IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 3595/08

In the matter between:

HAINRO GROENEWALD	Plaintiff
and	
IRVIN & JOHNSON LIMITED	First Defendant
MILLENIUM SECURITY	Second Defendant
NICHOLAS JOHANNES EHLERS	Third Defendant
and	
MILLENIUM SECURITY	Third Party

JUDGMENT DELIVERED ON 17 MAY 2017

GAMBLE J:

INTRODUCTION

[1] In this opposed application the plaintiff seeks leave to amend his particulars of claim in a trial which is pending before this court. The first defendant ("I & J") is a listed company which, inter alia, owns a mariculture facility at Danger Point Bay near

Gansbaai in the Western Cape at which it cultivates abalone for commercial purposes. During 2005 it concluded a written contract with the second defendant ("Millennium") to supply security services to it at that facility.

[2] In his particulars of claim the plaintiff alleges that on 1 March 2005, while innocently swimming in the sea in the immediate vicinity of I & J's abalone facility, he was wrongfully and unlawfully assaulted by the third defendant ("Ehlers") who fired a number of live rounds at him with a firearm. The plaintiff claims that one such bullet struck him and that as a consequence thereof he suffered severe injuries to the head, and in particular the brain, which have left him permanently disabled with a number of serious *sequelae.*

[3] On 27 February 2008 the plaintiff issued summons out of this court claiming damages in the amount of R4, 18m for the injuries sustained in the shooting incident. The claim was brought against the three defendants jointly and severally on the basis of the following allegations in the particulars of claim:

> *"13.1 the Second Defendant is vicariously liable for the said delicts of the Third Defendant; and*
>
> *13.2 the First Defendant is vicariously liable for the delicts of Second and/or Third Defendants."*

[4] The defendants have resisted the claim with I & J represented by one set of attorneys and Millennium and Ehlers by a different firm. Both groups of

defendants and the third party have filed their respective pleas to which brief reference will be made later.

THE PLEADINGS

[5] On 11 June 2015 I & J filed a request for trial particulars from the plaintiff to which the latter replied on 19 August 2015. Certain portions of paragraph 7 of that request and the answers thereto (which are reproduced immediately below in response to each individual question) are relevant to these proceedings and are therefore set out in detail.

Question:

"7.1 Does the plaintiff contend that the second defendant itself committed a delict (i.e. a delict for which it is directly as opposed to vicariously liable)?"

Answer:

"7.1 Yes."

Question:

"7.2 If the answer to 7.1 is in the affirmative, the plaintiff is required to identify the act or omission of the second defendant underlying that delict."

Answer:

"7.2 The Thirid Defendant who was a member of the Second Defendant unlawfully shot at the Plaintiff and in so doing injured him in the manner described in the Particulars of Claim."

Question:

"*7.3 Does the plaintiff rely on the alleged employment relationship(s) between the first defendant and the second and/or third defendants to support its allegation regarding the vicarious liability of the first defendant for the delicts of the third defendant?"*

Answer:

"*7.3 Yes."*

Question:

"*7.4 If the answer to 7.3 is in the affirmative, the plaintiff is required to state whether the allegation concerning the plaintiff's (sic) vicarious liability in respect of the delicts of the third defendant arises exclusively from:*

7.4.1 the alleged employment relationship between the first and third defendants; and/or

7.4.2 the alleged employment relationship between the first and second defendants, as well as the alleged employment relationship between the second and third defendants."

Answer:

"*7.4 It is assumed that plaintiff's delictual liability should read First Defendant's delictual liability.*

7.4.1 The First Defendant is vicariously liable for the defects of the Second and/or Third Defendants by virtue of the facts and circumstances set out in paragraph 1.1.1 above, which is repeated. The First Defendant is furthermore liable in its own right in that it breached its duty to ensure that care was taken when the security services were provided. The Particulars of Claim will be amended accordingly.

7.4.2 Paragraphs 1.1.1[1] and 7.4.1 above are repeated."

APPLICATION TO AMEND

[6] On 12 April 2016 the plaintiff gave notice in terms of Rule 28 of his intention to amend his particulars of claim (as contemplated in paragraph 7.4.1 of his

[1] Para 1.1.1, which amounts to a general refusal to furnish particulars to I & J on the basis of relevancy, nevertheless contains the following allegation by the plaintiff –

"1.1.1(b)(ii) The provision of the armed security services was an activity which was inherently dangerous, and the First Defendant was therefore under a duty not only to take care but to ensure that care was taken so as to prevent harm befalling (sic) members of the public;"

trial particulars) by the amendment of sub para 13.2 through the addition of the following :

"13.2 The First Defendant is vicariously liable for the delicts of Second and/or Third Defendants. In amplification thereof the Plaintiff pleads that:

13.2.1 The First Defendant employed the Second Defendant for the purposes of providing security services and knew alternatively should reasonably have known that the employees of the Second Defendant including the Third Defendant were armed with firearms;

13.2.2 The First Defendant knew alternatively should reasonably have known that anyone who was struck by a projectile discharged from a firearm would suffer serious injuries which could result in death;

13.2.3 There was accordingly a duty on the First Defendant to ensure that the firearms which were brought on to the Project Area were not discharged in circumstances in which this was unsafe as this had the potential to seriously injure any person who might be struck by a projectile discharged from the said weapon;

13.2.4 The steps which the First Defendant could and should reasonably have taken included:

13.2.4.1 Insisting that the employees of the Second Defendant were properly trained in:

13.2.4.1.1 the use of a firearm; and

13.2.4.1.2 the circumstances in which a firearm may lawfully be discharged;

13.2.4.1.3 imposing regulations pertaining to the use of a firearm, and the circumstances in which this could be done.

13.2.4.2 refusing to allow any person to have access to the Project Area who:

13.2.4.2.1 had not been properly trained; and/or

13.2.4.2.2 was not prepared to adhere to the regulations referred to in paragraph 13.2.4.1.3 above.

13.2.5 The First Defendant failed to take the aforesaid steps or any other steps to ensure that the Second Defendant and/or employees did not discharged a firearm in circumstances in which it was unlawful and/or unsafe to do so, and in so doing acted unlawfully and negligently;

13.2.6 As is pleaded in paragraph 6 above, the Third Defendant discharged the firearm [in] circumstances in which:

13.2.6.1 it was unsafe for him to discharge the firearm;

13.2.6.2 the firearm could not lawfully be fired; and

13.2.6.3 the Third Defendant acted wrongfully and unlawfully in so doing.

13.2.6.4 The Second Defendant and/or the Third Defendant were acting in the interests of the First Defendant and for the purposes of rendering security services to the First Defendant;

13.2.7 The Plaintiff was injured as a direct consequence of the facts and circumstances pleaded in paragraph 13.2.1 to 13.2.6 above."

[7] On 25 April 2016 I & J's attorneys filed a notice of objection to the intended amendment in which, *inter alia,* the following allegations were made:

"1. The Plaintiff's particulars of claim dated 7 February 2008 advance a cause of action against the First Defendant based on its alleged vicarious liability for the delicts of the Second and/or Third Defendant, on the basis that the First Defendant employed the Second and/or Third Defendants as security service providers.

2. The effect of the Plaintiff's proposed amendment, as foreshadowed in paragraph 7.4.1 of the Plaintiff's Amended Response to the First Defendant's Request for Trial Particulars, is to allege a new cause of action against the First Defendant, same being based not on its vicarious liability for the delicts of the Second and/or Third Defendants but on its own, independent delictual liability to the Plaintiff (a wrongful and negligent failure to take certain steps).

3. The defendant wishes to defend the new cause of action against it on the basis that it has prescribed….."

[8] In response to the notice of objection filed by I & J, the plaintiff filed a notice of motion of the intended amendment supported by an affidavit deposed to by his attorney, Ms. Spiers, in which she stated, inter alia, the following:

"29. As is clear from the aforegoing, the averment that the First Defendant was vicariously liable was always part of the pleadings. The Amendment nearly (sic) seeks to clarify the basis upon (sic) the First Defendant's vicarious liability is founded.

30……

31……

32. The Plaintiff's primary response is that he is not seeking to introduce a further claim, but is merely elucidating and/or expanding upon an existing claim; and his secondary response is that even if a further claim would be

introduced (which is denied), such claim has not become prescribed. These aspects are dealt with in more detail below."

That application was opposed only by I & J.

[9] The application for amendment was heard by this court on Monday, 24 April 2017. The plaintiff was represented by Adv. P.Tredoux and I & J by Adv. A Morrissey. The court is indebted to counsel for their helpful heads of argument. At the conclusion of his argument Mr. Tredoux indicated that, in the event that the court found that the proposed amendment introduced a new cause of action which had become prescribed, his client accepted that the court should not exercise its general discretion to grant the amendment. Accordingly, the alternative allegation in para 32 of Ms. Spiers' affidavit is no longer persisted with. Counsel were agreed as to the applicable principles and the relevant case law and, in the circumstances, the issues have become crisply defined.

[10] The principal issue for determination can, I think, be formulated as follows. Does the proposed amendment –

- purport only to amplify the existing allegation of vicarious liability already made by the plaintiff in terms of which he seeks to hold I & J liable for the delict said to have been committed by Ehlers while acting in the course and scope of his employment with Millenium, or

- introduce a new ground of liability on the part of I & J which relies on a delict allegedly committed by I & J itself?

PRINCIPLES RELATING TO VICARIOUS LIABILITY

[11] *Neethling et al*[2] provide the following introduction to the concept of vicarious liability (in a section of their book which deals with "*Forms of liability without fault"*) –

> *"Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a particular relationship between two persons. Three such relationships are important, namely that of employer-employee, principal-agent and motor car owner-motor car driver."*

[12] *Jonathan Burchell* [3] says that –

> *"In terms of the principles of vicarious liability, an employer is made liable for the wrongs (delicts) committed by his or her servant in the course and scope of the servant's employment. The employer need not be personally at fault in any way but the wrong of the servant (for which the servant remains personally liable) is imputed or transferred to the employer who often has the 'deeper pocket' or 'broader financial shoulders' to compensate the person injured by the servant's negligence."*

---

[2] Neethling,Potgieter and Visser, The Law of Delict , 5th ed

[3] Jonathan Burchell, Principles of Delict at 215

[13] In *Hirsch*[4] Booysen J conducted a thorough study of the common law approach to vicarious liability and went on to deal with the current state of the law as it then was. As a point of departure the learned judge observed that-

> *"In general the law does not hold one liable for the wrongs of another but sometimes it does. So, for example, it holds one vicariously liable when one's servant commits a wrong in the course and scope of his employment. That this is so today is well settled…*
>
> *By vicarious liability, I mean a person's liability for the wrong of another although he is himself free from fault or blameworthiness…"*

[14] At 650D Booysen J referred, inter alia, to *Fleming* [5], the leading English writer in the field of delict, who stated that –

> *"The hallmark of vicarious liability, then, is that it is based neither on any conduct by the defendant himself nor even on a breach of his own duty.*
>
> *Personal liability, in contrast, is always linked to breach of one's own duty. Certain forms of it, however, bear a marked resemblance to vicarious liability: viz, where the breach is committed, not by what the defendant, but by what somebody else, has done. There are several such situations; firstly, whenever one person orders another to commit a tort, say an assault, he is liable just as if he had committed it himself and*

---

[4] Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd 1992(3) SA 643 (D&CLD) at 647G *et seq*

[5] Fleming , The Law of Torts (7th ed) at 341

it matters nothing whether it is committed through the instrumentality of a servant, an agent, or a fierce dog. Here, truly, qui facit per alium facit per se.[6]

Secondly, someone tort duties are formulated so as to encompass responsibility for the conduct not only of oneself, but also of certain people varying in range. A common carrier, for example, is liable for loss of goods (saving certain exceptions) even if caused by strangers; a shipowner for unseaworthiness even if the defect was due to faulty workmanship by an independent supplier or repairer. Most of these are duties of absolute obligation, but some are mere duties of reasonable care. For example, the responsibility of schools to their pupils and of hospitals to their patients is no longer limited to vicarious liability for servants, but is complemented by a 'non-delegable personal' duty to assure that reasonable care is taken for their safety."

[15] In the plea filed on behalf of the second and third defendants, Millennium admits that Ehlers was its employee at the time in question. In those circumstances, provided it is established that Ehlers negligently (or intentionally) caused the plaintiff's injuries, Millennium will be vicariously liable to the plaintiff in damages in the event that it is established that Ehlers was acting in the course and scope of his employment with Millennium. So far so good.

---

[6] "*He who does anything by another does it by himself*" (Latin for Lawyers, Sweet and Maxwell,1915 ed. at 227)

[16] However, the plaintiff's allegation that I & J employed Millennium to provide security services at the mariculture facility is denied by both first and second defendants who say that Millennium was an independent contractor in relation to I & J. While the particular circumstances of the alleged contractual relationship between those parties might be sufficient to establish vicarious liability in this case[7] that is not an issue which falls for determination now. Rather, the question is whether, in the event that the plaintiff establishes such an employment relationship between those defendants, he will be entitled to rely upon the principle of vicarious liability to hold I & J (as opposed to Millenium) responsible for his damages. That too is not an issue which falls for determination now: it is something which I must assume for the purposes of considering whether the amendment seeks to introduce a new cause of action. .

[17] On the basis of the case as pleaded, I & J's liability towards the plaintiff is predicated, not its own negligence in relation to the plaintiff but, in terms of the principles of vicarious liability, that it is liable for the delicts of its employee's employee. The approach was dealt with as follows by Scott JA in *Messina Carriers*[8] -

> *"[10] It is trite law that an employer is liable for the delicts of an employee committed in the course and scope of the latter's employment. The rule is based on 'considerations of social policy' (per Corbett CJ in Mhlongo and Another NO v Minister of Police 1978(2) SA 551 (A) at 567H). Its origin lies no doubt in the need to provide the victim*

[7] Langley Fox Building Partnership (Pty) Ltd v De Valence 1991 (1) SA 1 (A)

[8] Messina Assoc Carriers v Kleinhaus 2001 (3) SA 868 (SCA) at 872

of a delict with a defendant of substance able to pay damages. But even in the absence of an actual employer-employee relationship the law of the recovery of damages from one person for a defect committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, as Watermeyer J put it in Van Blommenstein v Reynolds 1934 CPD 265 at 269, where 'in the eye of the law' the one was in the position of the other's servant. In such a situation one is really dealing with an analogous extension based on policy considerations of the employer's liability for the wrongful conduct of an employee. (See Boucher v Du Toit 1978(3) SA 965 (O) at 972D-E). Over the years the elements of the legal relationship between employer and employee and the interest of the one in the conduct of the other have been isolated in order to determine whether, in the absence of such a relationship, one person should, nonetheless, be held liable for a delict of another….."

In whatever manner the case is approached, the plaintiff relies upon the negligence of Ehlers and not of I & J, as the proximate cause of his injuries.

A LEGAL DUTY TO ACT ?

[18] The allegations introduced through the amendment (as foreshadowed in the averments made in para's1.1.1(b)(ii) and 13.2.1 of the plaintiff's trial particulars) seek, in broad terms, to place a duty on I & J to ensure that -

- all of the employees of Millennium were properly trained in the use of firearms;

- such employees were trained in recognising the circumstances under which such firearms could lawfully be discharged;

- there were regulations in place pertaining to the use of firearms at its mariculture facility; and

- any person who had not been so trained and/or refused to adhere to such regulations was not permitted access to the facility.

[19] The jurisprudential eloquence of Holmes JA in *Munarin*[9] describes the circumstances under which a party attracts a legal duty to conduct itself with care towards another:

> *"Negligence is the breach of a duty of care. In general, the law allows me to mind my own business. Thus if I happened to see someone else's child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother's keeper. This happens, for example, when the circumstances are such that I owe him a duty of care; and I am negligent if I breach it. I owe him such a duty if a diligens paterfamilias, that notional epitome of reasonable prudence, in the position in which I am in, would –*

[9] Peri-Urban Areas Health Board v Munarin 1965(3) SA 367 (A) 373E.

(a) foresee the possibility of harm occurring to him; and

(b) take steps to guard against its occurrence."

[20] The case which the plaintiff now wishes to advance at trial is that there was a legal duty on I & J generally in the terms set out in para 18 above and a failure to comply with that duty, as the plaintiff seeks to conclude in para 13.2.5 of the particulars of claim, if amended :

> *"13.2.5 [I & J] failed to take the aforesaid steps or any other steps to ensure that [Millennium] and/or (sic) employees did not discharge a firearm in circumstances in which it was unlawful and/or unsafe to do so, and in so doing acted unlawfully and negligently;"* (Emphasis added)

[21] The language employed by the plaintiff in this sub-paragraph could not be clearer: he seeks to hold I & J negligent on the basis of a breach of its own duty of care owed towards him. That is manifestly the language of personal negligence on the part of I & J and not the language of vicarious liability. The suggestion that the amendment is only intended to amplify the case for vicarious liability demonstrates a failure to distinguish personal liability grounded in negligence for breach of a duty of care from liability based on the delict of a third party standing in a particular relationship to the party sought to be held liable

CONCLUSION

[22] In the circumstances I am driven to conclude that the proposed amendment is not just an amplification of the case already pleaded but constitutes the

introduction of an entirely new ground of liability on the part of I & J, and hence a new cause of action. It is common cause that that cause of action has prescribed and that there is no basis upon which the court can exercise any discretion in favour of the plaintiff to permit the introduction of such a prescribed cause of action.

[23] Accordingly, the application for amendment falls to be dismissed with costs.

_____

GAMBLE J

JUDGE	**:**	Gamble J
JUGDMENT DELIVERED BY	:	Gamble J
FOR PLAINTIFF	**:**	Adv. P Tredoux
FOR FIRST DEFENDANT	**:**	Adv. A Morrissey
DATE OF HEARING	**:**	24 April 2017
DATE OF JUDGMENT (Reasons)	**:**	17 MAY 2017