IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C.L. 2000/H-104

BETWEEN	ERROL HANNA	CLAIMANT
A N D	UNIVERSITY OF THE WEST INDIES	DEFENDANT

Mr. Walter Scott and Mrs. Sharon Usim instructed by Messrs. Chancellor and Company for Claimant.

Mr. Christopher Kelman and Miss Maliaca Wong instructed by Myers, Fletcher and Gordon for Defendant

Heard: September 29, 30th, October 10, 2003 & October 19, 2004

Daye, J.

On the morning of the 18th November, 1999 at around 10:30 a.m. Mr. Errol Hanna a building contractor, and Managing Director of Cosmopolitan Limited, a construction company, was shot in the back of the neck at point blank range on premises occupied by the University of the West Indies at the Mona Campus, Jamaica. Mr. Hanna was shot by an unknown gunman who, along with other persons, invaded the construction site of which he had taken possession on September 20, 1999.

Miraculously, Mr. Hanna's life was spared. He spent one night in hospital. He returned to work at the same construction site on the

18th January 2000. The nature of the attack on Mr. Hanna could have been fatal. He suffered some partial physical disability. But it appears that the trauma of this ordeal has caused him the most injury. Quite understandably, he has suffered deep emotional and psychological harm. All well thinking Jamaicans condemn this incident and look forward to the full recovery of Mr. Hanna.

Cosmopolitan Limited had entered into an agreement with the University of the West Indies to build a chemistry laboratory near the Chemistry Department on the Mona Campus. The agreement or contract between Mr. Hanna's company and the University of the West Indies was not actually signed until January 25, 2000 which was after Mr. Hanna's injury. The terms and conditions of the Agreement are those contained in the Standard Form of Building Contract Private Editions with Quantities 1984 issued by the Joint Consultative Committee for Building and Construction Industry (commonly referred to as the yellow book contract and herein after called J.C.C contract).

Mr. Hanna claims that the University of the West Indies was liable for the damages he suffered as a result of the injuries and the loss he sustained and should compensate him accordingly. He asserts that the University of the West Indies had a duty of care to:-

(a) provide him and the workers of his company with adequate and effective security.

(b) prevent persons from the adjoining communities of the University of the West Indies from causing injury to him or his workers.

However, he claims that the University of the West Indies

(a) breached their duty of care to him at common law,

(b) breached their duty under contract to him,

(c) breached their duty imposed by statue to him,

He makes these assertions on the grounds that he had brought special security problems to the attention of the University of the West Indies through its Project Committee. He insists that the University of the West Indies' failure to take action about the very conditions he complained of was what gave rise to the event that caused his injuries.

The following, as far as is material, is how Mr. Hanna's Amended Statement of claim set out his contentions:

> "3 ... That as employer under the said Agreement and occupier of the property the Defendant had a duty of care to provide adequate and effective security for the plaintiff and other persons engaged in work on the construction site on the said property,"

> "4 ... the Defendant well knew that the security management on the said property had become

> increasingly difficult and that specific arrangement needed to be put in place in light of the well known volatility of the surrounding area ..."

> "6 ... it was an implied term of the Agreement that the Defendant would provide adequate and effective security for the Plaintiff."

> "8 ... The attack was caused soley and / or contributed to by the negligence and or breach of statutory duty by the Defendant."

Mr. Hanna went on to specify the breaches of the University of the West Indies as follows:

(a) Failing to properly fence the construction site of the said premises,

(b) Failing to have adequate and secure entrances to the construction site ...

(c) Failing to ensure that adequate security was placed on the construction site of the said property to deal with specific security concerns

(d) Failing to ensure that security guards both armed and unarmed were posted at the construction site of the said property.

(e) Failing to take any or any reasonable care to prevent injury or damage to the plaintiff.

(See Amended Statement of claim, page 2, 3, 4 Judges Bundle)

Contractual Duty

In order to ascertain if any duty of care was placed on the University of the West Indies towards Mr. Hanna's company, himself and workers it is

necessary to examine the contract documents between the parties. These documents are contained in Exhibit I (pages 1 – 74). They consist of Articles of Agreement, General Conditions of Contract and Bill of Quantities and Specifications.

The General Conditions of Contract (Exhibit 1, Page 12) have two relevant clauses that relate to security. They are as follows:

> "C. **Enclosure of Site and General Protection**
>
> Allow for providing all means necessary, other than watching and lighting, to preserve the site, works, unfixed materials and plant etc. from trespass, damage or theft and to protect all persons from injury or inconvenience due to the operation of this contract including temporary fences, screens etc ... '' $151,000.00
>
> "H. **Watching and Lighting**
>
> The contractor shall provide all day and night watching, security and temporary lighting to ensure the safety of the works and of materials delivery to the site during the contract. $180, 000.00"

Issues of fact and in some instances mixed questions of fact and law arise between the parties as to whether:

(a) there was an implied term of the contract that the University of the West Indies, as the employer, was responsible for the security of the site?

(b) the contractor was paid to provide security for the site?

(c) what was the nature of the security to be provided?

(d) was there a special security risk involved at the contract site?

(e) was there variation of the contract?

(f) if there was a variation of the contract what was the effect of it?

On the face of the two clauses dealing with security in the contract the contractor bears the express duty to fence, ie. hoard, the construction site and to provide security for the site. Mr. Hanna agreed under cross examination that there are no other provisions in the contract that changed this duty. However, he says these express terms were varied or amended as a result of discussions (ie. orally) at site meetings with the Project Committee. He further testified that some of the decisions taken at the site meeting were deliberately excluded from the records. Again, Mr. Hanna acknowledged in cross examination that he is familiar with the forms of the Jamaica Consultative Committee standard form contract and that this contract would apply to his construction work. The court will examine the minutes of the site meetings, the conduct of the parties and the surrounding circumstance to determine if the express terms of the contract were varied or if there was an implied term dealing with security.

Findings of Fact

Commencement of Contract

(i) Mr. Hanna took possession of the construction site on the 20th September 1999 at the Mona, Campus, University of the West Indies. This is not in dispute.

(ii) At that date no written contract was signed by the employer and the contractor Mr. Hanna. This is not in dispute.

The minutes of the site meeting dated 5th October, 1999 confirm this. Also the testimony of Mr. Louriston Jones, Quantity Surveryor confirms this.

(iii) The parties commenced this construction contract on the basis that the terms of the Jamaica Consultative Committee Standard Form contract applied. Mr. Hanna accepts this in his testimony.

(iv) Just after taking possession of the site Mr. Hanna encountered one "Tiger" of Mona Commons who invaded the site with about 50 men seeking employment. "Tiger" demanded $30,000.00 each forthnight in order for the work to continue on the site.

Security Concern

(v) That Mr. Hanna regarded this request as "protection money" which is associated with extortion practice in the building industry. Mr. Hanna's witness statement and his witness Bryan Galloway o/c "Cudjoe" second in command to "Tiger" were not challenged in this respect.

(vi) Mr. Hanna regarded the demands of "Tiger" and his encounter with him as a special security risk that would affect the construction site.

Site Meetings

(vii) Mr. Hanna informed the Project Committee of the University of the West Indies about the demands of "Tiger."

His testimony on this aspect is supported by Minutes of Site Meeting dated October 5, 1999. Two witnesses for the University of the West Indies who were members of the Project Committee, Mr. Lauriston Jones and Dr. Dasqupta in cross examination admit Mr. Hanna inform them about "Tiger."

(viii) Dr. Conrad Douglas, Project Manager instructed

Mr. Lauriston Jones, Quantity Surveyor to include in the Bill of Quantities the payment of $30,000.00 per forthnight to "Tiger" for the 13 weeks duration of the contract. I prefer and accept Mr. Hanna's evidence where there is any conflict on this issue. His evidence was clear and straight forward on this issue. Dr. Conrad Douglas testimony was very general on this issue. He was reluctant to answer specific questions on this issue as he claimed faulty memory in this area. I hold the reason for this demeanour by Dr. Conrad Douglas is that he did not want to appear to be associated or to condone an unlawful contract term and unhealthy social practice, in the area of security.

Contract terms – Security

(ix) The University included $180,000.00 in the contract clause dealing with security for the contractor to pay "Tiger"

(x) In the face of this item of payment in the contract which was negotiated by Mr. Hanna, the duty to provide security was firmly imposed on Mr. Hanna.

(xi) Mr. Hanna paid this sum of $180,000.00 per forthnight to "Tiger" or his associate "Cudjoe".

(xii) The conduct of the Project Manger to approve payment of protection money to "Tiger," though morally questionable I did not find varied or amended the express terms of the contract which placed the primary duty of providing security on the construction site on the contractor.

Implied Terms

(xiii) The University of the West Indies assumed the duty to oversee the security of the construction site. The Minutes of the Site Meeting of October 5, 1999 disclose this decision. It is as follows:

> "It was agreed that the present security would be asked to oversee site security."

This does not amount to an implied term that the University had primary duty to provide security. The Court is unable to find as fact or infer that approval of protection money or any other type of payment to "Tiger" in the Bill of Quantities equated to a variation or amendment to the express terms of the clause "Watching and Light" in the contract that places the security of the site on the contractor.

Contract terms – Fencing

(xiv) The contract assigned $151,000.00 under the clause "Enclosure" to the contract. On the face of this the duty to fence the site was also placed on the contractor.

The certificate of Payment Exhibit 3 A contains two payments of $104,000.00 and $16,000.00 for fencing and security respectively. Mr. Hanna accepts he got these payments but not for fencing or security. He did not go on to say what they were for. The court holds these payments are consistent with the money assigned under the contract for "Enclosure."

Variation

(xv) I hold that the primary duty to fence the construction site remained with the contractor in accordance with the express contract terms and was never shifted by any other conduct between the parties.

(xvi) The Standard Form Jamaica Consultative Committee contract was varied as far as the supply of material for construction was concerned. Thus it was a labour only contract. Mr. Lauriston Jones, the Quantity Surveyor and Dr. Conrad Douglas the Project Manager accept that this was so when they were cross examined on behalf of the claimant.

(xvii) No material was supplied by the university to provide for the fencing or hoarding of the perimeter of the construction site up to September 20, 1999.

(xviii) This did not shift the duty on the contractor to fence the site. He was assigned funds for this purpose and was actually paid to do so. Under the contract the University deducted the cost of material supplied from the certificate of payment. If no material was supplied then the contractor would be paid the full sum of his certificate of payment.

Duty of Care at Common Law - Tort of Negligence

In the circumstances where the Court holds that the University of the West Indies did not breach any contractual terms, the question arises whether independent of contract the University of the West Indies owed a duty of care to Mr. Hanna, his company and his workers. In other words is the University liable for the criminal act of this third party unknown gunman?

At common law the test of the existence of a duty of care originated in Lord Atkin's decision and classic dictum in the House of Lords case, **Donoghue v Stevenson** (1932) A.C 562 at 580, paragraph 2. It is as follows:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected by my act when I am directing my mind to the acts or omissions which are called in question."

Reasonable Forseability

> This case establishes that the test of the existence of a duty of care is reasonable forsight."
> Lord Wright in the Privy Council decision of **Hay or Bourhill v Young** [1943] AC. 93 at 110 paragraph 2 accepted this test and explained it in the context of the facts of the case before him as to whether the criterion of reasonable foreseeability extended beyond people of ordinary health or susceptibilities. He said as follows:
>
> > "It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee."

The Wagon Mound (No 1 {1967] A.C. 388 further confirms that there is no liability unless the damage was of a kind which was foreseeable. This was the opinion of Lord Reid in **The Wagon Mound** (No. 2) [1967] A.C. 617 of 636 paragraph E – F about the **Wagon Mound** (No 1) and **Hughes v Lord Advocate** [1963] A.C. 837. He said as follows:

> "It has now been established ... that in such cases damages can only be recovered if the injury complained of was not only caused by the alleged negligence but was also an injury of a class or character foreseeable as a possible result of it."

Counsel for the Claimant Mr. Hanna relies on these authorities as also the **House of Lords** decision of **Home Office v Dorset Yacht Company Limited** [1970] A.C. 1004 to support the claim the University owes Mr. Hanna a duty of care to prevent him being injured by a third party.

In this latter case Lord Reid pointed out that (at page 1030 paragraph b):

> " ... where human action forms one of the links between the original wrong doing of the defendant and the loss suffered by the plaintiff that action must have been something very likely to happen and it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient ... if the intervening action was likely to happen I do not think that it matters whether the action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the "very kind of thing" which is likely to happen as a result of the wrongful or careless act of the defendant."

On the facts of the case Lord Reid found that the taking of a boat by the escaping detainees and their unskilled navigation leading to damage to another vessel were the "very kind of thing" that Borstal Officers of the Home Office ought to have seen to be likely.

Lord Morris of Borth -y- gest's view was that a special relation arose in Dorset Yacht Company case which gave rise to a duty of care. This arose he pointed out because the Borstal officers were entitled to exercise control over the boys who, to the knowledge of the officers, might wish to escape and might do damage to property near at hand. He said the events that occurred and caused damage to the company that owned the boats in

question could reasonably have been foreseen. He further pointed out that officers and by extension the Home offices' duty was not to prevent the boys from escaping or from doing damage, but a duty to take such care as in all the circumstances was reasonable, in the hope of preventing the occurrence of any event likely to cause damage to the company.

Applying the principle expressed by the two law lords in **Dorset Yatch's** case to facts in this trial, I hold that the University of the West Indies did not have a duty of care to protect the claimant from the actions of the terminal intruders on the construction site on the 18th November 1999. Their position was not analogous to the Home Office. I agree with counsel for the defendant that it could not reasonably be foreseen that gun men would invade the construction site in the broad day and begin to shoot randomly. This is so notwithstanding the court's finding Mr. Hanna informed the project committee that men including one "Tiger" invaded the construction site demanding work and protection money which was paid.

Although Mr. Hanna's evidence in chief refers to volatility of the surrounding communities to the campus there was no evidence of this kind of shooting occurring previously. Counsel for Mr. Hanna submitted that the Court should take judicial notice, that it is notorious, that extortion occurs at construction and building sites in Jamaica. The court is unable to go so far as to hold, without evidence, that the practice of extortion, though associated

with threats of violence, involves shooting of the kind that occurred to Mr. Hanna. There was no evidence of such previous acts of violence in the community and the action of this third party gunman was not reasonably foreseeable. (**Birch v New Brunswick Command Canadian 29 D.L.R 361** applied.

I am mindful of the qualification made by Oliver, L.J. in **Lamb v L B of Camden** [1981] 2 ALL. ER. 408 at 419 of Lord Reid's test in the **Dorset** case that he underestimated the degree of likelihood necessary to fit responsibility on the tortfeasor. He was of the view that there may be circumstances in which the court would require a degree of likelihood amounting almost to inevitability before it fixes a defendant with responsibility for the act of a third party over whom he has and can have no control. It can't be concluded that when this third party gunman shot Mr. Hanna it was an event that the University, in the circumstances of the court finding of facts, should regard as inevitable and therefore liable for the third party's act. I agree too, that to so hold would make the University an insurer for the risk of injury which is unreasonable.

Although forseability is central to the test of the existence of a duty of care all the circumstance of the case must be taken into account to determine the duty of care at common law. Lord Keith express this position in delivering the judgment of the Privy Council is **Yuen Kun-Yeu v A. G.**

Hong Kong [1987] 2 ALL. ER. 705 at 710 g, h and at 711 paragraph d. He said firstly that "forseability does not of itself automatically lead to a duty of care." Secondly he said: "Forseability of harm is a necessary ingredient of such a relationship but it is not the only one."

Thirdly, he said that Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the forseability of harm, were appropriate to be taken into account in determining whether a duty of care arose.

There must be a close and direct relationship between the alleged wrong doer and the claimant. In all the circumstances of the facts I found I am of the view the University of the West Indies did not assume any voluntary responsibility for the type of security that Mr. Hanna complained about.

Occupiers Liability/Statutory Duty

There is no dispute in this trial between the parties that the University of the West Indies occupied the premises of the Mona Campus where the construction site was located. Similarly it is not dispute that Mr. Hanna's company took possession of the construction site in September 1999. Both Cosmopolitan Company Limited and the University of the West Indies would be in occupation of the premises of the construction site at the same

time, each on a separate and independent basis (per Campbell, J.A (Ag.) (**Rose Hall v Robinson and J.P.S** (1984), 21 J.L.R. 76 at 92 paragraph F.)

The question of occupation of the premises is relevant to the claim that the University of the West Indies breached its statutory duty of care to Mr. Hanna under the **Occupiers' Liability Act, 1969** in the circumstances where he was shot and injured on their premises. The purpose of the Occupiers' Liability Act was to provide 'New rules and institute a "common duty of care" by the occupier to all visitors be they invitees or licensee' (per Kerr, J.A. at page 81 paragraph c) Under section 3(2) of the Act the "common duty of care" is defined as:

> "the duty to take such care as is all the circumstances of the case is reasonable to see that the visitor will be reasonable safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there."

In **Rose Hall** case Campbell J.A. (Ag.) summarized this duty by pointing at that an occupier is only liable for firstly the dangerous physical condition of the premises i.e. static condition, and secondly for dangers arising from things done or omitted to be done on the premises by himself or others for whose conduct he is under a common law liability.

The Court of Appeal accepted the principles below applied to the Occupiers' Liability Act in Jamaica. They are as follows:

(a) Only the occupier of premises has the statutory duty of care under the Occupiers Liability Act, to his visitors ...

(b) Two or more persons may be in occupation of the premises at the same time, each on a separate and independent basis

(c) The duty of care owed to a visitor is the 'common duty of care' which is defined as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. The relevant circumstances for the purposes of this duty of care include the degree of care and want of care which would ordinarily be looked for in the visitor.

(d) The duty of care is owed to visitors by the occupier in relation to dangers due to the physical state of the premises or to things done or omitted to be done by himself or others for whose conduct he is under a common law liability.

(e) The occupier maybe held not to be under any duty of care to a visitor due to the fact that the danger to which the visitor is exposed on the premises is one which he, by virtue of his calling, will appreciate and guard against as special risk incident to his said calling, provided the occupier leaves him free to guard himself against the same.

(f) Where the danger is created by an independent contractor who had done work on the premises, the occupier is not liable to a visitor thereby, unless he knew of the danger so created. He would have discharged his duty under the Act once he has satisfied himself of the independent contractor's competence.

Mr. Hanna could be classified as a visitor, within the terms of the statute while the University would be classified as the occupier. The shooting of Mr. Hanna and the injuries he sustained cannot firstly be regarded as arising from the dangerous physical condition of the University premises. Secondly, I hold that his injuries did not arise from dangers arising from things done or omitted to be done on the University premises. The University had private security and police security on its premises. It undertook to oversee security at the construction site. These were reasonable step to ensure that Mr. Hanna was safe in using the premises for construction. In my view the University of the West Indies had discharged its common duty of care to Mr. Hanna and was not in breach of its statutory duty. By contract between the parties the University had left Mr. Hanna free to deal with any special risk involved in the construction of the laboratory.

The risk or potential risk of the construction site being invaded by rival gangs from the adjacent communities to the University of the West

Indies is not the type of danger the occupier has a duty of care for under the Occupiers' Liability Act.

In the event I do not find the University of the West Indies liable to Mr. Hanna either in contract, in negligence or by statue I do not find it necessary therefore to assess damages for the injuries Mr. Hanna sustained

Judgment for the Defendant .

Cost to the Defendant to be Agreed or taxed.