EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2017/0006

BETWEEN

ATTORNEY GENERAL

Appellant/
Counter Respondent

and

[1] COLLINGFORD JOHN
[2] GLEANOR JOHN
[3] D'ANDRE KINGSLEY LUC T'VON JOHN
(sole beneficiary and intended Administrator in the Estate of Kingsley John (Deceased) by his mother and next friend Boffy John)

Respondents/
Counter Appellants

Before:

The Hon. Dame Janice Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal

Appearances:

Mr. Kezron Walters, Senior Crown Counsel for the Appellant/Counter Respondent
Ms. Mandella Campbell for the First and Second Respondents/Counter Appellants
Mr. Duane Daniel and Ms. Jenell Gibson for the Third Respondent/Counter Appellant

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2018: July 17;
September 20.

Civil appeal — Negligence — Wrongful death — Vicarious liability — Whether the learned judge erred in finding that the Crown was vicariously liable — Contributory negligence — Whether the learned judge erred in finding contributory negligence — Apportionment of liability on the basis of contributory negligence

PC Kingsley John ("PC John") and PC Rohan Mc Dowall ("PC McDowall") were both members of the Saint Vincent and the Grenadines Police Force. While on duty at the

Biabou Police Station, the two officers were "playing around" in the recreation room. PC John had a knife in his hand and PC McDowall had an automatic M4 rifle. PC John told PC Mc Dowall that he could stab him before PC Mc Dowall would be able to shoot him, and PC Mc Dowall retorted that he could shoot PC John before PC John could stab him. PC John pushed the knife towards PC McDowall and PC McDowall stepped back and pulled the trigger on the firearm shooting PC John, who later died as a result of the gun shot injury he sustained.

The relatives of PC John, Mr. Collingford John, Mrs. Gleanor John and Mr. D'Andre John (collectively, "the Johns"), sued the Crown in negligence in respect of PC John's wrongful shooting death. The Attorney General denied that the Crown was vicariously liable for the wrongful death. The learned trial judge held that the Crown was vicariously liable and that PC John was contributorily negligent. The learned judge apportioned responsibility between PC John and PC Mc Dowall at 50 percent each.

The parties, being dissatisfied with the judgment have both appealed. The thrust of the Attorney General's appeal is that the Crown should not be held vicariously liable since PC John and PC Mc Dowall were not on official duty when PC John was shot. The Crown argued that although PC John was injured during the working hours, he was not engaged in the business of the force and that police officers are, by regulation 208 of the Police Regulations, prohibited from entering the recreation room while on duty. In response, the Johns contended that the learned judge correctly applied the "close connection" test in determining that the Crown was vicariously liable for PC Mc Dowall's wrongdoing. However, they argued that the learned judge erred in finding that PC John was contributorily negligent, or in the alternative that it was unjust for the judge to apportion liability on the basis of contributory negligence at 50 percent each.

Accordingly, the issues for this Court's determination are: (1) whether the judge erred in concluding that the Crown was vicariously liable for PC John's wrongful death; (2) whether the judge erred in holding that PC John was contributorily negligent; and (3) whether the judge erred in apportioning responsibility based on contributory negligence at 50 percent each.

Held: dismissing the appeal; allowing the counter appeal to the extent of the appeal against the learned judge's apportionment of 50 percent responsibility each and making the costs orders in paragraph 64 of the judgment, that:

1. The modern approach to be adopted in determining vicarious liability is whether the wrongful conduct is so closely connected with the acts the employee was authorized to do, that for the purpose of the liability of the employer to third parties the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the ordinary course of the employee's employment. In the case at bar, the learned judge properly applied that test to PC Mc Dowall's conduct in discharging the firearm, and properly held that even though he was in direct violation of the instructions of his supervisors, he was actively engaged in the execution of his duties. The learned judge was correct in finding that PC Mc

Dowall's wrongful act was so closely connected to his employment that it is just and fair that his employer, the Crown, be held vicariously liable.

Lister and Others v Hesley Hall [2002] 1 AC 215 applied; Bernard (Clinton) v Attorney General (2004) 65 WIR 245 applied; Ilkiw v Samuels and Others [1963] 1 WLR 991 applied; Mohamud v WM Morrison Supermarkets plc [2016] AC 677 applied; Dubai Aluminum Co. Ltd v Salaam [2002] UKHL 48 applied; Central Motors (Glasgow) Limited v Cessnock Garage and Motor Co. 1925 SC 796 applied.

2. A person is contributorily negligent if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt and in his reckonings, he must take into account the possibility of others being careless. In the case at bar the learned judge was correct, on the evidence, to find PC John liable for contributory negligence as he must have reasonably foreseen harm to himself from the firearm if it was discharged negligently and ought to have taken into account the possibility of PC Mc Dowall being negligent in the handling of the firearm and causing injury to him.

   Jones v Livox Quarries Ltd. [1952] 2 QB 608 applied.

3. An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial judge. In such circumstances, the appellate court may reassess the apportionment if it is satisfied that the assessment made by the judge was plainly incorrect. In this case, PC Mc Dowall had control over the firearm and should therefore shoulder more responsibility for the injury resulting in PC John's death. The learned judge's 50 percent attribution is unjust in all of the circumstances and is therefore plainly incorrect. As a result, it therefore falls to this Court to reassess the apportionment of liability on the basis of contributory negligence. In the circumstances, it is appropriate that PC Mc Dowall should be held responsible to the extent of 70 percent, with PC John's contributory negligence representing 30 percent.

   Jennings v Norman Collinson (Contractors) [1953] AC 663 applied; Hannam v Mann [1984] RTR 252, CA applied; Stapley v Gypsum Mines Ltd. [1953] AC 663 applied; Owens v Brimmell [1977] QB 859 applied.

JUDGMENT

Introduction

[1] BLENMAN JA: The Attorney General of Saint Vincent and the Grenadines appeals against the decision of the learned Justice Esco Henry, in which the judge

held that the Crown was vicariously liable for the wrongful death of PC Kingsley John ("PC John"). The judge also ordered the Crown to pay damages together with costs to the parents and son of PC John but reduced the level of compensation to which they were entitled on the basis that PC John was contributorily negligent to the extent of 50 percent.

[2] There is also a counter-notice of appeal challenging the judge's conclusion that PC John was contributorily negligent, together with other specific findings of the learned judge, filed by the parents and son of PC John, Mr. Collingford John and Mrs. Gleanor John, and D'Andre John respectively.[1] The Johns have importantly, also appealed against the learned judge's apportionment of liability in the assessment of contributory negligence.

Factual Background

[3] PC John was a member of the Saint Vincent and the Grenadines Police Force. On the fateful day he, together with a party of police officers, went on duty to Biabou Police Station from Old Montrose Police Station. There were other police officers present, including PC Rohan Mc Dowall ("PC Mc Dowall") and Station Sergeant Desmond Samuel ("Sergeant Samuel"). They went to Biabou Police Station in order to assist with the execution of search warrants. Sergeant Samuel had issued PC Mc Dowall with an M4 rifle and two magnums. Sergeant Samuel also issued a Glock semi-automatic pistol to PC John. After issuing the firearms to the officers, Sergeant Samuel accompanied the squad to Biabou Police Station to assist officers who were stationed there with the execution of search warrants. Prior to leaving the station, Sergeant Samuel had warned the officers to only use the firearm if it became necessary to protect life and property. The officers left the Biabou Police Station, executed the search warrants and thereafter returned to the Biabou Police Station.

[4] On their return to the Biabou Police Station, and while PC John and PC Mc Dowall

[1] Collectively referred to after as "the Johns."

were on duty, they went into the recreation room. PC John and PC Mc Dowall were "playing around," talking and laughing with each other in a friendly manner. During their "playing around," PC John had a knife in his hand and PC Mc Dowall had an automatic M4 rifle. PC John told PC Mc Dowall that he could stab him before PC Mc Dowall would be able to shoot him and PC Mc Dowall retorted that he could shoot PC John before John could stab him. PC John pushed the knife towards PC Mc Dowall and the latter stepped back and pulled the trigger on the firearm. A shot went off, PC John held his chest, dropped the knife, leaned against the wall and fell to the ground. PC Mc Dowall dropped the weapon and proceeded to cry. PC John later died as a result of the gun shot injury that he had sustained.

[5] Mr. Collingford John and Mrs. Gleanor John, sued the Crown for PC John's wrongful shooting death. D'Andre John[2] had also sued the Crown for his wrongful shooting death. The Attorney General denied that the Crown was vicariously liable for the wrongful death.

Issues before the Court of First Instance

[6] The following issues were identified by the learned judge, namely:

(a) Whether the Government is vicariously liable for PC Mc Dowall's act of discharging the firearm and the shooting death of PC John; and

(b) Whether PC John's negligence, contributed to his death.

[7] I now turn to the relevant part of the judgment in the court of first instance.

Judgment in the first instance court

[8] The learned judge, having heard the evidence and reviewed the parties' submissions, held that the Crown was vicariously liable for the wrongful death of PC John. The learned judge held that PC John was contributorily negligent and

[2] D'Andre John sued by his next friend Boffy John.

apportioned responsibility between PC John and PC Mc Dowall at 50 percent each. As a consequence, the learned judge ordered that Mr. Collingford John, Mrs. Gleanor John and Ms. Boffy John, as D'Andre John's next friend, are entitled to recover from the Crown, damages for PC John's wrongful death together with costs, both of which were to be assessed.

[9] Both sides being dissatisfied with the judgment, the Crown has appealed and the Johns have counter appealed.

Grounds of Appeal and Counter Appeal

[10] Both the Crown and the Johns have filed several grounds in their respective notices of appeal.

Issues on Appeal and Counter Appeal

[11] The following issues can be distilled from the grounds of appeal and the counter appeal:

(1) Whether the learned judge erred in concluding that the Crown was vicariously liable for PC John's wrongful death.

(2) Whether the learned trial judge erred in holding that PC John was contributorily negligent.

(3) Whether the learned judge erred in the exercise of her discretion by apportioning responsibility on the basis of contributory negligence at 50 percent each.

[12] I will now address each issue in turn.

Issue 1 - Whether the learned judge erred in concluding that the Crown **was vicariously liable for PC John's wrongful death**

[13] Learned Senior Crown Counsel, Mr. Walters, said that the judge incorrectly

concluded that PC John was on duty when he was shot. He pointed out that police officers are, by regulation 208 of the Police Regulations[3] ("the Regulations"), prohibited from entering the recreation room while on duty. Mr. Walters said that although PC John was injured during the working hours, he was not engaged in the business of the police force. In fact, Mr. Walters said that PC Mc Dowall and PC John were not on official duty when PC John was shot. Mr. Walters further stated that since they were in the process of doing a forbidden act by being in the recreation room, contrary to the relevant regulation, and at the same time being on a frolic of their own, there is no way that the Crown could be held vicariously liable. Mr. Walters said that there was no basis upon which the judge could properly have found that PC Mc Dowall and PC John were in the course of duty during the fateful incident.

[14] Mr. Walters purported to rely on Kirby v National Coal Board[4] in support of his arguments that, once PC Mc Dowall was doing an act that he was specifically prohibited from doing, there is no way in which the Crown could be held to have been vicariously liable for that wrongful act. He underscored the fact that, in the appeal at bar, there is no dispute that the relevant regulation specifically prohibited police officers from being in the recreation room while on duty. He said that, in clear breach of the regulations, both PC Mc Dowall and PC John went into the recreation room and were "playing around" and PC John having been injured in those circumstances, the Crown cannot be made vicariously liable for PC Mc Dowall's wrongful and negligent acts.

[15] In further submissions, Mr. Walters said that there is no evidence from which an inference can be drawn that the Crown instructed PC Mc Dowall to discharge his weapon against PC John after the execution of the search warrant. Therefore, no liability or vicarious liability can accrue against the Crown. Mr. Walters said that the learned judge ought to have paid more

[3] Cap. 391 of the Revised Laws of Saint Vincent and the Grenadines 2009.
[4] 1958 SC 514.

regard to the fact that the police officers had completed the execution of the warrants and were doing a prohibited act by being in the recreation room when the incident occurred. In this regard, he said that Kirby is applicable to the case at bar.

[16] Mr. Walters accepted that the test which the court should have applied is whether or not the acts were so closely connected to the act which PC Mc Dowall was employed to do. Mr. Walters also stated that the acts of PC Mc Dowall could in no way be said to have been closely connected with what he was employed to do, so as to make the Crown vicariously liable. Accordingly, Mr. Walters said that the learned judge incorrectly applied the test in Lister and others v Hesley Hall Ltd.[5] Mr. Walters therefore urged this Court to allow the Crown's appeal and set aside the decision of the learned judge, that the Crown was vicariously liable for the wrongful acts or omissions of PC Mc Dowall.

[17] In opposition, learned Counsel Ms. Campbell, on behalf of the Johns said that the judge was right in concluding that the Crown was vicariously liable for the wrongful acts or omissions of PC Mc Dowall.

[18] Ms. Campbell said that there was a close connection between the acts that PC Mc Dowall was employed to do and the wrongful shooting of PC John. She argued that notwithstanding what took place, the wrongful act cannot be taken as having occurred outside of the course of the officer's employment. She pointed out that, at paragraph 20 of the judgment, the judge specifically said that the Crown did not dispute that the officers were on duty at the relevant time. She said that this was the state of the evidence before the judge at first instance and therefore it is disingenuous for the Crown to advance a contrary position on appeal.

[5] [2002] 1 AC 215.

[19] Ms. Campbell argued that it was clearly open to the judge to find that the Crown was vicariously liable. She also directed this Court's attention to paragraph 34 of the judgment, where in the last sentence the judge stated:

> "Based on the evidence and the applicable law, I find that Mc Dowall and John went on duty at Biabou to execute search warrants and they were still on duty up to the time McDowall shot John."

[20] Ms. Campbell said that the above is a finding of fact from which the Attorney General has not appealed. She took us through many parts of the evidence in order to substantiate her submission that the learned judge was correct in concluding that the officers were on active duty at the time of the shooting. Learned Counsel, Ms. Campbell, pointed out that there has been no appeal against that finding of fact and therefore this Court should not interfere with the judge's findings of fact. I agree. It is well settled that the circumstances in which an appellate court will interfere with findings of fact are circumscribed and need no recitation.[6] In so far as there has been no appeal against the judge's findings of fact, there is no basis upon which this Court could interfere with the clear and specific findings of fact of the judge who had the benefit of seeing and hearing the witnesses and critically, as is in the case at bar, there is no appeal against those findings.

[21] For what it is worth, Ms. Campbell pointed out that the evidence before the court of first instance indicated that Sergeant Samuel, who had issued the firearm, was also in the recreation room and she opined that it may well be that regulation 208 is honoured more in the breach, but refrained from commenting further in the absence of any evidence on that matter.

The Correct Test

[22] Turning next to the related matter of the correct test, Ms. Campbell said that

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[6] See: Watts v Thomas [1947] AC 484; Yates Associates Construction Company Ltd v Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered 20th April 2016, unreported); Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21.

the judge correctly applied the "close connection" test in the determination of whether the Crown was vicariously liable for PC Mc Dowall's wrongdoing. She said that the correct test is that which was stated in Lister v Hesley Hall and that the pronouncements that were made in Kirby v National Coal Board are no longer good law. She also pointed out that the modern approach to the law of vicarious liability is not the approach stated in the Scottish case of Kirby. Ms. Campbell said that the modern approach to the tort of vicarious liability requires the court not to take a narrow or restrictive approach, in its determination of whether or not an employee was acting in the course of his duty at the relevant time, but rather mandates the court to take a broad approach. She highlighted a number of factors in her oral submissions to emphasize that PC Mc Dowall was, at the relevant time, acting in the course of his duty. Ms. Campbell reiterated that the modern approach requires the court to take a broad view of the circumstances in assessing whether the employer is vicariously liable. She said that the factors which she pointed out support the learned judge's conclusion and that once the modern approach is adopted, the Crown was vicariously liable.

[23] Ms. Campbell also pointed out that nowhere in the pleadings did the Crown state that the police officers were in a prohibited place namely, the recreation room and by this fact it was absolved from being vicariously liable. Ms. Campbell said that regulation 208 of the Regulations was not raised before the learned judge and therefore neither side had the opportunity to canvass with the judge as to the full meaning and effect of that regulation. She also said what makes it more critical that this Court should not utilize regulation 208 of the Regulations, as a basis to undermine the judge's decision, is the fact that the judge in her judgment merely referred to regulation 208 of the Regulations for the sake of completeness but that in any event, nothing turned on that since the judge at paragraph 35 of the judgment stated as follows:

> "In passing, it is interesting to note that police officers on duty are prohibited from entering the recreation room…Having regard to the

> evidence, this restriction appeared not to have been rigidly enforced that day. This in my view does not negate my finding that John and McDowall were on duty." (emphasis mine).

[24] Ms. Campbell maintained that the learned judge did not err in concluding that PC Mc Dowall's act of wrongfully shooting PC John was closely connected to his duty, so as to find the Crown vicariously liable. In support of her assertion, Ms. Campbell said that the judge correctly referred to and relied on Lister v Hesley Hall. Ms. Campbell also invited this Court to apply the same principle which was applied by the Judicial Committee of the Privy Council ("the Privy Council") in Bernard (Clinton) v Attorney General,[7] to conclude similarly that the Crown was vicariously liable for PC Mc Dowall's wrongful act. In Bernard (Clinton), a case which involved the shooting of a civilian by a policeman who was not in uniform, the Court of Appeal of Jamaica held that the deliberate shooting of the civilian was conduct which could not be seen as coming within a class of acts connected or closely connected with the authorized acts, so as to be regarded as a mode of doing them. It was an independent act for which the state was not vicariously liable because the constable was not acting within the scope or course of his employment. The Privy Council decisively overruled the Court of Appeal holding at page 245 that:

> "In the case of intentional wrongs, the correct approach to determine whether the employer (in this case, the Crown) is liable for a shooting committed by an employee (in this case, an armed member of the Jamaica Constabulary Force) 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 employer vicariously liable."

[25] To underscore her point, Ms. Campbell said that even if the employee did something that was specifically prohibited or restricted, this by itself without more would not absolve the employer from being held vicariously liable, once the offending act of the employee was closely connected to what he was

[7] (2004) 65 WIR 245.

employed to do. She pointed out that in this regard, the learned judge also referred to Ilkiw v Samuels and Others[8] in support of her conclusion on vicarious liability. Ms. Campbell also referred to Mohamud v WM Morrison Supermarkets plc[9] in support of her proposition.

[26] Ms. Campbell reiterated that the learned judge correctly concluded that the Crown was vicariously liable for the wrongful acts of PC Mc Dowall and that, in doing so, the judge had quite rightly applied the correct test as stated in Lister v Hall, which has been subsequently affirmed and applied by both the House of Lords and the Privy Council.

[27] Accordingly, Ms. Campbell urged this Court to dismiss the Attorney General's appeal with costs and affirm the trial judge's decision.

Discussion

[28] It was clearly open to the learned judge, based on the evidence led by the parties, to conclude that PC Mc Dowall was on active duty at the material time. However, this finding is not dispositive of the claim and the judge quite properly went on to ascertain whether PC Mc Dowall's wrongful act was closely connected to the business that he was employed to do, so as to make the Crown liable.

[29] I have no doubt that the old approach to vicarious liability adopted by the Court in Kirby is very restrictive. In that case, it was stated at page 523 as follows:

> "A master is liable for the negligence of his servant when the negligence takes place within the scope of the employment in the performance of an act which the servant is employed to do. But a master is not liable when the servant is negligent in doing an act unconnected with his master's business and for his own benefit. This applies especially when, as in the present case, the act was forbidden."

[8] [1963] 1 WLR 991.
[9] [2016] AC 677.

[30] It is perhaps important to highlight the facts of Kirby. In that case, a miner was injured by an explosion of gas, which had been accumulated in waste ground from which coal had recently been extracted. The explosion appeared to have been caused by a miner who lighted a match in the area known as "the waste", the miner had been prohibited by statute and instructions from going into that area. It was held that the miner who smoked in "the waste" was not performing any duty for his master. He was using his master's time for his own purposes and his master could not be held liable for the consequences. This was particularly so where his act was specifically prohibited either by his master of by statute.

[31] However, the common law has long moved on, and I agree with learned Counsel Ms. Campbell that the old approach as was stated in Kirby no longer reflects the present common law on vicarious liability. The modern approach, as stated earlier, is the test that was enunciated in Lister.

[32] In my view the learned judge, at paragraph 28 of the judgment, quite correctly regarded the decision of Lister as the seminal case on vicarious liability. This has been acknowledged by Lord Nicholls in Dubai Aluminum Co. Ltd. V Salaam[10] where His Lordship stated, on the matter of whether the employer is vicariously liable, that:

> "…the wrongful conduct must be so closely connected with the acts the… employee was authorised to do that, for the purpose of the liability of…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. Lord Millet said as much in Lister v Hesley Hall Ltd [2002] 1 AC 215, 245."

[33] Therein lies the modern and correct approach to vicarious liability and I could do no more than to adopt and apply that instructive approach to the case at bar.

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[10] [2002] UKHL 48, para 23.

[34] Further and in my view, the learned judge quite properly extracted from the case of Bernard (Clinton) the following principles:

> "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[11]…an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carried on."[12]

[35] I am fortified that that the learned judge correctly identified the task that she was required to do and applied the correct test. Indeed, at paragraph 29 of the judgment, the judge expressed as follows:

> "Was the Crown rendered vicariously responsible through PC McDowall's actions? It depends on whether he was a servant or agent of the Crown, was acting in the discharge of his duties at the time and whether his conduct was so closely connected to such duties as to make the Crown culpable."

[36] The approach adopted by the learned judge finds support in Lister where Lord Clyde stated, at paragraph 42, that "a broad approach" was to be taken in the court's determination of whether the act is so closely connected with the employer's business. Importantly, Lord Clyde stated that where there is an express prohibition imposed on the employee the distinction has to be drawn, namely "whether it is a prohibition which limits the sphere of the employment or only one which deals with the conduct within the sphere of employment."[13] The learned judge was alive to those principles and applied them at paragraph 33 of her judgment. In addition, the judge said at paragraph 37 that "It is not enough to merely ask whether the wrongful act was one which the employee was told not to do". The judge noted instead, that an employer often has to bear a wider responsibility. In support of this point, the learned judge referred

[11] supra, n. 7 at para 18.
[12] supra, n. 7 at para 19.
[13] supra, n. 5 at para 42.

to Lord Cullen's dicta in Central Motors (Glasgow) Limited v Cessnock Garage and Motor Co.:[14]

> "The employer has to shoulder responsibility on a wider basis; and he may, and often does, become responsible to third parties for acts which he has expressly or impliedly forbidden the servant to do. A servant is not a mere machine continuously directed by his master's hand, but is a person of independent volition and action, and the employer, when he delegates to him some duty which he himself is under obligation to discharge, must take the risk of the servant's action being misdirected, when he is, for the time, allowed to be beyond his master's control. It remains necessary to the master's responsibility that the servant's act be one done within the sphere of his service or the scope of his employment, but it may have this character although it consists in doing something which is the very opposite of what the servant has been intended or ordered to do, and which he does for his own private ends."

[37] In Mohamud v WM Morrison Supermarkets plc, an employee carried out an unprovoked assault on a customer. The Court of Appeal held that the claim against the company failed the "close connection" test because the employee had not been given duties involving a clear possibility of confrontation. However, this position was overturned on appeal.

[38] I find the following dicta of Lord Toulson at paragraphs 43-45 and 47 of the judgment in Mohamud quite instructive:

> "43. … in Lister the court was mindful of the risk of over-concentration on a particular form of terminology, and there is a similar risk in attempting to over-refine, or lay down a list of criteria for determining, what precisely amounts to a sufficiently close connection to make it just for the employer to be held vicariously liable. Simplification of the essence is more desirable.
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> 44. In the simplest terms, the court has to consider two matters. The first question is w**hat functions or "field of activities"** have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has

[14] 1925 SC 796 at p. 802.

been emphasised in several cases, this question must be **addressed broadly…**

45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice…To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point.…

47. In the present case it was Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and **ordering him to leave was inexcusable but within the "field of activities" assigned to him**. What happened thereafter was an unbroken sequence of events. It was argued by the respondent and accepted by the judge that there ceased to be any significant connection between Mr Khan's employment and his behaviour towards the claimant when he came out from behind the counter and followed the claimant onto the forecourt. I disagree for two reasons. First, I do not consider that it is right to regard him as having metaphorically taken off his uniform the moment he stepped from behind the counter. He was following up on what he had said to the claimant. It was a seamless episode. Secondly, when Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business.. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it." (Emphasis mine).

[39] As indicated earlier, there is no doubt that the learned judge quite properly applied the test of "close connection," as was enunciated in Lister, to the factual circumstances and properly held that even though PC Mc Dowall was in direct violation of the instructions and training directives from his superiors, he was actively engaged in the execution of his duties. Those prohibitions

notwithstanding, I am satisfied that it was open to the judge to conclude that PC Mc Dowall's wrongful act was so closely connected to his employment that it is just and fair that his employer be held vicariously liable.

[40] In view of the totality of the circumstances, it is an unfair criticism to say that the learned judge did not apply the correct test. In fact, there is a strong stream of jurisprudence which supports the approach that was adopted by the judge, in applying the correct test.

[41] I am fortified in the above view by way of the important authority of Lister where Lord Millet stated:

> "It is no answer 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."

[42] Learned Counsel, Ms. Campbell, quite clearly and in detail emphasized the factors which the learned judge took into account in coming to the conclusion that PC Mc Dowall's negligent act was closely connected to his employment. I accept the veracity of Ms. Campbell's submissions and in my view, nothing will be gained from this judgment enumerating those factors. Suffice it to say and it is worth reiterating that, it is clear from a close reading of the judgment that the judge correctly applied the principle for which Lister is authority. In my judgment, cumulatively, the factors which were referred to above and to which the judge referred, have persuaded me that the judge was correct in finding vicarious liability had been well established.

[43] In my view, the judgment was a careful and thorough one which was also closely reasoned. In addition to correctly applying the principle in Lister, the learned judge was quite properly guided by the principle in Central Motors Limited v Cessnock. I am of the clear view that the above principles are

instructive and can do no more than apply them to the appeal at bar. This buttresses my conclusion that the judge quite correctly applied Lister to PC Mc Dowall's conduct in discharging the firearm, which led to the demise of PC John. Although it was a misuse of the firearm, it was closely connected to the Crown's business. He was issued the firearm to use in the execution of warrants, which he would have been expected to discharge if it had become necessary to protect life and limb. His negligent use of the firearm caused the death of PC John.

[44] I have carefully reviewed the submissions that were made by both learned Counsel and I agree with Ms. Campbell that the learned judge did not err in concluding that the Crown was vicariously liable for the wrongful act of PC Mc Dowall.

[45] It is evident that the Attorney General's appeal against the learned judge's finding that the Crown is vicariously liable fails and must be dismissed with costs. I would so order.

[46] This brings me to address issues 2 and 3 outlined above which will conveniently be taken together since they are interrelated.

Issues 2 and 3 - Contributory Negligence

[47] The gravamen of the Johns' complaint is that the learned judge erred by holding PC John contributorily negligent for the injury that he suffered which ultimately led to his death. In addition, they say that even if this Court were to conclude that PC John was contributorily negligent, the judge erred in her apportionment of liability in the assessment of PC John's contributory negligence.

[48] In relation to the contributory negligence, learned Counsel Ms. Gibson made submissions on behalf of the Johns. Ms. Gibson quite correctly reminded us that an appellate court will generally only interfere with a finding of contributory

negligence in the event of a substantial misjudgment by the trial judge. Ms. Gibson relied on Jennings v Norman Collison (Contractors) Ltd.[15] She highlighted the fact that the appellate court should only interfere where the judge got it plainly wrong. In support of this proposition, Ms. Gibson referred this Court to the well-known case of Jones v Livox Quarries Ltd. [16]

[49] Ms. Gibson said that the learned judge erred in finding that PC John was contributorily negligent. She referred this Court to other cases to support her argument, namely, Davies v Swan Motor Co. (Swansea) Ltd.[17] and Stapley v Gypsum Mines Ltd.[18] She said that these cases indicate that, in determining whether PC John was guilty of contributory negligence, the court must consider not only the causative potency of a particular action but also its blameworthiness. Ms. Gibson therefore emphasised that the judge's finding on contributory negligence is plainly wrong. She sought to persuade this Court that the events which occurred on that fateful day was as a consequence of PC Mc Dowall's negligent act, and that PC John could not have been expected to have reasonably foreseen harm to himself.

[50] Further, Ms. Gibson said that in applying the test in Jones v Livox, it has to be determined whether PC John ought reasonably to have foreseen that by engaging in the simulation exercise of a close attack with PC Mc Dowall, this would result in PC Mc Dowall negligently discharging the firearm and injuring him. She said that in determining the contributory negligence, the learned judge failed to take into account that PC Mc Dowall, being a member of Special Services Unit (SSU), was specially trained to use the firearm, and that when the officers arrived at Biabou Police Station, they were specifically briefed by Sergeant Samuel who told them that at no time should anyone fire their weapon unless their own life or the lives of others was threatened. Ms. Gibson said that,

[15] [1970] 1 All ER 1121.
[16] [1952] 2 QB 608.
[17] [1949] 2 KB 291.
[18] [1953] AC 663.

at all times, PC Mc Dowall maintained full and effective control of the weapon and there was no evidence which suggested that he was incompetent or had a history of negligence in the use of the firearm. She therefore stated that in view of the above factors, the learned judge erred in concluding that PC John was contributorily negligent. She reiterated that in no way, in the circumstances, could PC John reasonably have foreseen that PC Mc Dowall would have been negligent in the use of the firearm and injure him.

[51] Alternatively, Ms. Gibson said that even if this Court were to conclude that the learned judge was right to find that PC John was contributorily negligent, she contended that the judge apportioned the liability incorrectly. She argued that, in view of the totality of the circumstances, it was unjust for the judge to apportion liability on the basis of contributory negligence at 50 percent each.

[52] It is noteworthy that Ms. Gibson said that, if the learned judge was required to apportion liability for contributory negligence in the circumstances, the judge ought not to have concluded that PC John was contributorily negligent to the extent of 50 percent. In this regard, she said that courts in the Commonwealth have determined that the level of blameworthiness is based on the degree of control which each party had over the object or weapon that caused the harm. Ms. Gibson analogously referred us to driving cases or motor accident cases in which the courts have taken the position that where a claimant has been contributorily negligent and suffers injury occasioned in the main by the negligent conduct of the defendant, as a rule of thumb, 20 percent is attributed to the claimant as representative of his contributory negligence. Accordingly, the damages that are awarded to the claimant are reduced by 20 percent. Ms. Gibson invited this Court to adopt a similar approach and to hold that PC John was no more than 20 percent contributorily negligent.

Discussion

[53] I remind myself that Section 3(1) of the Contributory Negligence Act[19] provides that:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:…"

[54] I am cognizant of the fact that an appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial judge. In such circumstances, the Court of Appeal may reassess the apportionment if it is satisfied that the assessment made by the judge was plainly incorrect. This principle is borne out in the cases of Jennings v Norman Collinson (Contractors) and Hannam v Mann.[20]

[55] In the circumstances of the present case, I am of the clear view that the learned judge's findings as it pertains to whether PC John was contributorily negligent were correct and the learned judge quite properly applied the principles that were laid down in Jones v Livox Quarries Ltd, where Denning LJ stated:[21]

> "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

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[19] Cap. 123 of the Revised Laws of St. Vincent and the Grenadines 2009.
[20] [1984] RTR 252, CA.
[21] supra, n. 16 at p. 615.

[56] In Stapley v Gypsum Mines Ltd, the Court at page 682 stated as follows:

> "Finally, it is necessary to apply the Law Reform (Contributory Negligence) Act, 1945. Sellers J. reduced the damages by one half, holding both parties equally to blame. Normally one would not disturb such an award, but Sellers J. does not appear to have taken into account the fact that Stapley deliberately and culpably entered the stope. By doing so it appears to me that he contributed to the accident much more directly than Dale. The Act directs that the damages 'shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'
>
> (section 1 (1)). A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do. I agree with your Lordships that in all the circumstances it is proper in this case to reduce the damages by 80 per cent. and to award 20 per cent. of the damages to the appellant."

[57] Similarly, in Owens v Brimmell[22] in which a plaintiff passenger accompanied the defendant driver on a visit to a series of public houses during which they each consumed at least eight pints of beer. The car subsequently hit a lamp-post due to the defendant's greatly impaired driving, and the plaintiff suffered serious injuries. Tasker Watkins J reduced the damages awarded by 20 percent for contributory negligence.

[58] I underscore the view that the learned judge had correctly applied the Jones v Livox principle by acknowledging, at paragraph 47 of the judgment, the previously stated pronouncements of Lord Denning in that decision.

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[22] [1977] QB 859.

[59] Accordingly, there is no doubt that the learned judge correctly applied the principles and quite rightly concluded that PC John was contributorily negligent. There was no other position that the judge could properly and correctly have arrived at given the totality of circumstances. It is apparent that I am of the view that, based on the evidence that was adduced, the judge was correct in concluding that PC John was liable for contributory negligence since he ought reasonably to have foreseen that if he did not act as a reasonably prudent man, he might hurt himself; and in his reckonings, ought to have taken into account the possibility of PC Mc Dowall being negligent in the handling of the firearm and causing injuring to him. The learned judge was alive to this and, at paragraph 51 of the judgment, stated that PC John must have reasonably foreseen harm to himself from the firearm if it was discharged negligently or carelessly. He would have been aware of such a possibility based on his training in firearm handling and basic common sense. In my view, the statement by the judge is well put and the judge cannot be faulted for her correct assessment and application of the principle in Jones v Livox.

[60] Consequently, the Johns' counter appeal against the learned judge's finding that PC John was contributorily negligent is dismissed.

[61] In relation to the ancillary matter of the apportionment of responsibility on the basis of contributory negligence, I am persuaded by Ms. Gibson's attractive arguments and therefore accept them.

[62] I agree that the motor vehicles or "driving cases" cases provide useful guidance on the issue of the requisite reductions that should be made based on the findings of contributory negligence. Applying the principle that was enunciated in cases such as Owens v Brimmell to the factual matrix of the case at bar, PC Mc Dowall had control over the firearm and should, in my

view, shoulder more responsibility for the injury which PC John sustained, which ultimately resulted in his death. I agree that the learned judge's 50 percent attribution to each person is not just in all the circumstances and is plainly wrong. It is appropriate that PC Mc Dowall should be held responsible to the extent of 70 percent, with PC John's contributory negligence representing 30 percent.

[63] Ultimately, I would set aside the learned judge's apportionment of PC John's contributory negligence and substitute the apportionment for PC John's contributory negligence as 30 percent. To that extent only, I would allow the counter appeal.

Costs

[64] The learned judge ordered costs to be assessed. It does not appear that the costs have been assessed. As it relates to this appeal, I would order that:

(1) The Attorney General having lost the appeal shall pay the Johns two-thirds of their costs, which are to be assessed if not agreed within 21 days of the date of this judgment; and

(2) The Johns have had some success on their counter appeal and therefore are entitled to one-third of their costs, against the Attorney General, to be assessed if not agreed within 21 days of the date of this judgment.

Conclusion

[65] For the above reasons, I would make the following orders:

(1) The Attorney General's appeal against the learned judge's decision is dismissed with two thirds of the costs of the appeal awarded to Mr. Collingford John, Mrs. Gleanor John and Mr. D'Andre John.

(2) The John's counter appeal against the learned judge's finding that PC John was contributorily negligent is allowed to the extent of varying the learned judge's apportionment of responsibility from 50 percent each. The apportionment of responsibility is varied so that PC John is held to be contributorily negligent to the extent of 30 percent. The Attorney General shall pay the Johns one-thirds of their costs on the counter appeal.

(3) The costs are to be assessed if not agreed within 21 days.

[66] I gratefully acknowledge the assistance of all learned Counsel.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

By the Court

Chief Registrar