial Committee of the Privy Council in an appeal from this Court also approved this principle set out in Salmond on Tort (19th Edition) (see The General Engineering Services Ltd. vs. Kingston and St. Andrew Corporation (1988) 3 All E.R. 867). The cases show that the principles guiding the consideration of the master's liability for the acts of his servant, are accurately set out in Salmond on Tort - that is to say, a master is liable for the wrongful acts of his servant, if the acts are authorised by him, or if unauthorised, they are modes of doing acts authorised by him. The unauthorised acts are considered modes

of doing a class of acts authorised by the master if they are so connected with the acts which the servant is authorised 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 unauthorised act is an independent act the master is not responsible.

Before us, both parties conceded the above to be the principles to be applied, the appellants however maintain that the facts in this case, do not fall within those principles. On the other hand, the respondents though conceding that the employee Cons. Thompson was not authorised to do the act which formed the basis for the respondents' claim, nevertheless contended that the acts were so closely connected to the acts which he was authorised to do, as to be considered a mode although improper of doing acts which he was authorised to do.

Though I find the references to the facts of other cases to be helpful, by way of analogy, determination of the question in each case must depend on an assessment of the particular circumstances under which the alleged acts were committed. In the face of the absence of any evidence being offered by the appellant the learned trial judge, accepted the evidence of the plaintiffs and so the facts outlined earlier in this judgment represents his finding. They show that Cons. Thompson was assigned duties at the hotel, having been issued with a firearm - his duties there specifically to prevent the harrassment of visitors, to accost drug pushers, whores and pimps and arrest them if it became necessary or otherwise to eject them from the hotels which were in the area of his assignment. Apart from his specific assignment at the relevant time, Cons. Thompson's duties and powers are set out in the Constabulary Force Act, as it applies to all police constables. Section 13 states:

"13. The duties of the Police under this Act shall be to keep watch by day and by 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."

To be successful in their claims against the Government the respondents had to prove on a balance of probabilities that the acts of felonious wounding committed on the parties, by Cons. Thompson, were so connected with the above stated authorised acts, that they could be considered modes of doing that which he was authorised to do. Mr. Robinson contended that the circumstances of this case took it outside of the normal employer/employee relationship, as this was a police officer whose duty and responsibility are delineated by statute, and consequently he is a special creature clothed by the Government with special powers and authority for the protection of the public. He further argued that a criminal act by a policeman, if so closely connected with his status as a policeman that the Court can find on the facts that the act could not have been committed but for the fact that the criminal was a policeman then the Government, his master, would be liable vicariously for the act. He maintained that Cons. Thompson was able to gain access to the hotel, and to all its areas including the ladies room, without challenge by the security guards for the sole reason that he was a policeman. In addition, that having been issued with a firearm by virtue of being a policeman, he used

it in the execution of these criminal acts and as Ms. Cummings for the respondent Reid, in adopting the submissions of Mr. Gordon Robinson pointed out, he shot the respondent Reid with that firearm, which she argued was an unauthorised mode of using the firearm which he was authorised to use.

This argument, though attractive, particularly in these circumstances where the plaintiffs through no fault of theirs have been subjected to serious injuries causing great pain and suffering, and affecting the future conduct of their lives, is nevertheless one with which I cannot agree. It is true that were the police officer not assigned duties at the hotel, he would not have had the opportunity to commit these wrongs. The fallacy of Mr. Robinson's submissions, however becomes evident when one examines the false foundation on which they rest i.e. that the acts being so closely connected with the status of a policeman, that they could not have been committed but for the fact that he was a policeman would result in the Government as his master being vicariously liable. The principles to be gleaned from the cases, do not establish that the act must be connected with the status of the offender except in so far as he was, by virtue of that status, doing the things which he was employed to do.

Indeed Diplock J (as he then was) in the case of Hilton v. Thomas Burton Ltd [1961] 1 All E R 74, at page 76 expressing his view as to the true test in cases such as this opined:

"I think that the true test can best be expressed in these words: Was the second defendant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent as in Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board [1942] 1 All E R 491; or even fraudulent, as in Lloyd v. Grace Smith & Co [1912] A C 716 or contrary to express orders, as in Canadian Pacific Ry. Co. v. Lockhart [1942] 2 All E R 464; the master is liable."

Of course, as we have seen, if the wrongful acts though not acts authorised, are nevertheless closely connected with authorised acts they would be deemed to be unauthorised modes of doing the authorised acts.

In Keppel Bus Co Ltd v. Sa'ad bin Ahmad [1974] 1 W L R 1082 decided in the Privy Council, in delivering the judgment of the Board, Lord Kilbrandon expressed it in this way at 1084:

"In Bakar v. Snell [1908] 2 K B 352 (approved [1908] 2 K B 825), Channell J after saying that the defendant's liability would depend on whether his servant's wrongful act was done in the course of his employment, went on at p. 355, 'the question is one of fact which ought to have been left to the jury.' A jury, however, would be entitled to find that the act was done in the course of the employment only if there were facts proved which established the extent of the master's delegated authority, express or implied, and that the servant's act was done under that authority, as part of his duty to his employer."

The above cited case arose out of the actions of a conductor on a bus, who having had an altercation with one of the passengers on the bus struck the passenger in the eye with his ticket punch, breaking his glasses, and causing the loss of the sight to the eye. The passenger claimed damages against the bus company as being vicariously liable for the wrong committed by the conductor. The bus company having been held liable, both at trial and on appeal, the matter was heard in the Privy Council. The following words of Lord Kilbrandon in allowing the appeal are appropriate to the principle being discussed.

"The function of a bus conductor, from which could be deduced the scope of the authority committed to him, was attractively put by counsel for the respondent as 'managing the bus'; it was said that what he did arose out of that power and duty of management. But this concept, it seems, if pushed to its extreme, could serve to bring

"anything which the conductor did during his employment within the class of things done in the course of it. There must be room for some distinction between the acts of a manager, however foreign to his authority, and acts of management, properly so called. Probably this way of putting the case is fundamentally no different from that which the trial judge adopted and their Lordships reject, because there is no evidence of circumstances which would suggest that what the manager actually did was, although wrongful, within the scope of his authority, express or implied, and thus an act of management."

As in the above case, a distinction must also be made here between the status of a policeman and his acts however "foreign to his authority," and acts of a policeman which are done in the scope of his employment.

If Mr. Robinson is correct in his contention, it would have chaotic results. The Government would be liable for any wrongful act of a police officer committed while he is on duty, even if such acts are outside the scope of his employment, and independent of what he was employed to do. The mere fact that the officer used an opportunity given to him by virtue of being a policeman, to commit an act independently of those authorised by the Government cannot, in accordance with settled principles, create a vicarious liability in the Government.

In my view, the answer to the real issue in this case i.e. whether the wrongful acts were so connected to acts which he was authorised to do, so as to be deemed a wrongful mode of doing authorised acts, cannot be resolved in the manner contended for by the respondents.

It is clear, that the wrongful acts were not authorised. Were they then, closely connected with the class of acts which a police officer is authorised to do. There is really no evidence to support such a view. Cons. Thompson, though assigned to the hotel, was assigned to do acts which are in complete

contradiction to the wrongful acts which he committed on the plaintiff. In my view the evidence supports a finding that the Constable, was acting independently of what he was employed to do, and I would state as Diplock J (as he then was) said about the facts in the case of Hilton v. Thomas Burton Ltd (supra) "This seems to me to be a plain case of what, in the old cases was sometimes called going out on a frolic of their own."

Regrettably, given the tragic consequences caused by the wrongful acts committed on the plaintiffs, and as much as I would in the circumstances have liked to find otherwise, I am of the opinion that the appeal should be allowed. However, I cannot leave this appeal without expressing the view that this is indeed an ideal case for an ex gratia payment to be paid by the Government to both respondents. The respondent Engerbretson is a tourist, who no doubt chose her vacation destination, as a result of the many and varied invitations that we put out to entice visitors to our island, and for whose safety, while on our shores, we must feel a sense of responsibility. She has suffered severely, and I do hope that these few words may help to convince those in authority to compensate her for her pain, loss and suffering. No less should be done for the respondent Reid who in answer to a call for help, suffered the gunshot wounds at the hand of a police officer with whom, he felt a sense of security which was suddenly without notice changed into an attack upon him.

I have had an opportunity to read in draft the comments of Wright J A in respect of the claim in negligence, and agree that that claim also must fail.

I would allow the appeal and set aside the orders below.

PATTERSON, J A (AG)

I am in complete agreement with the views expressed by Wright J A and with the conclusions arrived at by Forte, J A in this unfortunate case. I too would allow the appeal and set aside the orders below.

Cases referred to

- ① Canadian Pacific Railway Co v Lockhart [1947] KC 541
- ② Poland v John Parnell & Sons [1947] 1 KB 236
- ③ Warren v Henleys Ltd [1948] 2 All ER 935
- ④ Racz v Home Office [1948] 1 All ER 1?
- ⑤ Hamlet Bryant v George Lindo (unreported) S.C.A 20/85 delivered on 5/5/86.
- ⑥ The General Engineering Services Ltd. vs. Kingston and A. B. & Co. Corporation [1953] 3 All ER 867.
- ⑦ Hickson v Thomas Burton Ltd [1961] 1 All ER 74
- ⑧ Kepher Bus Co Ltd v Saad bin Ahmad [1974] 1 WLR 1082