

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1992/G161

BETWEEN	SYLVESTER GOWIE	PLAINTIFF
A N D	JAMAICA PROTECTIVE SERVICE LIMITED	FIRST DEFENDANT
A N D	FREDRICK SHAE	SECOND DEFENDANT
A N D	GERALD JONES	THIRD DEFENDANT

Miss J. Cummings instructed by Gaynair and Fraser for Plaintiff.

Miss J. Bennett instructed by Raphael Codlin and Company for Defendants.

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HEARD: February 27, March 2, 3, 8, 1995  
June 24, 25 and December 13, 1996

KARL HARRISON J.

The plaintiff brings this action against the defendants to recover damages for negligence and/or for breach of contract. He alleges that on or about the 15th day of April, 1991 the second named defendant the servant and/or agent of the first named defendant negligently assigned him to guard duties at certain premises in the parish of St. Andrew in breach of his contract of employment and as a consequence whereof he was shot and injured. The undermentioned are the particulars of negligence pleaded:

"Particulars of Negligence

- (a) Failing to take any or any sufficient or proper care for the safety of the Plaintiff.
- (b) Causing or permitting the plaintiff to participate and/or work in dangerous conditions knowing he was not competent to do so.
- (c) Failing to warn the plaintiff of any danger at the said premises.
- (d) Failing to provide the plaintiff with a baton and or guard dog and/or gun which are necessary for the proper performance of the said duties.
- (e) Failing to provide a safe system of work."

The plaintiff also alleges that on or about the month of August, 1991 the

defendants unlawfully, wrongfully and without reasonable and probable cause terminated his employment with the company.

The defendants have pleaded that the plaintiff was employed to the first defendant as a security guard and was, in the course of his duty, assigned duties on certain premises in St. Andrew. While he was at the premises he was attacked by intruders who, without any fault on the part of the defendants, shot the plaintiff causing injuries.

Further, the defendants denied that the third defendant wrongfully terminated the plaintiff's employment by dismissing him.

It was submitted by Miss Bennett that the plaintiff was injured as a result of a criminal act by someone for whom the defendants were not responsible and over whom they had no control.

Miss Cummings on the other hand, contended that the defendants had been negligent and had breached his contract of employment in that they placed him on guard duty and did not supply him with the necessary equipment and protection. Furthermore, she submitted that there was a high risk involved in guarding a politician's house.

This Court holds that an employer has a duty of care at common law to his employee to provide *inter alia*, a safe system of work during the course of such employment. He must take reasonable care for the safety of his workmen - see Wilson and Clyde Coal Co. Ltd. v. English [1939] AC 57.

This duty does not extend to the protection of all risks but only such risks as may be reasonably foreseeable or reasonably contemplated, depending on the claim being framed in tort or in contract. The reasonable employer is required, <sup>therefore,</sup> to foresee the probable consequences of his act not the possible consequences.

Now, the evidence in the instant case reveal that the defendants are in the business of providing security guards for business places and residences.

The plaintiff testified that he was a kennel attendant employed by the defendant company and that on the 15th day of April, 1991 he was working in that capacity. As a kennel attendant he was responsible for the care and maintenance of dogs owned by the company. He contends that he was not a security guard by training and was sent to perform security guard duties due to the fact a guard had not reported for duty. he said:

"...the supervisor force me off my work. Mi tell the supervisor mi not going....Him tell mi say mi have fi do the security duty...Him say anyway mi nuh go up there him a go let Joe Williams fire me next morning."

He did comply with the instructions and was taken to the residence of Mrs. Joan Webley. Whilst performing guard duties he was shot and injured. His description of what happened is as follows:

"...night come down. Lights on the outside of the building. Mi never hear nothing nor see anything...Nine o'clock mi a patrol round the building. They have back verandah but round there dark. After mi reach by the verandah mi hear a gun shot lick. After it lick mi nuh see nobody for round deh dark. Mi turn back...and mi fell mi foot a burn mi."

He was taken to the University Hospital of the West Indies where he was examined and treated by a Dr. Channer. Thereafter, he maintained that he went on sick leave. Whilst on leave had to attend Annotto Bay Hospital where he received further treatment as an out-patient.

Dr. Archibald McDonald gave evidence at the trial and testified that the records revealed that the plaintiff had suffered a gunshot wound to the anterior aspect of the middle third of his left leg. He opined that the injury was not serious and that the plaintiff would have been incapacitated for at least two weeks.

The evidence presented was revealed that there was no written contract of employment between the plaintiff and defendants. He tells the court that he was employed as a kennel assistant but there is also evidence that he could be promoted to the position of a security guard in due course. No evidence has been led that it was implicit in his contract of employment that he could not be asked to perform guard duties when the necessity arose.

There is also no evidence to support the contention that the defendants caused or permitted the plaintiff to participate and/or work in dangerous conditions knowing he was not competent to do so. Neither is there evidence that there was any form of danger at the premises where the plaintiff was sent. According to the plaintiff, the shot which caught him came from next door. One wonders therefore, whether a baton and/or guard dog and/or gun could really have helped him having regard to the manner in which he was shot.

The question therefore arises. Is this a breach of duty of care that creates

liability in the defendants? I would say that it would be wrong that a man should be held liable for damage unpredictable by a reasonable man and equally it would be wrong that he should escape liability, however indirect the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done. It is my view and I so hold, that the intervention of a gunman in the particular circumstances of this case was not reasonably foreseeable. There has been no suggestion that the gunman committed this wrong upon the plaintiff with a view to gain entry to the premises where he was a guard. A fortiori, the unusual intervention could not be said to have been within the reasonable contemplation of the parties at the time the plaintiff was employed by the defendants. It is my considered view therefore that the plaintiff has failed to prove on a balance of probabilities that the defendants were negligent or that they acted in breach of the plaintiff's contract of employment.

As to his claim for wrongful dismissal, the plaintiff testified:

"Them give me three months sick leave...I was paid during the three months sick leave. While at home them send call mi down at the company.....Mr. Shae tell mi say mi get fired. I get no letter telling me I was fired."

He also testified:

"I never returned to work after I got the injury. I never stop a day or two days off the work. It is not true I was dismissed because of poor attendance at work."

Joe Williams, Director of Administration of the defendant company said that it was brought to his attention sometime in August, 1991 that the plaintiff was dismissed but he was unaware who had dismissed him. He also testified that he had heard of the plaintiff being shot and had resumed working. According to him, the plaintiff's attendance thereafter was not regular.

It is my considered view that the plaintiff was dismissed from his job without cause. He would be entitled to two weeks salary in lieu of notice under the Employment (Termination and Redundancy Payments) Act. Although he gave evidence in chief that he earned \$500.00 per fortnight he did admit under cross-examination that it was only \$250.00 per fortnight that he earned. This is all he would be entitled to by way of damages for his wrongful dismissal.

This was an unfortunate experience for the plaintiff and although I have found

against him in respect of his injuries, it is my view, and I would strongly recommend that some ex gratia payment be considered by the defendants.

There shall be judgment for the plaintiff in the sum of \$250.00 with costs to be taxed if not agreed.

Costs to be agreed or taxed at the Resident Magistrate's Tariff.