

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
COMMON LAW
SUIT NO. C.L. S 206 OF 2001

BETWEEN	MICHAEL SAILSMAN	PLAINTIFF
AND	THE ATTORNEY GENERAL OF JAMAICA	1 ST DEFENDANT
AND	CORPORAL POWELL	2 ND DEFENDANT

IN OPEN COURT

Cecil J. Mitchell for the claimant

Lisa White instructed by the Director of State Proceedings for the first
defendant

CLAIM FOR ASSAULT AND BATTERY - VICARIOUS LIABILITY -
WHETHER POLICE OFFICER ACTING WITHIN THE COURSE OF
EMPLOYMENT

January 18 and March 26, 2010

SYKES J

1. The sole issue in this case is whether the Attorney General of Jamaica is liable for the alleged tortious action of Corporal Jermaine Powell. Mr. Michael Sailsman was shot and injured by Corporal Jermaine Powell on May 7, 2001. There is some dispute between the claimant and the defendant over the exact time the shooting took place but that dispute is of no moment since it is common ground that Mr. Sailsman was shot by the police officer. There is no doubt that Mr. Sailsman received injuries. The firearm used was the police officer's private firearm. The police officer was not sued in his personal capacity and therefore the issue of whether he is personally liable would only arise so far as is necessary to determine whether the Attorney General would be vicariously liable for the tortious conduct of the police officer.

The evidence

2. This is Mr. Sailsman's case. He was walking along Olympic Way in the parish of St. Andrew on May 7, 2001. As he was walking he was taunted by a man who asked him if he was 'mad' again. This man turned out to be Corporal Jermaine Spence, the second defendant. Mr. Sailsman continues by saying that the man threw stones at him. According to his witness statement, Mr. Sailsman himself took up stones and threw them at the police man. The witness statement says that the police man took out his firearm and pointed it at the claimant who began to run. Shots were fired. He was shot in the back. He was taken to the Kingston Public Hospital ('KPH'). Later on he was charged with assault and wounding with intent. The evidence did not make it clear who charged Mr. Sailsman.

3. On the other hand, the police officer says that he saw Mr. Sailsman on the day in question armed with a machete in the left hand and a stone in the right. Mr. Sailsman was said to be behaving in a boisterous manner which was frightening to other person in the immediate vicinity. According to the police man, pedestrians had to be scampering for cover because Mr. Sailsman was hurling stones all in an indiscriminate manner. He said that he called out to the claimant to behave himself and to take the machete to him. The corporal testified that the claimant responded by using an expletive and then declaring his dislike for police officers. The police officer continued that Mr. Sailsman (a) threw a stone at him which crashed against a nearby wall, (b) rearmed himself with another stone which he hurled in the policeman's direction and this stone also crashed against the wall. Mr. Sailsman, obviously dissatisfied with his efforts at seriously injuring the corporal, threw a third stone which found its mark on the right arm of the policeman who fell to the ground.

4. The corporal says that he quickly sprang from the ground and as he did this Mr. Sailsman was, quite literally, moving in for the kill. Mr. Sailsman had switched the machete to his right hand, swiftly moved towards the policeman and began slashing at him. The police officer was now backed against the wall, the same wall which the two stones thrown earlier had struck. He had no room to escape so he slid against the wall to escape the slash. Mr. Sailsman not to be deterred, slashed

was beginning to slash a second time and it was at this moment that the corporal pulled his service revolver and shot Mr. Sailsman.

5. Corporal Powell said that when he saw Mr. Sailsman with the stones, he did not intend to arrest him but he was acting in his capacity as a peace officer. He was trying to prevent the commission of a crime. In his mind, therefore, he was acting in his capacity as a policeman.
6. As an aside, a strange feature of this case is that the Attorney General somehow formed the naïve view that Corporal Powell could be relied on to establish the defence that he (the corporal) was acting outside the scope of his employment on the day in question. It is hard to see how this expectation could have arisen given that in the very witness statement of Corporal Powell given some two years before the trial, he indicated potential testimony from which it could be inferred that he was saying that he was acting in the scope of his employment. He said that he called out to Mr. Sailsman and told him to bring the machete to him. He seemed to be indicating that he was acting in the scope of his employment.
7. The reliability of Corporal Powell's testimony was undermined in cross examination when he stated that (a) he knew that Mr. Sailsman received the gunshot injury to his back; (b) that Mr. Sailsman was advancing towards him at the time he pulled his firearm and discharged it. In the details of the of the cross examination, Corporal Powell had difficulty explaining how it was that Mr. Sailsman was shot in the back when he was facing the policeman at the time the shots were fired. It will be recalled that the corporal's evidence was that Mr. Sailsman was bearing down on him with machete in hand when the shots were fired.
8. I won't say that the claimant was the clearest of witnesses but this is his version. His examination in chief as reflected in his witness statement was to the effect that the police officer threw stones at him and he (Mr. Sailsman) took up stones and threw at the policeman. In cross examination he seemed to be saying that he threw no stones at all and it was the policeman alone who was throwing stones. As the cross examination went on he came back to the position in the

examination in chief. He said that the policeman was coming towards him 'with a temper' and he used the stone to ease off the policeman. I understood him to mean that he flung stones at the police officer and started to run away from the policeman. As he ran he heard shots being fired and that his how he was shot.

Assessment of the evidence

9. From the totality of the evidence I conclude that stones were being thrown by Mr. Sailsman at the policeman. I do not accept that Mr. Sailsman had any machete, or if he had the machete that he used it in the way the policeman testified. If it were the case that Mr. Sailsman had used the machete in the way indicated by the policeman then Mr. Sailsman could not have been shot in the back. He would have been shot in the front of his body. Also, the policeman claimed that he recovered the machete and gave it to one Detective Corporal Faulkner, yet the machete was not produced in court.
10. On a balance of probability, I conclude that Mr. Sailsman was shot while he was running away from the policeman who was trying to stop him from running away. I also accept that the policeman was taunting and teasing Mr. Sailsman. I believe Mr. Sailsman when he said that the policeman threw stones at him; he in turn threw stones at the policeman, ran away and was shot. This version is more plausible and has greater explanatory power than the policeman's version and so I accept. It appears that what started out as private dispute ended with the policeman trying to apprehend Mr. Sailsman as he ran from the officer.
11. The critical issues are (a) in what capacity was the policeman acting when he shot Mr. Sailsman and (b) whether at the time the policeman shot Mr. Sailsman he had any lawful justification.
12. I shall take the second issue first. In relation to the second issue, it is my conclusion that the policeman did not have any lawful justification for shooting Mr. Sailsman in the back. At the time the shots were fired Mr. Sailsman was no longer posing a threat to the policeman or to anyone. He had already discharged his stones and was retreating. The only possibility here that can assist the Attorney

General in escaping liability is if it can be said that Mr. Sailsman was a fleeing felon but the case was not the pleaded case and neither was the case conducted on this basis. I was not addressed from this perspective and so I need not consider it. Further, it would be wrong to introduce this possibility without giving the parties an opportunity to make submissions on the point. Having examined the pleadings I do not think that that route is now open to the Attorney General whose position is that the policeman was not acting in the course of his employment.

13. I do not accept that the policeman was acting in lawful self defence. When Mr. Sailsman began running away, there was no objective basis for the policeman to believe honestly that he was under attack or about to be attacked further. This remained the position when the shots were fired. Now the fact that the objective basis for an honest belief has been eroded does not necessarily mean that the belief may not have been honestly held. However, it is also true to say that the more unreasonable the basis for the belief, the easier it is to infer that it was not honestly held. Having regard to the unreliability of the police officer's testimony on the question of Mr. Sailsman's alleged use of the machete I am of the view that the police knew that he did not have any lawful basis for shooting Mr. Sailsman and this fact accounted for the difficulty he had in explaining why Mr. Sailsman was not shot in the front of his body if he were using the machete in the manner indicated by the policeman.
14. I now turn to the first issue. Miss White's cross examination of Mr. Sailsman and her re-examination of the policeman was directed at establishing that the Attorney General was not vicariously liable for the conduct of the police man. Miss White sought to establish that at the time of the shooting, the firearm was not issued to the policeman by the Government of Jamaica. No doubt she had in mind the case of *Bernard v Attorney General* (2004) 64 WIR 245 where there was discussion of the legal significance of issuing a firearm to a policeman.
15. However, the *Bernard* case is of greater significance than what I believe Miss White had in mind. In that case the claimant was at a

phone booth when the policeman came up used the words 'police', 'boy leggo dis, police', took the telephone away, eventually shot the claimant, arrested and charged the claimant with criminal offences. McCalla J (now Chief Justice) seized upon these elements to ground liability in the Attorney General. The Court of Appeal reversed her Ladyship's decision on the basis that none of those elements, singly or cumulatively, was sufficient to establish that the Attorney General was vicariously liable for the unlawful conduct of the policeman.

16. Lord Steyn in giving advice to Her Majesty in Council held that the Court of Appeal was in error in reversing her Ladyship and restored the judgment of McCalla J. A careful reading of the advice reveals a number of things. First, merely to say that a policeman is not employed to shoot persons without lawful justification, is not sufficient for the Attorney General to escape being liable vicariously. One cannot simply say that because the act of the policeman may have been a crime or a tort, then that in and of itself means that he was acting outside the scope of his duty. As Lord Steyn rhetorically asked, 'How could the shooting of the plaintiff even arguably have been regarded as a mode of carrying out the constable's official duties?' (para. 22). This shows the profound analytical weakness of analysing vicarious liability from the standpoint of whether the act done by the employee is an unauthorized mode of doing his job. Second, the determination of whether a policeman is acting in his capacity as a police officer is not determined by whether he was on duty or off duty at the material time or whether he was using his police powers as a pretext for something else. What matters is whether he was in fact acting as a police officer at the time of the tortious act. Third, the significance of whether a policeman is on or off duty at the time of the alleged tortious act is 'reduced by the fact, which is common ground, that a constable may exercise his powers outside his assigned hours of duty' (para. 14). Fourth, what may start as a purely private act on the part of a policeman can transition during the event into a tortious act done by the policeman qua policeman for which the Attorney General can be held to be vicariously liable. Fifth, the subsequent act of arresting a claimant by the policeman may be used to determine whether at the time of the tortious act, the policeman was acting qua policeman. Sixth, whether a policeman is acting in that

capacity is not influenced or determined by whether the victim of the tort knew or believed that he was acting as a policeman. This point is necessary to make because Miss White's cross examination of the claimant seemed to suggest that the claimant did not know that the corporal was in fact a policeman then he was not acting in his capacity as a policeman. Seventh, whether the Attorney General is liable depends on whether the policeman's acts were so closely connected with his employment that it is fair and just to hold the Attorney General vicariously liable.

17. A significant feature of *Bernard* is that Lord Steyn made a number of assumptions in favour of the Attorney General. These were (a) the police officer was off duty; (b) that the place where the shooting took place was outside of the police officer's area of duty; and (c) the police officer's demand for the phone was for private purposes and unconnected with his job. All these assumptions meant that the material on which the inference that he was acting in the scope of his employment was reduced considerably. However, his Lordship was able to ground liability on the following basis: (a) the police officer by announcing that he was a police man purported to rely on his office as a police man; (b) his arrest of the claimant after the shooting was retrospectant evidence that made it obvious that the police officer was relying on his police powers when he sought to take the phone from the claimant and (c) the government has issued the policeman with the firearm that was used to commit the tort. This latter point was not given much weight by Lord Steyn but was of value because it reinforced the view that the State by giving the police man the gun created certain risks including the one that occurred. His Lordship was careful to point out that it would be going too far to say that since the state gave the police man the gun that fact alone was sufficient for liability on the part of the State.

18. It is my view that what Lord Steyn was getting at was whether there was sufficient evidence to enable McCalla J to draw the inference that the policeman was acting in his capacity as a policeman. The provision of the gun by the State was neither a sufficient nor a necessary condition for vicarious liability. It simply rounded out the evidence in the case. Neither was Lord Steyn saying that the

inference could only be made if evidence of a similar kind was presented. What his Lordship was at pains to show was that the inference could be drawn because the policeman purported to act as a policeman when (a) he announced he was a police officer and (b) the subsequent arrest. It seemed to me that the act of arrest, in light of the assumptions made in favour of the Attorney General, was the decisive fact in the case. This was so even though the fact of the arrest came after the act of shooting.

19. In light of this analysis of *Bernard* the issue in the present case is whether the act of shooting the claimant can be interpreted as an act directed at apprehending the claimant coupled with the corporal's assertion that he was in fact acting as police officer is sufficient to enable me to draw the inference that he was indeed acting as a policeman thereby making the Attorney General liable because there was no lawful justification for his act of shooting.

20. It therefore means that the fact that the firearm used was the corporal's personal firearm is unimportant to the question of liability. The fact that he was off duty is equally unimportant. The fact that he was in plain clothes is irrelevant. The fact that the matter started out as a private dispute does not mean that the corporal cannot transition to acting in his capacity as a policeman. The real focus has to be on in what capacity did the policeman act when he shot Mr. Sailsman. The actual instrument used to inflict the injury has no bearing on this question. This is why the Government issued firearm in *Bernard* could not by itself ground liability.

21. A police officer is required, as Miss White pointed out in her written submissions, to keep watch day and night to preserve the peace. Corporal Powell has made it clear that he was acting as a policeman when he shot Mr. Sailsman. He testified that he was seeking to prevent the commission of a crime he called out to Mr. Sailsman when he saw him with the stones and machete. However, I have found that Mr. Sailsman did not have any machete or if he had he did not use in the manner stated by the policeman. What the policeman did do is attempt to apprehend Mr. Sailsman by shooting him in the back. It is the attempted apprehension that makes the policeman acting in his

capacity as a policeman and therefore in that context the act of shooting was closely connected with his employment. The problem was that the method of attempted apprehension was unlawful and therefore tortious. It is on this basis that the Attorney General is liable to Mr. Sailsman.

Damages

22.No medical evidence was presented and neither was there any evidence of special damage. Miss White submitted that damages ought to be nominal in these circumstances. Mr. Mitchell cited cases where substantial damages were awarded. Those cases had medical evidence that showed the extent of the injury and its consequence. Nothing like that has happened here. There is no oral evidence from the claimant indicating any long lasting effect from the injury suffered. There is no evidence even indication if he was admitted or just treated and sent home.

23.I award the sum of \$100,000.00 to the claimant as nominal damages. Costs to the claimant to be awarded in the Resident Magistrate's Court.