SCJB

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

C.L. 1999/C – 262

Judgment Book

BETWEEN	**ALLAN CAMPBELL**	**CLAIMANT**
AND	**NATIONAL FUELS & LUBRICANTS LTD**	**FIRST DEFENDANT**
AND	**ROY D'CAMBRE**	**SECOND DEFENDANT**
AND	**SOLOMON RUSSELL**	**THIRD DEFENDANT**

Mr. Emil George QC and Miss Shena Stubbs instructed by DunnCox for the claimant

Mr. Stephen Shelton and Mr. Stuart Stimpson instructed by Myers, Fletcher and Gordon for the first and second defendants

Mr. Garth Lyttle instructed by Garth Lyttle and Company for the third defendant

October 25, 26, 27, 28 and November 2, 2004

Sykes J (Ag)

RULE 20.4 OF THE CIVIL PROCEDURE RULES, NEGLIGENCE AND VICARIOUS LIABILITY

Activities at the gas yard

1. Near to Greenwich Farm in the parish of St. Andrew there is an oil refinery known as the PetroJam Oil Refinery. It provides petrol and petroleum products to its customers. Tankers are allowed to load petrol on its compound and take it to its ultimate destination. The petrol is purchased for retail purposes by a number of petrol marketing companies. The first defendant is one such company.

2. On July 9, 1994, Mr. Solomon Russell, the third defendant, who was, on that date, employed to National Fuels & Lubricants Ltd, the first defendant, picked up a load of fuel from the PetroJam Oil Refinery on Marcus Garvey Drive. The product was to be delivered to a petrol station in Mona Heights, St. Andrew.

3. Also on July 9, 1994 there was a fire on the tanker while it was parked in the vicinity of 32 and 34 Fourth Street, Greenwich Farm. The fire occurred during the off loading of petrol. This case is about that fire and whether any of the defendants are liable to the claimant for damage to a building located at 34 Fourth Street which he says was damaged by the fire.

4. At 32 Fourth Street, next to 34, there was what was known as a "gas yard". This gas yard was in the business of selling petrol. Apparently it is not an authorised selling point for petrol. How would such a place obtain its products? Mr. Errol Reid, a witness for the claimant, provides part of the answer. He says that Mr. Solomon Russell, despite his name, engaged in the not-so-Solomonic act of taking petrol to this premises. According to Mr. Reid he has personally seen Mr. Russell delivering gas there "on a number of occasions". He has seen Mr. Reid for about four years before the fire in 1994 delivering gas to the gas yard.

5. Mr. Reid also knows Mr. Russell in another capacity. It seems that Mr. Reid's culinary skills have achieved legendary status among tanker drivers. He prepares meals which he sells from 29 Fourth Avenue, Greenwich Farm. This is just across the road from the gas yard. Mr. Reid says that Mr. Russell was one of his customers. So well does Mr. Reid know Mr. Russell that he even knows that he is called Cap by the other tanker drivers.

6. Mr. Russell has sought to refute these perfidious allegations. He says that he does not know Mr. Reid. He has never bought food from him. He has never been to or near any gas yard at 32 Fourth Street. The first time he went there was on July 9, 1994 when two marauding gunmen held him up at gun point shortly after he left the PetroJam Oil Refinery. These hoodlums, he said, simply gave him instructions which he followed. This is his account of how the petrol-laden tanker was parked in the vicinity of the gas yard.

7. Needless to say, if this is true and the fire occurred while the gunmen or their accomplices were discharging gasoline then no fault can be attributed to Mr. Russell and by extension, no liability can be attributed to the first two defendants since their liability is derived from the liability of Mr. Russell. Is Mr. Russell's account of the hold-up true? This is one of the critical issues in this case.

8. The claimant's case is that the third defendant's disposition of the petrol at Fourth Street was so unsafe and unprofessional that it exposed the claimant's property to the foreseeable risk of damage by fire.

9. The first two defendants stoutly resist the claim on the basis that Mr. Solomon Russell was on a frolic of his own and they are not liable for whatever act of negligence he may have committed. The first two defendants go even further to say that if Mr. Russell was engaged in a criminal act or to use the language of the civil law, an intentional tort, they could not possibly be liable because the claim is pleaded in negligence and the principles of vicarious liability when an intentional tort is committed do not apply here. The implication being that the case of ***Clinton Bernard v The Attorney General*** Privy Council Appeal No. 30 of 2003 delivered October 7, 2004 cannot assist the claimant because that case only applies to intentional torts. They say the ***Bernard*** case has not altered the law in so far as the hackneyed phrase "on a frolic of his own" captures the defence of an act committed outside the scope of the employee's job thereby deflecting any claim based on vicarious liability.

10. The second defendant has forged an additional shield against liability. He says that although he was the owner of the truck at the material time, the truck was on the exclusive business of the first defendant. The fact that he is a director of the first defendant and its Chief Executive Officer does not abrogate the long established principle that a company is a different legal entity from its directors.

11. Mr. Russell told the court that when he arrived at Fourth Street he was ordered out of the truck and while being held at gun point, the men began to unload some of the petrol in buckets and during this process the fire began. He said that the fire began in a bucket near the tanker. The fire followed a trail of

petrol that led from the bucket to the tanker. He tried to put out the fire but his efforts were fruitless.

12. Mr. Russell contends that the claimant is exaggerating his losses and the only damage the building suffered was from "smoke [blackening] its side a part of the cantilever".

13. One of the issues in this case is the question of vicarious liability. In determining this issue, the effect of ***Clinton Bernard v The Attorney General*** has to be considered. Before addressing this and other questions there is a procedural matter of some importance that I will now deal with.

Application to amend

14. At the commencement of the trial Mr. George QC applied to amend the particulars of claim to include additional items of special damages. This amendment would have inflated the claim to over $9,000,000 from the humble figure of $2,410,000. Naturally, this was resisted by the defendants who say that they would be severely prejudiced in their defence. They added that the manner in which they pleaded and prepared for the trial was to a large extent influenced by the way in which the claimant pleaded his case.

15. Mr. Shelton relied on the literal reading of rule 20.4 (1) and (2) of the Civil Procedure Rules (CPR). They read:

> *(1) An application for permission to amend a statement of case may be made at the case management conference.*
>
> *(2) The court **may not give permission** to **amend** a statement of case **after** the **first** case management conference **unless** the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference.* (my emphasis)

16. Mr. Shelton submitted that rule 20.4(1) gives the court the power to amend a statement of case at a case management conference. The power is a discretionary one and the manner of its exercise is governed by rule 20.4(2). There is a precondition that must be met. The precondition is signified by the word "unless". In short, Mr. Shelton was saying that the discretion cannot be activated "**unless**" the applicant enters through the narrow gate of "change in the circumstances which became known after" the first case management.

17. The first question is whether there has been any change of circumstance since the first case management conference that only became known after that conference. It was admitted by the claimant that the circumstances have not changed since the conference.

18. Mr. George QC posited two solutions. The first is what I call the accrued rights theory. It goes like this: since this case began under the old Rules of the Supreme Court then whatever rights accrued to the claimant under those rules were carried over into the CPR and survived unless they have been expressly abrogated or modified by the CPR. If it were not so, he said, then litigants who commenced an action under the old rules and had their trials conducted under the new rules would be at a disadvantage in that the goal posts were being changed during the course of the litigation. This, he submitted, would be unfair to the litigants.

19. This analysis does not give sufficient weight to the transitional provisions in rule 73. Rule 73.3 (1) and (7) states:

> *(1) These Rules do not apply to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix the date.*
>
> ...
>
> *(7) These Rules apply to old proceedings from the date that notice of the case management conference is given.*

20. If Mr. George's theory is to find a comfortable resting place it would have to be rule 73.3(1). Only persons who had a trial date within the first term of the commencement of the CPR will have the "benefit" of litigating under the old Rules of the Supreme Court; and even then, if the trial is adjourned to another date then the litigants are brought under the new regime. This is reinforced by rule 73.3(3) which states:

> *(3) Where in any old proceeding an application is made to adjourn a trial date, the hearing of the application is to be treated as a pre-trial review and these Rules apply from the date that such application is heard.*

21. What this is saying, when read in conjunction with rule 73.3(1), is that if the matter is set down for trial in the first term after the commencement of the new rules and an application for an adjournment is made, that application is the trigger that activates these new rules in relation to that case.

22. The net effect of all these provisions is that Mr. George's accrued rights theory would only apply to a case that was set down for trial in the first term after the commencement of these new rules.

23. This particular case, however, went through a case management conference so, on the face of it, the application to amend the statement of case should have been made then. Once the case management regime has been applied any rights under the old rules that may have accrued are extinguished and the new regime applies. Therefore, I cannot accept Mr. George's accrued rights theory.

24. The second solution proposed by Mr. George, was also unacceptable. He sought to outflank rule 20.4 by enlisting the assistance of rules 1.2 and 26.1(2)(c). Rule 1.2 states:

> *The court must seek to give effect to the overriding objective when it –*
>
> *(a) exercises any discretion given to it by the Rules; or*

(b) *interprets any rule.*

Rule 26.1(2)(c) provides:

Except where these Rules provide otherwise, the court may –

(a) ...

(b) ...

(c) *extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;*

25. Mr. George submitted that rule 1.2 is the yeast of the entire CPR. It permeates and influences the interpretation of the other rules to such an extent that if the clear and unambiguous words of any rule produce a result that is "unjust" then the court can ignore the clear words since it would conflict with the mandate of rule 1.2. The court, he submitted, must always seek to do justice. Therefore even if particular rules impose a restriction the court must bend, mould and massage the rules to produce a "just" result. i.e. giving effect to the overriding objective. The just result in this case, according to Mr. George, is that the amendment should be allowed because the defendants knew from letters written between the attorney for the defendants and the claimant that he was claiming for the items sought to be added to the claim for special damages.

26. The fact that the potential liability is to be increased by over 300% is of no moment, Mr. George submits. What is important is whether it is just so. Rule 20.4 despite its clear wording must yield to rule 1.2.

27. I cannot ignore the unambiguous terms of rule 20.4. For better or worse, the rules committee have decided that amendments should be granted in limited circumstances. They have decided that justice, in the context of an application to amendment the statement of case after the first case management conference, should take place in the manner prescribed by the rules.

28. Rule 26.1(2)(c) does not assist for the simple reason that it only applies where there is no express rule covering the particular subject matter. Rule 20.4 applies to the specific issue here and so I am not at liberty to ignore the express provision of the rule. The procedural rules are designed to assist the court to deliver and the litigants to receive practical justice according to the text of the rules.

29. The plain truth of the matter is that the claimant had more than ample time to include the additional items in his claim. The fire took place in 1994. The claim was in 1999. The letters were written in 1997, two years before the claim was filed. It is now five years since the claim was filed. Added to this, this action has been through a case management conference. With this procedural matter out of the way I now continue with the events of July 9, 1994 and their aftermath.

The Evidence

30. Mr. Russell's defence has been set out already. I will identify the undisputed facts as far as Mr. Russell is concerned.

(a) He was employed by the first defendant.

(b) On July 9, 1994 he was driving the tanker as an employee of the first defendant.

(c) He drove the truck, laden with petrol, to Fourth Street and stopped in the vicinity of 32 and 34 Fourth Street.

(d) Petrol was being removed from the truck.

(e) A fire began during this process.

31. Was Mr. Russell held up at gun point or did he drive there voluntarily? There is no third possibility, based on the evidence.

32. Mr. Lyttle submitted that Mr. Russell is the only person who has spoken about gunmen and since he was uncontradicted then I ought to accept his account. This submission suggests that if the internal logic of a witness's testimony is poor and it lacks coherence I must accept it merely because he is the only witness to testify on a particular issue. I have concluded that the conduct of Mr. Russell

after the alleged hold-up is not credible and is a fabrication to cover up the fact that he voluntarily drove to Fourth Street to provide gasoline to the gas yard. His post-hold-up conduct is too strange to be credible.

33. Mr. Russell says that after the robbery and during the fire he saw D'Cambre at the scene of the fire. He did not speak to him because the crowd was thick. This fire occurred at approximately midday on July 9, 1994. There is no evidence that Mr. Russell told Mr. D'Cambre either on July 9, 1994 or any other day that he was held up at gun point.

34. Mr. Russell said that while at the fire he saw the police. The police were there for some time. Yet, he did not report the hold-up to the police. Despite the presence of the police, Mr. Russell decided to report the matter to the Hunt's Bay Police Station. There is no evidence that he actually did make any report. Detective Inspector Castle testified that the police at Hunt's Bay were not at any time looking for any gunmen in relation to any hold-up of Mr. Russell.

35. This conduct, in the absence of some reasonable and credible explanation, defies common sense.

36. I am satisfied that that he drove to Fourth Avenue voluntarily. Mr. Reid has supplied the reason for his presence. He was there to deliver petrol as he was used to doing for the previous four years. Mr. Lyttle has pointed to inconsistencies in Mr. Reid's testimony. For example, Mr. Reid testified that (a) he saw Mr. Russell delivering gas on July 9, 1994 when that was not so; (b) 34 Fourth Street was burnt out when this was not so; (c) a Jamaica Public Service light post was burnt down when this had not happened and (d) he said that he saw the foam truck from PetroJam put out the blaze.

37. In response to questions posed by the court it turned out that Mr. Reid was the person who went to PetroJam and spoke to persons there. He saw the foam truck drive in the direction of the fire. He said that he did not actually see Mr. Russell delivering gas that day. In my view what Mr. Reid did was to draw inferences from (a) what he knew of Mr. Russell's behaviour over the preceding four years and (b) the fact that the fire was put out shortly after the foam truck

drove in the direction of the fire. This is not a lying witness. This is a witness who states as fact what was truly a matter of inference. In the circumstances it was obvious common sense. In respect of the house and the light post this was simply an example of hyperbole to which our people are particularly prone relating an exciting and dramatic event. These blemishes do not undermine his basic story: on July 9, 1994 there was an explosion, a tanker was on fire, the tanker was in the vicinity of 32 and 34 Fourth Street, Mr. Russell was a frequent deliverer of petrol to the gas yard was near to the tanker. Only the most generous of persons would think, initially, given the history of Mr. Russell, that he was there under duress.

38. The next question is what was his purpose there? On a balance of probabilities I find that he was there to deliver gas. There was no gunman there forcing him to face any wall. He was distributing gas a highly flammable, substance. I also find that it was during this illegal gas distribution that the gas was ignited and the fire began. All this in my view means that Mr. Russell, in law, was negligent. His clear duty was to handle and deliver the petrol safely to its destination. He breached that duty by engaging in an unlawful and possibly criminal act when he was delivering the gas to the gas yard. The circumstances of the delivery were unsafe and unprofessional. Gas escaped and a fire resulted.

39. The next witness for the claimant was Detective Inspector Castle. He said that he was stationed at Hunt's Bay Police Station on the day in question and attended upon the scene of the fire. He claims that he saw fire at the claimant's premises at 34 Fourth Street.

40. The claimant put in two reports. One from the valuator Mr. McPherson and the other from the Detective Inspector. The detective's report concerned what he saw at 34 Fourth Street as well as the result of investigation done by Detective Constable Nicholson.

41. The case for the first and second defendants was more one of law than fact. They said that they are not liable for any alleged act of negligence of the third defendant because he was acting outside the scope of his employment at the

material time. They rested their case on the testimony of Mr. Roy D'Cambre, the second defendant. His testimony was to the effect that he exercised due diligence in the recruiting, training and despatching of Mr. Russell. Mr. Russell was given explicit instructions that he was not to deviate from his route. If, they say, he was captured by gunmen then clearly there was no negligence in Mr. Russell and therefore they cannot be vicariously liable. Alternatively, if Mr. Russell drove to Fourth Street voluntarily he was in clear breach of duty and therefore outside the scope of his employment.

42. In respect of the second defendant in particular, Mr. Stimpson submitted that although he was the owner of the truck it was, at the material time, on the business of the first defendant and so the prima facie inference of vicarious liability may arise from the fact of ownership has been displaced.

43. Towards the end of his submission, Mr. Stimpson submitted that in the event that the court finds that Mr. Russell was negligent the fire is too remote. I do not agree. Where there is negligent handling of a substance that has as one of its characteristics a high degree of flammability I do not see how a fire can be said to too remote, particularly if the handling is taking place in less than ideal circumstances. In this kind of situation there is not just the risk of some damage but fire damage is foreseeable.

Vicarious liability

44. As indicated earlier, one of the critical questions is whether the ***Bernard*** case applies here. I have decided that it does. Mr. Stimpson made two points in respect of that case. He said

(a) the case only applied to intentional torts; and

(b) if it applied to this case then the test propounded there was not met.

45. But for the persistence of Mr. Stimpson I would thought that his submission that there is a difference in the application of vicarious liability between intentional torts and negligence was untenable

46. I will deal first with the question of whether the case only applies to intentional torts. It is my view that the law has never ever made a distinction between intentional torts and negligence when deciding whether vicarious liability arises in any situation. What has happened is that intentional torts have created a specific problem, viz, whether a tort done deliberately and often with careful planning is within the scope of the employment of the employee. The problem is acute because the very fact of the tort being deliberate as distinct from careless may be relied on by the employer as strong prima facie evidence that the employee was acting outside the scope of his employment.

47. Within the last eight years the highest courts of Canada, Australia, the United Kingdom as well as the Court of Appeal of New Zealand have had to grapple with trying to formulate the correct legal principles when dealing with vicarious liability. In all the jurisdictions mentioned, the cases that have brought the issue to the fore are for the most part, cases of sexual abuse of children by the employees of institutions, whether state run or private, that are charged with the responsibility of caring for or have children under their care (see ***Bazely v Currie*** 174 D.L.R. 45; ***Jacobi v Griffiths*** *174 DLR (4th) 71;* ***New South Wales v Lepore; Samin v Queensland, Rich v Queensland*** [2003] HCA 4 (6 February [2003]; ***S v The Attorney General*** [2003] 3 NZCA 450.

Is Bernard v The Attorney General restricted to intentional torts?

48. I need not state the facts of ***Bernard*** for the purpose of answering this question. Lord Steyn who wrote the judgment of the Judicial Committee of the Privy Council expressly predicated the decision on the two recent House of Lords decisions of ***Lister and others v Hesley Hall Ltd*** [2002] 1 AC and ***Dubai Aluminium Co. Ltd v Salaam and others*** [2003] 2 AC 366. I will examine ***Lister's*** case alone because it was a case of pure common law. The ***Dubai Aluminium*** case while enunciating similar principles was one involving the interpretation of a statute. If it can be demonstrated that ***Lister's*** case dealt with general principles of vicarious liability and it was adopted and relied by the

Privy Council in ***Bernard*** then the principles enunciated there apply to Jamaica. I hope that this analysis will show that there is nothing in any of the judgments in ***Lister*** that suggests that the test that was being developed was restricted to intentional torts.

49. In ***Lister,*** the House was confronted with what is called an intentional tort. A warden had molested children under his care. The issue was whether his employers should be held liable for his tortious acts. The judge at first instance said yes and the Court of Appeal said no. A brief examination of the tortuous route the trial judge took to establish vicarious liability will demonstrate why the House had to address the question of the appropriate method of analysis to be applied when vicarious liability is in issue.

50. The judge at first instance found vicarious liability on the basis that (a) the warden failed to report his intended acts of sexual abuse and (b) he failed to report the consequences of his tortious act. The trial judge was bound by a previous decision of the Court of Appeal that had decided, as a matter of law, that sexual molestation of children could not possibly be within the scope of employment of a person employed to look after young children (see ***Trotman v North Yorkshire County Council*** [1999] LGR 584). The Court of Appeal had held that the very act of sexual molestation was an act of self-gratification that could not possibly fall within the scope of his employment. It applied its previous decision in ***Trotman.*** The analysis of the trial judge was stigmatised by Lord Millett as "both artificial and unrealistic" (see para. 84 of ***Lister***).

51. In dealing with the issue of vicarious liability Lord Steyn referred to Salmond's test which was that an employer is liable for the wrongful act of his employee if the act done was either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master. This test was propounded in 1907 when Salmond's first edition appeared. It still appears in the twenty first edition. Lord Steyn highlighted an important section of Salmond's analysis that appeared in the first edition and all subsequent editions but apparently has not been given much prominence. Salmond also said

that that an employer is liable even for unauthorised acts provided they are so connected with acts which he was authorised to do such that they can be regarded as modes of doing the authorised act (see Lord Steyn para. 25 in ***Lister***). It was in this latter observation by Salmond rather than his initial statement of principle that Lord Steyn saw the seeds of developing an appropriate legal test that should guide the courts in future when deciding whether a particular act of the employee is within the scope of his employment.

52. As McLachlin J in ***Bazely v Currie*** 174 D.L.R. 45 so ably demonstrated, the test as formulated by Salmond did not cope well with intentional torts. I would add that it also does not easily accommodate torts that involved a deliberate course of conduct which are pleaded as a claim in negligence and not in terms of an intentional tort as is the instant case before me. McLachlin J was of the view, correctly so, that when Salmond said that an employer is liable if the act done either was (a) an authorised tort and (b) a wrongful and unauthorised mode of doing some act, Salmond did not provide any criterion to determine when a tort fell within category (b). It is only when one goes beyond the test and looks at the other parts of Salmond's text referred to by Lord Steyn that one begins to see a workable criterion by which a judge can make the decision of whether the situation gives rise to vicarious liability.

53. Category (a) torts have never presented a problem. The view has been expressed that category (a) torts are not true instances of vicarious liability since the liability in such a situation is primary and not derived from the negligence of another (see Lord Millett in ***Lister*** at para. 67). However category (b) is the one that poses the problem especially when an intentional tort is in view. The reason is obvious. When one is dealing with a deliberate act of wrong doing as opposed to a mere careless way of doing an act the question of whether the employer should be liable is brought sharply into focus. An intentional act of wrong doing tends to be inconsistent with carelessness. Intentional wrong doing often times, if not invariably, involves an act that is contrary to the express instruction or expectation of the employer. It is often times a negation of the duty required.

This is why it is really a misuse of language to speak of an intentional tort as an improper mode of doing an authorised act. Lord Steyn highlighted the difficulties of looking at vicarious liability in this way (see para. 16 of ***Lister***). In such situations it is very tempting to conclude that the more deliberate the act the further away the employee is from doing an act within the scope of his employment. The example given by Lord Steyn of the dishonest bank employee makes the point – a bank would only be liable for the dishonest acts of its employee if it carried on the business of dishonest banking. It is this analytical lense that the Court of Appeal wore in ***Lister*** why, according to Lord Steyn, they went awry. How could anyone realistically say that sexual molestation was an unauthorised mode of looking after the children in the care of offending employee?

54. Contrary to the submission of Mr. Stimpson, there is nothing in the analysis of Lord Steyn that suggests that his analysis was restricted or applicable only to intentional torts. Category (b) has at least two members: intentional torts and torts done carelessly. The fact that the discussion arose in the context of an intentional tort, without more, is not a reason to conclude that it is so restricted. I have already stated the reason why a more refined analysis is undertaken in intentional torts. Lord Steyn put Mr. Stimpson's submission to rest when he said that "*it is necessary to face up to the way in which* ***vicarious liability sometimes embrace intentional wrong*** *doing by an employee*" (see para. 16 of ***Lister*** (my emphasis)). This comment comes immediately after he cites Salmond's test. This makes it clear that Lord Steyn was not restricting his analysis to intentional torts. The effect of intentional torts was to indicate that close scrutiny of the connection between the act of the employee and the nature of his employment must be under taken. This kind of analysis can apply to any tort, whether intentional or not, once vicarious liability is in dispute. The development in ***Lister*** albeit ninety two years late was inevitable once ***Lloyd v Grace, Smith & Co*** [1912] AC 716 was decided. That case exploded the view

that the employer was only liable for an intentional tort if the employee was acting for the benefit of the employer.

55. Lord Steyn at paragraph 20 in ***Lister*** emphasised that when Salmond's formulation including the reference to the connection between the employee's act and what he was employed to do it emphasises the need to always focus on the "right act of the employee". By this Lord Steyn meant that one has to look, broadly, at what the employee was required to do and not isolate the act that results in the commission of the tort.

56. Lord Millett in his analysis took a somewhat different approach than Lord Steyn. He introduces the idea of inherent risk. It is my view that Lord Millett, while accepting Lord Steyn's approach as correct, sharpens the analysis by taking into account the inherent risk of any activity engaged in by the employer. He says that vicarious liability is really a loss-distribution device that does not have as a necessary condition the existence of fault within the employer (see para. 65 of ***Lister***). One of the most important passages in his judgment is found at paragraph 65. It is so important that I will quote it directly.

> *These passages [referring to Fleming and Atiyah] are not to be read as confining the doctrine to cases where the employer is carrying on business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong.* ***If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.*** (my emphasis)

57. This dictum led Lord Millett to say that if the clerk in ***Lloyd v Grace, Smith*** had stolen money from the victim's purse the solicitors would not be liable since he would have been taking advantage of an opportunity that presented itself (see para. 73 in ***Lister***). Lord Millett follows the above quoted passage with the observation that it would be straining language to regard sexual molestation as an unauthorised mode of doing the job of caring for children under the care of the warden. In other words, on the facts before the House, Lord Millett was not going to be deciding the case on the basis of an unauthorised mode of doing the job nor was he going to endorse the unrealistic reasoning of the judge. However the abandonment of that approach did not mean that the court would be unable to conclude that his act was within the scope of his employment. Therefore it is no longer necessary to categorise any tortious act as a wrongful and unauthorised mode of doing an authorised act though it might be possible to do so. What Lords Steyn and Millett were showing was that the approach of the Court of Appeal was based on apriori reasoning: vicarious liability was excluded because sexual molestation could not possibly have been a part of his job. The Court of Appeal had come to its conclusion because, by definition, there is no way that sexual molestation could be a wrong and unauthorised way of doing the authorised act of caring for the children.

58. The analytical tools of close connection and inherent risk provide a more satisfactory way of examining the issue. This is the change that has been introduced to Jamaican law by ***Bernard.*** There is no suggestion of any restriction of the principle to intentional torts. In fact, as will be shown, this approach transcends the distinction between intentional torts and other torts.

59. Lord Millett continued at paragraphs 69 and 70:

> *One of these steps in this analysis could, I think, usefully be elided to impose vicarious liability where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment.*

Such a formulation would have the advantage of dispensing with the awkward reference to "improper modes" of carrying out the employee's duties; and by focusing attention on the connection between the employee's duties and his wrongdoing it would accord with the underlying rationale of the doctrine and be applicable without straining the language to accommodate cases of intentional wrongdoing.

But the precise terminology is not critical. The Salmond test, in either formulation, is not a statutory definition of the circumstances which give rise to liability, but a guide to the principled application of the law to diverse factual situations. ***What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing and not to verbal formulae.*** *This is the principle on which the Supreme Court of Canada recently decided the important cases of Bazley v Curry 174 DLR (4th) 45 and Jacobi v Griffiths 174 DLR (4th) 71 which provide many helpful insights into this branch of the law and from which I have derived much assistance.* (my emphasis)

60. The use of the adjective "unauthorised" before "acts" in the second sentence in the just quoted passage cannot be understood, in this context, to mean "intentional". Further on a textual analysis of the first paragraph of the passage it is clear that Lord Millett is saying that if one examines the closeness of the connection between the employee's duties and the wrong doing "it would ... accommodate intentional wrongdoing". What is the "it" being referred to? The "it" must be the formulation that focuses on the closeness of the connection between the act and the employee's duties. The unstated part of the analysis, which he did not find not necessary to state, was that the formulation covered careless acts. The only remaining question was whether this formulation **could also** accommodate intentional torts. Lords Steyn, Clyde and Millett found that it

could and did. There was therefore no need to develop any principle of vicarious liability that was peculiar to intentional torts.

61. When Lord Millett spoke of "diverse factual situations" he did not mean "diverse factual situations when considering intentional torts". He did not say so. He was developing a general principle regarding vicarious liability. Ordinary acts of carelessness will, in many instances, be so obviously closely connected to the job that they do not demand this kind of analysis. However in not so clear cases the analysis will be helpful. So when lawyers speak of vicarious liability in instances of carelessness it is really the end result of an analytical process that, without articulating it, has concluded that the careless act is closely connected to the job of the employee.

62. Lord Millett then refers to intentional torts and their special problems. His Lordship urged, in paragraph 74, an abandonment of what he called "an excessive literal application of the Salmond test". This aspect of Lord Millett's judgment is in accord with that of Lord Steyn. Lord Hutton agreed with Lord Steyn.

63. Lord Clyde states at paragraph 37:

> ***An act of deliberate wrongdoing may not sit easily as a wrongful mode of doing an authorised act. But recognition should be given to the critical element in the observation, namely the necessary connection between the act and the employment.*** *The point is made by Salmond even in the first edition, at p 84, where he states: "On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible."* ***What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered. The sufficiency of the***

connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised. (my emphasis)

64. Not one of the Law Lords, including the reluctant Lord Hobhouse, doubted that ordinary acts of negligence fell within category (b) of Salmond's formulation. There is no such thing as principles of vicarious liability that are applicable to intentional torts which are distinct from principles of vicarious liability applicable to other torts. The distinction sought by Mr. Stimpson does not exist. There is no obvious benefit to be derived from this supposed distinction.

65. All this is the background to ***Bernard's*** case. ***Bernard*** is not quite as revolutionary as I had initially thought. What might be considered revolutionary was how broad the scope of the police officer's duty was conceived to be. However on further reflection, it might well be that this breadth is justified on the basis that section 13 of the Constabulary Force Act confers very, very broad powers on a police officer.

66. The added significance of ***Bernard*** is that Lord Steyn seemed to have moved closer to the language of Lord Millett in ***Lister***. In ***Lister*** Lord Millett spoke of the creation of a risk by the employer. This idea of the introduction of risk by the employer was discussed extensively by McLachlin J in ***Bazely*** . It is fair to say that in ***Lister*** the other Law Lords did not warm to this type of language. Lord Steyn did not use such language in ***Lister***. However by the time of ***Bernard*** Lord Steyn was using both the language of close connection and risk created by the employer. I cannot help but note that the passage from McLachlin J in ***Bazely*** quoted by Lord Steyn in ***Bernard*** has words such as "risk" and phrases such as "fair allocation of the consequences of the risk and/or deterrence" (see para. 23 of ***Bernard***)

67. 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.

68. Therefore as far as Jamaica in 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;

69. These considerations are not exhaustive but looking at any factual situation in this way one will find both a limit to vicarious liability and a satisfactory answer in determining whether the tort committed was within the scope of his employment. The employer is not liable for any and all torts committed by the employee. If this were so, then as McLachlin J said in ***Bazely*** the employer would become an involuntary insurer. I hope I have demonstrated that the way I

have approached this matter does not lead to open ended liability. Mr. Shelton's fears of unlimited liability have been adequately addressed.

70. Not daunted by my conclusion Mr. Stimpson attempted to staunch the flow of this analysis by appealing to the principle of stare decisis. Mr. Stimpson cited two cases, one from the Judicial Committee of the Privy Council and the other from the Court of Appeal of Jamaica, which he said were binding on me and as such I an obliged to find that the first and second defendants are not vicariously liable. Mr. Stimpson submissions, while true generally, did not accurately state the correct stance of a first instance court when it has to decide what is the effect of the latest decision of the highest court in its legal system which may be in conflict with either decisions of the Court of Appeal or the highest court itself. I resolved this difficulty by adopting the approach of Oliver J (as he was) in ***Midland Bank v Hett, Stubbs and Kemp*** [1979] 1 Ch. 384, when he was confronted, at first instance, with the decision of the House of Lords in ***Hedley Byrne v Heller*** [1964] AC 465 and a decision of the Court of Appeal in ***Groom v Crocker*** [1939] 1 K.B. 194 (see ***Midland*** at page 405). In my opinion while judges at first instance are bound by decisions of the Court of Appeal, any decision of that court that is inconsistent with ***Bernard*** either because it expresses a different principle or because the actual decision would yield a different result on an application of the ***Bernard*** approach then such cases must necessarily be overruled by ***Bernard***. ***Bernard*** is now the leading case on vicarious liability in this jurisdiction. It also follows that any previous decision of the Judicial Committee of the Privy Council from Jamaica that is inconsistent with ***Bernard*** cannot now be followed since the law has now moved decisively away from the old construct.

71. From this it follows that the case of ***Storey v Ashton*** (1869) 4 QB 476 relied on by the first and second defendants either has to be accepted as one in which the failure by the employee to return the cart and horse by the specified time was sufficient to break the link of vicarious responsibility or cannot now be followed in light of the more refined analysis developed by the Canadian

Supreme Court, the House of Lords and the Judicial Committee of the Privy Council. I suspect that if the facts are now examined in the light of Lord Millett's dicta on risk and close connection it would be decided differently today.

72. Mr.Stimpson's next case was ***United Africa Company Ltd. v Saka Owoade*** [1957] 3 All ER 216. Counsel sought to extract from this case and ***Lloyd v Grace, Smith*** that there was some category of case known as entrustment cases and if there was theft of the property then in those type of cases vicarious liability was established. The idea being that theft was the kind of activity that would be likely or foreseeable. Therefore, submitted Mr. Stimpson, I should look at the instant case with similar eyes – treat it as an entrustment case. In other words if Mr. Russell had stolen the petrol then there would be vicarious liability. The fire was not foreseeable because he was entrusted to deliver the petrol, not to set or cause fires to be set to it. This is a variation of the foreseeability submission to which I referred earlier. I do not accept this analysis because this is an unrealistic view of the matter. The fact is that Mr. Russell was indeed either stealing the petrol or facilitating its theft. Mr. Russell had indeed been entrusted with a highly flammable substance and so a fire arising from negligent handling of such a substance is not too remote albeit in the context of an illegal activity.

73. Another arrow in Mr. Stimpson's quiver was that of ***Dunkley v Howell*** (1975) 24 W.I.R. 293. The narrow question posed by Graham-Perkins JA cannot stand with Lord Steyn's broad approach (see page 295G in ***Dunkley***). The decision cannot be reconciled with ***Bernard***. It is no longer binding on me.

74. Mr. Stimpson's final authority was the Judicial Committee of the Privy Council's decision in ***General Engineering Services Ltd v Kingston and St. Andrew Corporation*** (1988) 36 WIR 331. In my view Lord Ackner posed the question about the job of the firemen in extraordinarily narrow terms. Lord Ackner stated the matter in this way at page 334c

Their mode and manner of driving (i.e. the slow progression of stopping and starting) was not so connected with the ***authorised act****, that is driving to the scene of the fire as expeditiously as reasonably possible, as to be a mode of performing* ***that act****.* (my emphasis)

75. Lord Ackner's focus was on the authorised act of driving rather than on the duty of the fire brigade. The duty of the fire brigade could hardly be restricted to "that act" of driving any more than it could be restricted to rolling up the hose or connecting the hose to a fire hydrant. If one now poses Lord Millett's question of whether the manner of driving was closely connected with the duty of the fire brigage I suspect the result may well be different. Lord Millett emphasised in ***Lister*** at paragraph 80:

Attention must be concentrated on the closeness of the connection between the act of the employee and ***the duties he is engaged to perform broadly defined****.* (my emphasis)

76. The ***General Engineering Services Ltd.*** case cannot stand, harmoniously, with ***Lister, Dubai Aluminium, Bazely, Bernard*** and ***Jacobi.*** I therefore conclude that I am not bound by it.

Does vicarious liability arise on these facts?

77. Mr. Russell was employed by the first defendant to deliver gas to petrol stations. Mr. D'Cambre stated that he was been in the business twenty five years and he has heard of fuel being off loaded from the tankers at places other than their destination. To prevent this happening to him he has not only trained and instructed the drivers of the first defendant but he has also put in place a monitoring mechanism. To use the language of Lord Millett, for the first defendant to achieve its objective of distribution of petrol it has to contend with the serious risk of the kind of wrong doing done by Mr. Russell, namely

distributing petrol at a place other than where he is supposed to do this. Again, to use the language of Lord Millett in ***Lister,*** what Mr. Russell did was "inherent in the nature of the business" of gas distribution. Mr. D'Cambre's evidence is that the risk of theft is inherent risk in the gas distribution business. Petrol is highly flammable. Mr. D'Cambre agrees with this. He said so under cross examination by Mr. George QC. The risk of fire must necessarily be an inherent risk in the petrol distribution business. This is an inevitable conclusion from the inherent characteristic of flammability of petrol.

78. The fact that Mr. Russell disobeyed the express instructions of Mr. D'Cambre is of no moment. When Mr. Russell drove to Fourth Avenue his deviation was closely connected with his duty of transporting gas to the proper destination. He was still within the scope of his employment.

79. A fire resulting from negligent handling of a highly flammable substance could not possibly be described as too remote. It does not matter whether the context of the handling was legal or illegal.

80. The first defendant is therefore vicariously liable for the negligence of Mr. Russell.

81. As far as the second defendant is concerned, I have concluded that he is not vicariously liable. It is true that he owned the truck but on the day in question it was on the exclusive business of the first defendant. Mr. Russell was not the employee of Mr. D'Cambre. The claimant has not made out his case as pleaded against Mr. D'Cambre.

Consequential damage

82. A number of photographs have been tendered in evidence. The defendants say that the photographs show little or no damage from the fire. I have examined the photographs and while they do not show a building that has been destroyed, they show signs of burning and soot. Some of the photographs show evidence of some burning inside the house (see exhibits 2d, 2e, 2f, 2i, and 3g). Exhibit 2g shows a light post with either soot or light scorching. Exhibit 2a shows

evidence of burning. The question is how did this evidence of burning and soot get inside the house and on the outside of the house unless it was caused by the fire? The evidence is that this tanker was in the vicinity of 34 Fourth Street. There was some dispute as to whether it was totally in front of 32 Fourth Street or partly in front of both 32 and 34 Fourth Street. Nothing turns on its precise position.

83. On this approach it is not necessary for me to decide whether Detective Inspector Castle was exaggerating when he spoke of fire on the premises or whether Mr. Reid's graphic account of the what he thought was the "burning down" of Mr. Campbell's place was entirely accurate except and in so far as it relates to their credibility. I have already dealt with the credibility of Mr. Reid. Mr. Castle's evidence does not add much to case other than that he is supposed to be the independent person who can speak to fire damage of the claimant's property. He did not go over there. He might have over stated the case for fire at 34 Fourth Street but given the smoke and soot that must have been present at the fire which was close by the property his error is understandable. I have objective evidence that can assist me and I rely on that. The photographs were taken by the claimant but no one has suggested or provided evidence that he altered the pictures in his favour. I accept him as a truthful and reliable witness. The account of what he did when he arrived in the island after the fire is internally consistent and harmonises well with facts external to him.

84. Mr. A. B. McPherson a valuator has provided a valuation report. He says that although the building could have been repaired he would not recommend it because it was structurally damaged. He recommended replacing it. The cost of demolishing the building, removing the debris and erecting the new structure was JA$2,410,000. The cost of the building itself would be JA$2,110,000. This is the amount claimed as special damages by the claimant.

85. Mr. McPherson's report was done in 1997, three years after the fire. It has been said that this report is suspect and I should not accept it. The defendants say that he has exaggerated the damage in favour of the claimant. Mr.

McPherson was not available for trial. Regrettably he is ill and has gone overseas with his wife for treatment.

86. He considered the possibility of repairs but having regard to the damage that he saw he felt that it was structurally unsound and therefore uneconomical to repair. This is his reason for recommending replacement. On the evidence before me he is the only person other than the claimant who has examined the house.

87. I have been asked to say, by the defendants, that the report of the fire from the fire brigade does not mention any damage to the house. The question is, does the failure to mention damage to the house mean that there was no damage? I have the photographs of Mr. Campbell which he took within one week of the fire. Since I have accepted Mr. Campbell as an honest witness I can only conclude that the fire brigade either did not see what was happening at 34 Fourth Street, which is a distinct possibility given the smoke and soot that was around at the time of the fire or they were careless in their observations or they could have seen it but excluded it from the report. The possibilities are many.

The quantum of damages

88. Mr. George QC was prepared to discount the replacement cost of the building to $1,600,000 given that the claimant would be receiving a new building and not the cost of repairing a twenty year old building. Mr. George submitted that I should make an award for loss of profit from the date of the trial forward because it would qualify as general damages.

89. I cannot accede to the submission with regard to future profit. It is not clear to me by what means I would arrive at figure for loss of future profit. Loss of future profit must be predicated upon some ascertainable figure. No method of calculation was put before me. It is true that it was indicated that the claimant earned $1,000,000 per year. I do not know how this figure was calculated. Thus in accordance with the burden and standard of proof, the claimant has failed to prove any loss of profit whether past, present or future. No award will be made under this head.

90. I will now deal with the damage to the house. The usual measure of damages in situations such as this is the diminution of the value of the property. This means that there usually is evidence of the pre-damage value and the post-damage value. In this case no such evidence was presented. The claim has proceeded on the basis that the house should be replaced. This is based upon the report of Mr. McPherson. He says that the house was structurally damaged to the extent that a new building is needed.

91. While it is true that I have found that the house received some damage, there is nothing before me to lead me to conclude that the house was so badly damaged that it needed to be demolished. Mr. McPherson has not stated in his report why he came to such a conclusion. He does not say or give any indication of the nature of the structural defects he saw why he concluded that the premises ought to be demolished. What he has stated is a conclusion and not the basis of his conclusion so that it could be examined. It is my view that if one is seeking the replacement cost of building then there ought to be cogent evidence supporting this claim.

92. Mr. George sought to overcome this difficulty by pointing to the fact that Mr. McPherson was the only person who, based on the evidence, examined the building. Queen's Counsel said that while the photographs do not show anything suggestive of structural damage I should accept the conclusion of Mr. McPherson. This is good advocacy but I am not convinced that it is the correct approach. Mr. Campbell also examined the house. He took the photographs. He had possession of the house, other than for a brief moment when vandals took over, from 1994 to 2001 when he sold it. It does seem remarkable that his evidence did not indicate that he saw anything of concern. I accept that he is not a valuator but I would have expected him to see the structural damage of which Mr. McPherson has written.

93. There is no evidence that the house was engulfed by flames. There is evidence of scorching at points on the building. There is no evidence explaining how the scorching, absent the building being on fire, could have caused this

structural damage. I conclude that on a balance of probabilities the claimant has not made good his claim for replacement cost. This being so I now have to look elsewhere for the quantum of damages. . There is really a paucity of the relevant evidence that would assist in this assessment but I have to do the best I can.

94. Mr. Campbell said that the he spent $200,000, approximately, on repairs before he stopped. He said that the repairs were not complete when he stopped. Taking into account his expenditure (of which there were no receipts) and the fact that repairs were incomplete I think that a sum of $300,000 is appropriate in the circumstances.

95. Although there was evidence of damage to tapes, records and such like I declined to make an award because there was simply no evidence of the value of these items.

Conclusion

96. The second defendant is not liable to the claimant. There is no evidence of personal negligence. Mr. Russell was not the employee of the second defendant and neither was he the servant or agent of the second defendant.

97. The third defendant, Mr. Russell was negligent. He voluntarily drove the truck to 32 - 34 Fourth Street, Greenwich Farm. He was either unloading the petrol himself or he facilitated its unloading in a negligent manner that resulted in the fire. The fire damaged the premises of Mr. Campbell at 34 Fourth Street. The damage is supported by the photographs to which I have referred.

98. The first defendant was the employer of Mr. Russell. The first defendant had exclusive use of the truck used by Mr. Russell to transport a highly flammable substance.

99. What Mr. Russell did was a risk that was inherent in the job of transporting fuel. His negligent act was closely connected with his job of transporting and unloading fuel. Fire resulting from negligent handling of a flammable substance was foreseeable. Consequently, his act was done within the course of his

employment. On this basis the first defendant is vicariously liable for the negligence of Mr. Russell.

100. Mr. Campbell is awarded the sum of $300,000 with interest at the rate of six percent from the date of the fire to the date of judgment.

101. Costs to the claimant. Costs of claimant and second defendant to be paid by the first and third defendants.