IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L 020/1981

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| BETWEEN | GEORGE LINDO | PLAINTIFF |
| A N D | CORPORAL HAMLET BRYAN | DEFENDANT |

L.M. Kandekore for Plaintiff
Neville Fraser, Asst. Attorney General and
E.L. Johnson, Crown Counsel for the Defendant.

Heard: May 9 and 31, 1985

JUDGMENT

DOWNER J.

CONSTITUTIONAL IMPLICATIONS

One of the characteristics of a legal system which has inherited the common law tradition is that the law of torts has proved adequate for vindicating the rights of the citizen against the acts of servants of the State. If rights are infringed the citizen is entitled not only to ordinary general, special damages and aggravated damages, but exemplary damages as well. The central issue to be determined in this case is whether a soldier acting by virtue of statutory powers promulgated during a State of Emergency is entitled to rely on Section 2 (1) of the Public Authorities Protection Act in answer to an action brought long after a year has elapsed where the allegation of the claimant is that the defendant is liable for a felonious tort. So formulated, what appears to be an ordinary instance of private law has important implications for our Constitutional system. Additionally, there arose on the evidence the issue whether the State was vicariously responsible for its servant's felonious acts when injury results, during the course of its servant's employment. The matter was further complicated because the Attorney General though he appeared by Counsel and contested this issue was not joined as a

party and if the decision goes against the soldier, the further issue arises as to the Attorney General's role as principal adviser to the Government to point out that although the courteous language of the law speaks of an ex gratia payment, in circumstances such as this in England, the Crown would have invariably meet the payment.

FINDINGS OF FACT

George Lindo is a diffident soft spoken Rastafarian, who wears his hair in locks. On the 31st July, 1976 he lived in the Denham Town area and he tells us that at that time he earned his living as a Crash programme worker, though Counsel insists on describing him as an employee on the Impact programme. He also sold the 'Star' newspaper in the afternoons. He reports that he had heard shots being fired that day and that after the firing ceased he went out by his gate where he saw his sister-in-law and had a talk with her.

He further stated that a patrol car came up and Corporal Bryan said to him "come ya bwa" and he went up to the car. He said that Bryan continued thus, "rass cloth, a who fire shot bout the place?" "You rass cloth friend just fire after me a while a go." Lindo further said that after some talking he was ordered to go into the trunk of the car and he refused. Eventually he sat in the back seat along with some police officers and another soldier and then he was taken to the Denham Town Police Station.

Corporal Bryan's story as to how Lindo arrived at the Denham Town Police Station is markedly different. He tells us that he was called to assist the police on the 31st July, 1976 and that he left Camp in company with others and went to Denham Town via Matilda's corner. He was then assigned on foot patrol to Nelson Street. He heard a screaming and on looking up Nelson Street he saw three men with a towel covering their hands and they opened fire. The police and soldiers, he would have us

believe, all ran save he. He asserted that he just got down on his knees and returned fire. Further, he told us a man on a bike came up, gave him a ride and he chased the men who ran over a fence but he caught Lindo who threw the gun over the fence. It was at that point that Corporal Bryan told us that the police radio car came up and it was then that he took Lindo to the Denham Town Police Station along with other police and soldiers.

Mr. Kandekore's apt comment was that despite the fact that soldiers and police ran, Bryan would have us believe that a brave stranger on a bike would dare to venture, when those who were responsible for policing the area had taken to their heels. It is against this background that I accept that as to the beginning of the incident, the account given by the plaintiff is to be believed rather than that given by the defendant.

At Denham Town, Lindo tells us that he was boxed and hauled right up to C.I.D. Office by the defendant. When it was asked why and what Lindo was there for, Bryan replied that Lindo's friends had shot after him in Nelson Street. The police on duty replied that Bryan should have cleaned up Lindo before he brought him inside. When I enquired what is to be understood by cleaning him up in that context, Lindo said that it meant that he was to be shot up. Such are the current refinements of our language.

Lindo further stated that Bryan had his gun in his hand and he saw him 'firming' his gun (loading the gun) and that he saw four shots and that Bryan fixed the gun at him from the distance of an arm's length.

More importantly, the plaintiff told the Court that he was dragged (draped) by Bryan and taken to the guard room and that Bryan was accompanied there by three others. Then he said one of the men said "yu a romp with the rass bwa" at that point Bryan had the gun aimed at him and he heard two explosions and felt

his neck and jaw burning. He reports that he fell down and was taken in the police jeep to the hospital where he was treated.

The defendant's story took a different line. His version was that when he took Lindo to Denham Town he saw a lady police officer and thereafter he took him to the guard room. He said further, that he was with another soldier, Hall and the female police officer, that while Hall was guarding Lindo, Lindo grabbed at Hall's gun and he Bryan fired a shot which caught Lindo in his neck. On this aspect of the matter the medical evidence supports Lindo as it speaks of two entry wounds.

I find Bryan's story incredible. He gave his evidence under obvious stress especially when he was being cross-examined by Mr. Kandekore 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 and on balance, I accept it rather than the soldier's tale.

THE PLEADINGS AS THEY RELATE TO VICARIOUS LIABILITY, THE FELONIOUS TORT, THE SPECIAL DEFENCES OF THE PUBLIC AUTHORITIES PROTECTION ACT AND THE EMERGENCY POWERS REGULATIONS

Paragraph 1 of the Statement of Claim reads as follows:-

> "The defendant was at all material times a member of the Jamaica Defence Force and was in the course of his duty"

this was amended by deleting the words "and was in the course of his duty." When I enquired of Mr. Kandekore as to why he amended it, I was told it was because of the provisions of the Public Authorities Protection Act. His contention was that the soldier was on a frolic of his own.

Paragraph 2 of the Statement of Claim as amended reads as follows:-

> "On or about the 31st July, 1976 while the Plaintiff was lawfully in the Denham Town Police Station in the city and parish of Kingston the defendant wrongfully

> assaulted the plaintiff by firing his pistol and hitting the plaintiff in the neck causing the plaintiff to collapse and fall to the floor."

This statement must be read in conjunction with the endorsation of the Writ which reads:-

> "The plaintiff claims against the defendant for damages for assault. That on or about the 31st July, 1976 the defendant unlawfully shot the plaintiff in the Denham Town Police Station in consequence of which the plaintiff was injured and suffered loss and damages and incurred expenses."

It is clear that the allegations of assault are based on the felonies, shooting with intent and wounding with intent and in accordance with the rule in Smith v. Selwyn 1914 3 K.B. p.98 criminal proceedings should be instituted before a civil action is heard. In view of the admissions by the defendant in Court, I am satisfied in this case that the criminal proceedings were instituted and completed. It is of some importance to note, that on the outcome of the trial Bryan said that the Jury convicted him, but that the Judge let him go and that in cross-examination he explained that the Judge did not give him a custodial sentence.

Another aspect of the pleadings which puzzled me, was the absence of the Attorney General as a party in view of the provisions of the Crown Proceedings Act. This is especially so as Mr. Fraser stated that from the beginning his department was defending the soldier. That they were as good as their words is seen from the defence which reads as follows:-

> "Further, the defendant will say that at the material time the defendant was acting in the course of his duty by virtue of the powers prescribed by the State of Emergency declared on June 19, 1976."

In those circumstances, it does seem to me there is some confusion in thinking when the plaintiff decided to proceed with his case without the Attorney General being made a party thereto as the Attorney General through his Counsel has expressly accepted

responsibility for the soldier's acts.

The other aspect of the pleaded defence to note, reads as follows:-

> "Further the defendant will contend that the Writ and its endorsation together with the Statement of Claim disclose no cause of action against him and will therefore rely on the provisions of Section 2 of the Public Authorities Protection Act."

To my mind the Act is procedural in its main effect and what it does is to bar an action after a year has elapsed. What could have been a bar to the action has only been obliquely pleaded, that is the regulations made pursuant to the Emergency Powers Act. It is in the light of these pleadings and the evidence adduced that we must go on to consider the scope and limits of the Public Authorities Protection Act, the issue of vicarious liability of the Crown, and in the circumstances of this case whether the Emergency Regulations barred the action.

DOES THE PUBLIC AUTHORITIES PROTECTION ACT APPLY WHEN IT IS ALLEGED AND PROVED THAT THE DEFENDANT IS LIABLE FOR A FELONIOUS TORT?

Since the pleaded defence relies on Section 2 (1) of the Public Authorities Protection Act, it is pertinent to set it out:-

> "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 case of a continuance of injury or damage, within one year next after the ceasing thereof."

In his submission, Mr. Fraser contended that there could be no dispute that Bryan was carrying out a public duty within the

intendment of the Act when the shooting took place. Consequently, the plaintiff should not succeed. Mr. Kandekore in an equally spirited manner said that Bryan was on a frolic of his own when he shot the plaintiff and therefore the Act does not apply.

To my mind the Act puts public servants in a privileged position as regards the time during which proceedings can be instituted against them, provided that they were acting in pursuance of a law or performing a public duty and they are alleged to be liable for negligence or honest mistakes. Implicit in the section is that the servant must be acting in good faith. If a Crown servant is acting fraudulently or maliciously or with a felonious intent, the Act gives no protection. One must remember that the Act is a species of nineteenth century legislation enacted at a time when the annual budget was the main instrument of fiscal policy and the intention was that an action should be brought within a year so the local and other statutory authorities could budget for expenditures to meet legitimate claims. Also, it should be recalled that when the Act was passed in the United Kingdom and up to 1947, because of the constitutional maxim that 'the Crown could do no wrong,' the Crown was not vicariously liable for the tortous acts of its servants though in practice the Crown met the payments whenever an action went against the Crown's servants.

If Mr. Fraser is correct, then if policemen rape a girl in Denham Town Station, they could never be liable civily once the magic period of a year has passed. I would not so interpret the Act, unless there was authority binding on me so to do.

What cases have Mr. Fraser brought to support his proposition? He cites Attorney General v. Desnoes & Geddes Ltd.

(1970) 12 J.L.R. p.3 and Clarence McKay v. Theophilius Forrest Unreported R.M.C. Civil Appeal 66/73. The fact is that those decisions relate to negligent action in the performance of bona fide public acts. One of the decisions cited in both judgments is Bradford Corporation v. Myers, 1916 A.C. 242 where it was held that the selling and delivering of coal did not attract the provisions of the Act as this was not the direct execution of a statute or in discharge of a public duty or in exercise of public authority.

Despite this warning sign, Mr. Fraser did not accept my invitation to consider whether if there were instances of fraud the protective provisions of the Act would still apply. In fact the decision of S. Pearson & Son Ltd. v. Lord Mayor of Dublin (1907) A.C. p.351 affords such an example. In that case it was held that the contract truly construed contemplated honesty on both sides and the Act protected only against honest mistakes and that it did not apply, as the act complained of was not done in pursuance of a public duty within the meaning of the statute. Apart from the fact that the limitation of a year did not apply, there are three points to notice about this case. Firstly, the agent of Dublin Corporation admitted in evidence that he deliberately misled the contractor. Secondly; the Corporation was regarded as vicariously liable for his tort of deceit; and thirdly, in resorting to the canons of construction developed by the common law, the Courts implied that the statute assumed that the defendant was acting in good faith and that it was in such circumstances that the protective provisions applied to honest mistake.

The next pertinent case to which I refer is not so much for the facts, as the defendants were found on appeal to be acting bona fide, instead of being liable for conspiracy as

alleged, and accepted by the jury at first instance. A passage from the judgment of Scrutton, L.J. illustrates the way Appellate Courts approach the problem. In Scammell & Nephew Ltd. v. Hurley, (1929) 1 K.B. 419 p.429 he said:

> "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 statutory justification. When defendants are found purporting to execute a statute, the burden of proof in my opinion is on the plaintiff to prove the existence of the dishonest motive 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."

Here Scrutton, L.J. is giving in extended language the principle laid down in Pearson's case, that the defendant must be acting in good faith. What if the plaintiff alleges and proves malice on the part of the defendant? It is pertinent to point out that at page 428 Scrutton L.J. said:-

> "In Newell v. Starkie (1919) 83 J.P. 113 an Irish appeal to the House of Lords, the plaintiff alleged that the defendant did certain acts, apparently in executing a statute 'maliciously' but gave no evidence of malice, treating the defendant as having the burden of proving that he acted in performance of a public duty. All the members of the House of Lords agreed that in the acts complained of, being apparently acts in the execution of a statutory duty, there was no evidence on which a question could be left to the jury whether the defendant acted maliciously and therefore outside the protection of the statute;" but Lord Finlay went on to say what was presumably not necessary for the decision. 'The second observation I have to make is that the Act necessarily will not apply if it is established that the defendant had abused his position by acting maliciously. In that case he has not been acting within the terms of statutory or other legal

> authority; he had 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 the Act of course never could apply to such a case.'

On the facts, I have found the words and conduct of Bryan showed that his reliance on the statute was a colourable device to attempt to conceal that he acted maliciously. From the inception of the incident he falsely accused Lindo by stating without justification, that Lindo's friends shot at him. He tried to put him in the trunk of the car, and he aimed at him initially and afterwards deliberately shot and wounded him. In Lord Finlay's words he had abused his position for doing a wrong and the statute affords him no defence.

About a week after the oral arguments, after I had forwarded to counsel on both sides the above authorities, Mr. Fraser helpfully sent me Lt. Colonel Leslie H. Lloyd v. The Jamaica Defence Board and others unreported S.C. Civil Appeal No. 59/78 which supports the approach that malice takes the case outside the statute. At page 9 Carey J.A. states:-

> "These cases which I have cited show that where some improper motive can be shown, it may have the effect of rendering a decision of a tribunal not acts done in intended execution of a statutory duty, but pretended execution thereof and remove the protection of the Act."

The same approach is implicit in the judgment of White J.A. where at page 20 after citing Newell v. Starkie he stated that 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.

These instances of deceit, conspiracy and malicious conduct demonstrate how Appellate Courts approach the issue. What should the approach be if the defendant is liable for a

felonious tort? In my opinion the cited cases illustrate the wider principle that the author of unlawful and wilful acts which are malicious or fraudulent cannot rely on the protective provisions of an Act of Parliament which puts him in a privileged position, and the defendant in these proceedings can find no comfort from Section 2 (1) of the Public Authorities Protection Act. Is it to be said that while he was deliberately shooting and wounding Lindo he was acting in pursuance of the Emergency Powers Act and could thus claim protection of the Limitation Act which implies that the defendant should be acting honestly and in good faith? I think not. As for Mr. Kandekore's submission, I would reiterate that the Public Authorities Protection Act is a Limitation Act and has procedural effects. If it does not apply to the servant or agent, it cannot apply to the Crown. The concept of being on a frolic relates to the issue of vicarious liability and the two issues must not be merged so as to cause confusion. Is the claim late? The Public Authoriities Protection Act gives an answer. Is the Crown liable for its servants torts? If the servant was on a frolic the answer is no.

DO THE EMERGENCY POWERS REGULATIONS 1976 PROTECT THE DEFENDANT WHEN IT IS ALLEGED AND PROVED THAT HE WAS ACTING WITH A FELONIOUS INTENT?

From the outset of these proceedings by the amended Defence, the defendant prayed in aid that he was acting in the course of his duty pursuant to the Emergency Powers Regulations P.R.R. Part 11 (1976). It is therefore instructive to examine the regulations to see if the broad contention of the plea is justified. Firstly, paragraph 2 (1) at page 291 states:-

> "In these regulations the expression authorized person means any competent authority, any member of the armed forces of the Crown ..... "

Further, paragraph 32 gives wide powers of arrest and detention. 32 (1) reads:-

> "Any authorized person may arrest without warrant and detain pending enquries any person whose behaviour is of such a nature to give reasonable grounds of suspecting
>
> (a) that he has acted or is acting in a manner prejudicial to public safety; or
>
> (b) that he has committed, or is about to commit an offence against these Regulations."

On my findings, the plaintiff has established that he was arrested and detained with a malicious intent by the defendant because he alleged that it was the plaintiff's friend who shot after him that day. Further, when he aimed his loaded pistol at the plaintiff and subsequently shot and wounded him, the malicious intent was still there. His actions therefore were a pretence as far as the regulations were concerned, as powers of arrest and detention were accorded to authorised persons in respect of those who on reasonable grounds were suspected of acting in a manner prejudicial to public safety or had committed or were about to commit offences against the regulations.

The regulations provide protective provisions in paragraph 46 (1) in respect of actions being brought against the security forces, providing they are acting in good faith. That paragraph reads:-

> "Subject to paragraph (2) no action, suit, prosecution or other proceeding shall be brought or instituted against any member of the Security Forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or the restoration of order or the preservation of the peace in any place or places within the Island or otherwise in the public interest."

May I reiterate that I find that the plaintiff has discharged the onus laid on him, he satisfied me that the defendant was not

acting in good faith and therefore on this ground the defendant has also failed.

IS THE CROWN VICARIOUSLY LIABLE FOR THE FELONIOUS TORTS OF ITS SERVANTS?

By pleading explicitly that the defendant was acting in the course of his duty by virtue of the emergency powers, the defendant has raised the important issue - the Crown's liability for the tortous act of its servants acting in the course of their duties. I was amazed that Mr. Kandekore for the plaintiff did not join the Crown and not surprisingly, Mr. Fraser endorsed Mr. Kandekore's stand. The starting point for any enquiry as to the Crown's liability must be Section 3 (1) (a) of the Crown Proceedings Act which reads as follows:-

> "Subject to the provisions of this Act the Crown shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity, it would be subject to:-
>
> (a) in respect of Torts committed by its servants or agents;"

The effect of Section 3 (1) (a) is to refer to the common law position of vicarious liability, especially when the acts of the servants involve a species of fraud or felony committed during the course of their employment. Perhaps the best starting point is the decision of the Privy Council in United Africa Co. Ltd. v. Saka Owoade (1955) A.C. p.130 - there the employer was held liable for his servant's act of conversion during the course of the servant's employment. Lord Oaksey at page 144 sets out the principle with admirable clarity thus:-

> "There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any tort wrongfully committed by his servant during the course of his employment. It is a question of fact in each case whether the wrong was committed during the course of the servant's employment, and in the present case their Lordships are of the opinion that upon the

> uncontradicted evidence, the conversion of the Appellant's goods took place in the course of the employment of the Respondent's servants."

The modern doctrine that the master is responsible for his servants' fraud was laid down in the classic case of Lloyd v. Grace Smith & Co. (1912) A.C. p. 716 where a firm of solicitors was held responsible for the fraudulent acts of their Managing Clerk though the fraud committed by the servant was for the servant's benefit.

What is the justification for the doctrine? In tort law, the aim is to shift responsibility to the party who can pay, so solicitors can protect themselves by fidelity insurance or if they chose not to rely on insurers to regard compensation for the fraud of their servants as business expenses. So far as the Crown is concerned, it is well known that Governments traditionally are their own insurers and not to ascribe responsibility to the Crown, would be putting the victim of wrongful acts committed by a Crown's servant in a worse position than if the victim suffered from a servant in private enterprise. I will cite two other cases where the employer was made responsible for their servant's fraud. The first is Regina v. Levy Bros. Co. Ltd. 26 D.L.R. 760 - where the Canadian Supreme Court held that the Crown was responsible for the fraudulent acts of its servants when a parcel of diamonds was stolen during its passage through Customs. It is instructive to quote the following passage at page 762 where Mr. Justice Ritchie speaking for the Court said:-

> "The employee or employees concerned were thus doing fraudulently (feloniously) that which they were employed to do honestly and the theft (the wounding with intent) was therefore in my view committed under such circumstances as to render the employer liable for the loss."

By substituting the words in bracket, the principle enunciated by Mr. Justice Ritchie covers the instant case.

The other authority I think it necessary to cite on this aspect of the case is the judgment of Diplock L.J. in Morris v. C.W. Martins & Sons Ltd. (1966) 1 Q.B. p.716 as it illustrates the error in my view which counsel on both sides had made in relation to vicarious liability. The passage reads as follows:-

> "The Judgment in Cheshire v. Bailey (1905) 1 K.B. p.237 seems to me with great respect to show a confusion between two distinct lines of authority that of a frolicsome coachman and that of the dishonest servant."

The fact is, that when we are dealing with vicarious liability, if the servant goes outside the course of his employment, then the master is not liable, if however, he is guilty of the crime committed during the course of his employment, then the master is liable. So the issue in this case is to determine whether the soldier was carrying out his duties for the Crown when the felony was committed, and whether the force he used was excessive and so takes the case outside the principle of vicarious liability. But it may be asked, what is the position as regarding the situation where personal injuries result during the course of the servant's employment? To my mind the broad principle laid down by Lord Oaksey in the United Africa Co. Ltd. case governs the situation and there are authorities which support this proposition. Very important is Dyer v. Munday (1895) 1 Q.B. p.742/a case where the employer was held responsible for his manager's assaults, when the manager used violence on the plaintiff in attempting to recover the furniture owned by the master under the terms of a hire purchase agreement. This is the case which most resembles the instant case. Hudson v. Ritch Manufacturing Co. (1957) 2 Q.B. p.348 was an instance where the employer was held responsible for the horse-play of his employee

when he injured another employee; while in Warren v. Henleys Ltd. (1948) 2 All E.R. p.935 it was found that the action of the employee on the facts of the case was outside the scope of his employment, as he had completed his assignment with the customer and afterwards on an act of revenge assaulted the customer who had reported him to the police and intended to make a further report to Henleys, the employer. At page 938 the judgment quotes with approval a passage from Scrutton L.J.'s decision in Poland v. John Parr & Sons (1927) 1 K.B. p.240 which reads as follows:-

> "To make an employer liable for the act of a person alleged to be servant, the act must be one of a class which the person is authorized or employed to do. If the act is one of that class, the employer is liable though the act is done negligently or in some cases even if it is done in excessive violence. But the excess may be so great as to take the acts out of the class of act which the person is authorized or employed to do. Whether it is so or not is a question of degree."

There is one other authority Keppel Bus Co. Ltd. v. Sa'ad Bin Ahmad (1974) 1 W.L.R. 1082 which is a further illustration of the principles applied when the complaint relates to personal injuries. In emphasising that there is a single test laid down by Lord Oaksey in the United Africa case, Lord Kilbrandon cites the Scottish case of Riddel v. Glasgow Corporation at page 1084 where it was sought to make Glasgow Corporation responsible for the libel of their servant. It was held in that case that there was nothing in the pleadings 'to show expressly or by implication that Gilmour was clothed with authority to express on behalf of the Corporation to rate-payers any opinion he might form on the genuineness of any receipts which might be produced to him for the payment of the rates.'

In the circumstances of the case, the Privy Council found that on the facts, there was no evidence to justify the ascription of

the act of the conductor to any authority express or implied, vested in him by his employers and in assaulting the passenger, the conductor was not acting in the course of his employment.

All this was said against the background that the Court of Appeal in Singapore had 'rightly pointed out that the question in every case is whether on the facts the acts done, albeit unauthorised and unlawful is done in the course of employment, that the question itself is a question of fact.'

What then are the circumstances of this case? The soldier was acting under Emergency Powers whereby he had the power to arrest and detain without a warrant pending enquiries. There is no issue that he was provided with a firearm to carry out those duties and that I take judicial notice that Denham Town was dangerous in those days. While he was under detention, paragraph 32 (4) of the regulations states he is deemed to be in lawful custody. From the time the plaintiff was detained until he was shot, the defendant soldier was performing his duties under the Emergency Powers Regulations and his pleaded case asserts this. Further, as Mr. Fraser submitted, there is no reply to this, so had Mr. Kandekore grasped the opportunity to join the Crown it is difficult to see on what grounds Mr. Fraser could object. Nor can it be successfully contended that the force used was excessive as to take the case out of the authorised acts of arrest and detention. Once again one turns to the Keppel & Co. case and at page 1084 Lord Kilbrandon cites Scrutton L.J. in Polard v. John Parr & Sons as follows:-

> "Maybe his action was mistaken and maybe the force he used was excessive, he might have pushed the boy instead of striking him. But that was merely acting in excess of what was necessary in doing an act which he was authorised to do. The excess was not sufficient to take the act out of the class of authorised acts..... '

One must take into account that the maximum coercive powers of the state were accorded to the defendant soldier during the State of Emergency. Maybe the force he used was excessive, but he was doing what he was authorised to do in a State of Emergency though it was a 'wrongful and unauthorised mode of doing some act authorised by the master.' It is against this background that I find had the Crown been joined as it should have been, I would have found the Crown liable as well as the soldier.

DAMAGES

For his General Damages for pain and injury, loss of amenities, the plaintiff produced an agreed medical report. With the aid of a dictionary I think I have been just about able to cope with it. He received a gun shot wound to the neck and mandible (lower jaw bones), there was an entry wound to the canine region of the left mandible and the exit wound was at the left sub-mandibular area. The second entry wound was at the right neck posterior to the trapezium (either of the two flat triangular muscles, one covering each side of the back and shoulders that rotate the shoulder blade). On the day the Doctor examined him - 31st July, 1976 the fractured mandible was reduced and immobilized. The Doctor describes his injury as one that might have been said to be serious. In the up-to-date medical report of 2nd March, 1984 which is about one year before the trial, the same Doctor describes the patient's complaint as firstly of residual pain and weakness of the right arm and secondly of acute pain on biting in the premolar area of the left mandible as genuine and in stating the reasons for this opinion, he said that the path of the bullet in the neck could have caused damage to the brachial plexus (of and relating to the arm or arm-like part or structure). Plexus means any combination of nerves or blood vessels. The

doctor recommended that this be assessed in detail by an Orthopaedic Surgeon, but regrettably this was not done. Further, the doctor in giving his opinion of the acute pain on biting states that radiographs reveal resorption of the root of the second premolar and periiapical radiolucency associated with the first premolar. Both these findings could have resulted from trauma infected by a bullet. I find that these are serious injuries and I take into account the malice with which they were inflicted that in making an award of THIRTY FIVE THOUSAND DOLLARS ($35,000) I include a modest amount for aggravated damages. It would seem to me that were a claim made for exemplary damages, I would have entertained it, as my finding that it was the type of act described by Lord Devlin in Rookes v. Barnard (1964) A.C. p.1129 as oppressive, arbitrary or unconstitutional conduct by servants of the government and I would have considered the appropriate additional sum to be between SEVEN and TEN THOUSAND DOLLARS. On the matter of special damages, I was not satisfied with the way the case was presented. Mr. Fraser on this aspect of the case asked me bear in mind Lord Goddard's words in Bonham-Carter v. Hyde Park Hotel Ltd.(1948) 64 T.L.R. p.177 & 178:-

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring action for damages, it is for them to prove their damage;
> It is not enough to write down the particulars and so to speak throw them at the head of the Court saying:-
> 'This is what I have lost, I ask you to give me these damages.' They have to prove it."

The plaintiff states that he was an employee of the Crash programme and that he earned ONE HUNDRED DOLLARS ($100) a week and further earned another FIFTY DOLLARS ($50) at least from selling the 'Star' newspaper in the afternoon. He said that he was away from work for three years. Under cross-examination by

Mr. Fraser he was not able to say how much profit he made from selling the 'Star' newspaper and how he managed to earn such a princely sum at that time by working on the Impact programme. I accept the fact that he did work, but not legitimately for the sums he has put forward. Mr. Fraser remind me that the minimum wage was around TWENTY DOLLARS ($20) a week at that time and I am prepared to give him TWENTY DOLLARS ($20) a week for two years. Given the nature of his employment he certainly wouldn't have worked for every week in the year. I am prepared to award TWENTY DOLLARS ($20) per week for ninety weeks as that has been proved to my satisfaction. I am also prepared to accept the loss of items listed in the Statement of Claim as it would be unreasonable to accept as Mr. Fraser suggested that he should have kept receipts for those purchases. Also I have accepted that he incurred medical expenses of TWO HUNDRED AND TWENTY DOLLARS ($220). The total special damages is TWO THOUSAND TWO HUNDRED AND THIRTY DOLLARS ($2,230). The interest awarded is at the rate of 3% for both sets of damages from the 25th February, 1981.

CONCLUSION

The plaintiff in this case has raised serious issues concerning the Law of Torts and its implications for constitutional law. He instituted his action against the defendant soldier alone and that I regard as an error. The law has its policies and the reason for common law developing the principle of vicarious liability was to ensure that those with long pockets would meet the legitimate claims in tort of their erring servants, and the Crown Proceedings Act was specifically designed to put the Crown in the same position as an ordinary private employer of full age and capacity. If the defendant cannot meet the judgment, is the plaintiff to suffer?

During the course of argument I specifically asked Mr. Fraser whether recommendations would be made that the judgment would be met if the decision were in favour of the plaintiff, and he assured me that this was usually done but he could give no guarantees that his recommendations would be followed. To my mind, the situation goes beyond the mere recommendation. By virtue of the Constitution, the Attorney General is the principal adviser to the Crown and if his department having drafted the pleadings and appears by Counsel, the natural inference is that the practice which obtained in England before the Crown Proceedings Act was passed would be followed in Jamaica. Winfield on Tort 8th Ed. p. 709 puts it thus:-

> "In practice the Treasury Solicitor usually defended an action against the individual Crown servant and the Treasury as a matter of grace undertook to satisfy any judgment awarded against him for tort committed in the course of his employment."

Consequently, although the constitutional maxim was 'that the King could do no wrong,' his servants could and when sued the Crown would pay. No doubt we followed this salutary practice ourselves before the Crown Proceedings Act was enacted. I am quite certain that this practice will be followed, despite the cautious language of the Assistant Attorney General. In addition to the THIRTY FIVE THOUSAND DOLLARS ($35,000) general damages and the special damages of TWO THOUSAND TWO HUNDRED AND THIRTY DOLLARS ($2,230) with the interest indicated, the plaintiff must have his costs which are to be agreed or taxed.