

BENDER v POWER LINES LIMITED (1968) ZR 12 (HC)

HIGH COURT

EVANS J

24th APRIL 1968

Flynote and Headnote

[1] **Tort - Independent contractor - Defined.**

When the employer has no power and does not control the manner in which the work is executed by the person engaged, the relationship is one of an employer and an independent contractor.

[2] **Tort - Negligence of independent contractor - Employer's liability.**

Generally, an employer is not liable for the negligence of an independent contractor or his servants in the execution of his contract, and if such a contractor is employed to do a lawful act and in the course of the work he commits some casual act of negligence, the employer is not answerable. He is, however, liable for his own neglect and, if he engages an independent contractor to perform some duty imposed upon him by common law or statute, he will be liable for the way in which the contractor performs the duty, even if it is done negligently, unless it is mere casual or collateral negligence of the contractor.

Case cited:

- (1) *Darling v Att. - Gen.* [1950] 2 All ER 793.
Cobbett - Tribe, for the plaintiff
Care, Clough, and Mwisiya, for the defendants

Judgment

Evans J: The plaintiff claims damages for negligence and breach of statutory duty against both defendants in the total sum (as amended at trial) of £1,827 (K3,654). It is common ground that the second defendant engaged the first defendant to construct an electric transmission line from Leopards Hill Switching Station to Mazabuka, which line crosses the plaintiff's farm, numbered 451 (a) and 452 (a), situated some twelve miles east of Lusaka, and that the first defendant by its servants and agents entered upon the said farm in 1966 and 1967, and constructed the said line, in the exercise of powers conferred upon the second defendant as an authorised undertaker by the Electricity Act, 1956 (Cap. AL 21).

The plaintiff alleges that, on the 18th October, 1966, the first defendant's servants flattened a portion of his barbed - wire fence (herein after called "the fence") on the boundary of his farm and the land of one Szeftel at the south - west corner of the plaintiff's farm, where the transmission line from Leopards Hill Substation to Mazabuka leaves his farm, and failed to repair the fence through which thirty - five of the plaintiff's cattle escaped. Twelve cattle were subsequently recovered, leaving twenty - three missing, in respect of which the plaintiff claims damages at the rate of £40 per head, totalling £ 920. He also claims £85 as the cost of repairing the fence.

The plaintiff further alleges that, on or about the 2nd December, 1966, the first defendant's servants opened and left open a locked gate (hereinafter called "the gate") in a paddock on his farm, with the result that twenty - two of his cattle escaped and have not been recovered. The gate is situated under the 88 kV, two - parallel transmission lines, leading west from Leopards Hill Substation and on the northern boundary of the plaintiff's farm where it adjoins Szeftel's land. The plaintiff claims damages at the rate of £40 per head in respect of these twenty - two missing cattle. I note that the total claim on this head is wrongly calculated as £822 on the third page of the Statement of Claim - the figure should be £880.

The first defendant denies any negligence or breach of statutory duty, denies flattening the fence and any escape of cattle therefrom and denies opening or leaving open the gate and any escape of cattle through it. In the alternative, the first defendant alleges that, if there were escapes of cattle from the fence and the gate, they were not due to any act of the first defendant, which denies all the particulars of damage alleged.

The second defendant denies employing the first defendant as its servant or agent and maintains that the first defendant was its independent contractor, for whose negligence or

breach of statutory duty (which are not admitted) it is not liable, and it denies all the particulars of damage alleged.

The trial was a long one, during which I held a view of the fence and the gate, but the benefit of the view was limited to observing only the locations and types of the fence and gate, because their conditions now differ from what they were at the material time.

I confess to experiencing difficulty not only during the hearing but also in deciding this case, which has been beset with conflicting, somewhat vague and at times exaggerated and played - down evidence from the principal witnesses, all of whom I closely observed in the witness box and all of whose evidence I have scrutinised and analysed. All the evidence is recorded, and I do not think it is necessary to reiterate it now. Upon the whole of it, I am satisfied that the plaintiff has proved his claim concerning the fence upon the balance of probabilities, but not his claim regarding the gate. The plaintiff was quite a convincing witness, who was not materially shaken by cross - examination, and some support for his contentions is to be found in the material documents. His principal supporting witness, Lyson Nyoka, gave evidence which was convincing in the main, and he is independent in so far as he left the plaintiff's employ in September, 1967. The principal defence witness, Fanizzi, gave unconvincing evidence, which I do not think was accounted for by his poor command of English and the necessary use of an interpreter, and I am confident that his evidence was at times, to say the least, inaccurate and suspect. For a professional man - a surveyor - his testimony did not impress me favourably, and it was palpably unreliable concerning the state of the fence after, as he put it, it had been "lowered" on the 18th October, 1966, to permit the passage over it of himself, a seven - ton lorry, a Land - Rover and thirteen African employees. In chief, he said the fence sprang back into a more or less vertical position. He repeated this in cross - examination but, when re-examined, he said that it remained at an angle of about 30 degrees (as demonstrated) from the ground. He repeated this when I questioned him and, having been reminded of his evidence in chief, he then said it was an angle of about 45 degrees, which is, of course, as nearly horizontal as it is vertical. The only other defence witness called as to the condition of the fence on the 18th October, 1966, was Chinkumbe, to whose evidence I attach no weight, because, having given a detailed account of how the first defendant's vehicles and employees had negotiated the fence, he retracted and said that he did not witness the said negotiating and that he had told the court what he had been told by a man named Spider Lungu (who was apparently outside the court, but who was not called).

Upon the whole of the evidence, I greatly prefer the plaintiffs' version, of the state of disrepair in which the first defendant's men left the fence, to the defence version, and I find proved that a stretch of the fence about 50 yards long, was knocked down by those men and vehicles and left virtually flat and that thirty - five head of cattle, of which twenty-three are still missing, escaped via the damaged fence from the plaintiff's farm. I accept the plaintiff's evidence about the searches and inquiries he made and caused to be made for the missing beasts, and I reject the defence submission that the plaintiff regarded the whole matter casually and took no pains to find his cattle and therefore contributed to his own loss.

As I have said, I am not satisfied that the plaintiff has proved his claim in regard to the gate. He and his servant Love Mwale's evidence about it was nebulous and not sufficiently clear (even if accepted) to prove that either of the defendants or their servants or agents left the gate open and so permitted the escape of cattle (for which the plaintiff sent out no search - party) on or about the 2nd December, 1966: it is merely a possibility, upon the totality of the evidence. Even if Love Mwale's evidence is true, and he was not a convincing witness, and a green coloured lorry did pass through the gate on the 3rd December from an easterly direction (Szeftel's farm and the Lusaka - Mazabuka power - line), it seems that it was not a lorry of the first defendant, the vehicles of which are, according to the witness, Chinkumbe, painted red and white. Furthermore, Mwale testified that he did not bother to close the gate after the lorry, because it was not his job to do so and because it was his "knocking - off" time, and he did not inform the plaintiff of the open gate until the 5th December.

Consequently, if the cattle did escape (and Mwale said there were no cattle in that part of the farm at the time), the proximate cause was Mwale's idleness and negligence. The plaintiff's claim under paragraph 5 (b) of his Statement of Claim fails.

As to the claim arising from the damaged fence and loss of twenty - three head of cattle, I consider upon the evidence that the plaintiff's damages should be K75.00 per beast - a total of K1,725. The damages for the fence itself must be minimal, because the first defendant has subsequently erected a gate in it, so I fix the damages at K20.00, which sum is based partly on the evidence and partly on what I trust is an intelligent estimate. I hold the first defendant liable for these damages, and the question remains: to what extent, if at all, is the second defendant jointly liable.

[1] I am abundantly satisfied that the first defendant was, in law, the independent contractor of the second defendant, which had no power to and did not control the manner in which the first defendant executed the work of constructing the power - lines.

[2] Generally, an employer is not liable for the negligence of an independent contractor or his servants in the execution of his contract, and if such a contractor is employed to do a lawful act and in the course of the work he commits some casual act of negligence, the employer is not answerable. He is, however, liable for his own neglect and, if he engages an independent contractor to perform some duty imposed upon him by law or by statute, he will be liable for the way in which the contractor performs the duty, even if it is done negligently, unless it is mere "casual or collateral" negligence of the contractor.

Upon the principles to be extracted from the many authorities upon the meaning of these terms, I am satisfied that the first defendant's negligence in leaving the plaintiff's fence in a state of disrepair was not casual or collateral. This case is not greatly dissimilar from *Darling v Att. - Gen.* [1], in which a ministry under statutory powers entered a field to bore for coal, and the act of their independent contractor in leaving there a heap of timber, which damaged a horse grazing there, was held not to be collateral negligence, on the ground that the ministry owed to the occupier of the field a duty to take reasonable care, from which they could not absolve themselves by employing an independent contractor. In the present case, section 41 of the said Electricity Act imposed a clear duty upon the second defendant, in the exercise of the powers conferred by section 37 of the Act, to cause "as little detriment and inconvenience and do as little damage as possible" and to "make full compensation to all persons who have sustained damage for all damage sustained by them by reason or in consequence of the exercise of such powers." I hold that the second defendant cannot absolve itself from that statutory duty by employing the first defendant, and my judgment is that the plaintiff is entitled to recover the total sum of K1,745 from both defendants, and the second defendant is entitled to be indemnified by the first defendant.

Judgment for the plaintiff.