JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 22/85

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (A.G.)

BETWEEN:	HAMLET BRYAN	DEFENDANT/APPELLANT
A N D :	GEORGE LINDO	PLAINTIFF/RESPONDENT

Mr. Neville Fraser, Asst. Attorney General and
Mr. Douglas Leys for the appellant.

Mr. H.G. Edwards, Q.C. for the respondent.

November 13, 1985 and May 5, 1986

CARBERRY, J.A.:

This was an appeal from a judgment of Downer, J. delivered on the 31st May, 1985, in which he found in damages for the plaintiff.

We heard and dismissed this appeal on the 13th November, 1985, and promised to put our reasons in writing. We do so now.

The respondent, hereafter called the plaintiff, was described thus by the trial judge, Downer J.:

> "George Lindo is a diffident soft spoken Rastafarian, who wears his hair in locks."

The appellant, hereafter called the defendant, was at all material times a private in the Jamaica Defence Force. On the 31st July, 1976, due to a State of Emergency declared on 19th June, 1976, he was required to assist the police in the execution of their duties, and in particular was on foot patrol in the Denham Town area, along with a party of policemen. It

is not in dispute that this party was fired on, but thereafter almost every item of the subsequent story was hotly disputed.

The plaintiff heard the sound of the exchange of gun fire: he lived nearby. After the shots had ceased, he went outside to see what had happened, and standing at the gate of his premises called to his sister-in-law. While they were talking a police radio car drove up. The defendant emerged from it, and according to the plaintiff, the defendant demanded to know who had been shooting at him and the police a while ago, and suggested (expletives deleted) that they were friends of the plaintiff. Plaintiff was picked up, and taken to the Denham Town Police Station. At the station defendant when asked why he had brought the plaintiff in, replied that plaintiff had fired shots at him at Nelson Street. The police then replied in effect that defendant should have "cleaned" him (the plaintiff) up, i.e. shot him, before bringing him into the station. The defendant's response to this suggestion was to man-handle the plaintiff, and when the watching policemen remarked that he was "romping" with the (expletive deleted) boy, the defendant, who already had his gun drawn, fired two shots at him at point blank range. They entered his neck and his jaw. He fell. He was taken to the hospital and was there treated for very serious injuries to neck and jaw.

The defendant's story was very different. He claimed that when the police-military party was fired on all the others save himself fled. He stood his ground and returned the fire, and further that a civilian on a motor-bike came on the scene and gave him a lift in his efforts to pursue the gunmen, who ran, and that the plaintiff was one of them, and that plaintiff

flung his gun away, and that he then held the plaintiff and took him to the station. At the station the defendant alleged that the plaintiff attempted to wrest a gun from one of the policemen, one Hall, and that seeing this he shot the plaintiff who was trying to escape. He claimed to have fired one shot only.

Faced with these two stories, (neither of which was supported by any other witnesses), Downer J. in his written judgment expressed himself thus:

> "I find Bryan's story incredible. He gave his evidence under obvious stress especially when he was being cross-examined by Mr. Kandekore (Plaintiff's counsel at the trial) about the previous criminal proceedings, to which I shall return. Lindo, on the other hand, was soft spoken but was never shaken by Mr. Fraser on this aspect of the evidence. His evidence has a ring of truth, I accept it rather than the soldier's tale."

In the argument before us challenge to the trial judge's findings of fact was withdrawn. Downer J. awarded damages in the sum of $2,230 special damages, and $35,000.00 for general damages, adding that if he had been asked to do so he would have awarded a further $7,000.00 for exemplary damages, following Rookes v. Barnard (1964) A.C. at p. 1129. There was no appeal on the question of the damages awarded.

What happened subsequently to the incident of the 31st July 1976? It appears that no charge was brought against the plaintiff in respect of the allegation that he had fired at the police-military party. Instead, the defendant was tried at the Circuit Court, evidently on a charge of shooting or wounding the plaintiff with intent, and was convicted. He alleges that "the judge let me go" and that "I did not go to prison". It is not clear exactly what this meant.

The plaintiff's writ was filed on the 25th February, 1981, claiming damages "for assault for that on or about the 31st day of July, 1976, the defendant unlawfully shot the plaintiff in the Denham Town Police Station". The original statement of claim was filed on the 23rd July, 1981. Judgment in default of appearance was obtained on the 6th November, 1981, and an assessment of damages was ordered. On the 20th October, 1982, at the instance of the Director of State Proceedings, the default judgment was set aside, and leave given to the defendant to file and deliver a defence within twenty-one days. The defence filed denied the plaintiff's allegations and set out those of the defendant, and in addition pleaded the Public Authorities Protection Act. Subsequently an amended statement of claim was filed and served: it deleted an allegation in the original statement of claim to the effect that the defendant "was in the course of his duty", and it gave details of the special damages claimed. This prompted an amended defence in which the defendant alleged that he was acting in the course of his duty and by virtue of the powers prescribed by the State of Emergency declared on June 19, 1976.

The reference to the State of Emergency added nothing to this case. It was not argued that it gave the right to anyone to shoot a prisoner gratuitously.

It will however be observed that the plaintiff in this action did not sue the Attorney General under the Crown Proceedings Act, nor did he seek to argue that the employers of the defendant, (the Government of Jamaica) were liable for the wrong committed by the defendant on the ground that he was acting within the course or scope of his employment. Possibly it was thought that this would prevent the defendant praying in aid the Public Authorities Protection Act. This as will be shown later, was a mistaken idea, the Act protects not only the

Authority but also its servants, but nevertheless the fact remains that the Attorney General, though his office intervened and conducted the defence vigorously, was not a party to the action. Nevertheless it is clear that in the circumstances of this case it was to be expected that the Government which had not only intervened and fought the case, would, if it went against the soldier involved, honour the liability incurred and pay the damages. It would have been sufficient for the learned trial judge to so indicate, but in his written judgment he went out of his way to state, in effect, that the plaintiff's advisers were at fault in not having sued the Attorney General, and that the Attorney General would in his view have been liable if sued.

The effect of these observations were to provide the defence with an ingenious argument. It ran like this: The judge found that the defendant was not within the protection of the Public Authorities Act, because in shooting a prisoner he could not be said to be acting within the execution of his duty, yet the judge also found that the Attorney General would have been liable on the ground that in doing what he did the defendant was acting within the course or scope of his employment: therefore, argued the appellants, there appears an inconsistency, and, if the latter finding is right, then the former is wrong. In any event they attacked the suggestion in the judgment that the Act did not protect those public officers who were guilty of a malicious act or a felonious tort or crime.

The argument is not well-founded, and results from an over simplification of the law relating to both the Public Authorities Protection Act, and the law relating to vicarious liability.

The relevant sections or provisions of the Public Authorities Protection Act read thus:

> "2. (1) Where any action, prosecution, or other proceeding, is commenced against any person for any act done in pursuance, or execution, or intended execution, of any law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect -
>
> (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within one year next after the ceasing thereof."

The Act set out above reproduces almost verbatim the provisions of the English Public Authorities Protection Act, 1893, with this difference, that our Section 2 of Law 6 of 1967 substituted a period of one year for the original period of six months. It is to be noted however that in England the 1893 Act was amended by Section 21 of the Limitation Act of 1939, and has eventually been abolished by Section 1 of the Law Reform (Limitation of Actions) Act, 1954. It may be that at some time in the future those responsible for law reform will consider the desirability of making similar amendments to our own Act.

In cases where the Act is pleaded, three questions arise for determination: (1) Is the person or body claiming the protection of the Act a "public authority" within the Act? (2) Is the act which is complained of one that falls within the protection of the Act? (3) If so, from what date does the time period indicated in the Act run?

As to the first question, who is a public authority? It is not necessary in this case to go into all the authorities that were cited and dealt with in the recent judgment in this Court in the case of Mildred Millen v. The University Hospital of the West Indies Board of Management (S.C. Civil Appeal 43/84

delivered 21st March 1986). The authorities clearly show that the armed forces of the Crown are a public authority. See The Danube II (1921) P 183 (C.A.). The headnote of that case correctly sets out the decision. It reads, in part:

> "The Public Authorities Protection Act, 1893, applies to servants of the Crown acting within the scope of their public duties,.....
>
> Accordingly, actions against commissioned officers in charge of His Majesty's ships for damage by collision must be commenced within six months and not within the period of two years allowed by the Maritime Convention Act."

Lord Sterndale M.R. at page 187 observed:

> "It seems to me that a man who under the orders of the Crown - in this case the Admiralty which is a department of the Crown - is taking a battle target to Scapa Flow for the purposes of the fleet, is undoubtedly engaged in a public duty.
>
> Perhaps no member of the public could complain if he did not take it; but certainly he was doing what was for the benefit of the public, and under the authority of the Crown; and it can, I think, hardly be denied that the Crown is a public authority."

It had earlier been held in Greenwell v. Howell (1900) 1 Q.B. 535 (C.A.) that servants of a public authority carrying out its duties were protected by the Act, and that decision was re-affirmed.

In Reeves v. Deane-Freeman (1952) 2 All E.R. 506 (Lord Goddard C.J.) affirmed on appeal (1953) 1 All E.R. 461; (1953) 1 Q.B. 459, it was held that a Canadian soldier driving an army lorry in the course of his military duty was protected by Section 21 of the Limitation Act, 1939, (equivalent to the Public Authorities Act), taken in conjunction with the Visiting Forces (British Commonwealth) Act, when his lorry was involved in an accident with a motor cyclist.

Lord Goddard observed:

> "It seems to me impossible to contend that the army and its officers are not a public authority."

However he added that it depended upon the nature of the duty on which the soldier was engaged:

> "..... for I can conceive that, if, let us say, the commanding officer of a battalion or depot had to attend some social function, such as regimental sports meeting or a special church service, for which it might be proper for him to use an army car, it might be that the driver would not be acting in pursuance of a public duty, and, if an accident took place on the journey he might not be protected by the section."

The judgment was affirmed by the Court of Appeal, both courts citing and following Greenwell v. Howell, (supra) and The Danube II (supra):

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.

In Bradford Corporation v. Myers (1916) A C. 242 at 247 Lord Buckmaster L.C. observed:

> ".... the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.
>
> In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority."

He went on to hold that though the act out of which the action arose (the delivery of coke) was intra vires the corporation's powers, it was not one covered by the statute under which they purported to act, nor was it done in the discharge of any public duty, and they were not therefore entitled to the protection of the Act.

This in part answers the argument put forward by the defendant's counsel in this case: it is perfectly possible to hold that an act is within the scope of employment, and is intra vires the powers of a corporation, while holding that it is not one which falls within the protection of the Act.

The matter goes further than that however. As a limitation act the Public Authorities Protection Act has at least one unique feature, it covers acts that are done in the intended execution of any law, public duty, or authority. There is therefore a mental element involved. In the second edition of Halsbury's Laws of England, Vol. 26: Public Authorities and Public Ofiicers, in dealing with the Act, the matter is put thus at page 295, para. 615:

> "It is sufficient if the defendant has a bona fide belief in a state of facts, which, if true, would make his conduct lawful; and bona fides is presumed, in the absence of cogent evidence to the contrary.....
>
> A defendant who honestly intends to act in execution of a public duty may be protected although he acts in ignorance, or under a mistake, as to the law.
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> The person claiming protection must, however, have acted colore officii and not for his own benefit; and the act complained of must be in purported execution of the duty and not merely contemporaneous with such execution.....
>
> Para 616. In every case the defendant must have acted in good faith, and therefore actions for deceit or malicious prosecution may be commenced after the expiration of the six months' limit."

Some of the cases cited in support of these propositions in

Halsbury, were cited to Downer J., and discussed in the argument before us. It is proposed to look briefly at some of them.

In S. Pearson & Son Ltd. v. Dublin Corporation (1907) A.C. 351 (H.L.) The Corporation were sued in deceit for damages for false representations made by agents of theirs in respect of certain foundations shown on plans for sewerage works which the plaintiffs contracted to build for them. The effect of the false representations was that the plaintiffs, in completing the contractual work, had been forced to execute more costly works than would otherwise have been required. Amongst the defences put forward by the Corporation was one to the effect that the action had not been commenced within six months as required by the Public Authorities Protection Act, 1893. It was held that the making of a false representation by which a private person was induced to enter into a private contract with a public authority for the construction even of works authorised by statute could not be held to be an act done by that authority "in pursuance or execution of a public duty" and that therefore the statute did not apply. See Lord Atkinson at p. 368. Though the main argument turned on the effectiveness of a clause in the contract which purported to bind the contractor to accepting the representations, the point that the 1893 Act could not protect the defendant was conceded. This then is an example of a public authority being sued in tort for the fraud of its agents.

The point arose again in Newell v. Starkie (1919) 89 L.J. (P.C.) 1. The headnote records:

> "A public official, acting in the exercise of a statutory or other authority, is not protected by the Public Authorities Protection Act, 1893, if he acts maliciously; but malice cannot be presumed from the fact that he is mistaken as to his authority if he bona fide believes that he is acting under the powers conferred upon him, and a plaintiff cannot deprive a defendant of the protection of the Act merely by pleading

> "that the acts complained of were done maliciously in the absence of evidence to support the plea..."

In point of fact there was no evidence that the defendant had acted maliciously, but at p. 6 in his judgment Lord Finlay said:

> "The second observation which I have to make is that the Act necessarily will not apply if it is established that the defendant has abused his position for the purpose of acting maliciously. In that case he has not been acting within the terms of the statutory or other legal authority. He has not been bona fide endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing a wrong, and the protection of this Act, of course, never could apply to such a case."

At page 7 Lord Atkinson said:

> "I quite concur with Lord Finlay on this question about the Public Authorities Protection Act, 1893. It is perfectly true that a public official, acting in the exercise of a statutory or other authority, cannot be protected under that Act if he acts maliciously He may, however, be protected if he acts mistakenly, but honestly, in the bona fide belief that he is carrying out the powers with which he fancies himself endowed. But it is impossible to presume malice from the fact that he is mistaken. ..... A man is entitled to protection if he bona fide considers that he is carrying out the authority conferred upon him. ....."

As it was found that there was in fact no evidence of malice the remarks cited above were strictly speaking unnecessary for the decision, but they do indicate their Lordship's considered view of the scope of the protection afforded by the Act.

Scammel & Nephew Ltd. v. Hurley (1929) 1 K.B. 419 (C.A.) arose out of the general strike of 1926 in England. The defendants (who numbered amongst them Major Attlee - later to become Prime Minister of England) were the members of the Electricity Supply Committee of the borough of Stepney, and were faced with a threatened strike in the electricity supply under their control.

They made a bargain with the strikers, the electricity workers and their union, that if they allowed street/domestic lighting to continue, then the latter might turn off the power line supply. They did this in the honest belief that it was the best that could be secured for the district in the face of the threatened strike action. The plaintiffs sued them alleging that they had conspired with the trade union involved to procure and induce the electricity workers to discontinue the supply of electric power to their factory. The defendants pleaded the Public Authorities Protection Act.

In his judgment, at page 427 Scrutton L.J. observed:

> "To require the application of the Public Authorities Protection Act, the acts must be acts not authorised by any statute or legal power. It would appear, therefore, if illegal acts are really done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by statutory authority, the Public Authorities Protection Act is no defence, for the acts complained of are not done in intended execution of a statute, but only in pretended execution thereof." (Emphasis supplied)

Scrutton L.J. went on to consider "defaults" distinguishing between those arising from simple forgetfulness or ignorance as opposed to those committed intentionally from motives other than a desire to perform the statutory duty. He cited in support the dictum of Lord Finlay in Newell v. Starkie referred to above.

Scrutton L.J. continued on, and at page 429 said this:

> "In my opinion, when a defendant appears to be acting as a member of a public body under statutory authority and pleads the Public Authorities Protection Act, the plaintiff can defeat that claim by proving on sufficient evidence that the defendant was not really intending to act in pursuance of the statutory authority, but was using his pretended authority for some improper motive, such as spite, or a purpose entirely outside the statutory justification. When defendants are found purporting to execute a statute, the burden of proof in my opinion

> "is on the plaintiffs to prove the existence of the dishonest motives above described and the absence of any honest desire to execute the statute, and such existence and absence should only be found on strong and cogent evidence. ....."

On the facts it was held that no dishonest motive was proved and that the defence of the Act succeeded.

Preston and Newsom, in their book "Limitation of Actions" 3rd Edn. (1954) put the matter this way:

> "Bona fides: Where the defendant relies upon the submission that he was intending to perform a public duty, as distinct from actually performing it, the intention must be genuine, and there must be no taint of malice. The Act protects persons who act mistakenly, and the mistake, standing alone, raises no presumption of malice. But once the plaintiff has discharged the onus of proving malice (and it is not a light one) the defendant loses the benefit of the Act, since no protection is afforded thereby to persons acting in pretended execution of public duties."

In the instant case, on the facts found by Downer J. on the evidence before him, this was a case of deliberate and gratuitous shooting of the plaintiff, for no other reason than that the defendant was responding to the jeering of the police personnel present. It was not an act done in pursuance, or execution, or even intended execution of any law, or public duty, or authority. It was clearly a case in which the defendant was using his pretended authority for some improper motive, whether spite, or for a purpose entirely outside the statutory or other justification.

The answer to the second question therefore is that the act complained of here, though done by a person prima facie entitled to the protection of the Act, was one which was not protected by the Act and fell outside the cover that the Act provides. This defence therefore failed, and the defendant was

rightly found to be liable, the action having been filed within the ordinary period of limitation.

Turning however / to consider further the argument that the remarks of Downer J., to the effect that had the Attorney General been sued, on behalf of the Crown, he would have found the Crown liable, and the suggestion that this is inconsistent with the finding that the Public Authorities Protection Act did not protect the defendant, it is important to realize that the/two findings are not necessarily inconsistent. 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. The word "may" is used advisedly.

Salmond on Torts, 14th Edn. at page 658, under the caption The course of Employment para. 194 provides a useful approach to the liability of a master for the wrongful acts done by his servant. It reads in part:

> "194. The Course of Employment
>
> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes-although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. 'In all these cases', said Willes J., delivering the judgment of the Court of Exchequer Chamber in Barwick v. English Joint Stock Bank, 'it may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he

> 'has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.'
>
> On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authorised to do at all."

At para. 196: under the caption "Wilful wrong-doing by Servant" Salmond explores the problems that arise in this area.

There are also two passages from Halsbury's Laws, 4th Edn. (1976) Vol. 16: Employment: which discuss this problem in the law as to vicarious liability at para. 746 Nature of tort immaterial and para. 747: Employer's liability in tort for employee's criminal act. They read as follows:

> "746. Nature of the tort immaterial
>
> Where the liability of an employer is otherwise clear, the nature of the act committed by his employee is immaterial and the employer is liable, whether the tort is an assault, a false imprisonment or arrest, a conversion, a trespass, an infringement of a patent; a nuisance or a breach of statutory duty. An employer, including a corporation, is liable even where the tort involves malice or guilty knowledge, as, for instance, in the case of malicious prosecution, libel or slander or fraud.
>
> 747. E Employer's liability in tort for employee's criminal act.
>
> In accordance with the principle that an employer is liable for the acts of an employee when acting within the scope of his authority, an employer is not exempt from liability in tort because his employee's act amounts to a crime, provided it is an act for which he would otherwise be liable. Thus, if an act is

> "done by employees in the course of their employment, as where they steal goods entrusted to the employer under a contract of carriage, the employer is responsible irrespective of his negligence, the sole test of his responsibility being whether the act was done in the course of the employment. The mere fact that a loss is due to theft by a stranger does not of itself necessarily lead to the consequence that the loss is too remote for the negligence of an employee, which made possible the theft, to result in the employer being vicariously responsible for the loss.

Each passage is supported by reference to a multiplicity of cases. What is at issue is the question: When, if ever, is a master liable for deliberate criminal action of his servant? and a study of the cases seem to show that the master may be so liable, if the act is one which arises either in the course of the servant's employment or is within his real or ostensible authority, or is so closely connected with the work that the servant is employed to do that it may fairly be regarded as a wrongful and unauthorised way of doing it. It can also be said that over the years there has been a growing tendency to hold the master liable, even where the act was not only not done for his benefit, but was done entirely for the servant's benefit.

The cases so far appear to fall into well recognized groups, consistent with the common law approach which is to proceed on a case to case basis. There are the "smoking on the job" cases where the changes that have taken place can be seen clearly by contrasting Williams v. Jones (1865) 3 H & C 602; 159 E.R. 668; (master held not liable), with Jefferson v. Derbyshire Farmers Ltd (1921) 2 K.B. 281 and Century Insurance Co. Ltd v. Northern Ireland Road Transport Board (1942) A.C. 509; (1942) 1 All E.R. 491 where the master was held liable and the majority judgment in Williams v. Jones was overruled.

Then there are the cases of deliberate dishonesty by servants ranging from cases in which the dishonest act was done to further the master's interest as in Barwick v. English Joint Stock Bank (1867) L.R. 2 Ex. 259 to Lloyd v. Grace, Smith & Co. (1912) A.C. 716 where a solicitor's managing clerk used his position to rob a client of the firm, and the master was held liable. An instructive contrast is to compare Abraham v. Bullock (1902) 86 L.T. 796 (master held liable for servant's negligence which permitted thieves to steal goods entrusted to him): with Cheshire v. Bailey (1905) 1 K.B. 237 (where the facts were practically identical, save that the servant was an active party to the theft, and the master was held not liable). In Morris v. C.W. Martin & Sons Ltd (1966) 1 Q.B. 716, the case of the stolen mink coat, Cheshire v. Bailey was narrowly distinguished, perhaps overruled, on the ground that the master had entrusted the customer's fur coat to the servant who stole it, and was liable as a bailee. These cases illustrate the proposition that though the servant could not be said to have been acting in the execution of his duty by any stretch of imagination, yet the master has been held liable. See for example the Privy Council judgment in United Africa Coy Ltd v. Saka Owoade (1955) A.C. 130, the headnote of which reads:

> "A master is liable for his servant's fraud perpetrated in the course of the master's business, whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment."

Perhaps the largest single group of cases, and those closest to the instant case are the cases in which the servant has deliberately assaulted a customer of his master: sometimes it arises "out of the job", sometimes it has been a matter of venting his personal anger. Here too the range is enormous. It ranges from cases such as Bayley v. Manchester, Sheffield &

Lincolnshire Railway (the misguided porter hauling a passenger out of a carriage thinking wrongly he was in the wrong train: master liable), to Dyer v. Munday (1895) 1 Q.B. 742 (Hire purchase firm's manager committing an assault in re-possessing firm's goods: master held liable), to Poland v. Parr (1927) 1 K.B. 236 (off duty carter hitting down a small boy whom he thought was stealing sugar from his master's dray: master held liable.) On the other hand contrast Warren v. Henlys Ltd (1948) 2 All E.R. 935 (gas station attendant threatened by customer with being reported punched customer, 'here is something to report me for'; master held not liable); Deatons Pty Ltd v. Flew (1949) 79 C.L.R. 370 (bar maid throwing glass at customer who insulted her: master held not liable) compare Petterson v. Royal Oak Hotel Ltd. (1948) N.Z.L.R. 136 (where on very similar facts the Court of Appeal of New Zealand held that the bar man's act was so closely connected with his work as to make the master liable for this improper mode of discharging his duty to keep order.)

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.

Therefore 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.

The Crown was not however sued in this case, and it is not necessary therefore to come to any firm conclusion as to whether it would have been liable if sued. The observations by the learned trial judge were obiter; though no doubt he was anxious to see that the unfortunate plaintiff recovered the

damages awarded for his injury from public funds, it would have been sufficient for him to make this as a recommendation and leave the matter thus, confident that in the circumstances of this case the Crown would in fact meet the liability involved.

ROSS J.A.

I agree.

WRIGHT J.A. (AG.)

I agree. The facts and the relevant law have been adequately dealt with and there is nothing that I can usefully add.