



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P 049 OF 1999

BETWEEN LESLIE POWELL CLAIMANT
AND GUARDSMAN LTD. DEFENDANT

Sharon Gordon-Townsend for the Claimant

***Lowell Morgan and Camille Wignall
instructed by Nunes, Scholefield, DeLeon & Co. for Defendant.***

***Heard: 19th April, 2007 &
 31st October 2007***

MARSH J.

By Writ of Summons and Endorsement dated the 19th day of May, 1999, the claimant initiated proceedings against the defendant for "money had and received in the month of May, 1999 for the use and benefit of the claimant in that the defendant received \$500,000 compensation for the gunshot injuries received by the claimant while on the job from Life of Jamaica Ltd. under a group Personal Accident Policy taken out by the defendant for the benefit of its employees including the claimant. And in the alternative the claimant's claim against the defendant to recover damage for failure to provide a safe system of work for that on the 1st day of July, 1998, the defendant was assigned by the claimant to work at

Cremo Ltd. at Six Miles in the parish of St. Andrew as a Security Guard without any support from other security guards and while on duty he was shot by an armed assailant and the claimant sustained injuries and suffered loss and damages.”

The particulars of negligence outlined were as follows:-

- (a) Failing to provide a safe system of work
- (b) Failing to provide adequate support from other security guards for the claimant while on duty.

In its defence, the defendant admitted that the claimant was on duty on the 1st July, 1998 at Cremo Ltd. Six Miles, St. Andrew where he was assigned and he was shot and injured by an armed unknown assailant.

The defendant admits that it has Group Personal Accident Insurance Policy with Life of Jamaica to provide coverage for contracted security personnel against death or disablement arising from accident while carrying out their duties. However, it is advised that claimant, not having been totally and permanently disabled as a result of the shooting incident of the 1st July, 1995 the claimant is not entitled to a permanent disability payment. The defendant denied that the injuries to the claimant were caused by its negligence and the Particulars of Negligence were denied.

The defendant further states that its system of work is, in all the circumstances, reasonably safe in that at the Cremo Plant five armed

guards including the claimant were assigned duties and all at various locations of the plant, which such locations were all covered by radio. The defendant further avers that the claimant's injuries were caused by and/or contributed to by his own negligence.

The negligence particularized by the defendant as being that of the claimant is as hereunder:-

- (a) failing to have any or adequate regard for his own safety
- (b) leaving his assigned post without permission and without advising or informing his other co-workers
- (c) positioning himself where it was dangerous and manifestly unsafe.
- (d) failing to keep any or any proper look out.
- (e) failing to abide by defendant's strict instructions.

The defendant denies the injuries and the special damages alleged. Further the defendant avers that any injuries suffered by the claimant on the 1st day of July, 1998, were not reasonably foreseeable and accordingly very remote and not due to any negligence on its part.

The claimant, by Notice of Partial Discontinuance filed on the 12th of December 2005, discontinued his claim against the defendant for money had and received.

BACKGROUND:

The claimant Leslie Powell, was, at the material time a security guard in the employment of the defendant Guardsman Ltd. and had been so employed since 21st August, 1987. The defendant is a company duly registered under the Laws of Jamaica. The claimant, on the 1st day of July, 1998, was on duty at the Cremo Plant at Six Miles in the parish of St. Andrew when he was injured by a shot to the head from an armed assailant. The claimant is contending that it was the negligence of the defendant that caused the injuries he sustained.

The defendant has denied that the injuries received by claimant were caused by the negligence of the defendant as alleged or at all. The defendant further avers that the system of work was, in all the circumstances, reasonably safe and that at the said Cremo Plant five armed guards were assigned duties at various locations on the site, all such locations being covered by radio.

SUBMISSIONS:

The claimant submitted that the contract between himself and the defendant is one for service therefore an employer/employee relationship existed between them at the material time. An employer's common-law duty to his employee includes providing a proper and safe system of work

for him - a duty which must be exercised with due care and skill. Further the claimant submitted that the system must meet the requirements of the circumstances. The claimant was therefore entitled to be compensated in damages because he had been injured by the negligence of the defendant - or because the defendant was in breach of his duty to provide a safe system of work which resulted in claimant's injuries.

The defendant countered these submissions by submitting as follows:-

The determination of the status of the worker must depend upon an examination of all the circumstances in which the working relationship exists, as each case as such will turn on its peculiar facts.

Factors to be considered are Control - the extent and degree of control that the person or company "engaging the services of another is entitled to exercise over that other person in the performance of the said service;

Whether the person offering his services provides his own equipment and hires his own helpers; the degree of financial risk the person takes; the degree of responsibility for investment and management which the provider of the services has and how far he has had an opportunity of profiting from sound management or the performance of his task.

The duty of the employer at common law is one to take reasonable care not to expose the employee to unnecessary risks of injury. However, the defendant pointed out, the risks are not all risks but only those as are reasonably foreseeable or that may be reasonably contemplated.

To establish a claim in negligence, a claimant to be successful, against his employer, must prove, not only that there was an act or omission on the part of his employer, but also that the act or omission complained of exposed him to a risk that was reasonably foreseeable.

No liability will attach to the employer for the ordinary risks of employment where there is no negligence on the part of the employer.

In addition, the employer ought not to be held liable in negligence for the acts of a third party, unless the employee proves to the degree required that the particular danger caused by the third party was a foreseeable or highly probable result of the act or omission complained of on the employer's part. The employee is also required to prove that the act or measure which he is contending his employer should have taken would have eliminated the risk.

THE ISSUES

1. What was the Claimant's status vis a vis the Defendant - was he Defendant's employee or was he an independent contractor.
2. If the Claimant is an employee of the Defendant, was the Defendant in breach of its duty of care to him as his employer and whether in those circumstances it can be held liable to the Claimant for the criminal acts of a third party.

THE LAW

A person employed to do a job may be either a servant or an independent contractor. A servant is employed under a contract of service while an independent contractor is employed under a contract for services.

The distinction between them has been summarized in ***Collins v.***

Hertfordshire 66 (1947) KB 598 per Hilberry J. as -

"in the one case the master can order or require what is to be done; while in the other case he cannot only order or require what is to be done but how it shall be done."

Courts have considered a wide range of factors including the degree of control over the workers' work; his connection with the business; and the terms of the agreement between the parties; the nature and regularity of the work and the method of payment of the wages.

In ***Harris v. Hall (1997) Court of Appeal (Jamaica) Civ. App. No. 31 of 1993*** (unreported) guidelines suggested by Cooke J. in ***Market***

Investigations Ltd. v. Minister of Social Security (1968) 3 All E.R. 732

have been adopted by the local Court of Appeal. Factors to be considered include "whether the man provides his own equipment when providing the services, whether he hires his own helpers, what degree of financial risks he takes, what degree of responsibility for investment and management he has, whether and how far he has an opportunity of profiting from sound management in the performance of his task."

The Common Law duty of an employer to his employees has been described as a duty to take reasonable care for their safety. He has a duty to provide a competent staff of men, adequate plant and equipment, a safe system of work, with effective supervision and a safe plant of work.

A claimant, who seeks to establish a claim in negligence against his employer, must prove not only that there was an act or omission on the part of his employer which caused damage or injury, but also that this act or omission complained of exposed him to a risk that was reasonably foreseeable. Where the injury or damage is caused by a third party, as a general rule, a person ought not properly to be held liable in negligence for that third party's act or omission. However in particular circumstances where there is a special relationship existing between parties (e.g. master and servant) or where the contract governing the relationship between the

parties provides for it, a person may be held liable in negligence, to another for the act of a third party. There must be, however, a high degree of foreseeability that the damage or injury caused by the third party would occur as a result of the act or omission of the person on whom falls the duty of care. The standard of proof is on a balance of probability and the onus of proof is on the claimant.

The basis of the claim against the defendant is outlined in his witness statement. After outlining his working association with the defendant and its history, the claimant stated that -

“On July 1st, 1998 while I was assigned to Cremo Limited at Six Miles, in the parish of Saint Andrew as an armed Security Guard. There was supposed to be four (4) armed Security Guards. I started working at 6:00 a.m. At about 8:00 a.m. my Supervisor Mr. Small came and took away Mr. Williams, one (1) of the armed Security Guards from Cremo Limited and replaced him with an unarmed Security Guard leaving only three (3) armed Security Guards. Mr. Wilson, who was the Supervisor working by the gate called me at about 1:30 p.m. to work there with him for a while because he was the only armed Security Guard there. After a while I went back to the back of Cremo to patrol. At about 1:30 p.m. I was to the back of the UHT Plant doing random patrol around that area. I was positioned with my back to the wall of the UHT Plant watching the Salesmen and delivery trucks and vans that come around to the back to pick up and return goods, when I feel something splash out of the top of my head and I wipe my face and look at it and I saw that it was blood. Blood was running down my face. I walked off and my left arm got numb and cramped up and I couldn't lift the arm. I realized I had gotten shot.”

Cross examined by counsel for the defendant the claimant indicated that at the time and on the date in question, 1st July, 1998, when he got injured, he was on the compound, under the tree. This tree, he indicated, was about some 30 feet from a particular building on the premises. He was seated on a chair, his back turned to the wall, his face to the entrance of the building he was covering. The wall in question was about 10 feet in height and there was zinc nailed on top of the wall.

It is the contention of the claimant that at the material time, he was employed to the defendant's company and assigned to Cremo Limited at Six Miles in the parish of St. Andrew.

The defendant, it was further contended had a duty of care i.e. to take reasonable care to carry on the work so as not to subject the employees to unnecessary risks. This duty of care was breached by defendant as it failed to provide a safe system of work, when it assigned, that day, an insufficient number of armed security guards on duty. Thus he was not supported by other security guards while he was on duty.

The defendant, on the other hand denies that it was negligent, in any way, as the claimant was not its employee and that all duties owed to the claimant by it had been discharged.

The first issue to be determined is what was the relationship of the claimant to the defendant. Was he a servant of the defendant or was he an independent contractor?

This issue is determined by considering the particular facts and circumstances of the instant case. The allegations relied on by the claimant are essentially agreed by the defendant, except for the relationship claimed by the claimant and whether the claimant had any reason of fact to claim to be a "servant" of the defendant or that he was 'an independent contractor.'

The central item of evidence besides claimant's insistence that he was employed to defendant is an agreement between the defendant company and the claimant dated the 21st day of August, 1987. This document contains the details of the terms agreed between the two parties.

The contract between the claimant and the defendant was a contract for 'security services.'

It was agreed that guard dogs supplied by the defendant to the claimant would be at a rental paid by the claimant.

There was no paid leave entitlement. The claimant was not entitled to pension and would be responsible for paying all statutory deductions including Income Tax, N.I.S. and N.H.T. payments.

Despite all these terms of the agreement however, the defendant still exercised such control over the claimant, that despite the claimant being described as a 'Contractor', the defendant's control over how the claimant did his work is readily identified in clauses 3, 4 and 5 of the said agreement.

- Clause 3 "The contractor shall perform his services hereunder as per schedules posted in the office of the Company."
- Clause 4 "The contractor agrees to comply with all reasonable directions of the company's representatives which may be issued from day to day or otherwise as the company may direct so as to ensure the orderly and efficient execution of the contractor's obligations hereunder."
- Clause 5 "The Contractor agrees while working on the premises to wear such specified uniforms and identification badges as may be issued by the company to him."

Applying the guidelines adapted in *Harris v. Hall SCCA 31 of 1993* (unreported) and earlier suggested by Cooke J in *Market Investigations Ltd. v. Minister of Social Security (1968) 3 All E.R. 732 at p. 737*, to the present case, I hold that the relationship between the claimant and the defendant is one of Master and Servant; not that the claimant is an independent contractor.

But should I be wrong to so hold, and the claimant is in fact an independent contractor, the real question is whether the defendant is in the circumstances of the particular case, in breach of a duty which he owed to the claimant. As it is put in the text **Salmond on the Law of Torts Fifteenth Edition** at p. 650 -

“If the plaintiff proves such a breach, it is no defence to say that another has been asked to perform it. The performance of the duties, but not the responsibility for that performance, can be delegated to another.”

Denning L. J. summarized it in this way in **Cassidy v. Ministry of Health (1951) 2 K. B. 343 at 363-**

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.’

On the premise that the relationship between the claimant and the defendant, at the relevant time, was that of Master and Servant, the defendant did owe to the claimant a duty of care. It was a duty to take reasonable care that the employee is not exposed to unnecessary risks of injury. These risks must be risks that are reasonably foreseeable or reasonably contemplated. This duty is not absolute.

In **Charlesworth on Negligence Sixth Edition** at para. 1034, the writer of the text puts it as follows:-

“Irrespective of whether the duty of the Master arises in tort or out of a contract of employment, it is not an absolute one. It can be performed by the exercise of due care and skill, and while a high standard of care is exacted, it is desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations upon employers that the Courts should be vigilant to see that the common law duty owed by its master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations.’

The claimant in the instant case was an armed security guard assigned to premises at Cremo Ltd. Six Miles, St. Andrew. According to his witness statement there should have been 4 armed security guards there. When supervisor Mr. Small replaced one with an unarmed security guard, there were only three armed guard's there. The claimant stated that he had 'gone back to the back of Cremo to patrol and where he was at the back of the UHT doing 'random patrol', his back turned to the wall, he felt something 'splash out the top of my head' and later he realized that he had been shot. He was then armed.

In cross examination, however, he admitted to being seated under a tree, his back turned to a wall about 10 feet high with zinc on top of that wall. He was unable to say what became of the shotgun with which he was armed.

The claimant need prove on a balance of probability that the risk to which the defendant's act or omission exposed him, was reasonably foreseeable.

It is undisputed that the nature of the claimant's employment is that of a security guard. The fact that he has been issued with a shotgun while he is performing his duty indicates that there is an element of danger involved in his job. Besides being issued with a shotgun, at least 3 other armed security guards on the premises were also on duty at the material time. The defendant has contended 'that there were in all 5 security guards on the premises, each armed. One section of the premises required 2 security guards but all other sections required one only. Each was provided with radio.

The claimant has insisted that not only did he not have a radio, the complement of armed security guards was one short. Even if this were to be accepted as the existing situation at the time that the claimant sustained his injuries, was the defendant in breach of his common-law duty to the claimant?

The claimant is, on his own evidence seated with his back to a wall approximately 10 feet high with zinc on top of it. The shots, according to the claimant came from on top of the wall. If the claimant's account is

taken as indicative of the situation that day – armed security one short and one absent radio, did this indicate that the defendant had failed to provide him with a reasonably safe system of work?

Is it reasonably foreseeable that the wall would be breached by a miscreant, in the circumstances and would the defendant by replacing the radio and the one absent armed guard have prevented the shooting incident?

The evidence has satisfied me that the claimant, a trained armed security guard had accepted the ordinary risks attached to his employment. His duty was to help secure the premises. The system of covering the premises with armed guards in the area where guards are to be placed, suggested that there was in place a reasonably safe system of work. The claimant was himself less than vigilant, seating himself as he did under a tree, his back to the wall.

There is no evidence that the danger from an independent third party was very likely to happen and could have been prevented by the defendant.

I have examined the claimant's pleadings – the statement of claim and the particulars of negligence, and having assessed the evidence provided, I have come to the conclusion that the danger complained of and

which is to be guarded against, is one caused by the activity of an independent third party and over whom the defendant had no control.

In *PUK Perl (Exporters) Ltd. v. Camden London Borough Council* (1984) Q.B. 342 it was held, inter alia, that even where it was recognized that a defendant was liable for the act of a third party because of a special relationship which imposed a duty on the defendant to exercise control over the third party causing the damage, there could be no exception to the rule unless there was a high degree of foreseeability that damage would occur as a result of the act or omission of the defendant.

On the facts of the instant case it was not reasonably foreseeable that the claimant would have received injury in the way he purported to have received it - a miscreant shooting from a 10 foot wall with zinc on it.

It is unfortunate that the claimant was injured in the way he stated he was; but the defendant cannot be held to be liable for a breach of his duty of reasonable care, owed at common law for the claimant.

For these reasons, I am obliged to find in favour of the defendant. There shall be costs to the defendant to be taxed if not agreed.