

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. C.L. 1998/B-219

BETWEEN	LANZIE BROWN	CLAIMANT
AND	DET. CORP. WAYNE CLARKE	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL	SECOND DEFENDANT
	OF JAMAICA	

Stephanie Orr instructed by Crafton Miller and Company for the claimant
Stuart Stimpson instructed by the Director of State Proceedings for the second
defendant

February 12 and 27, 2007

NEGLIGENCE, VICARIOUS LIABILITY, WHETHER EMPLOYER OF POLICE
OFFICER NEGLIGENT

SYKES J.

1. Being a bailiff can be hazardous at times. Mr. Lanzie Brown, the claimant, on April 4, 1998, found this out in quite vivid circumstance. The claimant is not only a bailiff for the parish of St. Catherine but also a police officer. In February 1998, he was contracted by Singer Sewing Company Limited ("Singer") to repossess a refrigerator that was taken out on hire purchase by a Miss Dionne Kellyman who resided at 22 Alamanda Drive, Portmore Pines, St. Catherine. She was twenty months in arrears. Mr. Brown went to her home on March 8, 1998, to repossess the refrigerator.
2. On his arrival at the home, he saw Miss Kellyman and told her of his business. She refused to grant Mr. Brown access to the house or to hand over the refrigerator. Mr. Wayne Clarke, the first defendant and tortfeasor, emerged from the rear of the premises and told Mr. Brown that he could not enter the premises. Mr. Brown was accompanied by Mr. Paul Russell, a special constable. In the face of this intransigence, Messieurs Brown and Russell went to the Greater Portmore Police Station and returned with a uniformed police officer. On their return with the uniformed officer, Mr. Clarke identified himself as a detective attached to the Elletson Road Police Station. After prolonged discussion it was agreed that Miss Kellyman would pay the outstanding sum. As it turned out, this was not done.
3. Later in the same week, Singer contacted Mr. Brown and told him that the full amount was not paid and he should repossess the refrigerator immediately. On April 4, 1998, Mr. Brown returned to Miss Kellyman's home. Mr. Clarke was present. He was told the purpose of Mr. Brown's mission. He refused to give Mr. Brown

access to the house. Mr. Clarke said, "Big man move from the door." Mr. Brown responded by reading the contract to Mr. Clarke who went inside of a room and returned to the veranda.

4. A standoff resulted. Mr. Brown decided to secure the assistance of police officers from the Greater Portmore Police Station. While Mr. Brown was calling the Greater Portmore Police Station for assistance, Mr. Clarke pulled a service firearm, issued to him by the police services, and shot Mr. Brown. The bullet went through Mr. Brown's left leg, in the region of the hip, and lodged in his right ankle.
5. At the time of the shooting, Mr. Brown was armed but there is no evidence that it was brandished or used by Mr. Brown in any threatening manner. He was taken to the Spanish Town Hospital and after being discharged he received follow up treatment from his private doctor.
6. The detective has not participated in the proceedings and judgment was entered against him on July 6, 2001. Mr. Brown, the claimant, has pursued the Attorney General, in the hope of grounding liability, vicariously or otherwise, so that he can receive compensation for his injuries.
7. There are two issues in this case. The first is whether the Attorney General is liable in negligence for the tort committed by the detective. The second is whether the Attorney General is vicariously liable for the deliberate and intentional tort committed by Detective Corporal Wayne Clarke.
8. From the particulars of claim, the claimant clearly predicated his case on the concept of vicarious liability. Paragraphs four and five particularises the acts of negligence laid at the feet of Mr. Wayne Clarke. There is no allegation raising the issue of whether the police services were negligent when they entrusted a firearm to Mr. Wayne Clarke. As I shall show, the law has now developed to the point where a duty of care has been imposed on anyone who entrusts an employee with a firearm. The duty of care is expressed in this way. The employer has a duty to see that the person to whom the firearm is entrusted is a suitable person to carry such a dangerous weapon. The duty is owed to anyone who may be injured by the negligent act of the person so entrusted.

Is the Attorney General liable in negligence?

9. It is fair to point out that when the particulars of claim were drafted, the cases of *Attorney General of British Virgin Island v Hartwell* (2004) 64 W.I.R. 103 and *Bernard v The Attorney General* (2004) 65 W.I.R. 245 had not been decided by the Judicial Committee of the Privy Council. However, by the time of the pre-trial review on January 10, 2006, these two decisions were decided and were in circulations. Unfortunately, the particulars of claim were not amended to take

advantage of the development in the law and neither was there special disclosure which might have assisted in grounding liability in negligence in the police services.

10. The important principle that emerges from *Hartwell* is that the employers of a police officer may be directly liable in negligence if they provide an unsuitable police officer with a firearm or access to a firearm and that police officer misuses the firearm to injure someone, even if at the time of the misuse he was not acting in his capacity as a police officer. This is the current legal position even if the police services are not vicariously liable for the conduct of the police officer. This was in fact the result of *Hartwell*, a case in which the claim for vicarious liability failed but the claim in negligence against the police services succeeded. This has important implications for the State and persons who employ armed security guards which ought to be carefully considered. *Hartwell* has provided a route to skirt the "frolic" defence and fix the employer with direct liability. The law is really saying that employers are taking a serious risk in retaining employees who have a history, even one incident may be sufficient, of conduct that suggests they may act in an inappropriate manner.
11. Lord Nicholls, who delivered the judgment in *Hartwell*, said these very important words at paragraphs 31 and 32:

31 Here the police are not sought to be made liable for failure to carry out their police duties properly. ... In the present case the police authorities were in possession of a gun and ammunition. They took the positive step of providing PC Laurent with access to that gun. Laurent did not break into the strongbox and steal the gun. The police authorities gave him the key. True, Laurent disobeyed orders in taking the gun as he did. But the fact remains that the police authorities chose to entrust Laurent, who was on the island by himself, with ready access to a weapon and the ammunition needed for its use. The question is whether in taking that positive step the Government, through the police authorities, owed a relevant duty to Mr. Hartwell.

32 The second feature of cardinal importance is that the alleged duty of care relates to entrusting PC Laurent with access to a hand gun and ammunition. Loaded hand guns are highly dangerous weapons. They are easy to carry and potentially lethal. One would expect to find that in deciding whom to entrust with such weapons the police would, expressed in general terms, owe a duty to exercise reasonable care. This would not impose a special duty on police authorities. One would expect a like duty to exist on everyone who entrusts another with a loaded firearm. That is eminently fair and reasonable. The

serious risks involved, if a gun is handed over carelessly, are obvious. The precautionary steps required of a careful person are unlikely to be particularly burdensome.

12. Paragraph 32 of Lord Nicholls' advice, cited above, reflected the fact that the claimant, Mr. Hartwell, actually alleged that the Government of the British Virgin Island was liable directly in negligence and indirectly by way of vicarious liability (see paragraph 14 - 18 of the advice). The case was that the authorities knew or ought to have known that the police constable in question was not a fit and proper person to be entrusted with a gun and had they exercised reasonable care they would not have permitted him to have access to a police firearm (see paragraph 18). Unfortunately for Mr. Brown, the pleading in the instant case has no such allegations.

13. It is clear from this passage that once the decision has been taken to arm a police officer and that officer misuses the firearm, it is not going to be sufficient to escape liability by saying he was not acting as a police officer at the time of the tortious act. It is not a defence to say, "I told him not to take the gun." For Lord Nicholls, entrusting the police officer with access to a gun is sufficient for liability to be established even if he was told not to take the firearm. The net is cast very wide indeed. Thus police officers with a history of misconduct are more likely to cause liability to attach to the police services. The message from the Privy Council is there for all to see. The police services have to make hard decisions about erring officers. Should it decide to retain them, it may come at, literally, a high cost. The "frolic" defence is no longer a safe haven for the Attorney General.

14. In paragraph 38 - 40 of the *Hartwell* case, cited below, Lord Nicholls elided any boundary between a police officer misusing the firearm for policing purposes and his private mission of vengeance. His Lordship said:

38 The risk in the present case was that a police officer, entrusted with access to a firearm for police purposes, might take and use the weapon for his own purposes, namely, with the object of maliciously injuring someone else, this risk inevitably carrying with it the further risk that in the course of such criminal activity a member of the public might be injured. Were these two risks, and particularly the first of them, reasonably foreseeable? It is always possible that anyone may behave in such an irresponsible and criminal fashion. Strange and unexpected things are always happening. But were these risks so remote that a reasonable police officer would ignore them as fanciful?

39 In the view of their Lordships the appropriate analysis is that when entrusting a police officer with a gun the police authorities owe to the public at large a duty to take reasonable care to see the

officer is a suitable person to be entrusted with such a dangerous weapon lest by any misuse of it he inflicts personal injury, whether accidentally or intentionally, on other persons. For this purpose no distinction is to be drawn between personal injuries inflicted in the course of police duties and personal injuries inflicted by a police officer using a police gun for his own ends. If this duty seems far-reaching in its scope it must be remembered that guns are dangerous weapons. The wide reach of the duty is proportionate to the gravity of the risks. Moreover, the duty imposes no more than an obligation to exercise the appropriately high standard of care to be expected of a reasonable person in the circumstances.

40 For these reasons, and contrary to Mr. Guthrie's submission, their Lordships consider that, in deciding to entrust PC Laurent with the key to the strongbox in the Jost Van Dyke police substation, the police authorities owed a duty of care to Mr Hartwell in respect of damage arising in the way it did.

15. The opening sentence of paragraph 39 is instructive. It may well be possible to mount an argument to this effect: once the police officer misuses his weapon then that is sufficient to ground liability and it is up to the police services to demonstrate that they took reasonable precautions to ensure that the officer was a suitable person to be entrusted with either access to a firearm or the firearm itself. This would be similar to a *res ipsa loquitur* approach to the question of liability. The police services would not be deprived of a defence but they would have to deflect liability by demonstrating by good evidence that they were aware of the risks and in respect of the particular officer who is accused of misusing his firearm, they took reasonable steps to ensure that he was a suitable person to have such a lethal weapon. Had the case been pleaded along these lines I would have been prepared to consider the case in this manner. It was not and it would not be fair to the Attorney General to transform the case in such a fundamental manner without adequate notice through the pleadings and witness statements.

16. An argument that can be legitimately made against what I have said is that assuming that Mr. Brown had amended his particulars of claim, he faced an evidential problem. The case was contested against the background of what I am about to say and I shall resolve the case in accordance with what follows below. I shall quote further from Lord Nicholls' advice so that the point can be appreciated. Lord Nicholls said at paragraphs 41 - 43:

Breach of the duty of care

41 The question which next arises is whether the police authorities failed to exercise reasonable care when giving PC Laurent access to the gun in the strongbox at Jost Van Dyke police substation. The answer to this question turns largely on whether the police

response to the "threat incident" on 16 January 1994 was adequate. On its face Mr Flavien's complaint was serious. He alleged that Laurent had assaulted him with an eight-inch bladed knife. The only recorded police response was the visit made to Laurent by PC Joseph and his colleague. They appear to have accepted Laurent's explanation. But there is no evidence that anyone interviewed Flavien or, indeed, Ms Lafond. This being so, it is difficult to see how the police could have been satisfied that Laurent's explanation represented the truth of what had occurred. It is not suggested that the police acted in bad faith. But the police response can be described as relaxed to the extent of being overly casual.

42 In his evidence Commissioner Malone was dismissive of this incident. The basis on which he reached this conclusion is not clear. He knew nothing of this incident until after the shooting had occurred on 2 February 1994. Whether he then instigated an investigation into the threat incident, on the basis of which he reached his dismissive conclusion, is not clear.

43 Nor is it clear whether the officer responsible for posting Laurent to Jost Van Dyke knew of the threat incident. That he knew, or that it would have made no difference had he known, were matters to be established in evidence by the police. The police called no evidence on these points. Nor did the police adduce any evidence to show there was in place, as there ought to have been, a system whereby information of this nature was made available to the officer responsible for making postings.

17. Lord Nicholls has identified the trigger mechanism of liability. It is in two parts. The first part is whether there is evidence that the particular person behaved in such a manner, before the tortious incident, that would suggest that that person is or may be unsuitable to carry the weapon entrusted to him or to be entrusted with access to the weapon. The second is whether the authorities satisfied themselves, by investigation or otherwise, that despite the conduct the risk of the person misusing the weapon is minimal, so minimal or remote that the risk could safely be ignored. What I have just said might seem inconsistent with what I said earlier at paragraph 15. This is not the case. If the case were contested on the basis of paragraph 15 the police services would be able to demonstrate that they did all that was reasonable to satisfy themselves that the offending officer was a suitable person to be given a firearm. In either situation the limitation is both necessary and desirable because, as Lord Nicholls observed in paragraph 38 of his advice, any may misbehave and indulge in criminal conduct. If it were that once such conduct occurred the employer would be liable then no employer could escape liability. The result would be to transform the employer, in instant case, the police services, into an involuntary insurer with unlimited liability.

18. Lord Nicholls relied on the fact that the police officer in *Hartwell* case had at least one serious prior incident of misconduct allegedly involving the use of a knife and that incident was not sufficiently investigated by the authorities. His Lordship noted that the incident might have indicated that the police officer was volatile or unstable and thus it might not have been prudent to entrust him, unsupervised, with a firearm. The lack of investigation by the authorities into this incident was the gate way to liability identified by his Lordship. There is no evidence in the case before me to indicate that any such breach occurred in this case, that is to say, that there was something in the evidence that established that the prior history of the first defendant that suggested or ought to have suggested that he was an unsuitable person to be granted access to a firearm.

19. This advice by Lord Nicholls, in which he agreed with the Eastern Caribbean Court of Appeal, has raised the bar of accountability. It would seem to me that in this type of litigation an obvious inference from this decision is that if a claim is brought against the police services alleging tortious conduct arising from the misuse of a firearm on the part of a particular police officer, any history of misconduct will undoubtedly be relevant in order to decide whether the police services are directly liable to the victim. If this is so, then the disciplinary record and the response of the authorities must necessarily be a proper subject of disclosure. This type of disclosure does two things. First, it would provide evidence of the officer's past history. The object being to determine whether the tortious conduct alleged was likely. Second, it provides evidence of the authority's response so that it can be determined whether the authorities conducted a thorough investigation of any alleged misconduct and were able to decide, on reasonable grounds, that the risk of the officer misusing his firearm was so remote that it could be ignore. In *Hartwell* liability attached because the Attorney General was unable to show that the knife incident was investigated sufficiently so that the authorities could have properly concluded that the risk of misuse of the firearm was remote.

Vicarious liability

20. To return to the claim based on vicarious liability. Miss Orr relied on *Bernard's* case to say that the Attorney General was vicariously liable for the shooting of Mr. Brown. She relied on *Lister v Heselley Hall Ltd* [2002] 1 A.C. 215 which was applied in *Bernard*. Counsel readily accepted that there was no evidence before me that would allow the inference to be drawn that Mr. Clarke was purporting to use his authority as a police officer as was the case in *Bernard*. That being so, Miss Orr's submissions ran aground because the effect of them, if accepted would be to remove the "frolic" defence from the Attorney General. Such a position is too far reaching to be acceptable. Miss Orr was not able to identify any special feature that would apply to the Attorney General and not to any other employer such that her submission could form the basis for the development of the law. Her position was that once the police authorities handed the firearm to a police officer,

anything he does with it would make them liable since it will be always foreseeable that it might be misused. Lord Nicholls in *Hartwell* never went that far and neither shall I. His Lordship found that "Cons Laurent used a service revolver, to which he had access for police purposes, in pursuit of his own misguided personal aims" (see para. 14 of *Hartwell*) and he "put aside his role as a police constable and, armed with the police revolver ..., he embarked ... on a personal vendetta of his own" (see para. 17 of *Hartwell*). This finding excluded a conclusion that the police services were vicariously liable for the police officer's conduct.

21. Mr. Wayne Clarke did not purport to be exercising any police powers. Neither did he, after the shooting, as was the case in *Bernard*, lay any charges against Mr. Brown so that it might be inferred that he was indeed acting as a police officer.

22. The law, as I understand it, is that vicarious liability is not established by job-created opportunity. Common sense, guided by previous decisions though not exclusively so, will have to be the way forward. An example of common sense application of the law is Lord Millet's analysis, in *Lister*, of *Lloyd v Grace Smith and Co.* [1912] A.C. 716, where vicarious liability was established because the clerk was held out as person permitted to do the transaction that resulted in the fraud whereas had he stolen from the client's handbag his employers would not be liable because his job simply provided the opportunity for stealing as distinct from committing a fraud in a transaction he was authorised to assist in (see Lord Millet at para. 73).

23. Miss Orr sought to elude *Grace Smith*, *Lister*, *Bernard* and *Hartwell* by suggesting that in order to determine whether a police officer's conduct is so closely connected with the acts he was authorised to do such that vicarious liability can arise, all that is necessary is that he misused the firearm. Miss Orr developed her submission with these propositions. A gun is inherently dangerous. In Jamaica, police officers are routinely allowed to keep their firearms when they are not on any assigned duty. The misuse of the firearm by such officers is not so remote that it can safely be discounted. According to Miss Orr, when the police officers have their firearms, it has to be that the authorities expect that they would use it to act in their capacity as police officers should the need arise. Thus by the act of handing over a dangerous instrument to members of a police force with a history of misuse, then if there is some misuse then liability ought to be attached to the police services. She relied on the number of cases that have been before the courts alleging firearm misuse by members of the police force. She did not produce any figures but I agree that any one living in Jamaica cannot help but be aware that allegations against the police of misuse of firearms are quite common. I do not think the test is so broad and logically it could never be that broad. The fallacy of the argument is that it assumes that if some officers have misused firearms, then that is sufficient to conclude that the police authorities must necessarily know that this particular police officer would have done so, and

therefore they are liable. If it were so broad then every employer would be liable for any conduct done by the employee once the employee was using property belonging to the employer.

24. In the present case, Mr. Clarke did not purport to be using his firearm for any lawful purpose connected with his job as a police officer. What happened here is that his job facilitated his possession of a firearm which he has misused. At the time Mr. Clarke acted, he was not doing any act remotely connected to his job. He was not on any assigned duty and neither had the circumstances deteriorated to the extent that he was required to use the authority vested in him by virtue of being a police officer. This is not a case where he embarked on a policing activity but did it badly. I therefore conclude that claim in vicarious liability fails. I go to the assessment of damages against Mr. Clarke, judgment having been entered against him on July 6, 2001.

The assessment

The nature and extent of the injuries sustained

25. On April 4, 1998, Mr. Brown was admitted to the Spanish Town Hospital with these injuries:

- a. 1cm wound to anterolateral surface of left thigh;
- b. 2cm x 1cm wound to posteromedial surface of left thigh;
- c. 0.5cm x 0.5cm wound to posterior aspect of right medial malleolus;
- d. 0.5cm x 0.5cm wound to sole of right foot.

26. There were no neurovascular injuries and radiological examination revealed no evidence of bony injury but the x-ray showed that the bullet might have lodged in the planter aspect of the right foot. The bullet was removed on April 7, 1998 and Mr. Brown was discharged in stable condition on the same day. He did not return to the hospital for follow up treatment.

27. On April 9, 1998, Mr. Brown was seen by Dr. Curtis-Warmington. The doctor noted swelling of the left thigh which was inflamed and tender. The gunshot injuries noted earlier were seen. The right ankle was swollen and tender. This included the sole of the foot. The patient was noted to be in severe pain on movement of both lower limbs.

28. He was reviewed on April 14, 1998. The affected areas seen on April 9, were still as they were on that date. Mr. Brown was seen several more times by Dr. Curtis-Warmington.

29. The wounds healed but there was pain associated with the right ankle. There was swelling when he stood for long periods. The doctor expressed the view that a condition known as post-traumatic arthritis is likely to be a permanent recurring condition.

The nature and gravity of the resulting disability

30. There is no medical evidence of permanent disability. Mr. Brown did not go to an orthopaedic surgeon as requested by his doctor and neither did he return to the Spanish Town hospital for follow up treatment. Mr. Brown complains of feeling pain in his ankle from time to time.

The pain and suffering endured

31. Mr. Brown said he bled heavily when he was injured and he lost consciousness. Significantly, there is no evidence of any pain at the time of the injury though he must have suffered some discomfort from the fact of injury and being impaired for some time. The evidence is that the pain was evident after he was discharged and went to his private doctor.

The loss of amenity suffered

32. Mr. Brown complains that he cannot stand for long periods and because of the pain he can no longer play football which he did quite often before the shooting. He suffers from severe pain and cramp in his foot if he stands for a prolonged period of time. He now has to wear flat shoes.

Pecuniary loss

33. I shall begin with the assessment of general damages. Only two cases were cited in this matter. The claimant relied on *Granville Bowen v The Attorney General* Suit No. C.L. 1982/B 338 (delivered January 1995). The plaintiff was shot and injured by the police. He received injuries to both legs. The bullet had entered and exited the left leg and lodged in the right leg. He had recovered satisfactorily. The sum awarded for pain, suffering and loss of amenities was \$200,000.00. Using the December 2006 CPI the current value is \$691,926.12.

34. Mr. Stimpson relied on the case of *Woodburn v Constable Richard Calame* Suit No. C.L. W. 447/1998 (delivered October 5, 2001). The claimant there suffered $\frac{3}{4}$ " entry wound to the lateral aspect at the junction of the middle and distal 1/3 of the left leg and an exit wound at the postero-medial aspect of the leg. The leg was swollen and tender.

35. I prefer the case cited by Miss Orr because it is almost identical to the present case. The bullet in *Bowen* went through one leg and lodged in the other as is the case here. In addition the claimant here suffered pain and discomfort during the recovery phase of his injury. His quality of life has been impaired by his inability to indulge his passion for football. In my view an appropriate award would \$730,000.00.

36. I go to special damages. The bills submitted come up to \$39,693.20. There is a claim for loss of income of \$100,000.00. There is no evidence to support this sum.

Mr. Brown said that he continued to be paid by the Government during his incapacity. There was no evidence of how much he earned from his bailiff activities. The special damages are \$39,693.20.

Conclusion

37. The Attorney General is not directly liable in negligence and neither is he vicariously liable. The case as pleaded did not raise the issue of whether the authorities were themselves negligent in permitting the detective to hold a firearm. The detective was inflicting his own private grief on Mr. Brown and did not purport to act under any authority vested in him by virtue of being a police officer.

38. Special damages are assessed at \$39,693.20 at 3% interest from April 4 to date of judgment. General damages are assessed at \$730,000.00 with 3% interest from the date of service of the writ to date of judgment.

