IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: 02(f)-44-07/2021(P)

BETWEEN

GMP KAISAR SECURITY (M) SDN BHD … APPELLANT

AND

MOHAMAD AMIRUL AMIN BIN MOHAMED AMIR … RESPONDENT

(IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: P-02(NCVC)(W)-1556-08/2019

BETWEEN

GMP KAISAR SECURITY (M) SDN BHD … APPELLANT

AND

MOHAMAD AMIRUL AMIN BIN MOHAMED AMIR … RESPONDENT

In the High Court of Malaya at Pulau Pinang
Civil Suit No: PA-23NCVC-20-06/2018

Between

Mohamad Amirul Amin bin Mohamed Amir … Plaintiff

And

1. Jaafar bin Haalid
2. GMP Kaisar Security (M) Sdn Bhd … Defendants)

CORAM:

ROHANA BINTI YUSUF, PCA
HARMINDAR SINGH DHALIWAL, FCJ
RHODZARIAH BINTI BUJANG, FCJ

JUDGMENT OF THE COURT

Harmindar Singh Dhaliwal FCJ:

Introduction

[1] This appeal is directed against the decision of the Court of Appeal which had affirmed, by majority, the decision of the High Court of Penang. The appeal concerns an important aspect of the law on vicarious liability.

Specifically, it raises the question of when can an employer be held liable for an intentional wrong committed by his employee where no fault can be attributed to the employer.

[2] The appeal was filed pursuant to the granting of leave on the following questions:

(i) Sama ada di dalam suatu tuntutan di bawah prinsip tanggungan liabiliti secara vikarius, adakah perlu untuk Mahkamah perbicaraan memutuskan terlebih dahulu sama ada perbuatan pekerja yang dinamakan adalah suatu perbuatan salah ataupun tidak? Sekiranya tidak ada apa-apa keputusan dibuat oleh Mahkamah perbicaraan berkenaan salah ataupun tidak perbuatan pekerja tersebut, bolehkah majikan dipertanggungjawabkan di bawah prinsip tanggungan liabiliti secara vikarius;

(ii) Sama ada di dalam suatu tuntutan di bawah prinsip tanggungan liabiliti secara vikarius, adakah perlu untuk Mahkamah perbicaraan (selepas memutuskan bahawa perbuatan pekerja yang dinamakan adalah suatu perbuatan salah) memutuskan gantirugi yang perlu ditanggung oleh pekerja tersebut sebelum memutuskan sama ada majikan boleh dipertanggungjawabkan di bawah prinsip tanggungan liabiliti secara vikarius;

(iii) Sama ada di dalam suatu tuntutan di bawah prinsip tanggungan liability secara vikarius, adakah majikan boleh dipertanggung jawabkan ke atas perbuatan salah pekerjanya semasa bertugas yang jelas bertentangan dengan skop pekerjaannya serta merupakan tindakan pekerja itu sendiri (on his own frolic); and

(iv) Di dalam suatu tuntutan di bawah prinsip tanggungan liabiliti secara vikarius, apakah tafsiran jelas "di luar skop pekerjaannya" dan "di atas tindakan pekerja itu sendiri (on his own frolic).

[3] The respondent ("Amirul") had filed a claim in tort against one Jaafar bin Haalid ("Jaafar") as the 1st defendant in the High Court and the appellant here ("GMP") as the 2nd defendant for vicarious liability. Amirul's cause of action against Jaafar and GMP emanated from the tragic event where he was shot at close range by Jaafar and consequently sustained serious bodily injuries. Amirul's action against Jaafar is on the basis that the latter is the primary tortfeasor while his action against GMP is on the basis of vicarious liability for Jaafar's action.

[4] The High Court, after a full trial, allowed Amirul's claim including the claim for compensatory damages. He was granted RM14,470.00 as special damages and RM70,000.00 as general damages. On appeal, the

Court of Appeal, by majority, found no appealable error and affirmed the findings of the learned trial Judge. The minority had a different view which we will come back to when dealing with the issues in this Appeal. The appeal was then heard by this Court after which the matter was adjourned for decision.

The Material Facts

[5] The relevant background facts leading to the filing of the present appeal are well stated in the judgments of the Courts below and in the parties' submissions. The salient facts, as far as they are relevant to the present appeal, can be restated as follows. For convenience, the parties will be referred to as they were in the court of first instance or by their abbreviated names as described earlier.

[6] On 23 November 2016, a contract was entered between GMP and a private limited company known as North Metal Industrial Sdn. Bhd ("North Metal"). The essential terms of the contract purports that GMP would be providing North Metal with the service of armed personal bodyguard.

[7] On 28 November 2016, a contract of employment was signed and entered between GMP and Jaafar, wherein among the salient terms are:

(i) that GMP takes Jaafar under its employment in the position of personal bodyguard, where the terminology used is “Pengawal Peribadi [Kontrak]”;

(ii) the date of commencement of Jaafar's work is on 28 November 2016; and

(iii) the starting salary is RM3,500-00.

[8] On 29 November 2016, a day after the contract of employment was signed, GMP placed Jaafar under the control and authority of North Metal.

[9] Only two days after the commencement of Jaafar's employment with GMP, that is, on the evening of 1 December 2016, tragedy struck. An individual by the name of Dato’ Ong Teik Kwang or better known as Dato’ M was driving his BMW bearing the registration plate PWF 11 (”the car”). Jaafar was in the car with him. He was seated in the rear passenger seat. At the time, Jaafar was performing his task as bodyguard for Dato’ M. Another individual, Lee Hong Boon, was seated in the front passenger seat. Significantly, Jaafar was equipped with a firearm provided by GMP. The firearm was an Austrian manufactured automatic pistol of the make of Glock

Mod 19 (“Glock automatic”). The Glock automatic was registered under the ownership and firearm licence of GMP.

[10] While the car was moving along Tun Dr Lim Chong Eu Expressway leading to the Penang Bridge, Jaafar suddenly shot and killed the said Dato’ M with the Glock automatic. The car collided on to the rear of another car and stalled. The other passenger alighted from the car and ran away. Jaafar then alighted from the car and fired randomly with the Glock automatic at members of the public.

[11] Meanwhile, at around 7.15 pm that evening, Amirul was heading to Pesta Pulau Pinang site for an assignment. He was tasked to video-record the opening ceremony of the Pesta, which was an annual event in Penang. He was accompanied by his friend Iskandar, who worked for the Malay language daily, Sinar Harian. Amirul was riding his motorcycle along the Lim Chong Eu Expressway.

[12] When Amirul approached the location where Dato’ M's car had collided with another car, he slowed down assuming there had been a road accident. He noticed a Chinese man seated near the fork of the road. The Chinese

man was bleeding profusely. Amirul presumed the Chinese man was a victim of the road accident. He got down from his motorcycle and approached the Chinese man. Amirul saw Jaafar standing nearby. He asked Jaafar what had happened. Jaafar retorted “Hang, nak apa?” In a split second, Jaafar whipped out the Glock automatic and shot Amirul in the chest. Amirul collapsed on the road.

[13] Amirul was rushed to the Penang Hospital in an ambulance. Surgical procedures were performed by a multi-disciplinary team of specialists. The injuries sustained by Amirul, as recorded in the medical reports, can be summarised as follows:

(i) fracture of the left 3rd and 4th ribs with hemopneumothorax;

(ii) comminuted fracture of left scapula;

(iii) traumatic left ulnar palsy; and

(iv) laceration of the left lung.

[14] Amirul was hospitalised from 1 December 2016 to 12 December 2016. He was discharged on 12 December 2016. However, he was re-admitted to the Penang Hospital on 21 December 2016 and warded until 12 January 2017. The re-admission to the hospital was due to neuropathic pain suffered

by Amirul as result of the ulnar nerve injury. Amirul was on medical leave for three (3) months from the date of the incident, during which time he had no source of income as he was unable to work. He lodged a police report in respect of the incident on 21 January 2017.

[15] Although Amirul resumed his work after the period of medical leave, he experienced difficulty in the movement on his left arm and the upper part of his body. On 13 March 2019, he was examined by the orthopedic consultant and surgeon, Mr. M Shunmugam of Gleneagles Hospital Penang who confirmed that Amirul had sustained gunshot injury to the chest and it was in close proximity to the brachial plexus. This had led to a nerve injury as well. Amirul has regained full movements of his joints of the left arm. However, there was still weakness of all the muscle groups of the left arm. The weakness will persist and this is due to the residual motor nerve injury. As a result of this, the left arm is weak; and owing to the weakness in the left hand, Amirul would not be able to lift any heavy equipment, as this might cause some functional disability.

[16] To add to his misfortune, the tragic incident also had a serious impact on him emotionally and psychologically. He was subsequently diagnosed to

be suffering from Post-Traumatic Stress Disorder as a result of which he will require continued psychiatric treatment.

[17] To continue the narrative of the events that took place on the fateful evening, it transpired that after killing Dato M, Jaafar had used the Glock automatic to randomly shoot at the public. As a consequence, two persons were killed and another four persons, apart from Amirul, sustained injuries. They were all innocent victims whose only misfortune was being at the wrong place at the wrong time. Jaafar was subsequently charged for murder under section 302 of the Penal Code. It is unclear as to the outcome of those proceedings as well as to why Jaafar acted as he did.

Proceedings in the courts below

[18] After a full trial, the learned trial Judge came to a finding that liability against the primary tortfeasor, namely Jaafar, had been firmly established as he had failed to give evidence and it was established beyond doubt that it was Jaafar who had shot Amirul thereby causing the injuries as listed earlier. After evaluating the evidence, the learned Judge also found on a balance of probabilities that GMP was vicariously liable for the

grievous injury suffered by Amirul. Apart from granting the declarations sought, the High Court awarded general damages of RM70,000.00 and a sum of RM14,470.00 as special damages.

[19] The decision of the Court of Appeal was split. The majority found no appealable error in the judgment of the High Court and affirmed the findings of the learned trial Judge. The minority judgment took the position that Jaafar's criminal acts had no connection whatsoever in carrying out his duties and were not acts authorized by his employer in the course of employment. It was then held that the finding of vicarious liability was plainly incorrect. The learned Judge who wrote the dissenting opinion also appeared to be troubled by the fact that there was no clear finding by the trial Court against the tortfeasor of the commission of a particular tort to trigger the employer's liability.

Issues for determination

[20] Following from the leave questions and the arguments raised by the parties, and at the risk of some oversimplification, the broad issues for our consideration and determination are as follows. The first issue is whether, as a matter of law and fact, GMP could be vicariously liable for the actions of Jaafar. The second issue is whether there was a failure on the part of the

learned trial Judge to make a clear finding of liability for a particular tort against the tortfeasor.

Finding of liability against the tortfeasor

[21] It may be more convenient to deal first with the second issue. In this connection, learned counsel for the appellant relied heavily on the dissenting opinion in the Court of Appeal in that there was no specific finding of the commission of a particular tort committed by Jaafar. The passages relied on in the dissenting opinion were as follows:

> "[2] As noted in the majority judgment, there was no dispute that the Plaintiff/Respondent had suffered serious injury and loss due to the act of D1 in firing a shot at him using a firearm supplied by the Appellant, his employer of the material time. However, the dispute centred around whether under the facts and circumstances surrounding D1's wrongful act the Appellant as his purported employer could be held vicariously liable to the Plaintiff for the loss and damage that he had suffered caused by D1's act which the LHCJ merely described as wrongful without making any specific finding as to what tortious act he had committed for the Plaintiff/Respondent to invoke the principle of vicarious liability against the Appellant.
>
> [3] I am of the considered view that for the aforesaid principle to be invoked against the Appellant as the employer of the tortfeasor (D1), there

must be a specific finding by the trial court that D1 had committed a wrongful act within the realm of the law of torts notwithstanding that, as the evidence disclosed, he may have committed a grave criminal act. As correctly highlighted to us by the Appellant, the Plaintiff in the court below had vide his pleadings only prayed for reliefs and/or orders against the Appellant (“D2") whereas against D1 no order or relief was sought. The Appellant was also correct, in my view, in pointing out that the Plaintiff, including during the submission before us, appeared to have made his own conclusion that D1’s wrongful act on the day in question (01/12/2016) was an unlawful act under the law of torts. There was not even a plea for him to be found liable or any specific tort. I must pause here to reiterate that the LHCJ had made a mere general finding that D2 was liable vicariously to the Plaintiff for D1’s wrongful act.

[4] Neither had any evidence been given in the trial as to what was the wrongful act under the law of torts that D1 had committed in regard to the claim against D2. Be that as it may, to my mind, it is indisputable that in law it was incumbent upon the Plaintiff to establish a tortious wrong by D1 for any tortious liablity to arise against D2 as the employer.

[5] An accurate definition of this kind of liablity is provided by the Appellant's quotation from Legal Dictionary.Net as follows:

> “Vicarious liability, sometimes referred to as “imputed liability,” is a legal concept that assigns liability to an individual who did not actually cause the harm, but who has a specific superior legal relationship to the person who did cause the harm. Vicarious liability most commonly comes into play when an employee has acted in a negligent manner for which the employer will be held responsible”.

[6] A perusal of the Respondent's statement of claim is necessary to ascertain the act of D1 as pleaded for which it was claimed that D2 should be held vicariously liable.

[7] As the pleaded background facts leading to the incident where D1 alighted from the car, pulled out a firearm and fired at the Plaintiff was not disputed, I would focus on the pleaded narrative in relation to D2's liability, as follows:

"Vicarious Liability

8. The Plaintiff pleads that the Second Defendant is vicariously liable for the wrongful act committed by the First Defendant, which in this case was discharging the firearm towards the plaintiff and causing him serious injury.

8.1 The First Defendant committed the act while and during the course of his employment under the Second Defendant."

[8] It bears emphasis that D1's act has been pleaded merely as a wrongful act in discharging the firearm towards the Plaintiff. It is abundantly clear that in the above paragraphs and all the other parts of the SOC concerning the shooting incident, there is no plea whatsoever of the tortious wrong that D1 had committed for the plea of vicarious liability, which is purely a tortious concept, to be sustainable. Merely describing the act as a wrongful act without pleading what is the tortious act for which that employer should bear liability would not suffice. This, to my mind, is not a proposition ground on mere labelling but goes to the substance of the liability sought to be imposed on the employer for the employee's act.

[9] For the record it was also pleaded that D1 was then facing several criminal charges, including for murder under section 302, Penal Code in consequence of his wrongful act during the incident. While there can be no doubt of overlapping between criminal acts and tortious wrongs, the point to be emphasised is the necessity for the tortious wrong to be expressly pleaded.

[10] Whether it is negligence or some other tortious wrong, it is plain that in principle there must be a clear finding by the trial court against the tortfeasor of the commission of a particular tort to trigger the employer's or superior's liablity…"

[22] With respect, we are unable to agree with the reasoning expressed above. In its broadest sense, the purpose of tort law is to provide redress for a wrong done to a person and provide relief, usually in the form of monetary damages as compensation, from the wrongful acts of others. The tort that is committed can either be an intentional or a negligent act. Commons forms of intentional acts are assault and battery, trespass and false imprisonment. At the risk of some oversimplification, an action in negligence arises from proof of breach of duty and want of reasonable care.

[23] In the instant case, it is beyond dispute that Jaafar had committed an intentional wrongful act by causing grievous injury to Amirul. The act of discharging a firearm at a civilian is not only a criminal act but it can also attract liability under tort law. This is not surprising as there are many wrongful acts which may simultaneously fall within the category of criminal offence as well as that of tortious wrongdoing.

[24] Considering the exceptional facts and circumstances of this case, the failure of the learned trial Judge to attach a particular label on Jaafar's action, with respect, cannot be a justification to set aside the entire judgment which is based on findings of facts after a full trial. What is important to comprehend is that Jaafar's action has caused grievous injury, both physically and psychologically, to Amirul, which attracts tortious liability in as much as it is also a criminal act.

[25] For all intents and purpose of the instant civil action, we are of the view that Amirul need only prove the facts that form the substratum of his cause of action. And this had been accomplished on the required standard of proof as found by the learned trial Judge. In short, there was really no confusion as to the claim brought by Amirul. For these reasons, we do not think the arguments by learned counsel for the appellant have any merit.

Vicarious Liability

[26] We now come to the next issue. The issue, as was alluded to at the outset, is whether as a matter of law and fact, GMP could be vicariously liable for the actions of Jaafar. Relying on the older cases such as *Samin bin Hassan v Government of Malaysia* [1976] 2 MLJ 211 and *Keppel Bus Co. Ltd v Sa'ad Bin Ahmad* [1974] 1 MLJ 191, the appellant argued that vicarious liability could not be imposed as Jaafar had acted on a frolic of his own as his actions were outside the scope of his duties and were not authorized by his employer.

[27] In this context, the appellant relied again on the observations of the minority judgment of the Court of Appeal which were as follows:

> "[21] Whether the wrongful act of an employee falls within his sphere of duties in a given case must depend on its own peculiar facts. Hence, it was incumbent for the LHCJ to have duly addressed the issue of whether D1 did the act in furtherance of his duties to his employer. Regrettably, the LHCJ omitted to do so but went on to hold that D2 could not be absolved from liability by just saying that it was a prohibited act contrary to instruction. Though the series of criminal acts were done by D1 in the normal course of his duties, the LHCJ had also failed to address her mind to the vital issue whether his obviously unauthorised acts had become so connected with his

authorised acts that they had merely become differing modes of doing the latter.

[22] It was patently evident in the instant case that D1's criminal acts had no connection whatsoever to carrying out his duties or acts authorised by his employer in the course of employment. Likewise, his acts went far beyond acts authorised by his employer or were manifestly beyond the employer's foreseeability or anticipation. It was similarly obvious that the acts cannot logically to be considered within the implied authority granted to D1 by D2. This is a clear case of the employee having gone so far on his own frolic that no liability can be imposed on his employer for the losses and damages suffered by the victim.

[23] In the circumstances, I am inclined to agree with the contention of the Appellant that the LHCJ had failed to judicially appreciate the material facts that she should have necessarily taken into account in the determination of whether vicarious liability would arise against D2."

[28] We must state at the outset that the scope of vicarious liability has come under much scrutiny in recent years. The way in which the law has undergone some changes was alluded to with much clarity in the High Court case of *Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979. The High Court had allowed the appeal from the Magistrate's Court which decision was affirmed by the Court of Appeal. The following is how the High Court characterized the development of the law:

“[21] An employer is vicariously liable for a tort committed by an employee in the course of his or her employment. The difficulty often arises with determining what is "in the course of employment" or sometimes referred to as scope of employment. To come within the scope of employment it is necessary to ascertain if what an employee does at work is sufficiently connected with the duties and responsibilities of the employee.

[22] As there was some dispute as to the correct test to apply in determining whether the defendant was vicariously liable in this case, it is necessary to consider the law on vicarious liability. To be fair to the learned Magistrate, he was referred to some fairly old legal cases, such as *Lee Beng Choon v. Tan Ngiap Kee* [1962] 1 LNS 75; [1962] 28 MLJ 315; *Sanderson v. Collins* [1904] 1 KB 628; *Samin bin Hassan v. Government of Malaysia* [1976] 1 LNS 139; [1976] 2 MLJ and *Rose v. Plenty* [1976] 1 All ER 97, which he appeared to have accepted in arriving at his decision on vicarious liability. In such cases, the judges have often referred to the employees going on a "frolic of their own" in describing acts of employees which have nothing to do with their employment or outside the scope of employment.

[23] Many of the arguments in the earlier cases revolved around the question whether, in the particular circumstances, the employee had been performing service for the employer but in an unauthorised way, hence the expression "frolic of his own".

[24] The connection between an employee acting within his scope of employment and the expression "on a frolic of his own" was explained by Diplock LJ in *Morris v. C W Martin & Sons Ltd* [1966] 1 QB 716 at p. 733:

> A coachman had a tendency, well-recognised in the nineteenth century, to drive off with his master's vehicle upon a 'frolic of his own' and sometimes to injure a passer-by while indulging in this foible. The only connection between the injury to the passer-by and the master's act in employing the coachman was that but for such employment the coachman would probably not have had the opportunity of driving off with the vehicle at all. At a period when judges themselves commonly employed coachmen, this connection was regarded as too tenuous to render the master vicariously liable to the passer-by for the injury caused by the coachman, at any rate if the master had exercised reasonable care in selecting him for employment. The immunity of the master from vicarious liability for tortious acts of a servant while engaged upon a frolic can be rationalised in a variety of ways. The master's employment of the servant was only a causa sine qua non of the injury: it was not the causa causans. It was not 'foreseeable' by the master that his employment of the servant would cause injury to the person who sustained it. The master gave no authority to the servant to create an Atkinian proximity relationship between the master and the person injured by the servant's acts. One or other of these rationalisations underlies the common phrase in which the test of the master's liability is expressed: 'Was the servant's act within the scope or course of his employment?'

[25] Be that as it may, the phrase "frolic of his own" is in itself vague and unhelpful as it does not provide a sufficient basis for determining the existence or limits of vicarious liability. It is probably for this reason that the authors of *Markesinis And Deakin's Tort Law* (7th edn, 2013) opined:

> The classical formulation is that of Parke B in *Joel v. Morrison*: '[i]f he [the driver] was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's

> business, the master will not be liable'. This test is devoid of guidance since it begs the question. To call an action a 'frolic' is not to give a reason why it is outside the course of employment; it only expresses a decision already made that it is outside.

[26] Even so, Lord Diplock's explanation was not surprising at the time considering that the classical formulation which applied to determine whether an employee's tort was committed in the course of employment was the so-called Salmond test, from the first edition of *Salmond on Torts* way back in 1907. This test required that before vicarious liability can be inferred, there must exist a relationship of *'master and servant*' between the defendant and the person committing the wrong. The servant, in committing the wrong, must have been acting in the course of his employment. A servant is deemed to be acting in the course of his employment if his act is either (i) a wrongful act authorised by the master; or (ii) a wrongful and unauthorised mode of doing some act authorised by the master.

[27] It should be noted that the terms *'master'* and *'servant'* was the old-fashioned way of referring to what essentially was an employer-employee relationship. *Salmond* further explained in a later edition that an employer is liable even for unauthorised acts if they are so connected with authorised acts that they may be regarded as modes - although improper modes - of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.

[28] What springs to mind at this juncture is that whilst an act of negligence may be easy to characterise as an unauthorised mode of performing an authorised act, an act of intentional, criminal wrongdoing, would be more

likely seen as an independent act. This presented an opportunity for the House of Lords in *Lister v. Hesley Hall Ltd* [2002] AC 215 to clarify and extend the application of the Salmond test which had by then stood the test of time for almost a century.

[29] The facts in Lister were as follows. The defendants ran a boarding school for children. The claimants were boys who had been sexually abused by a warden employed by the defendants. They claimed that the defendants were vicariously liable for the abuse. Now these claims would have been unsuccessful had the Salmond test been applied as the sexual abuse could not be characterised as the warden doing what he was employed to do in an unauthorised way.

[30] The House of Lords departed from this approach on the reasoning that the Salmond test did not actually work well in cases of intentional wrongdoing. Influenced by the decisions of the Supreme Court of Canada in *Bazley v. Curry* [1999] 2 SCR 534 and *Jacobi v. Griffiths* [1999] 2 SCR 570, the House of Lords adopted a different test, that is, an employee will be held to have acted in the course of his employment when he committed a tort if that tort was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable for that tort.

[31] This 'close connection' test enabled the House of Lords to hold that the sexual abuse was so inextricably interwoven with the task of the warden in looking after the boys as delegated by his employer that it would be fair, in the House of Lords opinion, that the employers be vicariously liable for the abuse.

[32] Considering the wide variety of ways in which cases involving vicarious liability can come before the courts, this test provided greater flexibility and was reminiscent of the 'fair, just and reasonable' test formulated in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 for novel 'duty of care' situations. One such case was *Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors* [2011] 1 LNS 1565; [2011] 2 AMR 214. This flexibility is necessary in view of the inevitable changes in social development affecting the workplace environment as well as employment relationships.

[33] Shortly after Lister, the House of Lords considered vicariously liability in a commercial case - *Dubai Aluminium Company Ltd v. Salaam* [2003] 2 AC 366. In that case, liability was imposed on a partnership of solicitors for the wrongful act of assisting in a fraud of one of the partners. Their Lordships were of the opinion that liability depended not on the actual or apparent authority of the partner committing the tort but on whether the wrongful act was so closely connected to the acts the partner was authorised to do.

[34] Lord Nicholls in Dubai Aluminium described the test in this way:

> Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the 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. (at para [23]).

[35] Lord Millet in the same case also summarised some important principles relating to vicarious liability as follows:

> So it is no answer to say that the employee was guilty of intentional wrong-doing, 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. (at para [79]).

[36] Nevertheless, Lord Nicholls acknowledged the limitations of the 'close connection' test in the same case:

> This "close connection" test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged... This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions." (at para [26]).

[37] In the earlier judgment of the Supreme Court of Canada in *Bazley*, *supra*, particular emphasis was laid to employers carrying out an enterprise with inherent risks of injury being caused to members of the community dealing with it. In that case, the defendants, who were running residential care facilities for emotionally troubled children, unwittingly employed a paedophile who sexually abused one of the children. McLachlin J, who delivered the judgment of the Supreme Court of Canada, noted the policy

considerations underlying the concept of vicarious liability and observed (at p. 557):

> Underlying the cases holding employers vicariously liable for the unauthorised acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, 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... The question in each case 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.

[38] On the question of degree of connection, Her Ladyship further observed (at p. 559):

> The fundamental question is whether the wrongful act is sufficiently related to conduct authorised 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 there from, even if unrelated to the employer's desires.

[39] This creation of risk justification for imposing liability was endorsed by Lord Nicholls in *Dubai Aluminium* where he said (at para. [21]):

> The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risk that others will be harmed by

> wrongful acts committed by the agents through whom the business is carried on. When the risk ripens into loss, it is just that the business should be responsible for compensating the person who has been wronged.

[40] The 'close connection' test was followed by the Privy Council in *Bernard v. Attorney-General of Jamaica* [2005] IRLR 398 and *Brown v. Robinson* [2004] UKPC 56. It was also approved by the House of Lords in *Majrowski v. Guy's and St Thomas' NHS Trust* [2007] 1 AC 224, the Court of Appeal of *England in Mattis v. Pollock* [2003] 1 WLR 2158 and *Maga v. The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441, the Supreme Court in *The Catholic Child Welfare Society & Ors v. Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2012] 3 WLR 1319.

[41] Recently, the English Court of Appeal in *Mohamud v. WM Morrison Supermarkets plc* [2014] 2 All ER 990 ("*Mohamud*") approved of a two-stage test of vicarious liability. The first stage involves a consideration of the relationship between the primary wrongdoer and the person alleged to be liable and whether that relationship is capable of giving rise to vicarious liability. The second stage relates to whether there is a sufficiently close connection between the wrongdoing and the employment so that it would be fair and just to hold the employers vicariously liable.

[42] The Court of Appeal also relied on the factors relevant in considering intentional torts in *Bazley v. Curry, supra* at para. 41, such as:

> (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 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 employer's enterprise; (d) The extent of power conferred on the employee in relation to the victim; (e) The vulnerability of potential victims to wrongful exercise of the employee's power.

[43] In the Malaysian context, the Court of Appeal in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653; [2009] 6 MLJ 826 had occasion to deal with the issue of vicarious liability. The facts of the case were as follows. The respondents were, a member of Angkatan Relawan Rakyat Malaysia [RELA] (first respondent), the Director-General of RELA (second respondent), the Director of Jabatan Islam Wilayah Persekutuan Kuala Lumpur [JAWI] (third respondent) and the Government of Malaysia (fourth respondent). The appellant was arrested by officers of the second and third respondents and put in a truck with other arrested persons in a joint operation.

[44] Sometime along the journey, the appellant asked permission from the officers to use toilet facilities. Her permission was denied and she was asked to ease herself in the truck. Unable to control her bladder, the appellant eased herself in the truck whilst others shielded her from view by encircling her and by using a shawl. At that juncture, the first respondent opened the truck's door, rushed in, pulled the shawl away and took photographs of the appellant squatting and urinating.

[45] The High Court held that:

(a) although the first respondent were carrying out their duties in their official capacity, the first respondent was never ordered to photograph any arrested person and that the camera belonged to the first respondent;

(b) taking photographs of the appellant urinating was not part of the first respondent's duty; and

(c) therefore, the second, third and fourth respondents were not vicariously liable for the first respondent's acts.

[46] At the Court of Appeal, the findings of the learned trial judge that the action of the first defendant was a "frolic of his own" came under serious challenge. The Court concluded, following the Privy Council decision of *Keppel Bus Co Ltd v. Sa'ad bin Ahmad* [1974] 1 LNS 62; [1974] 1 MLJ 191, that the evidence of snapping the photographs being so closely connected to the duties of the first respondent was overwhelming. Accordingly the second, third and fourth respondents were found vicariously liable for the wrongful act of the first respondent.

[47] The foregoing are now considered settled principles with regard to legal liability of employers for the wrongs of employees. It is with these principles in mind that this appeal ought to be considered and decided.

[29] For completeness we would add that the case of *Mohamud (supra)* went on to be decided by the UK Supreme Court (see [2016] UKSC; [2016] AC 677). A useful exposition of the decision was set out in *Clerk & Lindsell on Torts*, 23rd Edition, at 6-31:

"But that said, the Supreme Court did proffer some clarification of the circumstances in *Mohamud v Wm Morrison Supermarkets Ltd.* In that case, the claimant went into the kiosk at a petrol station owned by the defendant supermarkets to see if it was possible to get something printed from a USB stick. The defendant's employee refused the request using racially offensive language. The claimant was ordered to leave the premises and the employee followed the claimant across the forecourt to his car before physically attacking him. The Supreme Court held that the defendant could be held liable on the basis of the close connection test. Two matters were declared to be relevant when deciding whether the close connection test has been satisfied. "The first question is what functions or 'field of activities' have been entrusted by the employer to the employee", or in other words, "what was the nature of his job"? The second question is whether "there was a sufficient connection between the position in which he [the employee] was employed and his wrongful conduct to make it right for the employer to be held liable under the principle [of vicarious liability]". This approach was emphatically preferred to the notion that there could realistically be a precise "measure [of] the closeness of connection, as it were, on a scale of 1 to 10". In the instant case, their Lordships noted, first, that the employee's job included attending to customers and answering enquiries. They then held that what occurred was an unbroken chain of events in which the attack was intimately bound up with the employee's demand that the claimant should leave the defendant's premises. Accordingly, it was appropriate to identify a sufficiently close connection here between the employee's position and his tortious conduct."

[30] Be that as it may, the Australian High Court in *Prince Alfred College Incorporated v ADC* [2016] HCA 37 expressed some misgivings about the approach taken by the UK Supreme Court in *Mohamud*. Even so, we do not think it is necessary to delve in detail the differences in the two cases. In the end, both those decisions approved of the close connection test in *Lister v Hesley Hall Ltd (supra)* and it was only the way in which the test is to be applied that was the subject of contention. With respect, the outcome of the application of the close connection test, in any event, would depend very much on the facts and circumstances of each case.

[31] In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators:

(i) the intentional wrong must be committed by the employee in the course of employment;

(ii) there must be connection between the wrongful act and the nature of the employment;

(iii) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and

(iv) the risk is created by the employer, owing to the features of the business.

[32] Applying these factors to the instant case, we do not see how the High Court and the majority in the Court of Appeal had erred in applying the close connection test. In our view, there cannot be any blemish on the decisions of the courts below for the following reasons.

[33] At the forefront, the standout factor is the feature of GMP's business. It is a private agency that offers the service of armed bodyguards, among others. GMP is the registered owner of the firearms with the carry and use licence issued by the Home Minister. As such, they are obliged to follow all rules and regulations made under section 18 of the Private Agencies Act 1971. It is therefore GMP which equips or provides firearms to its employees who are designated to the position of personal bodyguards. In the instant case, GMP equipped Jaafar with the Glock automatic.

[34] More significantly, it was GMP who was responsible for selecting and employing Jaafar to function as a personal bodyguard thus enabling him to carry the said firearm. They cannot now be heard to say they are not

responsible if he had acted unlawfully in the course of his duty. It was common ground that on that fateful evening, Jaafar was performing his assignment as a bodyguard albeit in an illegal way.

[35] By providing Jaafar with a firearm to perform his duty as personal bodyguard, GMP has created a risk which exposed the public to potential harm. The risk manifested into reality when Jaafar decided to embark on a rampage for reasons only known to him. As reiterated earlier, GMP had created an opportunity for Jaafar to utilise the Glock automatic, albeit for wrongful intent. There is therefore little doubt that the wrongful act committed by Jaafar is closely connected with the line of work assigned to him by GMP, and for which GMP equipped him with the lethal weapon. As stated earlier, Jaafar was on duty that fateful day pursuant to his employment as a personal bodyguard.

[36] Now, Jaafar's actions may have been unauthorized by his employer but the pertinent question to ask is whether Jaafar's actions in unlawfully discharging his firearm and causing injury to Amirul was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. On the facts of this case and for the reasons we

have already stated, the answer must be yes. To put it in another way, Jaafar's wrongful act was not independent from the task he was employed to do. In this connection, it is apposite to recall the words of Lord Millet in the House of Lords case of *Lister and others v Hesley Hall Ltd (supra)*:

> "So, 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.
>
> …
>
> The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind."

[37] There was also a common thread in the plethora of cases cited to us (see for example, *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 3 AMR 3260; *Bernard v Attorney General* [2005] 2 LRC 561 and *Lister and others v Hesley Hall Ltd, supra*) in that, the nature of the work carried out by the employees exposed third parties (the innocent members of the community) to the risk or danger to their lives or safety, and, the same

nature of the work allowed the malevolent employees the opportunity to commit the intentional wrong on the third parties.

[38] In the circumstances, we find that the courts below were right in their assessment that GMP was vicariously liable for Jaafar's wrongful act. Accordingly, the appellant's argument on this issue must fail and the appeal be dismissed. For completeness, I only need to add that my learned sisters concur with the above reasons and conclusion.

Rohana Yusuf PCA:

[39] I have had the privilege of reading the judgment of my learned brother Harmindar Singh Dhaliwal FCJ and I concur with the conclusion and the reasons propounded by His Lordship. In support, I would like to add the following:

[40] The "*close connection*" test as we have earlier explained in the current appeal has been well accepted by this Court in **Dr. Kok Choong Seng & Anor v Soo Cheng Lin and Another Appeal [2018] 1 MLJ 685** and later in **Dr. Hari Krishnan & Anor v Megat Noor Ishak Bin Megat Ibrahim & Anor**

and another appeal [2018] 1 MLJ 281. Similarly, the Court of Appeal too had applied this test in **Zulkiply Bin Taib & Anor v Prabakar A/L Bala Krisna & Ors and other appeals [2015] 2 MLJ 607, Datuk Seri Khalid Bin Abu Bakar & Ors v N Indra a/p Nallathamby (the administrator of the estate and dependant of Kugan A/L Ananthan, deceased) and another appeal [2015] 1 MLJ 353 and Maslinda Bt Ishak v Mohd Tahir Bin Osman & Ors [2009] 6 MLJ 826**. In adopting this test, the Federal Court adopted the English decision of **Various Claimants v Catholic Child Welfare Society and others [2013] 2 AC 1**, which followed a landmark case of the House of Lords in **Lister and others v Hesley Hall Ltd [2001] UKHL 22** where the test was originally introduced.

[41] It is interesting to note that the House of Lords in introducing the "close connection" test in England had in fact considered two other landmark decisions by the Canadian Supreme Court in **Bazley v Curry [1999] 2 S.C.R 534** and **Jacobi v Griffiths [1999] 2 S.C.R 570.** Enunciating the principle of "close connection", the Supreme Court of Canada unanimously held liability in Bazley's case by a four to three majority came to the opposite conclusion in Jacobi's case. The Supreme Court in Bazley held that though an employer

is not “at fault”, it may still be “fair” that it should bear responsibility for the tortious conduct of its employees for sexual abuse.

[42] The Supreme Court of Canada in Bazley (supra) went on to explain that vicarious liability is generally appropriately involved where there is a significant connection between the creation or enhancement of risk and the wrong that flows from the risk. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is a risk to another or to others within the range of apprehension.

[43] This decision has significant implications not only in sexual abuse cases but in other cases where the employers of coaches, teachers, trip leaders, caregivers - in effect, anyone who is placed in a position of trust or with parent-like authority, power, and control over another individual. Non-profit corporations are not exempted from being vicariously liable. In applying this test however the Court needs to see whether the wrongful acts are carried out while they are in the course of their duties or in the execution of their duties, to the extent that they are so closely connected with their authorised duties before the employer can be held liable for the wrong.

[44] We are further guided by the Privy Council cases of **The Attorney General of the British Virgins Islands v Hartwell [2004] UKPC 12** and **Bernard v Attorney General of Jamaica [2004] UKPC 47.** In applying this test, these two cases help to illustrate the point on what amount to doing an act in the course of duty. In Hartwell, a Police Constable Kelvin Laurent was the sole police officer stationed on the island of Jost Van Dyke in the British Virgin Islands. PC Laurent abandoned his post and left the island. He went into a bar where his partner worked as a waitress and was consumed by anger and jealousy at finding her there with another man. He fired a number of shots at one or other or both of them with a service revolver to which he had access in the course of his duties. A bystander was injured and claimed damages from the Government. The Privy Council, applying Lister found and held that, at the relevant time, the officer had abandoned his post and his wrongful use of the service revolver was not something done in the course of employment. Consequently, the Government as the employer was held not to be vicariously liable.

[45] The contrast is found in Bernard. Here the Plaintiff went to the Central Sorting Office in Kingston to make an overseas call. He joined a queue of about 15 people who were waiting for the phone. When his turn came, Police

Constable Paul Morgan went to the head of the line and demanded the use of the phone. Plaintiff was determined not to let go of the phone. After slapping the Plaintiff on the hand and then shoving him in his chest did not make any difference, the Constable pulled out a service revolver and fired at his head at point-blank range. The bullet hit the Plaintiff on the left side of his head leaving entry and exit wounds in his skull. The Privy Council, applying Lister held that the Crown was vicariously liable. The actions of a police officer shooting a victim who would not turn over a public phone to the officer who had identified himself as a police officer, was held to be doing so in the course of his duty or connected to his duty.

[46] We can see quite clearly that despite applying similar test, the Privy Council arrived at a different conclusion. In Bernard, the Crown was found to be vicariously liable because the act of shooting by PC Paul Morgan was unlawful and did not fall within his prescribed duties but was nevertheless in furtherance of his demand asserting that he was executing his duties as a police officer.

[47] Conversely, in Hartwell, the Government was not vicariously liable because though the shooting at the bar was closely connected to his

employment, the Privy Council found that PC Laurent had abandoned his post and his wrongful use of the service revolver was not something done in the course of employment or execution of his duties. According to the Privy Council, when deciding to leave his post and the island, PC Laurent's activity has nothing to do with any of his police duties. He had no duties beyond the Island of Jost Van Dyke. He has albeit put aside his role as a police constable but, armed with the police revolver which he had improperly taken, he had embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of "a frolic of his own".

[48] Applying these two cases to our present case, the act of Jaafar, the tortfeasor, shooting the members of the public and the Respondent were a series of actions so closely connected with his employment as a bodyguard who was tasked of guarding Dato' Ong Teik Kwang. His action was done in the course of employment and in executing his duties as a bodyguard. The evidence of unauthorised shootings being so closely connected to his duties not only was overwhelming, but fitted well with House of Lord's landmark case of Lister. Hence, his employer, the GMP Kaisar Security (M) Sdn Bhd, the Appellant is vicariously liable for the wrongful act committed against the Respondent.

It is therefore important to note that the “close connection” test must always be considered on the factual matrix and circumstances of each case and cannot apply independently without looking at each set of facts.

Conclusion

[50] In conclusion, and for the reasons mentioned, the Courts below were entitled to come to the findings on the core issues as they did. As we have dealt with the core issues in our judgment, we find it quite unnecessary to answer the leave questions. Accordingly, the appeal is dismissed with costs to the respondents. The orders made by the Courts below are hereby affirmed.

Dated: 18 October 2022

Signed
(ROHANA YUSUF)
President Court of Appeal
Federal Court of Malaysia

Signed
(HARMINDAR SINGH DHALIWAL)
Judge
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