THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: **AXAHCV2015/0087**

Between

MR ROCKLYN MAYNARD

Claimant

And

THE ATTORNEY GENERAL OF ANGUILLA

1st Defendant

And

MR JASON HODGE

2nd Defendant

Appearances:

Mr. Devin Hodge for the Claimant.

Mr. John McKendrick QC, Attorney General with him Mr. Ivor Greene for the 1st Defendant.

2018: February 20th; May 22nd.

JUDGMENT

[1] **MATHURIN, J.;** On 15th September 20l5 Mr. Rocklyn Maynard (Mr. Maynard) attended the customs warehouse in Road Bay, Anguilla to clear and retrieve goods he had received from Puerto Rico. Mr. Maynard states that while he was securing his vehicle after having packed his goods,

there was a verbal exchange between himself and Mr. Jason Hodge (Mr. Hodge). Mr. Hodge was the customs official who attended to him that day. Mr. Maynard states that he was about to leave the warehouse and was securing his vehicle with his back turned to Mr. Hodge who was at least 30 feet away. He states in his statement to the police shortly after the incident that as he was about to leave the premises he told Mr. Hodge *" that he was going to die worse than his mother did. Jason was standing in the doorway at the customs building at the time. I was 60 feet from Jason next to my truck standing. Jason then came towards me, "don't talk about my mother" and he chucked me into the truck."*

[2] In his witness statement in these proceedings Mr. Maynard states as follows;

> *"19. In my frustration I stated to the Second Defendant that he would die worse than his mother. At the time when I made the statement to the Second Defendant I was in the process of closing the flaps on the truck because the pallet had just been loaded, so my back was turned.*
>
> *20. The Second Defendant asked me what I said to him, so I repeated that he will die worse than his mother. All this time my back remained turned. When I was done closing the truck I turned to enter the truck and observed the Second Defendant approaching me. He then pushed me in the chest with both hands causing me to fall backward impacting the bed of the truck…"*

[3] Mr. Maynard states that Mr. Hodge's actions caused him to fall backward hitting a stationary truck and then falling onto the ground. Mr. Maynard states, as does the medical evidence, that he suffered a severe back injury with consequential adverse repercussions. On the 8th December 2015, Mr. Maynard filed this claim for damages against the Crown and Mr. Hodge.

[4] The parties agree that one of the discrete issues to be determined is whether the Crown should be held vicariously liable for the actions of Mr. Hodge, the said actions having been the cause of the injuries suffered by Mr. Maynard. Mr. Hodge only intends to defend the claim as to the quantum of damages. The Attorney General however contends in his amended defence that in the circumstances as they obtained on that day, Mr. Hodge's actions were outside the scope of his employment as a customs officer and the claim against the Crown, should be dismissed. The

parties agreed that by way of written representations to be presented to the court on 20th February 2018, the issue of liability of the Crown would be heard. Counsel for the parties expanded on these submissions at a hearing on that day.

Claimant's Submissions

[5] Counsel for the claimant, Mr. Devon Hodge, submits that in cases of intentional wrongs and vicarious liability, heed should be given to the guidance set out in **Clinton Bernard v AG of Jamaica [2004] UKPC 18** at paragraphs 18 and 19 where Lord Steyn stated;

> *"The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee"*

[6] Counsel submits the following issues for the determination of the court;

> (a) Was the wrongful act so closely connected with his employment that it would be fair and just to hold the employers vicariously liable?
>
> (b) Can the wrongful act be fairly regarded as a reasonably incidental risk to the type of business carried on by the 1st defendant?

[7] Counsel demonstrated the applicability of the *close connection test* in the case of **Mattis v Pollock [2003] 1 WLR 2158.** In that case a bouncer (Mr. Cranston) left the premises of employment at a nightclub after a dispute with a patron and returned with a knife that he used to stab the patron's friend Mr. Mattis resulting in serious injuries. The Court of Appeal held the owner of the nightclub (Mr. Pollock) vicariously liable despite the bouncer's intent on revenge, the fact that Mr. Cranston went home to get a knife and the fact that the incident took place 100 feet away from the nightclub, due to the close connection of the tortious act to the bouncer's employment and duties.

[8] Paragraph 19 in particular states;

> *"The essential principle we derive from the reasoning in <u>Lister</u> and <u>Dubai Aluminium</u> is that Mr. Pollock's vicarious liability to Mr. Mattis for Cranston's attack requires a deceptively*

simple question to be answered. Approaching the matter broadly, was the assault "so closely connected" with what Mr. Pollock authorised or expected of Cranston in the performance of his employment as doorman at his nightclub, that it would be fair and just to conclude that Mr. Pollock is vicariously liable for the damage Mr. Mattis sustained when Crantson stabbed him."

[9] Counsel also submits that the correct approach was stated in paragraphs 27 and 28 of **Lister v Hesley Hall Limited [2001] UKHL 22** in that the court has to consider "whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. The facts in that matter were stated by Lord Steyn as follows:

> *"Between 1979 and 1982 while the appellants were in their early teenage years they attended a school for maladjusted and vulnerable boys which was owned and managed by the respondents. During the course of that period they were the victims of repeated sexual and physical abuse by the warden of a boarding house in which they were resident as students of the school. The warden was employed by the respondents to look after and care for the students resident in the house. The warden was later tried and convicted for a large number of offences against the appellants and other boys. The appellants have claimed damages from the respondents for personal injury. It is not now contended that the respondents had failed to take reasonable care in selecting or supervising the warden. The claims now rest on the basis that the respondents are vicariously liable for the acts of their employee."*

[10] Counsel submits that on the facts, the House of Lords held that there was a sufficient connection between the work of a warden who was employed at a boarding school to run the school, organise activities and care for the boys after school and the sexual abuse that he committed, to hold his employer liable. He states that the House of Lords held as relevant that the abuse was committed at the time, premises and during the warden's care of the boys. Counsel added that the time and place at which an intentional wrong is committed will always be relevant but not necessarily conclusive to the issue of vicarious liability.

[11] Counsel submits that it is therefore material that the assault by Mr. Hodge took place at a customs port during the hours of operation whilst Mr. Hodge was in customs uniform and executing his

duties to the benefit of his employer. Counsel submits that the court ought to weigh heavily the connection between the wrongful act of Mr. Hodge and the duties he was employed to perform, as well as the risks incidental to the type of business that the customs carries on.

[12] There is no dispute as to the duties of the customs officer referred to by counsel in the Customs Act and the Warehousing Regulations. In accordance with the restrictions imposed by the Comptroller of Customs, Mr. Maynard was permitted to remove only goods at risk of being destroyed by rodents. Mr. Hodge was required to ensure that Mr. Maynard did not exceed that restriction. Mr. Hodge was required to take account of those goods removed to be able to ascertain any duty payable.

[13] It is submitted by counsel for the claimant that Mr. Hodge was obligated as an employee to be present and to supervise the entire process of Mr. Maynard separating and repacking his goods and removing the separated goods from the warehouse and up until Mr. Maynard's departure from the premises.

[14] Counsel for Mr. Maynard further submits that customs officers are tasked with the responsibility for and authority to manage trade in and out of the jurisdiction and he asserts that there are reasonably incidental risks to the job of customs officers. Counsel further submits that it is a reasonably incidental risk that persons engaged in trade whether legitimate or illegitimate may be uncooperative, hostile, insulting, insubordinate and even dangerous and so it is expected that customs officers are trained to handle reasonably incidental risks to the type of business carried on. He asserts that Mr. Maynard's frustration and the consequent insult levied by him was not a bizarre occurrence or a far-fetched risk of the job.

[15] Counsel submits that prior to the insult the interaction between the parties was discordant because of things said and done that were directly related to Mr. Hodge's employment. He refers to the fact that Mr. Maynard went above him to his superiors when he had refused to permit Mr. Maynard to remove the goods.

[16] Counsel detailed the evidence of the frustration of Mr. Maynard at how he was dealt with by Mr. Hodge in the execution of his duties. That he was annoyed is evident from the comments that he made to Mr. Hodge according to paragraphs 16 to 18 of his witness statement;

"16. The Second Defendant stood to the side observing with a noticeable smirk on his face. I stated to the Second Defendant that he should not worry because there were other officers before him who had more stripes than him and they were not around today…

17. I continued unloading the pallets and when we were finished I asked the Second Defendant if we could leave with the goods, he then walked from where he had been standing approximately thirty (30) feet away on a raised deck to inspect the goods.

18. After the Second Defendant was done inspecting the very items that he stood and observed us transfer for approximately thirty minutes in the hot sun, he stated that three rolls of paper towels among the items could not be taken. He then walked back to where he had been standing previously and continued to smirk at my wife and me."

[17] Counsel further submits that inasmuch as Mr. Hodge responded to Mr. Maynard's insults by assaulting him for his own benefit, "*vicarious liability is not necessarily defeated if the employee acted for his own benefit."* In this regard counsel refers to Lord Millet in **Dubai Aluminium Co Ltd v Salaam and Others** [2002] UK HL 48 at para 121

"*121. In that case I observed that it was no answer to a claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. Vicarious liability for tortious and even criminal acts had been established well before the end of the 19th century.* ***Lloyd v Grace, Smith & Co [1912] AC 716*** *which Lord Steyn described as a breakthrough, finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit. The consequence, he said, at p.224 was that "**an intense focus on the connection between the nature of the employment and the tort of the wrongdoer became necessary."***

122. The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of the kind in question…"

[18] Counsel referred to **Bazely v Curry** [1999] SCR 534 at paragraphs 41 (2) and (3) as stating the material consideration when assessing the potential of an employer for a wrongful act of an employee.

"(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place, (without more) will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally forseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following;

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee)

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employers enterprise;

(d) the extent of the power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power."

[19] Counsel considered those factors and submits the following factors to prove the connection between the creation of a risk and the wrong that accrued from that risk;

(i) the assault committed by Mr. Hodge came immediately after Mr. Maynard's insult while at the warehouse;

(ii) the relationship became acrimonious as a result of how the Mr. Hodge went about his duties;

(iii) Mr. Maynard had not boarded his vehicle or left the warehouse;

(iv) Mr. Maynard was still in the jurisdiction of a customs port and subject to any further requests or orders of Mr. Hodge or any other officer, before he was free to leave;

(v) the transaction was not complete when he was assaulted;

(vi) final approval was required before Mr. Maynard could leave the compound;

(vii) given the likelihood of customs officers regularly interfacing with unpleasant or hostile persons at customs ports, the instant matter represents an opportunity for the court to militate the risk of other persons facing wrongful exercise of power by customs officers.

[20] Finally, counsel submits that if the court were to have difficulty accepting that there was a close connection between Mr. Hodge's employment and the assault, the Crown ought still be held vicariously liable pursuant to section 132 of the Customs Act, Revised Statutes of Anguilla, C169:

> *"No action, suit or other proceedings shall be brought or instituted personally against any officer in respect of any act done by him in pursuance of any power granted or duty imposed on him by a customs enactment."*

Counsel submits that at the very least, Mr. Hodge was acting in pursuance of a duty imposed on him leading up to the assault. He lists the duties that Mr. Hodge was about before the assault of overseeing the process of removal of goods and ensuring Mr. Maynard did not exceed the permission granted. He asserts that the Crown should not be permitted to escape liability on the basis that one act in a series of other authorized acts was wrongful.

1st Defendant's Submissions

[21] The Learned Attorney General, Mr. John McKendrick QC was of the view the pleaded case and evidence gave no details of how the Customs Department operated and neither was there any evidence of systemic failure of the Customs Department. The Attorney General referred the court to paragraphs 4 and 5 of the claim wherein Mr. Maynard states:

> "*4. On Thursday 15th September 2015, at or around 3:12 pm the Claimant was at Road Bay, Anguilla at the Customs warehouse to clear and retrieve goods that had arrived on island for him from Puerto Rico. In the process of securing his motor transport after he had loaded the said goods there was a verbal exchange between the Claimant and the Second Defendant.*
>
> *5. The Second Defendant, while acting in the course of his employment, wrongfully assault the Claimant, in that he forcibly pushed the Claimant in the chest causing him to fall backward, traumatically impacting a stationary truck and then onto the ground on the premises of the Customs Warehouse."*

The Attorney General states that the claim does not support the submissions of Mr. Maynard in this regard and focuses on matters that took place on the day in question. He further submits that Mr. Maynard has submitted no evidence to which the Crown could have responded of a systemic failure of the Customs Department.

[22] The Attorney General further asks the court to note that in any event, from Mr. Maynard's pleaded case, he had finished loading his goods when the exchange took place, so that the essential exchange of information between Mr. Maynard and the Customs Department had ended. He states that Mr. Maynard had his goods loaded on the transport and it was not at the beginning or midway through the process, but after he had his goods and was about to leave.

[23] The Attorney General also referred to the statement of principle laid down in the **Mattis** case;

> *"The essential principle we derive from the reasoning in **Lister** and **Dubai Aluminium** is that Mr. Pollock's vicarious liability to Mr. Mattis for Mr. Cranston's attack requires a deceptively simple question to be answered. Approaching the matter broadly, was the assault "so closely connected" with what Mr. Pollock authorized or expected of Cranston in the performance of his employment as doorman at his nightclub, that it would be fair and*

just to conclude that Mr. Pollock is vicariously liable for the damage Mr. Mattis sustained when Cranston stabbed him.

[24] Whilst the Learned Attorney General was in agreement with that statement of Lord Steyn, he disagreed with its applicability to the facts in this matter. Counsel agreed that the concept of "*close connection,*" was also explored by the House of Lords in the **Lister** case and submits that it was the very role of the warden to care for the boys in his services of warden and so the connection between the tort, the abuse and his employment was striking.

[25] The Attorney General referred to paragraph 20 in **Lister** where Lord Steyn cited Lord Justice Diplock in **Ilkiw v Samuels**;

> *'As each of these nouns implies' - he is referring to the nouns used to describe course of employment, sphere, scope and so forth - 'the matter must be looked at broadly, not dissecting the servant's task into its component activities - such as driving, loading, sheeting and the like - by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.'*
>
> *Applying those words to the employment of this servant, I think it is clear from the evidence that he was employed as a roundsman to drive his float round his round and to deliver milk, to collect empties and to obtain payment. That was his job. . . He chose to disregard the prohibition and to enlist the assistance of the plaintiff. As a matter of common sense, that does seem to me to be a mode, albeit a prohibited mode, of doing the job with which he was entrusted. Why was the plaintiff being carried on the float when the accident occurred? Because it was necessary to take him from point to point so that he could assist in delivering milk, collecting empties and, on occasions obtaining payment."*

Lord Steyn went on to add;

> *"If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden*

and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for the children."

The Attorney General submits that when considering a "*close connection"* one is looking at an inextricable interwovenness between the carrying out of the duties and the tort. He submits however that this does not apply in respect to Mr. Hodge and his interaction with Mr. Maynard.

[26] The Learned Attorney General also contends that the fact that Mr. Hodge was at the customs warehouse and in uniform is not decisive and refers to Lord Steyn at paragraphs 44 and 45 in **Lister:**

> *"44. Secondly, while consideration of the time at which and the place at which the actions occurred will always be relevant, they may not be conclusive. That an act was committed outside the hours of employment may well point to it being outside the scope of the employment. But that the act was done during the hours of the employment does not necessarily mean that it was done within the scope of the employment. So also the fact that the act in question occurred during the time of the employment and in the place of the employment is not enough by itself. There can be cases where the place where the wrongful act was committed can be said to have been one where the employee was no longer to be treated as within the scope of his employment, such as Kirby v National Coal Board 1958 SC 514, where the mine worker retired from the working face to the waste and was no longer acting in the scope of his employment, or the various cases on travel, such as Williams v A & W Hemphill Ltd 1966 SC (HL) 31, where a deviation from an intended route may or may not take the employee outwith the scope of his employment. The action may be so unconnected with the employment as to fall outside any vicarious liability. Where the employer's vehicle is used solely for a purpose unconnected with the employer's business, when, to use the language of Parke B in Joel v Morison (1834) 6 C & P 501, 503, the driver is "going on a frolic of his own", the employer will not be liable. Acts of passion and resentment (as in Deatons Pty Ltd v Flew (1949) 79 CLR 370) or of personal spite (as in Irving v Post Office [1987] IRLR 289) may fall outside the scope of the employment. While use of a hand basin at the end of the working day may be an authorised act, the pushing of the basin so as to cause it to move and startle a fellow-*

employee may be an independent act not sufficiently connected with the employment: Aldred v Nacanco [1987] IRLR 292.

45. Thirdly, while the employment enables the employee to be present at a particular time at a particular place, the opportunity of being present at particular premises whereby the employee has been able to perform the act in question does not mean that the act is necessarily within the scope of the employment. In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded: Heasmans v Clarity Cleaning Co Ltd [1987] ICR 949."

The Attorney General submits that the facts of this matter show a mere opportunity given the context in which Mr. Maynard made the comments to Mr. Hodge.

[27] The Attorney General refers to the dicta of Lord Steyn in **Clinton Bernard** (op cit):

"The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee"

The Attorney General submits that there is no inherent risk in a customs officer attending to a customer. He states that in consideration of the cases of **Mattis, Lister** and **Bernard,** it is noted that they related to inherently risky functions; a bouncer using force to remove persons from a nightclub; a live-in teacher entrusted with the care of young vulnerable children and an off duty armed police officer. The facts of these cases he states are distinguished from the case of Mr. Hodge dealing with a member of the public.

[28] The Attorney General contends that there is no close connection between the nature of Mr. Hodge's employment and the assault. He states that in Mr. Maynard's statement to the police soon after the assault, he says that as he was about to leave the premises he told Mr. Hodge *" that*

he was going to die worse than his mother did. Jason was standing in the doorway at the customs building at the time. I was 60 feet from Jason next to my truck standing. Jason then came towards me, "don't talk about my mother" and he chucked me into the truck."

[29] The Attorney General also states that it is not a case where it will be fair, just and reasonable to permit Mr. Maynard to benefit from his actions to Mr. Hodge by holding the Crown responsible for Mr. Hodge's behaviour.

[30] Finally the Learned Attorney General refers to section 132 of the Customs Act. Counsel submits that as Mr. Maynard has sued Mr. Hodge personally, he cannot in essence have his cake and eat it as either the actions of Mr. Hodge were within his employment and the Government is liable, or if they are out of his employment he is liable but it cannot be both. The Learned Attorney General further submits that it would be inconsistent with section 132 for this court to accept the admission of liability of Mr. Hodge, which has not been retracted or withdrawn, and find the Government vicariously liable.

Court's Analysis

[31] In reviewing the authorities in which vicarious liability was said to arise, it is clear that of particular importance, is the need to focus on the individual circumstances of the case under consideration. The Court adopts the principle as stated by Lord Nicholls in the **Dubai Aluminium** case that:

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

[32] This perspective was well expressed in **Bazely v Curry** (1999)174 DLR (4th) where McLachlin J observed (at 62):

> *"The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that*

the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

[33] The court has considered the evidence before the court in the round, heard Counsel and considered the written representations. The court is of the view that the physical assault on Mr. Maynard did not represent the culmination of the exchanges between the parties during the time that Mr. Maynard was clearing his goods. It is shown by the evidence of Mr. Maynard that during those exchanges he made several remarks to Mr. Hodge about his job. In fact, the evidence shows that Mr. Hodge responded simply by smirking at Mr. Maynard as he went about separating his goods. On the other hand, it is also clear that Mr. Maynard was getting frustrated, probably at the protraction of the transaction as gleaned from paragraphs 18 – 20 of Mr. Maynard's witness statements where he states:

> "*In the process of us unloading and transferring the food items to another pallet we received assistance from another Customs Officer. The Second Defendant stood to the side observing with a noticeable smirk on his face…*
>
> *After the Second Defendant was done inspecting the very items that he stood and observed us unload and transfer for approximately thirty (30) minutes in the hot sun, he stated that three rolls of paper towels among the items could not be taken. He then walked back to where he had been standing previously and continued to smirk at my wife and me…"*

[34] Further, it is the evidence before the court that the transaction had essentially been concluded by the time the powder keg remarks were made. The inspection had been completed and the truck had been loaded. Mr. Hodge, it seems to me had exercised his powers over the transaction with Mr. Maynard in a way that clearly frustrated Mr. Maynard. This in my view shows that Mr. Hodge was in control during the transaction despite Mr. Maynard's previous comments and frustration. The court is therefore of the view that the assault by Mr. Hodge was inconsistent with his previous

attitude to Mr. Maynard when he was directing him around, possibly protracting things in pursuance of his powers.

[35] In the final analysis, the court did not agree with the proposition of counsel for Mr. Maynard. The assault could not be looked at as a perverse execution by Mr. Hodge of his duty to engage with customers. It could not be regarded as falling within the scope of his work. Such an approach does not accord with the facts. It was only after Mr. Maynard's personal comment that Mr. Hodge became enraged. It was an extremely personal, cruel comment which concerned Mr. Hodge's mother. I am therefore of the view that Mr. Hodge's response falls within the same category of passion, resentment or personal spite as alluded to by Lord Steyn at paragraph 44 of the judgment in the **Lister** case.

[36] Further, I am not satisfied that the duties of a customs officer have been shown to be analogous to those of a bouncer. The hands on approach accepted as a means of crowd control at a club in the **Mattis** case has no applicability to these facts. Additionally the claimant has not shown that Mr. Hodge's duties were similar in type to that of a person with control over vulnerable persons such as children or the elderly as in the **Lister** case. Moreover, having considered the evidence in support of the claim, the court is not satisfied that Mr. Maynard has established his assertion that the work of a customs officer carries the risk of violence being used against customers. These factors in my view distinguish the matter herein from the authorities relied on by counsel for the claimant.

[37] The court is of the view that the assault having taken place during the time of Mr. Hodge's employment and at the customs warehouse is not of itself conclusive so as to attach liability to the Crown. The fact that the incident took place at the customs warehouse, in my view, was merely opportunistic. Mr. Hodge's violent and passionate response to the comment about his late mother differs markedly vis a vis other comments made with reference to his job.

[38] Finally, in consideration of section 132 of the Customs Act, the court is of the view that having not found a close connection between the employee's duties and the wrongful act, it is unlikely to find the wrongful act to be in pursuance of any power granted or duty imposed on Mr. Hodge by a customs enactment. Accordingly, since this court finds that there is no connection between the physical assault and the duties Mr. Hodge was employed to perform, it cannot therefore be said

that the physical assault was done in pursuance of any power granted or duty imposed on Mr. Hodge by a customs enactment.

[39] In conclusion, the court finds that the Crown is not vicariously liable for the actions of Mr. Hodge against Mr. Maynard. Consequentially, the claim against the Attorney General is hereby dismissed with costs to be agreed within 21 days hereof. The court thanks counsel for their industry.

Order

(1) The claim herein against the Attorney General of Anguilla is dismissed.

(2) Costs to be assessed if not agreed within 21 days.

Cheryl Mathurin
High Court Judge

By the Court

Registrar