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Doc. 18

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO. 294/88

BETWEEN: HENRY SOLOMON Plaintiff  
AND: THE ATTORNEY GENERAL OF THE GOVERNMENT OF THE CAYMAN ISLANDS Defendant  
AND: ORVILLE ANDY RYAN Third Party

Mr. Norman Hill Q.C. instructed by  
Mrs. Carla Reid for the plaintiff

Mr. Michael Marsden for the defendant

Mr. Ramon Alberga Q.C. instructed by  
Mr. Nigel Clifford for the Third Party

JUDGMENT

The facts of this case are very simple. The plaintiff, Henry Solomon, was at the material time employed as a driver by the Cayman Islands Government. His duties for the Public Works Department (PWD) were not however, confined to driving around. He was expected to do a full days work and fill in his working time with other tasks.

On 21st April, 1986, the plaintiff attended at Northward Prison, where works were being carried out for Government by an independent contractor, Mr. Ryan. He is the third party in these proceedings, and the contract to which he and Government are parties is an important feature of this case. Present at the worksite when the plaintiff arrived were Alfred Miller, a supervisor for the Public Works Department, who gave evidence on behalf of the plaintiff, Rudy Walton, who was Mr. Ryan's foreman, and other workmen employed by Mr. Ryan.

Walton asked Miller for some help in handling a door

which needed to be transported to the PWD compound for alteration. Miller told the plaintiff to lend a hand. Miller's supervisor, Mr. Rowlands the Building Superintendent, gave evidence that that was a proper instruction and that if he had been present he would have done the same. The door was a security door of heavy steel construction and it was lowered with its frame from its position in the wall to lie flat on two wooden beams by a team of whom the plaintiff was one. As it was being lifted again to be carried to the plaintiff's truck, the door fell open onto his foot injuring it. I need not particularise the injury as general and special damages have been agreed.

The plaintiff claims damages from the Government as his employer for its negligence and breach of any statutory duty. The defence is and always has been a denial that the plaintiff was acting in the course of his employment at the time when he assisted in the removal of the steel door. No other defence was raised. This is very remarkable, in view of the evidence of the defendant's own witness, Mr. Rowlands, which was to quite the opposite effect.

Some five years after the accident, and after the matter had been set down for trial between the plaintiff and the defendant alone, a third party notice was served on Mr. Ryan. The statement of claim which was ultimately filed against the third party set out the basis of the defendant's claim against him for an indemnity as follows -

"By a written contract dated the 26th day of February 1986 made between the Government of the Cayman Islands of the one part, and the third party Orville Andy Ryan of the other part, the third party agreed to undertake the construction of an extension to the maximum security wing at Northward

Prison within a period of four months and at a total cost of U.S. \$27,251.00.

By Clause 13 of the said contract the third party expressly agreed to fully indemnify the Government against any claim for damage or injury to his work force or to any claims by third parties. The defendant claims that the third party, as an independent contractor being fully responsible for the contract work and for providing a safe system of work for the labourers carrying out that work, specifically requested the plaintiff, Henry Solomon, to assist in carrying out that work, and the accident involving the plaintiff occurred when he was so assisting. The defendant claims that by virtue of the aforesaid request the plaintiff effectively became part of the third party's work force, thus falling within the ambit of section 13 of the contract and also making the third party absolutely responsible for the safety of the plaintiff while so working.

The defendant further claims that the plaintiff merely being an employee of Government was not a party to the aforesaid contract and he falls within the category of person defined as "third parties" as set out in clause 13 of the contract and thus also falls within the ambit of that section of the contract".

The defendant was constrained to concede at the end of the evidence that the plaintiff had indeed been acting in the course of his employment when the accident occurred. It was submitted that in the light of that, and on the pleadings, and in particular the absence of any allegation of negligence against Mr. Ryan the plaintiff was bound to succeed. I ruled in favour of that submission and the rest of the hearing was concerned solely with the position between the defendant and the third party. As is clear

from the passage in the third party statement of claim which I have just read, the defendant's claim is based on the terms of its contract with the third party, and in particular clause 13. I shall read this, and the relevant part of clause 7 also -

"7. The contractor is responsible for the collection and delivery of all materials to the site, excepting that Government is responsible for two major deliveries: initial delivery of underslab requirements, and subsequent delivery of all windows, doors, plumbing and electrical fixtures...."

"13. The Government accepts no liability whatsoever for any damage or injury to the contractor's work force or any claims by third parties and the contractor fully indemnifies the Government against all such claims. The contractor is required to produce a copy of his insurance policy for approval".

Another concession by the defendant was that the plaintiff is not a "third party" within the meaning of Clause 13. The Acting Solicitor-General addressed the indemnity provision on the basis that the plaintiff was "lent" to Ryan so as to have become a member of his "work force", and I was invited to take the following view -

1. The duty of moving the door to the truck was Ryan's obligation under the contract, even though the necessity of taking the door to the PWD compound had not been foreseen at the time the contract was entered into and no contract variation had been entered into in that regard.
2. The plaintiff's assistance was specifically requested on behalf of Ryan from the plaintiff's supervisor, Miller, in performing that

contractual duty. He was assisting Ryan as part of Ryan's "workforce" as on the evidence he was, or should have been, acting on the instructions of Ryan. The defendant can accordingly seek an indemnity against Ryan in accordance with clause 13 of its contract with him.

The third party, on the other hand said this -

This is an action by a servant against his master for breaches of duty, particulars of which are set out in the Statement of Claim. This duty extended to cover all acts normally and reasonably incidental to the work, such as a driver filling in waiting time by lending a hand at a location where he found himself from time to time.

The defendant's claim against the third party is not on the basis of the third party's negligence, nor does it claim liability on the basis of any negligence by the plaintiff. The third party claim is grounded solely on the indemnity provision set out in clause 13 of the contract. It cannot be sustained on as the clause cannot bear the meaning attached to it.

Clause 13 is unhappily drafted and I will construe it strictly contra proferentem. I find that the phrase "all such claims" which are the subject of the contractor's full indemnity relates back to the only preceding express reference to "claims" - that is to say claims by third parties - among which the defendant has conceded that the plaintiff is not to be numbered.

So I am concerned solely with that part of clause 13 which provides that the Government accepts no liability whatsoever for any damage or injury to the contractor's

workforce.

That provision must be, in my judgment, a shield and not a sword. It is a contractual provision between the parties to the contract - Government and Ryan - and might be a defence against any attempt by Ryan to hold Government liable for any damage or injury to his workforce. Ryan is doing no such thing. He is being brought as a third party into an action for negligence against Government by one who was acting in the course of his employment. That is not a use to which such a disclaimer of liability can be put.

If I am right about that, the question of whether or not the plaintiff had in fact become a member of Ryan's workforce is immaterial. However, I shall deal with the alternative argument put on behalf of the third party in case I am wrong. That is that the plaintiff was not in any event a member of that workforce at the relevant time.

"Workforce" is not a term of art, but there is ample authority for the proposition that a servant of one person may, on a particular occasion and for a particular purpose, become the servant of another, notwithstanding that he continue in the service of his general employer and is paid by him. The point has arisen time and again in cases where the issue is who is liable in negligence for damage caused by a worker. The leading case on that question is still Mersey Docks and Harbour Board v. Coggins and Griffith (1947) AC 1. The duty, and it is a heavy one, lies on the general employer to show that one of his employees has been "lent" to a temporary employer, but it is more easily discharged where, as in the present case, the employee is not required to perform a task involving any particular skill. In the context of establishing liability for the negligent act the employer at the material time is the person who can tell the

servant not only what he has to do but also the way in which he has to do it.

The status of that doctrine in that particular context was considered by Diplock LJ in Savory v. Holland, Hannen & Cubitt (1964) 3 ALL ER 18. I will read two passages from his judgment, from pages 21 and 22.

"I agree that this appeal be allowed. Before 1945, when the law of negligence was bedevilled by such unattractive doctrines as contributory negligence being a complete bar to recovery, as common employment and as the rigid rules as to the duties of care owed by occupiers to different categories of person such as invitee, licensee, and the like, there grew up a number of distinctions between the duty which one man owed to another man based on particular legal categories into which each fell. Since those unattractive doctrines have one by one been abolished in 1945, 1948 and 1957, it seems to me that the law of negligence can now be put in the simple form in which Lord Somervell of Harrow suggested that it should be put in Cavanagh v. Ulster Weaving Co., Ltd. (1959) 2 ALL ER 745 to exercise "reasonable care in all the circumstances" is the duty which one man owes to another.....

The question for the court is not whether the plaintiff was in the category of servant to the defendants pro hac vice. The only question is whether, in all the circumstances, the defendants used reasonable care for the safety of the plaintiff. The doctrine of master and servant pro hac vice today seems to me to be relevant only to a question of vicarious liability; it is a mere adjunct to the doctrine of respondeat superior for determining whether A is the superior of B".

Nevertheless, even in its restricted application the doctrine in my view can be called in aid by analogy to give some guidance as to the true meaning of the expression "the contractor's workforce."

The third party invites me to go so far as to say that the test for establishing membership of a workforce is the existence of a contract of service. I think that goes too far. The authority on which he relies Denham v. Midland Employers' Mutual Assurance Ltd dealt with whether an indemnity arose under an employers liability policy covering "any person under a contract of service" or a public liability policy covering other persons. In that case, a labourer who had been lent to contractors to perform unskilled tasks was killed in the course of his work. He was held not to have been under a contract of service with the contractors and there is no doubt in my mind that it would be outlandish to find that the plaintiff had any contract of service with Ryan.

But in determining the question of whether or not the plaintiff was part of Ryan's workforce in terms of clause 13 of the construction contract I am left without directly persuasive authority. I shall employ a test of my own which I hope is no more than common sense. It is derived from the evidence of Alfredo Miller, the PWD supervisor. It was in some ways remarkable. He said that he not only witnessed the accident but he could "almost see it" in the sense that he foresaw the risk. However he did not mention it, gave no instructions on how to lift the door as although he was supervising the work in general he did not consider that to be part of his responsibilities. Now suppose that in relation to the plaintiff, whom he foresaw was at risk as a result of the instruction he had given, he had taken a different course, as in my view he had not only the right but the duty to do, and said something like "Henry, I don't like the look of that, you had better come out of it". It is

inconceivable that Henry would have replied, or that anyone would have expected him to reply, "Sorry Mr. Miller, I can't do that, I am part of Mr. Ryan's workforce just now". Of course he would have followed the word of command of the leader of Ryan's team as to when to push, when to pull, when to lift and when to lower. It would have been foolhardy not to. But in every wider sense he remained subject to the dominion of his general employer, the Government of the Cayman Islands. He was not part of Ryan's workforce.

For these reasons I dismiss the proceedings by the defendant against the third party. Judgment is for the plaintiff against the defendant for the agreed sum of \$15,000 general damages, and as special damages \$1,000 for hotel accommodation and transportation, \$1,475 for medical services by Dr. Bhandari and \$75 for a report by Dr. Marzouca - making a total of special damages of \$2,550. Pre-judgment interest on the total award of CI\$17,550 will be at 7-1/2% from 4th November, 1988, the date of the writ, to the date of judgment.

Costs of the defendant and third party against the plaintiff to be taxed if not agreed.



G. E. Harre  
Judge

7th October, 1992