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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 131/1995

BETWEEN : CARSON EBANKS

PLAINTIFF

AND: MITCHELL SOLOMON (1)

THE CHIEF FIRE OFFICER OF
THE FIRE BRIGADE OF THE
CAYMAN ISLANDS (2)

THE ATTORNEY-GENERAL OF HER
MAJESTY'S GOVERNMENT (3)
OF THE CAYMAN ISLANDS DEFENDANTS

APPEARANCES:

Jeremy Walton for plaintiff

Lisa Agard, Crown Counsel for 2nd and 3rd defendants

1st defendant absent - not represented

28 & 29 April 1997

BEFORE PATTERSON J. (AG) IN OPEN COURT

JUDGMENT

The plaintiff and the first defendant were firemen employed by the second defendant or alternatively, the third defendant, at the Frank Sound Fire Station Grand Cayman. On the afternoon of the 2nd September, 1994, the first defendant used a machete to inflict a severe wound to the right hand of the plaintiff while they were engaged in trimming the hedge on the perimeter of the fire station compound. The plaintiff filed this action against the three defendants



claiming primary liability against all three for the tort committed by the first defendant and vicarious liability against the second and/ or third defendants.

The relevant pleadings are contained in paragraphs 1-4 of the statement of claim and they are as follows:-

- “(1) At all material times the Plaintiff and the 1st Defendant were employed by the 2nd named Defendant or alternatively the 3rd Defendant as firemen at the Frank Sound Fire Station, Grand Cayman.
- (2) On the 2nd day of September 1994 during the evening shift at approximately 5:15 p.m. whilst the Plaintiff and the 1st Defendant were working in the environs of the Frank Sound Fire Station, the 1st Defendant wrongfully wounded the plaintiff by striking him on the hand with a machete.
- 2.1 At all material times the 1st Defendant in acting as aforesaid was acting in purported performance of his functions as a fireman under the direction and control of the 2nd Defendant, his servants or agents.
3. The plaintiff avers that the said wounding was intentionally inflicted by the 1st Defendant. Further the incident and injury were caused or contributed by the negligence of the 2nd Defendant, his servants or agents and / or breach of statutory duty, alternatively by the negligence and / or breach of statutory duty of servants or agents of Her Majesty’s Government.
- 3.1 The 1st Defendant was convicted in the Grand Court on 18th March 1996 of the offence of Grievous Bodily Harm in relation to the aforesaid incident and injury. The said conviction is relevant to the issues herein and the plaintiff intends to rely upon the same at trial for the purpose of establishing vicarious liability on the part of the 2nd and / or 3rd Defendant for the loss and damage suffered by the Plaintiff.
4. By reason of the matters aforesaid the Plaintiff sustained severe personal injuries and has suffered loss and damage”.

The reliefs or remedies sought against the defendants jointly and severally were stated as:-

- “(1) Damages.
- (2) Aggravated damages against the first defendant.
- (3) Interest pursuant to statute
- (4) Costs.”

The first defendant did not give notice of his intention to defend, and on the plaintiff's application, judgment was entered against him on the 26th October, 1995 with damages to be assessed. It is plain that the claim against the first defendant is to recover damages for the deliberate assault and battery on the plaintiff; there is no allegation of negligence on the part of the first defendant. The assessment of damages in that regard is not before the Court at this time.

It is only the question of the liability of the second and /or third defendants that falls to be resolved by the Court at this time. Counsel for the plaintiff submitted that there were three issues of liability to be resolved. Firstly, there was the issue of the primary liability in negligence which arises from the personal non-delegable duty of an employer to take reasonable care for the safety of his employee. Secondly, there was the issue of vicarious liability of an employer to a third person for wrongful acts of his employee done in the course of his employment. The third issue was whether the second defendant was in breach of the statutory duty imposed by s. 5 (b) of the Fire Brigade Law. However, counsel for the plaintiff conceded in closing that the claim could not succeed under this head since the pleadings did not specify the elements of the statutory duty. Nothing more need be said on this issue.

The second and third defendants, in their defence, denied the primary liability in negligence that the plaintiff averred, and they also denied that they were vicariously liable for the conduct of the first defendant. They contended that the first defendant was not acting in the course of his employment when he wrongfully wounded the plaintiff by striking him with a machete. They contended further that the second and third defendants, through their agent or servant Linford Webb could not have reasonably foreseen that the first defendant would commit the act of wounding, and that in all the circumstances, they had discharged their duty to take reasonable care of the plaintiff.

I turn now to the evidence adduced by the parties. It is common ground that the plaintiff and the first defendant were, at the relevant time, firemen in the service of the Fire Brigade of the Cayman Islands. Both men were stationed at the Frank Sound Fire Station. On the 2nd September, 1994, they were working on the same shift - 4:30 p.m. to 8:30 a.m. the following day. The sub - officer in charge of that shift was Linford Raphael Webb. In fact, all three men had worked on the same shift for some months prior to the 2nd September, 1994. The plaintiff said that he had known the first defendant since he (the plaintiff) was a child, but he would not say that they were friends. This seems somewhat strange, since the day before the incident he had gone along with Linford Webb to the first defendant's home and freely gave his labour in assisting the first defendant to erect a fence.

During the day on the 2nd September, he again visited the first defendant at his home. Linford Webb knew both men for many years, and he said " they were

good friends". In my view, the plaintiff and the first defendant were not just co-workers, but good friends. The plaintiff said that he knew the first defendant to have "a bad temper at times- sort of an ignorant person" but he had never had any problem with him before this incident. He did not know of any problem between the first defendant and Linford Webb; the three of them got on well together.

After working together on the fence, the first defendant agreed with the plaintiff and Webb that he would take food to work on the following day for all of them. When the plaintiff visited the first defendant before going to work on the 2nd September, he asked the first defendant if "everything was in order concerning the agreement". On being told "no" he said he told him to forget it. By that he meant that the first defendant should forget about taking the food to work. But that was not the end of it all, it was the genesis of this action, and it is rather sad to trace the way in which such a simple arrangement between friends to supply food escalated to a violent criminal assault occasioning serious bodily harm.

The plaintiff testified that at about 4:25 p.m. while driving to work, the first defendant signalled him from behind to stop. Linford Webb was a passenger in the first defendant's vehicle. The first defendant asked him "where is the food and drink?" He in turn asked the first defendant "what do you mean? you are supposed to be bringing food and drink". Linford Webb said that the first defendant only asked about drinks - not food, but that is not an important issue.

Both the first defendant and Webb laughed over the matter; the first defendant appeared to have taken it as a joke. It seems quite clear to me that the first defendant was joking indeed, since Webb said that the first defendant had with him the agreed food in the form of cooked rice and seasoned chicken meat. But the plaintiff would not have known that then; he said he was very upset but the first defendant was not angry. He drove off and went to work.

Having assumed duties, all three men set about their tasks. Webb it seems, was in an office while the plaintiff and the first defendant together checked the fire truck and the other fire fighting appliances and equipment. While that was being done, the plaintiff and the first defendant continued arguing about the food. The first defendant accused the plaintiff of failing to take food in the past, and told the plaintiff that he had forgotten to do so on this occasion. No doubt the first defendant was still joking since the plaintiff had told him earlier in the day to "forget it". Webb could have heard the argument between the men, but he did not join in. No doubt his neutral conduct stemmed from the fact that he knew that the first defendant had brought the agreed food, but jokingly, was withholding the fact from the plaintiff. It does not appear that the argument interfered with the due performance of their tasks which took fifteen to thirty minutes to complete, and so there was no real reason for Webb to intervene.

Their next assignment was the trimming of the hedge, and all three men participated. The first defendant and Linford Webb were using machetes to do the cutting while the plaintiff picked up the debris. The argument continued

between the plaintiff and the first defendant. It is clear that it was the plaintiff who prolonged the argument while the first defendant and Linford Webb were cutting the hedge. The plaintiff, who was obviously displeased, stuck close to the first defendant. Webb was some distance off, but within earshot and apparently he was amused by the argument; the plaintiff said "he just laughed at times". Indeed, the topic of the argument would provide a source of amusement to the average bystander. As the argument continued, the first defendant told the plaintiff that he was uncivilized, and the plaintiff told him that he had no respect. That kind of argument continued while all three men were still working, but after about ten minutes, it took an unexpected serious turn. The plaintiff said that the first defendant, speaking in a loud and serious tone, said "move from in front of me or I will chop you". The plaintiff said he was then beside the first defendant picking up the cuttings and he said Webb was some three to four feet away from them. Webb, however, did not agree with the plaintiff. He said he was about ten feet from them, and that what the first defendant shouted was "Webb, come and get this man out of my face." It may well be that both statements were made by the first defendant. The plaintiff said he did not take the threat "seriously". He continued the argument by telling the first defendant that he was a cheap fellow, and this was what he said transpired thereafter:-

"I put my finger in his face. He said: 'take your hand out of my face'. I put my finger in his face again and at that point he pushed me. I pushed him back, and Mr. Webb came in between us, and in a split second the first defendant raised the machete and came down with it. It struck me between my ring and third finger straight down to my wrist".

Webb testified that when the first defendant shouted to him, he looked and saw that the plaintiff had his finger pointed in the first defendant's face. He realized that the "quarreling" between the men had taken a serious turn, and he moved towards them when the first defendant shouted to him. He said he got between the two men to separate them and stop the quarrel. This is what he said happened thereafter:

"I was facing Solomon (first defendant) with Ebanks (plaintiff) behind me, that was when Ebanks reached from behind me and hit Solomon on the side of his chin. I still did not think that the situation was dangerous. Before anything else could happen Solomon lifted the machete with his right hand and reached around me and chopped on Ebanks' hand. I had no idea that Solomon would use the machete to chop Ebanks' hand".

There can be no doubt that it was the actions of the plaintiff that transformed the argument that Webb and the first defendant took as a joke into a serious quarrel. As soon as Webb realised the turn of events, he stepped in to prevent further development. He said he pushed on the first defendant's chest to move him back "because he was the one with the machete in his right hand so I figured if anything was to happen it would be him". He did not push the first defendant because he was threatening violence; he did not fear that the plaintiff was in danger of being harmed by the first defendant.

In my view, Webb's intervention was timely, given the circumstances as he knew them to be. The argument did not interfere with the performance of the task

that he, as their supervisor, had set them; they had been arguing for some forty minutes while working. But the plaintiff's assault on the first defendant brought about an unexpected change of circumstances. The first defendant, for the first time it appears, expressed emotion by shouting to Webb seeking his intervention. Webb was quick in realising the change in the first defendant and he took immediate action to forestall further development. The first defendant inflicted the injury with the machete with such alacrity, he surprised the plaintiff and no doubt Webb also.

It was contended on behalf of the plaintiff that an employer is under a personal non-delegable duty of supervision to take reasonable care for the safety of his employee and that the employer in the instant case failed to discharge that duty, judged objectively in the course of events on the day in question. The assault and injury by a fellow employee on the plaintiff in the course of his work was a reasonably foreseeable consequence of the employer's breach of duty.

Issue was not raised as to whether the plaintiff and the first defendant were employed by the Government of the Cayman Islands represented by the third defendant. The third defendant admitted that at all material times the plaintiff and the first defendant were employed by the Government of the Cayman Islands represented by the third defendant. It was admitted that the plaintiff suffered a severe injury by the willful act of an employee of the third defendant. The live issues raised by the third defendant are set out in the following paragraphs of the defence:-

2.1 Paragraph 2.1 of the Re-Amended statement of Claim is denied. The 1st Defendant by wrongfully wounding the Plaintiff by striking him on the hand with a machete was not acting in the course of his employment. It is further denied that in so wrongfully acting the 1st Defendant was under the direction and control of the 2nd Defendant, his servants or agents.

3. Paragraph 3 of the amended statement of claim is admitted save that it is denied that the third Defendant was guilty of the alleged or any negligence. It is further denied that the third Defendant was guilty of the alleged or any breach of Statutory Duty.

3.1 It is admitted that the 1st Defendant was convicted in the Grand Court on the 18th March 1996 of the offence of Grievous Bodily Harm in relation to the incident. It is however denied that the said conviction can establish vicarious liability on the part of the 2nd and 3rd Defendant as the 1st Defendant was not acting in the course of his employment.

4. The Plaintiff knew or ought to have known that provoking the 1st Defendant in the manner in which he did involved a risk of injury and that the plaintiff in so provoking the retaliation of the 1st Defendant impliedly consented to running that risk.

5. The 3rd Defendant further denies that he is guilty of the alleged or any negligence as the plaintiff and the 1st Defendant were in the common employ of the 3rd Defendant at the time that the Plaintiff sustained his injury.

There can be no doubt that an employer owes a primary duty to his employee to take due care to provide and maintain a reasonably safe system of work. He must provide a competent staff of men, adequate material and a proper system and supervision. In Wilson & Clyde Coal Co v. English, [1937] 3 All ER (Annotated) 628, (at p. 636) Lord Thankerton referred to and adopted the comments of the Lord Justice - Clerk on the case of Fanton v Denville [1932] 2 KB 309 as to “what has always been regarded as a fundamental doctrine of the law of master and servant, viz., that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting

their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of these duties. The master's liability as for breach of these paramount duties is unaffected by the doctrine of fellow-servant, for in the eye of the law they are duties that cannot be delegated." But outside the scope of the non-delegable duties, the employee is not liable to his employee if there has been no want of due care by him.

So in what way can a breach of duty be attributed to the second or third defendant in the instant case? It is true that it is the responsibility of the employer to see to the proper supervision of his employees in the performance of their duties. Webb was the supervisor provided by the employer at the relevant time. For the plaintiff to succeed against the second or third defendant, it must be shown that Webb was negligent by not taking reasonable care for the safety of the plaintiff. It was contended that Webb should have appreciated the emotional state of the first defendant, and so he should not have given him a machete to trim the hedge as it was foreseeable that the plaintiff would be injured in the way he was. I think the contention is flawed. There is no evidence to support a finding that the first defendant was emotionally upset when Webb gave him the machete or indeed, at any time before the plaintiff assaulted him. The scope and nature of the duty will have a bearing on what is reasonably required to satisfy the duty; but what is reasonably required must be determined in the particular facts of the case.

Given the circumstances of this case as Webb must have known them to be, the argument between the plaintiff and the first defendant could only be regarded by

him as banter which did not call for his intervention. I think that any reasonable man would so regard it. In fact, a witness called by the plaintiff who overheard the argument said:- "I thought they were making jokes - did not pay it no mind". However, the circumstances changed with the assault on the first defendant by the plaintiff, and accordingly, the standard of care required of the supervisor would be what was reasonable in the changed circumstances.

Viewed objectively, a reasonable man could have done no more than what it is admitted Webb did. Realising the possibility of retaliation by the first defendant, and his responsibility as a supervisor, Webb got between both men with dispatch. In my view, he did all in his power to prevent physical harm to the men, and had it not been for the persistent attack on the first defendant by the plaintiff, and the swiftness of the first defendant to retaliate, he would have succeeded in his efforts. In my opinion, the evidence does not support a finding that Webb fell short in his duty as a supervisor. On the contrary, I find that he took reasonable action in the unexpected and unforeseen emergency that confronted him, and that a reasonable man would not have done more. In my judgment the third defendant, did not fail in the duty to provide proper supervision for the employee. The duty to provide a safe system of work has not been breached in any way, and accordingly no liability for negligence attaches to the third defendant in respect of the injuries sustained by the plaintiff.

Before leaving the question of the primary liability of the third defendant, I must deal with the contention that Webb ought not to have given the first defendant a machete to trim the hedge at the time he did. A machete is part and parcel of the firefighting equipment kept at the fire station. It had been used many times before to trim the hedge; at other times a hedge trimmer had been used. In my view, it was not reasonably foreseeable that at the time the machete was given to the first defendant, it was likely that the argument between the plaintiff and the defendant would take the turn it did and that the first defendant would then use the machete to inflict injury. The plaintiff himself, who knew the first defendant from childhood days, said he did not expect him to react the way he did with the machete. Had it not been for the gross provocation meted out to the first defendant by the plaintiff, I do not think the first defendant would have reacted the way he did.

I turn now to the question of whether the third defendant can be held vicariously liable for the wrongful act of his employee, the first defendant.

I think that the common law liability of an employer for the torts of his employee is set out in precise terms at para. 5-20 (p.176) of the 17th edition of

“Clerk & Lindsell on Torts”. This is what it says:-

“Where the relationship of employer and employee exists, the employer is liable for the torts of the employee so long only as they are committed in the course of the employee’s employment. The nature of the tort is immaterial and the employer is liable even where liability depends upon a specific state of mind and his own state of mind is innocent”.

It is admitted that the relationship of employer and employee existed between the third defendant and the first defendant. It is further admitted that the first defendant wrongfully inflicted a serious injury to the plaintiff. The paramount question to be decided is whether the wrongful act was done in the course of the first defendant's employment. Through the years, courts have adopted with approval the general statement of law stated in "Salmond and Heuston on the Law of Torts" as to when a wrongful act is deemed to be done in the course of the employment. It is in these terms (21st edition 1996 - cap. 21.5 at p. 443):-

"It is deemed to be so done if it is either (1) a wrongful act authorised by the master or (2) a wrongful and unauthorised mode of doing some act authorised by the master. Although there are few decisions on the point, it is clear that the master is responsible for acts actually authorised 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 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".

It was contended for the plaintiff that the proper test to be applied in determining whether an act was done in the course of the employment was that formulated by Comyn J. in Harrison v Michelin Tyre Co. Ltd [1985] 1 All ER

918. The headnote of that case reads as follows:-

"The plaintiff, a tool grinder employed by the defendants, was injured in the course of his employment while standing on the duck-board of his machine talking to a fellow employee. The injury occurred when S, another employee, while pushing a truck along a passageway (indicated by chalk lines) in front of the plaintiff, decided to indulge in some horseplay by suddenly turning the truck two inches

outside the chalk lines and pushing the edge of it under the plaintiff's duck-board. The duck-board tipped up and the plaintiff fell off it and was injured. He brought an action for damages for personal injuries against the defendants, claiming that S had been acting in the course of his employment, and that therefore they were vicariously liable for his negligence. The defendants denied liability, contending that at the time of the incident S had embarked on a frolic of his own. Held-For the purpose of determining vicarious liability, the test whether an employee was acting in the course of his employment was whether a reasonable man would say either that the employee's act was part and parcel of his employment (in the sense of being incidental to it) even though it was unauthorised or prohibited by the employer, in which case the employer was liable, or that it was so divergent from his employment as to be plainly alien to his employment, and wholly distinguishable from it, in which case the employer was not liable. Applying that test, a reasonable man would say that., even though S's act was of a kind which would never have been countenanced by the defendants, it was none the less part and parcel of his employment. Accordingly the defendants were vicariously liable for S's negligence"

But it is clear that no simple test can be formulated to cover all cases; each case depends on its facts. The Court of Appeal in England did not find favour with the test of vicarious liability formulated by Comyn J. in the Harrison case (supra.) . The Master of the Rolls Sir John Donaldson, in Aldred v Naconco [1987] 1. R.L.R. 292 was particularly critical in his disapproval of the learned judge's formulation of the test and the use that could be made of it. He expressed "the hope that in future cases the classic test" as set out in Salmond (supra), will be applied.

I am constrained to apply the "Salmond" test to the facts of the instant case. It was never suggested that the employer, the third defendant, authorised the unlawful wounding of the plaintiff by the first defendant. The question must therefore be this: can the unlawful wounding of the plaintiff by the first

defendant be regarded as an act that is so connected with that which the third defendant had authorised, that it may rightly be regarded as a mode - although an improper mode - of doing it? The task at hand for the first defendant was the trimming of the hedge. He had been provided with a machete for that purpose. But that was nothing unusual. A machete was used at times to cut back the hedge. It is clear that there is no complaint about the way in which he went about performing that task - there is no complaint that he was negligent in the way he used the machete to trim the hedge. In other words, there is no evidence that there was anything wrong in the mode he went about performing the task that had been assigned to him.

It is conceded that the first defendant deliberately chopped the plaintiff with the machete. That was done at a time when they had stopped from doing the task to which they were assigned - the one to cut the hedge and the other to gather the debris. It is true that the wrongful act was done while the first defendant was on duty, but an employer cannot be held responsible for the wrongful act of his employee simply because it is committed in the time he is on duty, nor can the employer be liable merely because he provided the weapon that was used to commit the wrong. The wrong must be committed in the course of the employer's business so as to form a part of it. What the first defendant did in the instant case had no connection whatsoever with the task he had been assigned. He did not do it for the purpose of his employment as a fireman; it was not an improper way of doing his job - it was not his job at all, but something done for his own purpose. He was on a "frolic of his own". In my

judgment the evidence clearly established that the unlawful act of the first defendant in wounding the plaintiff was not done in the course of his employment, and accordingly the third defendant cannot be held vicariously liable for such action.

The plaintiff has failed to establish the liability of the second and / or third defendants to the plaintiff for the injury he sustained at the hands of the first defendant. Therefore, there will be judgment for the second and third defendants against the plaintiff.

Dated this 28th day of May, 1997.



Sgd/ C.A. Patterson

S. Judge of the Grand Court