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Privy Council Appeal No.30 of 2003

Clinton Bernard *Appellant*

v.

The Attorney General of Jamaica *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 7th October 2004

Present at the hearing:-

Lord Bingham of Cornhill
Lord Steyn
Lord Millett
Lord Scott of Foscote
Lord Carswell

*[Delivered by **Lord Steyn**]*

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1. The central issue in this case is whether it was open to Mrs Justice McCalla, the trial judge, on the evidence placed before her to find that the Attorney-General of Jamaica was vicariously liable for the unlawful shooting on 11 February 1990 of Mr Clinton Bernard by a constable of the Jamaica Constabulary Force. In a reserved judgment dated 9 June 2000 the trial judge found in favour of Mr Bernard on this issue and gave judgment in his favour for substantial damages. The Attorney-General appealed to the Court of Appeal on the issue of vicarious liability. In a judgment dated 9 November 2001 the Court of Appeal (Bingham, Walker and Panton JJA) unanimously concluded that on the evidence vicarious liability had not been established and set aside the first instance judgment. The present appeal to the Privy Council challenges that decision of the Court of Appeal.

<u>The shooting incident</u>

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 summarised as follows. At about 9pm 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. The ground of his dismissal was that he had been absent from duty for over 48 hours. It seems

likely that he became aware of proposed criminal proceedings against him for wounding with intent, contrary to section 20 of the Offences against the Person Act. In any event, the constable left the island and his whereabouts were and are unknown.

The proceedings

6. On 28 January 1991 the plaintiff commenced an action against two defendants, viz the constable and the Attorney-General of Jamaica as the person appointed to be sued in civil proceedings against the Crown under the Crown Proceedings Act. The constable could not be served and he did not enter an appearance. The action proceeded against the Attorney-General in his representative capacity.

7. Section 3(1) of the Crown Proceedings Act provides:

> "Subject to the provisions of this Act, the Crown shall be subject to all those liabilities to 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."

8. The plaintiff's pleaded case was based on a summary of the material facts already described. The defendant did not dispute the shooting incident. It was common ground that in Jamaica a constable is an employee of the Crown. The defendant pleaded that –

> "the acts of [Constable Morgan] on February 11th 1990 at the Central Sorting Office, South Camp Road, Kingston, Jamaica were done entirely for [his] ... benefit ... and he was not acting in the course of his employment or for his employer's benefit."

9. The statutory framework of the case was as follows. Section 4 of the Constabulary Force Act requires every constable to swear

an oath that he would well and truly serve the Queen in the office of constable –

> "without favour or affection, malice or ill-will and that I will see and cause Her Majesty's Peace to be kept and preserved; and that I will prevent, to the utmost of my power, all offences against the same; and that while I shall continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully ..."

The duties of the police are set out in section 13 as follows:

> "The duties of the Police under this Act shall be to keep watch by day and night, to preserve the peace, to detect crime, apprehend or summon before a Justice persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices and criminal processes 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 ..."

Section 30 provides:

> "If any person shall assault, obstruct, hinder or resist, or use any threatening or abusive and calumnious language or aid or incite any other person to assault, obstruct, hinder, or resist any constable in the execution of his duty, every such offender shall be liable to a fine not exceeding two thousand dollars."

The Firearms Act contains detailed prohibitions on the carrying of firearms but section 52 provides in paragraph (e) that the Act shall not apply *inter alia* "to any constable". To this recitation of the applicable statute law it must be added that in practice, in Jamaica, a constable such as Constable Morgan, may take a loaded firearm issued to him home and he may carry that firearm while he is off duty. That was part of the context of the case before the judge.

<u>The judgment of McCalla J</u>

10. Having reviewed the oral evidence on the issue of vicarious liability in some detail the judge found and held:

> "The First Defendant demanded the use of the telephone by identifying himself as being a police officer albeit in a most crude and vulgar manner. The witness for the defence has admitted that it would be within the scope of a police

officer's duty to demand the use of a telephone as a matter of urgency if the necessity arose.

Although no evidence has been adduced that at the relevant time the first defendant was on duty, in the absence of evidence to the contrary the reasonable inference to be drawn is that his demand was somehow connected to his duties. The act of shooting the plaintiff was unlawful and clearly did not fall within any of his prescribed duties but was nevertheless in furtherance of his demand. He subsequently arrested and charged the plaintiff for assaulting him and by that act he could only have been asserting that at the material time he was executing his duties as a police officer.

In these circumstances I find that the Attorney-General is vicariously liable for the action of the first defendant. The plaintiff has established his case on a balance of probabilities and the defence fails."

The judge awarded to the plaintiff damages against the Attorney-General for assault, false imprisonment and malicious prosecution in the sum of (1) general damages of $2,230,000 with interest on $2,000,000 at the rate of 6% per annum from 1st February 1991 to 9th June 2000; (2) special damages in the sum of $318,000.00 with interest at the rate of 6% per annum from 11 February 1990 to 9th June 2000.

The Court of Appeal judgment

11. The Court of Appeal, with evident reluctance, felt compelled to allow the appeal. Bingham JA said:

"In the instant case, the constable was in possession of a service revolver issued to him by his superior officer which could be regarded as authorising him to be at large in carrying out his sworn duty to uphold the law. By his unlawful action in shooting and injuring the respondent the constable could not be seen as acting in the lawful execution of his duty. His conduct was of such a nature as fell outside the class of acts authorised by section 13 of the Constabulary Force Act, and did not render the state as his employer vicariously liable to the respondent."

Walker JA observed:

"... the trial judge laid great store on two pieces of evidence, namely:

(1) that in demanding the use of the telephone Morgan announced 'police'; and

(2) following the incident Morgan caused the plaintiff to be arrested on a charge of assaulting a police officer.

> To my mind, whether taken singly or together, these segments of the evidence are incapable of providing a sufficient basis for such a finding. Firstly, as to (1) above, the action of Morgan is at best equivocal, the probability being that he was asserting his status as a policeman for the sole purpose of obtaining the desired advantage. It had nothing to do with the execution of his official duties. Secondly, as to (2) above, the probability seems to be that the prosecution of the plaintiff was contrived in an attempt to cover up, or justify, the wrongful shooting of the plaintiff. It was not a genuine prosecution for an offence committed against Morgan qua police officer."

Panton JA agreed. In the result the Court of Appeal set aside the judgment entered for the plaintiff in its entirety, i.e. also in respect of false imprisonment and malicious prosecution.

12. The Court of Appeal did, however, strongly recommend an ex gratia payment. Bingham JA stated:

> "That I find it necessary to express myself in such extreme undertones, is due in no small measure to the state of the law as it relates to vicarious liability which, on the uncontroverted facts in this case, now appears to be occurring with the most alarming regularity and cries out for justice to be done. Such a cry can only be answered by the state instituting some measure of reform aimed at assisting the many innocent victims of the barbarous conduct of agents of the state."

He urged the state to make an ex gratia payment by way of compensation "to redress a grievous wrong done to one of its citizens while going about his lawful business" Walker JA also recommended "a meaningful ex gratia payment". The background to which Bingham JA referred is reviewed in a report dated 26 September 2003 by the Special Rapporteur, Asma Jahangir, of the United Nations Commission on Human Rights published under the title *Civil and Political Rights, including the Question of Disappearances and Summary Executions: Addendum: Mission to Jamaica:* E/CN.4.2004/7/Add.2., para 61 *et seq*.

13. On 15 February 2002 the Government of Jamaica made an ex gratia payment of $2,548,000 to the plaintiff, being the amount of the judgment without any interest or costs.

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 his 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 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.

The arguments

15. Counsel for the plaintiff put in the forefront of his argument the fact that the Court of Appeal did not have the benefit of the leading decision of the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. *Lister* was decided on 3 May 2001, i.e. about 6 weeks before the present case was argued in the Court of Appeal and more than 5 months before the Court of Appeal gave judgment. The decision in *Lister* had been reported about a month before the hearing in the Court of Appeal and several months before the Court of Appeal gave judgment: [2001] 2 WLR 1311 (reported on 18 May 2001); [2001] 2 All ER 769 (reported on 30 May 2001). But the decision was not drawn to the attention of the Court of Appeal at the hearing or before it gave judgment.

16. Counsel invited the Privy Council to apply the principles enunciated in *Lister,* which were applied by the House of Lords in *Dubai Aluminium Company Limited v Salaam* [2003] 2 AC 366, and to hold that vicarious responsibility was established. He put forward the cumulative effect of four features: (1) The constable's duty was in the words of the statute "to keep watch by day and by night" and "to preserve the peace". It was a duty by which he was bound whether or not he was in uniform, or within his hours of official duty. (2) By saying "police leggo this" the constable asserted the authority of his office, but then he abused his office by shooting the appellant. It matters not whether his demand for the telephone was for his own benefit or for a police function. He purported to act as a police officer. This provided a sufficient connection between his duties and his tortious act. (3) The constable shot the appellant with his loaded service revolver, given to him as a police officer which he was permitted to carry when off duty. (4) The constable arrested the appellant and charged him with an offence under section 30 of the Constabulary Force Act. In so doing the constable was asserting that at the time of the incident he was acting in the execution of his duty.

17. The Solicitor-General, who appeared for the Attorney-General, placed some reliance on the fact that the constable was not in uniform and that he was apparently not on duty. But he said that it was even more important that the constable must be assumed to have been acting for his own private purposes. He stated that the statement by the constable "police leggo" was irrelevant to the issue of vicarious liability. Similarly he argued that the subsequent arrest in the hospital of the plaintiff by the constable was irrelevant to the issue. He submitted that the act of shooting was not connected in any way with the duties of a constable. While not directly challenging the decision of the House in *Lister* the Solicitor-General expressed some reservations about its consequences.

The decisions in Lister and Dubai

18. In *Lister* a warden of a school boarding house had sexually abused resident children. The question was whether the employers were vicariously liable. In the leading opinion a single ultimate question was posed, namely [at 230C]:

> "... whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."

The four substantial opinions delivered in *Lister* revealed that all the Law Lords agreed that this was the right question. On the facts the members of the House unanimously took the view that the answer was "yes" because the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the boarding house. This decision did not come out of the blue. On the contrary, it was a development based on a line of decisions of high authority dating from *Lloyd v Grace, Smith & Co* [1912] AC 716 where vicarious liability was found established in cases of intentional wrongs. *Lister* is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment. It was held that the traditional test of posing, in accordance with Salmond's well-known formula, the question whether the act is "a wrongful and unauthorised *mode* of doing some act authorised by the master" is not entirely apt in cases of intentional wrongs: *Salmond, The Law of Torts,* 1907, 83, now contained in the current edition of *Salmond and Heuston, The Law of Torts,* 21st ed., 1996, 443. This test may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability. The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee. This strand in the reasoning in *Lister* was perhaps best expressed by Lord Millett who observed (para 83, at 250D):

> "... Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."

While the facts of *Lister* are very different from the circumstances of the present case, the principles enunciated in *Lister* are of general application to intentional torts.

19. A year later in *Dubai Aluminium Company Limited v Salaam and Others* [2003] 2 AC 366 the House of Lords applied the principles in *Lister* in a very different context. The issue was whether a solicitors' firm was vicariously liable for the fraudulent acts of one of its partners who, together with others, had defrauded the Dubai Aluminium Company. If the firm, which had paid compensation to the company, was vicariously liable, it could properly claim contribution from the other participants in the fraud. The House found vicarious liability established. All the opinions are closely reasoned and important but it is not necessary to review the case generally. A citation from the leading opinion of Lord Nicholls of Birkenhead, reveals the link with *Lister.* Lord Nicholls stated (para 23, at 377E):

> "... Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

Throughout the judgments there is an emphasis on the proposition that an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carried on.

20. Counsel for the plaintiff has drawn attention to the decision of the South African Appellate Division in *Minister of Police v Rabie* 1986 (1) S.A. 117 which was not cited in either *Lister* or *Dubai.* The case concerned a police officer who had maliciously, in pursuit of a private vendetta, assaulted and arrested an individual. By a majority of four to one the court found vicarious liability established. The judgment of the majority was given by Jansen JA. He faced up to the problem that the traditional test of vicarious liability was not wholly apposite to some intentional wrongs. He decided not to attempt to apply the traditional Salmond test. Instead he observed at 134H-135:

> "In my view a more apposite approach to the present case would proceed from the basis for vicarious liability mentioned by Watermeyer CJ in *Feldman (Pty) Ltd v Mall* [1945 AD 733, at 741]:
>
> > '... a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he

21. Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases of vicarious liability where employers were at fault. But it is not a requirement. This consideration underlines the need to keep the doctrine within clear limits.

22. It is now possible to examine the decision of the Court of Appeal in more detail. Bingham JA held that the constable was acting "outside the express or implied powers accorded to him by virtue of section 13 of the Constabulary Force Act". Walker JA's reasoning is expressed in similar terms. That the constable was not authorised to shoot innocent members of the public was a given. But this reasoning did not address the particular case of vicarious liability revealed by the evidence. Moreover, both members of the Court of Appeal struggled with the Salmond formula. Thus Bingham JA observed that the constable's tort "could not be seen as coming within a class of acts connected with the authorised acts *so as to be regarded as a mode of doing them*". Walker JA also relied on the Salmond formula. One can understand the difficulty encountered by the Court of Appeal. How could the shooting of the plaintiff even arguably have been regarded as a mode of carrying out the constable's official duties? In these circumstances the ultimate conclusion of the Court of Appeal, arrived at without the benefit of the principles enunciated in *Lister*, was perhaps inevitable.

23. As Lord Millett observed in *Lister* it is by itself "no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty": para 79, at 248F. For example, in *Lister* the warden was acting exclusively in his own perverted interests. On the other hand, the Board is firmly of the view that the policy rationale on which vicarious liability is founded is not a vague notion of justice between man and man. It has clear limits. This perspective was well expressed in *Bazley v Curry* (1999) 174 DLR (4th) where McLachlin J observed (at 62):

> "The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a

> is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work ...'
>
> By approaching the problem whether Van der Westhuizen's acts were done 'within the course or scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing Van der Westhuizen as a member of the Force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed.
>
> It is not necessary in the present case to define the limits of liability based on the creation of risk in this context. Suffice it to say that in the particular circumstances of the present case and in the light of the aforegoing the State, in view of the risk it created should be held liable for Van der Westhuizen's wrongs."

Since the oral hearing in the present appeal the Board has become aware that in subsequent decisions the reasoning in *Rabie* has not survived unscathed. While the dictum of Watermeyer CJ, which Jansen JA quoted, has remained authoritative, the South African Court of Appeal has three times rejected the reasoning of Jansen JA in *Rabie*: *Minister of Law and Order v Ngobo* 1992 (4) SA 822; *Ess Kay Electronics v FNB* 2001 (1) SA 1214 (SCA), at 1219; *Bezuidenhout N.O. v Eskom* 2003 (3) SA 83 (SCA), at 92. The view which prevailed is that Jansen JA elevated the reason for the principle of vicarious liability into a way of stating the rule. That may be a correct analysis. But it does not follow that in the overall assessment whether vicarious liability is established on the facts of a particular case the creation of special risks may not be a relevant factor to be considered.

Discussion

connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

The principle of vicarious liability is not infinitely extendable.

24. The Board concludes that the reasoning of the Court of Appeal in the present case cannot be supported. It does not, however, follow that the conclusion of the Court of Appeal was wrong. That question depends on the correct application of the principle for which *Lister* is now authority.

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 scepticism. 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.

28. Cumulatively, these factors have persuaded the Board that the trial judge was entitled to find vicarious liability established and that the Court of Appeal erred in allowing the appeal.

Disposal

29. The Board therefore quashes the decision of the Court of Appeal and restores the judgment of the trial judge dated 9 June 2000. The Board grants liberty to apply in writing within 21 days for further directions about the form of the order if any are needed.