



On Guard!

The employee set the fire, but it is the guarding company that has ended up on the hot seat

By Elliott Goldstein

Deliberately start a fire, put it out, and be acclaimed a hero! Well, it seemed like a "good idea at the time" to the security guard working the "graveyard shift" at the government dock. So he did it!

Unfortunately, the fire set by the guard — who aspired to becoming a professional firefighter — got out of control, spread quickly, and caused \$65,000 damage. Fortunately, no one was harmed. The security guard was charged with, and convicted of, arson. He and his employer (Invicta Security Service Corporation) were also sued by the Deas Dock Refit Complex owner, British Columbia Ferry Corporation.

At trial, Invicta was found "vicariously liable" for damage caused by the fire deliberately set by its employee in

1993 and was ordered to pay \$65,000 plus costs. Invicta appealed. The Court of Appeal of British Columbia, the highest court in the province, heard the appeal in September 1998 and delivered its reasons in November 1998. It upheld the trial judgment and dismissed Invicta's appeal.

The Invicta case and its appeal dealt squarely with the issue of whether vicarious liability should attach to the security guard's employer, thus making it liable for its employee's wrongful conduct (that is, the arson). Vicarious liability is a doctrine of law that makes an employer liable for the conduct (acts) of its employee "within the scope (or course) of employment." Note that vicarious liability does not require proof of blameworthiness or misconduct on the part



Photograph courtesy of British Columbia Ferry Corporation

of the employer (in this case, the security guard company).

At trial, the court concluded the employer was vicariously liable. Justice Robert Edwards ruled as follows:¹

"... where an employee is given authority which amounts to 'total intervention' or 'control' which is then misused through the perpetration of a deliberate wrongful act, the employer will be vicariously liable. Where, as here, a security company gives a security guard exclusive responsibility for security of premises amounting to effective total control of those premises, while the employee is in sole charge of them, it has put any employee who might be criminally inclined in a position to pursue that inclina-

tion, and is therefore vicariously liable on the reasoning of the cases culminating with the Photo Production case.

"The plaintiff or others engaging security companies, have contracted to have their premises secured rather than screen and employ their own staff to carry out that function. They rely on the security company to employ reliable personnel. When the personnel employed prove not to be reliable, it seems logical that the party with control over the hiring and supervision of the employees should bear the legal responsibility for the tortious acts of those employees, **whether negligent or deliberate.**" [Emphasis added.]

On appeal, Justice Anne Rowles, speaking for the Court of Appeal of British Columbia, said the question to be decided in the *Invicta* case was whether a security guard's arson is a normal risk of the business of providing security services. She found "two compelling reasons" to characterize the guard's arson as "within the course of his employment":

1. The arson was facilitated by the "special nature" of the security business.

"This is not a case in which the employer merely provided an opportunity for a tort to occur by placing the employee at the scene, such as, for example, employing a laborer or delivery person on the premises at night. The arson in this case was facilitated by the fact that [the guard] was assured, by virtue of his employment, that he could commit his crime undetected and uninterrupted that night."²

2. There is no reason why an employer should be liable for an employee's unintentional negligence but not for his intentional crimes such as arson.

"It would seem odd, then, that [the employer] would be better off for having employed an arsonist than simply a negligent watchman."³

The Court of Appeal was quick to point out that there are limits to the security company's vicarious liability. For example, by stating the following:

"...the company would be liable only for the kind of deliberate torts of its employees which the company could reasonably be expected to guard against from third parties. In other words, if arson is foreseeable enough that its employee is required to guard against it in the ordinary course of his duties, then the company cannot be heard to say that its own employee committing arson himself is entirely unforeseeable."⁴

The appellate court cited a number of connecting factors to reinforce this conclusion: the tort (arson) occurred on the premises; it occurred during the security guard's working hours; and the security guard company exercised a considerable amount of control over its employee in selecting, training and supervising him.

"While it was not strictly negligent in this latter respect, its element of control might shift the balance in favour of placing the risk of loss with [the security guard company] rather than the innocent dock owner. The security guard company's greater control over the sit-

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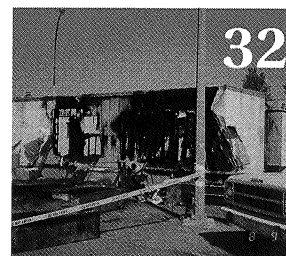
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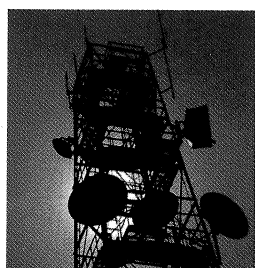
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