[2014] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 82 /2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL (AG)

BETWEEN	**THE ATTORNEY GENERAL FOR JAMAICA**	**APPELLANT**
AND	**KENYA TULLOCH**	**RESPONDENT**

Harrington McDermott instructed by Director of State Proceedings for the appellant

Alexander Williams instructed by Usim Williams & Co for the respondent

15, 16 January and 28 March 2014

PANTON P

[1] I fully agree with the reasoning and conclusion of my learned sister Mangatal JA (Ag) and have nothing to add.

PHILLIPS JA

[2] I have read in draft the judgment of my sister Mangatal JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

MANGATAL JA (AG)

[3] This is an appeal from the judgment of Morrison J delivered on 7 June 2011. The central issue is whether it was open to the learned trial judge, to find that the Attorney- General for Jamaica ("the appellant"), was vicariously liable for the assault and shooting of the respondent Kenya Tulloch. The respondent was shot by District Constable Lloyd Jones, now deceased. In a reserved judgment, Morrison J, found for the respondent on this issue, and gave judgment as follows:

> "IT IS THIS DAY ADJUDGED:-
>
> 1) Judgment for the Claimant against the 2nd Defendant in the sum of Two Million Dollars ($2,000,000.00) for general damages, with interest at the rate of 3% per annum from 5th July 2006 to 7th June 2011; and the sum of Two Hundred and Six Thousand, Five Hundred and Twenty Three Dollars ($206,523.00) for special damages with interest at the rate of 3% per annum from 25th February 2006 to 7th June 2011.
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> 2) Costs to the Claimant in the sum of $40,000.00."

The incident and immediate aftermath

[4] It must be said that there are gaps in the evidence which was presented at trial. Further, some portions of the evidence, particularly in witness statements, and in relation to entries in the relevant station diary, were hearsay evidence to which no objection was taken prior to being admitted. However, the matter arises in the following way. On 25 February 2006, the respondent, who was a jerk chicken vendor, had a stall where he sold chicken in front of Cactus Night Club, at Bridgeport Plaza ("the plaza"), in the parish of Saint Catherine. At the date of the incident, the respondent

had plied his trade at the plaza for many years. The respondent's brother, Kevin Tulloch was also a chicken vendor and had a stall nearby. At the trial, the respondent gave evidence that he operated at his stall five nights per week from 6 o'clock in the evening to the following morning about 4 o'clock, depending on how busy things were. He said he was well known and was not a "trouble maker". On Saturday, 25 February 2006, the respondent went to his stall at about 7:00 p.m. He went to order some goods from a wholesale shop which was also on the plaza, and from which he bought goods "all the time". The shop is called "Carton Enterprise". Whilst waiting at a section of the wholesale shop where one collects the goods, the respondent saw a man that he was accustomed to seeing at the pharmacy which is also located at the plaza. In cross-examination, the respondent indicated that he had been in a line waiting to get his goods when the man jumped the queue and came in front of him.

[5] This man came and stood right in front of the respondent who said to the man "shit belly, yuh nuh have no manners". At this point, the man pushed the respondent very hard in his stomach. The respondent stumbled, walked back to the man and pushed him back. The man pulled a gun from his waist, pointed it at him and shot him in his abdomen. The respondent had not known prior to being shot, that this man had a gun. The respondent tried to run but fell at the door outside. The shop was full of people purchasing goods and the respondent heard a woman who was selling clothes nearby say "Si him shoot di chicken man deh and walk gone up deh so". The respondent then saw a large crowd going to the area where the lady said the man was going.

[6] The respondent was in great pain and was there for about a minute when a police jeep and car came to the scene. He was taken to the Spanish Town Hospital and treated. It was later that the respondent learnt that the man who shot him was a district constable, Lloyd Jones. At the time of the incident therefore the respondent did not know that Lloyd Jones (hereafter "DC Jones") was a district constable.

[7] Kevin Tulloch, the respondent's brother, gave evidence that on 25 February 2006, at about 7:30 p.m. he was standing at his stall when he noticed that there was a crowd in front of the wholesale shop. He saw the crowd separating and then he heard a loud explosion and heard someone say that chicken man was down. Three minutes after he heard this explosion he went over to a pathway towards the doorway of Canton Enterprise. He walked towards the crowd and he saw the respondent lying on the ground. However, before he reached to him, along the pathway he saw a man with a firearm in his hand and as he approached the man, the man pointed the gun at him. Mr Tulloch said that he knew this man as a security guard at Total Care Pharmacy. When the man pointed the gun at him, Mr Tulloch asked him what happened. The man responded by saying "police, police". The man then headed straight to the pharmacy.

Specific evidence led by the appellant claiming DC Jones was not on duty

[8] Inspector Julian Rowe gave evidence on behalf of the appellant. She stated that she was employed to the Jamaica Constabulary Force and attached to the Kingston Central Police Station since March 2001. She was the sub-officer in charge of the

station since June 2001, and was sub-officer at the time of the incident. She gave evidence that the only duties ever assigned to DC Jones were at the Court of Appeal of Jamaica or the Home Circuit Court. These duties were of a security nature and would entail the officer watching the building and its contents.

[9] It was Inspector Rowe's evidence that between 7:40 a.m. on 25 February 2006 and 12:30 a.m. on 26 February 2006, DC Jones was off duty and was not assigned any duties pertaining to his post as district constable.

The proceedings and the pleaded cases

[10] On 30 January 2007, the respondent commenced an action against two defendants, i.e. DC Jones, and the appellant as the person appointed to be sued in civil proceedings against the Crown under section 3 of the Crown Proceedings Act. The action sought damages and aggravated damages for the tort of assault. The respondent in his particulars of claim pleaded that DC Jones was a member of the Island Special Constabulary Force, attached to the Central Police Station and was the servant and/or agent of the Crown. It was alleged that DC Jones had maliciously or without reasonable or probable cause, assaulted the respondent by pushing and shooting him. It is to be noted that there was no claim against the appellant for negligence.

[11] DC Jones died in December 2006 and thus, although named as a defendant, was never a party to the proceedings and was obviously not available to give evidence at the trial which did not take place until 2010. The action proceeded against the

appellant in his representative capacity. The appellant attempted to put in a copy of a statement typed by DC Jones, the original of which was given to the Bureau of Special Investigations. However, the respondent's counsel objected to its admission and the trial judge upheld the objection. There is no ground of appeal in respect of that ruling.

[12] The appellant in an amended defence admitted that DC Jones was a member of the Island Special Constabulary Force, attached to the Central Police Station, Kingston. However, it was pleaded that at the material time DC Jones was not acting as a police officer but was employed to Total Care Pharmacy as a security guard. It was denied that DC Jones pushed and shot the respondent maliciously or without reasonable or probable cause. Further, it was pleaded that a struggle developed between the respondent and DC Jones "as a consequence of what (*DC Jones*) was hired to do as a security guard". It was averred that during the struggle the respondent attempted to disarm DC Jones and in the process shot himself.

[13] The appellant's pleading also asserts that at the material time DC Jones was licensed to carry a private firearm and did carry a Smith & Wesson Revolver serial no. CBP3144.

[14] The appellant went on to plead that the injury or damage suffered by the respondent was not occasioned by or as a result of the actions of the servants and/or agents of the Crown.

[15] As previously stated, the respondent and his brother Kevin Tulloch gave evidence. The appellant called six witnesses. These witnesses were Constable Gary Wright, Sergeant Zilpha McIntosh, Sergeant Kevon Chambers, Inspector Julian Rowe, and Deputy Superintendent of Police Carlton Harrisingh, ballistics expert attached to the Government Forensic Laboratory. The appellant also called as a witness Michael Dixon, the Director of Records and Information Systems at the Firearm Licensing Authority, who gave information in respect of the firearm bearing serial no. CBP3144, licensed in the name of DC Jones for private ownership.

The statutory framework

[16] Section 3(1) of the Crown Proceedings Act provides:

> "Liability of the Crown in Tort
>
> 3-(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) ...
>
> (c) ...
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate."

[17] Sections 2(1), 4, 5 and 14 of the Constables (District) Act provide as follows:

> "**Appointment of district constables**
>
> 2-(1) The Commissioner of Police may, with the sanction of the Governor-General, appoint in any parish, such number of persons as he may think necessary, being householders resident in such parish, to be district constables, whose power and authority under this Act shall extend to all parts of the Island.
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> ...
>
> **Power of district constables**
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> 4. Every district constable shall have throughout the Island all the powers of constables, and shall exercise his office at all times when required to do so by any Justice, or any officer of Constabulary to whom such district constable is by this Act made subordinate, and also, whenever in his judgment the public safety or welfare, or the ends of justice demand it.
>
> **Subordination of district constables**
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> 5. Every district constable shall be subject to the orders of the Commissioner of Police and the officers and sub-officers of the Constabulary Force, and the district for which any district constable is appointed, shall be attached to a constabulary station. Any district constable, whether belonging to such district, or temporarily on duty therein, shall be subject to the orders of the sub-officer of Constabulary in charge of such station.
>
> ...
>
> **Legal protection of and assault on district constables**
>
> 14. Every district constable shall have the like protection, rights and privileges, in case of, and before the commencement of any action or proceedings at law against him, as a constable at Common Law, or under

> any enactment now or hereafter to be in force in this Island, is, or may be entitled to claim: And assaulting or obstructing a district constable in the execution of his duty, shall be punishable as assaulting or obstructing a constable in the execution of his duty is, or may be punishable."

Treatment of the issues by the learned trial judge

[18] We have had the benefit of a reasoned written judgment and notes of evidence as recorded by the learned trial judge. Having looked at the Constables (District) Act, and section 13 of the Jamaica Constabulary Force Act, (paragraphs [20]-[27]), Morrison J found that the "autonomy of a District Constable is not as wide and fluid as that of his counterpart, a Constable" (paragraph [26]). He went on to find (at paragraph [27]) that "it seems that a District Constable is always on duty".

[19] After addressing his mind to the powers and duties of a district constable, the learned judge then (at paragraph [28]) immediately turned to an examination of the pleaded defence and found that it was "singularly devoid of evidentiary support, and ... is characterized by generalities".

[20] At paragraphs [27]-[37], the learned judge made his findings of fact and stated that he applied those facts to the law as laid down by the Judicial Committee of the Privy Council in one of the leading cases in this area of the law, ***Clinton Bernard v The Attorney General of Jamaica*** [2004] UKPC 47. At paragraphs [51] to [54] Morrison J stated:

"[51] In the instant case though the facts are not co-termirous [sic] with the ***Bernard*** case the mined principle therefrom is applicable, *pari passu.*

[52] The assertion by D/C Jones of his police authority is one factor. The lack of evidentiary proof that D/C Jones was not on duty. The lack of evidentiary proof that D/C Jones was not in possession of the official issue of the firearm and ammunition. The lack of evidentiary support that the Claimant had shot himself.

[53] Finally, the pleadings of the second Defendant with its deficit of material support rendered its purported defence, indefensible, if not, nugatory.

[54] In the final analysis, looking at the matter in the round and having regard to the fact that the risk of harm to the public by D/C Jones was created by his superiors, I am led on a balance of probabilities to say that the wrongful conduct of D/C Jones was so closely connected with his employment that it is just and reasonable to hold the employers vicariously liable."

[21] **The grounds of appeal**

The appellant relied upon eight grounds of appeal. They are as follows:

"1. The Learned Judge erred in interpreting **section 4** of the **Constables (District) Act** when he found that the power given to a District Constable to exercise his office "*....whenever in his judgment the public safety or welfare, or the ends of justice demand it"* means that a District Constable is always on duty.

2. The Learned Judge erred when he found that the shooting of the Claimant was done in exercise of the powers reserved to a district constable pursuant to **section 4** of the **Constables (District) Act** in the absence of any evidence to support such a finding and by virtue only of the Second Defendant's failure to deflect that D/C Jones had formed the judgment

that shooting the Claimant was required for the public safety or welfare or to serve the ends of justice and the absence of an account of the incident from the deceased D/C Jones at the trial.

3. The Learned Judge erred when he found that the testimony of Inspector Julian Rowe that D/C Jones was not given any special permission by the Commanding Officers or Commissioner of Police to keep and carry firearm or ammunition issued at the time of commencement of duties, which she stated in evidence was to the best of her knowledge amounted to speculation.

4. The Learned Trial Judge erred when he found, in the absence of any evidence to support such a finding, that D/C Jones had been dispatched on duty with a service firearm on the 24th February, 2006 and was, at the time of the commission of the wrongful act in possession of officially issued items and that those items were used to shoot and injure the Claimant.

5. The finding of the Learned Trial Judge that the projectile was taken from the body of the Claimant is not supported by the evidence.

6. The Learned Judge erred when he found that the utterance of the word "police" after the commission of the First Defendant's wrongful act, away from the scene of the shooting, to a person other than the Claimant on a general enquiry, is evidence that at the time he shot the Claimant, he was purporting to act as a district constable.

7. The Learned Judge erred in finding that there was a close connection between Lloyd Jones' employment as a district constable and the shooting of the Claimant to make it just and reasonable for the Second Defendant to be held vicariously liable as such a finding is not supported by the evidence.

8. The Learned Judge erred in placing the legal burden on the Second Defendant to disprove vicarious liability without the Claimant having discharged its legal burden of proof."

Ground 5 conceded

[22] The respondent's counsel conceded that there was no evidence that the projectile, or bullet, was taken from the body of the respondent. He submitted however, that this was not material to the learned trial judge's decision, and in fact supported his conclusion that the appellant did not discharge his evidentiary burden of proving that the respondent was shot by DC Jones' private firearm. In light of Mr Williams' candid, and I think, correct concession, this ground does not need to be addressed.

The appellant's arguments

[23] The appellant submitted that in an action for vicarious liability, the legal burden lies on the respondent, consistent with the general rule in legal proceedings that he who asserts must prove.

[24] Counsel further submitted that the test for vicarious liability is whether the employee's wrongful act was so connected with what he was employed to do that it can be said that the employer has introduced the risk of the wrong and would therefore fairly be charged with its management and minimization. Reference was made to ***Lister v Hall Ltd*** [2001] UKHL 22, [2001] 2 WLR 1311; ***Dubai Aluminium***

Company Ltd v Salaam [2002] UKHC48 [2003] 1 All ER 97; ***Attorney General v Hartwell*** [2004] UKPC 12, and also ***Bernard***.

[25] Counsel argued that the evidence did not bear out the trial judge's finding that the shooting of the respondent by DC Jones was so closely connected to what he was employed to do as a district constable that it could fairly and properly be regarded as being done by him while acting in the course of his employment as a district constable and was therefore such as to make the government as employer liable for his actions.

[26] Mr McDermott argued that, the respondent having invoked section 3 of the Crown Proceedings Act in his pleadings, and therefore having relied upon the principles of vicarious liability, the legal burden was therefore on him to prove (1) that DC Jones, when he assaulted him, was acting as the servant/employee of the government; and (2) in any event, and most importantly, that the assault was so closely connected to what he was employed to do as a district constable so as to be properly and fairly regarded as being done by him while acting in the course of his employment as a district constable, so as to make the government as his employer vicariously liable. Mr McDermott argued that the claimant did neither at the trial. The appellant contended that in concluding that he was vicariously liable, the learned judge wrongly placed the legal burden on the appellant to disprove vicarious liability.

[27] It was submitted that there was no evidence before the learned trial judge that DC Jones had been dispatched on duty with a service firearm on 24 February 2006 and also no evidence on which he could properly conclude that DC Jones, when he shot the

respondent possessed a service revolver and ammuriition and that that service revolver and ammunition were used to shoot the respondent.

[28] Upon the issue of "retrospectant evidence", counsel asserted that the only evidence before the trial judge which gives an account of the circumstances under which the shooting occurred is that of the respondent. As to where, when, and how, the utterance of the word "police" came to be made, this is contained in the evidence of Kevin Tulloch. It was further submitted that the mere utterance of the word "police" ex post facto the commission of the wrongful act, without more, is incapable of suggesting that the wrongful act was done in the exercise or purported exercise of policing authority.

The respondent's arguments

[29] In assessing whether or not the learned trial judge's decision in fact rested on a shift in the legal burden, counsel for the respondent suggested that one should analyze the judge's decision in the context of the pleadings that were before him and of the evidence. Mr Williams also submitted that the judge properly addressed his mind to the question of whether the respondent had discharged his legal burden and concluded that this burden was discharged on a balance of probabilities. The description of the shooting, though denied, was unchallenged at trial. Paragraph 4 of the defence alleged a struggle, but this, counsel submitted, again, was not proved at trial.

[30] Counsel went further, however, and submitted that it is trite law that a policeman is the servant and/or agent of the appellant, and that therefore there is a

rebuttable presumption that the appellant is vicariously liable for the tortuous acts of a policeman. Reference was made to section 3 of the Crown Proceedings Act.

[31] Counsel submitted that the case of ***Clinton Bernard*** shows that the test is not whether DC Jones sought to exercise a police function or acted out of a private motive. Reference was made to the decision in ***Minister of Police v Rabie*** [1986] (1) S.A. 117.

[32] Mr Williams submitted that the respondent did not, in the course of his case, seek to prove that DC Jones was on duty, for the purpose of finding vicarious liability. He argued that the allegation that DC Jones was off duty was in fact advanced by the appellant and, as such, the appellant placed on himself the evidentiary burden of proving that allegation. Counsel therefore asked the court to conclude that the trial judge was entitled to explore the gap in the evidence put forward by the appellant, in deciding whether or not that evidentiary burden had been discharged.

[33] As regards the matter of retrospectant evidence, it was posited that the learned trial judge in coming to his decision as to whether there was sufficient evidence of this nature approached the matter in a broad way as set out in ***Bernard***.

The issues on appeal

[34] There are a number of issues that arise for consideration. The grounds have been rearranged somewhat and will be addressed by this court while discussing the issues as they appear to arise for consideration. The issues are as follows:

(1) Which party had the burden of proving that at the time that the tort is alleged to have been committed against the respondent, DC Jones was apparently or purportedly acting as a police officer? - Ground 8.

(2) If that burden was on the respondent, did the appellant, by the manner in which the defence was pleaded, relieve the respondent of, or assume a burden of disproof? - Ground 8.

(3) Was the learned trial judge correct in concluding that a district constable is always on duty? – Ground 1.

(4) Did the learned trial judge wrongly place the burden of proof on the appellant? - Ground 8.

(5) Was there evidence upon which the learned trial judge could find that DC Jones had been dispatched on duty with a service firearm on 24 February 2006, and was, at the time of the commission of the wrongful act, in possession of officially issued items, i.e. firearm and ammunition? - Ground 4.

(6) Was there evidence upon which the learned trial judge could properly conclude that at the material time DC Jones was apparently or purportedly acting as a police officer? - Ground 2.

(7) Was there evidence upon which the learned trial judge could conclude that there was such a close connection between the nature of the employment and the particular tort, and looking at the matter in the round, that it was just and reasonable to hold the employer/appellant vicariously liable? - Grounds 6 and 7.

First Issue- Which party had the burden of proving that at the time that the tort is alleged to have been committed against the respondent, DC Jones was apparently or purportedly acting as a police officer?

[35] It is trite law that he who alleges must prove. The law of vicarious liability is a species of strict liability. As Lord Millett stated in ***Lister***, at paragraph 65:

> "It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss distribution device... ."

[36] However, although the law in this area is strict, this does not mean that a claimant is relieved of the burden of establishing that at the time of the tort alleged the employee was apparently or purportedly acting as the servant or agent of the employer. This issue of which party bears the burden of proof in proving vicarious liability of the Crown in relation to the acts of a police officer was not directly discussed in the ***Bernard*** decision. However, ***Weir v Chief Constable of Merseyside Police*** [2003] EWCA Civ 111 is a decision of the English Court of Appeal, which was referred to at paragraph 25 of the judicial committee's decision in ***Bernard***. In ***Weir***, it was held on appeal that the claimant had met his critical burden of proving that the tortfeasor was at the time of committing the tort apparently acting in his capacity as constable. At paragraph 12 of the English Court of Appeal's decision, which was referred to, (but not set out) in ***Bernard*** *Sir* Dennis Henry stated:

> "To establish liability the claimant has to show more than the mere fact that the tortfeasor was a police officer. He has to show that the tort he alleges was committed at a time when the police officer was apparently acting in his capacity as a constable. It seems to me that from the moment PC Dudley started to put Weir out of the building he was apparently exercising his authority as a constable. He had just confirmed to, and Weir understood, that he was a police officer. When taking hold of Weir, throwing him down the stairs, assaulting and locking him in the police van saying he was taking him to the police station, I think the judge should have concluded that PC Dudley was apparently acting as a

> Constable, albeit one who was behaving very badly." (Underlining emphasis provided)

[37] So too in the instant case the burden of proof was on the respondent to show that at the time of the tort DC Jones was apparently acting, or purporting to act as a police officer. The decision of this court in ***Attorney General v Reid*** (1994) 31 JLR 237 at page 243, which was cited by Mr McDermott, reinforces that this is the law. This may be an appropriate juncture at which to deal with one of the submissions made on behalf of the respondent on appeal. In his written submissions, counsel submitted that it is trite law that a policeman is the servant and/or agent of the appellant, and that therefore there is a rebuttable presumption that the appellant is vicariously liable for the tortuous acts of a policeman. In my judgment, importing the concept of a rebuttable presumption in these circumstances is inappropriate and, if it was introduced in like fashion in the court below, it may well have caused confusion. It also rides roughshod over the consideration that to establish liability in the Crown the policeman must, at the material time, have purported to act as such police officer. There is no presumption, rebuttable or otherwise, that at the time of the alleged tort DC Jones was purporting or apparently acting as a police officer. Indeed, this can be readily seen from the analysis of the facts carried out in ***Bernard***, in particular at paragraphs 25-28 which I shall refer to later on in this judgment. Further, given that by definition a district constable is a householder in a district, who is quite entitled to be employed or engaged in an occupation or activities outside of being a district constable, there is no proper basis for applying any presumption, rebuttable or otherwise.

Second Issue - If that burden was on the respondent, did the appellant, by the manner in which the defence was pleaded, relieve the respondent of, or assume a burden of disproof?

[38] The function of pleadings is to outline for the court and for the parties the material facts in issue in a particular case. In Chapter 1 of **Phipson on Evidence**, 15th Edition, paragraph 1-01, the learned author states:

> 1-01: "Law is commonly divided into substantive law, which defines rights, duties and liabilities; and adjective law, which defines the procedure, pleading and proof by which the substantive law is applied in practice.
>
> The rules of *procedure* regulate the general conduct of litigation; the object of *pleading* is to ascertain for the guidance of the parties and the court the material facts in issue in each particular case; *proof* is the establishment of such facts by proper legal means to the satisfaction of the court, and in this sense includes disproof....."

[39] Rule 8.9 (1) of the Civil Procedure Rules ("the CPR") requires a claimant to include in a claim form or in the particulars of claim a statement of all the facts on which the claimant relies. Rule 10.5 (1) of the CPR requires that the "defence must set out all the facts on which the defendant relies to dispute the claim". Rule 10.7 addresses the consequences of not setting out certain matters in the defence and states that "[t]he defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission". However, in my judgment, it does not follow that if the defendant pleads certain facts as being in issue and fails to establish them, that failure itself translates into fulfillment of the claimant's burden of proof of the relevant facts to

ground his claim. Specifically, in this case the appellant had pleaded that at the material time DC Jones was not acting as a police officer but was employed to Total Care Pharmacy as a security guard. In addition, that there was a struggle that "developed between the claimant and the 1st Defendant as a consequence of what the 1st Defendant was hired to do as a Security Guard". The appellant fell short of establishing that at the material time DC Jones was acting in his capacity as a security guard or that the struggle arose in connection with that particular occupation. However, this did not affect the fact that it was the respondent who alleged that at the material time DC Jones was the servant or agent of the Crown. The appellant had in his pleading plainly traversed this fact. It is not the defendant's burden to prove the claimant's case for him. Facts are either primary facts that are themselves proved or facts are established by inference from other facts found proved. It remained the duty of the respondent to prove that at the time of the alleged incident DC Jones was apparently or purportedly acting as a district constable. The fact of whether DC Jones was apparently or purportedly acting as a district constable could not be proved by inference from the circumstance that the appellant had failed to establish other matters or facts which he had pleaded. In addition, as a matter of logic, there would be no proper basis on which it could be concluded that if DC Jones was not acting in his capacity as a security guard, then ergo, he was acting in his capacity as a police officer.

[40] An interesting decision of this court which was not cited by either party, but which deals with the issue of pleadings involving section 3 of the Crown Proceedings Law, No. 68 of 1958, (the predecessor to the current section 3 of the Crown

Proceedings Act), is that of ***Attorney General v Desnoes & Geddes Ltd*** (1970) 12 JLR 3. In that case, there was a collision between a public works department Land Rover and a pick-up owned by Desnoes and Geddes Limited, the defendant company. This court held that there was an onus on the defendant company to prove the issue of whether the driver of the Land Rover was acting as the servant or agent of the government department. This was so because on its counterclaim to a plaint filed in the Resident Magistrates' Court by the Attorney General, it was the defendant company that had raised and pleaded the issue that the Crown was liable under section 3 of the Crown Proceedings Law. This case is instructive because it demonstrates just how the onus of proving liability against the Crown under section 3 of the relevant Act remains squarely upon he who alleges vicarious responsibility.

Third Issue - Was the learned judge correct in concluding that a district constable is always on duty?

[41] Counsel for the respondent is quite correct that the test as enunciated in the ***Bernard*** decision did not turn upon a consideration of whether the police constable in question was on duty. Indeed, at paragraph 14 of the judgment, the Board indicated that it was prepared to assume in favour of the Attorney General that the constable was not on duty. This does not mean, however, that the question of whether DC Jones was on duty is of no relevance to the consideration of the issue of vicarious liability. Further, as the appellant has raised the issue in ground one, this court will examine the law and facts and the learned trial judge's reasoning in respect of this matter. Morrison J at paragraphs [20]-[27] of his judgment analyzed the powers and duties of a district

constable, and sections 2, and 4-6 of the Constables (District) Act. He reasoned as follows at paragraphs [26] and [27]:

> "[26] ... the autonomy of a District Constable is not as wide and fluid as that of his counterpart, a Constable. According to the Jamaica Constabulary Force Act, Section 13: "The duties of the Police under this Act shall be to keep watch by day and night, to preserve the peace, to deter crime, apprehend or summon before a Justice persons found committing any offence or whom they may reasonabl(y) suspect of having committed any offence, or who may be charged without having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices and criminal process issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a constable ...
>
> However, in respect of a District Constable, whereas the Commissioner of Police may appoint in any parish "householders resident in such parish to be district constables" their powers and authority shall extend to all parts of the island..."
>
> ... "duty" as defined under [t]he Constabulary Force Act entails a legal obligation or responsibility to do as Section 13 demands, "power" speaks to the authority that is given or delegated in the exercise of that office be it that of a Constable or a District Constable.
>
> [27] In the case of the latter it is exercisable in the circumstances adumbrated under Sections 4 and 5 of the Constables (District) Act, supra. The subordination of the District Constable to the Commissioner of Police, the officers and sub-officers of the Constabulary Force is also in respect of, "the district for which any District Constable is appointed," which is a "constabulary station". However, the ambit of his powers are significant by the use of the words "whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice" It seems to me that the words "whenever in his

> judgment" incorporates the notion of a legal obligation or duty, and responsibility with respect to public safety and welfare and to serve the ends of justice. On this view, it seems that a District Constable is always on duty."

[42] In my judgment, the learned judge fell into error in finding that a district constable is always on duty. It does appear to be a quantum leap from the statute providing that a district constable's powers are exercisable whenever in his judgment it is required for the public safety and welfare or to serve the ends of justice, to finding that a district constable is always on duty. The fact that a district constable may be fixed with a responsibility to exercise his judgment in certain circumstances, does not signify that he is always on duty. Indeed, even in the case of the autonomy and powers of a constable, which Morrison J found, (in my view correctly), to be more wide and fluid than that of a district constable, there is no presumption or legal circumstance or *a priori* assumption that a constable is always on duty. Further, there would seem to be even less basis for making such an assumption in the case of a district constable, who, whilst having all the powers of a constable, is by definition a householder resident in a particular parish and capable of being engaged in other occupations. In the instant case, there was in fact evidence from both the respondent's case, and the appellant's case, that DC Jones had another occupation, and that was as a security guard attached to the pharmacy. The existence of this other occupation, if it leans in any direction at all, would be to point away from an assumption that a district constable is always on duty. In looking at the evidence in the ***Bernard*** case, the Privy Council at paragraph 14 prior to assuming that the constable was not on duty for the purpose of assessing

liability against the Crown, examined the issue of what evidence was in fact led in relation to whether the constable was on duty. The Board found that evidence wanting, and pointed out that the fixing of liability on the Crown would not turn on that factor. At paragraph [14] it is stated:

> "Gaps in the evidence
>
> 14. Before addressing the issues directly, the Board would observe that there is a paucity of evidence. First, one does not know whether the constable was on duty at the time of the shooting. The importance of this gap in the evidence is, however, reduced by the fact, which is common ground, that a constable may exercise its powers outside his assigned hours of duty. So far as it is relevant, however, the Board will assume in favour of the Attorney- General that the constable was not on duty. Secondly, it is not clear whether the Kingston Sorting Office where the shooting took place was within the area for which the constable's police station was responsible. Again, however, the importance of the gap is reduced by the fact that a constable may exercise his powers outside the immediate area covered by his police station. Nevertheless, so far as it is relevant, the Board will assume that the place of the shooting was outside the constable's immediate area of responsibility. Thirdly, it is not clear on the evidence whether the constable demanded the handing over [of] the phone in the context of a police function or because he wanted to make a private call. The fact that he said he wanted to make a long distance call is not decisive: it is agreed that it may signify either an overseas call or a call outside Kingston. Again, the Board will assume in favour of the Attorney-General that the constable said 'police' as a pretext to persuade the plaintiff to allow him precedence." (Underlining emphasis provided)

[43] It would appear that in addition, Morrison J took the view that this was a finding which he was entitled to make as a matter of law, as opposed to examining the facts of the particular case to see whether or not DC Jones was in fact on duty. This perhaps explains why, having made that finding of law, the learned trial judge immediately "repaired to the substantiality of the defence". It will be seen from paragraph [14] of ***Bernard*** that even though the Privy Council considered that the gap in the evidence as to whether the constable was in fact on duty, was affected by the statutory provisions as they existed in relation to constables, these provisions only served to reduce the gap, and did not eliminate it. It was certainly not held that a constable is always on duty. The learned trial judge, in my view, erred when he approached the matter of the question of when a district constable is on duty in this way and erred in his conclusion as to the effect of the statutory provisions.

Fourth Issue - Did the learned trial judge wrongly place the burden of proof on the appellant?

[44] To examine this question, it is important to note the order in which the learned trial judge proceeded. Paragraphs [27]-[37] reveal that Morrison J moved directly from a finding that a district constable is always on duty, to an examination of the defence and all the matters there pleaded which in his view had not been established. Prior to so doing, the learned judge did not attempt any analysis whatsoever of the relevant facts or evidence as presented in the respondent's case. Having at paragraph [27] arrived at the conclusion that a district constable is always on duty, this is how the learned judge proceeded directly to make his findings:

"[28] I now repair to the substantiality of the defence. It is singularly devoid of evidentiary support, and if I might add, is characterized by generalities as I shall endeavour to demonstrate.

[29] I begin with the gaps in the presentation of the evidence for the defence. According to the evidence of Inspector of [P]olice, Julian Rowe, she is responsible for the general supervision and day to day management of the Kingston Central Police Station for officers from the rank of District Constable up to Sergeant. She is also responsible for the assignment of officers of various duties.

[30] Further, she says, "when I was transferred to the Kingston Central Division, District Constable Lloyd Jones was already a member of staff assigned duties at the Court of Appeal or the Home Circuit Court. These duties were of a security nature... District Constable Jones was never detailed to work anywhere else other than these courts."

[31] She goes on to say that, "when officers are assigned duties their assignments are recorded in the station diary." Also, she expands, "the officers are required to hand over any firearm or ammunition that is issued at the time of commencement of duties. Officers are not allowed to keep and carry any firearm or ammunition unless special permission is given by the Commanding Officers or Commissioner of Police." She advanced that, to the best of her knowledge, District Constable Jones was not given any such permission.

[32] Be it noted, however, that there is not a shred of evidentiary support for that bold and bland assertion. It speaks, I suspect, to her speculation, which is not a good advisor. Something more was required and it was not forthcoming. Thus, there was no evidence that D/C Jones had returned the firearm that he had been dispatched with on 24th February 2006 and

which duty he concluded at 7:40 a.m. on the 25th February 2006.

[33] Remarkably, Inspector Rowe's evidence elides the gap therein that at 12:30 a.m. on the 26th February 2006 D/C Jones was dispatched on duties to the Court of Appeal and was issued a .38 Smith & Wesson service revolver with serial number DG33947. It does not address the obviously important consideration of the issue and return of the firearm and ammunition concerning the material time. I therefore lean in favour of finding that D/C Jones was in possession of the officially issued items.

[34] Not dissimilarly, is the issue concerning whether or not D/C Jones was on duty. The record, or the absence thereof bears the default evidentiary proof that he was not, bearing in mind the absence of any record of the return of the firearm and ammunition by D/C Jones' supervisors. Also, the deficit on the evidence comes from the fact that the incident did not occur at the Total Care Pharmacy, where D/C Jones worked when off duty, but at the Canton Enterprise establishment which is at a remove [sic] from that Pharmacy.

Furthermore, it appears to me to be more probable than not, it not having been deflected by the Second Defendant, that, D/C Jones' account of the incident being unforthcoming it cannot be said that he was not purporting to exercise his powers, "whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice."

[35] The defence and evidence suffers the signal failure of proof that it was the Claimant who had shot himself.

[36] The evidence of Constable Guy Wright, Michael Dixon and Deputy Superintendent Carlton Harrisingh as to the receipt, ownership and testing of firearm CBP 3144 does not, in my view, address the crucial

> question whether it was the firearm and ammunition issued to D/C Jones that was involved in the shooting. All that occurred is that D/C Jones handed to Constable Guy Wright his personal firearm sometime after the incident. In any event the testing of his firearm and the result of the testing does [sic] not advance the defence so filed if, only on the basis that, the projectile taken from the body of the Claimant was not compared to that of any from CBP 3144. Apropos, the second Defendant did not allege that CBP 3144 was the offensive weapon that was the cause of the Claimant's injury.
>
> [37] Finally, while it is true that D/C Jones did not use the word "police" to the Claimant, contextually and instantly, his use of this word to the Claimant's brother, makes it plain that D/C Jones purported to act as a policeman. The materiality of the word "police" is to be referenced by its use before, during or after the incident. Thus, it was a retrospective claim to his police authority by D/C Jones.
>
> Having made the above findings of facts I have now to apply them to the law as is laid down in ***Clinton Bernard v The Attorney General*** ... ."

[45] This approach in my judgment speaks for itself. It is patently obvious that the learned trial judge wrongly placed the burden of proof (or rather, of disproof) that DC Jones was purportedly acting in the capacity of a police officer on the appellant, and not the respondent. This can readily be seen particularly where he speaks of it appearing to him to be more probable than not, "it not having been deflected by the Second Defendant, that, D/C Jones' account of the incident being unforthcoming it cannot be said that he was not purporting to exercise his powers, ... 'whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice' ".

I am not quite sure exactly what the learned trial judge meant when he spoke of the appellant not having "deflected". However, it was for the respondent to establish the material facts by proof of the primary facts or proof of facts from which inferences could be reasonably drawn. There was no proper evidential basis upon which Morrison J could have concluded that DC Jones was purporting to exercise his powers at a time, in his judgment, when it was required for public safety or welfare or to serve the ends of justice. There was nothing in the respondent's recitation of the facts from which it could have been reasonably inferred that DC Jones was acting upon such judgment of his.

Fifth Issue - Was there evidence upon which the learned trial judge could find that DC Jones had been dispatched on duty with a service firearm on 24 February 2006, and was, at the time of the commission of the wrongful act, in possession of officially issued items, i.e. firearm and ammunition? - Ground 4.

[46] At paragraphs [42] and [43] above I have already indicated that in my view Morrison J erred when he found that as a matter of law a district constable is always on duty. However, the learned trial judge also erred when he made a finding of fact that the appellant had not proved that DC Jones was not on duty. The learned trial judge appears to have decided (at paragraph [34] of his judgment) that the absence of evidence of the return of "the firearm and ammunition" also demonstrated a failure on the appellant to prove that DC Jones was not on duty. Further, he found that (at paragraph [34]) "the deficit on the evidence comes from the fact that the incident did not occur at the Total Care Pharmacy, where DC Jones worked when off duty, but at the Canton Enterprise establishment which is at a remove from that Pharmacy". It

should be noted that Morrison J does not appear to have had any regard to the unchallenged evidence of Inspector Rowe that the only places DC Jones was ever detailed to work as a district constable were the Court of Appeal and the Home Circuit Court. These courts are in Kingston. The incident happened in Bridgeport, Portmore, in the parish of Saint Catherine. It would appear that at that stage the learned trial judge was attaching significance to his finding that as a matter of law a district constable is always on duty.

[47] In addition, when the evidence as to service items is closely regarded a number of points emerge. The first is, that there was certainly a paucity of evidence. For example, one would have expected to hear evidence from Inspector Rowe, or otherwise, about the last time, if any, before the time of the incident (which occurred on 25 February 2006 at 7:00-7:30 p.m.) that DC Jones had been issued with a service firearm and ammunition. The only evidence about the issuing of a service firearm to DC Jones was about the issue of a firearm on 26 February, and of its return later that same day, both of which were concerned with time periods after the relevant incident. There is no evidence that every time that DC Jones was on duty (according to Inspector Rowe, doing security duties at the Home Circuit Court or the Court of Appeal), that he was issued with a service firearm. That was never explored. What Inspector Rowe said in her witness statement on this point was as follows:

> "6. On the 24th February 2006 District Constable Jones concluded his duties at the Court of Appeal at 6:45 a.m. On the same day he commenced duties at the same court at 10:00 p.m. and concluded these duties at 7:40 a.m. on the 25th February 2006.

7. At 12:30 a.m. on the 26th February 2006 District Constable Jones was dispatched on duties to the Court of Appeal. He was issued a .38 Smith & Wesson service revolver with serial number D933947 and twelve rounds of .38 cartridges. He concluded his duties and handed over the service revolver and ammunition at 10:20 a.m. on the 26th February 2006.

8. When officers are assigned duties these assignments are recorded in the station diary. Also, the officers are required to hand over any firearm or ammunition that is issued at the time of commencement of duties. Officers are not allowed to keep and carry any firearm or ammunition unless special permission is given by the Commanding Officer or Commissioner of Police. (Emphasis provided)

9. To the best of my knowledge District Constable Jones was not given any such permission."

[48] And then in cross-examination Inspector Rowe stated that what she had said in her witness statement was from what she had observed in the station diary. In response to a question from the court, Inspector Rowe stated that the recording of the issue and return of firearms issued to police officers is a foolproof procedure.

[49] There was evidence from Constable Gary Wright, one of the initial investigating officers, that, he was on mobile patrol on 25 February 2006. He attended at the Canton Wholesale, in the plaza after he received information by cellular telephone from the Bridgeport Police Station that a man had been shot at Canton. When he reached the plaza he received further information and as a result he went to the Total Care Pharmacy. There, a man opened the locked door and identified himself as Lloyd Jones, district constable attached to the Central Police Station and security guard when he is not on duty at Central Police Station. There was evidence led of what DC Jones said to Constable Wright about the incident. This formed part of Constable Wright's

witness statement (paragraphs 4-6) and which was ordered to stand as examination–in-chief without objection from the respondent's counsel. Constable Wright transported DC Jones to the Bridgeport Police Station that same evening and there at the station he seized from DC Jones the .38 Smith & Wesson revolver serial no. CBP 3144 which DC Jones had indicated was involved in the incident.

[50] The appellant also led evidence from the Firearm Licensing Authority that the .38 Smith & Wesson revolver serial no. CBP 3144 was licensed in the name of Lloyd Jones. The relevant license was admitted in evidence and states Mr Jones' occupation as "Security Guard/District Constable". It indicates that the license on this firearm was issued for private ownership. Evidence was also led from the Government Forensic Laboratory that based upon examination and testing carried out on 27 February 2006, it was concluded that the spent shell was fired by the revolver CBP 3144 and that this revolver could have been fired on 25 February 2006.

[51] Whilst I have some amount of sympathy for the trial judge's finding (at paragraph [33]), that "[r]emarkably, Inspector Rowe's evidence elides the gap therein", there is no evidence that in fact, on 24 February 2006 DC Jones had been dispatched with a firearm on his duties on 24 February 2006, and which duty he concluded at 7:40 a.m. on 25 February 2006 (paragraph [32]). There is no evidence that prior to the incident DC Jones was ever issued with a service firearm. In addition, there is no evidential basis to suggest that the question of the return of the service firearm number DG33947 and ammunition was relevant to a consideration of whether DC Jones was armed with this firearm at the material time since the only evidence as it relates to this

firearm is that it was issued to DC Jones on 26 February at 12:30 a.m., which would be the morning AFTER the incident. The learned judge also appears to have overlooked the fact that the only evidence that DC Jones was issued with a service firearm is that he was issued with it in the early morning hours of 26 February, a few hours after his private firearm had been seized by Constable Wright during Constable Wright's investigation on the night of 25 February 2006. Prior to Constable Wright seizing his private firearm, it is reasonable to infer that DC Jones had, or would have had a firearm, this private firearm available to him.

[52] Thus, there was additionally no evidential basis in this case for the learned trial judge's finding and conclusion at paragraph [54], "that the risk of harm to the public by DC Jones was created by his superiors". On the evidence there was no proper basis that should have caused Morrison J, as he indicated in paragraph [33], to lean in favour of finding that DC Jones was in possession of the officially issued items. That, with respect, amounts to speculation, and is not supported by the evidence. Whilst I will not place any weight on the evidence of Constable Wright as to what DC Jones said to him (since it appears to be hearsay evidence), this evidence was admitted at the trial and would also not lend any support to the learned judge's findings. In light of the approach which I have taken, and my findings on this issue, it is unnecessary to address ground three.

The sixth and seventh issues

Sixth Issue - Was there evidence upon which the learned trial judge could properly conclude that at the material

time DC Jones was apparently or purportedly acting as a police officer?

Seventh Issue - Was there evidence upon which the learned trial judge could conclude that there was such a close connection between the nature of the employment and the particular tort, and looking at the matter in the round, that it was just and reasonable to hold the employer/ appellant vicariously liable?

[53] It is convenient to treat these two issues together and to examine the case law in the leading cases of ***Bernard*** and ***Lister***. In ***Bernard***, it was held, applying ***Lister***, that in the case of intentional wrongs, the correct approach to determine whether the employer (in this case, the Crown), was liable for a shooting committed by an employee (in this case, an armed member of the Jamaica Constabulary Force) is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether, looking at the matter in the round, it is just and reasonable to hold the employer vicariously liable. In deciding this question, a relevant factor is the risk to others created by an employer who entrusts duties, tasks and functions to an employee - paragraph 18 of ***Bernard***.

[54] At paragraphs [2]-[5] Lord Steyn, delivering the advice of the Board, discussed the events as follows:

> "The shooting incident
>
> 2. This was a witness action. The evidence led was meagre. There was no disclosure of documents by the state. On the other hand, a number of primary facts were not disputed. They can be summarized as follows. At about 9 pm on 11 February 1990 the plaintiff, a man aged 32 years, and his parents went

to the Central Sorting Office in Kingston to make an overseas call. He joined a queue of about 15 people who were waiting to phone. Eventually his turn came. The plaintiff dialled. Suddenly a man intervened. According to the plaintiff's oral evidence the man announced 'police' and demanded the phone which the plaintiff was then using. According to the oral evidence of his mother the man said 'I am going to make a long distance call' and added 'boy, leggo this, police'. The man making the demand was in fact Constable Paul Morgan ('the constable').

3. The plaintiff refused to release the phone. The constable said 'boy me naw join no line, give me the phone'. It is convenient here to interpose the fact that at the trial a police sergeant, a witness called on behalf of the Attorney-General, testified that -

> "If there is an emergency situation and [an] officer needs to use the phone I would consider it normal for him to go to the head of the line and demand to use the phone as a matter of urgency."

In any event, the plaintiff was determined not to let go of the phone. The constable slapped the plaintiff on the hand and then shoved him in his chest. When the plaintiff still resisted the constable took two steps backwards, pulled out a service revolver, pointed it at the plaintiff, and fired at his head at point blank range. The bullet hit the plaintiff to the left side of his head, leaving entry and exit wounds in his skull.

4. The injury rendered the plaintiff unconscious for a short period. He was taken to a nearby hospital by ambulance. The plaintiff awoke in the casualty department of the hospital. He was surrounded by police officers, who included Constable Morgan. In the hospital Constable Morgan placed the plaintiff under arrest for allegedly assaulting a police officer and handcuffed him to his bed.

Subsequent events

> 5. Criminal charges were brought against the plaintiff. After a few months these charges were withdrawn. In the meantime the constable was dismissed from the Jamaica Constabulary Force with effect from 17 March 1990. ... In any event, the constable left the island and his whereabouts were and are, unknown."

[55] It should be noted, that with the exception of the interposition of the evidence of the police sergeant called as a witness on behalf of the Attorney General, about phone use, all of the evidence recited by Lord Steyn as to the facts appears to have come from the case and the witnesses presented by the plaintiff/claimant.

[56] Not unlike the case here, there was in ***Bernard*** a paucity of evidence and Lord Steyn was driven to comment upon that aspect of the case in paragraph 14 as has been discussed at paragraph [42] above. At paragraphs 25-27, Lord Steyn delivered the Board's discussion of the cumulative factors which persuaded the Board that the learned trial judge M^{c}Calla J (as she then was) was entitled to find that vicarious liability had been established:

> "25. Three features of the case must be considered. It is of prime importance that the shooting incident followed immediately upon the constable's announcement that he was a policeman, which in context was probably calculated to create the impression that he was on police business. As a matter of common sense that is what he must have intended to convey. It may be that the plaintiff, and others in the queue, viewed this invocation of police authority with some skepticism [sic]. But that purported assertion of police authority was the event which immediately preceded the shooting incident. And it was the fact that the plaintiff was not prepared

to yield to the purported assertion of police authority which led to the shooting: compare *Weir v Bettison* (CA) [2003] ICR 708, para 12, per Sir Denys Henry.

26. Approaching the matter in the broad way required by *Lister*, the constable's subsequent act in arresting the plaintiff in the hospital is explicable on the basis that the constable alleged that the plaintiff had interfered with his execution of his duties as a policeman. It is retrospectant evidence which suggests that the constable had purported to act as a policeman immediately before he shot the plaintiff.

27. Moreover, one must consider the relevance of the risk created by the fact that the police authorities routinely permitted constables like Constable Morgan to take loaded service revolvers home, and to carry them while off duty. The social utility of allowing such a licence to off duty policemen may be a matter of debate. But the state certainly created risks of the kind to which Bingham JA made reference. It does not follow that the using of a service revolver by a policeman would without more make the police authority vicariously liable. That would be going too far. But taking into account the dominant feature of this case, viz that the constable at all material times purported to act as a policeman, the risks created by the police authorities reinforce the conclusion that vicarious liability is established." (Underlining emphasis supplied)

[57] In ***Lister***, (see for example, paragraphs 26 and 28) it is pointed out that in this area of the law, whilst a broad approach is to be taken, matters of degree arise. It was acknowledged that there will be borderline cases which render it difficult to decide upon which side of a line the particular case falls. At paragraphs [24]-[26] of ***Dubai,*** very useful guidance and perspective is provided by the House of Lords. It was emphasized that the conclusion is a conclusion of law based on primary facts, rather than a simple

question of fact. Further, that in this area of the law, previous court decisions are particularly valuable. Lord Nicholls of Birkenhead, after reviewing a number of authorities and the language therein used, stated at paragraph [25] :

> "[25] This 'close connection' test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged..."

[58] So turning now to the previous authorities and court decisions that provide the most useful guidance, it is clear that the **Bernard** case is the one that can most assist this court in applying the close connection test and in discerning on which side of the line this case falls. In my judgment, it is immediately obvious that many of the primary facts, or even facts similar to the primary facts available in the **Bernard** case, are lacking or non-existent in the instant case. The fact and dominant feature which the Privy Council considered to be of primary importance in **Bernard** was the fact that the constable at the material time purported to act as a policeman, and announced that he was a policeman immediately before the shooting incident. There is no such evidence in this case. Indeed, it is the clear evidence of the respondent that he did not know DC Jones to be a district constable until after the incident. The respondent knew DC Jones only in his capacity as a security guard who he "always" used to see, at Total Care Pharmacy. There was in the instant case no evidence of any purported assertion of police authority as an event immediately preceding the shooting incident. There is also

no evidence here that it was the fact that the respondent was not prepared to yield to the purported assertion of police authority that led to the shooting. There is no proper or reasonable basis upon which the learned trial judge, could on the evidence presented, have drawn the inference which he appears to have drawn at paragraph [34] that "it cannot be said that (DC Jones) was not purporting to exercise his powers "whenever in his judgment it is required for the public safety or welfare or to serve the ends of justice". It should be noted that the evidence of Constable Wright as to what DC Jones said to him about the incident on the same evening of its occurrence (hearsay evidence) also does not support a finding that DC Jones was purporting to exercise his powers as a district constable at the time of the incident. With respect, the learned trial judge wrongly placed the burden of proving this fundamental issue, or rather of disproving a negative, on the appellant. Similarly, when Morrison J stated at paragraph [33] that he also leaned in favour of finding that DC Jones was in possession of the officially issued items, there was no proper evidential basis for this finding. Further, even if there was, as stated in paragraph 27 of **Bernard**, "it does not follow that the using of a service revolver by a policeman would <u>without more</u> make the police authority vicariously liable. That would be going too far". (Emphasis provided)

The judge's treatment of evidence as "retrospectant evidence"

[59] At paragraph [37] of the judgment, Morrison J stated:

> "[37] Finally, while it is true that D/C Jones did not use the word "police" to the Claimant, contextually and instantly, the use of this word to the Claimant's brother, makes it plain that D/C Jones purported to

> act as a policeman. The materiality of the word "police" is to be referenced by its use before, during or after the incident. Thus, it was a retrospective claim to his police authority by D/C Jones."

[60] In my view, it is plain that the learned judge erred in treating this evidence of the respondent's brother that DC Jones uttered the word "police" to him as constituting retrospectant evidence that DC Jones had purported to act as a policeman immediately before he shot the respondent. In the first place, there is, as the learned judge readily acknowledged, no evidence that DC Jones used the word "police" to, or identified himself to, the respondent as a district constable. Secondly, the evidence as to the surrounding circumstances in which the word "police" was uttered to the respondent's brother is very meagre. All we are aware of is that DC Jones pointed the gun at the respondent's brother Kevin Tulloch after the incident, at a point along the pathway. When DC Jones had pointed the gun at him, Mr Tulloch asked him what happened, and he said to him "police, police". DC Jones then headed straight to the Total Pharmacy and seemed to be in a hurry when he walked away. Thus, the evidence at its highest shows that DC Jones used the word "police, police" to an entirely different person, at an entirely different location, at an entirely different time than the incident which occurred between himself and the respondent. Further, it occurred at a time when DC Jones was leaving the scene of the shooting, and where a crowd had converged. This context has to be placed alongside the evidence of the respondent himself, which is plainly devoid of a scintilla of testimony that at the time of the incident DC Jones purported to act as a district constable. Further, the express and direct evidence of the

respondent was that it was only later that he learnt that the man who shot him was a man who was a district constable by the name of Lloyd Jones. There is also no evidence in the present case that DC Jones sought to have the respondent arrested or charged for assaulting a police officer.

[61] These circumstances are entirely distinguishable from those which existed in ***Bernard***. Approaching the matter in the broad way suggested in ***Lister*** and in ***Bernard,*** it is my considered view that there was no proper basis upon which the learned trial judge could treat the utterance to the respondent's brother as retrospectant evidence.

[62] In my judgment, the respondent failed to establish that at the material time DC Jones was apparently or purportedly acting as a police officer and there was no proper basis upon which the learned trial judge could have come to the conclusion that he was. Further, there was no proper evidential basis upon which the learned trial judge could conclude that there was such a close connection between the nature of the employment and the particular tort, that looking at the matter in the round, it was as a matter of law, just and reasonable to hold the appellant vicariously liable. This case clearly falls on the side of the law where there are a number of features negativing vicarious liability. Further, on the primary facts, there is no sound basis upon which it can properly and fairly be regarded that the appellant should be held vicariously liable for the wrongful acts of DC Jones. In my view the appeal ought therefore to be allowed.

PANTON P

ORDER

Appeal is allowed. The decision of the learned trial judge is set aside and judgment is entered for the appellant against the respondent. Costs here and in the court below to the appellant, to be taxed if not agreed.