2015 JMSC CIV 49

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV03070

BETWEEN	**PHYLLIS BENNETT**	**CLAIMANT**
AND	**WAYNE GRAY**	**FIRST DEFENDANT**
AND	**NADINE JONES**	**SECOND DEFENDANT**

CONSOLIDATED WITH

CLAIM NO. 2010HCV03510

BETWEEN	**DEVON COLLIE**	**CLAIMANT**
AND	**WAYNE GRAY**	**FIRST DEFENDANT**
AND	**NADINE JONES**	**SECOND DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Mr. Harrington McDermott instructed by Campbell & Campbell for the Second Defendant

Heard: December 12, 2014 and March 25, 2015

NEGLIGENCE– VICARIOUS LIABILITY – EMPLOYER AND EMPLOYEE

SIMMONS, J

[1] This claim arises from a motor vehicle accident that took place on September 20, 2009 along the Point Hill Main Road, in the parish of Saint Catherine, between the second defendant's motor vehicle which was being driven by the first defendant and the vehicle which was owned by Phyllis Bennett. Mr. Devon Collie was the driver of Miss Bennett's motor vehicle at the time of the accident

[2] Miss Bennett and Mr. Collie were injured in the accident and filed claims on the 29th June 2010 and the 19th July 2010 respectively. The particulars of the injuries sustained by Miss Bennett are:-

i. Mild osteoarthritis of the right hip;
ii. Mild spondylosis at junction;
iii. Lower back strain;
iv. Chronic ulceration to the right leg with peripheral neuropathy

Mr. Collie's injuries are stated to be:-

i. Pain to the right chest and shoulder;
ii. Muscle strain;
iii. Right shoulder sprain.

[3] The claimants have asserted that at the material time, the first defendant was acting as the servant and/or agent of the second defendant and as such is vicariously liable for his actions.

[4] The second defendant has refuted these claims, and has stated that Mr. Gray drove away the vehicle without her knowledge, consent or authorization. In such circumstances, she has denied that he was acting as her servant and/or agent at the time of the accident.

Undisputed facts

[5] There is no dispute that the second defendant's bus was involved in the accident in which both claimants were injured. There is also no dispute that the first defendant was driving the bus at the relevant time. The parties do however part company on the

issue of whether he was acting as the second defendant's servant and/or agent at the time of the accident.

[6] The second defendant was not in a position to dispute the first defendant's liability for the accident as she was not present when it occurred and Mr. Gray was not called as a witness.

Miss Bennett's evidence

[7] Miss Bennett stated that on the 20th September 2009, she was a passenger in motor vehicle registration number 2590 FQ which was being driven by Mr. Devon Collie. She indicated that whilst the vehicle in which she was travelling was negotiating a right hand corner she saw the second defendant's bus swerve onto her side of the road. The bus collided with the side of right front section of Mr. Collie's vehicle and "dragged onto the back right door" where she was seated. The window broke.

[8] She got out of the vehicle and assisted persons on the scene to remove her son from the vehicle. She indicated that one Mr. Jones took them to the Spanish Town Hospital and also transported her to her home.

[9] The claimant also indicated that she experienced pain in her hip and back for several months and was referred for physiotherapy. She did not act on that referral as she could not afford it since she had to attend to her son who is paralyzed. She stated that she is still experiencing pain in her hip and back and occasionally the pain in her hip is severe.

[10] Miss Bennett also gave evidence of the expenses which were incurred by her as a result of the accident.

[11] In cross examination, she stated that prior to the accident she did not know either of the defendants. She also said that she was unaware that a report had been made to the police against the first defendant by the second defendant. She was also not aware that Mr. Gray had pleaded guilty to the charge of driving away a vehicle without the owner's consent.

[12] She also stated that she did not repair her vehicle and that it has been sold.

Mr. Collie's evidence

[13] Mr. Collie gave evidence that on the morning of the 20th September 2009 whilst driving along the Point Hill Main Road in the parish of St. Catherine, the vehicle being driven by the first defendant swerved to avoid a pothole and collided with his vehicle.

[14] The police came on the scene and one of them made a phone call. Shortly afterwards two men arrived. He was informed that one of them was Mr. Jones, the owner of the bus. He said that the man purporting to be Mr. Jones told him that the man who was with him was its customary driver. The man also told him that he had given the bus to the first defendant for him to have it cleaned and for the radio to be fixed. He also said that Mr. Jones told him that the first defendant did not have a Driver's Licence.

[15] Mr. Jones transported himself and Miss Bennett to the Spanish Town Hospital and then to their respective homes.

[16] Mr. Collie also gave evidence pertaining to his medical treatment and expenses.

[17] In cross examination, he stated that after the accident he spoke to the first defendant as well as the second defendant by cell phone. He also stated that he was unaware that a report had been made by the second defendant against the first defendant in which she alleged that he drove away the vehicle without her consent.

[18] When he was re-examined, he said that he had received the second defendant's phone number from Mr. Jones and that they spoke about the accident. His evidence is that she told him that the first defendant was her "ductor" and that she had not given the vehicle to him.

Defendant's evidence

[19] Mrs. Jones gave evidence that she is the owner of the bus that was involved an accident with the claimants on the 20th September 2009. She indicated that on the day in question she left the bus parked at her home in Mendez District in the parish of Saint

Catherine and went to her egg farm. The keys for the bus were left at the house which was unlocked.

[20] Later that day she spoke to her husband and found out that the bus had been involved in an accident along the Brown's Town Road in Point Hill. She went home and confirmed that the bus was not there. The keys for the bus which she had left inside on a "what not" had also been removed.

[21] On the following morning she went to the Point Hill Police Station. She stated that the first defendant was employed by her as a conductor and she did not know whether or not he had a driver's licence. She also stated that she did not give him permission to drive the bus on the day in question or at any other time.

[22] She also indicated that she made a report to the police that the vehicle had been stolen by Mr. Gray and that he was arrested and charged for driving away the vehicle without her consent.

[23] In cross examination, Mrs. Jones gave evidence that she was in charge of the bus and her husband Mr. Ronald Jones assisted her in its operation. She stated specifically, that he did not deal with issues concerning the driver or the conductor except where persons were being interviewed for those positions. Her evidence is that he did not have the authority to deal with the bus.

[24] She stated that the bus was operated from Monday to Friday. She indicated that she was a Seventh Day Adventist and as a consequence it was not operated on Saturdays. She also stated that any required maintenance of the bus would be done on a Sunday.

[25] Mrs. Jones' evidence is that she would sometimes wash the bus or it would be taken by the driver to a car wash at Cudjoe Hill which is not far away from her home. This would usually be done late in the evening on a Sunday.

[26] On the day of the accident she said she was expecting the driver to take the bus to the car wash. Her evidence is that on some occasions the conductor would

accompany him to her house to collect the bus. She said that her husband did not have the authority to assist with the washing of the vehicle and if the driver is not available it would remain at her home.

[27] Mrs. Jones also gave evidence that a radio was to be installed by her neighbor on the same day that the accident occurred. She stated that she was not aware that Mr. Gray could drive a bus and had never asked him if he could do so. She also said that she did not consider it important to find out. She said that prior to the accident she had never heard of any instance in which a conductor had driven a bus to which he was assigned and met in an accident. She also stated that she had never directed her mind to the possibility of Mr. Gray driving the bus.

[28] Mrs. Jones said that on the day of the accident she left the keys for the bus in the usual place on the "what not" in her living room. She indicated that both Mr. Gray and the driver knew where the keys were kept. She also said that it was not usual for her to leave the keys where they would be accessible to the driver.

[29] She stated that although she left the house unlocked, she did not do so in order to give the driver access to the keys or to facilitate his removal of the vehicle from the premises in her absence. Her evidence is that it was the first time that she was leaving the premises unlocked and she did so because she was not going far and there were neighbours close by. She also gave evidence that she went to the egg farm every Sunday and would leave home at about 9:00 a.m. She stated that it was usual for her to be at the farm for six hours.

[30] Mrs. Jones also stated that on a Sunday it was customary for the driver to come to her at the farm and she would accompany him back to the house and give him the keys for the bus. She stated that the driver never went for the keys on his own although he knew where they were kept.

[31] Mrs. Jones also stated that she never went to the scene of the accident as her husband was dealing with the situation. She also said that she never spoke to Mr. Collie.

Claimant's submissions

[32] Mr. Kinghorn submitted that the issues which are to be considered are:

i. Whether the first defendant is liable for the occurrence of the accident on the 20th September 2009; and

ii. If so, whether the second defendant is vicariously liable for the negligence of the first defendant.

[33] With respect to the first issue, Counsel stated that in light of the fact that the evidence of the claimants is unchallenged, it is accepted that the accident occurred as a result of the negligence of the first defendant.

[34] Mr. Kinghorn urged the court to accept that the first defendant was acting as the servant and/or agent of the second defendant and that she is vicariously liable for his actions. He relied on the principles applied in the case of ***Lister v. Hesley Hall Limited*** [2001] 2 All ER 769 which was applied by the Privy Council in ***Clinton Bernard v. The Attorney General of Jamaica*** [2004] UKPC 47 and by Sykes, J in ***Allan Campbell v. National Fuel and Lubricants Limited, Roy D' Cambre and Solomon Russell*** (unreported), Supreme Court, Jamaica suit no. CL 1999/C262, delivered 2nd November 2004.

[35] In ***Lister v. Hesley Hall Limited*** (supra)***,*** the House of Lords found that an employer may be held to be vicariously liable for the actions of an employee, if it is established that there is a sufficient connection between the tasks assigned to the employee and the actions which constitute the tort.

[36] This principle was demonstrated in ***Clinton Bernard v. The Attorney General of Jamaica*** (supra). Where the Court held that the defendant, who was an off-duty policeman was vicariously liable for the unjustified shooting of a citizen.

[37] Counsel also made specific reference to the following passage from the decision of Sykes, J in ***Allan Campbell v. National Fuel and Lubricants Limited, Roy D' Cambre and Solomon Russell*** (supra):-

*"What **Bernard** has done is to indicate to employers that they must address their minds specifically to the management of risks that may be inherent in their activities. The more inherent the risk and the more serious the risk of the employee doing the type of act that is called into question the more likely it is that the court will conclude that the employer bears the loss via vicarious liability. The fact that there is a serious risk of the employee doing the act called into question and the fact that the serious risk of the particular wrongdoing by the employee was inherent in the nature of the activity are not necessarily conclusive of the matter of vicarious liability, but it is clear that these two facts will make a finding of vicarious liability more likely".*[1]

[38] Mr. Kinghorn urged the Court to apply the "close connection test" in its analysis of the evidence in the instant case and find that the second defendant is vicariously liable for the acts of the first defendant. In particular, he highlighted the following parts of the evidence of the second defendant in cross examination where she said :

- *'You are correct that the conductor comes with the driver when he comes for the bus to get it washed…*
- *It is the responsibility of the driver and the conductor to take charge of the Sunday maintenance of the bus…*
- *I never told him (Wayne Gray) he is not to drive my bus…*
- *The driver and the conductor would normally wash the bus and bring it back…*
- *Sometimes while I am at the farm the bus is being washed. When I get home it is sometimes washed already or is still out washing."*

[39] Mr. Kinghorn submitted that based on the evidence, the washing of the second defendant's vehicle was part of the first defendant's duties on a Sunday. He stated that

[1] Paragraph 67

at the very least, the driving of the bus on that Sunday was an act which was closely connected to that duty and as such the second defendant should not escape liability.

[40] Counsel further submitted that the fact that Mr. Gray pleaded guilty to the charge of driving away the vehicle without the owner's consent is not relevant in this matter. He stated that whilst the guilty plea confirms that the first defendant realized that he did not have permission to drive the vehicle that does not absolve the second defendant from civil liability based on the "close connection" test.

[41] Mr. Kinghorn also argued that when the methodology employed by the court in ***Princess Wright v. Allan Morrison*** (unreported) Court of Appeal, Jamaica, SCCA 39/2008, judgment delivered 15 April 2011 is applied, it is clear that the first defendant's driving of the bus was closely connected to his duty and responsibility of maintaining the bus by getting it washed.

[42] Counsel also stated that the evidence of the second defendant, satisfies the criteria required by the 'inherent risk test' referred to by Sykes, J in ***Allan Campbell v. National Fuel and Lubricants Limited, Roy D' Cambre and Solomon Russell*** (supra). He specifically referred to her evidence that she did not tell Mr. Gray that he should not drive the bus and that he knew where the keys were kept. He submitted that this evidence demonstrates that the second defendant failed to guard against him driving the bus or to address her mind to the inherent risks involved in leaving her house open.

[43] Counsel stated that both the close connection and the inherent risk tests have been satisfied and as such it is just and reasonable for the Court to assign liability to the second defendant in light of the evidence***.***

Second defendant's submissions

[44] Mr. McDermott submitted that the sole issue to be determined is whether at the material time the first defendant was acting as the servant and/or agent of the second defendant, so as to render her vicariously liable for his tortious conduct.

[45] Counsel stated that whilst the general principle is that the driver of a motor vehicle is doing so as the servant and/or agent of the owner, that presumption may be rebutted by evidence to the contrary. Reference was made to the decision of the Court of Appeal in ***Eric Rodney v. Allan Werb*** and ***Allan Werb v. Eric Rodney and Patricia Philpots*** (unreported), Court of Appeal, Jamaica, [2010] JMCA Civ 43, judgment delivered 3 December 2010 where Phillips JA cited with approval, the dictum of Scrutton, L.J. in ***Barnard v. Scully*** **(**1931) T.L.R. 557 and the judgment of Clarke J, in the case of ***Matteson v. G.O Soltau et. al*** (1993) 1 J.L.R 72. The learned Judge of Appeal stated :

> "*It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary this evidence [ownership of the vehicle] is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him".*

[46] Counsel also relied on the case of ***Rambarran v. Gurruchuarran*** [1970] 1 All ER 749, to make the point that although the court may infer that a vehicle is being driven by the owner or his servant or agent, where as in this case that has been denied, the court should assess all of the evidence in order to make a determination.

[47] He submitted that based on the facts that have been proved in this case, it is clear that the first defendant was not acting as the servant and/or agent of the second defendant at the material time. In this regard, he referred to Mrs. Jones' evidence that Mr. Gray was employed as a conductor and not a driver and that it was not part of his duties to drive the bus.

[48] Mr. McDermott stated that the fact that an employment relationship existed between the defendants did not make the first defendant her servant and/or agent for all purposes. He made the point that the first defendant was employed by the second

defendant as a bus conductor and as such his actions fell outside of the scope of his employment.

[49] He submitted that in the instant case it would be unjust to hold the second defendant liable for the tort committed by the first defendant. Reference was made to the following passage in ***Clinton Bernard v. Attorney General of Jamaica*** (supra) where Lord Steyn stated:

> "The *correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable"*

[50] Mr. McDermott also relied on the case of ***The Attorney General v. Craig Hartwell*** Privy Council appeal no. 70 of 2002 in which the court found that a police officer who used his firearm to shoot the respondent was not acting as the Government's servant or agent but was on a *"frolic of his own".*

[51] He stated that when the approach taken by the Privy Council in ***Clinton Bernard v. Attorney General of Jamaica*** (supra) and ***The Attorney General v. Craig Hartwell*** (supra) is applied to the instant case, the second defendant has rebutted the presumption of agency. He argued that the driving of the bus by the first defendant was clearly beyond the scope of his duties and this is underscored by the fact that the first defendant at the time of the incident did not possess a driver's license. Counsel also referred to the fact that the first defendant pleaded guilty to driving away the bus without the owner's consent. In these circumstances he urged the court to find that the first defendant like the police officer in ***The Attorney General v. Craig Hartwell*** (supra) was on a frolic of his own.

[52] Mr. McDermott also submitted that the evidence in the instant case does not support a conclusion that a close connection existed between the first defendant's duties as a conductor and his driving the bus. He stated that in those circumstances, it

would neither be just or equitable to hold the second defendant vicariously liable for his actions.

Discussion

[53] Vicarious liability has been defined as *"…the legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment".*[2] A wrong may be deemed to fall within the course of a servant's employment where it is expressly or impliedly authorised by his employer or is an unauthorized manner of doing something which is permitted. It may also be so designated where the act complained of is so connected to something which the employee is authorized to do.

[54] In ***Lister v. Hesley Hall Ltd*** (supra) Lord Steyn traced the development of the law in this area and examined in some detail Salmond's statement of the law in ***Salmond on Torts*** 1st edition (1907). In that text, the learned author stated that a wrongful act is deemed to have been done by an employee in the course of his employment if it was authorized by the employer or was an unauthorised method of doing an authorised act. He also said that an employer is also liable for acts which are unauthorised if *"…they are so connected with acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them".* Lord Steyn described the latter statement as the "germ" of the close connection test which was employed by the court in the Canadian cases of ***Bazley v. Curry*** 174 DLR (4th) 45 and ***Jacobi v. Griffiths*** 174 DLR (4th) 71.

[55] It should also be noted that an employer may be vicariously liable for the wrongful acts of an employee even where that employee was not acting for the benefit of his employer (***Lloyd v. Grace, Smith & Co*** [1912] AC 716).

[56] The above principles, according to Lord Steyn provide a *"…practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability".* Their objective is to ensure that an innocent victim has recourse against someone who

[2] Lister v. Hall (supra) at paragraph 14

is likely to possess sufficient resources to compensate him for any damage whilst ensuring that an employer is not unjustly saddled with liability arising from the actions of a rogue employee.

[57] In this matter, Counsel for the claimants has argued that the driving of the bus by Mr. Gray was so closely connected with his duties that the second defendant ought to be held liable. In ***Bazley v. Curry*** (supra) McLachlin J said:-

> *"In determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong…courts should be guided by the following principles. First, they should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'. Second, the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires"*

[58] The cases of ***Clinton Bernard v. The Attorney General*** (supra) and ***Allan Campbell v. National Fuel and Lubricants Limited et al*** (supra), which were referred to by counsel are also instructive. It should however be noted that the task of assessing whether a close connection exists between an employee's tortuous act and that which he is employed to do, is not a simple one. The relevant principle although easy to state is not free from difficulty in its application. This is so because each case has to be assessed on its own facts in order to determine whether the act complained of is one which satisfies the *"close connection"* test. This exercise, as the cases demonstrate require the court to examine a variety of factors which may impact on the particular circumstances. In ***Bazley v. Curry*** (supra) McLachlin J stated:-

> *"The problem is that it is often difficult to distinguish between an unauthorized "mode" of performing an authorized act that attracts liability, and an entirely independent "act" that does not. Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is possible to characterize the tortious act either as a mode of doing an authorized act (as the respondent would have us do), or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?"*

[59] The learned Judge also expressed the view that liability should accrue where the employer's business *"…created the risk that produced the tortious act".* He opined that having examined cases in which an employer was held liable for unauthorized torts, the common thread was that the employee's conduct was so *"…closely tied to a risk that the employer's enterprise has placed in the community…"* that it was just for him to be held vicariously liable for the employee's wrong.

[60] In this matter the bus was owned by the second defendant. Based on the authorities of ***Barnard v. Sully*** (1931) 47 TLR 557 and ***Rambarran v. Gurrucharran*** [1970] 1 All ER 749 the fact of ownership is prima facie evidence that a vehicle is being driven by either its owner or his servant or agent. That presumption can however, be rebutted. In ***Barnard v. Sully*** (supra) Scrutton, L.J. described the principle as follows:-

> "*No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners … But, apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts.'*

In ***Rambarran v. Gurrucharran*** (supra) Lord Donovan said:-

> *"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on* ***the totality of the evidence***.[3]

[61] The second defendant in this matter has denied that the first defendant was acting as her servant and/or agent when the accident occurred. According to the above cases, the burden is on her to rebut that presumption. In ***Eric Rodney v. Alan Werb*** and ***Alan Werb v. Rodney and another*** (supra) Phillips JA said that the decision of the court in ***Rambarran v. Gurrucharran*** (supra) *"…* makes *it clear that where the only fact known is that the defendant is the owner of the vehicle, the court will draw the inference that at the time of the incident, the car was being driven by the owner or his servant or agent. However, if other facts are known which are accepted by the court, then the question of service or agency will be determined on an assessment of all the evidence. The onus is on the owner of the vehicle to provide* ***sufficient credible evidence*** *to satisfy the court that the driver is not his servant or agent…"*

[Emphasis mine]

[62] There is no dispute that the normal duties of a bus conductor would not extend to the driving of a bus to which he is assigned. A conductor's duty would usually include the collection of fares and the issuing of tickets.

[63] The accident in this matter occurred on a Sunday. The second defendant has given evidence that that was the day which was reserved for the maintenance of the bus. It was also the day when it would be washed either by her or at a car wash. When

[3] Page 752

it was to be taken to the car wash, the driver and the conductor would come to her house to collect the bus.

[64] In order to determine whether the circumstances of this case satisfy the *"close connection"* test the evidence of the second defendant must be closely scrutinized. Mrs. Jones has in her evidence sought to negative the presumption that Mr. Gray was acting in a manner which was either explicitly or impliedly authorized by her. If her evidence is found to be credible she would have rebutted that presumption and succeeded in her defence.

[65] In assessing her credibility I will highlight certain aspects of her evidence. Mrs. Jones stated that on the day in question she went to the egg farm and left her house open because she was not going far. This she said was the first time that she was doing so. However, it is also her evidence that she would go to the egg farm every Sunday and would remain there for about six hours. The question which arises is why leave the house open on this occasion.

[66] Mrs. Jones also stated that when the driver came for the bus on a Sunday he would come to her at the farm and she would accompany him back to her house, give him the keys and then return to the farm. She said that he knew where to find her on a Sunday. He also knew where the keys were kept.

[67] The second defendant's evidence is that her husband was not involved in the maintenance of the bus, he could not wash it but could buy parts. She stressed that she was its owner and that Mr. Jones would mainly be involved when she was interviewing persons to man the bus. However, on the day of the accident she did not go to the scene because her husband was dealing with the matter. Presumably, this is the same person who from her evidence had very little authority in relation to the bus.

[68] Mrs. Jones also said in cross examination that she had never heard of any cases in Jamaica where a conductor drove away a bus and met in an accident and never directed her mind to that possibility.

[69] I do not find the second defendant to be a credible witness. I reject her evidence that the day of the incident was the first time that she left her house open. I also reject her evidence that the driver would have to go to the farm and accompany her back to the house to collect the key for the bus. I find that she has failed to rebut the presumption that the first defendant was at the material time acting as her servant or agent.

[70] The circumstances of this case, at first blush, appear to be vastly different from that in ***Clinton Bernard v. The Attorney General*** (supra) and ***Allan Campbell v. National Fuel and Lubricants Limited et al*** (supra).

[71] In ***Clinton Bernard***, at first instance McCalla, J. as she then was, found that the state was vicariously liable in the following circumstances:-

> *"The first defendant demanded the use of the telephone by identifying himself as being a police officer albeit in a most crude and vulgar manner. The witness for the defendant has admitted that it would be within the scope of a police officer's duty to demand the use of a telephone as a matter of urgency if the necessity arose…. The reasonable inference to be drawn is that his demand was somehow connected to his duties. The act of shooting the plaintiff was unlawful and clearly did not fall within any of his prescribed duties but was nevertheless in furtherance of his demand."*

[72] The Privy Council in agreeing with the learned Judge made reference to the risk that was created by the authorities when they allowed the officer to keep his firearm whilst off duty. In other words, the State facilitated the commission of the tort. The court also noted that the officer identified himself as a policeman when he requested to use the public telephone out of turn and when the plaintiff refused to let him do so, the officer shot him.

[73] In ***Allan Campbell v. National Fuel and Lubricants Limited et al*** (supra) the court found that the deviation of the tanker driver to the scene of the tort was closely connected to his duty of transporting petrol that it fell within the scope of his employment. Sykes, J in assessing the evidence, stated that the inherent risk involved in a particular enterprise is one of the factors which is to be taken into account in order to determine whether an employer is vicariously liable for the tortuous act of an employee. The learned Judge also stated that employers should address their minds to the management of such risks.

[74] In assessing the evidence in this matter I am also guided by the following passages in ***Bazley v. Curry*** (supra):-

> *"**The connection between the tort and the employment is broad. To say the employer's enterprise created or materially enhanced the risk of the tortious act is therefore different from saying that a reasonable employer should have foreseen the harm in the traditional negligence sense, making it liable for its own negligence**. As Fleming explains (supra, at p. 422):*
>
> > *Perhaps inevitably, the familiar notion of foreseeability can here be seen once more lurking in the background, as undoubtedly one of the many relevant factors is the question of whether the unauthorised act was a normal or expected incident of the employment. But one must not confuse the relevance of foreseeability in this sense with its usual function on a negligence issue. We are not here concerned with attributing fault to the master for failing to provide against foreseeable harm (for example in consequence of employing an incompetent servant), but with the measure of risks that may fairly be regarded as typical of the enterprise in question. <u>The inquiry is directed not at foreseeability of</u>*

> *risks from specific conduct, but at foreseeability of the broad risks incident to a whole enterprise. [Emphasis added.]…*
>
> *Therefore, "mere opportunity" to commit a tort, in the common "but-for" understanding of that phrase, does not suffice: Morris v. C. W. Martin & Sons Ltd., [1966] 1 Q.B. 716 (C.A.) (per Diplock L.J.).* ***The enterprise and employment must not only provide the locale or the bare opportunity for the employee to commit his or her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable. Of course, opportunity to commit a tort can be "mere" or significant. Consequently, the emphasis must be on the strength of the causal link between the opportunity and the wrongful act, and not blanket catch-phrases.*** *When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability".*

[Emphasis mine]

[75] The learned judge also sought to lay down some guidelines for the court where there are no cases which have dealt with similar facts. He said:-

> *"I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:*
>
> > *(1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".*

(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

> *(a) the opportunity that the enterprise afforded the employee to abuse his or her power;*
>
> *(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);*

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power".

[76] In ***Allan Campbell v. National Fuel and Lubricants Limited et al*** (supra) Sykes, J also set out some guidelines which may be of assistance of the court in these matters. He said:-

"Therefore as far as Jamaica is concerned the proper considerations in determining whether vicarious liability should be imposed in any given situation include:

(a) what is the duty to the claimant that the employee broke and what is the duty of the employee to the employer, broadly defined;

(b) whether there is a serious risk of the employee committing the kind of tort which he has in fact committed;

(c) whether the employer's purpose can be achieved without such a risk;

(d) whether the risk in question has been shown by experience or evidence to be inherent in the employer's activities;

(e) whether the circumstances of the employee's job merely provided the opportunity for him to commit the tort. This would not be sufficient for liability;

(f) whether the tort committed by the employee is closely connected with the employees duties, ***looking at those duties broadly***".

[Emphasis mine]

[77] The learned Judge was however careful to point out that this list is by no means exhaustive.

[78] In the instant case, there is no evidence that Mr. Gray was authorised by the second defendant to drive the bus and as such, the matter falls within the realm of an intentional tort.

[79] In assessing whether the wrong committed by the first defendant is closely connected with his duties those duties are to be looked at in a broad sense. The first defendant's Sunday duties involved his accompanying the driver to the car wash. This fact in my view provided an opportunity for him to drive the bus without the second defendant's permission. The second defendant is engaged in the operation of a bus. She is permanently employed and as such is not in a position to monitor the activities of the driver and the conductor whilst they are on the road. There is therefore in my opinion, an inherent risk that the first defendant may drive the bus, albeit without her permission. Such situations are not uncommon in Jamaica. I reject her evidence that she did not know of situations in which conductors drive away the buses to which they are assigned.

[80] When this is considered in conjunction with her evidence that she did not enquire whether he could drive and did not tell him that he should not drive the bus, the risk factor is even more evident. This was exacerbated by the fact that she left the keys in the "usual place" which was known to the first defendant. This act in my view, facilitated the commission of the tort. The second defendant in the words of Sykes, J. in ***Allan Campbell v. National Fuel and Lubricants Limited et al*** (supra) ought to have addressed her mind *"…specifically to the management of risks that may be inherent"* in the enterprise in which she was engaged. In the circumstances, I find that the second defendant has failed to rebut the presumption that the first defendant was at the material time acting as her servant and/or agent.

[81] In light of the above it is my view that the claimant has established on a balance of probabilities that the duties of the first defendant were closely connected with the tort

committed by him. I therefore find that the second defendant is vicariously liable for his actions.

Damages

Special Damages

[82] The special damages claimed by Miss Bennett are as follows:-

i.	Medical expenses (and continuing)	
	Oasis Health Care	$14,200.00
	Pines Imaging Center	$5,700.00
ii.	Transportation expenses	$42,000.00
iii.	Loss of Motor Vehicle	$245,400.00
iv.	Loss Adjusters Report	$4,000.00
		$311,300.00

The receipts that were admitted in evidence reveal that the sums paid to Oasis Health Care amounted to nineteen thousand eight hundred dollars ($19,800.00).

[83] Mr. Collie's claim for special damages is as follows : -

I.	Medical Expenses	$26,600.00
II.	Transportation Expenses	$5,000.00
		$31,600.00

The receipts for his medical expenses which were admitted in evidence indicate that a total of thirty five thousand six hundred dollars ($35,600.00) was spent.

[84] Mr. Kinghorn submitted that Miss Bennett and Mr. Collie should be awarded the sum of two hundred and seventy four thousand seven hundred dollars ($274,700.00) and forty thousand six hundred dollars ($40,600.00) respectively as special damages.

[85] Where Miss Bennett is concerned, he relied on the estimate of repairs which was prepared by M & M Mechanical & Electrical Auto Services Ltd. which indicates that it would have cost two hundred and forty five thousand four hundred dollars ($245,400.00) to repair her vehicle.

[86] Mr. McDermott submitted that Miss Bennett was entitled to the sums claimed with the exception of that for the loss of the motor vehicle. He directed the court's attention to Miss Bennett's evidence in cross examination that the vehicle was sold un-repaired in support of that submission. He argued that in the circumstances she was only entitled to the sum of seventy one thousand five hundred dollars ($71,500.00) as special damages.

[87] Miss Bennett has sought to buttress her claim for the loss of her motor vehicle by the presentation of an estimate of repairs. Unfortunately the court has not had the benefit of an Assessor's Report which would have provided an independent and objective assessment of the damage and the cost associated with the repairs. Such a report would also have included the pre accident value of the vehicle and an expert's opinion on whether it would have been economical to effect the repairs as indicated in the estimate.

[88] It is a well-known principle that special damages must be strictly proved. This principle was adopted by the Court of Appeal in ***Murphy v. Mills*** (1976) 14 JLR 119, where Hercules J.A cited the following passage from ***Bonham-Carter v. Hyde Park Hotel, Ltd*** (3) (1948) 64 T.L.R., at p.178 where Goddard, C.J. said:

> *"On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars, and, so to speak throw them at the head of the Court saying: 'this is what I have lost; I ask you to give me these damages' they have to prove it".*

[89] The failure of the claimant to provide an objective assessment of the value of the loss of the vehicle is in my view fatal to her claim. I therefore accept the submissions of Mr. McDermott that no award should be made in respect of her claim for the loss of the vehicle. I therefore award the sum of seventy one thousand five hundred dollars ($71,500.00).

[90] With respect to Mr. Collie, Mr. McDermott submitted that he was entitled to the amount of thirty one thousand six hundred dollars ($31,600.00) which was claimed. I have however noted that this figure included the sum of five thousand dollars ($5,000.00) in respect of transportation. The difference between the sum advanced by Mr. Kinghorn in his submissions and that claimed can be attributed to medical expenses which were clearly stated to be "and continuing". I accept the submissions of Mr. Kinghorn that Mr. Collie is entitled to the sum of forty thousand six hundred dollars ($40,600.00).

General Damages

Miss Bennett

[91] Mr. Kinghorn has relied on the authorities of ***Trevor Benjamin v. Henry Ford et al*** (unreported), Supreme Court, Jamaica claim no. 2005 HCV 02876, delivered 23rd March 2010, Milton ***Goldson v. Knoeckley and Nestle JMP Jamaica Limited*** (unreported), Supreme Court, Jamaica claim no. 2009 HCV 1260, delivered 9th December 2009 and ***Bruce Walford v. Garnett James Fullerton et al*** (unreported), Supreme Court, Jamaica claim no. 2001 HCV 00705, delivered 13th December 2012.

[92] In ***Trevor Benjamin v. Henry Ford et al*** (supra), the claimant's injuries were as follows:-

i. soft tissue injuries;
ii. spasms of his neck muscles;
iii. tenderness over the lower back muscles; and
iv. painful swelling and an abrasion to his right leg and foot.

In March 2010 he was awarded the sum of seven hundred thousand dollars ($700,000.00) in general damages. That figure updates to nine hundred and ninety thousand one hundred and two dollars and seventeen cents ($990,102.17) as at February 2015.

[93] In ***Milton Goldson v. Buckley and Nestle JMP Jamaica Limited*** (supra) the claimant suffered 'neck and back stiffness' due to muscle and ligament damage after a motor vehicle accident. He was unable to maintain an upright position without experiencing pain and had difficulty turning his head from side to side. He was awarded eight hundred and fifty thousand dollars ($850,000.00) in general damages in December 2009. When updated the figure would be one million two hundred and forty seven thousand six hundred and eighty dollars and fifty eight cents ($1,247,680.58).

[94] The claimant in ***Bruce Walford v. Garnett James Fullerton*****,** suffered lower back strain and an abrasion to the gluteal region as a result of being knocked down by a motor vehicle. In December 2012 the Court awarded seven hundred thousand dollars ($700,000.00) in general damages which after indexation updates to eight hundred and five thousand four hundred and fifty four dollars and fifty five cents ($805,454.55).

[95] Mr. McDermott relied on the case of ***Patricia Stewart v. Caribbean Products Co. Ltd*** (unreported), Supreme Court, Jamaica, suit no. C.L. 1991/S 151, delivered 8th April 1992 where the Court awarded one hundred and fifteen thousand dollars ($115,000.00) to a claimant who suffered contusions, tenderness in the right sacro iliac joint and an overall 5% whole person disability. The award updates to one million six hundred and twenty seven thousand two hundred and nineteen dollars and eighty eight cents ($ 1,627,219.88), using the CPI of the date of the award. It was submitted that the injuries suffered by the claimant Patricia Stewart are far more severe than those suffered by Miss Bennett. As such Mr. McDermott urged the Court to award the sum of one million dollars ($1,000,000.00) in general damages to the claimant.

[96] Having reviewed the cases, I am of the opinion that the injuries suffered by the claimant in ***Trevor Benjamin v. Henry Ford et al*** (supra) are similar to those experienced by Ms. Bennett. I therefore award the sum of one million dollars ($1,000,000.00) to her in general damages for pain and suffering and loss of amenities.

Mr. Collie

[97] Mr. Kinghorn relied on the authorities stated above to support his claim.

[98] Mr. McDermott submitted that the case of ***Hugh Douglas v. Morris, Wrap, Vincent McPherson, Sergeant Boreland and the Attorney General*** (unreported), Supreme Court, Jamaica suit no. C.L. 1984/D130, delivered 6th April 1994 is an appropriate guide on the quantum of damages. In that matter, the claimant suffered bruises to the right upper limb, bruising to the left upper limb and swelling to the left thigh. The Court awarded the sum of one hundred and forty thousand dollars ($140,000.00) in April 1994 which updates to one million two hundred and thirty eight thousand seven hundred and sixty four dollars and eighty three cents ($1,238,764.83).

[99] Mr. McDermott also submitted that the injuries suffered by Mr. Douglas are more severe than those of Mr. Collie. He highlighted the fact that Mr. Douglas suffered soft tissue injuries to both upper limbs, both shoulders and his left thigh. While, Mr. Collie only suffered pain to the right chest and shoulder.

[100] The case of ***Anthony Gordon v. Chris Meikle and Esrick Nathan*** (unreported), Supreme Court, Jamaica suit no C.L. 1997/G 047, delivered 7th July 1998 seems most appropriate to instruct the Court on an award of general damages.

[101] The claimant in that matter suffered pains in the lower back, multiple bruises to the right hand and left calf and tenderness of left hip movement. He was also assessed as having suffered a 5% permanent partial disability of the whole person. An award of two hundred and twenty thousand dollars ($220,000.00) in general damages was made to the claimant. This updates to one million seven thousand four hundred forty two dollars and sixty three cents ($1,007,442.63).

[102] Mr. Collie has not suffered any disability and as such, his injuries are less severe than Mr. Gordon's. They are also not as serious as those suffered by Ms. Bennett. In the circumstances, it is my view that an award of five hundred thousand dollars ($500,000.00) is appropriate for general damages for pain and suffering and loss of amenities.

[103] In conclusion judgment is awarded to the claimants against the second defendant as follows:-

Miss Bennett:-

i. General damages for pain and suffering and loss of amenities in the sum of $1,000,000.00 with interest at the rate of 3% per annum from the 13th day of August 2010 to today.

ii. Special Damages in the sum of $71,500.00 with interest at the rate of 3% from the 20th day of September 2009 to today.

Mr. Devon Collie:

i. General damages for pain and suffering and loss of amenities in the sum of $500,000.00 with interest at the rate of 3% per annum from 13th day of August 2010 to today.

ii. Special Damages in the sum of $40,600.00 with interest at the rate of 3% from the 20th day of September 2009 to today.

Costs to the claimants to be taxed if not agreed.