CASE COMMENT

Rendering to Each His Due

A somewhat succinct examination of the policy underlying two recent Privy Council decisions on vicarious liability[1]*

*By Sumaya Desai**

Cases:

- *Clinton Bernard v Attorney General of Jamaica* [2004] UKPC 47, [2004] 1 WLR 1273
- *Attorney General of British Virgin Islands v Craig Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273, (2004) 64 WIR 103

Abstract: English courts are generally reluctant to discuss at any great length the underlying policy reasons for their decision in a particular case, with some judges insisting that policy has no role to play in judicial decision-making. This case commentary briefly examines the role nonetheless played by policy in judicial decisions as a whole, and then goes on to appraise the inextricable role of policy in the tort of vicarious liability. The current test for determining vicarious liability for intentional torts was enunciated in *Lister v Hesley Hall*[2]; it is of two facets. First, there must be a close connection between the tortious act and the occupation of the employee and second, the imposition of vicarious liability must be 'fair and just'. The term 'fair and just' is purposely ambiguous, for this ambiguity bestows the courts with the freedom to persist in fencing the parameters of the tort with social justice, also termed public policy. It is primarily policy that underlies the recent imposition of vicarious liability by the Privy Council upon the Jamaican

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1 * Acknowledgement is due to Mr. Taitt, who eagerly read a draft of this commentary and appraised its grammatical and linguistical accuracy. This paper was written by a first year student for the course Legal Methods and Writing.

2 [2002] 1 AC 215, [2001] 2 All E.R. 769.

state in *Clinton Bernard v Attorney-General of Jamaica* and it was policy that thwarted its imposition upon the appellant in *Attorney General of the British Virgin Islands v Craig Hartwell.*

➢ Introduction: Law & the Imposition of Social Justice

Inscribed upon the wall of the library of the Harvard Law School is a quote from Justinian's *Institutes* that reads, "The precepts of the law are these: To live honorably, not to injure another, ***to render to each his due***. (Emphasis added.)"[3]

Rendering to each his due - an ideal almost as ancient as human society itself - is the classic definition of justice[4]. But justice is usually not so restricted; it is a term that evokes the most powerful of emotions, while invariably eluding a definitive meaning. Like the word 'good', it remains value-laden and subjective, and thereby ambiguous. However, although justice will never be conclusively circumscribed to any universally accepted characterization, it will always be associated with the law.

Justice and law are often considered synonymous. For positivists like Austin, law is itself the standard of justice, while for natural law theorists, since human law is founded upon an infallible higher law, there is the notion of universal justice, objective in composition. Undoubtedly, law and justice are not - and perhaps have never been, but certainly will never be - mutually exclusive. Instead, justice remains a somewhat utopian ideal to which the law persistently attempts to ascribe, with varying degrees of success. The courts endeavor to administer justice, but only according to the law. This is perhaps why English judges generally shy away from any explicit mention of them executing justice. According to Baron Parke in a 19th century case,

> ... [*sic*] it is the province of the judge to expound the law only; the written from the statute; the unwritten or the common law from the decisions of our predecessors and of our existing courts, from text-

3 Paul A. Freund, "Social Justice and the Law", in *Social Justice* (Richard B Brandit ed.) Prentice-Hill Inc., 1962. p 94.

4 John Howard Society of Alberta, "Community Issues in Criminal Justice", in *The Reporter* (Fall 2004) p 1.

> writers of acknowledged authority and upon principles to be clearly deduced from them by sound reason and joint inference [and] not to speculate what is best in his opinion, for the advantage of the community.[5]

The abovementioned quotation and similar assertions are admittedly accurate, but only partially so. It is the role of judges and courts in England and the Commonwealth to adhere to enacted legislation and case precedents in arriving at a decision in a given case, applying what may be termed as legal justice.

However, it is recognized that legal justice alone is quite inadequate for judges and the courts to effectively perform their constitutional duty, for as Pollock, C.B. has observed within the same case, courts have and must continue to recognize "the good of the state" or public policy as a valid ground for their decision, for without heeding such they would surely be failing in their duty.[6] Relying solely on legal justice is "dangerously narrow and limited"[7]. Although judges can and do readily rely on precedent and legislation to arrive at a decision, with the ongoing evolution of society, it is still possible, as it always will be, for a case to come before them which is relatively novel in its facts and issues. Precedent must originate from a source – the judges. Furthermore, even when precedents do exist, judges are quite often forced to choose between conflicting precedents of similar authority, and when these precedents happen to contravene what have become accepted as the values of mainstream society, as they appeared to do with the common law of occupiers' liability relating to trespassers in *British Railways Board v Herrington*[8], the courts have no qualms about overruling preceding decisions.

In fact, one esteemed American judge, speaking about the common law and the basis of its judicial decisions has proclaimed:

> The life of the [common] law has not been logic; it

5 *Egerton v. Earl Brownlow* (1853) 4 H.L. Cas. 1, 123.

6 *Ibid* at 144-149.

7 F. E. Dowrick, *Justice According to the English Common Lawyers* (London: Butterworths, 1961) at p 201.

8 [1972] 1 All E.R. 749.

> has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even the prejudices which judges share with their follow-men, have had a great deal more to do...in determining the rules by which men should be governed.[9]

This same judge, one Oliver Wendell Holmes, has reiterated somewhat more explicitly that it is an "inevitable" judicial duty to weigh considerations of social advantage[10]. His words demonstrate that more often than openly admitted, courts will, when necessary, readily engage in what may be phrased as social justice.

Social justice, in law, generally refers to a principle of judicial interpretation founded upon the current needs of the community from which it stems[11]. It occurs when judges faced with concrete social problems decide cases so as to give effect to what they regard as to be in the contemporary interests of the public, subscribing to what has also been described as the "public conscience"[12], "public policy"[13], "social duty"[14] and "social utility"[15]. It invariably involves a balancing of interests.

The explicit use of policy in judicial decisions, however, is rather controversial, particularly since policy arguments appeal not to clear rules (for they are usually none), but values, and it is suspected that by the manipulation of such, judges trespass in the realm of the legislature. It is for this reason that many common law judges, like Lord Morris, manipulating their seemingly infinite and well-respected ingenuity, have claimed that policy "need not be invoked when reason and good sense will at once point

9 Obiturary, New York Times (March 6 1935).

10 Oliver Wendell Holmes, "The Path of the Law", in Mark R. MacGuigan, ed. *Jurisprudence: Readings and Cases* (2nd ed. Toronto: University of Toronto Pres, 1966) 48 at 55.

11 Thomas Evans, *Public Policy: a vehicle for creating a relevant legal system in West Indian societies.* Cave Hill, Barbados: University of the West Indies, Faculty of Law, 1974. p 4 (Thesis).

12 *Revill v.* **Newbery** [1996] Q.B. 567, 569.

13 *Hill v Chief Constable of West* **Yorkshire** [1989] A.C. 53.

14 *British Railways Board v. Herrington* [1972] 1 All E.R. p 749, at 759.

15 *Bernard v. Attorney-General of Jamaica* [2004] UKPC 47.

the way"[16].

It can hardly be denied that in many a case there is no need to make reference to issues of public policy, and all that is required is the application of a legal rule (which however, was more than likely initially implemented to serve social justice). Nevertheless, Lord Morris' reference to common sense has been clearly and accurately identified as being nothing more than an appeal to widely accepted reasons of the common man, or as he has been termed in legal jargon, the man on the Clapham omnibus, who is representative of the general public.[17] Therefore, although the term 'reason and good sense' has been claimed by Lord Morris to be wholly distinct from 'policy'[18], the difference between them is merely semantic and quite negligible. It is humbly submitted that the term 'fair and just' in the most recent test for determining the vicarious liability of intentional torts, established by the House of Lords in *Lister v. Hesley Hall*[19], similarly comprises naught but a semantic difference from 'policy'. In other words, there is no difference between the two at all.

➢ The Role of Policy in Vicarious Liability

That policy should occupy such a pertinent position in the determination of vicarious liability is of little surprise. Vicarious liability may be considered somewhat of an anomaly in tort law, where much emphasis is placed on the concept of fault.[20] The doctrine allows the law to hold a person or corporation responsible for the loss or injury resulting from the misconduct of another person - one who happens to be under their authority - although they themselves may be free of any blameworthiness or fault. In modern law the imposition of vicarious liability is usually limited to employers, who may be held responsible for the torts of their employees, although its scope was previously much wider and interestingly, included holding a husband liable for the tortious acts of his wife[21].

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16 *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, 1039.

17 James Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983) p 36.

18 *Dorset Yacht Co Ltd. v Home Office* [1970] AC 1004, 1039.

19 [2002] 1 AC 215, [2001] 2 All E.R. 769.

20 W.V. H. Rogers, *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 2002) p 703.

21 J. G. Fleming, *The Law of Torts* 6th edn. (Sydney: Law Book Company Ltd., 1983) p 338.

While the law of tort essentially involves an attempt to balance the conflicting societal interests of security and freedom of individual action[22], the tort of vicarious liability in particular, developed from little else but the court's desire to implement social justice. Lord Pearce has candidly observed that "the doctrine of vicarious liability has not grown from any very clear, logical or legal principle, but from social convenience and rough justice"[23]. Fleming too notes that there is little doubt that this tort was birthed as a result of nothing else but a combination of policy considerations[24], an opinion emphatically supported by Baty[25], but also implied by Holmes[26] and most writers commenting on civil vicarious liability.[27]

The view of medieval English law that a master was to be responsible for the wrongs of his servant and family, regardless of what these were, although not expressly articulated as such, was undoubtedly a policy position. With the onset of the Industrial Revolution and the spread of industrialization, vicarious liability was narrowed as it came to be regarded as a threat to the development of commerce. This contraction of vicarious liability was consequently also the result of policy. With increasing concerns about the hazards of business activities, coupled with the persistent interest in the secure expansion of commerce, the courts attempted to garner a compromise between the social interest of providing a tort victim access to a defendant that was not "a man of straw"[28], and that of not obstructing the growth of commerce by placing undue burdens on business enterprises. It was for this reason that vicarious liability was not limited to acts authorized both implicitly and explicitly by the employer, but to any done within the course of employment, even if expressly prohibited[29].

Despite the continual contraction and expansion of vicarious liability,

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22 *Ibid* p 6.

23 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 685.

24 *Ibid* p 339.

25 *Vicarious Liability* (Oxford University Press, 1916)

26 *Agency*, 5 Harv. L. R. 14.

27 for example, W. V. H. Rogers, *Winfield & Jolowicz on Tort* and, Kodilinye, *Commonwealth Caribbean Tort Law.*

28 J. G. Fleming, *The Law of Torts* 6th edn. (Sydney: Law Book Company Ltd., 1983) p 339.

29 for example *Limpus v London General Omnibus Co* (1862) 1 H & C 526, *C.P.R. v Lockhart* [1942] A.C. 462

its principal rationale has always remained invariable and continues to be reasonable and effective loss allocation. Atiyah has indicated that the tort is "sound" only because it happens to be the most convenient and efficient manner of compensating persons who are injured by another's business activities[30], although the sentiment that one who benefits from an act should also bear any risks of this act has also contributed greatly to the formulation of the modern tort of vicarious liability[31]. Atiyah further noted that the fact that "certain types of willful acts, and in particular frauds and thefts, are only too common, and [vicarious] liability is generally imposed for torts of this kind, shows that the courts are not unmindful of considerations of policy."[32] This may also be evidenced from the words of Forest LJ, a Canadian judge, who has asserted that "the vicarious liability regime is best seen as a response to a number of policy concerns. In its traditional domain, these are primarily linked to compensation, deterrence and loss internalization."[33].

➤ *Lister* & the Expansion of the Law ofVicarious Liability

It must be mentioned that although there exists a number of justifications for the tort of vicarious liability besides loss allocation, the public policy consideration that has first claim on "the loyalty of the law" [34] is that wrongs should be adequately compensated. It was to ascribe compensation for a most grievous wrong that the Privy Council judges in *Clinton Bernard v Attorney General of Jamaica*[35] faithfully followed the decision made by their colleagues in the House of Lords in the landmark case of *Lister v. Hesley Hall*[36], a case which altered the appropriate test to be applied by courts when considering the vicarious liability of employers for torts which are both intentional and criminal. While it is debatable whether or not this supposedly new test is more than a semantic variation of the initial test utilized to determine vicarious liability[37], the unanimous acceptance and application of the *Lister* decision by the judges in both the abovementioned

30 P.S. Atiyah, *Vicarious Liability in the Law of Tort* (London: Butterworths, 1967) p 26.

31 *Ibid* p 18.

32 *Ibid* p 263.

33 *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* 1992 CarswellBC 315, at p. 336.

34 *X v Bedfordshire County Council* [1995] 3 WLR 152 at 183 per Lord Browne-Wilkinson.

35 [2004] UKPC 47.

36 [2002] 1 AC 215, [2001] 2 All E.R. 769.

37 Alan Barron, *Vicarious Liability for Employees and Agents*, S. L.T. 2004, 15, p 91, 95.

case, and many others[38], has certainly concretized the expansion of vicarious liability with regard to the intentional torts of employees.

Previously the test used by the courts to determine the vicarious liability of employers for the torts of employees, both inadvertent and intentional, was that enunciated by Salmond in his text on tort[39], in which he stated that a master i.e. an employer, was responsible for the tort of his servant or employee if it was either a wrongful act authorized by the master, or a wrongful and unauthorized mode of doing some act authorized by him[40].

The court in *Lister* has rightfully pointed out that while the courts have applied the test stated above, they have at times completely overlooked Salmond's subsequent explanation that:

> It is clear that the master is responsible for acts actually authorized by him...but a master...is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them...[However] if the unauthorized and wrongful act of the servant is not so connected with the authorized act so as to be a mode of doing it, but it 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 it.[41]

In determining vicarious liability, the question generally postulated by the courts is simply whether the tort was a wrongful mode of performing an act of the class which the employee was employed to perform[42]. A

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38 for example, *Balfron Trustees Ltd .v. Peterson* [2001] I.R.L.R. 758, *Dubai Aluminium Co v Salaam and Others* [2003] 2 AC 366, *Attorney-General of British Virgin Islands v. Craig Hartwell*[2004] UKPC 12, (2004) 64 WIR 103, *Mattis v. Pollock* [2004] 4 All E.R. 85 and *Inez-Brown v Robinson* [2004] UKPC 56.

39 Salmond, *Law of Torts* 6th edn.,

40 *Ibid* p 100.

41 *Ibid* pp 100-101.

42 Cf. *Conway v. George Wimpey & Co.* **Ltd** [1951] 2 K.B. 266.

strict application of this test usually prevented the liability of an employee's intentional and criminal torts from being transferred to the shoulders of the employer, unless it was performed for the benefit of the employer and his business.

This is reflected in the relatively recent decision of *Trotman v North Yorkshire County Council*[43]. In this case, the plaintiff, an epileptic teenager with a learning disability, was repeatedly sexually assaulted by the deputy headmaster who had been charged with the responsibility of caring for him on an overseas school trip. The boy brought an action in vicarious liability against the employer of the abuser. The English Court of Appeal, applying a strict application of the Salmond test, unanimously dismissed the action. They noted that the deputy headmaster's duty of caring for the plaintiff by sharing a bedroom with him did indeed provide him the opportunity to commit the crime. However they considered the manipulation of his duties in this manner to be an independent act, far removed from his authorized duties, too far removed to be regarded as an 'unauthorized mode' of doing them. They were in fact deemed a complete negation of the obligations of his employment.

The court in *Lister* perceived the position of the Court of Appeal in *Trotman* to be the result of an "overly restrictive view [that is] hardly in tune with the needs of society"[44], and the test used to determine that decision as rather "simplistic"[45]. Approving instead the more pragmatic approach taken by the Canadian Supreme Court in *Bazley v. Curry*[46] and *Jacobi v. Griffiths*[47], the House of Lords held that a more appropriate question to ask is whether the employee's torts were so closely connected with his employment that it would be fair and just to hold his employers vicariously liable. Consequently, the earlier case of *Trotman* was overruled and the respondent in *Lister*, the corporate owner of a commercial residential boarding house, was found vicariously liable for the systematic sexual abuse of two boys in their care by the pedophilic warden they had unwittingly employed.

43 [1999] LGR 584.

44 [2002] 1 AC 215, 224, per Lord Steyn.

45 *Ibid* at 227.

46 (1999) 174 DLR (4th) 45.

47 (1999) 174 DLR (4th) 71.

Although the judges sitting in the House of Lords in *Lister* applied the approach adopted in *Bazley*, unlike the judges of the Canadian Supreme Court, they paid only lip service to the role of policy in enforcing vicarious liability. They freely admitted that the justification for vicarious liability lay in public policy, but dismissed any need for an extensive discussion into the underlying policy reasons for vicarious liability. In the words of Lord Hobhouse, "...an exposition of the policy reasons for a rule is not the same as defining the criteria for its application. Legal rules have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it".[48]

Legal rules are, however, guided by social justice. Simply because the law lords in Lister did not delve in to policy considerations does not mean they were not influenced by them.

➢ The Privy Council Decision in *Clinton Bernard*

It was with the application of the test approved in *Lister* that in a recent appeal arising out of Jamaica, that the Privy Council was able to restore the imposition of vicarious liability on the Jamaican government by the judge at first instance. The decision of the trial court had been set aside in its entirety by the Jamaican Court of Appeal, which employed the previous test and concluded that the intentional and criminal tort of the State employee could not be regarded as being an "unauthorized mode" of performing his actual duties. It did, however, recommend that a meaningful *ex gratia* payment be made to the plaintiff as compensation for what it accurately termed a grievous wrong.

In *Clinton Bernard v Attorney General of Jamaica*[49], the appellant had been in the process of using a public phone, for which he had patiently stood in line, when a police constable rudely interrupted him and demanded its immediate use. Although the constable identified himself as a member of the police force, and it was normal for Jamaican police to commandeer public phones during emergencies, the appellant refused to release the phone. The constable therefore assaulted him in an attempt to wrest control of the

48 *Lister v Hesley Hall Ltd.* [2002] 1 AC 215, 242

49 [2004] UKPC 47, 2004 WL 2270264.

telephone from him. On failing to do so, he simply extracted his service revolver - a service revolver he was permitted to bear at all times - and shot the appellant in the head at point blank range.

The appellant remarkably survived the shooting, but did fall unconscious. He awoke at a nearby hospital to find himself arrested for assaulting the very same police officer that had in fact assaulted him. These criminal charges were however subsequently withdrawn. The constable was also dismissed from the police force, but on an unrelated matter. Although the appellant brought an action both against him and his Crown employer, the constable could not be found. He was therefore not served. The action proceeded, nevertheless, against the Attorney-General of Jamaica in the representative capacity accorded him under s 3(1) of the Crown Proceedings Act.

The trial judge had held that though the shooting fell outside of the constabulary duties authorized by the Jamaican Constabulary Force Act, the action was still connected to the execution of these duties. Although she also did not employ the *Lister* test that the Privy Council proceeded to use, their conclusions were identical.

This conclusion that there existed so close a connection between the unlawful shooting of the employee and his constabulary duties that it was just and reasonable to hold the State employer reasonable rested primarily on the fact that the constable clearly purported to act in his capacity as a police officer when he asserted his office immediately before he attempted to take control of the pay phone by assaulting and shooting the appellant. It was quite irrelevant that he may not even have been on duty at the time of the incident, or more importantly, that shooting innocent members of the public was not in any way delineated in the occupational duties of Jamaican police officers enshrined in statute. What was of import was that in carrying out the tort, the constable claimed to be acting as a policeman. This claim was reinforced by the fact that the appellant was later arrested by the constable. Furthermore, it was the constable's service revolver that was used to accomplish the shooting.

The constable had been allowed to bear his service revolver at all

times. The risk of a tort such as that evidenced in this case was therefore cultivated by the state police force. By routinely allowed its policemen to possess armed service revolvers at all times, whether or not they were on duty, the Jamaican state created the opportunity for the tort to take place. The creation of this risk was therefore additional justification for imposing vicarious liability.

➢ Attorney-General of the British Virgin Islands v Craig Hartwell

The issue of vicarious liability for the actions of a police officer was also brought before the Privy Council in an earlier appeal from the Eastern Caribbean, that of the *Attorney General of the British Virgin Islands v. Craig Hartwell*[50]. Although the facts of this case are reminiscent of those in *Bernard*, they are far from identical. The respondent in this case also brought an action not only in vicarious liability, but in negligence, arguing that the government itself had been at fault when it elected to provide an unsuitable person - in the form of the constable by whom he was shot - access to an armed firearm.

This constable had been the sole police officer stationed on the tiny island of Jost Van Dyke in the British Virgin Islands. On the night of the shooting, he intentionally abandoned his post to spy upon the mother of his children, who was working in a bar on the nearby island of Virgin Gorda. Upon seeing her with a presumed lover, the constable "became [so] consumed by anger and jealousy"[51] that he fired his service revolver in the general direction of the couple. The bar was crowded with both local residents and tourists, and in so doing, the constable injured not only his former lover, but a British tourist - the respondent. Before the shooting this same constable had been accused of assaulting another man whom he had also suspected of being a lover of his former lover. Although the alleged victim sought police protection, the police appeared to readily accept the constable's own explanation without any apparent further investigation. They then simply warned the constable not to let his personal affairs intrude upon his constabulary duties. Furthermore, the constable had been on probation

50 [2004] UKPC 12, [2004] 1 WLR 1273, (2004) 64 WIR 103.

51 *Attorney-General v Craig Hartwell* (2004) 64 WIR 103, 106.

at the time of the incident and was subject to daily supervisory visits. Unlike the constable in *Bernard*, he was not allowed to bear a weapon at all time, but was however provided access to the service revolver, though he was to be issued with it when its use was necessary. On the day of the shooting, the supervisory officer had been informed that he had been seen with the service revolver. The officer confronted him, and though he provided an unsupported explanation, he was merely orally reprimanded.

The respondent therefore brought an action in both vicarious liability and negligence against the Attorney-General as representative of the government of the British Virgin Islands, the employer of the police constable. The action in vicarious liability was dismissed by the trial court, but though the claim in negligence was also dismissed by the court of first instance, it was allowed by the Court of Appeal of the Eastern Caribbean States, causing the Attorney-General to appeal to the judicial committee of the Privy Council on the issue of negligence. His appeal was dismissed.

Although the appeal was not concerned with the issue of vicarious liability, the Privy Council still opted to briefly examine it in order to ensure that "the outcome of the claim [was] clear cut". They held that although the constable had been on duty at the time and his jurisdiction extended to Virgin Gorda, and he did utilize his service revolver to commit the tort, he was still on a "frolic of his own" – his purpose in performing the tort was to pursue a personal vendetta, for which he took the revolver improperly, and for which also intentionally deserted his station. There was therefore not enough of a close connection between his intentional tort and his employment to hold is employer vicariously liable.

➢ Concluding Remarks

In an extra-judicial utterance, Lord Mustill has asserted:

> It is impossible to tell whether the reasons published in a judgment by an individual judge are truly his reasons for that decision. Rather, the decision may simply have been made intuitively, or on grounds of policy and the given reasons may, in fact, have been considered only after it had been made either simply to reconcile it with legal materials which appeared to stand in its

> way, and which played no part in its formation, or to call support from favorable materials.[52]

Taking in to account this contention, it is again respectfully submitted that considerations of policy greatly encouraged the imposition of vicarious liability by the Privy Council in *Bernard* and the House of Lords in *Lister*. Policy also thwarted the imposition of vicarious liability in *Hartwell*.

The judges in *Lister* shied firmly away from any discussion on policy, focusing their attention on determining the proper application of the legal rules and principles relating to vicarious liability. It is ironic then that they approved and applied a decision that was explicitly founded upon policy considerations. Perhaps not only the close connection test, but the policy issues discussed in the case of *Bazley v Curry* were embraced by the House of Lords, albeit furtively. Regardless, the realization of social justice still motivated the imposition of vicarious liability, for on *Lister*, it has been said that its facts vociferously demanded the vicarious liability, so that the outcome of the case was inevitable once the House of Lords freed themselves from a narrow interpretation of the *Salmond* test.[53]

The previous test for applying vicarious liability, commonly termed the Salmond test, had often been aptly described as difficult to apply. It rested on a tenuous distinction between authorized acts and modes of doing authorized acts[54]. This allowed a particular court the discretion to define a particular act narrowly or broadly. If nothing else, the Privy Council cases of *Clinton Bernard* and *Craig Hartwell* demonstrate that although the close connection test preferred by *Lister* may have expanded vicarious liability, it did not do much to clarify it. It is difficult to comprehend why, given the Privy Council's approval of the test phrased by the House of Lords in *Lister*, vicarious liability was not imposed upon the government of the British Virgin Islands as it was on that of Jamaica.

Just as crimes of strict liability have been limited by the courts,

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52 B.S. Markesinis, J.B. Auby, D. Waltjen and S. Deakin, *Tortious Liability of Statutory Bodies* (Oxford: Hart Publishing, 1999) p 39.

53 Bruce Feldthusen, *Vicarious Liability for Sexual Abuse*, Tort L. R. (Nov 2001) p 171

54 *Supra* n. 36

with there being a presumption that there must be a mental fault element to be proved for each crime[55], so should torts of strict liability, like vicarious liability, be expanded with caution, particularly with regard to tortious acts that are intentionally criminal. There is an intrinsic feeling of injustice about holding someone liable for the torts of another for which they may be able do little to prevent. Doing so contravenes a fundamental principle of democratic legal systems, that an individual should only be punished for his own actions. There is a limit to the control which an employer can effectively exercise over his employees and police officers, like all persons from the ever so noble species of *Homo sapiens* are not only fallible, but also quite unpredictable. It is difficult to see what measures can be undertaken by the police authorities to completely eliminate any risk of the occurrence of a similar incident.

However, it cannot be denied that vicarious liability does admittedly generate a measure of social justice. It is this alone which not only preserves the tort, but maes it strongly defensible. Vicarious liability facilitates the spread of losses in society, giving the victim of a wrong access to a deep pocket, in this case one which is often erroneously presumed to be bottomless. It is this underlying policy reason for this tort that validates its continuing imposition and it was upon this policy motivation that the Privy Council found the State employer in *Bernard* vicariously liable, while eschewed such a finding with respect to the State employer in *Hartwell*, for the victim of the tort in the latter case could after all access compensation through a finding of negligence, a means not readily available to the victim in the former.

Depite this justification for the tort, this author cannot still help but greet this recent development in the Anglophone civil law with some measure of trepidation, while unable to resist desiring, perhaps somewhat ignorantly and hypocritically, that a similar advancement be made in the area of public international law, for if the courts can deem it "just and reasonable" to hold one state liable in negligence for the intentionally reckless, but accidental wounding of a tourist and another liable in vicarious liability for what they presumed to be a shooting performed by an employee of theirs for his own ends, should not the Abu Ghraib victims should also be able to

55 *Sherras v De Rutzen* [1985] 1 QB 918 at 921.

successfully bring an action against the state which created the situation that enabled employees to torture these individuals in their name, particularly as they are far more in need of any ensuing compensation?

It will not happen, for while policy considerations may seek to dispense social justice, both they can also aptly act to prevent it. All persons are equal, but some clearly remain more equal than others.