



IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 214 of 2019

BETWEEN

JASON MCCOY

Plaintiff

AND

(1) CAYMAN ISLANDS GOVERNMENT
(2) ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendants

Cause No: G 215 of 2019

BETWEEN

GARFIELD RITCH

Plaintiff

AND

(1) CAYMAN ISLANDS GOVERNMENT
(2) ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendants

IN CHAMBERS (Via Zoom)

Appearances: Mr Rupert Wheeler instructed by Mr James Kennedy of KSG
Attorneys for the Plaintiffs
Mr. Isaac Jacob instructed by Paul Keeble of Hampson &
Company for the Defendants

Before: Hon. Mme Justice Margaret Ramsay-Hale

Heard: 26 and 27 November 2020

**Draft Judgment
Circulated** 22 December 2020

Judgment Delivered: 6 January 2021

HEADNOTE

Statutory construction - Crown liability for injury to fire officer on duty - content of Crown's duty of care qua employer under section of 3(1)(b) of the Crown Proceedings Law- whether liability excluded Section 9(5) of Fire Brigade Law - Effect of section 3(1)(b) of the Crown Proceedings Law -

JUDGMENT



Introduction

1. This is the decision on the Crown's¹ application made by summons filed on 8 September 2020 in each matter seeking, *inter alia*, an order pursuant to **GCR** Order 14 r.12 dismissing the claim brought by the Plaintiffs, Mr. Ritch and Mr. McCoy, who at all material times were Fire Officers employed by the Cayman Islands Fire Service, on the ground that the claim has no prospect of success. Further or alternatively, the Crown seeks an order that the claim be struck pursuant to **GCR** Order 18 r.19(1) (a)(b) and /or (d) on the ground that it discloses no cause of action, is frivolous or vexatious and/or an abuse of the process of the court.

Background

2. The background to these proceedings can be summarised as follows. On 5 January 2017, the Plaintiffs, who were at the relevant time stationed on Cayman Brac at the Charles Kirkconnell Airport, were on duty and were tasked with taking a fire truck out on a monthly performance test. Mr. McCoy was driving the vehicle and Mr. Ritch was a passenger. As they carried out the test, which involved driving the fire truck around the airport, Mr. McCoy lost control of the vehicle causing the fire truck to overturn. As a result of the accident both Mr. McCoy and Mr. Ritch suffered injury.
3. The accident caused an investigation to be launched by the Fire Service and a comprehensive accident report was prepared and released on 9 May 2017 which was published on the Fire Service website. The key findings of the report showed that there was no allegation of driver error (and for the avoidance of doubt no blame to the passenger) and that the key components of the accident were that the truck had rusted, a bolt sheared off which resulted in an axle stop - designed to stabilise the truck - failing, and the truck tipping to its left on a right turn, losing its equilibrium and rolling over.
4. The Report also noted that this particular model of truck was susceptible to rollovers due to its high centre of mass, and criticised the lack of driver training. Reference was also made to the lack of a system of inspection and maintenance of the fire truck.

¹ The Plaintiffs' claim is against the Crown in damages pursuant to section 3 of the **Crown Proceedings Law** which by section 11(2) requires that all actions against the Crown be brought against the Attorney General.



5. Letters before action were issued on behalf of Mr. Ritch on 31 May 2017 and on behalf of Mr. McCoy on 4 June 2017. Due to the limitation period becoming imminent, proceedings by way of Writs of Summons were issued on 31 December 2019 in which both fire officers claim their injuries resulted from the Crown's breach of duty to ensure the health, safety and welfare of their employees by failing, *inter alia*, to maintain or provide a safe system of work and to provide or maintain adequate plant and equipment.
6. In its Defence, the Crown asserts that it is not liable to the fire officers on the ground that their claim, if being made against the Crown directly, is expressly barred by section 9(5)(d) of the **Fire Brigade Law** ("the Law") and, if made against the Crown vicariously for breach of an alleged duty of care by another member of the Fire Service, is expressly barred by section 9(5)(a) of the Law.

The Issue

7. The central issue for resolution in this application is whether section 9(5) of the Law operates so as to provide the Crown with immunity from liability for breach of its common law duty *qua* employer to provide a safe system of work for its employees which is imposed on it by section 3(1) (b) of the **Crown Proceedings Law**.

The Submissions

8. The Crown contends that the effect of section 9(5) of the Law is that it is immune from suit at the instance of fire officers who are injured in the course of their duties.
9. Section 9 which is headed **Officers' Powers** provides,

"9. (1) When engaged in their duties officers shall, in relation to the public, have all the powers of constables and when engaged in fighting a fire which is out of control shall take precedence over constables of equivalent rank.

(2) In the performance of their duties, officers may, in order to extinguish any fire or to avert any immediate danger from any hazard to which this Law relates—

(a) enter upon any premises or place with or without the consent of any occupant or occupier;

(b) enter, break into, sink, move or demolish any vessel, vehicle or aircraft with or without the consent of any person in charge thereof; or



- (c) *take such steps including the use of any water supply or water storage, the closure of any street or way and the demolition of any building, as in their opinion are desirable or necessary.*
- (3) *Whether or not, for the purpose of this section and section 7, a fire is out of control is a question for the decision of the senior officer present thereat.*
- (4) *Without prejudice to subsection (2), the Chief Fire Officer and any officer authorised in writing by him has, subject to section 13, right of entry to and search of any premises at all reasonable times for the purposes of carrying out any duty imposed upon him by this or any other law.*
- (5) *No action for damages may be brought against—*
- (a) *the Brigade or any member thereof;*
 - (b) *any constable;*
 - (c) *any member of the public acting at the request of any officer; or*
 - (d) *the Crown,*

In respect of death, injury or loss incurred by any person occasioned in the course of carrying out any [] responsibility² or duty imposed by this or any other law.”

10. Mr. Jacob, on behalf of the Crown submits that, giving the words of the statute their plain and ordinary meaning, the effect of section 9(5) is to bar the fire officers’ cause of action against the Crown for damages flowing from the injuries they received when the fire truck tipped over.
11. In developing his submissions, Mr. Jacob referred the Court to section 8 of the Law which sets out the duties of the officers as follows:

“Officers’ duties

8. The duties of officers include—

- (a) *fire fighting;*
- (b) *the elimination and reduction of fire hazards;*
- (c) *the enforcement of this Law;*

² I accept Mr. Jacob’s submission that the word “*other*” which appears in the statute is a draftsman’s error as the word does not appear in the Instrument which amended this section, Law 6 of 1996, enacted on 7 October 1996.



- (d) *the maintenance of stores and equipment;*
- (e) *compliance with the lawful orders of superior officers;*
- (f) *the carrying out of the duties imposed on them by this or any other law; and*
- (g) *such other duties as may be assigned to them, from time to time, by or from the Chief Fire Officer.”*

12. In particular, Mr. Jacob relies on subsection (d) that speaks to the officers’ duties to maintain stores and equipment, which Counsel reads as including fire trucks. He contends that any failure to provide satisfactory equipment and a proper system of maintenance as alleged by the fire officers would be the failure of the employer - the Crown - acting through those members of the Brigade responsible for procurement and for the maintenance of the fire truck. In consequence, any failure to maintain the fire truck would be the fault of the employee for whom the employer - the Crown - would be responsible but for section 9(5) which operates to exempt from liability any servant (“member of the Brigade”) for whom the Crown might be vicariously liable, as well as the Crown itself.
13. Mr. Wheeler, in reply, made the point that the claim is not put on the basis of the Crown’s vicarious liability “*in respect of torts committed by its servants or agents*” for which it is liable by virtue of section 3(1)(a) of the **Crown Proceedings Law**, but on the basis of the Crown’s section 3(1)(b) liability for “*any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer*” which he describes as a primary liability.
14. Mr. Wheeler submits that the principle that the Crown can be the subject of primary liability in respect of its duties as an employer is well established. In support of this proposition, he cites a number of English authorities which construe and apply the English **Crown Proceedings Act** 1947, which is in substantially the same terms as our local statute. Counsel relies on the following excerpt from the judgment of Lord Mance in *Smith and Other v Ministry of Defence* [2014] A.C. 52 in the context of duties owed by the Crown to soldiers:

“110. *The questions arising are (i) the existence and scope of any common law responsibility on the part of the state towards its soldiers, in particular in respect of deaths in active service and (ii) the nature and scope of any common law doctrine of combat immunity. The claimants’ starting point is that the state owes to its soldiers a general duty to take appropriate*



measures to secure their safety, like that owed by any other employer, and that it must also answer vicariously for any breach of duty by one soldier killing or injuring another. It is only therefore by virtue of some exceptional immunity that the state can escape liability for breach of any such duty, and the only principle giving any such immunity is a limited principle of combat immunity.

“111. *That the Crown is in tort generally in the same position as any employer follows from section 2 of the Crown Proceedings Act 1947, providing*

“Liability of the Crown in tort.

(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—

...

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;..”

15. Mr. Wheeler also cites in support of his submission the case of *Morgan v MOJ* [2010] EWHC 2248 (QB) in which Supperstone J said of the **Crown Proceedings Act** at paragraph 25:

“25. *I accept Mr. Sanders' submission that the effect of CPA, s.2 is to make the Crown subject to liability in tort in respect of Her Majesty's Government in the UK to much the same extent (subject to certain limitations and savings) as if it were a private person of full age and capacity. S. 2(1)(a) and (3) are concerned with vicarious liability and provide that where a servant or agent of the Crown commits a tort in the course of their official duties, they and the Crown will be jointly and severally liable. **Primary liability is envisaged under s.2(1)(b)-(c) and (2) only in relation to breaches of (1) actionable common law duties owed by an employer to his servants or agents (s.2(1)(b); (2) actionable common law duties owed by owners and occupiers of property (s.2(1)(c)); and (3) actionable statutory duties cast directly, but not exclusively, upon the Crown and its officers whether as an employer, a proprietor or otherwise (s.2(2)).**”*

16. Mr. Jacob contends, however, that the Crown can never be directly liable in tort but only vicariously liable, with the result that the exemption in section 9(5) relieves it of any liability for the fire officers' injuries. In support of his contention, Mr. Jacob relies on the case of *Chagos Islanders v A-G* [2004] EWCA Civ 997 in which Sedley LJ considered whether the State could ever be

primarily liable. His Lordship held at paragraph 20 that (save in relation to the Human Rights Act with which the Court is not concerned) there could never be any primary liability in the Crown:



“But the English common law has no knowledge of the state. Public law recognises the Crown as the repository of a range of prerogative and statutory powers. But the State has no tortious liability at common law for wrongs done by its servants, from ministers down. In England at least (Scottish law has historically differed) either the Crown's servants are personally liable or there is no redress. It was to change this anomalous situation that the Crown Proceedings Act 1947 was passed. But the 1947 Act does not work by making the state a potential tortfeasor: it works by making the Crown vicariously liable for the torts of its servants.”

17. Mr. Wheeler in response, however, argues that the *Chagos Islanders* case can be distinguished on the ground that the case concerned an action by the Chagos Islanders against the Crown for divers torts including misfeasance in public office, unlawful exile and deceit. Consequently, the principle enunciated by the Court has no application to an action for breach by the Crown as employer of its duty of care to its servants for which the Crown has primary liability.

Discussion and Decision

18. Having considered the submissions and the provisions of the statutes relied on in argument, it seems to me plain beyond peradventure that section 9(5) is directed to claims for damages for injury resulting from a breach of any of the statutory duties imposed on fire officers pursuant to section 8 of the Law or by any other law. In these proceedings, the fire officers are not asserting a claim for damages for any injury sustained as a result of the breach by any fellow officer of any statutory duty, as suggested by Mr. Jacob. Rather, they are claiming against the Crown for breach of its common law duty to provide a safe system of work.
19. That duty arises out of its contractual relationship with the fire officers into which the common law implies a duty of care. It is a duty which is owed to each and every employee of the Crown pursuant to section 3(1)(b) of the **Crown Proceedings Law**. The fire officers' right of action is not barred by section 9(5) as it speaks only to actions for damages for injuries which result from a breach of the fire officers' statutory duties and not to breaches of the Crown's common law duty of care owed to its employees.



20. The content of this duty was set out by the House of Lords in *Wilson & Clyde Co Ltd v English* [1938] AC 57 and includes providing competent staff, adequate material, a proper system of work and effective supervision. The House of Lords also held that the duty is personal to the employer in the sense that he cannot delegate it, but must perform it. To put it another way, the employer will be personally liable even where performance of the duty has been delegated to another. This ‘non-delegable’ duty was described in *Woodland v Essex* [2014] AC537 as a duty not only to take care, but to ensure that care is taken. ‘Non-delegable’ may be a more forensic way of conveying the idea that Mr. Wheeler seeks to convey by the use of the word ‘primary’ when describing the nature of this duty.
21. In the context of these proceedings, that means the Government cannot escape liability for non-performance of its duty by asserting that its performance had been delegated to another employee or third party, as Mr. Jacob is essentially arguing here. It is non-delegable so that even if, as is necessarily the case with respect to a government body which can only act through other persons, the management of the system of work or the maintenance of plant and equipment is carried out by other employees, the obligation of providing a safe system of work is one for which the Crown as an employer remains absolutely responsible. The duty to provide a safe system of work and proper equipment is not performed by entrusting the performance of that duty to other employees, even if those employees are selected with due care and skill. The duty requires the Crown to exercise due care and skill.
22. The fact that the maintenance of equipment generally is the responsibility of the fire officers, as set out in section 8 of the Law, would not relieve the Crown of its personal responsibility *qua* employer to ensure the safety of the fire officers.
23. The point was made by Wright LJ in *Wilson’s* case at page 84:
- “There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. The true question is, what is the extent of the duty attaching to the employer? Such a duty is the employer’s personal duty, whether he performs, or can perform, it himself, or whether he does not perform it, or cannot perform it, save by servants or agents. A failure to perform such a duty is the employer’s personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing. As Lord Macmillan said in the Lochgelly case, with reference to*



a duty to take care, at p. 18, "It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case, and in either case it is a duty imposed by law." To the same effect Lord Atkin at p. 9 says, "Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of 'personal' negligence." [emphasis supplied]

"...I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a company and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained. The obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not however broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foremen or other employees.

24. The Crown cannot provide its employees with inadequate plant or equipment or an unsafe system of work and escape liability as an employer for breach of duty, any more than could an ordinary employer.
25. What section 9(5) says is that the Crown, its fire officers, constables and those that might be pressed into service by fire officers are not liable for any loss or injury caused to any person in the course of carrying out any of their statutory duties or responsibilities. It confers a defence of statutory authority. None of the duties in section 9(5) relate to the Crown's obligation as employer to provide a safe system of work and adequate plant and equipment for those it employs, as that duty is at common law. The right to a safe system of work is a private right arising out of the employment relationship which is not excluded by section 9(5).

Conclusion

26. As the breach of duty on which the Plaintiffs rely is the breach of the Crown's common law duty of care as an employer, there are no grounds for finding that the claim is bound to fail by reason of any statutory immunity conferred on the Crown by section 9(5) of the Law. That section only limits the Crown's liability for breach of the statutory duties set out in that law. The Plaintiffs claim for damages for injuries, sustained as a result of the Crown providing them with a fire truck which they allege was not fit for purpose, is a claim that the Crown has breached its common law duty of care

as an employer. As stated by Lord Cranworth in *Weems v. Mathieson*, cited with approval by the House in the *Wilson's* case, the master is bound to provide machinery fit and proper for the work and to have it superintended by himself or his agent. The claims cannot be said to have “*no prospect of success*” in the circumstances.

27. I do not find it necessary to deal with Mr. Jacob’s further submissions as to the requirement under section 64 of the **Public Service Management Law** for “*bad faith*” to be pleaded and proved before any member of the public service may be held liable for any act or omission in the discharge of his functions - and vicariously, the Crown - as the officers are not seeking to hold any of their fellow officers liable for their injuries. Any comment I make in that regard would be *obiter* as it is not a matter that I have to decide.
28. The Defendants’ summonses are dismissed. Costs follow the event and I order that the Defendants pay Mr. McCoy’s costs of and occasioned by this application, such costs to be taxed if not agreed.



Hon. Mme Justice Ramsay-Hale
JUDGE OF THE GRAND COURT