



[2017] JMSC. Civ 151

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 HCV 04172**

<b>BETWEEN</b>	<b>ROYAN MAHONEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mr. Curtis Cochrane for the Claimant

Ms. Donia Fuller-Barrett instructed by the Director of State proceedings for the Defendant.

**Heard 20<sup>th</sup> September 2017 and 3<sup>rd</sup> October 2017**

**APPLICATION UNDER RULE 19.2(5) OF THE SUPREME COURT CIVIL PROCEDURE RULES TO  
SUBSTITUTE CLAIMANT**

**MASTER A THOMAS (AG)**

### **Introduction**

[1] This application is brought on behalf of the Claimant, Mr. Royan Mahoney. He is seeking to have Ms. Sylvia Dias and Ms. Vanessa Cooper substituted for him as parties in his claim against the Defendant, the Attorney General of Jamaica. His

claim against the Defendant is for damages for false imprisonment and assault and battery inflicted by persons, three of whom he claims were members of the Jamaica Constabulary force, the Island Special Constabulary force and the Rural Police force respectively. Ms. Dias and Ms. Cooper are the mother and niece of the complainant respectively. They have consented to having their names substituted for that of the Claimant.

- [2] The Defendant, the Attorney General of Jamaica, is being sued vicariously as it is alleged that the Claimant received his injuries by agents of the state. The Defendant is resisting this application on the basis that the Claimant has not satisfied Rule 19.2 (5) of the Civil Procedure Rules. Ms. Fuller-Barrett further submitted that the trial cannot be conducted with Ms. Dias and Ms. Cooper as Claimants because the only evidence they would be able to tender would be based on hearsay.

### **History and Nature of the Claim**

- [3] I will first examine the history and the nature of the claim before I address the issues and the applicable law in relation to these issues.

The claim was filed on the 5<sup>th</sup> of October 2016.

Mr. Mahoney alleges that on the 23<sup>rd</sup> of December 2013, while travelling in his brother's motor vehicle on the Junction Road in St Mary, he was assaulted, kidnapped and taken away by Mr. Sherwood Simpson and three other men. He claims that at the time of the incident, he knew that Mr. Sherwood Simpson was a constable of the Jamaica Constable Force and that two other of his assailants were a special constable and rural district constable respectively.

- [4] He further alleges that Mr. Sherwood Simpson took him from the van he was travelling in. He stated that Mr. Simpson had one of his hands around his neck and a gun in his other hand. He said he was shot as he tried to escape. He said he hit the shooter and as a result the gun fell. He further stated that he ran and was shot again. He claims that he suffered wounds to his neck, right side, both

lobes of his liver, gall bladder and stomach. He said he was hospitalized for two (2) months. He is now seeking exemplary damages and damages for loss of earnings and tools.

**[5]** A Certificate of Conviction dated the 29<sup>th</sup> of September 2015 was exhibited as SD/VC1 to the affidavit of Ms. Dias and Ms. Cooper, filed on 1<sup>st</sup> June 2017. It indicates that Mr. Sherwood Simpson was convicted of illegal possession of firearm and wounding with intent, apparently in relation to the incident where the Claimant, Mr. Mahoney, was injured.

**[6]** The main ground of this application is that the Claimant has relocated overseas as a result of fear. It was indicated in the affidavit of Ms. Dias and Ms. Cooper that he was under the witness protection programme before and during the trial and that he has relocated overseas. In support of this application Ms. Dias and Ms. Cooper have also exhibited a Power of Attorney from the Claimant indicating that he had appointed them to act for him. This was marked SD/VC2. The power granted to them was expressed in the following terms;

“(i) To attend mediation proceedings and to speak to my case as best as they can.

(ii) To substitute me in all proceedings in the Supreme Court and to speak to my case as best as they can.”

**[7]** In its defence, the Defendant is not denying that Mr. Sherwood Simpson was a member of the Jamaica Constabulary Force. Neither is the Defendant denying that Mr. Simpson was convicted in relation to the incident. However, the Defendant is denying that he was acting in the course of his duty when the injuries were inflicted to the Claimant. Additionally, the Defendant is not admitting that there were other assailants who were members of the Island Special Constabulary Force and the Rural Police Force who were acting in the course of their duties.

## The Issue

- [8] The issue to be determined in this application is whether an order substituting Ms. Dias and Ms. Cooper for the Claimant will enable the court to resolve the matter in dispute more effectively.

The matter in dispute being;

- (i) Whether Mr. Simpson was acting in the course of his duty or he was on a frolic of his own when he inflicted injuries to the Claimant.
- (ii) Whether injuries were in fact inflicted to the Claimant either individually or in concert with Mr. Sherwood Simpson by three other persons at least two of whom were members of the Island Special Constabulary Force and the Rural Police Force respectively while acting in the course of their duties.

## The Law

- [9] This application was brought pursuant to **Rule Section 19.2(5) Civil Procedure Rules**. This Rule governs the circumstances in which a court may order a new party to be substituted for an existing one. It reads;

*“(5) The court may order a new party to be substituted for an existing one if -*

*(a) the existing party’s interest or liability has passed to the new party;*

*or*

*(b) the court can resolve the matters in dispute more effectively*

*by substituting the new party for the existing party”.*

Therefore, in order for this application to succeed, it must be established that either

- (i) the interest of Mr. Mahoney has passed jointly to Ms. Dias and Ms. Cooper

- (ii) or that the court can more effectively resolve the issue of
  - (a) whether Mr. Simpson was acting in the course of his duty when the claimant received injuries; and
  - (b) whether other persons who were members of the Island Special Constabulary Force and the Rural Police Force inflicted injuries to the Claimant while acting in the course of their duties.

### **Submissions on Behalf of the Defendant**

**[10]** In opposing this application, Ms. Fuller-Barrett submitted on behalf of the Defendant that;

- (i) The matter is for false imprisonment and assault and battery. Therefore any evidence given by Ms. Dias and Ms. Cooper would be hearsay.
- (ii) The information that the Claimant was under the witness protection programme requires verification directly from personnel in charge of the programme.
- (iii) The reason given for the relocation is hearsay.
- (iv) The erasure on the Power of Attorney in relation to the address of the donor affects its validity.
- (v) The gravamen of the contention is that what is required under Rule 19 (2) 5 is not satisfied.

### **Submissions on Behalf of the Claimant**

**[11]** Mr. Cochrane, for the Claimant, made the following submissions;

- (i) Rule 19 2. 5 (a) is not relevant to the proceedings. The Claimant's liability or interest did not pass to applicants. Their affidavit indicates that the Claimant is out of the jurisdiction and is unable to participate in the proceedings. This is not a trial. Ms. Fuller-Barrett does not know what

the applicants have. She is assuming that they are substituting someone who is not able to speak to claim before the court.

- (ii) Rule 19.2. 5 (b) is applicable in this case. The application should be granted on that basis.
- (iii) In relation to the issue of hearsay, the Rules support hearsay evidence being given on an affidavit. (He referred to Rule 30.3 (1) and (2)) “They are informed and verily believe” is supported by the Rules. The affidavit states that the Claimant was under the witness protection programme during the trial. They are not saying that he is there now.
- (iv) The Power of Attorney is a public document. It is the copy that has been filed. He can make the original without the erasure available.
- (v) The nature of the environment in which we live, the court should decide whether it is reasonable to try our best to protect the innocent. The overriding objective of the Rules is to deal with the case justly and to ensure that the parties are on equal footing. A synopsis of the case is that the young man was shot and injured and left for dead by agent of the state. Not all are behind bars. He has given his mother and his niece power of attorney so that they can deal with the case.
- (vi) The Defendant was sued vicariously as it is being alleged that Mr. Simpson was at the time a police constable employed to the state.

## **Analysis**

**[12]** Despite the fact that this application was vigorously contested, apart from making references to the Rules, neither counsel has produced any authority in support of their respective positions.

However, I agree with counsel for both sides that this application does not fall within the ambit of Rule 19.2.5(a). The Power granted to Ms. Dias and Ms. Cooper by the Claimant does not have the effect of transferring his interest in a

quantum of damages to them. It merely gave them the authority to conduct or to participate in the proceedings.

- [13] This leaves me with the question as to whether or not the requirements of Rule 9.5.2(b) have been satisfied. The term “**more**” in this Rule is used comparatively. It therefore gives rise to the conclusion that in considering the substitution, the court will have to decide whether comparatively the substituting party is in a better or more effective position than the party being substituted to engender a more effective resolution of the issues.
- [14] The question to be asked, based on the nature of the claim and the issues arising, is whether Ms. Dias and Ms. Cooper as compared to the Claimant are better able to assist the court to effectively resolve the issues at a trial?
- [15] The remedy being sought against the Defendant is based on the legal principle of vicarious liability. It is being alleged that the Defendant is vicariously liable for the acts of Mr. Sherwood Simpson and others. That is the acts of false imprisonment, assault and battery. In light of the fact that there is no admission from the Defendant in this regard, this issue will have to be determined at the trial. On a perusal of the Pleadings, it is revealed that there is no indication from the Claimant Mr. Mahoney that Ms. Dias and Ms. Cooper were present when his injuries were inflicted. In fact, there is no indication that anyone else was present apart from himself and his assailants. The issue of vicarious liability is one that has to be determined by words and conduct prior to, during and immediately preceding the incident.
- [16] Essentially, at the trial, the Claimant will have to go beyond the fact that Mr. Simpson was convicted for illegal possession of firearm and wounding with intent to establish that the offences for which he was convicted were committed while he was acting during the course of his duty. Additionally, the Claimant will not only have to establish that the other men who participated in causing him injuries were members of the Island Special Constabulary Force and the Rural Police

Force; but he will also have to establish that during their participation they were acting in the course of their duties.

**[17] In Weir V Chief Constable of Merseyide Police [2003] EWCA CIV 111** at paragraph 12, it was stated by Sir Dennis Henry that in order,

*“to establish liability the claimant has to show more than the mere fact that the tortfeasor was a police officer. He has to show that the tort that he alleges was committed at a time when police officer was apparently acting in his capacity as constable”*

In that case, the Claimant was able to establish by the words used and conduct before and during the incident that the respondent, a police officer, was acting in the course of his duty when he inflicted the injuries to him.

**[18]** In the more recent case of **The Attorney General for Jamaica v Kenya Tulloch** [2014] JMCA Civ 13, Mangatal J at paragraph 40 stated,

*“The onus of proving liability against the Crown under S.3 of the Crown Proceedings Act remains upon he who alleges vicarious responsibility”*

**[19]** Nothing has been placed before me from which I can conclude that Ms. Dias and Ms. Cooper are able to speak to this issue. In reference to the actual incident, all they have said is,

*“That the claim arose out of an incident on December 23, 2013, wherein the claimant was taken away by four (4) members of the Jamaica Constabulary Force, the Island Special Constabulary Force or the Rural Police, shot and left for dead in bushes in the parish of Saint Mary”.*

This is found in paragraph 3 of their affidavit.

**[20]** Mr. Cochrane has submitted that counsel for the Defendant is making assumptions. He states that she is assuming that he will be bringing someone that cannot speak to the incident. However, at this juncture, I wish to highlight the fact that we have moved way beyond the era when trials are shrouded in secrecy. In accordance with the Rules, Case Management Conference Orders are usually made before trials. These orders include the exchange of witness statements and documents. Additionally, if Mr. Cochrane has someone apart



from the Claimant to speak to the facts of the incident, then that information should have been included in this application. In the absence of any such information, he has failed to satisfy the requirements of Rule 19.2.5 (b).

**[21]** Counsel, Mr. Cochrane, in support of his application, also spoke to the overriding objective of the Rules. This is outlined at Rule 1.1 (1). It states,

*“These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.”*

Rule 1.1(2) gives further clarity to Rule 1.1(1). It reads;

*“Dealing justly with a case includes -*

*(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;*

*(b) saving expense;*

*(c) dealing with it in ways which take into consideration -*

*(i) the amount of money involved;*

*(ii) the importance of the case;*

*(iii) the complexity of the issues; and*

*(iv) the financial position of each party;*

*(d) ensuring that it is dealt with expeditiously and fairly; and*

*(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”.*

Rule 1.2 mandates the court to;

*“seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules.”*

However Rule 1.3 places a certain obligation on the parties. It reads;

*“It is the duty of the parties to help the court to further the overriding objective.”*

**[22]** In my assessment of this matter, I have given due regard to the overriding objective of the Rules. In considering the objective of fairness which I believe is

of paramount consideration, I should not only regard the rights of the Claimant but also the rights of the Defendant despite the fact that this Defendant is the State. I take into consideration the fact that the Claimant has a right to advance his case. I take into consideration the fact that the Defendant equally has a right to advance its defence. If Ms. Dias and Ms. Cooper are allowed to substitute the Claimant, the trial of the issues could not be fairly dealt with. The Defendant would be hampered in advancing its case through cross examination if Ms. Dias and Ms. Cooper are unable to respond to questions in relation to the facts in issue.

**[23]** If counsel for the Claimant has other witnesses to fact, then in assisting the court to further the overriding objectives of the Rules, he has an obligation to place that information before the court so that I can more effectively decide on the issue.

**[24]** I would like to make another point about dealing with the case fairly. I do not believe that denying this application will result in any unfairness to the Claimant. I rather believe it will inure to his benefit. The fact that Ms. Dias and Ms. Cooper are unable to speak to the facts in issue could very well result in the failure of his claim. However, it is possible for him to employ other measures which will allow him to speak for himself in relation to the facts in issue.

**[25]** In fact, there is a more effective avenue that can be pursued by the attorney at law for the Claimant in assisting the court to further the overriding objectives of the Rules. In this regard, I will make reference to the Evidence (Special Measures) Act. There is in fact provision under this Act which will allow the trial to be conducted fairly and for the issues to be effectively resolved without the need for the Claimant to be physically present at the trial.

**[26]** The Act empowers the court to make orders for evidence to be given by live link. That is “a technological arrangement where a witness, without being physically present in the place where proceedings are held, is able to see and hear and be seen and heard by the persons present.”

In accordance with section 3 (b) of that Act, the court has the power to make such an order in the case of a witness in civil proceedings where,

*“the court is satisfied that the special measure is appropriate in the interests of the administration of justice.”*

## **Conclusion**

- [27]** There is no evidence before me to indicate that Ms. Dias and Ms. Cooper possess sufficient knowledge of the facts that would place them in a position to adequately establish or prove the claim, or to adequately answer questions that would be posed by opposing counsel.
- [28]** It seems to me that in the instant case, it is only the Claimant that would be able to speak to the words and conduct of Mr. Simpson and the other men for a court to properly come to a finding as to whether or not the other men participated in causing him injuries; and whether or not they were all constables acting in the course of their duties.
- [29]** Consequently, I find that on the application before me, there is insufficient evidence to satisfy the requirements of Rule 19.2.5 (b) or to further the overriding objectives of the Rules. Therefore, this application is denied.
- [30]** No order for Cost.