JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 18/99

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN:	**DAVE ROBINSON**	**1ST DEFENDANT**
AND:	**SENTRY SERVICE CO. LIMITED**	**2ND DEFENDANT/ APPELLANT**
AND:	**INEZ BROWN (Near relation of Paul Andrew deceased)**	**PLAINTIFF/ RESPONDENT**

John Vassell Q.C., Garth McBean and Alicia Richards instructed by Dunn Cox for the appellant Sentry Service Company Ltd.

Maurice Frankson instructed by Gaynair & Fraser for the Respondent Inez Brown

November 6, 7, 8, 9, 2001 and April 3, 2003

DOWNER, J.A.

Introduction

The order of this Court at the conclusion of the hearing of the appeal was as follows:

> "Appeal allowed.
>
> Costs to the appellant both here and below to be agreed or taxed.
>
> Stay of execution on interest bearing sum discharged. Sum to be paid to appellant."

The facts to be outlined are that the appellant provided security services and retained security guards to perform these services. Dave Robinson, the first defendant in the court below was retained by the appellant as one such security guard. His duties on 1st October 1985, was to allow authorized persons to enter Sabina Park through gate 2 to see a football match.

The initial issue to be decided is whether Robinson was retained as an employee or an independent contractor. If Robinson was retained as an independent contractor, then the appellant would not be liable. If, on the other hand, Robinson was retained as an employee then the appellant would be vicariously liable for the torts he committed during the course of his employment.

Since there is no appeal by Robinson on liability or quantum this Court ought to be bound by the findings of the learned judge, that he was liable. So the findings of Courtenay Orr J. on this issue are of importance. However, the appellant in grounds 3 and 4 of its appeal at pages 2-3 of the Record states that:

> "3. The Learned Trial Judge erred in finding as he did that the deceased did not stab at the First Defendant when he was shot and that therefore the First Defendant was not acting in self defence. Such a finding is unreasonable having regard to the following evidence:-
>
> (a) The evidence of Dr. Batchelor that he agreed that if the assailant stood before the deceased and the deceased raised his hands then the trajectory he saw would not have been possible.

(b) The evidence of Dr. Batchelor to the effect that it was unlikely or improbable that the deceased was shot while both his hands were up in the air.

(c) The evidence of the First Defendant Dave Robinson as a whole but in particular his evidence that he was stabbed by the deceased at the gate.

(d) The evidence of Mr. Tyrone Chuck that he saw the First Defendant with blood on his shirt and a tear on his shirt

(e) The evidence of the First Defendant that he now has a scar on his chest which he showed to the Learned Trial Judge.

(f) The evidence that a letter opener was exhibited in previous Court proceedings."

Then ground 4 reads:

"4. The Learned Trial Judge erring as he did as outlined in grounds 1-3 above also erred in giving judgment against the Second Defendant/Appellant."

The Relevant Grounds

It is therefore convenient to set out grounds 1 and 2 at pages 1-2 of the Record since these grounds form the substance of the appeal. They read as follows:

"1. The Learned Trial judge erred in finding as he did that the contract between the First Defendant Dave Robinson and the Second Defendant/Appellant is a contract of service and not a contract for services. Such a finding is unreasonable having regard to the evidence as a whole but in particular the following evidence:-

(a) The evidence contained in the written agreement between the First Defendant Dave Robinson and the Second Defendant/Appellant particularly an express term in the said agreement that the First Defendant was an independent contractor and not a servant.

(b) The evidence of Mr. Tyrone Chuck and the overall evidence including the said written agreement which revealed more factors which were consistent with a contract for services.

2. The Learned Trial Judge erred in finding as he did that the First Defendant Dave Robinson was acting in the course of his employment. Such a finding is unreasonable having regard to the evidence as a whole but in particular the following evidence:-

(a) The evidence of the First Defendant Dave Robinson that he was stabbed by the deceased who ran and that he chased the deceased to apprehend him.

(b) The evidence of Desmond Robinson to the effect that he was unable to say whether the First Defendant was stabbed by the deceased.

(c) The evidence of Mr. Tyrone Chuck as follows:

(i) That the First Defendant Dave Robinson was placed at one gate to man that gate and to allow only authorized persons to enter

(ii) That the First Defendant's role would be to protect life and property.

> (iii)That guards including the First Defendant were instructed not to use their firearms until their lives are threatened and that apprehension is to be done with minimal force.
>
> The Learned Judge's finding that the First Defendant was acting within his employment is also inconsistent with his finding that the deceased had not stabbed the First Defendant and that the deceased was not stabbing at the First Defendant when he was shot."

It is in this context that the findings of the learned judge must be considered.

The important findings of the learned judge read at page 26-27 of the Record:

> " I find that while Robinson was on duty to ensure that only authorized persons entered the park through the gate at which he was stationed, the deceased and other members of the crowd gathered there were pushing in the line in an effort to enter improperly; that as the deceased Reid pushed, Robinson hit him with a baton to deter him and Reid pushed Robinson, went under the rails and ran into the road. Robinson gave chase. He fired a shot, and Reid stopped running. Thereafter Robinson was trying to apprehend Reid but the latter kept evading him by dodging behind parked cars. Then Reid stopped. Robinson advanced toward him. Reid raised his hands in the air and said he would not run as he had done nothing. At that time Robinson had his gun pointed at Reid and said "You want mi shot you bwoy?, you want mi kill you?"
>
> Reid replied "after you cant shot mi because me nuh do nuttin." Robinson then fired one shot which hit Reid in the left axilla or armpit. Reid dropped to the ground. At no time did Reid stab at Robinson."

Another crucial finding runs thus at 49 of the Record:

> "The crowd was unruly. Robinson was trying to restrain them, when the deceased Reid, assaulted him and ran, Robinson set out 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 authorized act which was within the scope of his duty to preserve order at one of the gates at Sabina Park."

The growth of private security services has had such an impact on society that these services are now regulated by the 1992 Private Security Regulation Authority Act. This Act was not in force on October 8, 1983 when the incident occurred. In any event, this Act may need amendments to protect third parties as the respondent herein and that issue will be addressed later.

Assuming Robinson was an employee does the finding in the above passage, establish that Robinson was acting during the course of his employment when he shot Paul Andrew Reid? The context in which the above findings were made will answer this question. The judge's narrative obtained from the sole eyewitness is of importance. It reads at pages 15-16 of the Record:

> "The procedure for entering the ground was that one had to buy a ticket and then join the line to enter

the stand. Reid was some four (4) or five (5) persons ahead of him. There were rails there (apparently to control access to the stands).

The people in the line began to push. The pushing began from behind him and was therefore extended to the front of the line. He saw the first defendant Robinson, dressed in the uniform of a security guard at the front of the line, swinging a baton at the crowd, and in doing so he hit Reid. Reid "eased off" or pushed Robinson, went under the rails and ran into the road which leads away from Sabina park to North Street. As he ran the Holy Trinity Cathedral was to his left and St. Georges College to his right. There were cars parked on that road.

The first defendant Robinson gave chase. He pulled out his firearm and fired a shot. Reid ran around a parked car. Robinson caught up with Reid, who was then on the sidewalk whilst Robinson was on the road. They were just the length of a car apart and Robinson was trying to catch Reid, as they went round and round the car. Then Reid stopped. He held his hands in the air over his head and said he would not run as he had done nothing. Robinson said, "You want me shot you boy?" twice.

Reid replied, "after you can't shot mi because mi nuh do nuttin." Then Robinson shot Reid, the bullet entering his left armpit. He was about two (2) steps away from Reid when he shot him. A crowd began to come forward and Robinson fired another shot to scare them.

Reid fell to the ground. Robinson still pointing the gun at him and bending over him said twice, "You want me kill you bwoy?"

A man who said he was a soldier remonstrated with Robinson and he raised himself up. Then a policeman came up, took Robinson's firearm and walked with him back to Sabina Park.

> Reid was then put in a car and taken away. At no time did the witness see Reid with any instrument in his hands."

A very important part of these findings is the chase from Sabina park towards North Street. We can take judicial notice that this was some distance. After the chase Reid took avoiding action by going around parked cars.

As regards Robinson's duties on the 8th October, 1985 here are the learned judge's findings at page 17 of the Record:

> "On 8th October 1985, he was posted at a "pedestrian gate" at Sabina Park. The people in the line were pushing. He had his hand across the entrance to prevent unauthorized entry. Paul Reid was bending down trying to force his way in. He held him by the collar and pulled him back outside."

The relevant authorities

In determining whether Robinson was acting during the course of his employment it must be emphasized that we are dealing with mixed law and facts. It is against this background that the relevant authorities ought to be examined. Here is how Lord Kilbrandon appreciated the issue in **Keppel Bus Co. Ltd. v Sa'ad bin Ahmad** [1974] 2 All E.R. 700 at 702. He said:

> "The question in the case is whether the conductor did what he did 'in the course of his employment'. The course of the employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master. **In Poland v John Parr & Sons** [1927] 1 KB 236, [1926] All ER Rep 177, a carter, who had handed over his wagon and was going home to his dinner, struck a boy whom he suspected, wrongly but on reasonable grounds, of stealing his master's property. The master was held

liable for the consequences, since a servant has implied authority, at least in an emergency, to protect his master's property.

> 'Maybe his action was mistaken and maybe the force he used was excessive; he might have pushed the boy instead of striking him. But that was merely acting in excess of what was necessary in doing an act which he was authorized to do. The excess was not sufficient to take the act out of the class of authoriized acts . . . (per Scrutton LJ [1927] 1 KB at 224, [1926] All ER Rep at 180.'

There is no dispute about the law. The Court of Appeal relied on the well-known passage from Salmond on Torts 9th Edn (1936), p. 95; see now 16th Edn (1973), p 474 which was approved in **Canadian Pacific Railway Co. v Lockhart** [1942] 2 All ER 464 at 467 [1942] AC 591 at 599 ; it is not necessary to repeat it."

Then his Lordship continues thus on the same page:

> "The Court of Appeal rightly points out that the question in every case is whether on the facts the act done, albeit unauthorized and unlawful, is done in the course of the employment; that question is itself a question of fact. In **Baker v Snell**, [1908] 2 KB 352; at 355; affd. [1908] 2 KB 825, CA Channel J, after saying that the defendant's liability would depend on whether his servant's wrongful act was done in the course of his employment, went on, 'the question is one of fact which ought to have been left to the jury'. A jury, however, would be entitled to find that the act was done in the course of the employment only if there were facts proved which established the extent of the master's delegated authority, express or implied, and that the servant's act was done under that authority, as part of his duty to his employer. In **Riddel v Glasgow Corpn** 1911 SC (HL) 35 it was alleged that a rate-collector had defamed the appellant by charging her with forging a receipt, and that the corporation, his employers, were vicariously

liable. The question was whether the pleadings disclosed a relevant case. Lord Atkinson observed 1911 SC (HL) at 36,37.

> '...there is nothing, in my opinion, on the face of the pleadings to show expressly or by implication that Gilmour was clothed with authority to express on behalf of the Corporation to ratepayers any opinion he might form on the genuineness of any receipts which might be produced to him for payment of rates ... it was not shown by the pursuer's pleadings, as I think it should be, that the expression of such an opinion was within the scope of Gilmour's employment; from which it follows, on the authorities, that the Corporation are not responsible for a slander uttered by him in the expression of that opinion."

Turning to the finding of facts in **Keppel's** case Lord Kilbrandon said at page 703:

> "On the facts as found by the learned judge, and after examining, with the assistance of learned counsel, the testimony of those witnesses whom the judge accepted as credible, their Lordships are unable to find any evidence which, if it had been under the consideration of a jury, could have supported a verdict for the respondent. It may be accepted that the keeping of order among the passengers is part of the duties of a conductor. But there was no evidence of disorder among the passengers at the time of the assault."

Further guidance is given in the following passage at page 704 which reads as follows:

> "Although each case on this branch of the law must stand on its own facts, it was natural and proper that their Lordships should have been referred to other cases by way of analogy. There is no difficulty about **Daniels v Whetstone Entertainments Ltd** [1962] 2 Lloyd's Rep 1; in that case an assault was

> committed by a servant in circumstances which showed not a possibly excessive exercise of implied authority but, as Davies LJ pointed out [1962] 2 Lloyd's Rep at 9 a contumacious repudiation of a direct order. In **Warren v Henlys Ltd** [1948] 2 All ER 935 the master's business with the plaintiff, which had been transacted by the servant, was long over when the servant assaulted the plaintiff. As regards the two public-house cases cited, **Deatons Pty Ltd v Flew** (1949) 79 CLR 370 and **Petterson v Royal Oak Hotel** [1948]NZLR 136, their Lordships have some difficulty in reconciling them, except on the possible ground that while in both the servant was retaliating for a personal affront, in the latter, though not the former, he was also encouraging the undesirable he assaulted to leave the premises. If either of those cases assist, by analogy, the present, it would seem that more assistance might be obtained from the former."

How did the learned judge treat this important case? There are two passages which merit consideration. The first at page 19 of the Record reads:

> "This latter case was distinguishable from the instant matter on the basis that in **Keppel's** case there was no disorder on the bus. Robinson pursued Reid to apprehend him and therefore his behaviour was an improper mode of doing what he was authorized to do."

Then at page 41 the learned judge said:

> "It is useful to consider six more cases which illustrate the outworking of the concept of the course of employment. Firstly, **Keppel Bus Co. Ltd. v. Ahmad** [1974] 2 All ER 700."

Further on page 46 the learned judge said:

> "**Keppel Bus Co. v. Ahmad** (supra) and **Daniels v Whetstone Entertainments** (supra) were distinguished; the former on the basis that the assault

> by the bus conductor was occasioned by the plaintiff's protest at his use of bad language.
>
> The latter case was distinguished in that there the assault was committed on revenge or retaliation for an injury which the aggressor mistakenly believed to have been committed on him by the plaintiff and where the aggressor disobeyed the specific instructions of the defendant's manager to return to the dance floor. Both cases were classified as cases where the assailant was acting solely for his own purpose albeit at a time when on duty.
>
> The Court in holding the defendant vicariously liable reversed the decision of the Court below, and did so in spite of finding that at the time of the assault the assailants were not on the defendant's premises, that they had no authority to leave the premises and no authority to carry weapons."

To my mind it was the learned judge's failure to analyse **Keppel's** case why he fell into error. The similarity with the instant case lies in the fact that 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 scope 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.

Equally, the learned judge misunderstood **Daniel's** case. The true finding expressed in the headnote at page 1 of [1962] Vol. 2 of Lloyds Law eport was that as regards his second assault on the plaintiff that was an

act of private retaliation and not within the second defendant's scope of employment.

It is necessary to examine other authorities to show that the law has consistently supported the approach in **Keppel's** case. In **Radley and Another v London Council** (1909) 109 LT. 162 the headnote summarises the principle stated by Avory and Lush JJ thus at page 162:

> "Avory, J. was of opinion that the act of the conductor, being done with a view of punishing one who was supposed to be an offender, or for the purpose of punishing somebody with the object of preventing others from repeating the offence, was ~~not~~ an act for which his employers could be held liable.
>
> Lush J. held that the conductor in leaving the tram and pursuing the plaintiff was not performing an act of the class which he was engaged to do as conductor of a tram, and consequently was not acting in the course of his employment or within the scope of his authority."

Then there is **Daniels v. Whetstone Entertainments, Ltd., and Allender** (1962) Vol. 2 Lloyds Report page 1 at page 5. This case was wrongly summarized by Courtenay Orr J. In **Daniels.** Davies L.J. said:

> "The passage from Salmond on Torts which the learned Judge cited I read from the 13th ed.; the Judge had before him on Circuit the 12th ed. The two passages are these, and I read now from pp. 122 and 123.
>
> > 'It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as

> opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it.'

Then, at the top of p. 123:

> 'On the other hand, if the authorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment but has gone outside of it. He can no longer be said to be doing, although in a wrong and authorized way, what he was authorized to do; he is doing what he was not authorized to do at all'.

Those passages in an earlier edition of the same work, the 9th ed.., were cited with approval in the Privy Council case of **Canadian Pacific Railway Company v. Lockhart,** [1942] A.C. 591, at p.599, by Lord Thankerton, who was giving the judgment of the Privy Council."

Buckley J. said at page 9:

> "The problem which we have to consider is whether the second assault can be said to have been in any way committed in the course of the employment of Mr. Allender as a steward at the dance hall. I quite agree with what Lord Justice Davies has said – that ejectment, and what is necessary to carry out ejectment, would not cease necessarily at the threshold of the dance hall. One could not say that immediately the body of the culprit has passed the threshold, any violence applied to him is outside the steward's authority, for clearly he must have authority

> to eject him effectively, and moreover to prevent him (after being ejected) coming back into the dance hall, which on some occasions would certainly involve exercising some degree of force, and at times outside the threshold of the dance hall. But when one considers the facts of this particular case it is, in my judgment, impossible to say that what occurred could be said to be incidental to the ejectment of the plaintiff. In the passage which has been read by Lord Justice Davies from the learned Judge's judgment he said that the plaintiff was not making any attempt to come back into the dance hall, and therefore what was done could not possibly be held to be justified as preventing him re-entering the hall."

The headnote of this judgment is given at page 43 of the Record. Then on page 10 Buckley J. continues thus:

> "We were referred by Mr. Martin Jukes to a note in Halsbury's Laws of England, 3rd ed., Vol. 25, at p. 544, note (e) where there is a reference to the case of **Warren v. Henlys, Ltd.,** [1948] 2 All E.R. 935, to which my Lord has referred in his judgment, in the following terms:
>
> > 'The master is not liable if the assault was an act of private vengeance on the part of the servant and not committed in the course of his employment'."

The learned judge below placed great reliance on **Vasey v Surrey Free Inns Plc** [1996] PIQR P 373 at pages 37,47 and 50 of the Record. At page 50 of the Record here are the citations by the learned judge:

> "I am fortified in this finding by the approach of the learned judges in **Vasey's** case (supra) Stewart Smith L.J. said at page 5:
>
> > 'The act is not the assault but the protection of the defendant's property and the apprehension or identification of those responsible for

> damaging it so that they can make recompense or be prosecuted. That is plainly something which the manager was authorized to do, and so, I should have thought, the doormen as well.'

Later he dealt with the issue of the motivation for attack. He put it this way:

> 'Mr. Coleman submitted that the only purpose or motivation of the bouncers was to have and enjoy a fight and that was quite unconnected with the servants duties.
>
> I do not accept that not only was the attack so closely related in time and place for it to be the only proper inference that they were reacting to the damage to the door, but the evidence of the plaintiff to which I have referred, makes it plain they wished to teach a lesson to the person who had caused that damage. ... It was of course, an unlawful and unauthorized manner of carrying out the duty to which I have referred but I have no doubt that such is what it was. They were not pursuing their own purposes. Nor can I accept that the violence here was so extreme that it falls within the dictum of Scrutton L.J. There was undoubtedly excessive violence, even for the purpose of teaching a lesson, but I see no reason to doubt that that was the purpose.'

Ward L.J., added his perspective of the scope of the doormens' employment. He said at page 6:

> 'In a general sense, the job at which the defendants' employees were engaged was to control entry to the premises, to protect from harm both the premises themselves and also those persons employed there or peaceably enjoying its hospitality, to identify and, if and when necessary, to restrain the undesireable and unruly by reasonable force.

> Implicit therein was a discretion given to them as to whether and if so when to use force and as to the degree of force which was judged appropriate to contain the disturbance. Within that wide sphere of activity, an improper mode of carrying out that employment would include the use of unreasonable force exceeding the bounds of legitimate defence to person and property and a measure of hot pursuit to confront the offender'."

The important feature of that case was that the employers were liable for their employee's unauthorized act of assault. The master was found to be vicariously liable for the injuries inflicted on a visitor to the club who had kicked down and damaged the doors of the club. The court found that the assault was a reaction to the damage to their employer's property. This was the basis of finding the employer vicariously liable. There was no damage to Sabina Park in the instant case. Also there was no damage to the employer's property.

On the principles expounded in these cases, when applied to the facts of the instant case, we find that Dave Robinson, assuming he was an employee, was not acting in the course of his employment when he shot Paul Andrew Reid. So we would reverse the finding of Orr J. on this issue.

Was Dave Robinson retained by the appellant company as an independent contractor?

The approach by Orr J. on this issue cannot be faulted. The learned judge cited an article at page 34 of the Record on the issue which sets the framework thus:

> "This means that the Court adopted a 'tailor made' approach fitting criteria and principle, selectively chosen to the particular circumstances" (page 111 Litigation Library Vol. 15, January 1996, article by Geoffrey Holgate.)"

Although the learned judge cited numerous cases on this branch of the law he realized that the focus ought to be on instances where vicarious liability was claimed in relation to tortious liability. Further, the other aspect to emphasize is the issue as to whether the tortfeaser is a servant or independent contractor.

The learned judge approached the problem thus at page 30 of the Record:

> "The test sought to ascertain whether there was an entrepreneurial element in the relationship between the parties. The Court should ask "Is the person who engaged himself to perform these services performing them as a person in business on his own account?" If the answer was in the negative then, the contract was one of service. This test was foreshadowed by the opinion of Lord Wright in **Montreal Locomotive Works Ltd. v Montreal and A.G. for Canada** [1947] 2 DLR 161 at 169.
>
> > 'In certain cases a single test such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a

> chartered vessel is generally the employee of the ship owner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his behalf and not merely for a superior'."

Then turning to the specifics the learned judge said at pp. 34-35 of the Record:

> "I now turn to the application of these principles to the instant case. It is interesting to note that most of the cases dealing with the criteria by which to identify a contract of service, were not concerned with the problem of vicarious liability e.g. The **Ready Mixed South East Ltd. v. Minister of Pensions and National Insurance** [1968] 2 QB 497 (entitlement to social security benefits) **Hall v Lorimer** [1994] 1 All E.R. 250 (taxation) **Lee Ting Sang v Chung et al** [1990] 2 A.C. 374 entitlement to workmen's compensation).
>
> I bear in mind the wise caution of Mummery J in **Hall v Lorimer** (supra), that the task of the Court "is not a mechanical exercise of running through items on a check list to see whether they are present, or absent from a given situation. . . it is a matter of evaluation of the overall effect of the detail, which is not necessarily the sum total of the individual details." Nonetheless, I shall indicate the main details, the cumulative effect of which has influenced my decision.
>
> The evidence clearly shows that the financial risk of the business was not that of Robinson but the

> company. He was given a wage, supplied with equipment and uniforms. (clause 7 of the written agreement) Robinson, by clause 8, was only "allowed to keep, carry and use" the firearm when it was issued to him by the company and whilst carrying out "any work by virtue of this agreement" - i.e.; the work assigned to him by the company. It follows therefore that the fact that the firearm was licenced in his name (and that of the company) was only because it was necessary by the requirements of the law. All these factors I consider consistent with a contract of service.
>
> Other factors which point in this direction are the code of discipline which is a part of the written agreement. So too is his entitlement to "rest" days after working for certain consecutive periods; the fact that he was required to undergo training and sit examinations set by the company if the company thought it necessary."

Then in making his finding the learned judge said at page 36 of the Record:

> "In all the circumstances I find that the cumulative effect of the evidence points on a balance of probabilities to the conclusion that the rights conferred and the duties imposed by the contract between Dave Robinson and the company are not such as to make the contract a contract ***for*** services. It is a contract of service."

The evidence from Tyrone Chuck, the Managing Director of the appellant company supports the learned judge's conclusion. At page 21 of the Supplementary Record his evidence reads:

> "Ques: What is system of deploying security guards when someone contracts services of your company?
>
> Ans: When we are contracted to do a job, we get their requirements, how they want job to be conducted, times etc.

> everything they require and everything specific to their particular job. Request of client weighs heavily on how we deploy our contractors. Sometimes we have very detailed task. We would give guards instructions to ensure requirements carried out."

Then further, the following evidence strengthens the judge's findings.

At page 22 of the Supplemental Record the witness continued:

> "I had input in firm
>
> I outlined nature of security terms, types of problems we encounter. So we tried to tailor it to suit circumstances. Every client has different requirements. We take contract and brief him and tell him what requirement by particular client and how he wants job done.
>
> **Page 2 Clause 4** would allow us to brief contractor of requirement of client. I had input in agreement.
>
> **Ques:** After signing of this document, what was working relationship?
>
> **Ans:** He placed at different sites and each site carries a set of instructions of which he was briefed accordingly.
>
> The Defendant company has assigned 1st Defendant to Sabina on 8/10/85. He placed at area of the gate to man that gate and to allow only authorized persons to enter. Authorised persons would be cricket officials, Sabina Park officials and valid ticket holders. I think that on that particular day he was assigned for the duration of the particular day. Company would not issue firearms until they properly trained. 1st Defendant was issued with firearm re duties at Sabina park on day mentioned.

CROSS EXAMINATION – MR. WILLIAMS

Ques: 1st Defendant continued to work for your company some 3 years after incident?

Ans: Yes sir.

Despite this incident I consider him to be a good security guard. I definitely consider him to be one of my best. He was obedient person. He carried out instructions given him from time to time by his supervisors."

Then the contract purporting to be between the appellant and an independent contractor states at page 45 of the Supplementary Record:

"(3) During the lifetime ~~of this~~ Agreement the Company shall whenever it deems necessary conduct training sessions culminating in written examinations in security to be sat for and passed by the Contractor. Such sessions shall not exceed periods of more than seven continuous days and at all times and during such training sessions the Contractor shall not be entitled to charge the Company for time spent therein.

((4) The Contractor shall exercise proper skill and diligence in rendering security services to the Company's clients and shall be subject to direction from the Company or any of its agents as to the manner in which he shall perform his work."

It is appropriate to state that the learned judge's finding that Dave Robinson was not an independent contractor must be affirmed. He was an employee but not acting in the course of his employment in the circumstances of the instant case.

Conclusion

I am in agreement with Orr J. that Dave Robinson the security guard was an employee of the appellant company Sentry Service Co. Ltd. He was not an independent contractor as was stated in the contract of employment. However, I am of the opinion that when he chased Andrew Reid from the post where he was stationed at Sabina Park on 8th October, 1985, and shot him, he was not acting in the course of his employment. He was no longer maintaining order in the queue. The analysis of the learned judge's findings demonstrate that he was in hot pursuit of Reid on a private act outside the course of his employment. Further, in carrying out this act he used excessive force. A reality that ought to be faced is that security guards are in substance a private police force. If Robinson were a member of the Constabulary Force section 3 (3) of the Crown Proceedings Act which speaks of "purporting to perform acts" would probably have made the Crown liable in the circumstances of this case. The Private Security Regulation Authority Act ought to be amended to reflect these provisions of the Crown Proceedings Act so as to protect third parties.

The Court had agreed that the appeal by Sentry Service Co. Ltd. ought to be allowed and the order in the Court below set aside for the reasons stated in this judgment. The delay in delivering these reasons has been caused by the greatly increased number of complex cases with which this Court has had to cope since the year 2000. The delay is regretted.