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.*