Neutral Citation Number: [2024] CA (Bda) 25 Civ

Civil Appeal No. 7 of 2024

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ASSISTANT JUSTICE JOHN RIIHILUOMA
CASE NUMBERS: 2021: No. 47
2022: No. 66

Sessions House
Hamilton, Bermuda HM 12

Date: 20/11/2024

Before:

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, THE HON GEOFFREY BELL
And
JUSTICE OF APPEAL, THE RT HON DAME ELIZABETH GLOSTER DBE

- -

Between:

KHAMISI M. TOKUNBO

Appellant

- and -

(1) THE COMMISSIONER OF POLICE
(2) THE ATTORNEY GENERAL

Respondents

Appearances:
Ms Victoria Greening of Resolution Chambers Ltd, Counsel on behalf of the Appellant
Mr Brian Myrie of the Attorney General's Chambers, Counsel for the Respondents

Hearing date(s): 7 November 2024
Draft Judgment circulated: 19 November 2024
Date of Judgment: 22 November 2024

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JUDGMENT

SIR CHRISTOPHER CLARKE P

1. On **19 January 2019** there was a single vehicle road traffic incident in Paget. A car which had had in it Mr Alan Robinson and Mr Khamisi Tokunbo ("the Plaintiff") left the road and came to rest down an embankment. The car belonged to the Plaintiff. A Police Officer – PC 2208 Colin Mill, the Third Defendant - was on duty in his police vehicle and was deployed to a report of a road traffic collision in the Coral Beach area.

2. After PC Mill had arrived there he arrested the Plaintiff on the grounds that he had been driving while impaired and made a demand for samples of his breath. The Plaintiff agree to provide them and was transported to the Hamilton Police Station where a further demand was made by a police sergeant for samples of breath for analysis which he declined to provide[1].

3. On **8 May 2019** the Plaintiff was charged with having care or control of a motor vehicle whilst impaired and failing to comply with a demand for a sample of breath. He was subsequently prosecuted for the offence of refusing to comply with a demand made by a police officer to give a sample of breath for analysis contrary to section 35 C (7) of the *Road Traffic Act 1947*.

4. The Plaintiff has always maintained that he was not the driver of the vehicle but a passenger in the vehicle which was being driven by Mr Robinson. On **30 May 2019** Mr Robinson pleaded guilty to refusing to provide a blood sample and was fined $ 1,000 and banned from driving for 18 months.

5. In **October 2019** there was a two-week trial of the Plaintiff. On **21 October 2019** Acting Magistrate Valdis Foldats found the Plaintiff not guilty of the charge against him. The decision of the Learned Acting Magistrate is detailed. In essence he found that PC Mill did not possess an honest subjective belief that he had reasonable and probable grounds to believe that the Plaintiff had been driving the car whilst his ability to drive was impaired by alcohol, which he needed to have in order to arrest the Plaintiff and require him to give samples of breath: see section 35 C (1) of the *Road Traffic Act 1947.*

6. On **9 February 2021** the Plaintiff began proceedings – Action 2021 No 47 - against, initially, the Commissioner of Police ("the Commissioner") and, later, by amendment, the Attorney General ("the AG") and PC Mill, claiming damages , in tort, in respect of what he said had been his unlawful arrest and detention. The arrest was said to be unlawful because PC Mill did not have any reasonable grounds to believe that the

[1] This account of events is derived from the judgment of the court referred to in paragraph [5].

Plaintiff had committed any relevant traffic offence, and he lacked "*the honest subjective and/or the objective and reasonable and probable grounds for making any demand for"* a breath test or for arrest or detention. The Plaintiff claimed that the Commissioner and/or the AG representing the Crown were vicariously responsible for the acts of PC Mill. In Action 2021 No 66 the Plaintiff claimed damages for unlawful arrest based upon alleged breaches of his constitutional right to protection from arbitrary detention.

7. An application was then made on behalf of the Commissioner and the AG to strike out the Re-Re-Amended Specially Endorsed Writ of Summons on the grounds that it failed to disclose a reasonable cause of action against them and that the proceedings amounted to an abuse of court.

8. By a judgment dated **20 April 2023** Assistant Justice John Riihiluoma struck out the tort claim against the Commissioner and the AG. He did so on the basis that he saw no reason not to follow the decision of Hargun CJ in *Warrell v The Director of Public Prosecutions and others* Civil Jurisdiction [2022] No 129, approving the judgment of Kessaram AJ in *Akinstall v The Commissioner of Police* Civil Jurisdiction 2003 No 58. He also struck out the constitutional claim on the basis that the tort claim provided the Plaintiff with adequate means of redress.

9. In the *Worrell* case the Plaintiff had sought damages for false imprisonment, conspiracy to injure and malicious prosecution. His claim was against seven defendants including the Commissioner. In relation to the claim in respect of what was said to be the vicarious liability of the Commissioner Hargun CJ was referred to the *Akinstall* case (where the claims for which the Commissioner was said to be vicariously liable were in libel, slander and conspiracy to injure) which contains the following passages:

"I was referred by Crown Counsel Melvin Douglas acting for the Police Commissioner to the case of Enever v The King (1906) 3 CLR 969 for an understanding of the position in law of police officers vis-a-vis their appointing authority. That case makes it clear (specifically in relation to the position in Tasmania) that a police officer occupies a public office. I do not believe the position is any different in Bermuda. The appointment of police officers (except the Commissioner and Deputy Commissioner) is made by the Governor on the recommendation of the Public Service Commission ...

It seems to follow that the Police Commissioner is not being sued as the Crown for the acts or omissions of his officers. In the circumstances, section 3 of the Crown Proceedings Act 1966 does not apply. But even if (allowing a great degree of latitude to the Plaintiff in the way the case is presented) was to be treated as the Crown, it is clear on the authority of Enever that no liability would attach on the basis of the principle of respondeat superior notwithstanding s. 3 of the Crown Proceedings Act. One reason put forward for the rule of law (that the appointing authority of the police officer is not responsible for the acts or omissions of the police officers) is that a police officer is performing a public duty. It is the nature of the duties performed by the police

officers and not the relationship between the police officer and the body appointing him that is important. As was stated by Griffith, CJ in Enever:

> *"Now, the power of a constable, qua peace officer, whether conferred by common law or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself If he arrests on suspicion of felony, the suspicion must be a suspicion, and must be reasonable to him. If he arrests in a case in which the arrest may be made on view, the view must be his view, not that of someone else. Moreover, his powers being conferred by law, they are definite and limited, and there can be no suggestion of holding him out as a person possessed of greater authority than the law confers upon him. I dispose to think that this is a sounder basis for the rule of the immunity of those who appoint constables for their acts than that suggested by Wills J A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.* "

I have been given no reason to treat the position of police officers in Bermuda as being different to that in Australia. In my view the position is the same. In any event, as provided for in the Bermuda Constitution Order I 968, the Police Commissioner does not appoint police officers. They are appointed by the Governor upon the recommendation of the Public Service Commission. Thus, if the doctrine of respondeat superior were to have any application in the context of this case, it would be against the Governor that any proceedings would be directed. As noted earlier, however, such a claim would be bound to fail having regard to the nature of the duties performed by police officers. "

In the light of those observations it would appear that Kessaram AJ regarded the potential defendant as the Crown whose vicarious liability did not, however, arise because of the fact that a police officer's powers were exercised by him by virtue of his office. It appears from the decision in *Akinstall* that an application was made by the Plaintiff to substitute the Attorney-General but, for reasons which are not apparent, that summons was withdrawn.

10. At paragraph [34] of his judgment Hargun CJ accepted that the correct legal position in relation to vicarious liability was as set out by Kessaram AJ in *Akinstall*. He struck out the cause of action against the Commissioner based upon the doctrine of vicarious liability as unsustainable.

11. With respect to those who have taken a different view it does not seem to me that the fact that a police officer, in relation to some of his acts, can only act lawfully if he has a particular subjective view on reasonable grounds, or that he has no greater authority than the law confers upon him, is a sound basis for concluding that no one has any vicarious liability for a police officer's actions. If it were so, the curious result would follow that, if, when pursuing a suspect, a police officer drove carelessly and seriously

injured a member of the public, the only right of relief would be against the individual officer concerned.

12. The true position, as I see it, is that police officers are servants or agent of the Crown and, as such, the Crown is vicariously liable for their wrongful acts or omissions. That position was expressed with extreme clarity by Mussenden J, as he then was, in *Reynolds v Attorney General of Bermuda (as the relevant entity under the Crown Proceedings Act 1966)* [2022] SC (Bda) 35 Civ (26 May 2022).

13. The first two paragraphs of his judgment read as follows:

> *Introduction*
>
> *1. The Plaintiff PC Joseph Reynolds ("PC Reynolds") was employed by the Bermuda Police Service (the "BPS") as a police constable at all material times.*
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> *2. Pursuant to section 3(1)(a) of the Crown Proceedings Act 1966, the Defendant, on behalf of the Crown, is liable for torts committed by its servants or agents, in this case the BPS."*

There appears to have been no suggestion from the Attorney General to the contrary.

14. This is not surprising. The question was addressed by the Privy Council in *Bernard v The Attorney General of Jamaica* [2004] UKPC 47. In that case the issue was whether it had been open to the trial judge, on the evidence placed before her, to find that the Attorney General of Jamaica was vicariously liable for the unlawful shooting of an individual by a constable of the Jamaica Constabulary. It was common ground that in Jamaica a constable was an employee of the Crown. The Court of Appeal had allowed the appeal, with reluctance, on the ground that the police constable's conduct was of such a nature that he could not be seen to be acting in the lawful execution of his duty.

15. The Privy Council held that the reasoning of the Court of Appeal was defective. The Committee said this:

> "*23 As Lord Millett observed in Lister it is by itself "no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty": para 79, at 248F. For example, in Lister the warden was acting exclusively in his own perverted interests. On the other hand, the Board is firmly of the view that the policy rationale on which vicarious liability is founded is not a vague notion of justice between man and man. It has clear limits. This perspective was well expressed in Bazley v Curry (1999) 174 DLR (4th) where McLachlin J observed (at 62):*
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> > *"The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a*

> *connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."*
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> *The principle of vicarious liability is not infinitely extendable.*
>
> *24 The Board concludes that the reasoning of the Court of Appeal in the present case cannot be supported. It does not, however, follow that the conclusion of the Court of Appeal was wrong. That question depends on the correct application of the principle for which Lister is now authority.*
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> *25 Three features of the case must be considered. It is of prime importance that the shooting incident followed immediately upon the constable's announcement that he was a policeman, which in context was probably calculated to create the impression that he was on police business. As a matter of common sense that is what he must have intended to convey. It may be that the plaintiff, and others in the queue, viewed this invocation of police authority with some scepticism. But that purported assertion of police authority was the event which immediately preceded the shooting incident. And it was the fact that the plaintiff was not prepared to yield to the purported assertion of police authority which led to the shooting: compare Weir v Bettison (CA) [2003] ICR 708, para 12, per Sir Denys Henry.*
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> *26 Approaching the matter in the broad way required by Lister, the constable's subsequent act in arresting the plaintiff in the hospital is explicable on the basis that the constable alleged that the plaintiff had interfered with his execution of his duties as a policeman. It is retrospectant evidence which suggests that the constable had purported to act as a policeman immediately before he shot the plaintiff.*
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> *27 Moreover, one must consider the relevance of the risk created by the fact that the police authorities routinely permitted constables like Constable Morgan to take loaded service revolvers home, and to carry them while off duty. The social utility of allowing such a licence to off duty policemen may be a matter of debate. But the state certainly created risks of the kind to which Bingham JA made reference. It does not follow that the using of a service revolver by a policeman would without more make the police authority vicariously liable. That would be going too far. But taking into account the dominant feature of this case, viz that the constable at all material times purported to act as a policeman, the risks created by the police authorities reinforce the conclusion that vicarious liability is established.*
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> *28 Cumulatively, these factors have persuaded the Board that the trial judge was entitled to find vicarious liability established and that the Court of Appeal erred in allowing the appeal."*

16. The Privy Council had also addressed the question of vicarious liability in an earlier case in the same year: *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12. In that case a police officer employed by the Royal Virgin Islands Police

Force, having abandoned his post, entered a crowded bar where his partner worked as a waiter and, in a fit of jealous rage at finding her there with another man, fired four shots at her with a police service revolver. The claimant, a tourist at the bar, was seriously injured and claimed damages for negligence against the Attorney General representing the Government of the British Virgin Islands. The question of vicarious liability arose only on the appeal to the Privy Council, which held that since, at the relevant time, the officer had abandoned his post and embarked on a vendetta of his own, the wrongful use of the gun was not something done in the course of his employment. The claimant did, however, succeed on the basis that the police authorities had owed the claimant a duty of care, which they had broken, to see that the officer was a suitable person to be entrusted with a dangerous weapon.

17. As to vicarious liability the Privy Council said this:

> *"14 The immediate cause of Mr Hartwell's injuries was the deliberate, reckless act of Laurent firing his revolver in the crowded bar. Laurent was consumed by anger and jealousy at the sight of Ms Lafond in company with Mr Vanterpool on the fateful evening. He fired shots at one or other or both of them. So this is not a case where a police officer used a service revolver incompetently or ill-advisedly in furtherance of police duties. Laurent used a service revolver, to which he had access for police purposes, in pursuit of his own misguided personal aims.*
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> *15 Mr Hartwell's claim is that, nonetheless, the Government of the British Virgin Islands is liable in law for the consequences of PC Laurent's wrongful acts. There are many circumstances where one person may be liable for a wrong deliberately committed by another. Foremost among such instances are those giving rise to "vicarious" liability of an employer for acts done by an employee in the course of his employment. Mr Hartwell has advanced a case based on the Government's vicarious liability as employer for acts done by Laurent as a police officer.*
>
> *16 This is not Mr Hartwell's primary case, but it will be convenient to mention it first as the outcome of this claim is clear cut. The applicable test is whether PC Laurent's wrongful use of the gun was so closely connected with acts he was authorised to do that, for the purposes of liability of the Government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of his employment as a police officer: see Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 AC 215, 230, 245, paras 28, 69, and Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48, [2003] 2 AC 366, 377, para 23,. The connecting factors relied upon as satisfying this test are that Laurent was a police constable on duty at the time of the shooting (working his three day shift on Jost Van Dyke), that his jurisdiction extended to Virgin Gorda, and that before leaving Jost Van Dyke he had improperly helped himself to the police revolver kept in the substation on that island.*
>
> *17 These factors fall short of satisfying the applicable test. From first to last, from deciding to leave the island of Jost Van Dyke to his use of the firearm*

> *in the bar of the Bath & Turtle, Laurent's activities had nothing whatever to do with any police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost Van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of "a frolic of his own".*

18. This case is, therefore, an example of a situation where the acts of the police officer were so far removed from his duties and functions as a police officer that no vicarious liability arose.

19. In the light of these authorities (neither of which was drawn to the attention of the judge at the hearing[2]) Mr Myrie accepted that the Attorney General was vicariously liable for the acts of PC Mill unless what PC Mill did should be regarded as not falling into the ambit of vicarious liability as identified in the authorities. Whilst he made some submissions as to why that might be so[3] he accepted, as I understood him, and it must in any event be the case, that that issue falls to be determined at trial. The arrest which was said to be tortious was carried out by a police officer in uniform (with a bodycam), on duty, responding to the report of an incident, and purporting to exercise the powers of a policeman. These are sufficient *prima facie* grounds to suggest that he was acting (wrongfully) in the ordinary course of his employment.

20. If the AG is vicariously liable for the acts of PC Mill within the scope of his employment, then it is accepted that the Plaintiff has adequate means of redress within the meaning of section 15 of the Constitution. Riihiluoma AJ accepted that that was the position if the only remedy of the Plaintiff was against PC Mill, a proposition which I find questionable but upon which it is not necessary to decide.

21. In the light of that Ms Greening did not seek to press the claim against the Commissioner of Police. I do not propose to make any final decision on potential vicarious liability of the Commissioner. But it would seem to me that he is not to be held vicariously liable for the torts of the police. He has the command of the Police Service and is responsible for its administration: see section 3 of the *Police Act 1974*. But that does not, as it seems to me, render him vicariously liable for the acts of police officers any more than a general is responsible for the acts of his soldiers. The position is different in the UK where section 88 of the *Police Act 1996* makes the chief officer of police for a police area liable in respect of torts committed by constables under his direction and control and provides for payment of any damages out of the police fund.

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[2] *Bernard* was relied on in support of the application for leave to appeal.

[3] The evidence before the Magistrate at the October 2019 hearing suggests that PC Mill was motivated to try and help Mr Jefferis, (who had said that he had to pull Mr Robinson out of the passenger window) out in some way; and, on one view, suggests that he intended to treat the Plaintiff differently because he was a Magistrate.

22. Accordingly, the order that I would make is to allow the appeal against the decision to strike out the claim against the Attorney General, who must remain as a defendant. I would order that the Second Respondent, the Attorney General should pay the Appellant his costs of the appeal and of the tort strike out claims below to be taxed on the standard scale. I see no reason to make some different order in respect of the costs of the Commissioner, given that the Commissioner and the AG have been represented by the same counsel both here and below.

Other decisions

23. There are a number of decisions which have addressed the question of vicarious liability (or assumed it) which I think it appropriate to mention.

24. In the case of *Gladwyn Simmons v The Commissioner of Police* [2008] Bda LR 10, the claim was for damages said to have been caused to a yacht owned by the plaintiff which was detained pursuant to an investigation under the provisions of the Misuse of Drugs Act 1972. Bell J, as he then was, struck out a writ and statement of claim in which the defendant was the Commissioner on the basis that the Commissioner was not vicariously liable for the acts and omissions of police officers. The learned judge agreed with all that has been said by Kessaram APJ in *Akinstall*. He also referred to a decision of Ground J in *Smith v Attorney General* (Ruling dated 8 October 1992) in which he referred to the fact that the Chief Justice should not be vicariously liable for the alleged default of the Registry staff because "*they are public officers and as such are employed by the Crown"* – similar to the position of the police. He also referred to the potential substitution of the Attorney General as the representative of the Crown (15); but observed that there was no application in that respect. If there had been such an application, and the decision in *Akinstall* was applied, it would appear that the Plaintiff would still have failed.

25. In *The Commissioner of Police v Dr Mahesh Sannapareddy* Civil Appeal No 12 of 2017 [20 March 2020] the question of whether Dr Sannapareddy's arrest and the search of his home were unlawful, as they were held to be, was addressed in judicial review proceedings in which the Commissioner was the Respondent. An application for damages was adjourned to a date to be fixed. The decision did not address any question of vicarious liability.

26. In *Harper v The Commissioner of Police Service* [2022] SC (Bda) 72 Civ (6 October 2023), the applicant sought judicial review of the decisions made on behalf of the Commissioner to arrest her and search her home .The Court declared her arrest and subsequent arrest to have been unlawful; to have been unlawful and gave her liberty to apply for a further hearing in order to determine the amount that the Commissioner should pay the applicant by way of compensation for unlawful arrest.

27. These latter two cases proceeded on an assumption, which I do not share, that vicarious liability rested with the Commissioner. They also took no account of the decision in *Akinstall* and *Worrell*.

28. In *Cox v Minister of Justice* [2016] UKSC 10 the Supreme Court of the United Kingdom was concerned with whether the Ministry of Justice was vicariously liable for the injury caused by a prisoner working in the prison kitchen who dropped a sack of rice on the back of the catering manager. The Supreme Court upheld the decision of the Court of Appeal that the Ministry was liable. The decision provides a useful examination of the law of vicarious liability. A decision that the Crown is vicariously liable for the torts of police officers is, in my view, entirely consistent with that decision.

BELL JA

29. I agree.

GLOSTER JA

30. I, also, agree.