Judgment 1/2012

Stephen Mark Le Huray and The States of Guernsey in the matter of an application for leave to appeal – (Civil Action File 1299)
Royal Court – 22nd June 2011 &
Court of Appeal (Civil Appeal File No 434)
- 19th January, 2012

22nd June 2011 - Application for leave to appeal judgment of 14th April 2011, granted.

19th January 2012 – Appeal from the Royal Court to determine whether the States of Guernsey are vicariously liable for the actions of the Police and Customs Officers in the performance or purported performance of their law enforcement functions. Appeal dismissed in relation to Police Officers and allowed in relation to Customs Officers.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 22nd day of June 2011, before Richard John Collas Esquire, Deputy Bailiff alone,

STEPHEN MARK LE HURAY

Plaintiff

V

THE STATES OF GUERNSEY

Defendant

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL

Whereas on 14th April the Deputy Bailiff gave judgment in the above matter and allowed the Defendant's exception de fonds regarding a preliminary point of law as to whether the States of Guernsey is liable at law for the wrongful acts or omissions of Police officers and Customs officers in the performance or purported performance of their law enforcement functions and whereas the Plaintiff sought leave to appeal the said decision and whereas the Deputy Bailiff considered the written submissions of Advocates N J Barnes and J Hill counsel for the Plaintiff and Defendant respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and GRANTED leave to appeal.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between **Plaintiff**

STEPHEN MARK LE HURAY

And

Defendant

THE STATES OF GUERNSEY

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL

Decision handed down: 22nd June 2011

Before: Richard John COLLAS Esq., Deputy Bailiff

Counsel for the Plaintiffs: **Advocate N J Barnes**
Counsel for the Defendant: **Advocate J Hill**

Cases, texts & legislation referred to:

The Court of Appeal (Guernsey) Law, 1961, section 15(e)
Practice Note (Court of Appeal (Civil Division)) [1999] 1 WLR 1027
McNamara v Gauson 2009-10 GLR 387

1. I have received an Application by the Plaintiff for leave to appeal the judgment delivered by me on 14th April 2011. The Application is opposed by the Defendant. I have the benefit of written submissions from Counsel for the Plaintiff and Defendant dated 26th May 2011 and 6th June 2011 respectively. Counsel were content for me to deal with the Application on the basis of their written submissions.

2. Leave to Appeal is required under Section 15(e) of The Court of Appeal (Guernsey) Law, 1961 because my decision was an interlocutory judgment as it concerned a point of law which, with the consent of the parties, was heard as a preliminary matter. The preliminary issue is expressed in paragraph 1 of my judgment as being "*whether the States of Guernsey is liable at law for the wrongful acts or omissions of Police officers and Customs officers in the performance or purported performance of their law enforcement functions"*. I observed in my judgment that the question had not previously had to be decided by a court of law in Guernsey. I answered the question in the negative.

3. The question was a pure legal issue. I do not believe I am being unfair to the Plaintiff if I summarise the grounds of appeal by saying he disagrees with my legal analysis and wishes to re-argue the same issues before the Court of Appeal.

4. The test I propose to apply in considering whether to grant leave is that set out in Practice Note (Court of Appeal (Civil Division)) [1999] 1 WLR 1027. In my decision in McNamara v Gauson 2009-10 GLR 387, I explained why I believe that is the correct test to apply in Guernsey.

5. The first issue I have to decide is whether "*an appeal would have no realistic prospect of success. A fanciful prospect is insufficient"*.

6. I have carefully considered the reasons submitted on behalf of the States of Guernsey as to why the appeal has no real prospect of success as well as the Plaintiff's criticism of my judgment.

7. Whilst I stand by the decision I delivered and the reasons I gave, I am not able to say that there is no real prospect of the Court of appeal reaching a different decision.

8. The point of law had not previously been considered by a Guernsey court, as I have said. It involved a number of considerations including: the relevant Guernsey Law which was similar, but not identical, to legislation elsewhere; legal decisions in other jurisdictions, including Commonwealth jurisdictions; developments in the law of vicarious liability in Guernsey and elsewhere; and Human Rights law.

9. I also had to consider not only the position of Police officers, on whom counsel had concentrated most of their argument but also Customs officers in relation to whom there was less guidance to be found in the decisions of other jurisdictions.

10. I can accept that there is a real prospect that the Court of Appeal may come to a different conclusion than I did. Even if my decision is upheld as respects Police Officers, the Court of Appeal might decide differently concerning Customs Officers.

11. I am therefore satisfied that I should grant leave to appeal. I do not have to decide whether the second limb of the test is satisfied, namely whether the appeal will give rise to a question of general importance. I am inclined to the view that it is satisfied. Persons who may have a right of action arising from the manner in which Police and/or Customs Officers have discharged their law enforcement duties are entitled to know who they should sue. The officers themselves, including their Chief Officers, may wish to know their position and, of course, the States of Guernsey are entitled to know for whom they may be liable.

12. Leave to appeal is hereby granted.

IN THE COURT OF APPEAL OF GUERNSEY

The 19th day of January, 2012 before The Hon Michael Jacob Beloff QC presiding, Michael Scott Jones QC and Clare Patricia Montgomery QC

STEPHEN MARK LE HURAY

Appellant

and

THE STATES OF GUERNSEY

Respondents

In the matter of the appeal by the Appellant from a decision of the Royal Court, handed down on the 14th April 2011;

Whereas, on the 13th September 2011 THE COURT heard from Advocate N J Barnes for the Appellant and HM Procureur for the Respondents, and on the 15th September 2011 reserved their judgment;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto; and

1. DISMISSED the appeal so far as concerns police officers; and

2. ALLOWED the appeal so far as concerns customs officers.

J TORODE
Registrar of the Court of Appeal

Approved Judgment
19 January 2012
Approved Amendment 22.02.12

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

Before: **Michael J Beloff Q.C. JA President**
M S Jones Q.C. JA
C P Montgomery Q.C. JA

Between: **STEPHEN MARK LE HURAY** **Appellant**
AND
THE STATES OF GUERNSEY **Respondents**

Counsel for the Appellant: **Advocate N J Barnes**
Counsel for the Respondent: **H M Procureur**

JUDGMENT

The President

Introduction

1. This is an appeal brought with permission of the Deputy Bailiff of 22nd June 2011 against his judgment delivered on 14th April 2011. It raises the issue as to whether the States of Guernsey is liable at law for the wrongful acts or omissions of its police officers and customs officers in the performance or purported performance of their law enforcement functions, a matter of general, even constitutional, importance and no little complexity. The question has not previously had to be decided by a Court in this jurisdiction. The Deputy Bailiff decided that the States of Guernsey is not so liable.

2. Questions arise as to whether the test to decide whether there is such vicarious liability *vel non* is one or more of the following: a test of employment: a test of control: a test of function and (if so) whether of source or nature: and whether there is a constitutional override or even a form of sovereign immunity. A further question is whether the positions of police and customs officers can be distinguished. Finally there is a question of what, if any, impact the European Convention on Human Rights has upon the issue.

3. The case law concentrates on when (and why) public authorities are not liable for police torts: but not what factors (if any) could make them liable. Marshall and Loveday in The Police;

Independence and Accountability; The Changing Constitution 3rd ed. by Jowell and Oliver, show the variety of theories which underpin the absence of municipal and central governmental liability for acts of constables in various jurisdictions; Scotland; the Canadian provinces; the states in the USA and Australia (pp290-8). In South Africa the cases are inconsistent as to whether, and, if so, when such vicarious liability may in fact exist: J Milton ''The Vicarious Liability of the State for the Delicts of the Police'' South African Law Journal 1967 625.

4. But first I must set the scene.

Factual Background

5. The following summary of the assumed factual background is taken substantially from the Appellant's Cause. (I substitute "Appellant" for the Plaintiff in the interests of clarity), and information, provided without objection from Advocate Barnes, by HM Procureur.

6. On an unspecified date customs officers intercepted at the Post Office a parcel that was thought to contain controlled drugs. On the morning of 25th September 2000, they caused a controlled delivery of the parcel to be made at an address in Rue de Barras, Vale, following which in a joint operation by Guernsey customs and police officers a number of persons were arrested, three of whom were in due course convicted and sentenced.

7. The Appellant is not one himself of those three convicted persons. He was arrested by customs officers, as part of the operation. The customs officers arrested and detained the Appellant utilising section 55 of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 ("the Customs Law"), the offence under investigation being detailed in section 77 of the Customs Law in connection with a prohibition or restriction on importation by virtue of section 2 of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 ("the Drugs Law"). He was subsequently detained at police headquarters where he was interviewed by customs and police officers. In due course he was charged by the police with an offence which (I infer) was under the Drugs Law, and was brought before the Magistrate's Court. He was held in police custody and was subsequently charged by the police. [The police were involved, we were told, in order to assist with the detention, interviewing and charging of the Appellant, pursuant to their customary law powers.] On four separate occasions applications made on his behalf for him to be released on open remand were refused. On 6th February 2001 he was committed for a trial fixed to start on 2nd July 2001 in the Royal Court. On 28th June 2001, the Royal Court ordered that the trial could not proceed unless certain material was disclosed to him by the prosecution. The prosecution chose not to disclose that material. On the following day, 29th June 2011, the prosecution having offered no evidence, the Appellant was formally acquitted.

8. In the present proceedings, the Appellant claims damages for false imprisonment and assault (including loss of income and legal fees) as well as aggravated and exemplary damages, totalling in all £225,000.

9. The Appellant alleges that the criminal charges against him were based on false evidence, in particular statements made by three customs officers, contrary to the true facts, to the effect that he had been seen riding his motorcycle along Rue de Barras at 09.40 hours on the morning of the controlled delivery of the parcel. He also alleges that the investigating customs officers made false statements that they had found a substance thought to be cannabis resin in a garage to which he had access and which he had permitted them to search. The Appellant claims that the cannabis was either planted by the investigators in the garage or never in fact found there at all.

10. In his contentions the Appellant says he is unable to identify all the individual officers involved, so as to claim against each: in any event, it is obvious that even could he do so, their ability to pay the substantial sums claimed is at the very least doubtful.

11. For the purposes of the appeal I shall assume without - I stress - finding both that the Appellant's factual allegations are correct (or at any rate viable) but that for him to pursue his claim would not be productive unless the States of Guernsey can be made liable for the torts committed by the individual unidentified officers, either police or customs.

Guernsey Legal Instruments: Police Officers

12. I start by considering the position of the police in Guernsey.

13. Pursuant to the Report of a Committee, established in 1914, but because of the exigencies of war not reporting finally until 21st February 1919 the police in Guernsey are subject to the Loi Ayant Rapport à la Police Salariée Pour L'Ile Entière 1920 ("the 1920 Law"):

> ***Article I***
>
> *Il sera établi aux frais des Etats de cette île une Police Salariée pour l'île entière le quel corps exercera à la place des Connétables de l'île les fonctions suivantes savoir :-*
>
> *(a) la surveillance de toutes les affaires criminelles de l'île;*
>
> *(b) le maintien de la paix et du bon ordre de l'île;*
>
> *(c) la mise à exécution des lois et des ordonnances de la Court Royale, à l'exception de celles qui sont purement civiles;*

(d) les démarches nécessaires à faire pour la tenue des levées de corps;

(e) la surveillance des lois et ordonnances relatives à la circulation des véhicules sur les routes, rues et chemins de cette île;

(f) la surveillance des havres de l'île, des lieux licenciés pour la vente de liqueurs spiritueuses, vins, bière et cidre, des côtes d l'île et de la pêche;

(g) tous autres devoirs qui pourront lui être imposés de temps à autre par Ordonnance de la Cour Royale, sur la recommandation du Comité.

Article II

Le corps de la Police Salariée sera sous la surveillance et l'autorité d'un Comité composé de neuf membres nommés par les Etats dont au moins deux tiers seront membres des Etats; trois membres sortiront de charge à la fin de chaque année. Le Comité élira de parmi ses membres un Président chaque année.

Les Jurés-Justiciers de la Cour Royale, le Superviseur de la Chaussée et Trésorier des Etats, et les Officiers du Roi seront inéligibles au dit Comité.

Article III

Le corps de la Police Salariée sera composé d'un Inspecteur nommé par les Etats, et de tel nombre de Sergents et d'Agents de Police qui sera de temps à autre trouvé nécessaire par le Comité des Etats, et qui seront nommés par le dit Comité.

14. Various amendments and additions were made to the 1920 Law in 1938, 1947, 1949 and 1986. In particular by the Island Police Force Establishment (Guernsey) Law 1949, paragraph 2 provided "*The Establishment of the Island Police Force shall be such as the States may from time to time determine*". [The Deputy Bailiff noted that since that time the responsibility for appointing and dismissing officers has lain with the Chief Officer of Police, (Judgment para 17).]

15. The Police Committee (Amendment) (Guernsey) Law, 1990 provides:

Article II

Le Corps de la Police Salariée sera sous la surveillance et l'autorité d'un Comité dont les statuts seront de temps en temps, prescrits par résolution des Etats de Guernesey:

> *Pourvu toutefois que les Jurés-Justiciers de la Cour Royale de Guernesey et les Officiers de la Reine de l'Ille de Guernesey seront inéligibles au dit Comité.*

At the material time (although no longer now) the relevant committee was the Home Department.

16. Police in Guernsey have always had the power to arrest, detain and charge[1].

17. The statement of the standard conditions of employment of a Guernsey policeman, pursuant to the Conditions of Employment (Guernsey) Law 1985, describes the employing department (sic) as the Home Department[2].

The Status of a Police Officer at Common Law in England and Wales

18. The seminal case is that of *Fisher v Oldham Corporation* [1930] 2 KB 364 ("*Fisher*") a case of a wrongful arrest and detention. By 1930, the date material to the claim before the Court, the relationship between local government officials and the police was governed in part by the Municipal Corporations Act 1882 ("the 1882 Act") which created a watch committee with responsibility for appointing borough constables. On appointment the constables were required to be sworn in before a local justice. The watch committee had both the power to frame such regulations as they deemed expedient for preventing abuse or neglect and to ensure the efficient discharge of the constable's duties, and the power to dismiss a constable whom they considered to be negligent (see generally Halsbury Laws 4th ed Vol 36(1) para 205).

19. The Plaintiff in *Fisher* claimed that those provisions of the 1882 Act established a relationship of master and servant between an Oldham police officer and the Defendant Corporation. McCardie J. dismissed that argument. After a review of how (in his perception) the role of constable had evolved over the centuries, he determined that:

> *"Prima facie, therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and regulation." (p. 371)*

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1 See usefully the Guernsey Police Guidance Manual 2000. As of 5th April 2004 they carry out those functions in accordance with the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003 ("PPCEL").

2 We were informed that the Home Department is simply a Committee of the States of Guernsey. Like all such Committees, the Board of that Department has only those functions assigned to the Department by the States, whether by resolution or by statute. The States, through the Home Department or otherwise, gives no operational instructions to arrest, detain or charge, nor is it empowered to do so. Operational responsibility and direction is exclusively exercised by the Chief Officer.

and therefore concluded:

> *"I hold that the defendants are not responsible in law for the arrest or detention of the Appellant. The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn "to preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace." If the local authorities are to be liable in such a case as this for the acts of the police with respect to felons and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change."*(p.377)

20. In *Farah v Commissioner of Police of the Metropolis* [1998] Q.B. 65 ("*Farah*") a claim was brought by a Somali refugee against the Police Commissioner pursuant to section 48(1) of the Police Act 1964 alleging false imprisonment, assault and battery, malicious prosecution and unlawful discrimination under the Race Relations Act 1976 ("the RRA").

21. The Court of Appeal had, *inter alia*, to consider the effect of section 32 of the RRA whereby the chief constable could be held liable for the actions of his officers in contravention of the RRA if either the officers were the employees of the chief constable (section 32(1)) or they were acting as his agents and with his authority (section 32(2)). It was common ground that the officers were not the employees of the chief constable. The issue to be decided was, therefore, whether the police officers were the agents of the chief constable.

22. In his leading judgment, Hutchinson L.J. who accepted that police officers were "*not employed but hold their office under the Crown" (*79B*)* dismissed a submission based upon a passage in Clayton & Tomlinson on Civil Actions Against the Police, 2nd edition (1992), at p39 said to be supported by *Hawkins v Bepey* [1980] 1 W.L.R. 419 that police officers are now to be regarded as agents of the chief officer. He held that *Hawkins* was determined on its "*rather special facts*" and not in conflict with *Fisher* (at 83A). Hutchinson L.J. concluded:

> *"In my view there is no valid ground for concluding that the officers in the instant case were acting as agents of the commissioner"* (p.83B).

23. Otton L.J. said, more generally, that *"In my view the concept of principal and agent is inimical to the status of a police constable. It is ingrained in the law of the constitution that police constables are office holders and there is no relationship of employer and employee." (para. 5)* (85F). Peter Gibson LJ agreed with both judgments (p. 86).

24. *Farah* thus made clear – if it had otherwise been in doubt because of the linguistic imprecision of McCardie J in *Fisher* – that police officers were no more servants of central than they were of local government. This had indeed been expressly stated in the Privy Council case of *AG of NSW v Perpetual Trustee Co Ltd* 1955 AC 452 ("*AG of NSW*") where the Board stated that the cases:

> "*showed convincingly that neither changes in organisation nor the imposition of ever-increasing statutory duties have altered the fundamental character of the Constable's office. Today, as in the past, he is in common parlance described in terms which aptly define his legal position as "a police officer, "an officer of justice," "an officer of the peace". If ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the State … … "* (p. 480-81)

and concluded:

> "*there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category, his authority is original not delegated, and is exercised at his own discretion by virtue of his office. He is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognised in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master"*. (p.489-90)

25. In England any perceived risk that third parties might seek, in consequence of *Fisher*, to claim damages for torts of police officers against central, as distinct from local government was nullified by the definition of Crown Servant in the Crown Proceedings Act 1947, section 2(6) which excluded, seemingly designedly, police officers who, <u>not</u> being paid wholly out of monies provided by Parliament, were taken out of the category of crown servant for whose torts the state might otherwise be liable.

26. The proposition of common law that police officers are neither servants of local or central government nor agents of either is vouched for, albeit not for identical reasons, first by other English jurisprudence than that already cited including *R v Commissioner of Police of the Metropolis ex p Blackburn*: 1968 2 QB 131 per Lord Denning MR at p.135-136 and *Sheikh v CC of Manchester* 1990 1 QB 63 at p. 643, second by all major commentaries (see eg Hood Phillips and Jackson Constitutional and Administrative Law 8th ed p454-5; Bradley and Ewing Constitutional and Administrative Law 12th ed pp530-1; Wade and Forsyth Administrative Law 10th ed pp.108-109; De Smith Judicial Review 6th ed [pp.19-012-013]; Halsbury Law, Vol 36(1)0 para 305; Salmond and Heuston on the Law of Torts 21st ed

[1402]; Winfield and Jolowicz on Tort 16th ed at para 20-07; Street on Tort 12th ed p.661; Charlesworth and Percy on Negligence 12th ed, para 3-111; Booth and Squires "The Negligence Liability of Police Authority": para 10.03), third by Commonwealth jurisprudence notably the Australian case of *Enever v The King* (1906) 3 Commonwealth L. R. 969 (another wrongful detention claim) ("*Enever*") where Griffiths C.J. said:

> *"At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown".*

but clarified in what sense by adding:

> *"the powers of a constable, qua peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. . . . A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application."* (p.975-6)

as well as decisions of the Supreme Court of Canada, the Supreme Court of Massachusetts and the Supreme Court of South Africa all cited in *Fisher* at p.372.

27. This inability to accord effective redress to persons, the victims of torts committed by individual officers, generated in England an improvised pragmatic solution. (Clayton & Tomlinson Civil Actions against the Police 3rd ed 1-063 p.39.) The practice was to give financial support on an *ad hoc* basis. One such case provoked heated debate in Parliament and led, *inter alia*, to the establishment of the Royal Commission on the Police. The Commission proposed a more robust and permanent solution, namely to make by statute a Chief Constable a joint tortfeasor with the individual officers under his direction and control, and to provide that damages and costs be paid out of police funds. This proposal was given legislative effect in the Police Act 1964 s.48(1) (2: now Police Act 1986 s.88(1)(2)). Thus in England the Appellant's difficulties both as to identification of the actual police wrongdoers and the absence of a guarantee of adequate compensation would not exist. It is, however, significant that in England it was concluded that express statutory provision was required.

28. De Smith opines

> "*Generally it has been argued that the imposition of personal liability on individual decision makers or vicarious liability on their employer, may have a detrimental effect on their behaviour and that direct governmental liability is to be preferred in an ideal scheme of remedies"(*19-013*).*

Such ideal scheme has not, at any rate to date, been adopted in England.

29. Two commentators Marshall: Police and Government 1956 ("Marshall") Ch.2-3 and Lustgarten: The Governance of the Police 1986 ("Lustgarten") Ch 2-3 have, from the perspective of constitutional law, criticized the doctrine of police independence as, in the latter's words *"of recent origin, contrary to earlier practice and understanding and no part of the tradition of English liberty"* [p.48] and criticized the jurisprudence in support of it as *"replete with errors of logic and historical analysis and marred by crude value judgements inappropriate to the judicial function*". [p.67]

30. Their concerns appear to be that to grant the police in law such special immunity offends against notions of democratic accountability (Marshall p.16). The rationale for such grant may, however, have been inspired by concerns of partisan political interference by public - especially local - authorities (Marshall p.27). It also ensured that financial liability for tortious actions by police could not be visited upon the ratepayers' balance sheet (*Fisher*), although, on the other side, the public authority who lost the services of a constable through the negligence of some third party could not, at a time when the claim *per quod servitium amisit* was still recognised, obtain compensation from that third party (*AG of NSW*).

31. *Fisher*, the same commentators note, set rather than relied on English precedent. Although two claims in Scotland seeking compensation against local authorities for police torts had failed [Marshall p. 40] there was no previous English case relied on in argument except *Stanbury v Exeter Corporation* 1905 2 KB 838 ("Stanbury"), which was concerned with a health inspector who negligently detained the plaintiff's sheep wrongly suspected of being infected with sheep seal, where Wills J *obiter* suggested that a local authority would not be liable for the torts of the police because their functions were national, not local (pp842-3) as well as *Enenver*, which supplied a quite different rationale for the same conclusion i. e. that a constable's authority was original, not delegated.

32. Marshall himself recognised that the notion of police independence and absence of liability of any public authority for their torts were interconnected [p.39]. He seems to consider that the tail (absence of vicarious liability for the police for police torts) was wagging the dog (absence of police accountability). But it is not easy to understand how at common law the two could be separated: the jurisprudence regards them as two sides of the same coin. Certainly if police authorities could control police operations, they would not be other than vicariously liable for a tortious outcome. However it may be that, if the concept of police independence is limited to the exercise of operational discretion, those academic concerns are exaggerated.

33. Immunity from control of particular operations does not after all *ipso facto* equate to immunity from influence by democratically constituted bodies. In *R v DPP ex p. Duckenfield*

2000 1 WLR 55 Laws LJ dissected the Police Act 1996 and summarised its effect: "*Looking at the whole picture displayed by these provisions, it is clear that the Chief Constable is in charge of day to day operations, the police authority has a role in relation to strategy but this is subject to the overall direction of the Secretary of State*" (p.78).

This analysis allows for police operational independence as well as confirming their accountability to elected persons.

34. It is within that framework that the autonomy of the individual officer in exercising critical powers of arrest remains unaffected. In *O'Hara v Chief Constable of RUC* 1997 AC 286 Lord Steyn referred "*to the longstanding constitutional theory of the independence and accountability of the individual constable"* p.293. Ryan and Williams in "Police discretion" Public Law p.284 suggest further legislative controls on the power to arrest, but start from the premise that the power is the officer's and his alone.

35. It is, however, notable that no criticism has been made by either commentator of the position in tort, (in itself) but only of what has been (or may have been) inferred from it, (its implications) as appears from a later observation by Marshall in "Constitutional Conventions" 1983 Chapter 8 entitled "The status of the Police".

> *"Since there was almost a complete absence of any decided cases directly bearing on the constitutional status of police it may have been natural enough for the decision in Fisher's case to the effect that the police were not servants for the purpose of civil liability to be picked out by textbook writers and others and given wider constitutional significance."*

See too The Police: Independence and Accountability, Marshall & Loveday *cit. sup.* "*It is not clear that this rule of civil liability can be used to define the proper constitutional relationship between police and police authorities*" p.295.

36. In any event, even if arguably the law took in some way a wrong turning in 1930, as regards absence of vicarious liability for police torts, the unqualified endorsement given to *Fisher* in later authority and commentary is a road block preventing the possibility of retreat.

Vicarious Liability: General

37. It seems indeed well established that the general law of vicarious liability which has undergone various mutations has no relevance in this particular context. Chapter 6 of Clerk & Lindsell on Torts, 19th ed sets out the different and developing tests that have been applied by the courts in identifying whether the relevant relationship of employer and employee exists in any particular case.

* The 'control test'. (Para 6-06)

* The 'organisation test' which involved "asking was the worker part of the employer's association; was his work co-ordinated by the employer, so that the employer controlled the "where" and "when", rather than the "how"? (para 6-09).

* The 'multiple factor test' which provides that all aspects of the relationship are to be assessed and the assessment itself is seen as a complex undertaking (para 6-09).

* The 'economic reality test' (para 6-10).

38. But, however the test for vicarious liability is formulated, Clerk & Lindsell considers that the position of police officers at common law is unchanged.

> *"A police officer is neither an employee of the Crown nor of the police authority and therefore, at common law, the only legal remedy available to a person injured by a police officer's tort lies against the officer himself."* (para 6-96).

The Appellants' position

39. Advocate Barnes invites us to discard this volume of consistent authority and analysis, and conclude that it has no application to the particular position in Guernsey.

40. His submission, which underwent several mutations between its written and its final oral form, was founded on three main propositions, firstly that the fact that police officers in Guernsey were undisputedly employees meant that the English and Commonwealth cases where such relationship between officer and authority was lacking were of no relevance: second that the position of the States and of the Watch Committee in *Fisher* could, in any event, be distinguished; third that, had the inequity of the common law not been remedied by statute (as in the Police Acts 1964 and 1988), the judges would have found a means of revising or overriding the *Fisher* principle, and that we could and should do so. He also prayed in aid *dicta* in *Carteret v State of Guernsey* ("*Carteret*") a decision of LB Finch, 19th November 2004 (unreported).

41. The third submission is entirely speculative and it is not easy to see how (or why) English judges would have taken that hypothetical step rather than recommend legislative reform. We certainly should not do so in Guernsey, indeed could not do so without trespassing unwisely outside our role as judges. I say no more about it. The other two submissions, particularly the first, merit closer consideration.

42. The cases provide a strong and consistent line of authority for the proposition that, in the absence of a person being an employee or agent of another, vicarious liability will not arise.

The question before us posed by Advocate Barnes is whether it is the corollary of that proposition that if a person is an employee (or agent) of another, vicarious liability will always arise.

43. Advocate Barnes could point us to no authority to that effect save for *Lambert v Grant Eastern Railway Co* (1909 2 KB 776) where the Court of Appeal held that a special constable of a railway company is a servant of the company against whom an action for false imprisonment would lie if he arrested a person on suspicion of felony without any reasonable grounds for so doing. The case is of limited assistance to Advocate Barnes's argument since the company was a private body and it was a foundation of the Court of Appeal's reasoning that the special constable was performing duties as an officer of the company (page 783). Moreover, in *Fisher*, McCardie J suggested that *Lambert* was a decision *per incuriam* and that the authorities to which it made reference, in particular, *Edwards v Midland Railway Co* (6 QBD 287) rested on a special basis derived from special statutory provisions (*Fisher* pp. 374-5). McCardie J, it may be inferred, did <u>not</u> consider the question of employment *vel non* dispositive.

44. The main issue before us fell for consideration north as well as south of the border between England and Scotland. In *Jessie Young v Magistrates and Town-Council of Glasgow* (1891) 18R 825, an action for damages for wrongful apprehension against two police constables and the Magistrates and Town-Council of Glasgow as Police Commissioners, the Lord President (Inglis) said:

> "*I entertain no doubt that the action would not lie against the Magistrates either as such or as Police Commissioners. It appears to me that the pursuer has altogether mistaken the position in which the Magistrates stand. They are bound to maintain a police establishment, and to provide money for the purpose. But the management of the policy of the city is in other hands – it is in the hands of the Committee of the Commissioners of police. who have not been called in the action, and of the Sheriff. Therefore, I come to the conclusion that the constables who are charged with effecting a wrongous apprehension are not in any sense servants of the Magistrates as Commissioner of Police, and the latter cannot be made answerable."* [p.828]

Lord Adam said:

> "*I think there is no case whatever against the Magistrates and the Town-Council. I think the police-constables are the servants, and act under the authority of the Committee of the Police Commission who are a statutory body different from the Magistrates and Town-Council. Along with the Sheriff, they are the authority who*

> *have the charge and control of the police. It is now proposed to make the Magistrates and Town Hall responsible for the conduct of persons with whose appointment, they have nothing to do. This would be a complete novelty and I think we must dismiss the action as against these defenders."* [p.829]

Lord McLaren said:

> "*the argument which has been addressed to us for the pursuer is founded on a mistaken analogy between cases like the present and cases in which an employer of labour is held responsible for the negligent acts of persons in his employment on the principle of respondeat superior. The relation between the Magistrates and the Police is not a relation of employment, but is an official relation constituted by statute. ... ... The Town Council who are the Police Commissioners of Glasgow have no right to interfere with the police in the execution of their duties in relation to the apprehension and detention of prisoners, and therefore the Town-Council cannot be responsible for the negligent performance of these duties.* [p.829]

He added:

> *"I do not say that where the police are acting under the direct orders of the Sheriff or Magistrate, the official who gives the order may not be responsible in an action containing proper substantive averments of malice towards the person aggrieved."* [p.829]

45. In *Girdwood v The Standing Joint Committee of the County of Midlothian* (1894) 22R 11, the question was whether an action lay against the defenders as a body, or against the individual members of that committee, for faults said to have been committed by police constables of the county, acting within the scope of their duty, and without special orders from the committee or any of its members. The standing joint committee was created by the Local Government (Scotland) Act, 1889 ("LGA"), and consisted of a certain number of county councillors and/or commissioners of supply, and of the Sheriff of the county. It was deemed to be a "police committee" as established under the County Police Act 1857, and "*shall have all the powers of such committees, and be subject to all the provisions of"* that Act, except so far as modified by the LGA.

46. It was held that an action did not lie. The powers and duties of the standing joint committee were those of the police committee under the County Police Act, and it was clear from a consideration of that Act, and particularly of clauses 6 and 15, that the county police were not subject to the control or orders of the committee. They were subject to the control and bound

to obey the orders of the chief constable, the Sheriff, and the justices of the peace, but they were servants of the State, and had distinct duties imposed by statute. The relations of master and servant, or employer and employed, did not subsist between the committee and the police, and there was, therefore, no legal ground on which either the committee or its members could be called to account for the errors of the police.

47. At one point, the Lord Ordinary, Lord Kincairney, simply said that:

> "*The charge of the peace of the county was not committed to the police committee. The duties of the police-constables, however, are not only those which the chief constable, Sheriff, or Justices direct, but are embodied in the Act of Parliament. They are not the servants of the chief constable, Sheriff or Justices, but of the State, with distinct duties imposed on them by statute."* [p.13]

The Lord Ordinary's decision was appealed, but the appeal was refused by the Second Division of the Inner House, without reasons, the Lord Justice-Clerk (Macdonald) commenting "*The pursuer's case is hardly stateable*". [*ibid.* p. 13]

48. In *Muir v The Provost, Magistrates and Councillors of the Burgh of Hamilton* 1910 1 SLT 164, the pursuer, who was a pit sinking contractor, brought an action against the Provost, Magistrates and Councillors of the Burgh of Hamilton, for damages for illegal apprehension by a sergeant in the police force of the burgh. Lord Salvesen relied on the previous cases:

> *"In Young's case Lord Mc'Laren said that "the relation between the magistrates and the police is not a relation of employment, but it is an official relation constituted by statute"; and in the case of Girdwood, Lord Kincairney said, with regard to the Standing Committee, "they have, under statute, no control of the police; the relation of master and servant to or of employers and employed does not subsist between the Committee and the police, and there is, therefore, no legal ground on which either the Committee or its members can be called on to answer for errors of the police."* [p.167]

Lord Salvesen concluded his review of the cases with these words:

> *"I think these observations apply to the present case. The defenders, as I read the statutes, have no power to appoint police constables, or to dismiss them; and they are, therefore, not the employers or masters of the individuals who may be appointed by the chief constable, nor answerable as such for their errors. It is nothing to the purpose that they are empowered to raise the funds necessary to provide for the maintenance of a police establishment; for, in so doing, they are merely the*

> *administrative body appointed by statute to levy the necessary funds at the expense of the ratepayers.*
>
> *It would thus appear that, in the case of an illegal apprehension by a police constable belonging to the county police, or by a constable of either of the two largest towns in Scotland, no action would lie, apart from special instructions, against any person except the constable himself; and it would be somewhat anomalous if a different state of matters prevailed in the police burghs, because of the somewhat different statutory provisions which regulate the maintenance of a police force within such burghs."* [p.167]

49. In *Dornan v The County Council of Lanarkshire* 1916 2 SLT 282 ("Dornan") the pursuer brought an action against the County Council of Lanarkshire for damages in respect of injuries sustained by him in consequence of having been knocked down, on 7th June 1915, by a motor van belonging to the County Council and driven by a police constable, Graham.

Lord Anderson said:

> *"Was Graham a servant of the County Council? In the case of Young, Lord Adam expressed the opinion that Glasgow police constables "are the servants and act under the authority of the Committee of the Police Commissioners, who are a statutory body different from the magistrates and town council . Lord Mc'Laren agreed with Lord Adam on this point and added that "County constables are subject to the joint control of the Sheriff and the Police Committee (now the Standing Joint Committee of the County Council and of the Commissioners of Supply)". In the case of Girdwood Lord Kincairney took the view that county constables were not under the control or subject to the order of the Police Committee; and that, while police constables were bound to obey the directions of the Chief Constable, Sheriff or Justices of the Peace, they were servants of the State, with distinct duties imposed on them by statute. Now, whichever of these conflicting views as to who is the employer of a police constable is correct, there is nothing in the County Police Act 1857 (the leading statute regulating the police force in the counties of Scotland) or in the Local Government (Scotland) Act 1889, which established County Councils and Standing Joint Committees, to justify the suggestion that a police constable is the servant of the County Council or subject in any way to be controlled or directed by that body. On the contrary, all the indicia which suggest the relationship of master and servant point the other way. A police constable is appointed and controlled and is dismissible only by the Chief Constable (section 6 of 1857 Act). His wages, though in part provided by the County Council, are not in fact paid to him by that body. It is*

therefore plain that, by statutory enactment, a police constable is not, in ordinary circumstances, a servant of a County Council. But the pursuer avers that Graham was pro hac vice the servant of the County Council. Now A. may borrow (so to speak) the servant of B. and become responsible for his negligence. But to effect this result it is necessary that B.'s servant should be (1) subject to the orders of A., and (2) doing A.'s work when the negligence complained of takes place.

"In the present case I have shewn that a police constable is never subject to the orders of a County Council, but only to the directions of his own superiors in the force, of the Sheriff, or of the Justices of the Peace. The pursuer does not aver that orders were given directly to Graham by the County Council, but alleges that the County Council "directed" the Chief Constable to send three of his men with the motor van, and that Graham was one of the men sent. I hold this averment, to use the language of Lord Kincairney in Girdwood, "merely a somewhat reckless contradiction of the provisions of the statutes, and not an averment which can be remitted to probation". By the 6th section of the County Police Act 1857 the Chief Constable has "the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from the Sheriff, or from the Justice of the Peace in general or quarter sessions assembled, and to the rules established for the government of the force in terms of this Act" . These rules now emanate from the Secretary for Scotland, to whom a chief constable is ultimately responsible.

"I accordingly hold that, on the occasion in question, Graham was not subject to the orders of the County Council. Nor was he on that occasion doing the County Council's work. The pursuer avers that he was, because it is the "Council's duty, under various public statutes, to take charge of criminals after sentence and convey them to prison."

"The pursuer's Counsel did not refer me to these public statutes nor could he do so for they do not exist.....

"I accordingly reach the conclusion, on this part of the case, that the pursuers' averments, when tested by an examination of the statutory enactments and a consideration of the known facts of public administration, disclose no case of liability against the County Council. I shall therefore sustain the first plea in law stated for these defenders and dismiss the action as laid against them."

50. The Scots cases appear to me to turn on the absence of an employment relationship (as well as particular Scottish statutes). In my view however even if an employment relationship exists it is not sufficient to establish vicarious liability in all cases. As Atiyah: Vicarious Liability (1967) states:

> "*There are in fact important and distinct (though related) questions which it is necessary carefully to distinguish.*
>
> *"First, there is the question whether the person whose status is in question is a servant at all, or whether he is a public official holding a legally recognised office, but not employed under a contract of service.*
>
> *"Secondly, there is the question whether, even where a contract of service is shown to exist, the master is liable for acts done by the servant where the servant has done the act in virtue of some special qualifications or status. This is a distinct question from the first, because a person may well be employed under a contract of service, and yet be in a special position which enables him to exercise special statutory or common law powers (p.78)."*

He notes the distinction between these two types of case is hinted at in *Mahoney v Besley* (1865), 4F & F. 544, and is definitely recognised by the Australian High Court in *Field v Nott* (1930), 62 CLR 660, and in South Africa where it was held that a policeman was a Crown servant like any other, but that the Crown was not liable for wrongful arrest: *Lawford v Minister of Justice*, 1914 NPD 284; *British South Africa Co, v Crickmore* [1921] App D. 107; *Sibiya v Swart* [1950] 4 SA 515.

51. This key distinction was also clearly recognised in Australia: *Oceanic Crest Shipping v Pilbara Harbour Services Limited* 66 ALR 29 ("*Oceanic*") where the High Court of Australia determined that an employer was not vicariously liable for negligent navigation of a pilot since the pilot was executing an independent duty which the law cast upon him.

52. Gibbs CJ in his leading speech stated:

> *"The decision in Fowles v Eastern and Australian Steamship Co Ltd has since been understood in this court as depending on the circumstance that the pilot was executing an independent duty which the law cast upon him: Field v Nott (1939) 62 CLR 660 at 672, 675; Little v Commonwealth (1947) 75 CLR 94 at 114; cf Attorney-General for NSW v Perpetual Trustee Co (Ltd) (1952) 85 CLR 237 at 265, 300-1. In Little v Commonwealth at p 114 Dixon J (as he then was) cited Fowles v Eastern and Australian Steamship Co, Ltd as one of the authorities which establishes or*

exemplifies "the doctrine that any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability". The doctrine to which Sir Owen Dixon referred in that passage was first laid down in Australia in Enever v R (1906) 3 CLR 969, which followed Tobin v R (1864) 16 CB (NS) 310;143 ER 1148 and Stanbury v Exeter Corporation [1905] 2 KB 838. It has been criticized by text writers (see Fleming: The Law of Torts 6th ed (1983), at p 346 and Atiyah: Vicarious Liability in the Law of Torts (1967), at pp 75-8), and has been abrogated by statute in some jurisdictions. However, it is firmly established as part of the common law of Australia: other cases in which it has been applied include Baume v Commonwealth (1906) 4 CLR 97 and Irvin v Whitrod (No 2) [1978] QB R 271.

"The principle is not limited to cases in which the duty which is being carried out is imposed by statute -- the question is whether the person who committed the tort was acting in the performance (or supposed performance) of a duty imposed by law (either by statute or by common law) or whether his authority to act was derived from his employment. Further, although many of the decisions in which the principle has been applied were cases in which the Crown was sought to be made liable for the tort of a public officer, the principle is not confined to such cases. Stanbury v Exeter Corporation was a case in which a local authority was held not to be liable for the negligence of an inspector whom it had appointed, where the inspector was negligent in carrying out a duty imposed by statute upon him and not on the local authority. That decision was followed, not only in Enever v R (see particularly at pp 976, 986-7, 992-3) but also in Fisher v Oldham Corporation [1930] 2 KB 364, and both Stanbury v Exeter Corporation and Fisher v Oldham Corporation were mentioned with apparent approval in the judgment of the Judicial Committee in Attorney-General for NSW v Perpetual Trustee Co (Ltd) [1955] AC 457 at 478-80; see also R v Commissioner of Police of the Metropolis Ex parte Blackburn [1968] 2 QB 118 at 136. There are three cases which might possibly be thought to support a contrary conclusion; in Goff v Great Northern Railway Co (1861) 3 El & El 672;121 ER 594; Edwards v Midland Railway Co (1880) 6 QBD 287 and Lambert v Great Eastern Railway [1909] 2 KB 776 it was held that employers of special constables under private statutes were vicariously liable for wrongful arrests which they had effected, but those cases were discussed in Fisher v Oldham Corporation at pp 373-4, and the view was there taken that they depended on the effect of particular statutes. The fact that in the decisions of this court to which reference has been made, Fowles v Eastern

> *and Australian Steamship Co, Ltd is regarded as falling within the principle plainly shows that this court was of the view that the doctrine is not confined to the Crown."* [pp.33-34]

53. Brennan J said:

> *"When the Crown or a public authority is the employer of a public officer who is charged by statute with the exercise of an "independent responsibility cast on him by law", what is done in discharge of that responsibility is not done on behalf of the employer. The Crown or public authority , having no authority either to discharge that responsibility or to control its discharge, is not acting through the officer and what is done by the officer in discharge of the independent responsibility by the employee is not regarded as done in the course of his employment as a servant of the crown or public authority. The statute which charges the officer-employee with the exercise of the independent responsibility denies that what he does in discharge of that responsibility is done on behalf of or for the benefit of the Crown or public authority."* [p.52**]**

The distinguishing factor for Brennan J was that*:*

> *"an employer which is a private trading corporation having a commercial interest in its employee's exercise of a statutory responsibility stands in a different position. It may be within the object and powers of a trading corporation to employ servants who will discharge an independent statutory responsibility. True it is that such a servant needs no authority from and is not amenable to control by his employer in acting in discharge of his independent statutory responsibility, but in so acting he is doing what he is employed to do and he is doing it on behalf of his employer. This seems to be the basis on which railway companies employing special constables became liable for a wrongful arrest made of a malicious prosecution launched by those constables."*

With regard to 20th century developments in what may be called the "control" test for employer's liability, Brennan J quoted a 1986 Australian authority thus:

> *"...the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters'"* [p.53]

and continued:

> *"The Crown or a public authority escapes vicarious liability for the negligence of an employed public officer discharging an independent statutory responsibility because the discharge of that responsibility is not a function which the employer is authorized to perform. A trading corporation whose objects are advanced by the employment of servants to discharge independent statutory responsibilities and whose powers extend to the employment of servants to advance the corporate objects may be held liable on the same footing as railway companies employing constables, that is: "liable to the extent which their servant and agent is liable - not further than that, but to that extent." ... ... In the present case, the piloting of the Oceanic Crest by Captain Hammonds was an activity which he performed as part of his duties to his employer, a trading corporation."* [p.53]

54. The other judges who concurred with Gibbs CJ, Wilson and Dawson JJ, both appear to attach weight principally to the independent functions point, Dawson J gives a particularly helpful analysis of the issues concerning control or otherwise, in the following passage:

> *"No doubt in Fowles' case and the other cases, absence of control was a significant factor in establishing the independent status of a pilot employed by the Crown or a harbour authority or its equivalent. But it is absence of control in a different or more fundamental sense than the practical absence of control which recent cases reject as a decisive indication that there is no relationship of master and servant. There is a difference between absence of control which, in the case of the pilot, arises from the fact that his status does not permit it and absence of control, which in the case of other employees, stems from the fact that the employer lacks the skill or training necessary to exercise control. True it is that in a technologically complex world the relationship of master and servant may exist notwithstanding the inability of an employer to exercise control over the manner in which a skilled employee performs his work, but in those circumstances it is the practicality of the situation which robs the absence of control of its significance rather than anything else. It is not so much that there is no right of control, but that it is practically impossible to exercise it because of the skill involved, except in incidental matters."* [p.67]

55. I find *Oceanic* a valuable authority. Its approach, discarding a blunt employment test, is in harmony with the approach of the Privy Council in *AG v NSW* which denies that changes in organisation can alter "*the fundamental character of a constable"*. It is also in line with the observations of Lord Alverstone in *Stanbury*:

> "*If this had been an ordinary case of delegation by the corporation of duties which they had to perform or of power which they were entitled to exercise, then the*

> *ordinary rule in cases of master and servant and the doctrine of respondent superior might apply. This case, however, having regard to the position of the parties and to the statute and the order made thereunder, is, I think, very analogous in 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 good ground for contending that the corporation are responsible for their negligent acts.* (p.840-1)
>
> *"The inspector was not acting in performance of duties imposed by statute upon the defendants, or, in other words were not performing their urgent duties imposed on them and delegated by them to him, but was acting in discharge of duties imposed on him as inspector by order of the Board of Agriculture.* (p.841-2)*"*
>
> "*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 the corporation as directed by the statute."* (p.844)

56. In *Bushell v Port Authority of Trinidad and Tobago* (1998) 56 WIR 460 it was held that estate police, whose function was to defend property and persons of their employers, the Port Authority, engaged the employers' liability, not that of the state, albeit they swore oaths on appointment and were subject to the marginal control of The Commission of Police. *Fisher* and *AG of NSW* were distinguished in the leading judgment of de la Bastide CJ [p.465]. *Enever* was distinguished in the judgment of Ibraham JA. The latter recognised that *Enever* involved the act of a police constable and required consideration of the nature of his office [p.475]. But he did not suggest that it was wrongly decided; and he had previously noted that in *Trinidad and Tobago* "*every officer in the police service is in public <u>office</u>"*. (ditto)

57. Nowhere in the judgments in *Bushell* is there any express suggestion that the fact that a police officer has a contract of employment with the state means that the principles expressed in that trio of cases have no longer any application.

58. De la Bastide CJ said:

> *"The fact of the matter is that almost invariably (and this case is no exception) when estate police exercise the powers vested in them by the Supplemental Police Act ('the Act'), they are about the business of their employers rather than the business of the State. They are acting in defence of the property of the persons of their employers, their employer's senior officials or their customers. They are also effectively at the disposition and subject to the instructions of their employers. It may be said that, in so far as they prevent crime and apprehend and bring to justice those who commit*

> *crime, they are acting in the wider interest of the public and performing functions which would normally be performed by regular police, but this is wholly incidental and subsidiary to the service which they are providing to their employers. For these reasons I have come to the conclusion that there is no support to be found either in legal principle or in the authorities for treating the individual respondents as the servants of the State, rather than servants of the respondent authority, when they took whatever action they are found to have taken in relation to these appellants."* [p.463-4]

59. Ibrahim JA said:

> *"even though rural and estate police are supplemental bodies of police governed by the same Act, there is nevertheless a fundamental distinction between the two bodies, with the former being police officers with police powers exercisable in a defined area, whilst the latter are employees of estate owners clothed with the same police powers which they can exercise only in respect of offences committed on the estate on which they are employed and throughout the division in which the estate is situated.*
>
> *"Having regard to the foregoing, it is not unreasonable to conclude that rural constables, in the performance of their functions and especially having regard to the provisions of s 4(1) of the Act that classify them as an auxiliary to the police service in the performance of their ordinary duties, are acting as a part of the executive arm of the State and, accordingly, the State would be liable for their actions."* [p.470]

and then towards the end of his judgment, after analysing the English railway company cases:

> *"The estate constables are appointed principally to protect the property of their employer and the enhanced powers conferred upon them by the Act are designed to enable them to perform their duties more effectively and efficiently. They are not by that fact made servants of the State nor are their acts the acts of the executive arm of the State."* [p.477]

Hosein JA agreed with both judgments.

60. In response to this, Advocate Barnes acknowledges that the English and Commonwealth decisions state as a matter of principle that public authorities are not vicariously liable for public officers discharging an independent statutory responsibility because the discharge of that responsibility is not a function which the employer is authorised to perform. He submits however that such rule should not be applied in the present case. The days when public functions were discharged by independent public officers have gone. For example, more than

a century has passed since the duties of highway surveyors were transferred to local authorities. That type of public administration is historical and, Advocate Barnes submits, it would no longer be appropriate to apply legal principles developed in that obsolete context. It would nowadays be unrealistic to conclude that the States can escape liability for the activities of its law enforcement agencies, which extend, *inter alia*, to planning officers, revenue officers, social security officers and officers investigating breaches of housing control law.

61. In my view, while for obvious reasons, in a modern society the rights and obligations of a police officer vis a vis his employer requires spelling out, his operational duties in fact derive not from that contract, but from statute (the 1920 Law Article 1). He is no less an officer because he is an employee; and it is as an officer that, whoever it was, carried out the powers of arrest, detention and charge germane to this case. The oath he swears (the 1920 Law Article III (2)) before the Royal Court "*to the good and faithful discharge of his duty"* refers to his duties under law and statute, not duties owed to the States.

62. We do not need to consider whether the States would be liable for an accident caused by the negligent driving of a police officer, whether during working hours or outside them. C.f*: Dornan*. Suffice it to say that the source of a police officer's power to drive does not lie in statute.

63. I turn to Advocate Barnes' second subsidiary argument. The position in Oldham in 1930, he submits, was different from that in Guernsey in 2000. Whilst police officers were subject to the aegis of the Watch Committee, this was accompanied by control exercised by the Secretary of State *Fisher* p.170 and the control exercised by Justices of the Peace who might give instructions to police constables [Municipal Corporations Act 1882 s.191(2) p.170]. By contrast the Court's role in Guernsey is limited to requests to the police for the arrest of defendants who have failed to appear before the Court. I find this to be a distinction without a difference. Focussing on the relevant comparison, i.e. between the Oldham Corporation and the States, it is clear the relationship of each with police officers was materially similar. The authority could set general policy; it could not interfere with particular operations. In any event Advocate Barnes does not explain how any such difference would result in the vicarious liability of the States in this case.

64. In *Carteret* an unsuccessful claim was brought against police for negligently allowing oil to remain on a highway, so causing a hazard to vehicles. The Lieutenant Bailiff stated in para 26 "*The Island Police Force comes under the States of Guernsey*" (146). The observation was *obiter* and made in a wholly different context. There is no indication that the issue before us was raised or discussed at all. It is of no assistance.

65. I conclude that the position in Guernsey is in harmony with the position adopted elsewhere and that the States is not vicariously liable for the torts of the police alleged in this action, and I turn to the potentially discrete issues raised by the claim against the States *qua* employer of the customs officers.

Guernsey Legal Instruments: Customs Officers

66. In relation to the Customs and Immigration Department, the governing Law is the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 ("the Customs Law"). Section 1 of the 1972 Law has the following material definitions:

*"**the Department**" means the States of Guernsey Home Department;*

*"**Chief Officer of Customs and Excise**" means the Chief Officer of Customs and Excise for the time being appointed by the States Policy Council;*

*"**Chief Revenue Officer**" means the Chief Officer of Customs and Excise and shall include any officer of Customs and Excise acting by or under his authority;*

*"**officer**" means the Chief Revenue Officer or any other person authorised by the Department to act as an officer of Customs and Excise;*

*"**police officer**" means –*

(a) in relation to Guernsey, Herm and Jethou, a member of the salaried police force of the Island of Guernsey and, within the limit of his jurisdiction, a member of the special constabulary of the island of Guernsey; and

(b) in relation to Alderney, a member of the said police force and a member of any police force which may be established by the States of Alderney;

(c) in relation to Sark, the Constable , the Vingtenier and a member of the said police force of Guernsey

*"**the States**" means the States of Guernsey;*

*"**States Revenue Officer**" means a person authorised by the Department to act as an officer of Customs and Excise; "*

67. Section 2 of the 1972 Law provides:

"The Chief Revenue Officer shall, subject to the general control of the Department, be charged with the duty of collecting and accounting to the Department for the duties of customs and excise."

68. Section 3 provides, so far as material, that:

"*3.(1) Any act or thing required or authorised by or under this Law or any other enactment to be done by the Chief Revenue Officer may be done by any officer or other person authorised generally or specifically in that behalf in writing by the Department or by the Chief Revenue Officer.*

(2) Any person, whether an officer or not, engaged by the [orders] or with the concurrence of the Department or the Chief Revenue Officer (whether previously or subsequently expressed) in the performance of any act or duty relating to an assigned matter which is by law required or authorised to be performed by or with an officer, shall be deemed to be the proper officer by or with whom that act or duty is to be performed, and any person so deemed to be the proper officer shall have all the powers of an officer in relation to that act or duty."

69. Section 4 provides for assistance to be given by police officers to customs officers: but there is no reciprocal obligation to be found in the 1972 Law or anywhere else.

"It shall be the duty of every police officer to assist, within the territorial limits to which his authority extends, in the enforcement of the law relating to any assigned matter."

70. Section 55 provides:

"***Provisions as to detention of persons***

(1) Any person who has committed, or whom there are reasonable grounds to suspect of having committed, any offence under the customs or excise Laws may be detained by any officer or police officer at any time within three years from the date of the commission of the offence.

(2) Where it is not practicable to detain any such person as aforesaid at the time of the commission of the offence, or where any such person having been then or subsequently detained for that offence has escaped he may be detained by any officer or police officer at any time and may be proceeded against in like manner as if the offence had been committed at the date when he was finally detained.

(3) Where any person has been detained under the provisions of this section by a police officer the police officer shall, as soon as reasonably practicable, give notice of the detention to an officer.

(4) Where an officer detains a person under the provisions of this section, or where he receives notice pursuant to subsection (3) hereof that a person has been detained by a police officer, he shall, as soon as reasonably practicable, notify Her Majesty's Procureur or Comptroller of the detention."

71. Section 56 provides:

"***Provision as to detention, seizure and condemnation of goods, etc***

(1) Any thing liable to forfeiture under the customs or excise Laws may be seized or detained by any officer or police officer.

(2) Where any thing is seized or detained as liable to forfeiture under the said Laws by a police officer, he shall, subject to the provisions of subsection (3) of this section, either –

(a) deliver that thing to the Chief Revenue Officer; or

(b) if such delivery is not practicable, give to the Department notice in writing of the seizure or detention with full particulars of the thing seized or detained.

(3) Where the person seizing or detaining any thing as liable to forfeiture under the said Laws is a police officer and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Laws, it may be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought:

Provided that –

(a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Chief Revenue Officer;

(b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police.

(4) Subject to the provisions of subsection (3) of this section and to the provisions of the First Schedule to this Law, [any] thing seized or detained under the customs or excise Laws shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned as forfeited, shall be disposed of, in such manner as the Board may direct."

72. Section 60 provides:

"***Protection of officers, etc in relation to seizure and detention of goods, etc***

(1) Where, in any proceedings for the condemnation of any thing seized as liable to forfeiture under the customs or excise Laws, judgment is given for the claimant, the Royal Court, sitting as an Ordinary Court, may, if it sees fit, certify that there were reasonable grounds for the seizure.

(2) Where any civil proceedings are brought against the States or any person authorised by or under this Law to seize or detain any thing liable to forfeiture under the said Laws on account of the seizure or detention of any thing, and judgement is given for the plaintiff, then if either –

(a) a certificate relating to the seizure has been granted under subsection (1) of this section; or

(b) the Court is satisfied that there were reasonable grounds for detaining that thing under the Law,

The plaintiff shall not be entitled to recover any damaged or costs:

Provided that nothing in this subsection shall affect any right of any person to the return of the thing seized or detained or to compensation of any damage to the thing or in respect of the destruction thereof.

(3) Any certification under subjection (1) of this section may be proved by the production of the Act of Court relating thereto."

73. There is no statute which equates customs officers with police officers but there is a plethora of enactments which include "*customs officer*" within the definition of "*police officer*": The Bail (Bailiwick of Guernsey), Law 2003 – section 19; The Criminal Justice (Miscellaneous Provisions) (Bailiwick of Guernsey), Law 2006 – section: 18; The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey), Law 1999 – section 51; The Disclosure (Bailiwick of

Guernsey), Law 2007 – section 17; The Drug Trafficking (Bailiwick of Guernsey), Law 2000 – sch 2, section 69; The Misuse of Drugs Law (Amendment) Ordinance, 2010 – section 1; The Police Property and Forfeiture (Bailiwick of Guernsey), Law 2006 – section 6; The Prevention of Corruption (Bailiwick of Guernsey), Law 2003 – section 8; The Terrorism and Crime (Bailiwick of Guernsey), Law 2002 – section 79; The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007 – S56; The Criminal Justice (International Co-Operation) (Bailiwick of Guernsey) Law 2001 – S10; and the False Documents and Domicile, etc (Bailiwick of Guernsey) Law 1998 – section 13[3].

74. Turning now to the powers of customs officers potentially relevant to this appeal:

(i) **Power of arrest[4]**

The power to arrest is set out in section 55 above. It details the provisions as to arrest and detention of persons.

(ii) **Power to detain**

The Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972 section 72 as amended also empowers an officer to detain a person who is not under arrest for the purpose of conducting a search of that person. This tends to support the view that the power to detain under 55, amounts to "arrest" and that "detention and arrest" under that section is one and the same thing.

All other references to detention in the Customs Law are in relation to goods.

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[3] Legislation in force at and prior to 2000 would use the word detain in the same sense as arrest. As in the UK different statutes used different labels. The distinction between actual arrest, then detention, was only made with the introduction of PPCEL 2003, "**Powers of arrest**".

PPCEL 2003 Schedule 5, paragraph 8 amended the Customs Law by substitution wherever the following words were used in relation to a person

Detained	Arrested
Detaining	Arresting
Detention	Arrest
To detain	To arrest

This would support the interpretation prior to PPCEL whereby any reference to detaining a person, including section 55, implied a power prior to arrest.

[4] Customs officers can now utilise the powers under PPCEL 2003, since they apply to customs officers by virtue of section 89 and schedule 5. Section 28 of PPCEL gives the power of "*arrest without warrant"* but this was not the position in 2000.

(iii) Power to charge persons

customs officers do not currently and did not at any time charge persons.

The Status of the Customs Officers at Common Law

75. It is stated *inter alia* in *Oceanic* and *Stanbury* (see paras [31-35] above) that the police are not the only persons whose activities (statute apart) may not engage the vicarious liabilities of their employers. However in this instance the Court is faced not with a surfeit but with a dearth of authority as to whether customs officers fall within that group. A solitary case involving a claim against the customs for malicious prosecution was drawn to our attention. In *Dunlop v HMRC* (CA unreported 12th March 1998) the claim was brought in England against the Commissioner. However the issue before the Court of Appeal was the date of accrual of the cause of action in that tort: the question of whether the Commissioners were liable for the torts of individual officers, and if so, on what basis, was not raised.

76. The Deputy Bailiff held (paras 54-55)

(i) when a customs officer is discharging a criminal law enforcement function, he has the same duties and responsibilities as a police officer doing the same task. They often (as in the present case) work alongside each other; the operation may be led either by a customs officer or by a police officer; and their roles are interchangeable.

(ii) in such tasks, the relationship between the individual officer and his superior, whether he is the Chief Officer of Police or the Chief Revenue Officer, is similar. Neither group of officers is under the control of any States committee.

(iii) The reasons for holding that a police officer enjoys a special status whereby he is neither the servant nor the agent of the States apply equally to a customs officer when discharging a law enforcement function.

(iv) There is therefore no legal justification for saying that the States of Guernsey is vicariously liable for the acts and omissions of one group of officers when it is not vicariously liable for the other group. Both groups of officers should have the same relationship with the States when they are discharging the same law enforcement functions.

77. There are obvious attractions in that analysis.

78. First, it would be *prima facie* peculiar if in a joint operation when the roles of customs and police officers were interchangeable and it was adventitious whether police or customs personnel effected the arrest and detention that the States would be liable in one scenario (customs arrest) but not in another (police arrest).

79. Second, there are statutory provisions to the effect that in the investigation of certain offences and gathering of evidence customs officers have the same powers as police officers (see the definition of 'officer' in section 1(1) of 1972 Law, as amended by section 2(1) of 1991 Law, and section 69(1) of The Drug Trafficking (Bailiwick of Guernsey) Law, 2000) (""Officers of Police" means .....(d) an officer within Section 1(1) of the 1972 Law") (see above).

80. There are, however, significant differences between police officers and customs officers; their respective roles have evolved separately over the centuries and they do not have identical incidents of office.

81. First a customs officer does not take an oath before the Royal Court on appointment, unlike a police officer.

82. Second the police are (and customs officers are not) "*warranted officers*" – every member of the police service is given a warrant card as an authority for executing the duties of his office.

83. Third customs officers do not have the customary powers inherited through statute by police officers.

84. Fourth customs officers do not have (and never have had) the power to charge.

85. Fifth the customs have certain non law enforcement functions (which the police do not) such as the collection and accounting of revenue. In this the States of Guernsey <u>does</u> have responsibility, vested through the Chief Officer, in making operational decisions and (more directly) specifically designated powers in the 1972 Law (e.g. the first schedule - condemnation proceedings of goods seized - powers of the "Board").

86. Considering the fifth point in more detail, section 2 of the 1972 Law imposes on the Chief Officer of Revenue <u>subject to the general control of the Department</u> the duty of collecting and accounting to the Board for duties of customs and excise. Three matters may be noted. First the duty is imposed on the Chief Revenue Officer not his subordinates. Second the control of the Board is general, not particular. Third the content of the duty is revenue collection, not law enforcement.

87. There is therefore a distinction in the 1972 Law between the duties of Customs and Excise of collecting and accounting for the duties of Customs and Excise, which is directed and

controlled by the States of Guernsey through the Chief Officer (section 2) (but with which the present case is not concerned) and the performance of duties such as law enforcement, (with which it is) by the Chief Officer or other officers similarly authorised (section 3) which are solely vested in officers or other persons generally or specifically appointed by the Chief Officer or the Board.

88. It follows that in discharging law enforcement powers such as those in section 55 (as amended) the duty to act does not come from an officer's contract of employment but from section 3 of the 1972 Law and only after they have been authorised as an officer by the Chief Revenue Officer or the Board.

89. In my view the key question from the perspective of the Law is therefore whether customs officers, in the context of arrest and detention, are performing original duties imposed *ab extra* by law, or delegated duties imposed by their contract of employment or otherwise.

90. I confess that I have not found this issue susceptible of easy resolution and for a long time was attracted by the pragmatic simplicity of the Deputy Bailiff's analysis.

91. However, and in my view critically, it is because he is the holder of a public office who acts in the performance of a duty (now statutory) to act, that vicarious liability for the wrongful act of a police officer or constable does not attach to his employing authority. His powers are given to enable him to perform that duty. As it is put in *Fisher*: *"The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn "to preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace.""* [p.377] There are similar references to the fulfilment of those duties in many of the cases which I have cited.

92. It is the nature of the constable's authority that marks the *"fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract."* See *AG of NSW* at pp.489-490. Under Section 2 of the 1972 Act, a customs officer is in that particular context of revenue collection certainly exercising a delegated, rather than an original authority (unlike a constable in performing any of his duties.) Section 3(1) of the 1972 Law further provides that an officer may do any act that the CRO may be required or authorised to do, as may any "other person authorised generally or specifically in that behalf in writing by the Department or by the Chief Revenue Officer". It would appear that under this provision toothe customs officer's powers are delegated. It would certainly be anomalous if the Board was not liable for

the wrongful acts of a person authorised by it to act generally or specifically. But if it was so liable, it would be also anomalous if the Board was not equally liable in respect of an officer who derives his authority from it. (See section (1)).

93. Furthermore, unlike a constable, a customs officer does not have general law enforcement powers. The latter may detain a person who has, e.g., committed "any offence under the customs or excise Laws" (section 55(1)). But, *"Where any person has been detained under the provisions of this section by a police officer the police officer shall, as soon as reasonably practicable, give notice of the detention to an officer"* (section 55(3)). Certain enforcement powers which may be exercised by an officer may only be exercised in the company of a police officer. (Sections 36 (power to take action for the prevention of smuggling) and 70 (power to search premises)). There is a power to search persons (section 72), but that is subject to the right of such person to be taken before a Jurat who may override the officer's power to search (section 72(3)). None of this suggests an equation between the police officer and the customs officer: but rather a form of hierarchical relationship.

94. The 1972 Law section 60 certainly envisages that the States may be held vicariously liable in damages for the unlawful seizure or detention of goods, and gives protection from liability where there were reasonable grounds for such seizure or detention, section 60(2)), this is inconsistent with possession of original (i.e. non-delegated powers by customs officers).

95. I therefore conclude that the States is liable vicariously for the torts of customs officers including those raised in the claim.

Human Rights

96. Advocate Barnes sought to rely on the provisions of the ECHR incorporated into Guernsey Law with effect from 1st September 2006. He confronted an immediate problem in that the events to which the claim related took place more than half a decade previously. The relevant dates are that the Appellant was arrested on 25th September 2000. The Project de Loi entitled "The Human Rights (Bailiwick of Guernsey) Law", 2000 was not approved by the States of Deliberation until two days after the arrest. It was approved by Her Majesty in Council on 13th December 2000 ("the 2000 Law") and the Order in Council was registered by the Royal Court on 22nd January 2001. There was then a delay of more than five years before the Law was brought into force, in its entirety, on 1st September 2006.

97. The 2000 Law. as is well established, does not provide retrospectively a sword as distinct from a shield, s.18(2) (for authoritative guidance on the analogous section under the Human Rights Act 1998 see *re McKerr* [2004] 1W.L.R 807). It is true that the interpretative provision (reading legislation down where possible to make it convention rights compatible)

applies to legislation whenever enacted s.3(2)(a), but Advocate Barnes could point to no legislation where interpretation in that way assisted his client's case. He also argued that the Court could make use of the Convention, as happened on the mainland, to develop the Guernsey Common Law even prior to the 2000 Law coming into effect. Even assuming this exercise to be open to us, we are in fact being invited (if my previous conclusions are correct), not to develop but to override the Common Law. Accordingly the human rights arguments fail *in limine*, and any observations hereinafter are *obiter*. But it may nonetheless be useful to consider them in case, on another occasion, where there is no time bar, they are sought to be resurrected.

98. Two Articles of the Convention were said to be engaged: Article 6 and Article 5(5). As regards Article 6 Advocate Barnes' argument proceeded as follows. Under the general law as in England and Wales persons who are the victims of the unlawful conduct of employed persons acting in the course of their duties are entitled to be indemnified by those persons' employers under the normal rules relating to vicarious liability. (Clerk and Lindsell *cit. sup.*) Therefore any legal provision which exempts the States from vicarious liability for a particular class of its employees constitutes a breach of Article 6(1), of the Convention, (fair trial). He relied on *Ashingdane v UK* (1985) 7 EHRR 528 ("*Ashingdane*") paragraph 57, *Fayed v UK* (1994) 18 EHRR 393 ("*Fayed*") paragraph 66-68, *Roche v United Kingdom* (2005) 42 EHRR 599 ("*Roche*"), and in particular the dissenting judgments of Judge Loucaides and others at pages 42, and of Judge Zupancic 46 and *Osman v UK* (1998) 29 EHRR 245 ("*Osman*"), at paragraphs 141-158.

99. In my view, Advocate Barnes' reliance on these authorities is misplaced. *Ashingdane* concerned s.141 of the Mental Health Act 1959 imposing restrictions on the ability of mental patients to have recourse to the Courts other than for acts done negligently or in bad faith. It was held that the section "*did not impair the very essence of the claimant's right to a Court or transgress the principle of proportionality itself"* (para 60).

100. *Fayed* concerned the defence of privilege attaching to a company inspector's report. The ECtHR recognised that Article 6(1) was concerned with procedural barriers to access to a Court, not with the content of civil rights but did not find it necessary to resolve on which side of the line the legal rule complained of fell commenting "*it may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or the remedy"* (para 67). The claim failed: the restriction was held to be proportionate (paras 82-83).

101. *Roche* was concerned with Section 10 of the Crown Proceedings Act 1947, which, subject to the conditions therein set out, immunised the Crown from claims in tort by members of the

armed forces whose death or injury was suffered in the course of their professional duties. The ECtHR held that the impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law. In such circumstances the applicant had no civil right recognised under domestic law which would attract the application of Article 6(1) of the Convention (para 124). It is notable that Advocate Barnes is constrained to rely on the dissenting not the majority judgments in *Roche*.

102. *Osman* impeached the substantive rule of common law which excluded, for public policy reasons, liability of the police for alleged negligence in the investigation and suppression of crime (para 154). However in *Z v UK* (2002 34 EHRR 3) the ECtHR, fortified by the presence of an *ad hoc* English judge, held that there had been no breach of Article 6(1) in the exclusion of liability of a local authority for children in their case who had suffered abuse. The Court recognised that the inability of the applicants to sue the local authority flowed not from a procedural immunity but from the applicable principles governing the substantive right in English law. In short *Osman* had been wrongly decided.

103. In *Roche* the ECtHR specifically endorsed the approach of Lord Bingham in *Matthews v MOD (*2003 UKH24) at 142:

> "*Although there are difficulties in defining the borderline between substance and procedure the general nature of the distinction is clear in principle and it is also clear that Article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system not with the substantive content of its natural law".*

104. In my view, fortified by that lapidary statement, Article 6(1) is concerned with procedural, not substantive, law. It does not oblige the member state to create or protect any civil right – that is or may be the function of other Convention Articles. It is concerned only to ensure where a civil right (in the Strasbourg autonomous sense) exists the legal system of the member state does not put disproportionate obstacles in the way of its enforcement. In *Roche* the main dissent included the following statement:

> "*The courts may examine whether there is sufficient legal basis for civil right in the States in question regardless of the domestic conditions or limitations".*

This is with respect wrong. It conflates substantive and procedural law, and stretches Article 6 beyond breaking point.

105. On this analysis Article 6(1) is not engaged at all in the present case. The Appellant has a cause of action against individual police or customs officers which he is free to bring. He had

no cause of action against the States for any torts of those officers, because of the substantive law of Guernsey. There has been, as far as I am aware, significantly no challenge to the *Fisher* doctrine since the ECHR was domesticated under the law of England and Wales by the Human Rights Act 1998 with effect from 2nd October 2000.

106. Advocate Barnes in the alternative raised an issue under Article 5(5) of the Convention which provides that "*Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation"*. The precondition is that a person has been deprived of his liberty by a states officer or body otherwise than in accordance with a procedure prescribed by law, which *inter alia* licences lawful arrest or detention. For this purpose I shall assume that the preconditions are satisfied in the Appellant's case. Advocate Barnes submitted that, in consequence, the Court must examine whether a person (here Mr Le Huray) has an effective remedy for compensation. If the only remedy is against an individual officer, it may not be effective in any case where identification of the officer concerned or recovery of an award made against him is difficult. He submitted that in such circumstances the right to receive compensation has to be met by the States as the Defendant; only the States with its deep purse can satisfactorily discharge any obligation to pay compensation.

107. There would, on its face, be (at least) two possible literal constructions of the Article: one (espoused by Advocate Barnes) that the state must satisfy any award of compensation made by an appropriate body in full: the other (supported by HM Procureur), that the state need do no more than provide a means whereby a victim can bring proceedings before a Court which can determine (without restriction) an appropriate sum for compensation: but whether or not those against whom such an award is made and enforced can satisfy it is immaterial.

108. In my view HM Procureur's construction is correct for the reasons as succinctly stated in Lester, Pannick and Herberg: Human Rights Law and Practice (3rd ed) para 4 5 72. "*The remedy required is one before a national court which leads to a legally binding award"*. See *Brogan v UK* 1988 11 EHRR 117 at page 67. *Fox, Campbell & Hartley v UK* 1990 31 EHRR 14. *Federov v Russia* (2007) 44 EHRR 544 paras 80-82. Mr Le Huray has a right to claim compensation. The Convention does not entitle him to bypass any difficulties in gathering evidence to sustain such a claim or any difficulties in benefitting from an award. HM Procureur said that in practice if proceedings were brought successfully against an individual officer or his chief officer it would be met by the States with a payment from general revenue unless it was covered by insurance.

109. In my view the Convention would not assist the Appellant, even had the matters of which he complains occurred this year.

CONCLUSION

110. Atiyah notes:

> "*So far as the answer to such legal questions may be influenced by general considerations of policy it is perhaps worth observing that there is everything to be said for treating public officials as the servant of somebody for the purposes of the law relating to vicarious liability and otherwise. If public officials of this nature are held not to be servants of anybody it follows that they alone can be liable for any tort committed in the course of carrying out their public functions, and the result must inevitably be to impose personal liability for loss either on the official himself, if he is financially able to meet it, or on the innocent victim, if he is not. Generally speaking the risk of injury to members of the public as a result of a public official committing a tort in the course of carrying out his statutory functions is one which ought to be borne by the public just as much as though the official were a servant, and the simplest way of securing this is to treat him as a servant of the body with whom he has the closest connections"* (Atiyah op cit p.78).

We are, however, concerned in the *lex lata*, not the *lex ferenda*. I would dismiss the appeal so far as concerns police officers, but allow it so far as concerns customs officers. The facts, of course, remain for determination.

JONES JA I agree

MONTGOMERY JA I also agree