



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2021: No. 47 & 2022: No. 66**

**BETWEEN:**

**KHAMISI TOKUNBO**

**Plaintiff**

**-and-**

**THE COMMISSIONER OF POLICE**

**First Defendant**

**-and-**

**THE ATTORNEY GENERAL**

**Second Defendant**

**-and-**

**PC COLIN MILL**

**Third Defendant**

**JUDGMENT**

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**Before: JOHN RIIHILUOMA Assistance Justice**

**Representation: VICTORIA GREENING for the Plaintiff**  
**BRIAN MYRIE for the First and Second Defendant**

**ALLEN DOUGHTY for the Third Defendant**

**Date of Hearing: 1 February 2023**

**Date of Judgment: 20 April 2023**

*Application to strike out Statement of Claim, unlawful arrest, vicarious liability of the First and Second Defendants, scope of Constitutional claims*

**RIIHILUOMA AJ**

1. This matter comes before me on applications brought by the Defendants to strike out two Statements of Claim brought by the Plaintiff claiming damages for unlawful arrest.

**BACKGROUND**

2. The Plaintiff is a Magistrate. On 19 January 2018 the Plaintiff was involved in a single vehicle road traffic accident in Paget. The Plaintiff was arrested by the Third Defendant, a police officer on charges of having care and control of a vehicle whilst impaired and failing to provide sample of breath. The claims against First and Defendants are based on vicarious liability.
3. Following a two week trial in Magistrates' Court the Plaintiff was acquitted of all charges on 19 October 2019. The Plaintiff relies heavily on the judgment of Acting Magistrate Foldats to support his claim that his arrest was unlawful.

**THE STATEMENTS OF CLAIM**

4. Both Statements of Claim rely upon the same facts. Action 2021: No 47 is a claim for damages based on the tort of unlawful arrest (“the tort claim”). Action 2022: No. 66 is a claim for damages for unlawful arrest based upon alleged breaches of the Plaintiff’s constitutional rights (“the constitutional claim”).

#### **THE FIRST AND SECOND DEFENDANTS’ CASE**

5. Mr Myrie for the First and Second Defendants case is straight forward, under Bermuda law the First and Second Defendants are not vicariously liable for the actions of serving police officers. He relies on the Decision of Hargun CJ in *Worrell v The Director of Public Prosecutions and others* Civil Jurisdiction [2022] No 8. The Chief Justice approved and followed Kessaram AJ’s judgments in *Akinstall v The Comissioner of Police* Civil Jurisdiction 2003 No. 58 which makes clear that as a matter of Bermuda law the Commissioner of Police is not vicariously liable for the actions of police officers. The Chief Justice found that same principle applied to the Director of Public Prosecutions.
6. Ms Greening on behalf of the Plaintiff argued that I should follow English precedent and find that the First and Second Defendants are vicariously liable for the acts of police officers. The decisions in *Worrell and Atkinslall* are well reasoned and focus on the situation in Bermuda. I can see no reason not to follow these decisions. I find that the First and Second Defendant are not vicariously liable for the actions of the Third Defendant as a matter of Bermuda law. Accordingly, I strike out the Plaintiff’s claims against First and Second Defendants in both actions.

#### **THE THIRD DEFENDANT’S CASE**

7. Mr Doughty for the Third Defendant bases his strike out applications on two theories. First, as a matter of interpretation of the Bermuda Constitution, the Plaintiff is not entitled to bring the constitutional claim because he has an alternative remedy, namely, the tort claim. Second, Mr Doughty contends that the tort claim should be struck out because the Statement of Claim is not pleaded with sufficient particularity.
  
8. The constitutional claim alleges that the Plaintiff's right to Constitutional protection from arbitrary detention had been violated by the Third Defendant's actions and seeks damages. Mr Doughty relies on section 15 of the Constitution which provides:

***Enforcement of fundamental rights***

*(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

*(2) The Supreme Court shall have original jurisdiction—*

*a. to hear and determine any application made by any person in pursuance of subsection (1) of this section; and*

*b. to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:*

*Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.*

9. Mr Doughty submits that the common law tort claim provides the Plaintiff with adequate means of redress. Ms Greening did not present any cogent reasons as to why the tort claim was inadequate or why it needed to be bolstered by the constitutional claim.
10. In the circumstances, I strike out the constitutional claim. It remains to consider whether the tort claim is liable to be struck out on the pleading grounds contended for by the Third Defendant.
11. Mr Doughty complains on behalf of the Third Defendant that the Statement of Claim in the tort claim does not have a heading captioned “Particulars” and that in any event it lacks sufficient specificity as to what the Plaintiff is relying on. So far as is material the tort claim Statement of Claim states:

**Statement of Claim**

2. *The Third Defendant, PC #2208 Colin Mill, is, and at all times was, a police constable in the employment, office or agency of the Bermuda Police Service.*
3. *On the 19<sup>th</sup> day of January 2019, PC Mill was on duty, in his police vehicle, and deployed to a report of a road traffic collision in the Coral Beach area.*
4. *The Plaintiff had been a passenger travelling in a vehicle that left the road and came to rest down an embankment.*
5. *On the 19<sup>th</sup> day of January 2019, the Plaintiff was unlawfully arrested by PC Mill and was unlawfully detained by him. He was taken to the police station and unlawfully detained further.*
6. *Subsequently, on the 8<sup>th</sup> day of May 2019, on behalf of the Defendant, 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.*

7. *Without prejudice to the burden of proof that is upon the Defendants to prove the lawfulness of the actions of PC Mill in all respects trespassing upon the person and liberty of the Plaintiff, PC Mill did not have reasonable and probable grounds for believing that the Plaintiff had committed any relevant offence on 19<sup>th</sup> January 2019. PC Mill lacked the honest subjective and/or the objective reasonable and probable grounds for making or procuring the making of any demand for breath under section s.35C(1) of the Road Traffic Act 1947; and/or for arrest and/or for detention.*

8. *It was known to or ought to have been known to PC Mill if properly and lawfully conducting his investigative duties, and/or considering the constellation of objectively discernible facts, that:*

- a. No person claimed to have witnessed the Plaintiff driving the vehicle and there was no evidence of the same; and/or*
- b. The Plaintiff informed PC Mill that Mr. Alan Robinson was the driver of the vehicle; and/or*
- c. If Mr. John Jefferis who was known to PC Mill, is alleged by PC Mill (and no admissions are made as to the same) to have said that Mr. Jefferis pulled Mr. Robinson out from the passenger side of the vehicle, this was an impossibility given the position of the vehicle on a 45-degree angle; and/or*
- d. PC Mill failed to examine the vehicle; and /or*
- e. Mr. Jefferis had a history of appearing before the Plaintiff facing charges for indictable drugs offences, and with an antecedent record of dishonesty and questionable credibility; and/or*
- f. Mr. Jefferis when asked by PC Mill expressly stated that he could not say if the Plaintiff had been the driver; and/or*
- g. Mr. Robinson had suffered injury in the collision and was bleeding from his forehead and face, and his asserted condition at that time may be related to the suffering of those injuries; and/or*
- h. The account available from the witness who called 911 and who was able to state that the Plaintiff was not the driver; and/or*

i. *The absence of evidence that the Plaintiff was impaired in his ability to drive.*

9. *PC Mill intentionally and deliberately, or with reckless disregard for his duties, failed to act honestly and in accordance with his duty investigate the situation he attended and/or PC Mill acted in a manner intentionally hostile or biased or discriminatory towards to Plaintiff. In particular, he turned on and off his Body Worn Video camera and/or audio-record whilst speaking to a potential witness and told the witness that PC Mill was “loathe to let someone like this get away with this s\*\*t. You know me from a long time; if you can help me out, I can try and do what I gotta do with you”. Magistrate Foldats found that PC Mill’s interaction with the main witness at the scene “was unprofessional and disclosed a bias against the Plaintiff “and some sort of quid pro quo with Mr. Jefferis”.*

12. I accept the there is no heading in the tort claim Statement of Claim headed “Particulars” but this is not fatal. In my opinion the tort claim Statement of Claim read as a whole adequately pleads with particulars the Plaintiff’s common law claim for unlawful arrest. The Third Defendant should not have difficulty in pleading a Defence as the Plaintiff’s case is reasonably clear on the face of the Statement of Claim. Accordingly, I decline to strike out the Plaintiff’s tort claim Statement of Claim against the Third Defendant.

## **SUMMARY**

13. The constitutional claim is struck out. The tort claim against the First and Second Defendants is struck out. The tort claim against the Third Defendant stands.

14. Unless the parties apply within 14 days for a different order, I rule that the Defendants shall have the costs of the constitutional strike out claim. The First and Second Defendants shall have the costs of the tort strike out claim.

Dated 20 April 2023



  
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**JOHN RIIHILUOMA**  
Assistant Justice