[2016] JMSC Civ 145

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV03942

BETWEEN	**ARDEN CLARKE**	**CLAIMANT**
AND	**SECURITY INNOVATIONS LIMITED**	**1ST DEFENDANT**
AND	**MASTER C. McNAMEE**	**2ND DEFENDANT**

Orane Nelson instructed by K. Churchill Neita & Co. for the Claimant

Stuart L. Stimpson instructed by Hart Muirhead Fatta for the First Defendant

June 24 & 25, 2013; August 30, 2016

Vicarious liability – Appropriate test – Whether employee acting within the scope of his employment or on a frolic of his own when committed intentional tort

D. FRASER J

Background

[1] The second defendant, Mr. C. McNamee was engaged as a Security Guard by the first defendant Security Innovations Limited (SIL) which provided security services to a number of clients including Flow Company Ltd. Mr. McNamee had a Firearm User's (Employee's) Certificate issued by the police which authorized him to use particular firearms owned by SIL in the discharge of his duties. Mr. McNamee also had a licence issued to him by the Private Security Regulation Authority.

[2] On April 1, 2008 Mr. McNamee reported to work at Flow Company Ltd located at Ashenheim Road to carry out duties as a security guard pursuant to the contract which SIL had in respect of those premises. He was provided by SIL with a shot gun.

[3] During his tour of duty, Mr. McNamee left Flow's premises armed with the shotgun and went to the vicinity of Omega Manufacturing Company Limited (which is located approximately 180 feet from Flow). He shouted something to the claimant Mr. Arden Clarke who was a security guard stationed at Omega and then fired shots at him. The claimant sustained several injuries. Mr. McNamee returned to Flow. He left shortly afterwards leaving the shot gun behind. It was recovered by the police and later handed over to the 1st defendant. Mr. McNamee has not been located since.

[4] The claimant seeks damages for assault and battery and/or negligence against the 1st defendant alleging that the second defendant was acting in the course of his duties as the servant and/or agent of the first defendant at the time the injuries were inflicted by the 2nd defendant on the claimant.

The Issues

[5] Initially there were three issues for determination.

i) ***Was the 2nd defendant an independent contractor or an employee of the 1st defendant?*** There was some cross-examination of Ms. Amos the representative of the 1st defendant in relation to this issue. However by the time of submissions, it was acknowledged that the 2nd defendant would have been an employee of the 1st defendant and not an independent contractor. This is in keeping with the analysis in the authorities of ***Montreal v Montreal Locomotive Works*** [1947] 1 DLR 161 and ***Ferguson v Dawson & Partners*** [1976] 1 WLR 1213 cited by counsel for the claimant and the authority of ***Dave Robinson & Anor. v Inez Brown (Near relation of Paul Andrew***

deceased) SCCA 18/99 (April 3, 2003), cited by counsel for the 1st defendant, which settled the status of security guards in Jamaica.

ii) ***Whether the 1st defendant was liable in negligence for the actions of the 2nd defendant.*** The claim as pleaded averred assault and battery or negligence on the part of the 2nd defendant, for which the 1st defendant was said to be vicariously liable. The evidence in the case however did not admit of negligent commission of the acts of the 2nd defendant that caused the claimant's injuries. Further, as pointed out by counsel for the 1st defendant, there was no evidence of prior conduct of the 2nd defendant that should have put the 1st defendant on notice that the 2nd defendant might have acted as he did, which would therefore render the 1st defendant liable for the issuance of a firearm to the 2nd defendant. See ***Attorney General v Craig Hartwell*** [2004] UKPC 12 and ***Lanzie Brown v Det. Corp. Wayne Clarke & The Attorney General*** CL 1998/B-219 (Feb. 27, 2007).

On the contrary the 2nd defendant was the holder of a Firearm User's (Employee's) Certificate issued by the police and also a licence issued to him by the Private Security Regulation Authority which would negate any indication of negligence in the 1st defendant's issuing a firearm to the 2nd defendant and deploying him to work on location. In light of these factors counsel for the claimant conceded that a claim in negligence was not established.

iii) The third and only remaining issue is therefore: ***Was the first defendant company vicariously liable for the actions of its employee the second defendant, in respect of his discharge of the firearm at the claimant?***

Issue: ***Was the first defendant company vicariously liable for the actions of its employee the second defendant in respect of his discharge of the firearm at the claimant?***

[6] Counsel for the claimant submitted that the first defendant was vicariously liable for the result of the deliberate tortious acts of Mr McNamee. Citing **Street on Torts** 12th Edition at page 611 counsel submitted that, *"The crucial question is whether the act in question was committed either directly in the course of the employee's employment, or whether it was sufficiently connected to it to warrant the imposition of vicarious liability...the employer cannot be held vicariously liable simply for supplying an opportunity for the employee to commit the crime...The leading case is Lister v Helsey Hall Ltd."*

[7] Counsel submitted further that a master is at law liable for the criminal/deliberate conduct of the employee/servant even if the conduct was not done for the benefit of the Master (See ***Lister v Helsey Hall Ltd*** [2002] 1 AC 215 and ***Port Sweetenham Authority v T.W. Wu & Co.*** [1979] AC 580). Counsel also relied on ***Clinton Bernard v The Attorney General of Jamaica*** [2004] UKPC 47 where following ***Lister*** it was stated at paragraph 18 that, *"The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and 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".*

[8] Counsel submitted that as the first defendant issued Mr. McNamee a firearm the discharge of the firearm would have been contemplated by the first defendant. Therefore the act Mr. McNamee committed was inextricably bound up with what he was employed to do as an armed security guard. Accordingly the first defendant was vicariously liable for the criminal/intentional wrongdoing of Mr. McNamee and it was not that his employment only provided him with the opportunity to commit the tortious act.

[9] Counsel for the first defendant on the other hand noted that Salmond on Torts had outlined certain circumstances under which an employer could be vicariously liable:

a) a wrongful act authorized by the master;

b) a wrongful and unauthorized mode of doing some act authorized by the master.

Counsel pointed out that the second limb was stated by Salmond to include unauthorised acts so closely connected with a servant's employment, that they may rightly be regarded as modes — although improper modes — of carrying out one's duties.

[10] Counsel also relied on the six considerations laid down by Sykes J in the case of ***Allan Campbell v National Fuels and Lubricants Ltd et al*** C.L. 1999/C – 262 (Nov. 2, 2004) as factors to help in determining whether vicarious liability was established. Counsel maintained that it was evident from the facts that Mr. McNamee's intentional assault on the claimant, was not closely connected with Mr. McNamee's duties to the first defendant. Counsel noted that the case of ***Princess Wright v Alan Morrison*** SCCA 39/2008 (April 15, 2011) also utilised the close connection test and showed that it applies to both intentional and unintentional torts.

[11] Counsel further cited with approval the cases of ***Attorney General v Craig Hartwell*** and ***Lanzie Brown v Det Corp Wayne Clarke & AG*** where in each case, vicarious liability of the employer was not established, as there was no close connection between the intentional tort and the duties of the employee. Counsel maintained that the facts and analyses of those cases demonstrated that the 1st defendant was not vicariously liable in this case. Counsel submitted that the 2nd defendant having left his post, gone on a frolic of his own and then departed, leaving the firearm behind, there was no basis for the 1st defendant to be held vicariously liable.

Discussion and Analysis

[12] Vicarious liability is a genus of strict liability that reflects the policy and legal attempts to balance the aim of providing innocent victims of torts with legal/financial recourse, against the desirability of protecting employers from having the net of responsibility for the consequences of their employees' unauthorised unlawful conduct, being cast too widely.

[13] This need for balance was clearly outlined in ***Bazley v Curry*** (1999) 174 DLR (4th) where McLachlin J observed (at 62):

> The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

[14] For many years the test for vicarious liability was that outlined by Sir John Salmond. A master was only responsible for a wrongful act done by his servant in the course of his employment where it was either a) a wrongful act authorized by the master or b) a wrongful and unauthorized mode of doing some act authorized by the master **Salmond, Law of Torts,** 1st ed (1907) p. 83 and **Salmond & Heuston on the Law of Torts,** 21st ed. p. 443. Salmond's formulation was examined in some detail in ***Lister and Others v Hesley Hall*** where the central question was whether the employers of the warden of a school boarding house, who sexually abused boys in his care, was vicariously liable for the torts of the warden.

[15] Lord Steyn at paragraph 15 stated that:

> For nearly a century English judges have adopted Salmond's statement of the applicable test as correct... Situation (a) causes no problems. The difficulty arises in respect of cases under (b). Salmond did, however, offer

> an explanation which has sometimes been overlooked. He said (*Salmond on Torts,* 1st ed, pp 83-84) that "a master . . . is liable even for acts which he has not authorised, provided they are *so connected* with acts which he has authorised, that they may rightly *be regarded* as modes - although improper modes - of doing them" (my emphasis)

[16] Lord Steyn noted at paragraph 20 that Salmond's formulation for vicarious liability did not fit in well with intentional wrongdoing. He therefore proposed, following Diplock LJ in ***Ilkiw v Samuels*** [1983] 1 WLR 991, that employment needed to be understood in a broad way in terms of what job the employee was engaged to do rather than dissecting the servants task into component activities. Then consideration should be given to how closely connected the wrongdoing was to the employment.

[17] Lord Clyde in his judgment also maintained that in considering whether an employer was vicariously liable for the criminal conduct of an employee stated that the question was whether the conduct fell within the scope of the employment. He stated at paragraph 42 that "in considering the scope of employment a broad approach should be adopted." At paragraph 43 he noted that:

> If a broad approach is adopted it becomes inappropriate to concentrate too closely upon the particular act complained of. Not only do the purpose and the nature of the act have to be considered but the context and the circumstances in which it occurred have to be taken into account.

[18] At paragraph 65 Lord Millet opined that:

> If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.

[19] Lord Millet continued at paragraph 67 stating that the first of the two alternatives given by Salmond is not an example of vicarious liability at all and that the second did not serve as a test of vicarious liability for intentional wrongdoing. At

paragraph 69 he highlighted as well the passage at page 83 -84 of Salmond's book which Lord Steyn said was often overlooked and which he stated was unfortunately less often cited, where Salmond put forward the concept of masters being liable for an employee's unauthorised acts that were so connected to acts which were authorised that they could be regarded as improper modes of doing them. At paragraph 70 Lord Millet proposed that the analysis could be reformulated to state that vicarious liability would be imposed on an employer where the unauthorized acts of employees, *"are so connected with acts which the employer has authorized that they may properly be regarded as being within the scope of his employment."*

[20] In ***Lister*** it was accordingly held that having regard to the circumstances of the warden's employment, including the close contact with the pupils and the inherent risks that it involved, there was a sufficient connection between the work that he had been employed to do and the acts of abuse that he had committed for those acts to be regarded as having been committed within the scope of his employment.

[21] ***Lister*** was applied in the case of ***Clinton Bernard v The Attorney General of Jamaica***. In ***Clinton Bernard*** a policeman, Constable Morgan went up to the claimant who was using a public telephone, announced he was a policeman and demanded to be allowed to use it. Upon the plaintiff refusing to hand it over, Constable Morgan shot him in the head. Constable Morgan also later arrested the plaintiff for assaulting a police officer. At trial, the issue was whether the Attorney General on behalf of the State was vicariously liable for the actions of Constable Morgan. Following ***Lister***, Lord Steyn writing on behalf of the Board stated at paragraph 18:

> 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.

[22] Three factors primarily influenced the Board to hold that the State was vicariously liable. The assertion of police authority by Constable Morgan immediately before he shot the plaintiff, the subsequent arrest of the plaintiff by Constable Morgan which would tend to support his earlier assertion of authority and the risks created by the authorities permitting off-duty policemen to be armed with loaded firearms.

[23] The approach in ***Lister***, adopted in ***Clinton Bernard*** now provides the framework for deciding cases in this jurisdiction where employees commit intentional torts without the express or implied authorization of the employer. Two Jamaican cases decided by Sykes J demonstrate the application of the new principles.

[24] In ***Allan Campbell v National Fuels and Lubricants Ltd et al*** the issue was whether the employer was liable for fire damage caused to a building at a location to which his employee had diverted. He had gone there to unlawfully sell some of the petrol which should instead have been delivered to a particular petrol station. Sykes J after conducting an extensive review of the development of the law on vicarious liability distilled six principles to guide the application of the principle in Jamaica, though noting that they were not exhaustive. They are:

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

> (f) whether the tort committed by the employee is closely connected with the employees duties, looking at those duties broadly;

[25] Applying the principles, Sykes J held that there were inherent risks in the gas distribution business of gas being wrongfully delivered at a place other than it should be and also of fires breaking out during petrol distribution. Accordingly when the employee diverted to the affected location and the damage was caused, he was still acting within the scope of his employment and the employer was therefore vicariously liable.

[26] In ***Lanzie Brown v Det. Corp Wayne Clarke and The Attorney General of Jamaica*** the claimant a policeman acting as a baliff, went to the home of one Ms. Kellyman to repossess a refrigerator as she was in arrears. Det Corp Clarke who was also at the premises denied the claimant access to the premises. While the claimant was in the process of calling for assistance from the police, Det. Corp Clarke pulled a firearm issued to him by the police services and shot the claimant. Sykes J held the Attorney General was not vicariously liable as there was no evidence, as there had been in ***Clinton Bernard,*** that the policeman was purporting to exercise his authority as a policeman at the time of the shooting.

[27] Perhaps the closest case on the facts to the instant matter is that of ***Attorney General v Craig Hartwell***. In that case Police Constable Laurent armed himself with a police service pistol, left his post and journeyed to where Ms. Lafond the mother of his two children was working in a bar. Among the patrons there was Mr. Vanterpool who was said to be associating with her. Without warning Larent fired a number of shots causing minor injuries to Ms. Lafond and a tourist and serious injuries to the claimant Craig Hartwell. Laurent was prosecuted and pleaded guilty to charges of unlawfully and maliciously wounding Mr. Hartwell and Ms Lafond and having a firearm with intent to do grievous bodily harm. He was sentenced to five years' imprisonment and dismissed from the police force.

[28] Civil proceedings were brought against Laurent and the Attorney General. Judgment on default was entered against Laurent. At first instance the case

against the Attorney General was dismissed. On appeal the appeal was allowed and damages awarded to the claimant. On further appeal to the Privy Council Lord Nicholls of Birkenhead writing on behalf of the Board stated at paragraph 16 that following ***Lister*** [2002] 1 AC 215, 230, 245, paras 28, 69 and ***Dubai Aluminium Co Ltd v Salaam*** [2003] 2 AC 366, 377, para 23:

> The applicable test is whether PC Laurent's wrongful use of the gun was so closely connected with acts he was authorised to do that, for the purposes of liability of the Government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of his employment as a police officer.

[29] It was held that the facts did not support the applicable test for vicarious liability as, from he left his post until he fired the shots at the bar, Laurent's activities had nothing whatsoever to do with any police duties either actually or ostensibly. He was in terms of the classical phrase "on a frolic of his own".

[30] Considering the authorities, the determination on the question of vicarious liability in the instant matter comes down to this:

a) Can it be said that the 2nd defendant's wrongful use of the firearm was so closely connected with acts he was authorised to do, that, for the purposes of determining any liability of the 1st defendant, the 2nd defendant's wrongful use may fairly and properly be regarded as made while he was acting in the ordinary course of his employment as a security guard?

b) It should additionally be considered whether it could be said that for the 1st defendant to achieve its objective of providing armed security services it had to contend with the serious risk that the 2nd defendant would use the firearm to intentionally and unlawfully shoot persons such as the claimant?

c) If so was that risk inherent in the nature of the business of providing armed security services?

[31] The peculiar facts of this case point to one conclusion. The action of the 2nd defendant could not be in any way related to his duties as a security guard. Unlike the policeman in ***Clinton Bernard*** who purported to be acting in his capacity as a policeman, the 2nd defendant was not acting or purporting to act in his capacity as a security guard. The 2nd defendant left the premises he was assigned to guard and went to the premises guarded by the claimant shouted something to him and shot him. The claimant was in no way and at no time a threat to the security of Flow's premises that was being guarded by the 2nd defendant. The 2nd defendant's actions therefore had nothing to do with him taking any measures in furtherance of guarding the premises he was assigned to secure. Rather than staying on the premises to defend it, he left the premises to go and offend. That was clearly acting beyond the scope of his employment. The scope of his employment would only have extended to him discharging his firearm in the vicinity of the premises he was employed to secure, in circumstances where it was necessary to do so.

[32] At the point he left his assigned premises he was just a man with a gun on a mission to commit an unlawful act. His employment as a security guard only provided the opportunity in terms of his assigned location and the assigned firearm for him to carry out his tortious act. The situation is akin to that in the case of ***Attorney General v Hartwell***. As in that case, the 2nd defendant in the instant case, left his post on a mission divorced from his duties and was from leaving until the end of the incident, on a frolic of his own. Similarly, just as in ***Lanzie Brown*** where the fact that Det. Corp. Clarke was a policeman only provided the opportunity for him to have his service pistol, which he used to unlawfully wound the claimant, and hence the State was not liable, the 2nd defendants actions in the instant case were opportunistic and cannot be imputed to the 1st defendant.

[33] Even utilising the analysis in ***Allan Campbell*** it cannot be said that for the 1st defendant to achieve its objective of providing security services it had to contend with the serious risk that the second defendant would use the firearm to

intentionally and unlawfully shoot persons such as the claimant. It is not expected that security guards will leave their posts and use the firearms with which they are issued to carry out their duties, to carry out personal vendattas which it appears is what transpired in this case. The risk of what happened to the claimant is therefore not inherent to the provision of armed security services.

[34] There is accordingly no basis in the instant case for the 1st defendant to be held vicariously liable for the actions of the 2nd defendant. The claimant has undoubtedly suffered loss and damage. Unfortunately the 2nd defendant has not been located to shoulder his responsibility. In the circumstances of this case the 1st defendant cannot be made to fill that breach. The claim fails.

Disposition

[35] Judgment on the claim is therefore entered for the 1st defendant. Costs to the 1st defendant to be agreed or taxed.