[1999–00 Gib LR 243]

A.F. GAIVISO v. COMMISSIONER OF POLICE, FIELD and SHOESMITH

SUPREME COURT (Schofield, C.J.): June 21st, 1999

Police—execution of duty—negligence—may be liable to acquitted suspect for damage caused by negligent performance of investigatory procedures, e.g. identification—no dismissal of damages claim on public policy grounds alone

Human Rights—fair hearing—dismissal of claim on public policy grounds—dismissal, on public policy grounds alone, of negligence claim against police by acquitted suspect is breach of right to fair hearing of civil claim under European Convention on Human Rights, art. 6(1)—each case to be decided on merits

The plaintiff was charged in the magistrates' court with offences against the person.

The plaintiff was charged with causing grievous bodily harm with intent, causing grievous bodily harm, and violent behaviour, and was remanded in custody. He pleaded guilty to the lesser charge and was acquitted, following a trial by jury, of the two more serious offences. The time he had spent in custody pending trial exceeded the sentence imposed by the court for the lesser offence. He brought proceedings against the Commissioner of Police and the two investigating officers for breach of the identification procedures which had led to his being identified by the complainant and, consequently, to his being charged and remanded in custody for offences of which he was later acquitted.

The defendants applied to have the statement of claim struck out as disclosing no cause of action.

The plaintiff submitted that the defendants owed him a duty of care to comply with proper investigative procedures and that they had been negligent in the performance of that duty, resulting in the unwarranted loss of his liberty pending trial.

The defendants submitted that (a) the plaintiff was unable to establish a sufficient causal link between the alleged breaches of procedure and his remand in custody by the magistrates' court pending trial; and (b) it was contrary to public policy for the police to be held liable in damages for any such breach.

Held, dismissing the application to strike out:

(1) The court would not strike out the plaintiff's negligence claim on

public policy grounds. The English courts had consistently dismissed on those grounds claims seeking to establish liability on the part of the police to the victims of crime and their families for failure to apprehend criminals, but in no case had the same objection been upheld in respect of liability to accused persons. Furthermore, the European Court of Human Rights had held that to regard the public policy issue as a blanket defence in all cases was an unjustifiable restriction on a plaintiff's right, under art. 6(1) of the European Convention, to have his civil claim heard, and that all cases must be considered on their merits (paras. 9–13).

(2) Nor would the plaintiff's claim be struck out at this stage on the basis that the plaintiff would be unable to establish the necessary causal connection between the defendants' negligence and the damage he had suffered. It would not be easy to show that his being identified had led directly to the charges laid against him, since other factors would also have been involved in the decision to prosecute. Moreover, the decision to remand him had been taken by the Magistrate, not the defendants. However, the plaintiff would be given the opportunity to prove his case by evidence. The application would be dismissed (paras. 14–17).

Cases cited:

(1) *Hill* v. *Chief Const. (W. Yorks.)* (1985), 136 New L.J. 239; on appeal, [1988] Q.B. 60; [1987] 1 All E.R 1173; on further appeal, [1989] A.C. 53; [1988] 2 All E.R. 238, not followed.

(2) *Osman* v. *Ferguson*, [1993] 4 All E.R. 344; on appeal, *sub nom. Osman* v. *UK* (1998), 29 E.H.R.R. 245; [1999] 1 FLR 193; [1998] T.L.R. 684, followed.

(3) *Welsh* v. *Chief Const. (Merseyside)*, [1993] 1 All E.R. 692, considered.

Legislation construed:

Rules of the Supreme Court, O.18, r.19(1):

> "The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in the indorsement, on the ground that—
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> (*a*) it discloses no reasonable cause of action . . ."

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), art. 6(1): The relevant terms of this paragraph are set out at para. 12.

D.G. Hughes for plaintiff;
C. Pitto for the defendants.

1 **SCHOFIELD, C.J.:** On September 6th, 1997 the plaintiff was arrested by police officers on suspicion of being involved in serious

assaults on a person identified in the statement of claim as "the complainant." The plaintiff was held in custody at New Mole Police Station and at about 3.30 a.m. the second and third defendants, who are police officers in the Royal Gibraltar Police Force, confronted the plaintiff with the complainant for the purposes of identification. It seems the plaintiff was identified by the complainant, for he was charged with the offences of causing grievous bodily harm with intent, causing grievous bodily harm, and violent behaviour. It is the plaintiff's claim that such charges were as a direct result of the complainant's identification of him.

2 It is the plaintiff's case that the second and third defendants conducted the confrontation identification in breach of guidelines promulgated by the Commissioner of Police and published in the training manual of the Royal Gibraltar Police Force. For the purposes of this application, I shall assume that those guidelines were breached and accept the catalogue of breaches set out in the statement of claim, which I need not repeat here.

3 The plaintiff claims that in failing to conform to the guidelines, the second and third defendants and, vicariously, the first defendant, were negligent towards the plaintiff and caused him damage. I should add that an application by the plaintiff to join the Attorney-General as the fourth defendant to the action is not opposed.

4 The damage alleged is this: On September 8th, 1997, the plaintiff appeared in the magistrates' court on the charges referred to above and pleaded "not guilty" to the more serious charges but admitted the offence of violent behaviour. He was remanded in custody. On November 20th, 1997, the plaintiff was sentenced to 12 months' imprisonment on a matter unrelated to this suit. On May 4th, 1998, the plaintiff was found not guilty of causing grievous bodily harm with intent and causing grievous bodily harm. Although it is not stated in the statement of claim, this was after a trial by jury. On the same day he was sentenced to two months' imprisonment for violent behaviour. If one assumes that the two months' prison sentence commenced on September 8th, 1997, which is the date on which he was first taken before the magistrates' court and remanded in custody for the two more serious offences, that notionally put him in prison until November 9th, 1997. Between November 9th and 20th, 1997, when he was sentenced on the unrelated matter, he was held in custody for the offences for which he was later acquitted and thus, says the statement of claim, he thereby suffered damage.

5 This is an application under O.18, r.19(1)(*a*) that the statement of claim be struck out as disclosing no cause of action. The first argument of the defendants is that even if they owed a general duty of care to suspects to ensure that proper investigative procedures were complied

with, public policy required that the police should not be liable in such circumstances.

6 I was not taken by either party to any cases which involve a decision on the duty of care of police towards suspects, but I was addressed on the House of Lords decision in *Hill* v. *Chief Const. of W. Yorks.* (1), in which the mother and administratrix of the last victim of a serial killer who had been responsible for 13 murders and 8 attempted murders brought an action claiming damages against the Chief Constable in whose area most of the offences had taken place. She contended (i) that the earlier murders and attacks were so similar that it was reasonable to infer that they had been committed by the same person; (ii) that it was foreseeable that unless apprehended that person would commit further offences of the same type; (iii) that it was the duty of the police to use their best endeavours and exercise all reasonable care and skill in apprehending him; and (iv) that they had been in breach of that duty in the manner in which they had carried out their investigation and in failing to detect him before he murdered her daughter.

7 At first instance, the judge held that the police owed no duty of care to a member of the public who suffered injury through the activities of a criminal. The Court of Appeal affirmed this decision. The House of Lords held, according to the headnote to the report in *The All England Law Reports* ([1988] 2 All E.R. at 238), that—

> "in the absence of any special characteristic or ingredient over and above reasonable forseeability of likely harm which would establish proximity of relationship between the victim of a crime and the police, the police did not owe a general duty of care to individual members of the public to identify and apprehend an unknown criminal, even though it was reasonably foreseeable that harm was likely to be caused to a member of the public if the criminal was not detected and apprehended."

8 Of course, those considerations do not apply in the instant case. It was the second head of their Lordships' decision which was relied on by Mr. Pitto. This is that it is contrary to public policy for the police to be held liable for damages in such a case. Lord Keith of Kinkel had this to say (*ibid.*, at 243):

> "But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy."

He went on (*ibid.*, at 243–244):

> "Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a

higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward types [*sic*] of failure, for example that a police officer negligently tripped and fell while pursuing a burglar, others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted."

9 Lord Templeman put it, perhaps more succinctly (*ibid*., at 245):

"This action is in my opinion misconceived and will do more harm than good. A policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public, and the elected representatives of the public must ensure that the public get the police force they deserve. It may be that the West Yorkshire police force was in 1980 in some respects better and in

> some respects worse than the public deserve. An action for damages for alleged acts of negligence by individual police officers in 1980 could not determine whether and in what respects the West Yorkshire police force can be improved in 1988. I would dismiss the appeal."

10 Mr. Pitto argues that that principle should be applied to the case of a suspect in these circumstances. It is not good policy for a police officer to be held liable in negligence for every failure to follow strictly the laid down investigative procedures.

11 *Hill* was followed in the English Court of Appeal in *Osman* v. *Ferguson* (2), in which a schoolteacher, P., formed an unhealthy attachment to a 15-year-old male pupil and subjected the victim to harassment. He was dismissed from the school for continued harassment but this did not stop him. The police were aware of his activities and P. even told a police officer that the loss of his job was distressing and there was a danger that he would do something criminally insane. Following that, P. deliberately rammed a vehicle in which the boy was a passenger. The police laid an information against P., alleging careless driving, but the summons issued upon it was not served on P. Some three months later P. shot and severely injured the boy and killed his father. It was held that there was a very close degree of proximity, amounting to a special relationship, between the boy's family and the investigating officers. However, following *Hill* (1), the court found that it would be against public policy to impose a duty to individuals for damage caused them by criminals whom the police had failed to apprehend when it was possible to do so.

12 The plaintiff in *Osman* took the matter to the European Court of Human Rights and it is the decision in that court which provides the answer to the arguments on this aspect of the case. It was argued that the decision of the Court of Appeal offended, *inter alia*, art. 6(1) of the European Convention on Human Rights, which provides: "In the determination of his civil rights . . . everybody is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ." In finding that the Court of Appeal's decision to uphold the striking out of the plaintiff's claim under O.18 r.19 amounted to a breach of art. 6(1), the court had this to say (29 E.H.R.R. at 315–317):

> ". . . [T]he Court notes that the applicants' claim never fully proceeded to trial in that there was never any determination on its merits nor on the facts on which it was based . . . The applicants' claim was rejected [by the Court of Appeal] since it was found to fall squarely within the scope of the exclusionary rule formulated by the House of Lords in the HILL case . . .

> 150. Although the aim of such a rule may be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court must nevertheless, in turning to the issue of proportionality, have particular regard to its scope and especially its application in the case at issue . . . [I]t would appear to the Court that in the instant case the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police . . .
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> 151. The Court would observe that the application of the rule in this manner without further enquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.
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> In its view, it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case. It is to be noted that in the instant case Lord Justice McCowan appeared to be satisfied that the applicants, unlike the plaintiff HILL, had complied with the proximity test, a threshold requirement which is in itself sufficiently rigid to narrow considerably the number of negligence cases against the police which can proceed to trial. Furthermore, the applicants' case involved the alleged failure to protect the life of a child and their view that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence. The applicants also claimed that the police had assumed responsibility for their safety. Finally, the harm sustained was of the most serious nature.
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> 152. For the Court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police."

13 In my judgment, it would be proper to follow this persuasive decision and not to exclude on the grounds of public policy a trial on the merits.

14 The second limb of Mr. Pitto's argument is that there is insufficient causal link between the alleged negligence of the defendants and the

damage caused. There is much in this argument, and the plaintiff will have his work cut out to prove that any wrong procedures in the confrontation identification caused his wrongful remand in custody. Issues which immediately come to mind are that the cause of the charges has to be established as the complainant's identification, whereas a number of factors no doubt came into play before a decision to charge the suspect was made. Furthermore, the decision to remand the plaintiff in custody was not that of the defendants but was an independent judicial act of a magistrate.

15 However, in *Welsh* v. *Chief Const. of Merseyside Police* (3) the plaintiff was arrested for charges which he had had taken into consideration in an earlier hearing. The solicitor in the Crown Prosecution Service had failed to endorse his file to the effect that the charges had been so dealt with, and when the plaintiff failed to attend court to answer bail a warrant for his arrest was granted. He was subsequently arrested and held in police custody for two days. An application for his claim to be struck out pursuant to O.18, r.19(1)(*a*) on the ground that the Crown Prosecution Service did not owe him a duty of care was denied. Although the question of causal link was not argued in that case, there was the act of a magistrate intervening between the alleged negligence of failing to make the proper endorsement on the file and the damage of being arrested and held in custody.

16 Although the decision to issue a warrant for a person who does not answer to his bail is of a different quality to a decision whether or not to remand in custody an individual charged with a serious offence, without the benefit of the evidence we do not know what part the identification by confrontation played in the decision of the court to remand the plaintiff in custody. I repeat that the plaintiff may, at trial, have a difficult time in proving the necessary causal link, but in my judgment it is a matter of evidence and I should not strike out his claim at this stage.

17 The application is dismissed with costs.

Application dismissed.
