

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W014/89

BETWEEN OSROURNE WITTER PLAINTIFF  
AND BRINKS JAMAICA LIMITED DEFENDANT

David Henry of Messrs Nunes Scholefield, DeLeon & Company for plaintiff

Norman Davis of Messrs Myers, Fletcher & Gordon for defendant.

HEARD: March 23, 24; April 8 and October 10, 1992.

HARRISON, J.

This is an action in which the plaintiff claims against the defendant company damages for negligence, and or in the alternative, breach of contract, in that on the 26th day of July 1988 the motor vehicle provided by the defendant company to an employee, the plaintiff, to do his duties as a security guard broke down because of the negligent manner in which it had been repaired by the defendant. As a consequence the plaintiff was held up and shot thereby suffering injury, loss and damage and incurred expense.

The Court found the facts following:-

The plaintiff, now 40 years old is employed to the defendant company as a clearance driver. His duties include taking cheques from the branches of a commercial bank to its data centre for processing after which he would return the said cheques to the respective banks.

He would commence his said duties by taking possession of the motor vehicle on a Sunday afternoon, at a time of his choice, drive it home and on Monday mornings at 5:30 a.m. he would commence collecting cheques from the data centre and do the respective deliveries. He worked until 8:15 p.m. each day and kept the said vehicle after each working day until the Friday evening of the week when he would return it to the company's office for servicing. He would then re-take it on the Sunday afternoon following. The plaintiff is also provided with a firearm in the performance of his duties.

On Friday morning 24th June 1987 the motor vehicle assigned to the plaintiff would not start. He eventually started it by pushing it - and used it to work throughout the day. On the said Friday morning he returned to the

defendant company's office and advised the operations manager of the defect to the vehicle. In the evening before he started working for the evening sessions, the plaintiff advised the serviceman, one John Lettman, of the defect, and he Lettman said, "The mechanic will have to check it out".

On Sunday afternoon, the plaintiff went to the defendant company's office at 5:30 p.m. to 6:00 p.m. On asking Lettman if he had "checked the car", the plaintiff was told, "The car is starting go and check it". The plaintiff did so - the car started readily. He took the car and left the premises. The plaintiff visited a friend, left the friend's house at 9:00 p.m. and drove to Seaview Gardens, towards where he lived. On reaching the main road, the said car suddenly come to a stop - "just drive and shut off". He turned the ignition key - it would not start and he pushed it for 12 yards to a light on the road. He came out of the car and lifted the bonnet, looking into the engine. A man walked up to him, enquired what had happened, pulled a gun and threatened to kill the plaintiff. The plaintiff hit aside the hand with the gun, ducked and pulled his firearm and fired a shot. The man cursed and ran.

When the plaintiff hit the man's hand with the gun, it was discharged and the plaintiff's left index finger was injured by a bullet.

The plaintiff returned to his car. The car started after the fourth turning of the ignition key. His left hand felt cramped. He drove to Medical Associates Hospital where he was treated and his finger bandaged. His hand was x-rayed and he was referred to Dr. Dundas who treated him for three months. He underwent an operation on the 28th July, 1987. He cannot now grip with his left index finger and thumb or button his shirt with his left hand. The plaintiff is left handed. The plaintiff returned to work on the 30th October, 1987.

The plaintiff wears a uniform while performing his duties and is issued with a firearm by the defendant company. He has lived in Seaview Gardens since 1983, and stated that "in 1987, in the area no trouble - a little house-breaking ...". He regarded his duties in his employment as risky. He usually worked alone and traversed areas from Kingston to Linstead, St. Catherine. The vehicle is unmarked.

He stated further in cross examination that the defendant company employed its own mechanic who serviced the vehicle with oil and gas during the week but did a detailed service on weekends.

Mr. Norman Davis for the defendant company elected to make a submission at the close of the plaintiff's case and to call no witnesses.

He submitted that there was no evidence of a contract of employment to provide a nexus between the mechanics who repaired the said motor vehicle and the defendant company and if there was, it was not proven that the defendant company failed to adequately repair or that it provided a defective motor vehicle to the plaintiff. He submitted further that an employer was not liable for injury caused to an employee due to a latent defect in a defective piece of machinery which could not have been detected on reasonable examination. He accepted however that the employer would be liable if he knowingly retained dangerous equipment which caused such injury. There is no evidence that the defect was apparent at the time that the plaintiff took the motor vehicle. The court may assume that the difficulty in starting had been corrected, checked by the plaintiff and driven for nine miles "without defect becoming apparent". No liability therefore attached to the defendant.

He argued further that there is no duty of care on the defendant company in view of the fact that at the material time the plaintiff was not doing something inherently dangerous i.e., transporting cheques. The "level of foreseeability" accordingly lessened - and was therefore too remote. The plaintiff, by his conduct did not foresee any danger. The defendant company could not therefore have foreseen, that the plaintiff driving an unmarked motor vehicle in those circumstances, and the vehicle having broken down, he would have been held up and shot by a gunman.

Mr. Davis stated further that the action of the gun man was an intervening event unrelated to the defective motor vehicle, and therefore was not foreseeable; it would make a difference if the plaintiff was at the time transporting cheques, in a marked motor vehicle. He referred to the case of *Tai Hing Cotton Mill Limited vs. Liu Chong Hing Bank Limited* [1985] 2 All ER 947, and stated that the plaintiff is restricted to his remedy on the contractual liability of the defendant company to the exclusion of a remedy

in tort. This principle, he added, was confirmed in the case of Reid v. Rush Tomkins Group [1989] 3 All Er 226. This latter case shows the reluctance of the court to extend the terms of a contract of employment to protect an employee from a special risk. The "special risk" of the intervention of a gunman, in the circumstances of the instant case, was not reasonably foreseeable.

Mr. Henry for the plaintiff submitted that the motor vehicle owned by the defendant company was serviced at the instance of the defendant company which by providing a defective motor car was in breach of its duty as an employer to provide a safe system of work for its employee and not to expose him to foreseeable risk of injury. The motor vehicle, being defective was not fit for the purpose. It was therefore reasonably foreseeable by the defendant company that the plaintiff engaged in the risky and dangerous job of transporting cheques and the vehicle having broken down would be held up by a gun-man. The court may take judicial notice of the high rate of crime in Kingston in 1987. The defendant company anticipated the risk, seeing that the plaintiff had been provided with a firearm. Although the plaintiff was not then transporting cheques, and the occurrence was unusual, it was of a type which the defendant company could have reasonably foreseen, having provided an unreliable motor vehicle which broke down. The plaintiff had a duty to pick up the said vehicle to commence work at 5:30 a.m. and so was engaged in the course of employment. He further argued that the plaintiff ought to succeed, in the alternative, in contract. Namely, because at the time of the making of the contract, the parties ought reasonably to have contemplated, that because of the nature of the employment, the motor car, which was primarily to transport the plaintiff and the cheques, if it broke down, the plaintiff would be exposed to the danger of being held up and shot. Counsel for the plaintiff relied on the cases, Wilsons & Clyde Coal Company Limited vs. English [1937] 3 ALL ER 628, Tremain vs. Pike [1969] 3 ALL ER 1303, The Waggon Mound [1961] 1 ALL ER 404, Roe vs. Ministry of Health [1954] 2ALL ER 131, Czarnikow Ltd. vs. Koufos (The Heron II) [1969] 1 A.C. 350 and Hughes vs. Lord Advocate [1963] A.C. 537.

With reference to the case of Reid vs. Rush, supra, counsel argued that though it affirmed the principle in the Tai Hing case, that the plaintiff need not pursue a claim in tort, where the parties are in contractual relationship, it is distinguishable from the instant case. In that, it primarily concerned whether a duty of care was owed by the employer to protect the employee from economic loss which said duty was not a term of the contract, nor was the loss accompanied by any injury to the employee or his property. In the instant case a duty of care clearly exists in the employer towards the employee and therefore the court need not extend a duty of care by imposing a duty in tort by implying such a term. However, on the facts of the instant case, and applying the principle in the Reid vs. Rush case, if at the time of the making of the contract, the plaintiff and defendant had been asked "what the position was" with reference to the risk of the plaintiff, suffering injury in the course of his employment by the negligence of another driver, (i.e. what was 'reasonably contemplated') both parties would have answered that the defendant owed a duty of care to the plaintiff.

This court holds that the employer has a duty of care at common law to his employee to provide, inter alia, proper plant and appliances and a safe system of work, during the course of such employment. The employer has this general personal duty to take reasonable care for the safety of his workman - vide Wilsons and Clyde Coal Company Ltd. vs. English [1939] A.C. 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 to foresee the probable consequences of his act not the possible consequences. As a result, the law seeks to restrict within a certain range, the liability even of apparent wrongdoers.

This general duty to the employer is based both in contract and in tort - Matthews vs. Kuwait Bechtel Corporation [1959] 2 Q.B. 57. In some cases the plaintiff's claim may be drafted to seek compensation in both, where, though the relationship initiated in contract, a wider duty may arise in tort.

In Lister vs. Romford Ice & Cold Storage [1957] A.C. 555, after stating that there are cases where the duty between employer and employee could be

seen as either contractual or tortious, Lord Radcliffe said, at p. 567,

"Since in modern times the relationship between master and servant, between employer and employed in inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract."

This view was reinforced by Lord Scarman in *Tai Hing Cotton Mill Limited vs. Lin Chen Hing Bank Limited* [1985] 2 ALL E.R. 947, who said, at p. 957,

"Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship .. particularly so in a commercial relationship .."

This case concerned the respective rights and duties between banker and customer. This restriction was maintained in the case of *Keid vs Rush and Tomkins Group* [1989] 3 ALL E.R. 228. There it was held that an employer owed no duty to inform an employee who was being posted to work overseas, in Ethiopia, of the non-existence of motor vehicle insurance in cases of accident caused by an unknown wrongdoer, giving rise to an obligation to compensate the plaintiff, if injured in such circumstances. Ralph Gibson, L.J.J., in giving the judgment of the Court, said, at p.244,

"... it is not open to this court to extend the duty of care owed by these defendants to the plaintiff by imposing a duty in tort which, if I am right, is not contained in any express or implied term of the contract."

There may however be instances where a claim for compensation, brought by an employee against an employer for injuries received, may be drafted in contract, and in tort, in the alternative. For example, an employee, who is injured by a motor vehicle supplied by his employer, would fail in contract if it is shown that he was not, at the time of the accident, in the course of his employment, i.e., he was on a "frolic of his own". If however, he can show that the motor vehicle was inherently dangerous and this was known to the employer, he may be able to succeed in tort, under a general tort liability.

Liability in negligence is based on lack of reasonable foresight. That is, the injury to the plaintiff is the result of the breach of a duty owed

by the defendant to the plaintiff, which breach created such a risk to the plaintiff which the defendant should have foreseen and which would cause harm to him, the plaintiff. This foreseeable plaintiff sets the limits to the class of persons that could be affected by the risk created by the defendant. The case of *Donoghue v. Stevenson* [1932] A.C. 562 created one of the earliest formulations of this foreseeable plaintiff, with its formulation of the "neighbour" principle. Lord Atkin said, at p.580,

"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 when I am directing my mind to the acts or omissions which are called in question."

This principle has survived and was further expanded by Lord Wilberforce in the case of *Anns vs. Merton London Borough Council* [1978] A.C. 728. He said at p.751,

"... in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrong-doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

In a criticism of the "proximity" basis of the decision in the latter case, the author in, *The Law of Torts by Fleming*, 7th Edition, p.130 said,

"... the law has been traditionally chary of postulating duties of affirmative action, that is, of protecting potential victims of someone else's wrong-doing. Often however, the culprit ... lacks the financial means to pay the damages. One of the more notable features of modern

tort law has been a creeping extension of liability to 'deep pocket defendants' whose relation to the accident is much more remote and often consists merely in a pure omission to avert harm threatening from another source."

The said author however re-inforced the principle of foreseeability, when he continued, on p.131 of the said work,

"... the plaintiff may still fail because he was outside the foreseeable range of injury, however many others happened to be within it. Our law has become committed to limiting the range of liability to persons alone who were foreseeably imperilled, lest defendants be crushed by the burden of excessive liability for some quite trivial fault."

In the case of Beyong v. Shenburn [1946] K B 227, though the employer had an obligation to provide a cloakroom locker where the employee kept his possessions, it was held that such an employer had no duty to protect such employee's possessions from the criminal act of a third party.

However, a restaurateur who required his head waiter to deposit the evening's takings in the night safe of a bank without protecting him from robbery incurred liability - Chomentowski vs. Red Garter Restaurant [1970] 45 A.L.J.R. 713.

In the instant case, the plaintiff, as an employee, was required to take the motor vehicle home prior to the commencement of his actual transportation duties. Though he deviated to visit his friend, at the time of the occurrence he was on his way home and therefore is deemed to have been in the course of his employment. On the evidence which is unchallenged, the said motor vehicle had a defect, i.e. a difficulty in starting. This defect was known to the defendant company who attempted, unsuccessfully, to correct it. In this regard therefore the defendant was in breach, in failing to provide a defect-free vehicle to its employee, the plaintiff.

The question therefore arises. Is this a breach of duty of care that creates liability in the defendant company?

Duty of care is a term of art, mostly attributable to tort liability. An employer owes a duty of care to his employee. Such latter duty therefore sounds in tort. In the current climate of judicial thought, an employee who

is wronged in such circumstances is required to frame his complaint in contract, unless there are bases for doing otherwise - vide Tai Hing, supra.

The test for liability in contract is whether or not the breach was in the reasonable contemplation of the parties at the time of the making of the contract. However, within the avenue of tort liability the terminology of contractual liability recurs. In discussing the duty of care in tort, Lord Atkin in *Donoghue vs. Stevenson* speaks of "... reasonably to have them in contemplation ...", and Lord Wilberforce in the *Anns* case refers to "... sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of ..." (emphasis added). Lord Denning, in *Farnsworth vs. Uttley Ingham and Company* [1978] 1 ALL ER 525 found it difficult "... to draw a distinction between what a man 'contemplates' and what he 'foresees' "... I cannot swim in the sea of semantic exercises ...."

The consensual nature of the relationship of the plaintiff and the defendant company in the instant case attracts an examination of the reasonable contemplation of the parties, but the foreseeability test is not without its share of influence, in setting the boundaries of the duty.

As a consequence, this court needs to determine whether or not provision of the defective vehicle was a breach of duty which created the type of risk which in the reasonable contemplation of the parties would probably give rise to the situation that the plaintiff would be attacked and shot by a gunman.

The motor vehicle provided by the defendant company was for the transportation of the plaintiff and the cheques. There is no evidence that it was regarded as a part of the security system of the employment. Whereas a firearm is clearly so, a motor vehicle in itself is not. If of course the vehicle was, for example, armoured, it could be so regarded. The defect in the said vehicle was not therefore referable to the obligation as to the provision of a safe system of work. The action of the gunman was not referable to any enticement caused by the ostensible activity or patent conduct of the plaintiff transporting valuable cargo. Nor was the gunman's action suggestive of an attempt to rob any such property contained in the vehicle. One may not import into the case circumstances that are not supported by the facts.

The court cannot say that it is reasonable to assume that when a car stalls in the streets of Kingston and particularly in Seaview Gardens, the driver thereof is likely to be held up and shot by a gunman.

It is not sufficient to argue that it is possible that in such circumstances a person may be held up and shot, one has to show that it is probable that such consequences will follow.

Using the test in contract, if the question was asked of the parties what was the reasonable contemplation at the time of the making of the contract of employment, as to the duty owed by the defendant company to the plaintiff in the circumstances as in fact occurred, this court cannot say that the answer would be that the defendant company would be liable. The direct consequences of a motor vehicle being unable to start in such circumstance, are for example, the expense of having to acquire alternative transportation or the burden of suffering the fatigue of an unanticipated walk home - not the probability of being shot.

Conversely, in *Bradford v. Robinson Rentals Limited* [1967] 1 WLR 337 the plaintiff a 57 years old radio service engineer was instructed to undertake a journey between 450 - 500 miles in January 1963 in England in his van to change and bring back a colleague's old van, both of which were unheated. The radiator of the old van was defective. The weather was severe, there was snow and ice on the road and the weather forecasts advised travel in essential circumstances only. These facts were known to the defendants. The plaintiff having reluctantly obeyed the instructions suffered injury from the extreme cold. It was there held that the defendants exposed him to a reasonably foreseeable risk of injury and were therefore liable.

On the facts of the instant case, this court cannot say that there is a term implied in the contract of employment attracting the duty of care contended for by the plaintiff. If, as the plaintiff's attorney concedes, the event of the intrusion and action of the gunman was "not the usual type ..." and "... were unusual...", a fortiori, one could not imply such a said term. The instant case is not in the nature of the cases of *Smith v. Leech* [1909] 2 Q.B. 405 and *Hughes v. Lord Advocate* [1963] A.C. 837. In each of the latter cases the events were held to have been of the type that was reasonably foreseeable, though of a different degree and in a different manner, respectively.

The very nature of the event was of a different genus than the foreseeable consequences of the motor vehicle having shut off and unable to be re-started.

It was beyond the reasonable contemplation of the parties. In Reid v. Kush, supra, the court declined to construe an implied term in that particular contract of employment, namely, that an employer has a specific duty of care to warn his employee who is being posted overseas, of the risk from injuries suffered in a motor vehicle accident caused by an unknown third party for whom the defendant was not responsible and which risk was not covered by insurance in such overseas country.

The chance appearance of a gunman in these circumstances, the possibility that such a person may appear, cannot be elevated to the threshold of probability - which is the answer to the test of reasonable foresight or more particularly, the reasonable contemplation of the parties. This court declines to hold that there is such an implied term of the contract in the instant case.

For the above reasons there it will be judgment for the defendant company with costs to be agreed or taxed.