[2019] JMSC Civ. 159

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV04031

BETWEEN	**MICHELLE LINDSAY**	**CLAIMANT**
AND	**FIRSET WHITFIELD**	**1ST DEFENDANT**
AND	**JAMAICA URBAN TRANSIT COMPANY**	**2ND DEFENDANT**

IN OPEN COURT

Assault and Battery – Vicarious liability – Driver of bus repeatedly assaulting passenger – whether tort so closely connected to the employment as to hold employer liable – whether driver on a "frolic of her own"

Danielle Archer instructed by Kinghorn & Kinghorn for the Claimant

Georgia Hamilton and Roxanne Bailey instructed by Georgia Hamilton & Co for the 2nd Defendant

Heard: May 30, 2019 and July 18, 2019

PALMER, J

Introduction

[1] The claim arises out of an incident between Michelle Lindsay, the Claimant, and Firset Whitfield, 1st Defendant and a driver employed to the Jamaica Urban Transit Company (ñJUTCò), the 2nd Defendant. Ms. Lindsayôs claim is that on September 25, 2011 she boarded a JUTC bus on which Ms. Whitfield was the driver, when the two (2) women had a heated argument. The verbal exchange was apparently precipitated by Ms. Lindsayôs expression of dissatisfaction to Ms. Whitfield with the quality of service being provided to the public. Ms. Whitfield supposedly took

exception to this and pursued, on two separate occasions, what appears to have been a personal vendetta against Ms. Lindsay by assaulting her.

TRIAL

[2] The Claimant is the only party to these proceedings who was present at the time of the alleged incident to provide an account of what transpired between herself and Ms. Whitfield. For this reason, the bulk of evidence relevant to the present proceedings substantially represents the Claimantôs account of what transpired. The Claimantôs witness statement was permitted to stand as her evidence in chief at the trial.

The Claimantôs Case

[3] In her witness statement dated March 5, 2019, Ms. Lindsay stated that on the day of the incident she had been waiting for almost two (2) hours at the bus stop in Portmore when the bus finally arrived at about 1:05pm. She boarded the bus and paid her bus fare to Ms. Whitfield, the driver, who issued her with a bus ticket. Ms. Lindsay then asked Ms. Whitfield as to the reason for the delay in the bus arriving, in particular, whether there had been a problem at the terminus. Ms. Whitfield did not respond, even after Ms. Lindsay repeated the question, and the Claimant then proceeded to sit in the front seat of the bus. In apparent response to being ignored Ms. Lindsay commented, ñ*Some of unu drivers and Inspectors need fi go home. A unu a mash up the system because the bus caah drive itself".* Ms. Whitfieldôs retort was to tell Ms. Lindsay about her mother, to which Ms. Lindsay, not to be outdone, admitted in cross-examination that she responded in kind. A heated verbal exchange ensued between the women with some passengers ñweighing inò at points in the argument.

[4] As the bus approached Marcus Garvey Drive, a passenger on the bus pressed the buzzer at which point Ms. Lindsay, along with about two (2) other passengers waited to exit the bus. The bus stop was in the vicinity of the Tinson Pen Aerodrome, and just as the bus approached it, Ms. Whitfield turned around and

looked at the Claimant, then drove past the bus stop. When the doors were opened the passengers ahead of Ms. Lindsay disembarked, but as she proceeded to do the same, she felt an impact in her back which threw her out of the bus on her knees on the sidewalk and in severe pain.

[5] While on the ground she saw Ms. Whitfield come at her again to kick her but Ms. Lindsay held her by the foot and went back into the bus. After a few tense moments during which Ms. Lindsay attempted to pull Ms. Whitfield from the bus, she eventually, after the urging of a young man known to Ms. Whitfield, let go. Ms. Lindsay, after collecting her shoes and belongings that were strewn all over sidewalk, re-boarded the bus and rode it downtown with the intention to report the matter to the police.

[6] When the bus completed its route to downtown, Kingston, Ms. Whitfield announced to the passengers to exit the bus via the back door as she would not be opening the front door. The passengers on the bus all complied with her instruction but when Ms. Lindsay got to the back door, Ms. Whitfield instructed that she exit the bus using the front door. Ms. Lindsay said that as she exited through the front door, Ms. Whitfield was standing just outside the door and used a reel of paper to strike her violently to the face, knocking her to the ground.

[7] During cross-examination, counsel for JUTC suggested to Ms. Lindsay that her witness statements contained material omissions when considered in the light of the statement she gave to the police shortly after the incident. In particular, it was suggested to the Claimant that she had failed to mention that when expressing her dissatisfaction with the quality of the service offered by the 2nd Defendant she made statement to the effect that *"some a unnu driver and conductor need fi go home. A unnu a mash up the system cause the buss cant drive itself.*ò This comment, it was further suggested, by counsel for the 2nd Defendant prompted the 1st Defendant to respond abrasively by advising the Claimant to *"go suck u mumma"*, to which the Claimant herself countered by advising her to do the same. The irresistible inference to be drawn from defence counselôs probing in this regard

is that Ms. Lindsay effectively provoked the Ms. Whitfield or was herself the aggressor and, in so doing, precipitated the verbal altercation that would later ensue between them.

The Defendantôs Case

[8] The 2nd Defendant strenuously contested the veracity of the Claimantôs averments. Specifically, it contended that Ms. Whitfield, whom it accepts was in fact its servant and/ or agent at the time of the alleged incident, at no point kicked, slapped or in any way caused injury to the Claimant. Furthermore, and in the alternative, while the 2nd Defendant categorically denied that Ms. Whitfield did the acts complained of, it maintained that if the possibility existed that Ms. Whitfield did such acts then she would have done them in defence of herself; using no more force than was reasonably necessary in the circumstances, against the Claimant who was behaving belligerently and who threatened to kill her. That said, the JUTC has presented no evidence to support that position, and relied entirely on the evidence of Ms. Lindsay in the hope of discrediting her in cross-examination.

[9] Mrs. Kay Thompson-James, a Human Resource Officer in the employ of the JUTC, gave a witness statement on March 7, 2019, which represents the only substantive item of evidence that offers some support for certain aspects of the 2nd Defendantôs case. More specifically, while the statement does not speak to the circumstances surrounding the occurrence of the alleged incident, it makes peripheral references to assertions made by Ms. Lindsay about the alleged incident within the larger context of the JUTCôs operational codes and/or protocols of conduct to which it requires strict adherence by its bus drivers when discharging their duties to customers.

[10] According to Mrs. Thompson-James, the JUTC usually takes great care in following certain procedures related to the hiring, training and dispatching of its bus drivers. As a company with very high standards, it has fixed guidelines and rules regulating the conduct of its drivers when they operate its motorbuses in

fulfilment of their professional obligations. In this regard, the JUTC is said to expect and require that all drivers in its employ comport themselves in a professional manner and transport passengers safely to their destination. Additionally, upon being employed by the JUTC, each driver was furnished with a copy of its Employee Manual and Disciplinary Code for Guidance and was required to undergo an extensive eight (8) week driver training course at the Advance Driver Training Centre at Lakes Pen Road, St. Catherine, where they received training in customer service. It was the evidence for the 2nd Defendantôs case that prior to her promotion to a single unit driver in December 2007, Ms. Whitfield was selected to attend the eight (8) week driverôs training course in March 2006, was fully trained in customer service and received her copy of the companyôs employee manual. According to Mrs. Thompson-James, the alleged incident was brought to the attention of the company by other bus drivers on the morning after it occurred, after which a formal report was lodged by Ms. Whitfield.

[11] Mrs. Thompson-James said further, that Ms. Whitfieldôs actions were never connected to her job as a driver and, having been in the employ of the JUTC since 2001, she would have received the relevant training and upon being appointed as a driver, have been reminded of the high level of professionalism that was expected of her. Moreover, since her appointment as a driver in December 2007, Ms. Whitfield was fully aware of the challenges associated with discharging her responsibilities as a driver. In particular, she knew that if she were to be threatened by a passenger she was to proceed to the nearest police station to seek assistance in having the passenger removed or otherwise dealt with by the police, unless the threat concerned was one of life or death. It has, however, always been Ms. Whitfieldôs contention, according to the 2nd Defendantôs case, that on the date of the incident in question, the Claimant had threatened to kill her. As earlier stated, there is no record of Ms. Whitfield ever making a report to the police and the report made to the company was never tendered into evidence at trial.

SUBMISSIONS OF THE PARTIES TO THE PROCEEDINGS

The Claimantôs Submissions

[12] For the Claimant is was submitted by way of reminder that rule 10.5 of the Civil Procedure Rules of 2002 (ñCPRò) prescribes that a defence should contain only what the Defendant intends to prove. In light of this, and given that there is no evidence to prove that Ms. Whitfield was provoked by Ms. Lindsay, as the 2nd Defendant proposed in its submissions, there is no evidence to support a conclusion that self-defence was a factor in this case. Moreover, having failed and/ or omitted to provide a statement from Ms. Whitfield, there is no account of how the incident occurred save and except for that which has been provided by Ms. Lindsay, and as a consequence, it was submitted that the JUTC is in no position to prove any of the arms of its defence.

[13] It was then submitted for JUTC that nothing in the evidence adduced by it, in the way of a witness statement made by its Human Resource Officer substantiates its explanation as to how and why the incident between the Claimant and the 1st Defendant transpired. Ms. Lindsayôs evidence, on the other hand, both strongly substantiates her averment that there was a verbal altercation between herself and Ms. Whitfield and also provides the Court with an explanation as to the circumstances leading to its occurrence. Accordingly, it was submitted that the Court should accept Ms. Lindsayôs account of the incident.

[14] It was submitted further for the Claimant that the Court should take special note of the fact that the JUTC had actioned the reports made by fellow workers as well as Ms. Lindsay about the incident, and evidently concluded that the manner in which Ms. Whitfield reacted to Ms. Lindsay was at variance with how she had been trained to deal with its customers by virtue of the fact that it ultimately dismissed her. A modest sampling of seminal decisions enunciating the foundational principles relevant to the doctrine of vicarious liability were then referenced by Counsel for the JUTC, to include: ***Lister v Hesley Hall Limited*** [2001] 1 AC 215; ***Trotman v North Yorkshire County Council*** [1998] EWCA Civ 1208; ***Clinton Bernard v the AG of Jamaica*** [2004] UKPC 47 (07 October 2004) Privy Council

Appeal No.30 of 2003 ; and ***Allan Campbell v National Fuel and Lubricants Limited, Roy D' Cambre and Solomon Russell*** [2004] C.L. 1999/C- 262.

[15] For the Claimant, several propositions were put forwards to support the contention that the JUTC should be held vicariously liable for the acts committed by Ms. Whitfield against the Claimant. Firstly, that as the altercation between Ms. Lindsay and Ms. Whitfield arose on account of the manner in which Ms. Whitfield was driving the bus, it cannot be reasonably denied that there was a relative closeness between the tortious act committed by the 1st Defendant and her employment as a driver to the 2nd Defendant.

[16] Secondly, that the 1st Defendant was employed in a system wherein drivers are, by virtue of the service they offer, exposed to situations which may be threatening and as such are instructed to go to the police station if and when confronted by such situations. According to the Counsel for Ms. Lindsay, what is reflected by this system is the ñrelative closenessòbetween the tort committed by Ms. Whitfield and the nature of her employment as a driver. Moreover, it was further submitted that prior to the rendering of the ***Lister*** and ***Bernard*** decisions, the argument could reasonably have been made that the response of Ms. Whitfield was simply ña wrongful and unauthorized modeò of doing an act which she was ostensibly authorized to do.

[17] Thirdly, that the provocative acts of Ms. Whitfield, supposedly done by her in response to the Claimantôs verbal assault and threats, were in fact closely connected to her employment and therefore provide a legitimate basis for those acts to be imputed to the 2nd Defendant. Finally, that the evidence presented by the Claimant was credible, coherent and cogent and her case was also supported to a great extent by the 2nd Defendantôs case. The Claimantôs case is that she sustained serious personal injury while being transported as a passenger on the bus owned by the JUTC. The JUTC agrees that the 1st Defendant was the driver of its bus, that the incident occurred and that the 1st Defendant was dismissed as a consequence of the incident. Accordingly, it was submitted, the 2nd Defendant

had failed to show that it should not be held liable for the assault that was caused by Ms. Lindsayôs failure to respond to a potentially contentious situation involving a passenger, as she had been trained to do. Accordingly, it was submitted, liability should be determined in favour of the Claimant.

The Defendantôs Submissions

[18] The submissions on behalf of the JUTC began by acknowledging that Ms. Whitfield was in fact employed to it as a driver and was therefore its servant and/or agent at the material time. As such, it was submitted that the central question for determination is whether the alleged acts of Ms. Whitfield would warrant the imposition of vicarious liability upon the JUTC for the unlawful acts of its servant and/or agent. In respect of the latter point, it was submitted for the JUTC that in order for the Claimant to affix vicarious liability to it for the alleged acts of Ms. Whitfield, she would have to prove, on a balance of probabilities, that the acts alleged to have been committed by their servant and/or agent were sufficiently connected to her job as a driver to the 2nd Defendant.

[19] Support for the proposition advanced was said to be found in the dicta of Sykes J (as he then was) in the case of ***Curlon Orlando Lawrence v Channus Block and Marl et ux*** [2013] JMSC CIV.6 at paragraphs 8 through to 13, where the learned judge was keen to emphasize that in order to make a Defendant liable for the acts of their employee, the Claimant must do more than show that the job created the opportunity to commit the tortious act. More specifically, the Claimant must go further by showing that the tortious act complained of was so closely connected with the job functions of the employee at the material time that it would be fair and just to hold the employer vicarious liable.

[20] The point was then stressed that the 2nd Defendant was not asserting that the alleged acts of the 1st Defendant were either intentional, deliberate or criminal. To the contrary it was submitted that the acts alleged to have been committed by Ms. Whitfield were lawful and reasonable because Ms. Whitfield has, at all times,

maintained that she acted in self-defense after being attacked by Ms. Lindsay at the time of the alleged incident.

[21] Further it was submitted that in any event and regardless of the contention by the Ms. Lindsay and/or Ms. Whitfield the alleged acts of Ms. Whitfield were unconnected to and did not in any way share a nexus with the nature of her employment as a driver to the JUTC. Further and/or alternatively it was submitted that Ms. Whitfield was acting on a "frolic of her own" when the alleged incident occurred.

[22] In support of the abovementioned contentions, reliance was placed on the ***Curlon Orlando Lawrence*** case. It was submitted that in the instant case, Ms. Whitfield's was hired to transport passengers to and from their destination and has discharged this job. It would therefore be unfair and unjust, it was submitted, to impose liability on the JUTC for any alleged assault and/or battery against Ms. Lindsay by Ms. Whitfield, if in the circumstances these alleged acts were done after she had already discharged her duty as a driver to the JUTC. For the avoidance of all doubt, it was submitted that it would have been at the point when Ms. Whitfield had stopped to let off the Claimant along Marcus Garvey Drive and later again in Down Town Kingston after the Claimant had exited the bus, that the alleged assaults occurred.

[23] Specific reference was made to paragraph 5 of the witness statement of Mrs. Kay Thompson-Jones in which she described the nature of the job of a driver to the JUTC as entailing the transportation of passengers from one point to their destination. Thereafter, it was submitted that at all material times the tortious acts complained of by Ms. Lindsay were committed by Ms. Whitfield after she had discharged her responsibilities as a bus driver, even though she has always maintained that the acts alleged to have been done by her were actually done in self-defense. Furthermore, and alternatively, it was submitted that at the time the acts complained of were allegedly committed against Ms. Lindsay, they had absolutely nothing to do with Ms. Whitfield's duties as a driver, neither actually nor

ostensibly, and were therefore done by her while she was efectively on a ñfrolic of her ownò

THE LAW

[24] As Lord Steyn opined in ***Lister v Hesley Hall Ltd*** [2001] UKHL 22 at paragraph 14:

> *"[v]icarious liability is a legal responsibility imposed on employer, although he is himself free from blame, for a tort committed by his employee in the course in the course of his employment…"*

In ***Curlon Orlando Lawrence*** cited above, Sykes J ably outlined the foundational premise of the doctrine of vicarious liability as well as its underlying rationale. In particular, the learned judge noted that the doctrine is said to be predicated on social and economic policy, which has decided that the employer should bear the damage arising from any negligent acts by his employee if the negligent conduct is sufficiently connected to the employeeôs job so that it can be said that he was acting on the employerôs behalf at the crucial time.

[25] Until recently, the relevant test to be applied when determining whether the doctrine of vicarious liability was relevant or applicable to a case involving the commission of a tort by an employee was propounded by the venerable Australian legal scholar and jurist Sir John Salmond in the first edition of his treatise titled ñ**The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries**ò, published in 1907. Sir Salmond posited that a wrongful act by a servant in the course of their employment was:

> *"… either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master."*

An important qualification that was thereafter made to this analysis by the learned author which, as Lord Steyn lamented in ***Lister***, appears to have been sometimes overlooked that:

> *"… a master…is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes — although improper ones — of doing them."*

[26] However, the problem with this latter aspect of Salmond's analysis, as was highlighted by McLachlin J in ***Bazely v Currie*** [1999] 2 S.C.R. 534, is that it did not treat adequately with intentional torts. On this point, Sykes J (as he then was) opined in ***Allan Campbell v National Fuels & Lubricants Ltd, Roy D' Cambre and Solomon Russell*** at paragraph 52 that:

> *"…it also does not easily accommodate torts that involved a deliberate course of conduct which are pleaded as a claim in negligence and not in terms of an intentional tort…".*

The learned judge went on to say at paragraph 53 of the judgment that making a determination as to whether vicarious liability should be imposed on an employer in cases involving the commission of intentional torts by the employee is more likely to pose problems when compared with cases involving torts occasioned by negligence because the former implies intentional wrongdoing which:

> *"…oftentimes, if not invariably,* ***involves an act that is contrary to the express instruction or expectation of the employer…[and] … is often times a negation of the duty required****." [emphasis supplied].*

[27] However, as Lord Steyn was anxious to point out in ***Lister***, the law has moved on from its previous position of ambivalence with respect to the potential applicability of the doctrine to situations involving the commission of intentional torts. In ***Lister***, the Defendant company ran a boarding school for boys and had employed a warden to oversee the daily operations of the school, as well as to see to the discipline, supervision and care of the boys after school hours. However, it was eventually discovered that the warden had sexually abused a number of the boys in his care over a three (3) year span, unbeknownst to his employers at that time. While the sexual abuse took various forms, a distinctive feature of the abuse was

that it tended to be perpetrated within the context of the wardenôs exercise of control over the boys and his administration of disciplinary action in relation to them. Accordingly, the question to which the Court was ultimately constrained to address its mind was whether the defendant company, who had hired the warden, could be held vicariously liable for his intentional sexual abuse of the boys in his charge.

[28] In an effort to resolve this issue, Lord Steyn thought it prudent to first dispense with a correlative issue concerning the applicability of the doctrinal principles relevant to the imposition of vicarious liability, as conceived of and expressed by Salmond above, in cases like ***Lister*** which involved the commission of intentional torts by the employee as against those that were occasioned by their negligence. On this point, the learned law Lord said at paragraph 16 that:

> *"…**it is necessary to face up to the way in which vicarious liability sometimes embraces intentional wrong doing by an employee**" [emphasis supplied].*

[29] Thereafter, the test was reformulated so as to allow for a more flexible and judicious approach to the application of the doctrine to be adopted in cases involving the commission of an intentional tort. In this connection, Lord Millett at paragraph 69 expressed himself thus:

> *"One of these steps in the analysis could, I think, be elided to impose vicarious liability where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment…What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing and not to verbal formulae."*

[30] According to Lord Clyde in ***Lister***, the closeness (or sufficiency) of the connection may be gauged by asking whether the wrongful acts can be seen as ways of carrying out the work which the employer authorized (see paragraph 37 of ***Lister***).

In addition, Sykes J (as he then was) at paragraph 55 of ***Allan Campbell*** observed that the approach advocated by Lord Steyn underscores the need to:

> *"…**look broadly at what the employee was required to do** and not isolate the act that results in the commission of the tort." (emphasis supplied).*

[31] According to Sykes J (as he then was), the analysis provided by Lord Steyn above was ñsharpenedò by Lord Millett who at paragraph 65 of ***Lister*** suggested that account be taken of the inherent risk of any activity engaged in by the employer. More particularly, Sykes J quoted Lord Millett as follows:

> *"These passages [referring to Fleming and Atiyah] are not to be read as confining the doctrine to cases where the employer is carrying on a business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. **If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.**ò (emphasis supplied)*

[32] In the final analysis, Lord Steyn stated that at paragraph 28 of ***Lister*** that the decisive question to which the Court had to address its mind, having regard to the fact that the employers entrusted the care of the children in the boarding school to the warden, was whether the wardenôs torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable (adopting the broader approach discussed above). Ultimately, he determined that it would be fair and just to hold the employers vicariously liable for the tortious acts of the warden given that ñthe sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House.ò (see par. 28 of ***Lister***).

[33] Sykes J (as he then was) at paragraph 68 of ***Allan Campbell*** adumbrated a number of what he called ñproper considerationsò which should guide any determination as to whether vicarious liability should be imposed in any given situation. Such considerations include but are not limited to:

> *(a) What is the duty to the claimant that the employee broke and what is the duty of the employee to the employer, broadly defined;*
>
> *(b) Whether there is a serious risk of the employee committing the kind of tort which he has in fact committed;*
>
> *(c) Whether the employer's purpose can be achieved without such a risk;*
>
> *(d) Whether the risk in question has been shown by experience or evidence to be inherent in the employer's activities;*
>
> *(e) Whether the circumstances of the employee's job merely provided the opportunity for him to commit the tort. This would not be sufficient for liability;*
>
> *(f) Whether the tort committed by the employee is closely connected with the employee's duties, looking at those duties broadly.*

ISSUE

[34] The real issue is whether, in all the circumstances of the instant case, the JUTC can be held vicariously liable for the tortious acts that were alleged to have been committed by Ms. Whitfield, its servant and/or agent.

ANALYSIS

[35] The largely uncontroverted evidence of the Claimant, is that the Ms. Whitfield gratuitously and unlawfully assaulted her on two separate occasions, as discussed earlier in the review of the evidence. Additionally, owing to the fact that the Ms. Whitfield neglected, for reasons unknown, to provide evidence reflecting her own account of what transpired between herself and Ms. Lindsay on the date of the

incident in question, the Claimantôs account is the only narrative before the Court that is relevant to how the incident occurred. In resolving the primary issue as identified, the Court must consider the following:

a. Whether the 1st Defendant was acting as a servant and/or agent of the 2nd Defendant at the time of the incident;
b. Whether the acts committed by the 1st Defendant against were so closely connected with her employment as a driver to the 2nd Defendant as to make the 2nd Defendant liable for those acts;
c. Whether the 2nd Defendant should be held vicariously liable for the tortious acts of the 1st Defendant against the Claimant;

Was Ms. Whitfield the servant and/or agent of the JUTC at the relevant time

[36] The evidence of Ms. Lindsay establishes conclusively that Ms. Whitfield was the servant and/or agent of the JUTC at the time of the incident which caused her to sustain injuries. The JUTC has unreservedly acknowledged that as she was in its employ at the material time, it is in fact the case that she was their servant and/or agent at the time of the incident.

Were the tortious acts committed by Ms. Whitfield so closely connected with her employment as to make the JUTC vicariously liable for those acts?

[37] The dicta of Sykes J (as he then was) in ***Allan Campbell*** is quite useful in making a determination as to whether vicarious liability ought to be imposed in any situation. Mrs. Kay Thompson- James in her witness statement in support of the JUTCôs case stated that Ms. Whitfield, as a driver to the JUTC, would have been charged with transporting passengers safely from one point to their destination. It is therefore plain on the evidence of Mrs. Thompson-James, that the 1st Defendant would have owed the Claimant, as a lawful passenger aboard a bus she was driving, some duty of care which, broadly-defined, which entailed ensuring that she was transported to her destination safely. It cannot be said that a job to safely

transport passengers to their destinations could possibly create a serious risk of that driver, tasked with achieving that objective of safe transportation, would assault and/or batter a passenger in pursuance of that objective.

[38] Quite apart from the fact that there is no evidence to substantiate the JUTC's contention that Ms. Whitfield was provoked and acting in self-defense when she assaulted the Claimant, the witness statement of Mrs. Kay Thompson-Jones, speaks only to a risk of JUTC's drivers being confronted by disgruntled passengers, in which case they should go to the nearest police station and seek assistance in having them removed. This was the only risk, as borne out on the evidence of Mrs. Thompson-Jones, that was contemplated as being capable of materialising within the context of the discharge of their job functions by a driver.

[39] At no point was there a risk, much less a serious one, of a JUTC driver assaulting and/or battering a lawful passenger on one of its buses, and especially in the absence of any credible threat of physical harm, injury or death. As such, it is highly improbable that there was a serious risk of Ms. Whitfield committing the kind of tort that she committed against the Claimant, especially as the assaults seemed to have been part of a personal vendetta carried out in response to Ms. Lindsay's comments. Even if such a serious risk existed, it is not reasonable to be described as being either necessary for or otherwise beneficial to the achievement of the 2nd Defendant's purpose.

[40] It is safe to say that no evidence was presented by any party to these proceedings that demonstrated that if a serious risk of Ms. Whitfield committing the tort in question even existed, that it is one which is inherent in the employer's activities. As alluded to above, the only risk which evidence presented in this case would tend to show was capable of materialising, was the risk of drivers being accosted by disgruntled customers. Moreover, even if such a risk were to materialise and be in turn capable of giving rise to a correlative risk of a physical altercation ensuing between a passenger and a bus driver, it would still be untenable to say that the risk of a bus driver, without reasonable cause or lawful excuse, assaulting and/or

battering a passenger on more than one occasions, is inherent in the transportation of passengers to their destinations. Such a risk, even if it were shown to exist, would simply be too remote.

[41] In relation to the fourth consideration, in line with the reasoning of Sykes J (as he then was) in ***Allan Campbell***, it is true that but for her job as a driver, Ms. Whitfield would not, in the particular circumstances of this case, have been in a position to assault and/or batter the Claimant. In the first assault she used the fact that she was in the driver seat and could manipulate the doors to allow passengers offer as the opportunity to kick Ms. Lindsay when her back was turned. In the second, she directed her to the front door where she could again assault Ms. Lindsay. Accordingly, it can be said that her job provided her with the opportunity to commit the tort. However, as the learned judge emphasised, this, without more, would not be sufficient to establish liability on the part of the employer.

[42] Indeed, as the Court opined in ***Lister***, in order for vicarious liability to be affixed to the employer, the Claimant must do more than show that the job created the opportunity to commit the tortious act. In fact, the Claimant must go further by showing that the conduct complained of was so closely connected with the job functions of the employee at the material time that it would be just and fair to hold the employer vicariously liable.

[43] With regard to the fifth consideration outlined in ***Allan Campbell***, while the Claimant has sought to persuade the Court that the tortious acts of Ms. Whitfield were closely connected with her job functions, with the principal job function being to transport passengers safely from one point to their destination, it is submitted that there is no evidence to suggest that this is actually the case. In fact, the evidence adduced in relation to the nature of the 1st Defendantôs job and, to some extent, her specific job functions, seem to suggest the very opposite. More specifically, the evidence presented by JUTCôs Human Resource Officer arguably calls into question the closeness or sufficiency of the connection between what Ms. Whitfield was hired, trained and dispatched to do in relation to JUTC

customers, and what she ultimately did to Ms. Lindsay. Lord Clyde opined in ***Lister***, the sufficiency (or closeness) of the connection may be gauged by asking whether the wrongful action can be seen as ways of carrying out the work which the employer had authorised.

[44] In the instant case, it is very doubtful that it could reasonably and objectively be said that assaulting a passenger on more than one occasions, especially in the absence of any tangible evidence to suggest that one was attacked or threatened with death or the infliction of grievous bodily harm, can be seen as a way of carrying out the work of transporting passengers safely to their destination. This is not a conclusion which, on a balance of probabilities, one could reasonable arrive at from the evidence presented in this case. As such I do not find that the tortious acts committed by Ms. Whitfield were so closely connected with her employment as a driver to the JUTC, that it would be fair and just to hold the JUTC vicariously liable for them.

CONCLUSION

[45] While it is most unfortunate that Ms. Lindsay was made to suffer such indignity and injustice while on her lawful business, it is pellucid that on an application of the legal principles on vicarious liability, that it would be neither fair nor just to hold the 2nd Defendant vicariously liable for the tortious acts of Ms. Whitfield. Judgment is therefore given in favour of the 2nd Defendant, the JUTC, against the Claimant, Ms. Lindsay, with costs to the JUTC, to be taxed if not agreed.