JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 3/85

Before: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Wright, J.A.

BETWEEN GENERAL ENGINEERING SERVICES LTD. APPELLANT

AND KINGSTON AND ST. ANDREW CORPORATION RESPONDENT

R. Carl Rattray, Q.C., and Clark Cousins
for General Engineering Services Ltd.

Dr. L. G. Barnett and John Vassell
for Kingston and St. Andrew Corporation

26th, 27th, 28th May & 2nd October, 1986

CAREY, J.A.:

General Engineering Services Ltd. (the company) carried on the business of mechanical and electrical engineers, manufacturers' representatives for electrical equipment, general estate services and consultants and owned premises 27 Dunrobin Avenue in St. Andrew at which were stored specialised medico-electrical equipment of various kinds, and other paraphernalia connected with the company's multifarious operations. On 13th October 1977, a fire occurred on those premises completely destroying not only a building which served as office and storeroom, but also the contents therein, the total loss being set at $6.2M.

That date, 13th October 1977, was no less inopportune for the Kingston and St. Andrew Corporation (the K.S.A.C.) because members of the Kingston and St. Andrew Fire Brigade services, had just shortly before that, initiated industrial action against the K.S.A.C.:

specifically the firemen had embarked upon that apology for work, quaintly called 'a go slow'. In the event, although a report of the fire at the company's premises was communicated to the Fire Brigade station at Half Way Tree within minutes of its discovery, the firemen, consistent with their industrial strategy, responded to the call with less than the usual alacrity. A distance of 1½ miles ordinarily covered by the fire-unit in no more than 3½ minutes, occupied on this occasion some 17 minutes. According to the respondent's own witness, had the Fire Brigade responded at their accustomed pace, the fire would have been speedily extinguished, and one supposes the company would have been spared the apparent total ruin of its business.

The company thereafter filed a writ against the corporation for negligence and breach of statutory duty, hoping that like a veritable phoenix, it would rise again from the ashes of that disastrous fire. At a trial before Malcolm J, that hope was not realized however, because the action was dismissed, judgment being given in favour of the K.S.A.C. with costs. This appeal is against that judgment which is dated 14th December, 1984.

In order to appreciate the appellant's case, I think it helpful to advert to the statement of claim which pleaded (so far as is material) as follows:

> "3. The aforementioned Kingston & Saint Andrew Fire Brigade has a statutory duty to extinguish all fires within the fire limits and to protect life and property in the case of any such fire.
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> 4. The premises of the Plaintiff situated at 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew aforementioned are within the fire limits referred to in paragraph 3 hereof.

"5. The plaintiff claims that the statutory duty imposed on the Kingston & Saint Andrew Fire Brigade and referred to in paragraph 3 hereof is owed to the Plaintiff in respect of premises 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew.

6. On the 13th October, 1977, a fire started on the premises of the Plaintiff Company at 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew at approximately 5:45 a.m.

7. That the Plaintiff claims that shortly after the outbreak of the said fire, the Fire Brigade at Half Way Tree was notified and requested to take immediate steps to attend to and extinguish the said fire in keeping with the duty of the Kingston & Saint Andrew Fire Brigade referred to in paragraph 3 hereof.

8. The Plaintiff further claims that reasonable performance of the aforementioned duty would have resulted in the extinguishment of the said fire with minimal damage and loss to the Plaintiff.

9. At the time of the said fire, the members of the Kingston & Saint Andrew Fire Brigade were engaged in industrial action to wit a go slow for the purpose of obtaining increased emoluments and fringe benefits.

10. The Kingston & Saint Andrew Fire Brigade in breach of its statutory duty under the Kingston & Saint Andrew Fire Brigade Act failed to respond promptly to the call in respect of the fire at the Plaintiff's premises and further failed to proceed at a reasonable pace to attend to the extinguishment of the said fire, delayed the arrival of the Fire Brigade to the scene of the fire and having arrived, failed to attend promptly and with due diligence to the extinguishment thereof. FURTHER and/or alternatively the Defendant failed to take the necessary steps to ensure its ability to carry out its statutory duty.

11. The Kingston & Saint Andrew Fire Brigade was negligent in:-

(a) Failing to respond promptly to the call in respect of the fire at 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew aforesaid.

"(b) Failing to travel to the scene of the fire with due expedition.

(c) Deliberately refraining from acting promptly and efficiently in respect of extinguishing the said fire.

(d) Failing to deal efficiently with the extinguishing of the said fire".

As to paragraph 10, particulars of negligence were requested and supplied as follows:

"(a) the defendant failed or neglected to advise the Minister responsible for Defence that having regard to all the circumstances he should direct members of the Jamaica Defence Force to carry out the statutory duty;

(b) the defendant failed or neglected to advise the Chief of Staff of the Jamaica Defence to place or alert those members of the Force, who he had nominated, to extinguish fires within the fire limit and to protect life and property as permitted by the Statute".

The defence (so far as is relevant) was expressed as follows:

"3. The Defendant denies paragraph 3 of the Statement of Claim and says that the duty of the Defendant is to provide within the limits of its financial, material and human resources a fire service, but it has no statutory duty to insure or guarantee the protection or safety of any property. Further the control and discipline of the said service is vested in a statutory Committee.

5. The Defendant denies paragraph 5 of the Statement of Claim and says that the statutory duty is owned to the public generally....

8. The Defendant denies paragraphs 8, 10-12, inclusive of the Statement of Claim, and says that in any event the Acts complained of are of non-Feasance for which the Defendant is not liable.

9. The Defendant further says that the slow response to the call in question was due to the fact that its employees who manned the fire service were engaged in an unlawful industrial

> "action in contravention of the Labour Relations and Industrial Disputes Act, in breach of their contract of employment with the Defendant, contrary to the orders and instructions of the Defendant and in repudiation of their obligations to the Defendant
>
> 10. In acting as aforesaid, the said employees of the Defendant were acting outside the scope of their employment and in a criminal frolic of their own".

The learned judge in a considered judgment, had little difficulty in fanding that the firemen had been dilatory not only in responding to the call but in setting up operations to extinguish the fire. But they had quickly put out the fire thereafter.

Before considering the submissions, the following sequence of events prior to the fire must also be detailed. On 11th October 1977, the Assistant Town Clerk responsible for industrial relations, was advised that industrial action on the part of the firemen was being contemplated. He duly brought this situation to the attention of the Mayor and in the event, both visited the York Park Fire Station where the grievances of the firemen were aired. They advised the men that their complaints constituted no ground for dispute and required them to resume duty immediately. It was understood that "immediately" really meant that normalcy would be expected at the first shift on 12th October. On that day, the Assistant Town Clerk spoke with Colonel Mignon of the J.D.F. and alerted him to the fact of industrial unrest among the firemen. This communication was made with the full knowledge and acquiesence of the Mayor. The usual procedure was for the Mayor to advise the Minister of Local Government (under whose aegis the K.S.A.C. would fall) of the situation and military personnel would only assume duty at the point where there was a complete break down of services. The military, in fact, took over firefighting

operations on 14th October, the day after the fire occurred on the appellant's premises.

The primary question which falls to be determined may be stated thus: is the Corporation vicariously liable in negligence or breach of statutory duty for the acts of its employees committed in pursuance or furtherance of an industrial dispute with the K.S.A.C.? But there are some other matters of principle raised before us, which must be settled before I come to deal with the question I have posed.

Mr. Rattray argued that a duty both at common law and by statute was imposed on the K.S.A.C. to extinguish fires, and protect life. Dr. Barnett took exception to the K.S.A.C. being sued in the first place, because as he argued, no duty either at common law or statute was imposed on it with respect to the extinguishment of fires.

The relevant statute is the Kingston and St. Andrew Fire Brigade Act under which the K.S.A.C.'s fire services are constituted. Section 3(1) provides as follows:

> "For the purposes of protecting life and property in the case of fire within such limits of the Area as the Council, with the approval of the Minister, may from time to time determine by notice published in the Gazette, there shall be established a fire brigade to be called the Kingston and St. Andrew Fire Brigade".

This provision gives the K.S.A.C. power to constitute a firefighting service for the purposes of protecting life and property within the corporate area and Kingston Harbour. Section 3(2) provides:

> "The Council shall provide the Brigade with all such fire engines as may be necessary for the efficient performance by the Brigade of its duties, and all the expenses of the establishment and maintenance of the Brigade shall be included in the Estimates of the Council prepared under the Kingston and

> "St. Andrew Corporation Act and shall be met out of the funds of the Council".

The K.S.A.C. is the body required to furnish and maintain units and equipment and to pay the fire-fighting personnel. Section 3(3) is not material for these purposes. Section 4 provides:

> "For the purposes of this Act there shall be established a Committee, to be called the Corporation Fire Committee, and all the powers of the Council in relation to the control and discipline of the Brigade are hereby delegated to such Committee".

The power of control and discipline over the fire-fighting service is delegated to a committee of the K.S.A.C. which is of course, constituted by this provision. Section 6 provides:

> "The Committee may engage or dismiss a superintendent and such officers or firemen as may be necessary for the purposes of the Brigade, and such persons shall be members of the Brigade. Such superintendent, officers and firemen shall receive such emoluments as the Council with the approval of the Minister may from time to time determine: Provided that the prior approval of the Governor General shall be obtained to the appointment or dismissal of any person to, or from, an office of which the emoluments exceed seven hundred dollars per annum".

Consistent with its power of control and discipline, the Committee has the right to employ and dismiss. It is made plain that the firemen are paid by the K.S.A.C. Section 7 which provides as follows:

> "It shall be the duty of the Brigade to extinguish all fires within the fire limits, and to protect life and property in the case of any such fire".

speaks for itself. Section 14 confers powers on the Committee and Council to make regulations, in keeping with their respective sphere of authority.

Dr. Barnett argued that the powers of the K.S.A.C. as to control and discipline having been delegated to a Committee under this Act, that body was the sole legal

entity which had the duty to extinguish fires and protect life and property. As the Act imposed no duty on the K.S.A.C., he maintained, the action against that body was wholly misconceived. Mr. Rattray, for his part, submitted that the relationship between the K.S.A.C. and the firemen in its fire-services, was that of employer and employee.

In my view, on any fair reading of the provisions recited above, it is plain that save as to control and discipline, the K.S.A.C. retained all other powers over its fire-service, and in relation to the sphere of control and discipline, those powers were exercised by a committee of the K.S.A.C. as a delegated function. The Committee is comprised of members of the K.S.A.C. in respect to which, section 5(1), 5(3), 5(5) are relevant:

> "5(1) The Committee shall consist of a Chairman and six other members to be appointed by the Council and such persons shall, subject to the provisions of subsections (2), (3) and (4), hold office until the 30th day of November next after their appointment.
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> 5(3) The appointment of any member of the Committee may be revoked at any time by the Council.
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> 5(5) Every member of the Committee appointed under this section who, at the time of his appointment, was a member of the Council shall, upon ceasing to be a member of the Council, also cease to be a member of the Committee".

It is the K.S.A.C. which is possessed of the plenitude of power, one aspect of which, has been conferred by the Act on one of its committees. The conclusion seems inevitable that the fire-fighting service is an arm of the K.S.A.C. and in relation to the firemen, the relationship is that of employer and employee, master and servant. At all events, the K.S.A.C. is responsible for the financial management of its fire service. "He who pays the piper, calls the tune". Further, it is not amiss to call

attention to section 13(1) which confers immunity on individual members of the fire service in respect of acts done by them bona fide in the execution of their duty. The functions of the firemen are plainly exerciseable pursuant to and governed by the Kingston and St. Andrew Fire Brigade Act but on the true construction of the Act, responsibility for their negligent acts must lie, not on their delegate the Committee, but on the K.S.A.C., which as has been shown, retains overall responsibility.

Dr. Barnett referred to a trio of cases, but with all respect to learned counsel, I did not derive much assistance from these offerings in construing the provisions of the Kingston and St. Andrew Fire Brigade Act. These were Stanbury v Exeter Corporation (1905) 2 K.B. 838; Harrison v National Coal Board (1951) 1 All E.R. 1102; Fisher v Oldham Corporation (1930) 2 K.B. 364. Each of these cases was concerned with specific English Acts or Regulations, not at all analogous to the Act under consideration in this appeal.

I must mention another argument put forward on behalf of the respondent. It was urged that the Kingston and St. Andrew Fire Brigade Act contained no provisions indicating that the K.S.A.C. could be made liable for the failure of the firemen to carry out their statutory duties. The statute, he said provided sanctions for breaches of the duties it imposed, and a regime for disciplining members of the fire service who fail to carry out their duties. The conclusion he urged was plain that no civil action lay for breach of their duty. He relied on Clegg, Parkinson & Co. v Earby Gas Company (1896) 1 Q.B. 592 where Wills, J. at page 594 set out the principle which Dr. Barnett argued should be applied. He said this:

> "In my opinion this is one of these cases in which the principle applies, that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take proceedings provided by the statute".

Wright, J. expressed this formulation:

> "The general rule of law is that, where a general obligation is created by statute and a specific remedy is provided, that statutory remedy is the only remedy".

In disagreement with Dr. Barnett, it should be noted, as Mr. Rattray rightly pointed out, that in fact no penal sanctions exist in the Act for any failure by the firemen to perform their duties. It is true that the Superintendent is empowered to try and punish members of the Fire Brigade for breaches of the Regulations made by the Committee. Such penal sanctions as are mentioned in the Act (vide Section 17) relate to members of the public interfering with members of the Brigade in the due performance of their duties; they do not at all relate to acts on the part of firemen. In my opinion the principle invoked by Dr. Barnett is not at all applicable to the statute in this appeal. As I understood the principle relied upon by him, the injured party is debarred from instituting proceedings where the statute under which the defendants acts, provides a remedy or a penalty. It follows therefore that if no remedy is provided for the breach of the duty imposed, then a right of action accrues to the injured party. The basis for this view is clearly illustrated by the following citation from a judgment of Salmon, J (as he then was) in A.G. v St. Ives R.D.C. (1959) 3 All E.R. 371 at p. 377:

> "The only other question which remains for decision is whether the breach of duty to maintain and repair the drains gives the plaintiff, Mr. Paisley, a personal right to sue, or whether an action can be brought only by Her

> "Majesty's Attorney General on the relation of Mr. Paisley. The point for decision really turns on whether it was the intention of the legislature to make the duty imposed one
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> > 'which was owed to the party aggrieved as well as to the state, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates'.
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> See Phillips v. Britannia Hygienic Laundry Co. [(1923) K.B. at p. 841] per Atkin, L.J. In other words the court must
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> > '... consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons'.
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> See Groves v. Lord Wimbourne [(1898) 2 Q.B. at p. 407] per A. L. Smith, L.J. In deciding this question one must look at the Act generally and consider, amongst other things, whether any penalty is provided for breach of the statutory duty. If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally a right of civil action accrues to the person who is damnified by the breach. 'For, if it were not so, the statute would be but a pious aspiration': see Cutler v. Wandsworth Stadium, Ltd. [(1949) 1 All E.R. at p. 548; (1949) A.C. at p. 407] per Lord Simonds".

See also the case of Atkinson v. Newcastle Waterworks Co. (1874 - 1880) All E.R.(Rep.) 757 which was also referred to: and is to the like effect.

Having regard to what I have so far said, it must be clear that I hold that the duty to extinguish fires in the Corporate area is imposed on an arm of the K.S.A.C. and if negligence or breach of statutory duty is shown, then the K.S.A.C. would be liable.

The learned judge appeared to have held that a duty was cast upon the K.S.A.C. to extinguish fires but was of opinion that that duty was not an absolute one.

This must be right, the K.S.A.C. must use their best endeavours to put fires out. If despite those efforts, damage is caused to a householder, the K.S.A.C. cannot be held liable. They do not guarantee to extinguish fires so that no harm results. Indeed I did not understand Mr. Rattray to be contending otherwise.

As well, a common law duty of care is imposed on the K.S.A.C. They must make efforts to put fires out. For example they must respond to calls with reasonable despatch; they must not dawdle on the way to a fire; they must act efficiently in the discharge of their duty. If their firemen go on strike, in my judgment, the K.S.A.C. is obliged to act pursuant to the Act and advise the Minister of Defence (see Section 8) so that the Jamaica Defence Force men can take over the duty of the K.S.A.C. Fire Brigade. Indeed, I would think where firemen do take other industrial action the Fire Committee must act. They must act reasonably having regard to all the circumstances.

In the present case, the appellant averred that:

> "(a) the [respondent] failed or neglected to advise the Minister responsible for Defence that having regard to all the circumstances he should direct members of the Jamaica Defence Force to carry out the statutory duty;
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> (b) the defendant failed or neglected to advise the Chief of Staff of the Jamaica Defence to place or alert those members of the Force, who he had nominated, to extinguish fires within the fire limit and to protect life and property as permitted by the Statute".

The evidence showed that the K.S.A.C. officials proceeded with despatch and could not justly be accused of acting as their firemen did in responding to the call. The Army had been alerted of impending industrial action the very day the deadline for normalcy expired and in fact had

taken over within 2 days of normalcy not having returned. So that the learned judge was in my view correct in his conclution that this aspect of liability had failed. I do not share the view expressed by Mr. Rattray that where there was a 'go slow', then the K.S.A.C. ought to replace the offenders. It must have been anticipated, he argued, that if a 'go slow' was in progress, then the K.S.A.C. would be despatching men whom they ought to realize, would have been less than enthusiastic in responding to calls. It was, as he urged, to invite catastrophe. We were referred to Meade v. London Borough of Haringey (1979) 2 All E.R. 1016. The facts as extracted from the judgment of Lord Denning at p. 1020, were as follows:

> "On Monday 22nd January 1979 the caretakers at the schools in Haringey came out on strike. There were very few of them. Only one or two for a school of 500 or 600 children. Their duties were simple enough. To look after the buildings and the heating system. To unblock drains. To lock up at night and open up in the morning. And so forth. Yet by coming out on strike they succeeded in paralysing the educational system of the great London Borough of Haringey. The borough council closed over 100 schools for weeks on end. 37,000 children were deprived of the teaching they should have had. They were put back in their examinations and their careers. Some ran loose in the streets while their mothers were out working.
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> The parents of the children were much upset by all this. They went to their lawyers to see if there was any way to get the schools reopened. The lawyers looked up the statute and found that it was the duty of the borough council under s 8 of the Education Act 1944 'to secure that there shall be available for their area sufficient schools ... for providing ... full-time educations suitable to the requirements of [the] pupils'. The parents relied on this section. They came to the courts to see if the borough council could be compelled to do their duty under it. Goulding J held that the courts were powerless. The only person who could give orders to the borough council was the Secretary of State (Mrs. Shirley Williams). She refused to do so. In a letter of 19th February 1979 she said that 'the Haringey local education

> "' authority have not failed to discharge their duty under section 8 of the Education Act 1944'".

The principle which Mr. Rattray wished us to apply in the present appeal is to be found at page 1020 where the learned Master of the Rolls expressed himself in the following terms:

> "As I read the statute, it was and is the only of the borough council not only to provide the school buildings but also to provide the teachers and other staff to run the schools, and furthermore to keep the schools open at all proper times for the education of the children. If the borough council were to order the schools to close for a term, or for a half-term, or even for one week, without just cause or excuse, it would be a breach of their statutory duty. If any of the teachers should refuse to do their work, the borough council ought to get others to replace them and not pay the defaulters. Likewise if the caretakers refuse to open the schools, and keep the keys, the borough council ought to demand the return of the keys and open up the schools themselves if need be. For this simple reason: it is the statutory duty of the borough council to keep the schools open. If they should fail to do so, without just cause or excuse, it is a breach of their staturoty duty".
> [Emphasis mine]

Applying that principle to the facts of the present appeal, learned counsel thought that the K.S.A.C. should have called in the J.D.F. from the first intimation of a 'go slow' on the part of the firemen.

I have already said that on the facts the K.S.A.C. officials have acted promptly and reasonably. They had alerted the J.D.F. and indeed within 48 hours the J.D.F. were manning the fire-fighting services. It should also be remembered that the responsibility for calling out the military rests not on the K.S.A.C. but on the Minister of Defence. The evidence showed that the line of communication was Mayor - Minister of Local Government and then - Minister of Defence. Even if the opinion of Lord Denning M.R. is to be taken literally, the K.S.A.C.

had in the event found others to replace the firemen so far as that lay in their power,

The principle which should in my judgment be applied in the circumstances of the case was stated by the learned Master of the Rolls in the same case at page 1024:

> "If a statute imposes a duty on a public authority, or entrusts it with a power, to do this or that in the public interest, but expresses it in general terms so that it leaves it open to the public authority to do it in one of several ways or by one of several means, then it is for the public authority to determine the particular way or the particular means by which the performance of the statute can best be fulfilled. If it honestly so determines, by a decision which is not entirely unreasonable, its action is then intra vires and the courts will not interfere with it: see especially by Lord Diplock in Home Office v Dorset Yacht Co. Ltd. [(1970)] 2 All E.R. 294 at 332, (1970) A.C. 1004 at 1067 - 1068]. But if the public authority flies in the face of the statute, by doing something which the statute expressly prohibits, or by failing to do something which the statute expressly enjoins, or otherwise so conducts itself, by omission or commission, as to frustrate or hinder the policy and objects of the Act, then it is doing what it ought not to do - it is going outside its jurisdiction - it is acting ultra vires. Any person who is particularly damnified thereby can bring an action in the courts for damages or an injunction, whichever be the most appropriate".

I am not in the least doubt that the decision by the K.S.A.C. to alert the military taken as early as 12th October, was entirely reasonable, and it cannot therefore be said that the K.S.A.C. by its conduct was frustrating or hindering the policy and objects of the Act.

Anns and others v London Borough of Merton (1977) 2 All,E.R. 492 which was cited to us, is, I think useful in this connection in considering whether the K.S.A.C. was in breach of its common law duty of care towards the appellant, as pleaded "in failing to advise the Minister

of Defence ...". This case was concerned with the duty of care owed by a Borough Council under the Public Health Act 1936 to lessees of some maisonettes who claimed that structural movements which resulted in cracks in the walls, sloping of floors and other defects were attributable to inadequate depth of foundations which had been negligently approved by the Council's agents and/or which had not been inspected by them.

Lord Wilberforce who delivered the main opinion, demonstrated that even where authorities acted under powers conferred by bye-laws, they nevertheless owed a common law duty of care to avoid harm to persons likely to be affected by their activities. He developed this view in this way at p. 500:

> "What then is the extent of the local authority's duty towards these persons? Although, as I have suggested, a situation of 'proximity' existed between the council and owners and occupiers of the houses, I do not think that a description of the council's duty can be based on the 'neighbourhood' principle alone or on merely any such factual relationship as 'control' as suggested by the Court of Appeal. So to base it would be to neglect an essential factor which is that the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law. The problem which this type of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court. It is in this context that the distinction sought to be drawn between duties and mere powers has to be examined.
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> Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion', meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes, also, prescribe or at least presuppose the practical execution of policy decisions: a convenient

> "description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose on it a common law of duty care. I do not think that it is right to limit this to a duty to avoid causing extra or additional damage beyond what must be expected to arise from the exercise of the power or duty. That may be correct when the act done under the statute inherently must adversely affect the interest of individuals. But many other acts can be done without causing any harm to anyone - indeed may be directed to preventing harm from occurring. In these cases the duty is the normal one of taking care to avoid harm to those likely to be affected".

Later at p. 501, he spoke of the extent of this duty:

> "Passing then to the duty as regards inspection, if made. On principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed, namely to ensure compliance with the byelaws. It must be related to the fact that the person responsible for construction in accordance with the byelaws is the builder, and that the inspector's function is supervisory. It must be related to the fact that once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection. But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise, discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely on a common law duty of care. But if he can do this, he should, in principle, be able to sue".

This case I think makes two points. First, where negligence is alleged against a council, then liability might arise even if the council is acting pursuant to statutory powers conferred on it, and secondly the negligence might emanate

either from the council's discretionary functions or its operational functions. However, for a civil action based on common law negligence involving a discretion to succeed, the acts or omission of council, must be outside the delegated discretion, that is, amounting to an abuse of the power or in excess of the power. In effect, there must have been no real exercise of the discretion given by the Act. See also Home Office v Dorset Yatch Co. Ltd. (1970) 2 A-1 E.R. 294

Thus in the present case, the K.S.A.C. had a discretion to call in the J.D.F. the precise point in time when they do, must be left to their discretion. If they had failed to invoke the procedure to bring this about, they could be liable in negligence. If however they do act, but do so, as would be alleged, belatedly, the result might not be the same. The allegations made on the part of the appellant in this regard, viz, that they had failed to do so were not proved. What was established was that the officials of the K.S.A.C. acted but, from the point of view of the appellants, the response to the representations of the K.S.A.C. to the authorities came too late to prevent the catastrophe which ensued. That evidence would be wholly inadequate to constitute the required proof.

On this aspect of the case, the learned judge concluded that:

> "... the evidence adduced by the [appellant] has failed to establish such failure or neglect".

I think he was right in this view.

I can now consider the crucial question which was posed earlier. Mr. Rattray argued that the K.S.A.C. was liable for the negligence of its employees, the firemen, as they were acting in the course of their employment that is, to extinguish a fire and it mattered not, whether their actions were criminal, or were done deliberately or negligently. Dr. Barnett argued that the act of the firemen

was a plain repudiation not only of their contractual obligations but also a repudiation of the very essence of the duties imposed on them.

The law in this regard is well settled, but the application of the principle may sometimes occasion difficulty. A master is answerable for the acts of his servant which are done in the course of his employment and depart from a standard or course of conduct which is obligatory upon both master and servant. See Kitto J in Darling Island Stevedoring and Lighterage Co. Ltd. 19 C.L.R. 36 at 62. In Salmond on Torts (17th ed) p. 465, the learned editors suggest what is to be understood by 'course of employment':

> "a wrongful act is deemed to be done in the course of the employment, 'if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master'".

Lord Thankerton in Canadian Pacific Railway Co. v Lockhart (1942) 2 All E.R. 464 at p. 467 gave approval to the rest of this statement of principle, which is thus expressed:

> "It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts that he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it ... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it".

It should be said at once that whether a wrongful act is within the course of employment is really a question of fact and accordingly all the facts must be taken into account which must mean that not only the wrongful acts causing the damage, must be examined but also the surrounding circumstances. Although an act is prohibited, disobedience by the servant will not necessarily relieve the master of liability. In Canadian Pacific Railway Co. v Lockhart (supra) the company had issued instructions prohibiting servants from using their own cars for purposes of the company's business unless they were insured against public liability and property damage risks. A servant of the company who was employed as a carpenter and general handyman and whose headquarters were at West Toronto, was required in the course of his employment to take a key to North Toronto. For this purpose he used his own uninsured vehicle and in the course of his journey injured the infant plaintiff. It was held that the comp ny was liable because the servant was performing the journey for the purpose of this employment: the driving of an uninsured vehicle was an authorized act, albeit performed in an improper mode. Lord Thankerton expressed his opinion in this way at p. 468:

> "The existence of prohibitions may, or may not, be evidence of the limits of the employment. In the present case Stinson was employed to work as a carpenter and general handyman and for that purpose he required to go from his headquarters at West Toronto Station to other railway buildings of the company throughout Toronto and district. The means of transport used by him on these occasions was clearly incidental to the execution of that which he was employed to do. He was not employed to drive a motor car, but it is clear that he was entitled to use that means of transport as incidental to the execution of that which he was employed to do, provided the motor car was insured against third-party risks. If the prohibition had absolutely forbidden the servant to drive his motor car in course of his employment, it

> "might well have been maintained that he was employed to do carpentry work and not to drive a motor car, and that, therefore, the driving of a motor car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which or by means of which the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties".

From this it would seem that if the prohibitoon is to have effect, it must restrict a class of acts and not relate to the particular method of performing the class of acts.

Of particular relevance in this appeal is the question, what is the result if the servant commits a criminal act in the course of his employment? Is the master nevertheless liable? A convenient start is Poland v. John Parr and Sons (1926) All E.R. (Rep.) 177 where a carter who had handed over his wagon and was going home to dinner, struck a boy whom he suspected wrongly but on reasonable grounds, of stealing his master's property. Here, the master was held liable since a servant has implied authority, at least in an emergency to protect his master's property. In Keppel Bus Co. Ltd. v. Sa'ad bin Ahmad (1974) 2 All E.R./p. 700, where a conductor on a bus assaulted a female passenger, the Privy Council was unable to find any facts which showed that the conductor when he struck the blow, any emergency situation had arisen, which called for forcible action which could be justified or any express or implied authority with which the bus company had clothed the conductor. This case which was cited to us, does not carry the case any further but its an illustration of the application of particular facts to the principle indicated in Poland v. Parr and Sons (supra).

Lloyd v. Grace, Smith & Co. (1911-13) All E.R. (Rep.) 51 is an example of criminal conduct on the part of the servant rendering the master liable. In that case, a Solicitor's managing clerk induced the appellant to give him instructions to sell or realize some property she had bought but was doubtful whether she had got her money's worth. For that purpose, she gave him the deeds and signed two documents which she neither read nor knew the tenor of, but they put her interests in the property into the hands of the managing clerk. This done, he signed the documents and dishonestly disposed of the appellants's property. As managing clerk, he was authorised to receive deeds and carry through sales and conveyances and to give notices on the respondent's behalf. Their lordships laid it down that if an agent commits a fraud while acting or purporting to act in the course of the business which he is authorised, or held out as authorised, to transact on account of his principal, the principal although innocent of the fraud, is liable for the fraud of the agent whether the fraud results in a benefit to the principal or not.

It may be that in cases of fraud, where principal and agent are involved, it is better to say that the master will be liable if the fraudulent conduct is within the scope of the servant's authority, actual or ostensible.

In Joseph Rand Ltd. v. Craig (1919) 1 Ch 1, the illegal acts of the servants were tortious, viz. a trespass to land, but the court held that they were not within the sphere of the servant's employment. There, carters were employed by a contractor by the day to take rubbish from certain works to his dump and to tip it there, and were strictly forbidden to tip it anywhere else. Some of the carters, without knowledge of the contractor, and in contravantion of their orders, took the rubbish to a piece of unfenced land, the property of the plaintiff, and deposited

it there. They did this for their own convenience: the unfenced land was nearer to the works than the dump of the contractor. In an action by the plaintiff against the contractor, the Court of Appeal in affirming the judgment of the judge in the Court below found that the contractor was not liable for the reason already stated. Swinfen Eady, M.R. at p. 9 put his decision on the following basis:

> "But in any case the acts of which they were guilty were acts done deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer. The purpose of their own suggested was probably either to indulge their laziness or to give them an opportuniyy of spending an extra time in the public-house, but at any rate it was entirely a purpose of their own. The acts of which they were guilty were their own deliberate acts. It is not a case of carelessness or negligence in the course of their employment. In my judgment it is a case, on the facts proved, of departing from the course of employment, and for their own purposes deliberately committing the acts in question. Under these circumstances I am of opinion that the learned judge on the facts proved before him, arrived at a right conclusion, and on the facts so proved the trespasses complained of were not acts done in the course of the employment for their master for which he can be rendered liable".

There is one other case to which we were referred, Bartlett v. Department of Transport The Time 8th January, 1985. In the laconic report of this case in the Times, the Department of Transport were held not in breach of their statutory duty under the Highways Act 1959 to maintain the highway by their failure to reduce the danger of ice and snow on a truck road when the Department's employees as a result of industrial action, had refrained from working on the particular road. Boreham, J is reported as saying:

> "The crucial question was whether the defendants were blameworthy. The plaintiff did not rely on anything done by employees in the course of their employment. Assuming that the

> 'employees were acting unlawfully in withdrawing their labour they were not in breach of duty to the plaintiff; their breach was of their duty to their employers. The plaintiff could not complain of that unless that breach was induced or condoned by the employers".

What was being identified as helpful in providing a solution in the present appeal, is the statement of the learned judge that the withdrawal of services was not a breach of duty to the injured party but a breach of their duty to their employers. In that event, the plaintiff could only succeed if the employers induced or condoned their employees' action. With this view I am in entire agreement.

The authorities show, as I understand them, that the master will be liable if the wrongful acts are authorised expressly or impliedly, by him for the acts will fall within the course of his employment. The acts are nonetheless within the scope of his authority or course of employment, where the employer holds the servant out as being able to perform acts which he in fact performed, albeit criminal. The employer may escape liability if he restricts the class of acts which the servant is employed to perform.

In the present case, the firemen were acting in breach of their contract with their employers, the K.S.A.C. They were deliberately frustrating the carrying out of the duty imposed upon them by statute. In my judgment, in those circumstances, there could be no juristic warrant to hold that they were acting in the course of their employment in driving the fire-units at a speed which would prevent the successful extinguishment of fire or the protection of property. To arrive on the scene of a fire long after it has started and timely advice been received of the start of the fire was a matter of deliberate policy to subserve the ends of the firemen. It was a departure from and contrary to the purpose of their employment. It was in breach of

their contractual obligations to their employer. It surely cannot be the purpose or objective of firemen to fiddle while Rome burns. Plainly their action was neither induced nor condoned by the K.S.A.C.

In the result, I am clearly of opinion that the K.S.A.C. is not vicariously liable for the wrongful acts of the firemen. I would therefore dismiss the appeal with costs and affirm the order of Malcolm, J.

WHITE, J.A.:

On the morning of the 13th day of October 1977, the appellant suffered substantial damage as the result of fire which destroyed premises No. 27 Dunrobin Avenue, in the parish of St. Andrew. The extent of the damage and loss can be seen from the claim that the value of the building destroyed was set at $88,000; the contents of the building destroyed by the fire were valued at over 6 million dollars (Ja.). Add to this the claimed reduction in business as a result of the fire, $775,000, which represented loss of earnings up to the filing of the Statement of Claim on the 18th June 1984.

According to Mr. Alexander Dixon, the Managing Director of the appellant, the business was one of a Manufacturer's Representative, and specifically, as a maintenance specialist not only for the Kingston and St. Andrew Corporation (the K.S.A.C.), but also for the Ministry of Health - hospital maintenance, the Ministry of Works, the Supply Department, Government Chemist. At the time of the fire, his company had in stock all the spare parts to maintain all the X-Ray units in the hospitals, for the Electro-Medical Units, the Boilers, Air Conditioning Units, and Incinerators. To this catalogue of stock must be added motor vehicles and office furniture, other tools and equipment.

The building was 40 feet long by 140 feet in depth. It was made in part of concrete nog and in other parts of steel. According to Mr. Dixon, the front part, the older part, was solid in foundation, and made of nogs on top strengthened by wood. In this older part there was a double glass door and aluminium louvre windows. The roof was in part wood shingles. The roof in the newer added section was made of aluminium and zinc. The added part was made of concrete block and steel with a steel door. There were about

twenty-four sections to the entire building, which were appropriated to the several activities of the appellant's business. Each section was secured by a concrete wall, with strong wooden doors for ingress and egress from any one section. All the internal doors were locked. Further, it was secured as follows:

> "The premises is grilled inside and outside. It has complete total coverage. I had placed a wire mesh along the entire top - conducts electrical signals - mesh. It transmits the signal to alarm flash lights - sirens and bells. On every conceivable opening I place censors that would sound the alarm if glass broken or if any of opening opened or touched. The doors are closed and locked. By opening I mean an entrance or access point. I also had in every section of the building the heat detecting heads. They were wired into the alarm system. I also had half dozen fire extinguishers at various points within easy access. Outside the premises in a ring about 6 feet perimeter around the building - electric ultra violet eye. It would go off. All neighbours would be alerted beyond say 50 - 60 yards. I normally close gate and lock it sometimes. On the night of fire I did not disconnect or deactivate any of these systems. Left all the doors and windows securely locked. There wouldn't be any openings normally when I lock up".

Despite these precautions the building and contents were destroyed by fire of unknown origin.

Mr. Dixon said he was informed of this fire at about 7.15 a.m. by Mrs. Enid Holding and her husband who reside at No. 29 Dunrobin Avenue. Thereupon, he went to No. 27 Dunrobin Avenue, and saw the building completely burnt out. He saw a fire engine there. Firemen were present, and were sprinkling a lot of water on the ashes, and pushing down the weak walls of the building that the fire had destroyed. He observed that the firemen were moving about slowly. According to Mr. Dixon, he went into the premises and spoke to the chief officer in charge of the Fire Brigade,

asking him:

"Why did you let the place burn down?".

This question elicited the reply:

"We are on a go-slow and even if my mother was in there, it would have to burn down. I want my raise of pay".

This conversation was denied by Mr. Monthen Powell, District Officer in the K.S.A.C. Fire Brigade. He did not make any such remark nor did he hear any such remark being made to any Fire Brigade officer senior to himself, or any such reply as related by Mr. Dixon.

It was the appellant's case that the ravages of the fire were decidedly caused by the 'go slow' tactics of the firemen who were dispatched from the Half Way Tree Fire Brigade substation in answer to urgent calls from Mrs. Holding. She testified that at about 5.45 a.m. on the 13th October 1977, she was awakened by a slight crackling sound from No. 27, Dunrobin Avenue. As she looked from her bedroom window at the building on No. 27 she saw slight smoke and some flame coming from the middle section of No. 27. When she first saw the fire it was a small one coming from the floor. She thereupon phoned the Fire Brigade at Half Way Tree. At about 6.00 a.m. she again phoned the Fire Brigade, and immediately went out on the street; she opened the gate of No. 29. At about 6.10 a.m. she said she heard the siren of the fire engine which she thought at the time was on the bridge at Constant Spring Road, which is about half mile from No. 27. She said that as she was going up the road she saw when the fire engine turned from Constant Spring Road into Dunrobin Avenue. There was "hardly any traffic at that hour". And she estimated that the fire engine took about 10 minutes to travel the short distance between the bridge and when it turned from Constant Spring Road into Dunrobin Avenue. It is instructive to use her words to describe the

movement of the fire engine as recorded by the learned trial judge:

> "It finally came up to No. 27 - slow - forward - stop - then slow - forward and stop and that went on for a long time. It took about 20 minutes from the corner to reach up to No. 27. By the time it stopped at No. 27 it was about 6.30 a.m.".

After the arrival of the fire unit it was brought under control, after some 30-35 minutes. I make this estimate based upon the evidence of Mrs. Holding, who the Judge records as describing the movements of the firemen at the scene of the fire. First of all, having taken 20 minutes to reach from the corner to No. 27 Dunrobin Avenue - a distance of half mile - the firemen got out with a big hose and put some water on the building. In a short while this water was finished. But instead of utilising a hydrant which she said is positioned at 2 yards from the western side of the gate to No. 27, the firemen continued along Dunrobin Avenue, into Lindsay Crescent. They returned to No. 27 after about 15-20 minutes, and then and there connected their hoses to the abovementioned hydrant, which she said had been earlier ignored, although pointed out to them by her son. By applying the water through the hose at the building the fire was put out in about 10 minutes. She said that during this last period the firemen were not on go slow.

The witnesses for the respondent admitted that the fire service was on go slow which commenced on the 11th October, 1977. According to Mr. Powell, the District Officer at the Half Way Tree Substation, he received the call at that substation at 5.50 a.m. by the VHF Radio. He responded at 5.51 a.m. The route followed to No. 27 Dunrobin Avenue was up Eastwood Park Road, into Constant Spring Road, across the Sandy Gully Bridge, and then from the Constant Spring Road into Dunrobin Avenue, and the fire unit arrived

at No. 27 Dunrobin Avenue at 6.08 a.m. The total journey of 1½ miles took 17 minutes, whereas, according to him, "At 30 m.p.h. driving normally it would take 3 minutes. There was a go slow in process and the unit was being driven at a slower rate". He denied however, that there was "a stop and go" during the journey. Specifically, it did not stop on the Sandy Gully bridge. Nor did the fire engine and its crew take 20 minutes to go from the corner to No. 27. The estimate of the normal travelling time of 3 minutes is supported by the evidence of Mr. Alexander Binns and Mr. Dixon.

Mr. Powell testified that when he arrived there the building on the premises was on fire; sections of the roof had already caved in. Water was applied from the unit's water tank, and on his instructions a search was made for the nearest hydrant which was identified on Lindsay Crescent. Eventually, upon the morning becoming lighter, the hydrant by No. 27 was identified and allowed for a more concentrated flow of water and the fire was eventually brought under control. He admitted that he and his men journeyed slowly to the scene of the fire. He denied however, that they fought the fire slowly, and was emphatic that he knew of no tactic to allow the building to burn down. He frankly admitted that to fight a fire effectively it is essential to get to the scene quickly. In fact, when he first arrived on the scene of the fire his early opinion was that the fire had been burning for between 3 and 4 hours. He at that time did not know the contents of the building, when the fire started. He stressed, however, that most of the roof had collapsed, and this was indicative that the fire must have been burning for a considerable time before the Fire Brigade arrived on the scene.

In the context of these basic facts, Malcolm, J. had to consider the claim that the respondent was liable for the damage flowing from the breach of a statutory duty imposed upon

the respondent. This breach of duty was redressible by an action against the respondents because of the relationship of the men of the Fire Brigade to the K.S.A.C. It was said that they were the servants or agents of the K.S.A.C., "for the purposes of protecting life and property in the case of fire within such limits of the Area as the Council, with the approval of the Minister, may from time to time determine by notice published in the Gazette". For these purposes the Kingston and St. Andrew Fire Brigade was established by the Kingston and St. Andrew Fire Brigade Act (section 3). The Area referred to "means the area comprising the Corporate Area as defined in the Kingston and St. Andrew Corporation Act and the Harbour of Kingston as defined and declared by virtue of the provisions of the Harbours Act" (id s 2).

The Fire Brigade has the duty "to extinguish all fires within the fire limits, and to protect life and property in case of any such fire" (s. 7). This statutory duty, it was said, was not observed, in that the Fire Brigade at Half Way Tree having been notified of the fire at No. 27, Dunrobin Avenue, had failed to take immediate steps to attend and extinguish the said fire with minimal damage and loss to the plaintiff. This could have been effected if the Fire Brigade had performed its statutory duty reasonably - a statutory duty owed in particular to the appellant in respect of its premises at No. 27 Dunrobin Avenue.

The appellant's statement of claim set out the kernel of complaint as follows:

> "9. At the time of the said fire, the members of the Kingston and St. Andrew Fire Brigade were engaged in industrial action to wit a go slow for the purpose of obtaining increased emoluments and fringe benefits.
>
> 10. The Kingston and St. Andrew Fire Brigade in breach of its statutory duty under the Kingston and St. Andrew Fire Brigade Act failed to respond promptly to the call in respect of the fire at the Plaintiff's premises

"and further failed to proceed at a reasonable pace to attend to the extinguishment of the said fire, delayed the arrival of the Fire Brigade to the scene of the fire and having arrived, failed to attend promptly and with due diligence to the extinguishment thereof. Further, and/or alternatively, the Defendant failed to take the necessary steps to ensure its ability to carry out its statutory duty.

11. The Kingston and St. Andrew Fire Brigade was negligent in:-

(a) Failing to respond promptly to the call in respect of the fire at 27 Dunrobin Avenue, Kingston 10 in the parish of St. Andrew aforesaid.

(b) Failing to travel to the scene of the fire with due expedition.

(c) Deliberately refraining from acting promptly and efficiently in respect of extinguishing the said fire.

(d) Failing to deal efficiently with the extinguishing of the said fire".

The admitted go slow was the form of industrial action begun on the 11th October 1977, and was one ground of the negligence complained of. For said, Mr. Rattray, the K.S.A.C. was negligent in dispatching firemen who were known to have been so engaged. In addition there was the negligent way in which the firemen fought the fire. Mr. Rattray's approach is to condemn the manner of the performance of the duty which by statute rests upon the defendant K.S.A.C. so that the claim is not only for breach of statutory duty but also for negligence.

By its amended defence in paragraph 5,

> "The defendant denies paragraph 3 of the statement of claim [referring to the statutory duty of the Fire Brigade] and says that the duty of the Defendant is to provide within the limits of its financial, material and human resources a fire service but it has no statutory duty to insure or guarantee the protection or safety of any property. Further the control and discipline of the said service is vested in a statutory Committee"

The appellant's reply was the pleading denying that:

> 'the defendant's duty is limited to that alleged by the Defendant. The Plaintiff avers that the Committee statutorily invested with the control and discipline of the fire service is a Committee of the Defendant Corporation delegated to perform the particular functions of the said Corporation and as such acts inter alia as agents of the Corporation".

The Committee mentioned in the foregoing pleadings is established by section 4 of the Act:

> "For the purposes of this Act there shall be established a Committee to be called the Corporation Fire Committee and all the powers of the Council in relation to the control and discipline of the Brigade are hereby delegated to such Committee".

The Constitution of the Committee is set out in section 5. There shall be a Chairman and six other members to be appointed by the Council. Each member shall hold office until the 30th November next after their appointment. Membership is determinable by resignation, death, or on ceasing to be a member of the Council, or on his appointment being revoked at any time by the Council. One of the members of the Committee shall be a member of the Jamaica Defence Force who shall be appointed by the Chief of Staff. "Provided that the prior approval of the Governor General shall be obtained to the appointment or dismissal of any person to, or from, an office of which the emoluments exceed seven hundred dollars per annum".

By section 6, the Committee may engage or dismiss a Superintendent and such officers or firemen as may be necessary for the purposes of the Brigade. The Committee also has the power to fix the emoluments of the personnel of the Fire Brigade, subject to Ministerial approval from time to time. The control and discipline of the Brigade is amplified by the power of the Committee to make regulations:

> "14(1)(a) prescribing the requirements for the admission of members into the Brigade, and the period of service, and the training, government, discipline, good conduct and discharge of such members;
>
> (b) prescribing the uniform to be worn by, the hours and places of training and exercise of, and the distribution of duties among, the members of the Brigade;
>
> (c) prescribing the services required of the members of the Brigade and the manner of their performance of such services;
>
> (d) prescribing the classification and rank, and the promotion and reduction in rank of members of the Brigade;
>
> (e) prescribing the manner and procedure of enquiry into, and the punishment (including dismissal) for, breaches of any such regulations:
>
> Provided that where such punishment entails a fine, such fine shall not be in excess of ten dollars, or where it entails suspension shall not be for any period in excess of one month, for any one breach of such regulations".

Contrastingly, by section 14(2) the Council may make regulations:

> "(a) in relation to the insurance by the Council of the lives of the members of the Brigade;
>
> (b) in relation to the compensation payable to any member of the Brigade in the event of his being injured while on duty, or to his wife or family in the event of his death from such injury;
>
> (c) in relation to the gratuities and rewards payable to any member of the Brigade for extraordinary and meritorious services performed by him on the occasion of a fire".

It was much debated during the hearing of the appeal whether in all the circumstances there was any statutory duty cast upon the respondent. To the question each party examined the Act. As adumbrated earlier the appellant maintained that the Kingston and St. Andrew Corporation has a statutory duty owed to the appellant which duty is enacted in the Kingston and St. Andrew Fire Brigade Act which establishes the Fire Brigade. Mr. Rattray contended that the K.S.A.C. is in the position of the employer of the officers of the Fire Brigade. He said that the Council is the governing body which has statutorily delegated to its Fire Committee its powers regarding the Fire Brigade. And he takes issue with the trial judge's dictum that the duty is not an absolute one, and submitted that the learned trial judge was wrong in law in failing to find the existence of a statutory duty in the defendant, and a breach of such a duty as will cause the plaintiff to be entitled to judgment.

On the other hand, Dr, Barnett posited that, although the Act requires the Kingston and St. Andrew Corporation to bring the Fire Brigade into existence, and to provide it with

> "all such fire engines as may be necessary for the efficient performance by the Fire Brigade of its duties, and all the expenses of the establishment and maintenance of the Brigade shall be included in the estimates of the Council prepared under the Kingston and St. Andrew Corporation Act and shall be met out of the funds of the Council",

that does not conclude the matter. He put forward for the Court's consideration the exceptional relationship between the Corporation Fire Committee and the members of the Fire Brigade. This means that the Council of the Kingston and St. Andrew Corporation has no power of control over the Brigade or to abolish the control of the Committee. The Fire Brigade, which is established as a special entity is specifically given the

duty to extinguish fires, and to protect life and property. This duty is not imposed on the K.S.A.C. The K.S.A.C. did not make the delegation to the Committee. This is not a situation in which the K.S.A.C. has any alternative in relation to the entrusting of the responsibilities in firefighting to other groups of persons or entities. In his further submission, the Statute has clearly made a specific demarcation of responsibilities of the Council and the responsibilities of the Fire Committee controlling the Fire Brigade . He also pointed to the extensive powers given to the members of the Fire Brigade by sections 10 and 11 of the Act. To carry out their responsibilities on the occasion of a fire, the Superintendent or other officer in charge of the Brigade may in his discretion:

> "s 10(a) take command of other persons who may voluntarily place their services at his disposal;
>
> (b) remove or order any member of the Brigade to remove any person who by his presence or conduct interferes with or obstructs the operations of the Brigade;
>
> (c) cause any water to be shut off from the mains and pipes of any district in order to give a greater supply and pressure of water in the district in which a fire has broken out;
>
> (d) direct the closing of any street in or near which a fire is burning;
>
> (e) order the removal of any furniture or goods from any building on fire or in danger of fire;
>
> (f) take possession of, and if necessary break down, any building, wall or fence for the purpose of extinguishing or preventing the spread of the fire;
>
> (g) generally, take any measures that may appear expedient for the protection of life and property, with power by himself or any member of the Brigade or person under his command to break into or through, or take possession of, or pull down, any premises for the purpose of putting an end to, or preventing the spread of, a fire, doing as little damage as possible.

> "(2) Any member of the Brigade, being on duty, may, without the consent of the owner or occupier, enter, and if necessary break into, any building, which he has reasonable cause to believe is on fire."

And by s 11 all the powers and immunities of the members of the Brigade on duty at a fire -

> "are the powers, authorities and immunities of constables, and [they] shall have power to arrest without warrant every person who may assault or obstruct or impede the members of the Brigade in the discharge of their duties."

From the foregoing it is clear that the powers are directly vested in the Superintendent and men who constitute the Brigade. In those circumstances, he submitted the wrongful or negligent performance of the statutory duty to extinguish fires cannot constitute a basis for an action against the K.S.A.C. since those duties have been directly imposed on the Fire Brigade personnel.

I am in agreement with Dr. Barnett's construing of the Act. In my view the statutory powers and duties regarding control and discipline of the Fire Brigade is the sole responsibility of the Fire Committee, and none of these powers can be assumed by the Council of the K.S.A.C., on the theory that they were delegated by the K.S.A.C. itself. The K.S.A.C. cannot abolish the Committee. I would even go as far as to say that the word "control" does not signify a power even in the Committee to direct how and when the Fire Brigade should perform its duty to extinguish all fires within the fire limits and to protect life and property in the case of any such fire. Emphatically, the responsibility for the response to notification of a fire is that of the Superintendent of the Brigade. By s 9 of the Act:

> "On notification being received by the Brigade that a fire has broken out within the fire limits the Superindent of the Brigade or, in his absence, the next senior officer, shall cause as many members of the Brigade and fire engines as he may consider necessary to be despatched immediately to the scene of such fire."

It is my view that the scheme and intendment of the Act was not to make the Council substantially responsible for the Fire Brigade, but to make the Fire Committee of the Council the responsible body for overseeing the work of the Fire Brigade. The independence of the Fire Brigade in carrying out the duty imposed on it can be readily underlined by the terms of s 10. "Powers of the Superintendent," on the occasion of a fire, as well as importantly, by s 13 dealing with damage done by the Brigade:

> "13(1) No member of the Brigade, or person under the command of the officer in charge of the Brigade, acting bona fide in the exercise of the powers conferred upon him under this Act shall be liable for any damage or for any act done under this Act.
>
> (2) Any damage occasioned by any member of the Brigade or by any person under the command of the officer in charge of the Brigade in the exercise of the powers conferred under section 9 shall be deemed to be damage by fire within the meaning of any policy of insurance against fire".

Upon a cursory view, this section exonerates from liability to damages when members of the Brigade are acting in exercise of the powers conferred by the Act and the provision that damage done thereby and thereunder "shall be deemed to be damage by fire within the meaning of any policy of insurance against fire", indicates the limitations of any claim in such circumstances as the present case, in that the person having a claim in respect of such damage or for any act done under this Act, will have to have recourse to any

policy of insurance covering damage by fire. I am of the view that it must be affirmatively shown that the damage complained of as a result of the fire was occasioned by the members of the Brigade not acting in exercise of the powers conferred by the Act. Even where there is a go slow, as here, I am of the view that there is nothing on the evidence to show that the Brigade was not acting in the execution of its powers and duties. The statutory duty is not breached if they are acting under the statute, albeit at some stage during their activities the members of the Brigade deviated from what was the course properly regarded as would allow them to arrive at the scene of the fire much earlier than they did. The question must be: Was what they did of such a nature as to lead one to say that they were acting wholly beyond the statute? I am not satisfied that the matter was looked at from this viewpoint at the trial. In any event on a fair view of the evidence the appellant did not prove that it should succeed on its claim for damages under this head.

Despite the provisions of the Act, Mr. Rattray argued that it cannot be correct to say that to provide all the requisite fire engines and to meet all the expenses of the fire brigade is complying with the duty of extinguishing all fires within the fire limits so as to protect life and property. It is true, as he says, that the expectation is that the task of extinguishing fires must be performed with due care and efficiency. But it is not quite clear to me how in the terms of the Statute it is possible to translate that expectation into concrete liability. He proposed a general statement of liability in these terms: The Act imposes upon the Fire Brigade a duty to extinguish fires using such care and skill as is reasonably necessary. If the members of the Fire Brigade are negligent in the performance of this duty then both under the Statute as

well as at common law, the respondent in this case is liable for damages.

In passing, it would seem that if one gives prominence to the words "acting bona fide in the exercise of powers conferred upon him under the Act", it may well be important to recall the words of Parker, J in Bullard v. Croydon Hospital Group Management Committee (1953) 1 Q.B., at pp. 516-517.

> "that a person is not absolved under this section (s 72 of the National Health Service Act 1946) merely because he acted bona fide, and if a person is not absolved, presumably the authority itself is not absolved merely because it has acted bona fide. If one accepts the directions of Willes, J in Arthy v. Coleman 30 L.T. (O.S.) which was approved in the Court of Queen's Bench) the act must not only be bona fide but done without recklessness or carelessness".

In the circumstances of the instant case, the appellant has to show that by the go-slow the firemen were not acting bona fide in the execution of their duty, and, in the argument of Mr. Rattray, that that carelessness and recklessness must be transferred to the respondent by reason of the doctrine of vicarious responsibility. I have already stated my opinion that on the basis of the interpretation of the statute the K.S.A.C. cannot be described as the principal of the Fire Brigade so as to be liable for the wrongful or negligent performance of the statutory duty to extinguish fires.

Malcolm J did not specifically find that the go-slow was not a bona fide execution by the firemen of their statutory duty and that they were negligent or careless or reckless in the circumstances of the case. He animadverted upon the insidious and callous attitude of "firemen (who) leave their stations to a job and they arrive on the scene and fiddle while Rome burns". Nevertheless, he was persuaded on the facts and on the law as it stands that the

defendant Corporation is entitled to judgment as the plaintiff, on a balance "of probability, has not established its case".

The appellant has questioned the judgment for the Kingston and St. Andrew Corporation on the premise that its cause of action arises out of the terms of the statute. The Kingston and St. Andrew Fire Brigade Act, it was argued, does not provide any remedy to a private individual, although the scope and focus of the Act is the protection of life and property. Despite this, the appellant is not precluded from bringing an action even though the Act provides penalties against the members of the Brigade for breaches of the Regulations made thereunder. Support for this submission were the following remarks of Salmon, J, (as he then was) in his judgment in Attorney General v. St. Ives Rural District Council (1959) 2 All E.R. 371, at p. 377; (1959) 3 W.L.R. 575 at p. 583:

> "The only other question which remains for decision is whether the breach of duty to maintain and repair the drains give the plaintiff a personal right to sue, or whether an action can be brought only by Her Majesty's Attorney General on the relation of the plaintiff. The point for decision really turns upon whether it was the intention of the legislature to make the duty imposed one 'which was owed to the party aggrieved as well as to the State or was a public duty only. That depends on the construction of the Act and the circumstances in which it was made and to which it relates'. Phillips v Britannia Hygienic Laundry Co: per Atkin L.J. (1923) 2 K.B. 832, 841. In other words, the court must 'consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons': Groves v Lord Wimbourne, per A.L. Smith L.J. (1898) 2 Q.B. 402, 407; 14 T.L.R. 493. 'In deciding this question one must look at the Act generally and consider, amongst other things whether any penalty is provided for breach of the statutory duty. If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally, a right of

> "'civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration'; Cutler v. Wandsworth Stadium Ltd., per Lord Simonds (1949),A.C. 398, 407; 65 T.L.R. 170; (1949) 1 All E.R. 544".

In that case Salmon, J., interpreted the Inclosure Act 1800 and the award thereunder as not imposing any penalty or other sanction for non-compliance with the duty to maintain and repair drains used for agricultural land drainage. Did a private person have a cause of action? On this Salmon, J. said:

> "I have come to the conclusion that the Act was passed and the award made for the benefit of the persons in favour of whom the enclosures were made, that is to say for the persons whose land is immediately adjacent to the drain, and through whose land the drains pass. I am fortified in this conclusion by the last recital to the Act".

Let it be appreciated that the thesis of the submissions on behalf of the appellant is that the respondent is liable for acts of the Fire Brigade in allowing the fire to destroy the building and its contents, given the duty to answer all calls immediately and extinguish fires as quickly as possible. According to Mr. Binns, if the response had been made promptly and the firemen arrived on the scene within 3 minutes he would expect the Fire Brigade to put out the fire promptly and without damage. At the same time, Mr. Powell the District Officer, did not agree with the suggestion from Mr. Rattray that if the Fire Brigade does not get to the scene of a fire promptly the fire might reach proportions which it might not be possible to contain, and in this case if they had connected both hoses more quickly the fire would have been brought under control more quickly.

Mr. Rattray in submitting that a statutory duty is imposed upon the respondent said that although the Act provides penalties - he could have pointed out the paltry fines

permissible - those are not the only remedy for breach of the statutory duty. He relied upon a modern restatement of the long recognised principle which was made by Lord Denning M.R. in Meade v Haringey Council (1979) 1 All E.R. 1016; (1979) 1 W.L.R. 637. The breach alleged in that case was the failure of an education authority to keep open schools which had been closed by industrial action involving non-teaching staff. There were continious negotiations between the education authority and the unions representing the non-teaching staff to get the schools reopened. The statute provided that interested persons may make a complaint to the Secretary of State. The question was whether this complaint to the Minister excluded a right of action for breach of a positive duty without just cause.

Lord Denning M.R., at the outset of discussing the applicable law at p. 645 formulated the discussion with the following words:

> "The point of law which arises is this: if the local education authority have failed to perform their duty (to keep open the schools), have parents any remedy in the courts of law? There is a remedy given by the statute itself. It is to complain to the Secretary of State under section 99 of the Act. But that remedy has proved to be of no use to the parents. Can they now come to the courts? This depends on the true construction of the statute. Lord Simonds put it thus in Cutler v Wandsworth Stadium Ltd. (1949) A.C. 398, 407:
> '.... it is often a difficult question whether, where a statutory obligation is placed on A., B. who conceives himself to be damnified by A's breach of it, has any right against him ... the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted'".

He went on to say, at p. 646:

> "Now although that section does give a remedy by complaint to a Minister it does not exclude any other remedy. To my mind, it leaves open all the established remedies which the law

"provides in cases where a public authority fails to perform its statutory duty either by an act of commission or omission".

He further expounded the law as follows, at p. 647:

"This principle has received powerful support from the House of Lords. If a statute imposes a duty on a public authority, or entrusts it with a power, to do this or that in the public interest, but expresses it in general terms so that it leaves it open to the public authority to do it in one of several ways or by one of several means, then it is for the public authority to determine the particular way or the particular means by which the performance of the statute can best be fulfilled. If it honestly so determines, by a decision which is not entirely unreasonable, its action is then intra vires and the courts will not interfere with it: see especially by Lord Diplock in Home Office v Dorset Yacht Co. Ltd. (1970) A.C. 1004 at 1067-1068. But if the public authority flies in the face of the statute, by doing something which the statute expressly prohibits, or by failing to do something which the statute expressly enjoins, or otherwise so conducts itself, by omission or commission, as to frustrate or hinder the policy and objects of the Act, then it is doing what it ought not to do - it is going outside its jurisdiction - it is acting ultra vires. Any person who is particularly damnified thereby can bring an action in the courts for damages or an injunction, whichever be the most appropriate. Instances from the House of Lords are when the corporation of Lyme Regis failed to perform its public duty to repair the sea wall, in consequence of which some cottages were flooded (see Lyme Regis Corpn Henley (1834) 8 Bligh N.S. 690); and when the Minister of Agriculture failed to refer a complaint to a committee of investigation and thereby so conducted himself as to frustrate the policy and objects of the Act (see Padfield v Minister of Agriculture, Fisheries and Food (1968) A.C. 997); and when an officer of the Home Office (who was in charge of borstal boys) was guilty of an act of omission contrary to his instructions, by reason of which an individual suffered damage, the Home Office were liable because it was ultra vires both the officer

> "and the Home Office (see Home Office v Dorset Yacht Co. Ltd. [1970] A.C. at 1068-1069 by Lord Diplock); likewise when the inspector of a local authority acted outside the ambit of the discretion delegated to him (see Anns v London Borough of Merton [1977] 2 All E.R. 492 at 503-504 by Lord Wilberforce)".

Before these principles can be applied in any particular case, it is as important to interpret the particular Act to discover who is to be sued, as well as who should bring the suit, in the event of a breach of statutory duty. This was the approach of the Court in e.g. Fisher v Oldham Corporation [1930] 2 K.B. 364; [1930] All E.R. Rep. 96, in which McCardie, J. held upon the interpretation of the relevant statutory provisions and history that a police officer in arresting or detaining the plaintiff was not the servant or agent of the police authority which had appointed him. Some years before, in 1905, in the case of Stanbury v Exeter Corporation [1905] 2 K.B. 838, by interpretation, it was held that the particular order under consideration did not impose a duty upon the local authority or require them to perform the duty which was imposed upon an inspector appointed by the corporation under the Diseases of Animals Act 1894. The relation of master and servant did not exist, as the inspector was not acting in performance of any duties imposed by statute upon the defendants, but was acting by virtue of an order of the Board of Agriculture.

These examples fortify me in the conclusion which I already announced, and which I again stress that the Kingston and St. Andrew Fire Brigade Act constitutes the Kingston Fire Brigade independent of any master and servant relationship, or agency, vis-a-vis the respondent. Provision is made for penalties for breaches of the Act by the firemen, and against those citizens who interfere with the firemen in the proper discharge of their duties. It is incumbent on the plaintiff to show on a balance of probabilities that as a person aggrieved by the alleged breach of statutory duty, he is

entitled to seek a remedy in the Courts notwithstanding that the relevant statutes contain provisions for enforcement (see Bonnington's Castings Ltd. v Wood (1959) 1 All R.R. 615, (1956) at p. 615.

Let me further illustrate by referring to the case of Atkinson v. Newcastle Waterworks Co. 2 Ex. D 441; (1874-1880) All E.R. Rep. 757. This was an appeal from an order of the Court of Exchequer in an action brought by the plaintiffs against the defendants for damages for breach of statutory duty. The averment was that the defendants, who were waterworks authorities did not keep their pipes charged with water under the pressure required by the local Act and the Waterworks Clauses Act 1847. In consequence of that failure the plaintiff's premises were burnt down. As Lord Cairns L.C., said in his judgment the breach complained of was the breach of a duty which is imposed irrespective of payment, for the supply of water. He questioned whether that undoubted statutory duty

> "give a right of action to any individual who can aver, as the plaintiff does here, that his premises were near the pipes, that a fire broke out, that there was no water to extinguish it, and that his premises were burnt? He does not say that he was not allowed to take the water, but he complains of a failure in the duty to keep the mains charged". (p. 760 A)

To Lord Cairns: (p. 760 B-C)

> "The proposition a priori appears to be somewhat startling that a company supplying a town with water - although they are willing to be put under obligation to keep up the pressure, and to be subject to penalties if they fail to do so - should further be willing to assume, or that Parliament should think it necessary to subject them to liability to individual actions by any householder, who could make out a case. In the one case, they are merely under liability to penalties if they neglect to perform their duty, in the other case they are practically insurers,

> "so far as water can produce safety from damage by fire".

With particular reference to the obligations to keep the pipes charged and allow all persons to use the water for the purpose of extinguishing fires, he said "the provision is for the benefit of the public and not of any individual specially, and the guarantee for their performance of the obligation is the liability to public penalty of £10".

His analysis of the relevant Acts is found at p. 760:

> "Apart from authority, I should be of opinion that the scheme of the Act and its true construction was not to create a duty which should be the subject of an action by any individual who might be injured, nor to give a right to an individual to bring an action, but to lay down a series of duties, and provide a guarantee for their performance by s 43, which imposes penalties in case of neglect or refusal".

He did not agree with:

> "the broad general statement that wherever there is a statutory duty imposed, and any person is injured by the non-performance of the duty an action can be maintained. It must depend upon the particular statute and where it is like a private legislative bargain, into which the undertakers of the works have entered, it differs from the case where a general public duty is imposed". (p. 761 A-B)

Cockburn C.J. and Brett L.J. concurred in holding that the only remedy was the penalty imposed by the statute, and no action for damages lay for a breach of the provision.

This is comparable to the present case, and underlines that there is no absolute rule regarding liability for breach of statutory duty, but the existence of the statutory duty will depend on the purview of the legislation, which will also determine whether any private individual may sue where he suffers damage beyond what others may have suffered as a result of the breach.

Darling Island Stevedoring and Lighterage Co. Ltd. [1956-57] 97 C.L.R. 37, is apposite to the present discussion in that the High Court of Australia considered whether an employer can be sued and made liable for the wrongful act of his employee acting in the course of his employment, and where the governing statute and regulations made thereunder impose a duty on the employee. If the regulations in question laid no duty on the employer but on the employee, then it necessarily followed that the appellant company could not be sued for breach of a statutory duty even when the employee was then acting in the course of his employment. Accordingly, the High Court of Australia held, in an action for negligence that, in the circumstances of the case, and bearing in mind the definition of the phrase "person in charge" the appellant could not be held liable as such for having failed to securely fasten the hatch beams before loading and unloading of cargo was begun. The duty was cast upon the person actually exercising control on the spot where the operations were being carried out, and not upon the employer of such a person.

The duty was not personal to the employer, which conclusion was made as a matter of construction.

Interestingly enough, there had been an earlier action between the same parties in this case from Australia. That was for negligence at common law, whereas the present decision deals with an alleged breach of statutory duty. Fullager, J. pithily stated:

> "The position in this case is simply that the plaintiff sues for breach of a statutory duty, and in order to succeed, he must find not merely a statutory duty but a statutory duty imposed upon the defendant. If the defendant can be brought within the expression "person in charge", in reg. 31, the plaintiff can find such a duty. But, in my opinion, that expression cannot be construed as including the defendant company. And in my opinion that is the end of the matter".

I am satisfied that in the light of the foregoing the appeal fails on the ground of breach of statutory duty.

Mr. Rattray forcefully argued that the matter is compounded by the failure of the respondent, to provide alternative fire fighting services, and in particular, in making a request to the appropriate authorities so that they could take steps to deploy members of the Jamaica Defence Force to operate the Brigade at the crucial point. In more detail, Mr. Rattray contended that the negligence under this head consisted of failure to act or to make the request immediately the firemen failed to resume normal duty when instructed so to do on 11th October 1977:

> "(2) in failing to act by making the request on the 12th that the men were not resuming normal duty, so that the request could be made for the Jamaica Defence Force to take over firefighting;
>
> (3) in not buttressing contact with the Military by the Mayor requesting the Ministry of Local Government to ensure the use of the J.D.F. for firefighting services;
>
> (4) in the K.S.A.C. following the practice that the J.D.F. would not be so requested unless there was a full stoppage of work although the consequences of a go-slow would be as disastrous as those flowing from a full stoppage of work".

The ambit of the request alluded to is in section 8 of the Kingston and St. Andrew Fire Brigade Act which authorises the utilisation of the services of the members of the Jamaica Defence Force. It reads:

> '8(1) The Minister responsible for defence may, whenever he is satisfied that it is necessary so to do, by order direct that such members of the Jamaica Defence Force as the Chief of

"Staff shall from time to time nominate, may extinguish fires within the fire limits and protect life and property in the case of any such fire.

8(2) Any order made under this section may contain such consequential, supplemental or ancillary provisions as appear to the said Minister to be necessary or expedient for the purpose of giving due effect to the order and, without prejudice to the generality of the fore-going, may provide that such provisions of this Act as may be specified in the order shall, in relation to members of the Jamaica Defence Force on duty pursuant to the order, apply such modifications, if any, as may be so specified as they apply to members of the Brigade.

8(3) Members of the Jamaica Defence Force on duty pursuant to any order made under this section may use the fire engines and other property provided for the use of the Brigade".

The Minister responsible for defence is the person who must be satisfied that it is necessary to utilize the services of the Jamaica Defence Force. But, as Dr. Barnett pointed out, the defendant is neither by law nor practice required to advise the Minister for Defence on that necessity. What the evidence indicated was that when Mr. Keith Miller, the Assistant Town Clerk responsible for industrial relations, received a report from Mr. Binns that the firemen were on go slow, he discussed the matter with the then Mayor, Mr. George Mason, who had died before the date of the trial. Mr. Miller gave sworn evidence that on the same day when the go-slow started, he and the Mayor visited the York Park Fire Station. After hearing the grouses of the men, the Mayor and Mr. Miller advised them that there was no ground for the dispute, and requested them to resume normal working immediately. The expectation that there would be ready compliance was disappointed, so that on the following day a formal letter was addressed to the men of the Fire Brigade. Mr. Binns was instructed to read this letter to the men on parade. Apart from this Mr. Binns testified that he himself

had contacted the Town Clerk and the Military. In his experience where there is industrial action in the nature of a go-slow, the Military would take over the operations of the fire services, when required by the Town Clerk and the Minister of Local Government. He himself as Superintendent would have no contact with the Ministry of Local Government or the Ministry of Defence.

Mr. Miller testified that he and the Mayor had advised the Military of the go-slow and alerted them. He did this by reporting the matter to Colonel Mignon. The Jamaica Defence Force was called to fire service on the 14th October 1977. Mr. Miller stressed that the defendant could not make the final decision until the Minister of Local Government had been informed of the desire of the defendant for the Military to be called in, if the firemen failed to respond to the instructions given. However, the practice was that the Military would not take over until there was a complete breakdown. And since the men were on duty, albeit on go slow, the Jamaica Defence Force personnel would not be in operational charge of the Fire Brigade. Mr. Miller testified that he and the Mayor worked together within the constraints of the practice as outlined above. The learned trial judge accepted Mr. Miller's account of the steps taken on behalf of the respondent as the true state of affairs, and rejected the evidence of Mr. Dixon that he had had a discussion with the Mayor, who had expressed his regret at the fire and apologised to Mr. Dixon for not carrying out his intention to request that the Jamaica Defence Force be called out to man the Fire Services. It was a question of fact. The learned trial judge rejected Mr. Dixon's attribution to Mr. Mason as not in accord with, and "in complete conflict with his (Mr. Mason's) subsequent behaviour". There is no ground upon which I can disagree with this finding.

In fact, Dr. Barnett rightly commented,the eventual take over by the Military on the 13th October 1977, indicated that the arrangements had in fact been made, and the decision-making process initiated by which the intervention should take place. Also to be borne in mind are the considerations which had to precede that action, and the agencies to be consulted. So that there was not such a passage of time as to amount to negligence on the part of the defendant even if it could be said that the time for intervention was determined by the K.S.A.C.

All the foregoing indicate that the respondent took all reasonable steps to effectuate the immediate and continued working of the Fire Brigade. The respondent cannot be held liable for any breach of statutory duty considering that in my view, not only are they not the operators of the Fire Brigade, but they took the proper steps which were requisite in the particular circumstances of this case. Thereafter, the operational responsibility was with those whose job it was to extinguish fires. It may very well be that in an appropriate action the fire men themselves would be found in breach of their statutory duty but, for the reasons earlier advanced the action against the Kingston and St. Andrew Corporation is misconceived.

Let me now deal with the arguments whether there was a breach of the common law duty to take care, and is the employer liable in the circumstances where,admittedly there is unlawful industrial action in an essential service which results in the go-slow,and which itself is the negligence complained of.

These two questions are but facets of the one problem posed by the facts of the instant case. It must always count for something that the powers of the Fire Brigade are constituted by the Act. It must carry out its duties within

the grant of statutory powers, which must be exercised in favour of the public generally. It can be argued that such powers and duties must be performed according to the financial, material and human resources of the fire service, but the question is whether it has a statutory duty to insure or guarantee the protection or safety of any property. This brings to mind, nevertheless

> "the conception of a general duty of care, not limited to particular accepted situations, but extending generally over all relations of sufficient proximity, and even pervading the sphere of statutory functions of public bodies",

per Lord Wilberforce, in Anns v London Borough of Merton [1977] 2 All E.R. 492 at p. 503 b-c. The Law Lord had earlier, at p. 498, set the perspective of this duty of care.

> "Through the triology of cases in this House, Donoghue v Stevenson [1932] A.C. 562 Hedley Byrne and Co. Ltd. v Heller and Partners Ltd. [1963] 2 All E.R. 575, [1964] A.C. 465, and Home Office v Dorset Yacht Co. Ltd. [1970] 2 All E.R. 294, [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former carelessness on his part may be likely to cause damages to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person or the damages to which a breach of it may give rise (see Dorset Yacht case per Lord Reid). Examples of this are Hedley Byrne and Co. Ltd. v Heller and Partners Ltd. where the class or potential plaintiffs was reduced to those shown to have relied on the correctness of statements made, and Weller & Co. v Foot and Mouth Disease Research Institute [1965] 3 All E.R. 560, [1966] 1 Q.B. 569 and (I cite these merely as illustrations, without discussion) cases about 'economic loss' where a duty having

> "been held to exist, the nature of the recoverable damages was limited (see S.C.M. United Kingdom Ltd. v W. J. Whittal & Son Ltd. [1970] 3 All E.R. 245 [1971] 1 Q.B. 137, Spartan Steel and Alloys v Martin & Co. Contractors Ltd. [1972] 3 All E.R. 557; [1973] Q.B. 27".

In the instant case Mr. Rattray put forward the argument that the duty of care on the K.S.A.C. is to those who have houses within the fire limits to extinguish fires with due efficiency, care and skill. If they use due efficiency, care and skill there can be no liability; otherwise, he says, the respondent will be liable. He recognised that this is not an absolute duty in the sense that if they do not extinguish the fire they will be liable, but the gravamen of his complaints is that the taking longer than usual to get to the scene of the fire, was negligent, and in breach of the duty of care.

In Anns v London Borough of Haringey (supra) the claim was against the Council for damages for negligence by their servants or agents in approving the foundations on which a block of flats had been built, and/or in failing to inspect the foundations. The Council had been empowered by statute and regulations made thereunder to have control over building operations. The sum total of the claim was that the inadequate foundations upon which the block of flats was built, resulted in the subsequent damage to the structure of the building. While holding that the local authority was not under a statutory duty to inspect the foundations, the House of Lords dismissed the appeal by the council on the ground that failure to carry out the inspections was capable of amounting to breach of a duty of care. The Council were under a duty to take reasonable care to secure that a builder did not cover in the foundations which did not comply with the byelaws.

As Lord Wilberforce saw the problem:

> "the local authority is a public body, discharging functions under statute; its powers and duties are definable in

> "terms of public not private law. The problem which this type of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court. It is in this context that the distinction sought to be drawn between duties and mere powers has to be examined".

This examination proceeded to the point of Lord Wilberforce saying (p. 500):

> "Many statutes .... prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. It can safely be said that the more operational a power or duty may be, the easier it is to superimpose on it a common law duty of care.
>
> I do not think that it is right to limit this duty to avoid causing extra or additional damage beyond what must be expected to arise from the exercise of the power or duty. That may be correct when the act done under the statute inherently must adversely affect the interest of individuals. But many other acts can be done without causing harm to anyone - indeed may be directed to preventing harm from occurring. In these cases the duty is the normal one of taking care to avoid harm to those likely to be affected".

At p. 503 he reminded that in his speech in the House in Home Office v Dorset Yacht Co. Ltd. (supra):

> "Lord Diplock ... gives this topic (of the duty of care) extended consideration with a view to relating the officers' responsibility under public law to their liability in damages to members of the public under private, civil law. My noble and learned friend points out that the accepted principles which are applicable to powers conferred by a private Act of Parliament, as laid down in Geddis v Bann Reservoir Proprietors, (1878) 3 App. Cas. 430, cannot automatically be applied to public statutes which confer a large measure of discretion on public authorities. As regards the latter, for a civil action based on negligence at common law to succeed, there must be acts or omissions taken outside the limits of the delegated discretion; in such a case 'its action-ability falls to be determined by the civil law remedies of negligence'

> "It is for this reason that the law, as stated in some of the speeches in the East Suffolk case, but not in those of Lord Atkin or Lord Thankerton, requires at the present time to be understood and applied with the recognition that, quite apart from such consequences as may flow from an examination of the duties laid down by the particular statute, there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law. It is irrelevant to the existence of this duty of care, whether what is created by the statute is a duty or power; the duty of care may exist in either case. The difference between the two lies in this, that in the case of the power, liability cannot exist unless the act complained of lies outside the ambit of the power. In Home Office v Dorset Yacht Co. Ltd. the officers may (on the assumed facts) have acted outside any discretion delegated to them and having disregarded their instructions as to the precautions which they should take to prevent the trainees from escaping (see per Lord Diplock [1970] 2 All E.R. 294 at p. 333, [1970] A.C. 1004 at p. 1009). So, in the present case, the allegations are consistent with the council or its inspector having acted outside the delegated discretion either as to the making of an inspection or as to the manner in which an inspection was made. Whether they did so must be determined at the trial. In the event of a positive determination, and only so, can a duty of care arise".

Is Mr. Rattray right in his submission that the applicant has met the criteria? The evaluation of the fact of the admitted dilatoriness of the Fire Brigade in taking fifteen minutes or 30 minutes to do the journey from the Half Way Tree Substation to No. 27 Dunrobin Avenue, must be to give due weight to the uncontroverted evidence of Mr. Monnthen Powell, that when he first arrived at the scene of the fire he realised that sections of the roof had already caved in. Having regard to what he observed on his arrival he was able to estimate that the fire had been in progress and burning for between three and four hours.

Additionally, his evidence is borne out somewhat by the evidence of Mrs. Holding that when the Brigade arrived the

men got out with a big hose, put some water on the building. In a short while that water was finished. According to her when they drove off to go to Lindsay Crescent the building was blazing, and even while they were away at Lindsay Crescent. For what it is worth she had earlier said that "it was when they came first that they concentrated on the middle portion of the building. By then the flame had risen above the height of the building". When the first saw the fire, "it was a small one just coming from the floor", and this was in the middle of the building. She was not able to see the other parts of the building, other than where she saw the "flames coming up". In a certain degree she bore out Mr. Powell's assertion that the firemen did not fight the fire slowly. He said he sent the firemen to search for a hydrant when the first flow of water was finished.

Looking at the evidence of Mr. Alexander Binns, the Superintendent of the Fire Brigade, he was of the opinion that, having regard to the structure of the building as described, and bearing in mind the point at which Mrs. Holding first saw the flames in the middle of the building, the fire must have been in progress for three or four hours before the flames went up above the building. This opinion was expressed subject to what were the contents of the building, for example, inflammable materials, which would be relevant to how far and fast the fire would have progressed. Wind velocity and direction as well as air draught would also be relevant. There was no evidence of these last factors.

The foregoing when taken into consideration lead me to the conclusion that despite the disproportion between the estimated normal journeying time (3 minutes) over the 1½ miles from the substation at Half Way Tree and the actual journeying time (15-20 minutes) on the morning of the fire, there is no such unfavourable disproportion in the time taken to bring the

fire under control. In fact, the roof had already collapsed when the Fire Brigade reached the scene, thereby evidencing the length of time since the fire had started, the crawling journey (5 m.p.h. per Powell) would not itself have contributed to the alleged negligence by going slow. The word 'disproportion' is not to disclose cynicism, nor to discount the legal issues which have been discussed as applicable to this case. But as a Court of rehearing this Court must appreciate the factual descriptions upon which the Court is being asked to pronounce that the Fire Brigade did breach the duty of care which was owed to the plaintiff.

Although I have strictly interpreted the Act as I had earlier set out, I must perforce take note of the Amended Defence, whereby in paragraphs 9 and 10, the respondent admitted the relationship of employer and employee between the respondent and the members of the Fire Brigade. The paragraphs are here quoted:

> "9. The defendant further says that the slow response to the call in question was due to the fact that its employees who manned the fire service were engaged in an unlawful industrial action in contravention to the Labour Relations and Industrial Disputes Act in breach of their contract of employment with the Defendant and in repudiation of their obligations to the Defendant.
>
> 10. In acting as aforesaid the said employees of the Defendant were acting outside their employment and in a criminal frolic of their own".

Both sides presented arguments for and against the effect of the go-slow in view of the breach of the provisions of the Labour Relations and Industrial Disputes Act, which prohibits, subject to notice procedures, industrial action of any kind in any essential service, of which the Fire Brigade is one. Undoubtedly, the go slow was engaged in without the requisite previous notice, and continued despite the cautionary advice given by the deceased Mayor, Mr. Mason, and Mr. Miller, not forgetting the instructions for return to normal rate of work

conveyed to the firemen by Mr. Binns, the Superintendent of the Fire Brigade. Mr. Rattray argued for the K.S.A.C.'s liability for acts of the firemen in the course of their employment, even if the act is a prohibited act, which is punishable as a criminal act. He depended firstly on the well-known cases of Lloyd v Grace Smith & Co. [1912] A.C. 716; [1911-13] All E.R. Rep. 5, and Canadian Pacific Railway Co. v Lockhart [1942] 2 All E.R. 464 for the statement of principle applicable to the liability of a principal or master for the wrongdoing of the agent or the servant committed in the scope of the authority of the employee. In the one case, a solicitor's managing clerk committed a fraud on a client of his principal who was ignorant of the fraud. The fraud did not result in any benefit to the solicitor. It was held that as the managing clerk was acting within the scope of his authority, his principal, though innocent of the fraud, was liable for the fraud whether the fraud resulted in benefit to the principal or not. In the words of Lord Loreburn, L.C. at p. 54 of [1911-13] All E.R. Rep.:

> "It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of the principal".

Lord Macnaughten underscored the principle by stressing that whether the principal receives the benefit of the fraud or he does not makes no difference. He reasons thus at p. 61:

> "The only difference in my opinion between the case where the principal receives the benefit and where he does not is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by

> "taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate".

Canadian Pacific Railway Co. v Lockhart (supra) was the case of an employee doing an authorised act in an improper manner in that the servant of the appellant in pursuance of his employment, used his own car which was uninsured against public liability and property risks, contrary to the prohibition by his employer. The Privy Council, through Lord Thankerton, expressed the opinion that the employer was liable in damages, for the negligent driving of its employee. Though he had been forbidden to drive an uninsured car, he was nevertheless performing the journey for the purpose of his employment, because the driving of an uninsured vehicle was an authorised act although performed in an improper mode.

At p. 467 he quoted with agreement the statement of principle in Salmond on Torts, 9th edn., p. 95. Then at p. 468 Lord Thankerton advised:

> "In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment. In the present case Stinson ... was not employed to drive a motor car, but it is clear that he was entitled to use that means of transportation as incidental to the execution of that which he was employed to do, provided the motor-car was insured against third-party risks. If the prohibition had absolutely forbidden the servant to drive his motor car it might well have been maintained that he was employed to do carpentry work and not to drive a motor car and that therefore, the driving of a motor car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which or by means of which the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties".

Pausing here, I need to make the comment that in the case before this Court the prohibition against the unlawful industrial action was not a private communication but had the imprimatur of Statute with the sanctions for breach therein provided.

Another case upon which the argument for liability of the K.S.A.C. was based was the case of Bugge v Brown [1919] 26 C.L.R. 110. The headnote reads:

> "The defendant, who was the owner of certain grazing land, employed a servant to work on the land, who was entitled, as part of his renumeration to be supplied with cooked meat. On one occasion the servant was supplied with raw meat for his mid-day meal, and was instructed by the defendant to cook it at a certain house on the land. For the purpose of cooking the meat, the servant, notwithstanding those instructions, lighted a fire at another place on the land nearer to where he was working. By the negligence of the servant the fire escaped and spread to the land of the plaintiff and did damage there.
>
> Held, by Isaacs & Higgins JJ. (Gavan Duffy J. dissenting) that in the circumstances the lighting of the fire was within the scope of the servant's employment, and therefore that, notwithstanding the servant had disobeyed the instructions of the defendant as to the place where the fire should be lighted, the defendant was responsible for the consequences of his servant's negligence".

In each of those cases the Court was concerned to see the extent of the authority given to the servant so as to determine the intrinsic nature of the act which he performed. This determination in each case showed that what the employee did was within the scope of his authority, so the employer was held vicariously liable for the act of the servant. In the light of the principles set out in those cases Mr. Rattray argued that once the firemen are acting in the course of their employment even if they do so badly or criminally, the respondent is responsible for their criminal acts. At pp. 116-119

in the case of Bugge v Brown, Isaacs J., set out "some of the well-known postulates applicable to a case like the present". Among these postulates is the effect of a prohibition by the employer of an act by the employee which may or may not circumscribe the authority of the employee, and in any given set of circumstances the consequential liability of the employer is a question of the inferences to be drawn from the facts of the particular case. In the present case the firemen were enjoined to work at the proper and normal rate of work, and to forego the go slow.

Dr. Barnett characterised the go slow as the adoption by the firemen of a stance hostile to their employer. By resorting to industrial action of the sort under consideration they took a deliberate action which was not induced, condoned or encouraged by the employer. The firemen were acting contrary to the advice and instructions of their employer. Furthermore, and most importantly, they were acting in breach of the law. They were acting for their own benefit as their behaviour showed. He added that this is a circumstance which the Court should take into account on the question of the vicarious liability of the K.S.A.C., in that it must be appreciated that it is not every act of the employee for which the employer will be liable.

In the light of these general comments Dr. Barnett put for our consideration the following cases: (1) Joseph Rand Limited v Craig [1919] 1 Ch. 1; (2) Darling Island Stevedoring & Lighterage Co. Ltd. v Long [1956-57] 97 C.L.R. 37; (3) Keppel Bus Co. Ltd. v Saad Bin Ahmad [1974] 2 All E.R. 700 P.C.; (4) Bartlett v Department of Transport Times Newspaper, January 8, 1985.

In Joseph Rand Ltd. v Craig, Swinfen Eady, M.R. addressed his mind to the fact that despite strict instructions to the contrary, the carters had deposited rubbish on the land

of the plaintiff. The Master of the Rolls saw that:

> "The acts for which they were guilty were acts done deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer. The purposes of their own suggested was probably either to indulge their laziness or to give them an opportunity of spending an extra time in the public house, but at any rate it was entirely a purpose of their own. The acts of which they were guilty were their own deliberate acts. It is not a case of carelessness or negligence in the course of their employment. In my judgment it is a case on the facts proved, of the departing from the course of their employment, and for their own purposes deliberately committing the acts in question".

I have already mentioned Darling Island Stevedoring and Lighterage Co. Ltd. v Long in so far as it dealt with the aspect of breach of statutory duty. Williams J. expressed the view that an employer, in this case, the defendant stevedoring company, who employs a supervisor or foreman to take charge of the loading or unloading of a ship could not be said to be even indirectly in control of the persons actually engaged in the process of loading or unloading the ship. The employer would not be in control of them at all. Its supervisor of foreman would be in control and it could only be made responsible at common law for any breach of duty on his part because at common law an employer is vicariously responsible for anything done or omitted to be done by his servant in the course of his employment. He was careful to point out that:

> "The regulations do not detract at all from the vicarious responsibility at common law of the owner or master of the ship of the stevedores for any negligence on the part of any officer or member of the crew of the ship or of any supervisor or foreman of the stevedores occuring in the course of their employment".

But germane to this aspect of the considerations which were raised before the Court he posed

"The final question whether the applicant can be sued at common law for breach of the statutory obligation placed upon its supervisor or foreman but not upon it by reg. 31 because it is the employer of the supervisor or foreman". (p. 51)

At pp. 52-53 His Honour answered thus:

"If the defendant can be sued it must be because an employer is responsible for statutory wrongs committed by his servant in the course of his employment. In this case reg. 31 provides that the supervisor or foreman of a stevedore shall see that certain precautions are taken before the work of loading or unloading a ship began. It was contended that this is a statutory duty imposed upon the supervisor or foreman in the course of his employment and that the employer is vicariously liable for breach of such a duty by his employee. But the vicarious liability of an employer for the acts and omissions of his servant in the course of his employment is a liability at common law. If the omission of the supervisor or foreman to take precautions before loading or unloading a ship prescribed by reg. 31 would be a breach of the duty of care that the supervisor or foreman owed those engaged in loading or unloading the ship at common law the stevedore could be sued at common law because he would be vicariously responsible for this breach of duty. But the employer could not be made liable for the breach by his servant of a duty imposed by a statute or regulation on the servant and not on the employer. To make the employer liable in such a case would be to enlarge the scope and operation of the statute or regulation. Where a statute or regulation creates a civil right of action it can be enforced in an action for damages at common law. But it is the statute or regulation that creates the civil right and not the common law. It is the common law that supplies the remedy. It is only in this respect and to this extent that such a duty can be said to become part of the common law. This was the conclusion reached by Ferguson J. and that conclusion was right. The civil right does not originate in the common law at all. It is necessary to go to reg. 31 in order to ascertain the nature and extent of the duty and the persons who are bound to perform it.

> "The duty created by that regulation is imposed not on the stevedore but on his supervisor or foreman. The stevedore is not included within its scope and to hold that the stevedore could be responsible for a breach of the regulation by the supervisor or foreman simply because the latter is in the employment of the former would give the regulation an operation not justified by its provisions. The regulation, as has been said, is a regulation of the kind apt to create a correlative civil right and such a right was probably created by it. But this right would be correlative with the criminal liability and punishment for breach of the duty is not imposed on the defendant but on its supervisor or foreman. Any correlative civil liability for breach of the duty created by the regulation must therefore also be confined to the supervisor or foreman. It would seem to be quite inconsistent with principle to hold that an employer upon whom no personal liability is imposed by a statute or regulation can be sued for breach of that duty simply because it is committed by an employee in the course of his employment. The statute or regulation can, if Parliament or its duly authorised delegate sees fit, impose a personal duty on the employer and he is then bound to see that the duty is performed. If the statute or regulation creates a correlative civil right the employer is personally liable if any person whom the law was intended to benefit suffers injury from the failure to perform the duty whether it is the employer himself who fails to do so or his servant or even an independent contractor. But where the employer is only vicariously liable for the acts and omissions of his servant in the course of his employment, the employer could only be liable for the breach by his servant of a statutory duty laid on the servant alone if he was sued at common law and that breach was evidence of the negligence of the servant at common law".

In his contribution Kitto J. at pp. 59-60 stated:

> "The defendant company, however, is not sued as a "person-in-charge". It is sued as the employer of a "person-in-charge". Upon an employer, as such, the regulation places no duty, and therefore as against him it creates no private right. No doubt proof of a breach of its provisions would afford evidence of negligence in an action against the employer, as surely as it would in an action against the "person-in-charge";

> "but the action we have here to consider is not an action of negligence. It is an action in which the plaintigf's whole case is that, personal injury having been caused to him by a breach of the regulation committed by a "person-in-charge of a process of loading and unloading in which the plaintiff was one of the persons actually engaged, the fact that it was in the course of his employment by the defendant that the "person-in-charge" committed the breach entitles the plaintiff to damages against the defendant.
>
> This contention accepts as its hypothesis that reg. 31 places no duty upon the defendant. It depends upon the proposition that whenever a servant incurs a liability in damages by reason of an act or omission in the course of his employment (a breach of contract, I suppose, being excepted), the common law subjects his master to a like liability. In my opinion the proposition is not sound".

Although their Honours of the High Court of Australia have recorded their apparently differing views on the principle relating to the liability of a master for the actions of his servant in the course of his employment, the real issue before them was how to construe the relevant regulation. I have recited their comments however, because they formed part of the issues in this case, and also as I recall a passage in the judgment of Lord MacDermott in Harrison v National Coal Board [1951] A.C. 639. He is there responding to the argument that a master is not vicariously responsible in respect of his servant's statutory negligence (a phrase deprecated by Fullager J. as "a harmful invention") Lord MacDermott reminded:

> "To my mind this, as a general proposition finds no support in principle or authority. Vicarious liability is not confined to common law negligence. It arises from the servant's tortious act in the scope of his employment".

Another case which shows that it does not necessarily follow that the employer will be liable for every wrongful act committed by an employee in the course of his employment, is Keppel,Bus Co. Ltd. v Saad bin Ahmad [1974] 2 All E.R. 700 P.C.

The respondent before the Privy Council, while a passenger on a bus owned by the appellants, had been assaulted by the conductor who was employed by the appellants. In an action by the respondent in the High Court of Singapore against the appellants and the conductor, the trial judge held that the appellants were vicariously liable for the conductor's act. He held that on the facts the assault was committed in the course of carrying out, by a wrong mode, work which the conductor was expressly or impliedly authorised and therefore employed to do

In the judgment of the Privy Council Lord Kilbrandon pointed out first of all that the "question in the case is whether the conductor did what he did in the course of the employment. The course of the employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master". (p. 702)

Considering "that the question is whether on the facts the act done, albeit unauthorised and unlawful, is done in the course of the employment; that is itself a question of fact" Lord Kilbrandon further said:

> "their Lordships are unable to find any evidence, which, if it had been under the consideration of a jury could have supported a verdict for the respondent. It may be accepted that the keeping of order among the passengers is part of the duties of a conductor. But there was no evidence of disorder among the passengers at the time of the assault. The only sign of disorder was that the conductor had gratuitously insulted the respondent, and the respondent had asked him in an orderly manner not to do it again.... to describe what he did in these circumstances, as an act of quelling disorder seems to their Lordships to be impossible on the evidence; on the story on a whole, if anyone was keeping order in the bus, it was the passengers. The evidence falls far short of establishing an implied authority to take violent action where none was called for". (per Lord Kilbrandon at p. 703)

Again,

> "Their Lordships are of opinion that no facts have been proved from which it could be properly inferred that there was present in that bus an emergency situation calling for forcible action, justifiable on any express or implied authority, with which the appellants could be said on the evidence to have clothed the conductor".

In the event,

> "Their Lordships ... conclude that there was no evidence which would justify the ascription of the act of the conductor to any authority, express or implied, vested in him by his employers; there is, accordingly, no legal ground for holding that the facts of this case justify a departure from the ordinary rule of culpa tenet suos auctores".

The plaintiff in Bartlett v Department of Transport (supra) sought to make the defendants liable for negligence in that they failed to properly maintain a trunk road which had become dangerous because of snow and ice, resulting in the death of her husband. Those road conditions had not been reduced on this particular road because the employees of the Oxfordshire county council had withdrawn their labour on the instructions of their union. This forbidden work applied to this particular trunk road only. All the other roads were being cleared, and the employees at all levels had worked very long hours to achieve that result. Boreham J. observed that the plaintiff did not rely on anything done by the employees in the course of their employment. Two points stand out in the very short report of his judgment: (1) Assuming that the employees were acting unlawfully in withdrawing their labour they were not in breach of duty to the plaintiff, their breach was of their duty to their employers. The plaintiff could not complain of that unless that breach was condoned by the employers, the Oxfordshire County Council. (2) The defendant's duty was to all

travellers on all the roads, not just the users of the A34. There was no ground for saying that the authority's actions were inconsistent with their public duty under section 44 of the Highways Act 1959, to maintain the highway. The plaintiff had not proved that the defendants were in breach of their statutory duty. The report stresses that a plaintiff could only succeed in an action for damages for breach of section 44 if the failure to maintain was related to want of repair, that is, if an obstruction was contributed to by want of repair or if an obstruction caused or contributed to want of repairs.

Indubitably, the report of this case is not full in the actual words reasoning the judgment of Boreham J. Nevertheless, it does allow for gleaning the comment that if the statutory duty is of such paramount importance that it is owed to all the public, the court will take into account how the statutory duty is performed in the particular circumstances of any case. At the same time industrial action by the employees was not used to form the basis of any claim against the employers, who, despite the industrial action, were doing their best to properly perform the statutory duty. In the absence of a fuller report, the relevance of Bartlett v Department of Transport (supra) must be tentatively assessed to the extent of saying further that the breach by the employees of their duty to their employers, was not in any event ascribed as negligence of the employers.

All in all, whether the claim in this case is looked at from the viewpoint of breach of statutory duty or breach of the common law duty of care, that is, in negligence, with concomitant vicarious liability, I am not persuaded that the appellant has maintained his complaint that the go-slow was the central and causative factor for his loss. The Fire Brigade is under an obligation created by statute to carry out its duty for the benefit of the public generally. The fact

that in carrying out that obligation loss was occasioned to one of the public beyond a degree which would normally have been expected, is not a matter for complaint, unless it can be shown that the manner of performance effectually reduced the usual performance of the duty and so effectively created a breach of duty in the result of that performance. In other words, it is not enough to say that this act was a deviation from the usual manner of performance. It must be affirmatively proved that, taking all the circumstances into account, there was a failure in that obligation which ineluctably, was the reason why the damage complained of occurred.

I am not persuaded that this has been shown by the appellant in this appeal. I would dismiss the appeal.

WRIGHT, J.A.:

This is an appeal from the judgment of Malcolm J., whereby, after considering evidence restricted to the issue of liability, he dismissed the plaintiff's claim, and entered judgment with costs to be agreed or taxed, for the defendant.

The case assumes importance by virtue, not only of the points of law involved, but because it provides a startling example of the havoc that can result, when there is disregard for the law governing industrial action in Essential Services. The First Schedule to the Labour Relations and Industrial Disputes Act, lists the Fire Fighting Services among the Essential Services as defined in Section 2 of the Act, in which services, industrial action is proscribed as follows:

> Section 9(5):
>
> "Any industrial action taken in contemplation or furtherance of an industrial dispute in any undertaking which provides an essential service is an unlawful industrial action unless -
>
> (a) that dispute was reported to the Minister in accordance with subsection (1) and he failed to comply with subsection (3) or subsection (4) or subsection (7); or
>
> (b) that dispute was referred to the Tribunal for settlement and the Tribunal failed to make an award within the period specified in section 12."

In defiance of these provisions and the efforts of the Mayor, the Assistant Town Clerk and Superintendent Alexander Binns in charge of the Kingston and St. Andrew Fire Brigade (The Brigade) the men in all the sub-stations in the corporate area took industrial action by going on a "go slow" with effect from the 11th of October, 1977. The inescapable effect of such action was a reduction in the fire-fighting capacity of the Brigade, and it was while this situation lasted, that the plaintiff's building and its contents at 27 Dunrobin Avenue were destroyed by fire

on the early morning of the 13th October, 1977. The plaintiff/appellant's claim is that the negligent manner in which the Brigade went about the job of extinguishing the fire is responsible for the extent of damage caused by the fire. As a consequence, it is claimed that the defendant/respondent is liable in negligence and/or for breach of statutory duty for damages amounting to $7,072,432.00. After listening to evidence dealing with eighty-one items damaged, and learning that the total would be two thousand and eighty-three items, the learned judge quite adroitly decided to deal only with the question of liability at that stage, which he resolved in favour of the defendant/respondent.

The relevant portions of the Amended Statement of Claim and the Amended Defence which the learned judge had to consider are set out hereunder:

AMENDED STATEMENT OF CLAIM

"1. .....

3. The aforementioned Kingston & St. Andrew Fire Brigade has a statutory duty to extinguish all fires within the fire limits and to protect life and property in the case of any such fire.

4. The premises of the Plaintiff situated at 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew aforementioned are within the fire limits referred to in paragraph 3 hereof.

5. The Plaintiff claims that the statutory duty imposed on the Kingston & Saint Andrew Fire Brigade and referred to in paragraph 3 hereof is owed to the Plaintiff in respect of premises 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew.

6. On the 13th October, 1977, a fire started on the premises of the Plaintiff Company at 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew at approximately 5:45 a.m.

"7. That the Plaintiff claims that shortly after the outbreak of the said fire, the Fire Brigade at Half Way Tree was notified and requested to take immediate steps to attend to and extinguish the said fire in keeping with the duty of the Kingston & Saint Andrew Fire Brigade referred to in paragraph 3 hereof.

8. The Plaintiff further claims that reasonable performance of the aforementioned duty would have resulted in the extinguishment of the said fire with minimal damage and loss to the Plaintiff.

9. At the time of the said fire, the members of the Kingston & Saint Andrew Fire Brigade were engaged in industrial action to wit a go slow for the purpose of obtaining increased emoluments and fringe benefits.

10. The Kingston & Saint Andrew Fire Brigade in breach of its statutory duty under the Kingston & Saint Andrew Fire Brigade Act failed to respond promptly to the call in respect of the fire at the Plaintiff's premises and further failed to proceed at a reasonable pace to attend to the extinguishment of the said fire, delayed the arrival of the Fire Brigade to the scene of the fire and having arrived, failed to attend promptly and with due diligence to the extinguishment thereof. FURTHER and/or alternatively the Defendant failed to take the necessary steps to ensure its ability to carry out its statutory duty.

11. The Kingston & Saint Andrew Fire Brigade was negligent in:

(a) Failing to respond promptly to the call in respect of the fire at 27 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew aforesaid.

(b) Failing to travel to the scene of the fire with due expedition.

(c) Deliberately refraining from acting promptly and efficiently in respect of extinguishing the said fire.

(d) Failing to deal efficiently with the extinguishing of the said fire.

"12. In consequence of the aforementioned breach of statutory duty and/or negligence of the Kingston & Saint Andrew Fire Brigade the premises and contents of 27 Dunrobin Avenue were destroyed by fire and the Plaintiff has suffered damage and loss."

AMENDED DEFENCE

" 1. .....

3. The Defendant denies paragraph 3 of the Statement of Claim and says that the duty of the Defendant is to provide within the limits of its financial, material and human resources a fire service, but it has no statutory duty to insure or guarantee the protection or safety of any property. Further the control and discipline of the said service is vested in a statutory Committee.

4. The Defendant admits paragraph 4 of the Statement of Claim.

5. The Defendant denies paragraph 5 of the Statement of Claim and says that the statutory duty is owned to the public generally and is as described in paragraph 3 hereof.

6. Save that the Defendant denies that the fire started at approximately 5.45 a.m., the Defendant admits paragraph 6 of the Statement of Claim.

7. Save that the Defendant says that a call was received at the Fire Headquarters Station at approximately 5.49 on the said 13th of October 1977, the Defendant denies paragraph 7 of the Statement of Claim.

8. The Defendant denies paragraphs 8, 10-12, inclusive of the Statement of Claim, and says that in any event the Acts complained of are acts of non-feasance for which the Defendant is not liable.

9. The Defendant further says that the slow response to the call in question was due to the fact that its employees who manned the fire service were engaged in an unlawful industrial action in contravention of the Labour Relations and Industrial Disputes Act, in breach of their contract of employment with the Defendant, contrary to the orders and instructions of the Defendant and in repudiation of their obligations to the Defendant.

"10. In acting as aforesaid, the said employees of the Defendant were acting outside the scope of their employment and in a criminal frolic of their own.

11. In the premises the Defendant is not liable to the Plaintiff as alleged or at all.

12. Further, or alternatively, the damage and loss suffered by the Plaintiff was caused wholly or in part by its an (sic) negligence.

PARTICULARS

(1) Failing to provide any or any adequate personnel or security for the said premises.

(2) Failing to establish any adequate warning system to give timely warning of the occurence or fires or to report such occurence to the Defendant's fire service.

(3) Failing to establish any reasonable system for dealing with such emergencies."

The facts of the case are that at about 5:45 a.m. on the 13th of October, 1977 Mrs. Enid Holding who resided at 29 Dunrobin Avenue, adjacent to the plaintiff/appellant's premises, was awakened by the crackling sound of fire from next door. She looked through her bed-room window and saw "slight smoke and some flame coming from the middle section of No. 27." Straightway she telephoned the Fire Brigade at Half-Way-Tree and reported the matter. At about 6:00 a.m. when she did not see any fire engine, she telephoned again, and was told that a unit was on its way. After another ten minutes she heard the siren of the fire engine which then appeared to be on the Sandy Gully Bridge - one mile from Half-Way-Tree and half of a mile from the burning building. It succeeded in covering this half of a mile in ten minutes and so arrived at the scene of the fire at 6:30 a.m. It is established on the evidence that the journey from Half-Way-Tree Station normally takes three to three and a

half minutes. Mrs. Holding's evidence is that along Dunrobin Avenue the unit travelled "slow - forward - stop - then slow - forward and stop and that went on for a long time."

After the unit arrived the men got out and applied water from the unit to the fire. In a short time that water was finished. Mrs. Holding's son pointed out to the men a hydrant which is fifteen feet from the gate at No. 27 but they said it was not a hydrant and drove away, turned up Lindsay Crescent only to re-appear between 15-20 minutes later and attach a hose to the rejected hydrant which produced water copiously with which they extinguished the fire in about ten minutes. Mrs. Holding and her husband drove to the home of Mr. Alexander Dixon, the Managing Director of the appellant company, at 7 Woodley Drive about 7:15 a.m. and informed him and thereafter he visited the scene.

When Mr. Dixon arrived, his building was already completely burnt out and cooling-down operations were under-way; some tall trees were burning and there were several firemen moving about slowly. Mr. Dixon's query addressed to the Chief Officer in charge of the Brigade: "Why did you let the place burn down?" yielded the response: "We are on go slow and even if my mother was in there it would have to burn - I wan't my raise of pay." Mr. Dixon's assistant, one Mr. G.S. Raymond remonstrated with the firemen thus: "You are a wicked lot, look how slow you are moving." One fireman replied: "You can say anything because you are not involved but we want our raise of pay." All this goes to prove the point that the destruction of the premises was what the firemen desired and that their dilatory approach to extinguishing the fire was calculated to achieving that end.

Was this act perpetrated by the servants or agents of the respondent (the K.S.A.C.) for which the latter is responsible?

Again, is there some statutory duty which the K.S.A.C. breached and in so doing occasioned the destruction of the appellant's premises? A judgment for the appellant would require an affirmative answer to these questions. It is necessary therefore to consider how, if at all, the K.S.A.C. is related to the Brigade.

The Brigade was established by Section 3 of the Kingston and St. Andrew Fire Brigade Act (The Act) which provides:

> "(1) For the purposes of protecting life and property in the case of fire within such limits of the Area as the Council, with the approval of the Minister, may from time to time determine by notice published in the Gazette, there shall be established a fire brigade to be called the Kingston and St. Andrew Fire Brigade.
>
> (2) The Council shall provide the Brigade with all such fire engines as may be necessary for the efficient performance by the Brigade of its duties, and all the expenses of the establishment and maintenance of the Brigade shall be included in the Estimates of the Council prepared under the Kingston and St. Andrew Corporation Act and shall be met out of the funds of the Council.
>
> (3) The superintendent, officers, sub-officers and firemen of the Kingston Fire Brigade at the coming into force of this Act shall be deemed to have been appointed to the Brigade under the provisions of this Act."

It is important to observe that the establishment of the Brigade was not by resolution of the K.S.A.C. but by Act of Parliament. Control and discipline of the Brigade are vested in a Committee established by Section 4 of the Act which states:

> "For the purposes of this Act there shall be established a Committee, to be called the Corporation Fire Committee, and all powers of the Council in relation to the control and discipline of the Brigade are hereby delegated to such Committee."

It is my opinion that the effect of this section is, without the concurrence of the K.S.A.C., to absolutely divest the K.S A.C. of all powers in the areas assigned to the Committee. The constitution of the Committee is set out in Section 5 of the Act and having regard to both the evidence given and the submissions made relating to the role of the military, it is interesting to note the provision of Section 5 (2):

> "One of the members of the Committee shall be a member of the Jamaica Defence Force, who shall be nominated by the Chief of Staff."

Section 7 of the Act clearly sets out the role of the Brigade:

> "It shall be the duty of the Brigade to extinguish all fires within the fire limits, and to protect life and property in case of any such fire."

And it is significant to note that in order to facilitate the performance of this duty, very wide powers and immunities are conferred on the Brigade by Sections 9, 10, 11 and 13 of the Act. By Section 9 power is conferred to despatch the requisite number of fire engines and men to the scene of a fire. Section 10 provides for control of proceedings at or near the scene of the fire to the extent of closing any street, taking possession of and breaking down any building etc. for the purpose of extinguishing or preventing the spread of the fire and generally, to take any measures that may appear expedient for the protection of life and property. Section 11 invests members of the Brigade on duty at any fire with the powers, authorities and immunities of constables with power to arrest without warrant for assaulting, obstructing or impeding members of the Brigade in the discharge of their duties. Such provisions are obviously calculated to facilitate the extinguishing of fires and the protection of life and property.

It is my opinion that the provisions of Section 12 are very relevant:

"(.) No member of the Brigade, or person under the command of the officer in charge of the Brigade, acting bona fide in the exercise of the powers conferred upon him under this Act shall be liable for any damage or for any act done under this Act.

(3) Any damage occasioned by any member of the Brigade or any person under the command of the officer in charge of the Brigade in the exercise of the powers conferred under Section 9 shall be deemed to be damage by fire within the meaning of any policy of insurance against fire."

In as much as the section contemplates a bona fide exercise of the powers conferred, it will, I think, be necessary to consider the effect of this provision on the issues at hand. But of this more anon.

Quite apart from the action of the firemen, the appellant endeavoured to show that the K.S.A.C. was negligent in not requesting that the Army man the Brigade during the go-slow. That evidence was given by Mr. Dixon. Mr. George Mason (now deceased) was the Mayor in office at the time and Mr. Dixon testified that he had a conversation with Mr. Mason on this aspect of the matter about two weeks after the incident. He said he asked the Mayor "Why didn't you request that the Army send to man the Fire Brigade when the go-slow began?" And Mr. Mason replied that he had thought about it but didn't get around to it. Further he said Mr. Mason said that the go-slow had started on the Tuesday before the fire and that he had called out the Army two days after the fire. The learned judge found this piece of evidence did not accord with other evidence which he accepted and quite properly, it seems to me, rejected it.

What then was the rest of the evidence which he had to consider? Mr. Keith Miller who was at the time Assistant Town Clerk with responsibility for industrial relations gave evidence

for the respondent that on the 11th of October, 1977 when he received a report from Superintendent Binns (presumably of contemplated industrial action) he and the Mayor visited the York Park Fire Station and addressed a meeting of the firemen when the go-slow was just about starting and after hearing their grievances advised them that there was no ground for a dispute and that they should resume duty immediately. The expected response was that normality would return on the following day. But when that did not take place a formal letter was issued to the men and Superintendent Binns was requested to read the letter to them. Having regard to the fact that all the sub-stations were involved in the go-slow, wide publicity was given to the steps being taken by the Authorities via all news media. Further, the witness advised Colonel Mignon of the Jamaica Defence Force of the industrial unrest. As between the witness and the Mayor, decision was taken to inform the Minister of Local Government of the desire for the military to be called in if the firemen did not respond to the instructions given. Also Mr. Miller spoke with Colonel Mignon on the arrangements for the take-over by the military. However, the practice was, that the military would not take over until there was a complete break-down, but in the meantime, would be on alert. This is the piece of evidence, referred to earlier, which Malcolm J. preferred to the evidence of Mr. Dixon on the question of involving the military.

Superintendent Binns in his testimony said that in a situation as then obtained, he would not have any direct contact with the military about a take-over. Request would be made by the Town Clerk and the Minister of Local Government. The true position is as Section 8(1) of the Act provides:

> "The Minister responsible for Defence may, whenever he is satisfied that it is necessary so to do, by order direct that such members

> "of the Jamaica Defence Force as the Chief of Staff shall from time to time nominate may extinguish fires within the fire limits and protect life and property in the case of any such fire."

This provision makes it clear that the ultimate authority for calling out the military resides with the Minister of Defence - not the Minister of Local Government and certainly not the Mayor or any other officer of the K.S.A.C.

Issue was joined on the question as to how long the fire had been burning before the arrival of the Brigade. However, having regard to Mrs. Holding's evidence Superintendent Binns agreed that if the Brigade had acted promptly the fire would have been extinguished without great damage. District Officer Monthen Powell of the Half-Way-Tree sub-station testified that the report of the fire was received at the Headquarters at 5:49 a.m. and relayed by V.H.F. Radio to his station at 5:50 a.m. At 5:51 a.m. he and a crew of six men set out for the scene of the fire but in keeping with the go slow they did go slow to such an extent that a journey that should have taken three minutes on his reckoning took seventeen minutes instead - over five times the normal period. His evidence is that "We went there slow but we did not fight fire slow."

When they arrived, he said, sections of the roof had already caved in. The one tank of 800-1,000gallons of water which they had taken, was applied to extinguishing the fire. The water was exhausted in six to seven minutes. Thereafter, from a hydrant which had in the meantime been located on Lindsay Crescent, the tank was re-filled and the water used to fight the fire. It was still dark then. He denied Mrs. Holding's evidence about their rejecting the hydrant near the burning building. After the unit had returned from Lindsay Crescent about twenty to

twenty-five minutes after they had first arrived, the disputed hydrant was located - by then it was a bit lighter - and thereafter that hydrant was used to complete their mission. This hydrant had not been located earlier, he said, because it is an underground hydrant, the spot was in pitch darkness and the people milling around had managed to conceal it.

On this evidence the learned trial judge found, inter alia, that:

1. No absolute duty was cast upon the K.S.A.C. by the Act.

2. "The Council did provide an adequate and efficient service. It cannot be said it failed to do so because its employees, in breach of their contract and in criminal repudiation of their responsibility, failed to adequately perform the functions for which they were employed."

3. The default resulted from the industrial action taken by the members of the Fire Brigade - such action was not approved by the K.S.A.C.

4. The act of the firemen was criminal:

> "As was submitted by the Defence it is certainly not an easy construction to place on the Statute that even when the Statutory Body provides an efficient service the criminal conduct of its employees, who have defined specific statutory responsibilities, can be visited on the public authority by civil action brought by a person who suffers injury. No doubt there are cases in which an employer may be liable for the criminal act of an employee but it is my view that the instant case is not such a one. I accept the submission of the Defence that where it is clear that the action being taken is in direct contravention of the law and in repudiation of the employee's relationship with his employer, or is such that it cannot reasonably be said that it was done with the authority of the employer, then the employer cannot be liable. I accept that submission as being sound."

"5. The negligence pleaded has not been proved. Particulars of the negligence alleged were:

(a) The defendant failed or neglected to advise the Minister responsible for Defence that having regard to all the circumstances he should direct members of the Jamaica Defence Force to carry out the statutory duty.

(b) The defendant failed or neglected to advise the Chief of Staff of the Jamaica Defence Force to place on alert those members of the Force who he had nominated, to extinguish fires within the fire limit and to protect life and property as permitted by the Statute.

It is clear that failure to adduce the necessary evidence to prove these allegations left the plaintiff's contention unsubstantiated.

The grounds of appeal urged before us were:

1. That the learned trial Judge erred in rejecting the evidence of the Plaintiff's witness, Mr. Alexander Dixon, that the Mayor of the Kingston & Saint Andrew Corporation, the late Mr. George Mason, had told him that he intended to request that the Jamaica Defence Force be called out to man the fire services but had not got around to it; in that there is no evidence to contradict the truth of this evidence given by the witness, Mr. Dixon.

2. That the learned trial Judge erred in law in holding that the Defendant was not in breach of any statutory duty imposed by the Kingston and Saint Andrew Corporation Act, and the Kingston and Saint Andrew Fire Brigade Law.

3. That furthermore there is in addition to the statutory duty on the part of the Defendant a common-law duty of care imposed upon the Defendant and the Defendant was in breach of both statutory and common-law duty, and the learned trial Judge erred in law in not so finding.

4. That the learned trial Judge erred in law in holding that the Defendant was not liable in respect of the negligent acts of the firemen as a consequence of which negligence the

" Plaintiff suffered damage; as the acts of the firemen complained of by the Plaintiff were executed in the course of their employment even if forbidden by the employer or prohibited by the Labour Relations and Industrial Disputes Act."

In advancing his arguments, Mr. Rattray posed certain questions, the answers to which, he contends, hold the solution to the vexing question of the liability of the K.S.A.C. Here are his questions:

1. Is there a statutory duty imposed on the K.S.A.C.?

   If yes, what is the nature?

2. Was there a breach of that duty which caused to the plaintiff damage more than de minimis?

3. Is there a breach of the common-law duty to take care?

4. Is the employer liable in the circumstances where admittedly there is illegal industrial action in an essential service which results in the go-slow which is the negligence being complained of i.e. the slowness of getting there and in the method of putting out the fire?

Dr. Barnett's line of enquiry goes further afield in some areas. He sees the issue through the perspective of these questions:

1 (a) What is the statutory duty imposed upon the K.S.A.C.?

(b) Is the K.S.A.C. liable for breach of such statutory duty or for negligence at common-law in its performance?

2. Has the statute conferred a right of action on the plaintiff/appellant to recover damages for breach of the duty which it imposes and, if so against whom?

3. Is the K.S.A.C. vicariously liable to the appellant for injury done to him as a result of industrial action taken by the firemen?

4. Is the K.S.A.C. in breach of its general common-law duty of care and, if so, has the plaintiff shown that his loss resulted from that breach?

Several cases were cited in support of the varying contentions, but it may not be necessary to examine all of them, as it would be repetitive, without at the same time being helpful, to do so. The subject matters presented for consideration through this number of questions can be grouped thus:

A. Statutory duty of the K.S.A.C.

B. Common-law duty of the K.S.A.C.

C. Liability of K.S.A.C. during industrial action in an essential service.

D. Right of action under the Act.

It will be more convenient to deal with the opposing contentions under these various heads.

A. STATUTORY DUTY OF THE K.S.A.C.

Referring to Sections 3 and 4 of the Act (supra) Mr. Rattray submitted:

> "It is clear from the provisions of the Act that the K.S.A.C. is in the position of employer/employee vis-a-vis themselves and the members of the Brigade. The Committee had statutorily delegated to it the K.S.A.C. powers to discipline and control the Brigade. The members of the Committee are appointed by the Council." (Section 5).

Then, after citing Section 6 (empowering the Committee to engage and dismiss the Superintendent and other personnel of the Brigade) and Section 7 (supra), he stated the following proposition:

> "The Act imposes upon the Brigade a duty to extinguish fires using such care and skill as is reasonably necessary in the extinguishing of fires. Therefore, if the members of the Brigade are negligent in performance of this duty resulting in damage to the plaintiff then both under statute and at Common-Law the defendant would be liable to the plaintiff in damages."

It was his contention that the duty imposed upon the K.S.A.C. transcended a mere compliance with the provisions of Section 3(2) of the Act in providing fire-engines and men. The requirements of the Act must be matched. He cited for support Meade v. London

Borough of Haringey (1979) 2 All E.R. 1016:

> "In that case a local education authority, which was in sympathy with the union representing caretakers and ancillary staff, rather than exacerbating the impact of a strike in support of a wage claim sided with the union's expressed intention to close the schools in the area and had all parents notified not to send their children to school. After complaining to the Secretary of State without redress a parent, after four weeks of closure sought, but was refused, an injunction to compel the authority to perform their duty by keeping the schools open. The refusal was based on the ground that the remedy sought could be obtained only by application to the Minister as provided in the Education Act and not by the Court's intervention since the authority's decision to keep the schools closed was a mere non-feasance, and not misfeasance or malfeasance and was ultra vires, and further, even if that view was wrong, the injunction sought ought not to be granted because the Courts could not supervise such an injunction. Accordingly, the judge held that if the action went to trial it would fail.

The Court of Appeal, though finding that the plaintiff had made out a clear prima facie case of breach of duty, nevertheless upheld the refusal of the injunction because inter alia, on the balance of convenience it would be difficult to enforce but held, as well, so far as is relevant to the present case, that the evidence of the remedy of complaint to the Secretary of State under the Education Act did not exclude an application to the Courts for the remedies of damages or injunction by a parent who had suffered damage when a local education authority had failed to perform the relevant statutory duty, and that failure was caused by a decision taken ultra vires or by an act of malfeasance or even misfeasance.

It is not difficult to appreciate the ratio decidendi because the Court was dealing with the authority upon which, without the need for reasoning, the statutory duty had been imposed. In the instant case that duty has been imposed by the ipsissima verba of the Statute not on the K.S.A.C. in general but on the Brigade an admitted arm of the K.S.A.C. Note,

however, that by paragraphs 9 and 10 of the Defence it is admitted that the firemen are the employees of the defendant.

From Dr. Barnett's point of view, it is necessary to examine the Act to ascertain its scheme and after referring to Sections 2, 4, and 6 (supra), he observed that the relationship between the K.S.A.C. and the members of the Brigade is an exceptional one, in which the Council of the K.S.A.C. has no power to assume control of the Brigade or to abolish the controlling committee. The Brigade, established as it is with its duty and powers, is a special entity. The duty on the Brigade is not a duty which had been imposed on the K.S.A.C. and which was voluntarily delegated by the K.S.A.C. to the Brigade. Indeed, the K.S.A.C. has no alternative in relation to entrusting the fire-fighting responsibilities to other groups of persons or entities. He then extracted the submission that the statute has clearly made a specific demarcation of the responsibility of the Council and the responsibility of the Brigade and its controlling Committee. Referring to Sections 10 and 11 of the Act he observed that the powers thereby conferred, are vested directly in the Superintendent and the officers and men who constitute the Brigade. In those circumstances, he submitted, the wrongful or negligent performance of the statutory duty to extinguish fires, cannot constitute the basis for an action against the K.S.A.C. Cases cited in support are Stanbury v. Exeter Corporation (1905) K.B. 838; Fisher v. Oldham Corporation (1930) K.B. 364; Harrison v. National Coal Board (1951) 1 All E.R. 1102 H.L.

In Stanbury v. Exeter Corporation it was held that local authorities are not liable for negligence of an inspector appointed by them under the Diseases of Animals Act, 1894, where the alleged negligence is in respect of his having, whilst acting

under the provisions of the Sheep-Scab Order, 1898, seized and detained in a market sheep suspected of sheep-scab. Before quoting from the very instructive judgment of Lord Alverstone C.J. upholding the decision of the county court judge dismissing the action, which I adopt as apposite to this case, I note with interest, that, as in the instant case, where there is no Jamaican authority to guide this Court, there was similarly no English authority to guide the Court in the Stanbury case. Assistance was found by crossing the Atlantic to New York and Ontario.

In his judgment, Lord Alverstone C.J. had this to say at pp. 840-41:

> "If this had been an ordinary case of delegation by the corporation of duties which they had to perform or of powers which they were entitled to exercise, then the ordinary rule in cases of master and servant and the doctrine of respondeat superior might apply. This case, however having regard to the position of the parties and to the statute and to the order made thereunder, is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts....."

Further on he said:

> "To adopt the language of the county court judge, the inspector was not acting in performance of duties imposed by statute upon the defendants, or, in other words, was not performing as their agent duties imposed upon them and delegated by them to him, but was acting in discharge of duties imposed on him as inspector by the order of the Board of Agriculture. ..... I think, therefore, that the duty imposed upon the inspector was imposed upon him as inspector by the order, and that, whatever may be the remedy of the person aggrieved against him in respect of negligent or improper acts, the county court judge was right in holding that no action would lie against the corporation."

Both Wills and Darling JJ. concurred with the decision to dismiss the appeal. Excerpts from Darling J.'s contribution, highlight the inspector's position vis-a-vis the appointing authority at p. 843 thus:

> "To my mind the question whether the local authority are liable for the inspector's negligence depends upon whether the act done purported to be done by virtue of corporate authority, or by virtue of something imposed as a public obligation to be done, not by the local authority, but by an officer whom they were ordered to appoint. The particular things which the inspector did here were things which the corporation could not do themselves, and they were not in fact doing them. ....."

At page 844:

> "It appears to me, therefore, that these were not acts done by a servant of the corporation or under their authority, but were acts of a public nature done by a public officer appointed by a corporation as directed by statute."

There is a very close resemblance between the positions of the inspector and the firemen in the instant case. In each case the duty being performed was a duty of a public nature imposed by statute, in the one case, upon the inspector, and in the other upon the firemen. This decision is a very strong authority against Mr. Rattray's and in favour of Dr. Barnett's contention.

The case of Fisher v. Oldham Corporation deals with the position of the constable exercising the powers vested in him directly. It was held that:

> "The police appointed by the Watch Committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as servants or agents of the corporation so as to render that body liable to an action for false imprisonment."

In Harrison v. National Coal Board it was held that a failure by an employee of the corporation to perform certain statutory duties imposed on him personally which resulted in an injury to the appellant was not a failure of the corporation

but of the servant alone. I find my reasoning guided to the conclusion that, inasmuch as the duty to extinguish fires is imposed by the statute upon the firemen, the failure to extinguish the fire in the accepted manner was a failure of the firemen. And since the K.S.A.C. had provided an adequate and efficient service then it was not answerable for the failure of the firemen.

B. COMMON-LAW DUTY OF THE K.S.A.C.

Mr. Rattray's submission under this head lost a leg, because, on his submission, liability at common-law had its genesis in the duty of care in performing the statutory duty for which he contended. And inasmuch as the total loss could not be attributed to the conduct of the firemen he based his case on material contribution to the loss resulting from the conduct of the firemen. He relied on the case of Bonnington Castings Ltd. v. Wardlaw (1956) 1 All E.R. 615:

> In that case the appellants admitted being in breach of statutory regulations which resulted in the inhalation of silica dust by the respondent producing the disease known as pneumoconiosis after he had worked in the appellant's foundry for eight years. But in addition to the dust resulting from the appellant's breach of statutory duty dust had also been inhaled from a source against which there was no known protection. It was argued unsuccessfully by the appellants that they should not be held liable for the respondent's condition because he could not show that dust occasioned by their breach had contributed materially to his contracting pneumoconiosis. It was held that their contribution was not negligible and had indeed been material to the contraction of the disease. The appeal was dismissed.

If Mrs. Holding's account is correct, then indeed, the conduct of the firemen would have contributed materially to the extent of the loss suffered by the appellant. Mr. Rattray would inflict the consequences of the firemen's conduct upon the K.S.A.C. because the latter had foreknowledge that the men, if despatched, would go slowly and yet persisted in sending them out.

Further the K.S.A.C. was negligent in not taking steps in advance of the fire to have the military take over the fire-fighting services.

The fallacy of this contention ignores the statutory provision (Section 8) that the matter of assigning fire-fighting duties to the military lies in the absolute discretion of the Minister responsible for defence. The K.S.A.C. can do no more than supply information and the unchallenged evidence of Mr. Miller is that that was done. The appellant adduced no evidence on the point worthy of acceptance.

Mr. Rattray sought to invoke assistance from the City of Kotzebue v. McLean 702 P 2d 1309 (Alaska 1985) which decided that the City owed a duty of reasonable care to protect potential victims of a caller, who identified himself and his location, and informed police that he was going to kill a friend of his, as well as from Adams v. State, Alaska 555 P 2d 235 in which five people died in a hotel fire after the City had inspected the hotel for fire hazzards. The Supreme Court of Alaska held, that by its affirmative conduct in undertaking to inspect the hotel for fire hazzards, the State assumed a common-law duty to proceed further with regard to those which were detected. It is only respect for counsel's industry that constrained me to refer to either of these cases because it is manifest that the K.S.A.C. was never in the position of either the City or the State in these cases. And indeed it seems to me to be beyond dispute that where there is neither a statutory duty nor an assumption of duty nor a general common-law duty of care there can be no basis for liability for want of care.

The case of Anns and Others v. London Borough of Merton (1977) 2 All E.R. 492 cited by Mr. Rattray is also clearly distinguishable on the ground that that case concerned negligence in performance of powers conferred by statute. Central to the decision in the House of Lords was the determination that:

> The fact that an act had been performed in the exercise of a statutory power did not exclude the possibility that the act might be a breach of the common-law duty of care, (per Lord Salmon at p. 511a).

Dr Barnett submitted that where there is no statutory duty, there cannot be liability for negligence in performance of that duty. Further, having regard to the particulars of negligence supplied (supra), it is clear that the appellant had failed to prove any breach of duty of care at common-law. In any event it was submitted, even if it had been shown that the K.S.A.C. had either a statutory or common-law duty, no evidence had been adduced to prove a negligent performance of such duty. In my opinion, these submissions are sound.

C. LIABILITY OF K.S.A.C. DURING INDUSTRIAL ACTION IN AN ESSENTIAL SERVICE

The industrial action engaged in by the firemen not having complied with the requirements of Section 9(5) of the Labour Relations and Industrial Disputes Act (supra) was unquestionably unlawful. Accordingly, the finding of the learned judge that the act of the firemen was criminal cannot be challenged. Such act on their part was punishable under Section 13(2) of the aforesaid Act on summary conviction before a Resident Magistrate by a fine not exceeding $200.00. It is against this background that the vicarious liability of the K.S.A.C. must be considered. The learned trial judge on this point found as stated at 4 (supra) of his findings that the K.S.A.C. is not liable. He put it thus:

> "No doubt there are cases in which an employer may be liable for the criminal act of an employee but it is my views that the instant case is not such a one."

It is conceded that the Act provides no remedy by civil action for the victim of such conduct as was engaged in by the firemen. In challenging the finding of the learned judge on this aspect of the case, Mr. Rattray submitted that the employer is liable for the negligent act of the employee done in the course of his employment even if the act is prohibited or criminal. Said, he, the firemen were sent out and were acting in the course of carrying out their duty; and even if the duty is carried out badly or even criminally the employer is responsible for their act. He cited for support, among others, Lloyd v. Grace, Smith & Co. (1911-1913) All E.R. 51; Canadian Pacific Railway Co. v. Lockhart (1942) 2 All E.R. 464; Bugge v. Brown 26 C.L.R. 110.

In Lloyd v. Grace, Smith & Co. a solicitor was held liable for the fraud of his managing clerk, committed in the course of his employment, and not outside the scope of his authority. The clerk had been authorized to receive deeds and carry through conveyances on the solicitor's behalf and in that capacity he perpetrated a fraud upon a client whom he persuaded to sign mortgage documents (of the contents of which she was unaware) and although the fraud was solely for the benefit of the clerk the solicitor was held liable to make good the client's loss.

In his judgment Lord Loreburn had this to say at pp. 53-54:

> "The managing clerk was authorised to receive deeds and carry through sales and conveyances and to give notices on the defendants' behalf. He was instructed by the plaintiff, as the representative of the defendants' firm - and she so treated him throughout - to realise her property. He took advantage of the opportunity so afforded him as the defendants' representative

> "to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion, there is the end of the case. It was a breach of the defendants' agent of a contract made by him as defendants' agent to apply diligence and honesty in carrying through a business within his delegated powers and intrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal."
>
> [Emphasis supplied]

One look at this case and any pretended resemblance to the instant case immediately vanishes. The over-riding difference is that there is not in the instant case the delegation by the principal which would render the firemen the agents of the K.S.A.C. nor could it be said that their criminal act was within the scope of, even if during the course of, their employment. This case cannot aid the appellant's cause. Canadian Pacific Railway Co. v. Lockhart was cited for the benefit of Lord Thankerton's judgment at p. 467F. The case dealt with the situation in which the servant of the company, contrary to instructions issued by the company, used his own car for company business without the car being insured against public liability and property risks and in the course of such journey injured an infant. The appellant was held liable on the basis that:

> "The servant was performing the journey for the purpose of his employment because the driving of an uninsured car was an authorised act although performed in an improper mode."

Lord Thankerton had this to say at p. 467F:

> "The general principles ruling a case of this type are well known, but ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmon on Torts, 9th Edition p. 95 viz:
>
> > 'It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even

> 'if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he had not authorised, provided they are so connected with acts that he has authorised that they may rightfully be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. ..... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it'."

Bugge v. Brown: In this case the employer was held liable for the act of the employee causing damage to the plaintiff because the act was authorised though not to be done in the place where the servant actually performed it.

I accept Dr. Barnett's submission that these last two cases dealt with, do not establish as a general rule, that the acts of a servant may be visited on the master merely because the servant was on duty when he committed those acts. Examples of cases to the contrary are - Joseph Rand Ltd. v. Craig (1919) 1 Ch. 1 (acts of carters employed to convey and dump rubbish held to be for their own convenience and not within the sphere of their employment - employers not liable); Warren v. Henleys Ltd (1948) 2 All E.R. 935 (act of personal vengeance by employee on the job - employer not liable): Darling Island Stevedoring and Ligherage Co. Ltd. v. Long (1956-57) 97 C.L.R. 36 (master held not liable for breaches by his employee of statutory obligations cast solely upon the employee and not on the employer). Other authorities were cited, but I think the principle is sufficiently well-established so as not to require burdening this judgment with further citations on the point.

It is my opinion that there is much merit in Dr. Barnett's submission on this issue that:

> "Where employees adopt an attitude which is hostile to the employer or resort to industrial action because of a dispute with the employer the crucial question whether the employers are liable for injury resulting from such action is dependent on whether the employer can be said to have been blameworthy and where such action was not induced or condoned by the employer the latter is not liable."

The extra-ordinary feature of this case which denies the application of the ordinary principles of liability governing the relation of master and servant is that the very act giving rise to complaint was deliberately done, not even purportedly in the master's interest, but against the master. The more I contemplate the facts of this case and the issues involved the more I find myself agreeing with the trial judge when, accepting defence counsel's submission, he said:

> "I accept the submission of the defence that where it is clear that where the action being taken is in direct contravention of the law and in repudiation of the employee's relationship with his employer or is such that it cannot reasonably be said that it was done with the authority of the employer, then the employer cannot be liable.

I cannot apprehend how the employer can be held liable for the breach of a statutory obligation cast solely upon the employee.

D. RIGHT OF ACTION UNDER THE ACT

It is well to bear in mind that effort to resolve the question: "Does the Act confer a right of action?" has the K.S.A.C. in contemplation as the defendant. In contending for an affirmative answer Mr. Rattray cited Attorney General (on the relation of Thomas Brownlee Paisley) and Another v. St. Ives Rural District Council and Another (1959) 3 All E.R. 371. Of the three questions involved in that case only two are of relevance

to the present enquiry, viz:

(i) Was there a right of action against the defendants for failure to maintain and repair drains - an act of non-feasance.

(ii) Did the second plaintiff, an individual whose farm had been damaged as a result of the failure to maintain and repair the drains (a statutory duty) have a right to sue for damages.

Both questions were answered in the affirmative. But it is my opinion that this case cannot be of assistance to the appellant, unless the K.S.A.C. can be placed in the position of the defendants in that case, the endeavour to achieve which has, as I have shown, ended in failure. Another case which is equally unhelpful to the appellants is Carpenter v. Finsborough Council (1920) 2 K.B. 195. The reason being that the defendants were under a statutory obligation to ensure that a street was well and sufficiently lighted but were found to be in breach thereof, thus giving rise to the action in which they were held liable. Nor is the position altered on a consideration of the question as to the nature of the Act i.e. whether it is a penal one? Mr. Rattray contends it is not, a question which he says must be decided by finding in the Act itself a penal provision but not otherwise. It is true that within the four corners of the Act, no penal provision appears for such conduct as is here under consideration, although there are indeed other penal provisions in the Act. But it is my opinion, that the matter does not end there. Consideration must be given to the provision of Section 9(5) of the Labour Relations and Industrial Disputes Act (supra) a later statute, which provides criminal sanctions for the said conduct. But even if Mr. Rattray's point were conceded we would be heading back to the point where the answer must be a denial of the appellant's claim because of the absence of any statutory duty on the K.S.A.C.

The breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling anyone who suffers special damage therefrom to recover damages against the tortfeasor (Per Farwell L.J. in Dawson & Co. v. Bingley U.D.C. (1911) 2 K.B. 149, 156). This is the harbour where the appellant seeks a haven but to succeed he must choose his tortfeasor correctly.

This brings me to the point where as promised I return to consider Section 13 of the Act. The relevant portion of the Section reads:

> "No member of the Brigade, ... acting bona fide in the exercise of the powers conferred upon him under this Act shall be liable for any damage or for any act done under this Act."

It is patent that the Act does not provide a comprehensive protection for the Brigade but only in respect of its bona fide acts. Can the Brigade claim such a protection in the instant case? Any effort to answer that question must bear in mind the tag of "Criminal action liable to punishment by a fine not exceeding $200.00." No one has said, - and it would be next to impossible to persuade anyone to believe - that the firemen were ignorant of the legal sanctions against industrial action by the Brigade. For even were it possible to think that initially they were unaware, how could they maintain that stance after the efforts which the evidence discloses were made to dissuade them from the course they contemplated? Indeed the evidence covering the events at the scene of the fire shows that they had no compunction about letting the place burn. The Chief Officer must be taken to have expressed their

consensus when he replied to Mr. Dixon: "We are on go-slow and even if my mother was in there it would have to burn down - I want my raise of pay." Not a trace of bona fides is detected in their conduct. Rather, mala fides is very evident.

Accordingly, they could not claim the protection of the Act, and would thus be liable to the victims of their indefensible conduct. But, for reasons already stated, the K.S.A.C. would not be affected by such liability.

I conclude therefore that all the issues are determined against the appellant. I would dismiss the appeal with costs to the respondents.