VICARIOUS LIABILITY OF GOVERNMENT — MUST THE EMPLOYEE-TORTFEASOR BE IDENTIFIED?

Haji Abdul Rahman v. *Government of Malaysia* [1]

The plaintiff in the instant case brought an action against the Government to recover damages arising from a traffic accident allegedly caused by the negligence of the driver of a Government motor vehicle. The driver himself was not made a party to the action.

At the hearing, the Court upheld a preliminary objection by the State Legal Adviser that the action was statute-barred as it was not commenced within twelve months from the date the cause of action arose,[2] and summarily dismissed the contention of counsel for the plaintiff that the date on which the writ was submitted for registration was the date of the commencement of the action and not the date on which it was issued.

The case might have ended there. However, Abdul Aziz J. went on to determine what he considered was the second question in the case: *viz.,* whether action would lie against the Government as principal when the servant of the Government was not also a defendant to the action. He quoted at length the relevant provisions of the Government Proceedings Ordinance, 1956, which prescribes the liability of the Government in actions on tort. Section 5 reads:

> . . . Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent. . . .

Section 6(1) reads:

> No proceedings shall lie against the Government by virtue of s. 5 in respect of any act, neglect or default of any public officer, unless proceedings for

29. *Re H. K.* and *Lafieur* v. *Guay, ante.*

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1. [1966] 2 M.L.J. 174.

2. See s. 2 (a) of the Public Authorities Protection Ordinance, 1948.

> damages in respect of such act, neglect or default *would have lain against such officer personally.*

Section 6(4) reads:

> No proceedings shall lie against the Government by virtue of s. 5 in respect of any act, neglect of default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government. . . .

After citing these statutory provisions, the learned judge then arrived at a rather curious conclusion. His Lordship said:

> All this *[i.e.* the above sections] contemplates that the identity of the officer must be ascertained and the liability of the officer must be established before the Government can be made liable. ...

It is submitted that this interpretation given by Abdul Aziz J. is, among other things, much too narrow and restrictive. Apart from the fact that it makes it very inconvenient for the plaintiff to bring an action against the Government, it may also place him in some circumstances at their tender mercies as they may decide not to reveal the identity of their negligent servant. There is a presumption of statutory interpretation that the Legislature does not intend what is inconvenient or unreasonable unless this is an irresistible inference from the surrounding circumstances, or unless the intention is expressly stated in the words of the statute.[3]

One main purport and intention of the Government Proceedings Ordinance is to render the Government liable to an action in tort where previously it was immune. Its purpose is to make the liability of the Government correspond, as far as possible, to that of a private individual, and accordingly to render the Government vicariously liable for the torts of its servants by an analogy with the common law rules of vicarious liability.[4] It is difficult to define the exact scope within which the analogy will hold good. But obviously the vicarious liability of the government is not coextensive with that of an individual employer. Section 6(1), apart from any other implications it may have, appears to indicate that the government employer will be liable for the tortious act of its employee only if the employee himself would have been liable "personally". This is clearly not the position at common law as regards vicarious liability. For example, in the case of an employee who negligently injures his wife in the course of his employment, the wife would not be able to sue the husband [5] but she could sue his employer.[6] Nevertheless, s. 6(1) does not go so far as to warrant the view that in all cases the employee whose wrongful act is in question must be identified. There may be cases where it is sufficient for a plaintiff to show that one (or more) of a group of persons who are in government employment has (or have) tortiously caused harm to him in order to make the government liable vicariously.[7] If the burden is on the plaintiff to identify the particular wrongdoer (or wrongdoers), the right which is given him by s 6 may in many conceivable cases be defeated by practical difficulties. At any rate, the device of *res ipsa loquitur* which is very useful in imposing vicarious liability on a private employer for the tort of some unidentified person in his employment will then be of no avail in a proceeding against the government.

Even if the learned judge's interpretation that the government employee must be identified be correct, it does not necessarily follow (as the learned judge thought) that the identified person *must* be brought in as a party to the defence. Surely it is no stretch of the language of the relevant provisions to hold that the identity of the employee can well be ascertained and his liability established without having to bring him into court.

3. See Odgere, *The Construction of Deeds and Statutes,* (4th Ed. 1956) p.2 76. See also *In re A.B. & Co.* [1900] 1 Q.B. 541 at p. 644; *Attorney-General for Canada* v. *Hallet & Carey Ltd.* [1952] A.C. 427 at p. 449.

4. See Street, *Government Liability — A Comparative Study* (1953) at p. 36.

5. *Tinkley* v. *Tinkley* (1909) 25 T.L.R. 264.

6. *Smith* v. *Moss* [1940] 1 K.B. 424.

7. This position seems to be that envisaged by s. 6(4).

S. 6(1) is to protect the Government from liability where an Act of State would have been a defence to the servant. The words "would have lain against such officer" should, in the ordinary sense mean "would have lain against such officer had he been made a party to the action," but does not mean that making him a co-defendant is a pre-requisite to bringing a successful action against his employer, the Government. Besides, there is nothing expressed or implied in s. 6(4) to support the contention that the driver must be hauled in as a party. On the contrary, this section would seem to show that an action shall lie against the Government in respect of an act of negligence of any of its public officers so long as the officer was at the material time employed and paid by the Government.

It is therefore submitted that the learned judge erred in so far as he held that the driver of the motor vehicle must (a) be identified and (b) as a necessary corollary to (a) be made a party to the action.

Finally, there may also be a policy argument against the insular view adopted by the Court. One should not construe an Act of Parliament as interfering with or injuring the aggrieved party's rights to just compensation unless one is clearly obliged to so construe it.[8] It is respectfully submitted that the relevant provisions in quesion far from obligating his Lordship to restrict the plaintiffs rights to recover damages in tort against the government are meant to protect the interests of the plaintiff and to confer him rights not hitherto recognised. In holding as he did, the noble judge seemed to have showered his sympathies on the wrong side.

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8. See *Attorney-General* v. *Homer* (1884) 14 Q.B.D. 246, *per* Brett M.R. at p. 257.

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