Neutral Citation Number: [2017] EWHC 203 (QB)

Case No: HQ13X02162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2017

Before:

MR JUSTICE STEWART

- -

Between:

Kimathi & others	**Claimants**
- and -	
The Foreign and Commonwealth Office	**Defendant**

- -
- -

Mr Simon Myerson QC & Miss Mary Ruck (instructed by **Tandem Law, Lead Solicitors**) for the **Claimant**
Mr Guy Mansfield QC, Mr Niazi Fetto, Mr Mathew Gullick & Mr Stephen Kosmin (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 16 Jan 2017 & 8 Feb 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE STEWART

Mr Justice Stewart:

Introductory

1. The Defendant issued an application notice on 26 July 2016 seeking an order that certain issues be listed for hearing as a preliminary point. Whether or not to order those issues to be tried as a preliminary point came before me on 9 September 2016. It became apparent during that hearing that the application would benefit from redrafting. That was done and a fresh application notice was issued on 29 September 2016. In support of that application notice was a detailed statement from Mr Andrew Robertson, dated 29 September 2016. Mr Robertson is a Senior Lawyer in the Government Legal Department.

The 29 September 2016 Application

2. The application of 29 September 2016 was as follows:

> The Defendant is seeking an order that the following issues be listed for hearing as a preliminary point:
>
> > **"**a. Issue A: whether "the regulatory framework", "as a unit" (per paragraph 18.b. of the Amended Generic Reply), was void, invalid and/or unlawful (per paragraph 18 of the Re-Amended Generic Particulars of Claim), including by reason of it supporting and/or perpetrating a "system" of forced eviction, detention/false imprisonment and forced labour (per, *inter alia*, paragraphs 9(2), 10(5)(b), 19, and 19A(6) of the Re-Amended Generic Particulars of Claim) that circumscribed, abolished, or limited common law rights (per paragraph 19A(6)(a) of the Re-Amended Generic Particulars of Claim) ("Issue A");
> >
> > b. Issue B:
> >
> > i. whether the form of the Defendant's pleaded reliance on the Emergency legislation in the Individual Defences, as illustrated in the context of Test Case 30, is sufficient to permit the Defendant properly to deny joint and/or vicarious liability to Individual Test Case Claimants in respect of the torts pleaded at paragraphs 8(1) and 8(4) of the Re-Amended Generic Particulars of Claim, without the need for additional particularisation; and
> >
> > ii. whether, given the need for proportionate conduct of the litigation and the overriding objective, the Defendant is capable of discharging the burden of proving that certain conduct alleged by the Claimants was permitted by reason of the Emergency legislation, without identifying the specific instrument in fact or potentially relied upon in respect of each and every tortious allegation made by the Claimants giving rise to a pleaded cause of action."

3. Mr Robertson (paragraph 59) submitted that those issues were suitable for consideration as preliminary issues because:

> "a. The issues are key to the case management of the litigation and enabling the parties and the court to understand the basis upon which the trial will proceed;
>
> b. Determination of the issues is capable of significantly narrowing the matters in issue before the court, and thus promoting proportionate and cost effective resolution of the case; and
>
> c. Determination of the issues will provide the parties with a more information (*sic*) basis for approaching any ADR or negotiations."

4. At a hearing on 7 November 2016, the application of 29 September 2016 was not determined. The reasons for this are:

(a) Issue A: It became common ground that the Claimants' case is that the lawfulness of the Emergency legislation is of no relevance save as it arises to rebut the Defendant's reliance on the Emergency legislation to establish the defence of Statutory Authorisation[1].

(b) Issue B: To quote Mr Block QC acting for the Defendant[2]

> "At some point you are going to have to rule upon whom is the burden of proof that an alleged act was or was not carried out pursuant to the Emergency legislation… "

The Order of 7 November 2016

5. As a result of the Court's Order the following issue is now to be determined:

> "On the assumption that the court will need to determine whether conduct alleged by the Claimants to have been unlawful was rendered lawful pursuant to the "Emergency legislation" (defined at paragraph 18.c. of the Amended Generic Defence as "the legislative and regulatory scheme in force in Kenya at the material time"), which party will bear the burden of:
>
> a. identifying the Emergency legislation potentially applicable to that conduct; and
>
> b. proving that that conduct fell outside or within (as appropriate) the terms of that Emergency legislation?"

[1] Transcript 7 November 2016, page 10.
[2] Transcript 7 November 2016, page 15; page 21

6. In broad terms each party alleges that the other has the burden in respect of both a. and b.. I now have fresh Skeleton Arguments. I also have a witness statement from Kathryn Elizabeth Smith, a lawyer in the Government Legal Department dated 23 December 2016, the purpose of which is described as follows (paragraph 2):

> "The purpose of this statement is to describe the considerable efforts, reflected both in time and cost, that the Defendant has undertaken in locating and identifying the Emergency legislation…in order to establish the provisions which might have provided statutory authorisation for certain acts alleged by the Claimants, which are alleged otherwise to have been tortious."

1t was accepted by Mr Mansfield Q.C., for the Defendant, that the statement was not specifically material to the issues I have to determine in this judgment. I therefore make no further reference to it.

Background

7. I will not set out a detailed exposition of the history of this litigation so far. In May 2014 the Generic Particulars of Claim were served. In October 2014 the Generic Defence was served. In November/December 2014 the Individual Particulars of Claim were served. The major CMCs before me were on 12/13 March 2014, 10/11 December 2014, 18/19 March 2015 and 2/3 March 2016. Other notable dates were:

10.12.2015	Amended Generic Defence.
18.12.2015	First 10 Individual Defences served.
February 2016	Remaining Individual Defences served.
March 2016	Amended Individual Particulars of Claim, Amended Generic Reply and Individual Replies served.

The trial commenced in May 2016. During June and July 2016 the evidence from 24 of the 26 then living Test Claimants was heard. Various applications were dealt with in July/August and September 2016. October 2016 was set aside for (a) preparation for the remainder of the trial and (b) preparation of (other) preliminary issues to be heard in the weeks commencing 7 November 2016 and 14 November 2016. Thereafter the Claimants began to open their case based on the enormous amount of documentation. This was not completed by the end of the Michaelmas term. The Hilary term will be spent hearing expert medical witnesses and lay witnesses from both parties, hearing further applications and, it is hoped, completing the Claimants' opening.

The Relevant Pleadings

8. The following initials will be used in this judgment:

Re-amended Generic Particulars of Claim – GPOC

Amended Generic Defence – AGD

Amended Generic Reply – AGR

Individual Particulars of Claim – IPOC

Individual Re-amended Defence – IRAD

Individual Reply - IR

9. In paragraph 8 GPOC, the Claimants summarise their causes of action as follows:

> "…(i) Trespasses to the person, including:
>
> (a) assaults and batteries causing personal injury;
>
> and/or alternatively:
>
> (b) assaults and batteries which may or may not have caused personal injury in the course of:
>
> (i) forced removal from their homes;
>
> (ii) detention/false imprisonment;
>
> (iii) forced labour without remuneration."

In sub paragraph 8(6) it is said "no other causes of action are pursued." A claim for detention/false imprisonment[3] has been deleted by amendment.

10. Section B of the GPOC is headed "OUTLINE OF CAUSES OF ACTION." It covers paragraphs 9 – 14.

In paragraph 9 GPOC, the Claimants state that they "will claim for trespasses to the person namely assaults and batteries perpetrated during the course of the Emergency (these paragraphs assert no other cause of action other than trespass to the person)"

They continue that the trespasses: –

"(2) Whether or not they caused personal injury, were perpetrated as part of a system of forced eviction, detention/false imprisonment and forced labour."

At paragraph 10(5) it is said that the "system" is proved by (*inter alia*)

"(b) the legislative and regulatory framework passed to support it."

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[3] Previous paragraph 8(3) GPOC

11. In paragraphs 11, 12–14 and 15, the Claimants plead an alternative case in negligence, based upon an alleged "duty to take reasonable care in the management, care and treatment" of them, breach of which led to foreseeable injury, loss and damage. They assert[4] that "The Defendant knew or ought to have known that a breach of duty owed to the Claimants would or might result in injury to them".

12. In paragraph 36 GPOC the Defendant is said to be directly liable as joint tortfeasor with the Colonial Administration and/or vicariously liable for the acts complained of.

Joint liability is dealt with in paragraph 37 as follows:

> "a. The Defendant is jointly liable for the acts of the Colonial Administration, its servant or agents…by reason of the common design between the Colonial Administration and the British Army to restore law and order;
>
> b. The Defendant is jointly liable with the Colonial Administration for the assaults and other abuses and maltreatment complained of because they arose through or under a system (as defined in paragraph 10 above) in which the British Army, as part of the Emergency Security Forces, participated, acquiesced or was complicit: In particular ….
>
> (ii) Acquiescence (namely that the Defendant permitted acts knowing that what was being permitted was unlawful)."[5]

Vicarious liability is dealt with under paragraph 38 GPOC. In paragraph 38(2)(b) it states "The perpetrators were enabled to act by virtue of the methods and legal structures used to deal with the Emergency, put in place by the Defendant…" In paragraph 38(3): "In the premises, the relationship between the Defendant and the perpetrators is sufficiently close to establish legal liability on the part of the Defendant."

13. Anticipating a potential defence based on Emergency legislation, the GPOC pleads:

> "8(3)…it is for the Defendant to assert, should it wish to do so, that the acts alleged by the Claimants are lawful and the basis on which they are said to be lawful. The Claimants will respond by way of Reply."
>
> "18B:
> The regulations have been set out in a Schedule annexed to this amended pleading as Annex 4C, the purpose of which is to illustrate the regulatory framework of the Emergency. It is for the Defendant to assert whether it is their case that the acts alleged by the Claimants to be unlawful were rendered lawful

[4] Para 12 GPOC. See also the Particulars of Knowledge in Annex 6 GPOC.
[5] Further under paragraph 37c the Claimants allege the Defendant is responsible as a result of the Secretary of State for the Colonies' instruction dated 16 July 1957, said to authorise use of overwhelming beating and compelling force in the context of so called psychological shock treatment…

> by the Regulatory framework. The Claimants believe that comprises a reasonable and proportionate pleading of the matter and is sufficient for the Defendant to know the case it has to meet….
>
> No further breaches based on those regulations are currently pleaded.
>
> The Claimants reserve the right to plead out this aspect of their case further once the Defendant has indicated whether it is in issue, and to assert more or different breaches if relevant once test cases have been selected."

Paragraphs 19 and 19A state that at least part of the system which resulted in the regulatory framework depended on breaches of the Claimants' common law rights. These breaches of the common law rights are not said to be a free standing cause of action but a relevant factor in assessing the scope of the duty of care to the Claimants and the standard of care (19A(1)). Specifically it is said:

> "19A(6) Of "at least part of the system" above:
>
> (a) The legislation or regulations circumscribing, abolishing or limiting common law rights were passed with the objective of implementing the system set out at paragraph 10 above."
>
> "19A(f)…the Defendants either have to prove such a justification in relation to each and every Claimant whose common law rights were infringed, or alternatively, to explain why what is described does not amount to system of restriction or proscription of common law rights."

14. As to the AGD, essentially the relevant allegations set out above are put in issue and, in particular:-

- Paragraph 30 states:

> "In respect of paragraph 18 (GPOC):
>
> a. It is impossible for the Defendant to defend, and unfair to require it to defend, an alleged 'regulatory framework' of over 400 regulations that were passed 60 years ago, in another country, by a different Government, in response to a complex and volatile national emergency lasting 8 years, and which are in any event no longer in force."

The remainder of paragraph 30 alleges that it is for the Claimants to identify which regulations are alleged to be unlawful and void and to particularise the basis of the alleged illegality;

- Sub paragraph 32b states:

  "It is denied that it is for the Defendant to assert whether 'it is [its] case that the acts alleged by the Claimants to be unlawful were rendered lawful by the Regulatory framework'. The onus is on the Claimants to prove their case."

- Sub paragraph 32d states:

  "…the Defendant avers that, as a matter of generality:

  i. It is (and will be) impossible for the Defendant to respond to and defend assertions by individual Claimants of particular grounds upon which specific regulations are said to have been unlawful and/or breached, insofar as:

  (1) The Defendant was not directly involved in the index events complained of…

  (2) There is no contemporaneous documentary evidence and/or no witness evidence available to the Defendant recording (1) what happened to the individual Claimants, or (2) pursuant to which regulatory power/s…

  ii. It is unfair to require the Defendant so to respond."

15. The AGR replies at paragraphs 17 – 30. Particular points to note are:

- Paragraph 18b

  "The regulatory framework was enacted by the Defendant its servants or agents. If the Defendant's case is that the regulations cannot properly be read as a unit it must plead that case, and call evidence to establish it…."

- Paragraph 22

  "…The Claimants still do not know whether the Defendant relies on the regulations to render lawful that would be otherwise unlawful…."

16. For illustrative purposes in relation to this application, and the application of 29 September 2016, the Defendant selected Test Claimant 30. By her IPOC she alleges:

- Forced eviction and assault. She cannot remember the exact date of the event but it was after the Lari Massacre (this was in late March 1953). It is said that if the Defendant's case is that the removal of the Claimant was lawful, it is put to proof of that proposition.

- Detention at Kibichoi Camp for about five months. It is said that she was subject to forced labour whilst she was there. Further that she was subject to assaults.

17. In the IRAD the Defendant says it is unable properly to investigate and respond to the Claimant's allegations because the relevant events occurred more than 55 years ago and the Claimant has failed to provide adequate information about the circumstances including times, place and personnel. In paragraph 11d IRAD the Defendant, without prejudice to other defences pleaded, states:

> "i. Under the Emergency legislation the Colonial Government had power to control and/or to take possession of certain items of property and/or certain property was liable to be forfeited, including pursuant to regulations 13 and 33 of the Emergency Regulations 1952.
>
> ii. Relevant provisions of that legislation, to the extent discovered by the Defendant's reasonable searches, are set out in the Appendix.
>
> iii. If particular property was so taken, the Defendant is for the reasons given at paragraph 38 below unable to say under which provision(s) of the Emergency legislation and/or the ordinary criminal law this occurred…"

There is a similar pleading by the Defendant in respect of allegations of forced removal, detention, forced work and villagisation (paragraphs 12, 15, 17, 29 and 30 IRAD).

Paragraph 38 IRAD provides:

> "As to paragraph 45, sub-paragraphs 18d-f of the Amended Generic Defence are repeated. Pursuant to the Emergency legislation, certain deprivations of ordinary liberty, and the destruction and/or control and/or forfeiture if (*sic*) property were permitted, under specified conditions, to address the threat posed to public safety and order by the Mau Mau insurgency. The Defendant refers again to the Appendix. The Defendant has made reasonable efforts to identify the legislative provisions and orders which may have amounted to more than justification for any alleged trespass, but is deprived of a fair opportunity to do so because:
>
> a) The relevant events occurred more than 55 years ago; and
>
> b) The Claimant has failed to provide adequate information about her allegations."

18. In the IR the Claimant responds:

> "9. As to paragraphs 11, 12, 15, 17, 23, and 30 and elsewhere applicable, the Defendant fails to specify the particular regulation upon which it relies, the Government Notice number, title of the regulation, specific provisions thereof, or the commencement date. The failure to provide any particulars of the application of the regulation to this Claimant's case makes it impossible for the Claimant to reply. Insofar as further particularisation is impossible (which is not admitted) the regulation is irrelevant to the Claimant's case…. "

The Abrath Case

19. Both parties drew the Court's attention to the case of Abrath v North Eastern Railway Company[6]. The following passages from the judgment of Bowen LJ (with whom Fry LJ agreed) were cited:

> "…Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin, if he does nothing, he fails; if he makes a primâ facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests…"

At page 547:

> "…Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an

[6] (1883) 11QBD 440

> essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative" and "affirmative" are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively…"

20. In the Abrath case the Court of Appeal decided, in the context of the action for malicious prosecution, that the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the Defendant rests upon the plaintiff.

Assault/Battery: Discussion

21. In the Skeleton Arguments both parties, in different ways, developed submissions which go beyond what is necessary to decide the preliminary issues. This is not a criticism because context is important. However I must be astute to answer, with proper reasoning, the preliminary issue questions and no more. In this litigation there is an ever-present risk of my saying something not strictly relevant to the rulings I have to make, and which may become a hostage to fortune in the future.

22. I first note that the Claimants record that the assumption in the preliminary issue is not to be taken as read. The questions which I am answering are predicated upon an assumption which may or may not be satisfied.

23. An assault is defined in Clerk & Lindsell on Torts (21st Edition) as follows:

> "15-12
>
> **Assault**
>
> "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person". The defendant's act must also be coupled with the capacity of carrying the intention to commit a battery into effect…."

24. As regards battery, Clerk & Lindell states:

> "15-09
>
> **Battery**
>
> "The least touching of another in anger is a battery." The direct imposition of any unwanted physical contact on another person may constitute the tort of battery. There is no requirement to prove that the contact caused or threatened any physical injury or harm. "An intention to injure is not essential to an action for

> trespass to the person. It is the mere trespass by itself which is the offence.""

There is argument, based on certain authority, as to whether hostile intent is necessary for the tort.[7]

25. In relation to assault, but not battery, the ingredients of the tort require the apprehension of the infliction of immediate unlawful force. Therefore the burden lies on the Claimant in the tort of assault to prove that the force apprehended would have been unlawful at the time. This only goes so far and does not answer the question as to what evidence is required for the Claimants to prove unlawfulness. That is the key to this question. If a Claimant brings sufficient evidence as to what would be, absent statutory authority, an assault i.e. the apprehension of the infliction of immediate unlawful force, then he or she does not have to plead and prove that there was no regulation which justified it. Of course, it all depends upon the circumstances, but if the Claimant brings evidence to prove an act which would otherwise be unlawful then, if the case stopped there, and following Bowen LJ's reasoning, the Claimant has proven the tort of assault.

26. This conclusion, which may to a large extent be academic in this case, since assault without battery appears to be relatively rare, also means that in practical terms there may generally not be one conclusion for assault and another for battery. As Clerk & Lindsell says in the section headed "Defences to Trespass unto the Person" at paragraph 15-49: "In an action of trespass to the person, once the trespass is admitted or proved it is for the defendant to justify the trespass if he can, to show he acted with lawful excuse." The textbook then lists a number of potential defences by which a Defendant may justify trespass to the person.

27. The discussion so far relates to the position of the primary perpetrator of the alleged trespass to the person. No primary perpetrator is a Defendant. I will turn later to the allegations of joint liability and vicarious liability whereby the Defendant is said to be liable for the trespass of the perpetrator. Nevertheless, if a Claimant brings sufficient evidence to prove trespass against such a perpetrator, if the Defendant seeks to avoid liability on the basis that the perpetrator's trespass was rendered lawful by some legislation or regulation, then the burden is on the Defendant so to justify the trespass.

28. The Defendant also relies upon the fact that in paragraph 15 GPOC there are positive assertions by the Claimants that some of the particular acts of which they complain were unlawful. So:

> "15.
>
> (9) Failed, either adequately or at all, to prevent criminal acts of violence towards the Claimants.
>
> (10) Caused, permitted, allowed or suffered criminal acts of violence to be perpetrated against the Claimants."[8]

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[7] See the discussion in Clerk & Lindsell at 15-10; also in Smith & Hogan Criminal Law 14th Edition paragraph 17.1.1.

From this the Defendant submits that the Claimants bear the burden of establishing that such acts of violence amounted to crimes under Kenyan Law, including referring to any legislation/regulation which might have authorised such conduct and any potential defences which might have applied. It submits that if the Claimants say something was unlawful then they must prove it.

This in my judgment does not assist the Defendant so far as the elements of the tort of the primary perpetrator are concerned. Again I refer to what was said by Bowen LJ. From that it seems to me that if a Claimant proves that he or she has been the subject of a battery (e.g. having been taken hold of and put into a lorry), then that Claimant has adduced sufficient evidence of an unlawful trespass to the person, absent an explanation justifying the conduct. It does not assist any pleading of trespass to the person in a civil case to describe it as "criminal," and save possibly as to damages, nothing is gained or lost by substituting the word "unlawful" or "tortious" for the word "criminal". Mr Myerson Q.C., for the Claimants accepted this. He said that the word "criminal" was used so as to claim aggravated or exemplary damages. He further accepted that if the Claimants are to succeed in claiming such damages on the basis of criminal acts, then they bear the burden of proving criminality.

29. Further material extracts from the GPOC are:

> "12….
>
> (3) It is acknowledged that punishment itself could be lawful, but averred that the method of punishment could be unlawful or not rendered lawful by a regulation…"
>
> "AGR 5…
>
> (a) The Claimants acknowledge that legislation or regulation permitted particular punishment, which were accordingly, capable of being lawful…"

Paragraph 5 AGR then sets out conditions for the lawful imposition of the punishment, and alleges that punishments which were not so imposed were not lawful under the legislation or regulations.

> "41
> …the Colonial Office and/or the officials within the Colonial Office were in negligent breach of the duty to protect the Claimants, and to take all reasonable and necessary steps to prevent systemic use of unlawful violence…"

The Defendant submits that the Claimants have positively alleged unlawful acts and must prove them. However, on analysis:

(a) If the trespass to the person by the primary perpetrators is proven by the Claimants adducing sufficient evidence of a trespass to the person, then, absent an explanation justifying the conduct, that element of the negligence

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[8] The phrase "criminal acts of violence" is repeated in the Particulars of Negligence and/or trespass to the person in the IPOCs.

allegation (i.e. trespass by the primary perpetrator) is also proven, for the reasons set out above.

(b) It is for the Defendant to plead and prove justification of any such trespass to the person, so as to render it lawful.

30. It is to be noted that the preliminary issue does not require me to decide, nor can I decide, what is or is not or may or may not be, sufficient evidence to justify otherwise unlawful conduct. Indeed, having heard full argument, I must express some concern with the wording of the preliminary issue. Assuming that in the case of a particular Claimant, that Claimant has brought forward sufficient evidence to prove an assault or battery, the wording of the preliminary issue cannot be taken to suggest that the Defendant has necessarily to identify each and every regulation which applied to that individual and to dot every "i" and cross every "t" in proving that the conduct fell outside or within the terms of Emergency Legislation. That is a matter which can only be determined having heard the facts. To take an extreme hypothesis: assume the Defendant adduced evidence in respect of Province X that in 1953-1958 there were in force regulations properly implemented which authorised taking hold of somebody to detain them, but there was an evidential gap in March-June 1955. Assume further that the Claimant was so detained in May 1955. It may well be that the Court would infer, though it would depend on all the evidence and circumstances, that the battery was lawful as having been properly justified by the regulations. Nor would the circumstances necessarily have to be as extreme as this. It will be a question of what inferences I can properly draw on the evidence which is adduced before me.

Negligence; Joint Liability; Vicarious Liability; Knowledge

31. I have already referred[9] to the claim in negligence where the alleged duty was to protect British subjects from torture or inhuman or degrading treatment or punishment. In paragraph 12(3) GPOC the Claimants acknowledge "that punishment itself could be lawful but (aver) that the method of punishment could be unlawful or not rendered lawful by a regulation." Further in paragraph 41 GPOC negligence is alleged based on failure "to take all reasonable and necessary steps to prevent systemic use of unlawful violence".

Knowledge and system are alleged by the Claimants to be relevant to negligence and joint/vicarious liability for trespass. The Defendant points to paragraph 32 GPOC which states:

> "The Defendant knew or ought to have known that unlawful violence in pursuance of the system referred to at paragraph 10 above was being perpetrated against the Claimants in the course of arrests, screenings, detentions and as part of the "villagisation" process…"[10]

Insofar as the Claimants allege such knowledge or other conduct by the Defendant in support of their claims based on joint/vicarious liability for the trespass by the primary

[9] See paragraph 11 above.
[10] See also the pleadings set out in paragraphs 12 and 13 of this judgment.

perpetrators, then the Claimants must plead and prove such knowledge/conduct. Thus in the specific matters pleaded under paragraph 32, 37b ii and Paragraph 1 of Appendix 6 to the GPOC ("Particulars of Knowledge") the Claimant must prove that the Defendant had actual or constructive knowledge

(a) of acts or violence;

(b) that the acts or violence were unlawful.

Whether the Claimants have, as a matter of law, to prove what is alleged in those specific paragraphs in order to fix joint or vicarious liability on the Defendant is, of course, another matter. Similarly, the Claimants must plead and prove the "system" for these purposes. Thus, to the extent to which the Claimants rely on the Emergency Legislation to prove these matters, the onus is on them to plead and prove it. That is a totally separate matter from the onus which is on the Defendant if it seeks to exculpate itself from liability on the basis that a primary perpetrator of what otherwise would have been a tort, (e.g. assault/battery) would himself not have been liable, because of justification by Emergency Legislation.

32. In relation to the negligence pleading at paragraphs 12 and 41 GPOC:

- As regards the elements in paragraph 12(3) GPOC:-

  (1) the burden of proof is on the Defendant to show that any punishment of a Claimant was lawful. A punishment is a battery;

  (2) the burden of proof is on the Claimants to the extent that they seek to aver that such punishment was not rendered lawful by a regulation.

- As regards paragraph 41 GPOC, I find it impossible to answer the preliminary question: "Systemic use of unlawful violence" may, for example, potentially be proved by a number of assaults/batteries by individual perpetrators. If so, then it falls within what I have said in paragraph 29 above. It may be proved perhaps by other matters e.g. the Defendant's alleged knowledge in paragraph 32 GPOC. If so, then it falls within paragraph 31 above.

33. Based on paragraph 10(5)(b) GPOC[11] the Defendant says that the Claimants bear the burden of demonstrating each and every element of the legislative and regulatory framework as part of their pleaded case on the existence of the "system".[12] The Defendant says that the Claimants have the burden of proving the connection between the Emergency Legislation and the wrongdoing leading to a test claimant's injuries. The preliminary issue does not require me to determine this. However I have heard some argument on it. Suffice to say that it is not necessarily the case that the Claimants have to demonstrate "each and every element of the legislative regulatory framework". The Claimants rely on other facts and matters to prove the system. To what extent they may also rely on the legislative and regulatory framework depends on whether, and if so how far, such evidence as is before me on that framework may be said to be probative of the system.

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[11] "The system is proved by …
(b) The legislative and regulatory framework passed to support it"

[12] *cf* also many other references to "system" e.g. paras 18A(1)-(3) GPOC

34. Similarly, the Defendants refer to GPOC 38(2)(b).[13] Based on this the Defendant says that the Claimants bear the burden of proving which "methods and legal structures" applied in any given instance to enable the direct perpetrator to act as he or she is alleged to have done. My response at this stage is set out in the paragraphs above.

Conclusion

35. The answers to the questions raised by the preliminary issues on the assumption in those issues are: -

    (i) Where the Claimants adduce evidence which would be sufficient to prove trespass to the person by a particular perpetrator(s) then, if the Defendant avers that the trespass was not tortious as it was justified by Emergency Legislation, the burden is on the Defendant to plead and prove that the Emergency Legislation upon which it relies did justify the otherwise tortious conduct by the perpetrators.

    (ii) To the extent that the Claimants rely on the Emergency Legislation in paragraphs 32, 37b ii of and Paragraph 1 of Appendix 6 in the GPOC in support of their allegations of joint liability and vicarious liability, the burden is on them to plead and prove the Emergency Legislation upon which they rely.

    Further, in those paragraphs, the Claimants allege that the Defendant had actual or constructive knowledge (a) of acts or violence and (b) that the acts or violence were unlawful. The burden is on the Claimants to prove both these elements. Therefore, in respect of those paragraphs of the GPOC, in order to prove that knowledge, the Claimants will have the burden of:

        (a) Identifying the Emergency Legislation potentially applicable to that conduct;

        (b) proving that that conduct fell outside or within (as appropriate) the terms of that Emergency Legislation.

36. As to negligence, my answers, insofar as I am capable of giving them, are in paragraph 32 above.

37. My answers to the preliminary issues have been given substantially by reference to specific paragraphs referred to in the GPOC. I consider it important to do this as broad statements of principle may lead to confusion and error.

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[13] "As to vicarious liability…
(2) The connection between the said relationship and the acts of abuse and maltreatment was:
…
(b) The perpetrators were enabled to act by virtue of the methods and legal structures used to deal with the Emergency, put in place by the Defendant, in consultation with the Colonial Administration, the Governor, General Erskine and the War Council."