

ON GUARD!!!

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

By Elliott Goldstein
(Canadian Security - February/March 1999, pages 32-34)

*Elliot Goldstien, B.A., LL.B., is a lawyer,
visual evidence consultant, and an
author based in Toronto, Ontario.*

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 fire-fighter – 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 judgement 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 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 inclination, 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 tortuous 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 characterise 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 labourer 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

ON GUARD!!

Continued from page 12

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 situation and greater relative fault is relevant both to the fairness of shifting the risk of loss to it, and to the deterrent rational...."⁵

At the appeal hearing, counsel made reference to other cases in which security guards, employed by security guard companies, had deliberately set fires damaging the businesses they were supposedly guarding. In the 1978 U.K. case of *Photo Production Ltd. V. Securicor Transport Ltd.*,⁶ the defendant security guard company had a contract to provide security services to the plaintiff at its premises. The trial judge held that the defendant (the security guard company) was entitled to rely on an exemption clause in the contract. The Court of Appeal (of England) held that the defendants were vicariously liable for the act of their employee and were not protected from liability by the exemption clause. On appeal, the English House of Lords (the highest court in the British Commonwealth) reversed only on the issue of whether the exemption clause applied; it left untouched the finding of vicarious liability.

In the 1988 Alberta case of *Plains Engineering Ltd. V. Barnes Security Services Ltd. Et al*,⁷ a security guard's employer was hired by the tenant of a building, without the knowledge of the plaintiff landlord, to provide security serviced. The security guard intentionally started a fire and the court found the guard's employer not to be vicariously liable on two grounds:

1. The employer of the security guard owed no duty to the landlord plaintiff.⁸
2. "If the employee's wrongful act is willful or deliberate, the employer will

only be liable if the tortious act by the employee is of the same general kind as the employee was authorized to carry out on behalf of the employer, and where the resultant loss can be connected to the employer. Foreseeability also plays a part as to whether the wrongful unauthorized act was a normal or expected incident of the act which the employee was engaged to perform. This may be answered by asking whether the employer could have reasonable foreseen the wrongful act as a risk which might be expected in the typical performance by the employee in the course of performing his appointed tasks."⁹

"Setting a fire would hardly be considered to be a mode of carrying out security services. Whatever reason he had for setting the fire, it was in his own interest and not done on behalf of his employer."¹⁰

The different findings of vicarious liability in the Photo Production case and the Plains Engineering case could be explained by the fact that, in the former case, the plaintiff business had contracted directly with the guard company, Securicor Transport, whereas, in the latter case, there was no contract between the plaintiff landlord and the guard company, Barnes Security.

So what can we learn from the Invicta case?

First, that security guard companies must exercise care in selecting, training and supervising their security guards. Failure to do so may result in their being found vicariously liable for their employees' acts.

Second, that security guard companies must include a

PRICEWATERHOUSECOOPERS

Jim Forbes, C.A., C.F.E.

PricewaterhouseCoopers LLP
21 King Street West
Hamilton Ontario Canada L8P 4W7
Telephone +1 (905) 777 7000
Facsimile +1 (905) 777 7060
Direct Tel. +1 (905) 972 4105

We are a team of dedicated professionals who provide services based on the following principals:

- We tailor our approach to your needs.
- We provide high quality, supportable recommendations.
- Our reporting is timely and cost effective.
- Develop creative solutions to assist in claims settlement.

Our strength is the *depth of our experience* and the *people* we have serving you throughout Ontario.

Dispute Analysis & Investigations

ON GUARD!!

Continued from page 13

Second, that security guard companies must include a properly worded exemption clause or limitation of liability clause in their contracts. Failure to do so will result in their having to pay damages, or to pay higher damages.

In conclusion, this author suggests that security guard companies pay heed to the old adage: "Forewarned is forearmed." Be careful out there!

Author's Notes:

1. *British Columbia Ferry Corporation v. Invicta Security Service Corporation and Manddep S. Dosange*, (Court of Appeal for British Columbia, Vancouver Registry no. CA023277, unreported decision of Rowles, J.A. at P.25 para. 32 &33
2. *Ibid.*, P.28, para. 51.
3. *Ibid.*, p.29, para. 52.
4. *Ibid.*, p. 29, para.53.
5. *Ibid.*, p.30, para.55.
6. [1978] 3 All E.R. 146 (C.A.), [1980] 1 All E.R. 556 (H.L.)
7. (1988), 19 C.C.E.L. 205 (Alta.Q.B.).
8. *Supra*, footnote 1, at 32, para. 61.
9. *Supra*, footnote 1, at 32, para.61 citing the decision of Judge Hutchinson in the Plains Engineering case at 225.
10. *Ibid.* at 219.

Note: This article has been reproduced with the permission of the publisher of Canadian Security, CLB Media Inc., as well as the author.

Arson Seminar Photos

May 25 & 26, 2000

UPCOMING SEMINARS

The Fourth Arson Seminar was jointly run by the I.A.A.I. and the O.P.P. The course included approximately 85 students from various Fire, Police and Insurance personnel. Previous Arson Seminars were held in Guelph, London and Simcoe with one being planned for October 2001 in North Bay. Watch for more information on this seminar.



ABOVE PHOTO: Back row (L to R): Tom McIntyre (Origin and Cause), Dick Walters (Origin and Cause), Jim Forbes (PriceWaterhouseCoopers), Kevin Varley (Lombard Canada) Front row: Ken Byers (Origin and Cause), Colin Darmon (Detective Constable, O.P.P.), Glenn Gibson (Crawford Adjusters Canada), Jim Zyta (North Waterloo Farmers Mutual)

LEFT PHOTO: Major Seminar Speakers: (L to R) Glen Johnson (President, O.M.I.A.), Detective Inspector Bob Goodall (Criminal Operations, Western Region, O.P.P.), Detective Inspector Kate Lines (Behavioural Science Section, O.P.P. General Headquarters)

The International Association of Arson Investigators

The Team Approach



SPRING 2001
www.iaai-ontario.com

