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Privy Council Appeal No. 27 of 2004

Inez Brown (near relation of Paul Andrew Reid, deceased) *Appellant*

v.

(1) David Robinson and
(2) Sentry Service Co. Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 14th December 2004

Present at the hearing:-

Lord Bingham of Cornhill
Lord Clyde
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

*[Delivered by **Lord Carswell**]*

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1. On 8 October 1985 Paul Reid, a young man of 17 years, was shot and seriously injured by the first-named respondent David Robinson, an employee of the second respondent, a security company named Sentry Service Co Ltd ("the company"). He was taken to hospital suffering from paraplegia and died on 20 January 1986 from septicaemia resulting from his wounds.

2. The appellant, Paul Reid's mother, commenced the present proceedings in 1990, claiming damages against both respondents under the Law Reform (Miscellaneous Proceedings) Act on behalf of his estate and under the Fatal Accidents Act as his dependant. The action eventually came on for hearing in March 1996, but judgment was not given until 18 December 1998. The judge Courtenay Orr J awarded a total of $3,717,838.20 against both respondents. The first respondent

Robinson was not in a position to satisfy the judgment and the company appealed to the Court of Appeal. The appeal was heard (by Downer, Walker and Langrin JJA) over several days in November 2001, at the end of which the court declared that the appeal would be allowed and the action against the company dismissed, on the ground that Robinson had been acting outside the scope of his employment and the company was not liable for the tort committed by him. It was also argued on behalf of the company that the damages awarded by the judge were wrong in principle and excessive, but since the court found in favour of the company it did not deal with the issue of damages. A written judgment was given on 3 April 2003. The appellant appealed to the Privy Council by special leave given on 13 November 2003 and the appeal was heard on 14 October 2004. The Board was given reasons for part at least of the long delay, but without expressing any opinion on their sufficiency the Board must record its concern at the length of time which has elapsed since the shooting incident in 1985.

3. At the hearing before the Board counsel for the parties dealt with two issues in their arguments. The first was whether the company was vicariously liable for Robinson's tort – no appeal was brought against the finding by the Court of Appeal that Robinson was an employee of the company and not an independent contractor. The second was the issue of damages.

4. The judge found that on 8 October 1985 Paul Reid went to Sabina Park, Kingston to see a football match. Robinson was on duty at the gate at which he sought entry. The match had already started and the line of people waiting to get in began to push and became unruly. Robinson tried to restrain the crowd and struck some of them with his baton, including Reid, who pushed him and then ducked under the rails and ran off. Robinson gave chase after him in hot pursuit, pulled out his firearm and fired a shot. He caught up with him some little distance away from the gate to the ground and both men dodged around some parked cars. Reid stopped, held his hands in the air and said that he would not run as he had done nothing. Robinson said words to the effect "You want me shoot you boy? You want me kill you?" Reid replied "after you can't shot mi because mi nuh do nuttin". Robinson then shot Reid from about two paces distance. Reid fell and Robinson bent over him, pointing his gun, and said twice "You want me kill you bwoy?" The crowd which gathered became hostile and Robinson fired a shot in the air to scare them. A soldier then intervened and Robinson was eventually disarmed by a police officer. Robinson gave evidence that Reid had stabbed at him with a knife at the gate to Sabina Park and

again when he caught up with him, but the judge regarded his account as unreliable and untruthful (page 76 of the record) and rejected the evidence that Reid had stabbed at Robinson on the road after the chase.

5. The medical evidence established that Reid had sustained a gunshot wound on the left axilla, which caused paraplegia with loss of sensation at the level of the ninth thoracic vertebra. He had cardiac respiratory distress on admission to hospital and a left-sided haemothorax and a right-sided pneumothorax. He was doubly incontinent and a catheter was inserted. He developed repeated infections in his lungs and urinary tract infections and had to be reintubated. He developed pressure sores, which led to anaemia and hypo-protoanaemia.

6. The judge assessed damages under several heads:

(i)	special damages (agreed)	$11,620.00
(ii)	loss of earnings, pre- and post-trial	527,483.20
(iii)	loss of expectation of life	15,000.00
(iv)	pain and suffering and loss of amenities	2,000,000.00
(v)	assault and battery	1,000,000.00
(vi)	Fatal Accidents Act damages	163,735.00
	TOTAL	$3,717,838.20

The only items in contention before the Board were (iv) and (v) and it will be necessary to examine these further in due course.

7. In the course of his judgment the judge examined Robinson's terms of employment with the company. His written contract with the company does not give much assistance as to the functions which he was to perform, but the judge made the following finding, which has not been challenged:

> "I find that Robinson was engaged to ensure that only authorised persons were allowed to enter the park, and therefore he had a duty to prevent unauthorised persons from entering. His duties included protecting the life and property of patrons, the identification, restraint and apprehension of those causing damage to property, injury to persons or threatening the lives or health of patrons and of course himself, so that where damage occurred recompense could be made and offenders prosecuted. In seeking to restrain and/or apprehend undesirable and unruly persons he was entitled to use reasonable force including a baton

and a firearm. Implicit in all this was a discretion to decide whether and if so when he should use force and as to the degree (including the discharge of his firearm) which would be appropriate in any circumstance where he ought to control a disturbance."

8. The judge set out at pages 86-7 of the record the test which he applied for determining whether the company was vicariously liable for Robinson's acts:

> "A master is liable for the tortious act of his servant done in the course (or scope) of his employment. It is deemed to be so done if it is (a) a wrongful act authorised by the master or (b) it amounts to an unauthorised mode of performing an authorised act. Such latter acts to fix the master with liability must be sufficiently connected with the authorised act as to be a mode of doing it. *Poland v Parr (John) & Sons* [1927] 1 KB 236 at 240."

He went on, however, to cite a further sentence from *Salmond and Heuston on the Law of Torts*, 21st ed (1996), p 443, the source of the statements quoted:

> "A master as opposed to an employer of an independent contractor, 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."

The judge then examined in some detail a number of previous cases and concluded that Robinson's conduct was an unauthorised act which was within the scope of his duty to preserve order at one of the gates to Sabina Park.

9. The Court of Appeal focused in particular on *Keppel Bus Co v Sa'ad bin Ahmed* [1974] 1 WLR 1082, *Radley v London Council* (1909) 109 LT 162, *Daniels v Whetstone Entertainments Ltd* (1962) 2 Lloyds Rep 1 and *Vasey v Surrey Free Inns plc* [1996] PIQR 373. It is clear from the discussion in the judgment of Downer JA, with which the other members agreed, that he was applying the traditional basic Salmond test of acts which were authorised or unauthorised modes of performing authorised acts. He expressed the view that the judge had failed to analyse *Keppel's* case correctly and misunderstood *Daniel's* case. He distinguished *Vasey v Surrey Free Inns plc* on the ground

that there was damage to the club premises in that case, whereas there was none caused to Sabina Park, and concluded at page 125 of the record:

> "... Robinson's employer would not have authorized him either expressly or impliedly to give chase to Reid and to shoot him in the circumstances of this case. This was an excessive act done outside the course of his employment. Even if Robinson was stabbed, as he claimed, this was an act of revenge or 'private retaliation' and would not be one of necessary self defence. On this analysis Robinson was not acting in the course of his employment. So his employer, Sentry Service Co Ltd, was not vicariously liable for his torts."

10. Their Lordships do not find it necessary to examine the authorities to which Downer JA referred or to determine whether Courtenay Orr J understood and applied them correctly, although they would observe that *Vasey v Surrey Free Inns plc* appears to be a more useful example than the Court of Appeal accepted and the ground on which the court distinguished it appears somewhat insubstantial. It is unnecessary to explore these cases further, although they may serve as examples of the application of the principles, because those principles have now been authoritatively laid down by the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 and by the Privy Council in their recent decision in *Bernard v Attorney General of Jamaica* [2004] UKPC 47.

11. In *Lister v Hesley Hall Ltd* the claimants had been systematically sexually abused by the warden of a boarding house in a school owned and managed by the defendants. The House of Lords accordingly had to consider the employer's liability for an act which was not only unauthorised but could be regarded (as Butler-Sloss LJ had regarded a similar act in *Trotman v North Yorkshire County Council* [1999] LGR 584 at 591) as a negation of the employee's duty. The Court of Appeal had held that the employer was not vicariously liable for the warden's acts, but the House of Lords unanimously reversed its decision. It broadened the ambit of the principle governing vicarious liability for intentional torts by emphasising the focus which is required on the closeness of the connection between the tort and the individual tortfeasor's employment (see para 18 of the judgment in *Bernard's* case, per Lord Steyn). As Lord Clyde stated at paras 37 and 43 of his opinion in *Lister's* case, it is possible to gauge the closeness of the connection by asking whether the wrongful acts, considered broadly in their context and the circumstances of the case, can be seen as ways of

carrying out the work which the employer had authorised. The essential test, however, remains that of close connection, as formulated by Lord Nicholls of Birkenhead in the *Dubai Aluminium* case at para 23:

> "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 reasonably be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

The risk which may have been created by such acts on the employer's part as arming his employees is a relevant consideration, as it may form a strong policy reason underlying the legal rule: see the decision of the Supreme Court of Canada in *Bazley v Curry* (1999) 174 DLR (4th) 45. Their Lordships agree, however, with the view expressed by Lord Hobhouse of Woodborough at para 60 of his opinion in *Lister's* case that it does not constitute the criterion for application of the rule defining the ambit of vicarious liability.

12. The judge's conclusions should now be re-examined in the light of these principles. His critical finding is set out in a passage from his judgment at pages 99 to 100 of the record:

> "The crowd was unruly. Robinson was trying to restrain them, when the deceased Reid assaulted him and ran, Robinson then set off in hot pursuit down the road. When he fired a warning shot and then pursued Reid, this way and that around a parked car, he was still within the scope of his employment. I find that his words 'you want mi shoot you boy?' were uttered to impress upon the deceased that he had done wrong and ought to be punished and clearly implied that Robinson felt he ought to be taught a lesson. I find that Robinson sought to do just that and to exact swift retribution for Reid's earlier behaviour and impose a general deterrence and his authority, so that thereafter good order would prevail. I find therefore that Robinson's conduct was an unauthorised act which was within the scope of his duty to preserve order at one of the gates of Sabina Park."

When one substitutes the test of whether Robinson's acts were so closely connected with his employment that it would be just and reasonable to hold his employer liable, the answer seems clear to their

Lordships. They are satisfied that when one applies this test the employer was vicariously liable for the shooting and the judge was quite justified in so holding. They are unable to agree that it fell on the side of the line that would make it an act of revenge or "private retaliation", as the Court of Appeal held. Their Lordships are accordingly of the opinion that the appeal should be allowed. The present case is in their view distinguishable on the facts from *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273. In that case Lord Nicholls of Birkenhead summarised at para 17 the actions of the police officer who shot the claimant in the following terms:

> "From first to last, from deciding to leave the island of Jost van Dyke to his use of the firearm in the bar of the Bath & Turtle, Laurent's activities had nothing whatever to do with any police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of 'a frolic of his own'."

Their Lordships are accordingly of the opinion that the appeal should be allowed.

13. The issue of damages, which the Court of Appeal did not include in its decision, was argued before the Board. Of the heads awarded by the judge, only items (iv) and (v) set out in paragraph 6 of this judgment were in issue. At page 102 of the record the judge set out his findings on these issues. He recited the injuries sustained by the deceased and their sequelae and continued:

> "I take into consideration what must certainly have been a long duration of pain in the upper portion of his body which still had sensation; the fact that he had to be reincubated [sic] – this could not have been in the least pleasant, and the mental distress which he must have felt at being a cripple, together with the embarrassment of being doubly incontinent.
>
> I regard an amount of $2,000,000.00 as appropriate and award the plaintiff accordingly."