REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2017-02186

Between

ALEXANDRIA BADAL Claimant

And

NORTH WEST REGIONAL HEALTH AUTHORITY

Ancillary Claimant/ First Defendant

AMALGAMATED SECURITY SERVICES LIMITED

Ancillary Defendant

Before The Honorable Justice David C. Harris

Appearances:

Mr. Kern Saney instructed by Ms. Edisha K. Greene **for the** Claimant.

Mr. Kirk Bengochea instructed by Mr. Charles Law **for the** First Defendant/Ancillary Claimant.

Ms. Catherine Ramnarine instructed by Ms. Jeanelle Pran **for the** Ancillary Defendant.

JUDGMENT

INTRODUCTION[1]

1. The Claimant claims damages, interest and costs for gun shot injuries sustained while on the job at the premises of her employer the Ancillary Claimant/Defendant – The North West Regional Health Authority (**"NWRHA"** or the **"Hospital"**). This Defendant brought an Ancillary Claim against

[1] Extracted from the Claimant's Amended Statement of Case.

the Ancillary Defendant company – Amalgamated Security Services Ltd - who had earlier been contracted by the said ancillary claimant/ Defendant to provide security services at the Port of Spain General Hospital('NWRHA' or 'Hospital')[2]. It is not in dispute that on June 13th June 2013 the Claimant was on the premises of the Port of Spain General Hospital in the course of her employment when she was apparently inadvertently shot in the face by an unknown gunman who had shot at another person who was also nearby on the premises. Three persons including the claimant were shot in that incident. The Claimant suffered injury, loss and damage and alleges that such injury and loss was the result of the negligence of the Ancillary Claimant/Defendant. She was hospitalized from the date of the incident until 12th December 2013. The effects of her injuries are alleged to include seizures, memory loss, blackouts and continuous pain in her face, shoulders, neck, head, back and legs.

2. **The Claimant's case**[3] is that her employer, failed to provide a safe place of work and did not take reasonable care for her safety by ensuring that the work premises were safe. This was so especially given that their own post-shooting internal security assessment report (the "***Sweeney report***")[4] indicated a deteriorating safety environment prior to the shooting that they ought to have known of at the time. Further, the Claimant alleges that a prior incident of a similar nature had occurred on the said premises. As such, the Claimant was exposed to injury and damage which the Defendant/Ancillary Claimant ought to have known as it was foreseeable that a violent incident could occur on the premises resulting in injury to persons on the premises including employees.

3. **The Defendant's/Ancillary Claimant's case**[5] is that it took all reasonable steps to ensure the safety of the Claimant and that she would not be exposed to risk of damage or injury. To this end, the Defendant/Ancillary Claimant contracted the Ancillary Defendant to secure the premises. Having taken all reasonable and practicable steps to keep the premises safe and mitigate exposure of the

[2] Contract for Security Services between the Defendant/Ancillary Claimant and the Ancillary Defendant dated 17th January 2001, at page 41 of the Ancillary Defendant's Trial Bundle, herein after referred to as the "agreement" or the "contract."

[3] Summarised from the Claimant's Amended Statement of Case.

[4] Report of Solomon Sweeney, Manager Security Services at the NWRHA dated 14th June 2013 at page 57 of the Claimant's Trial Bundle.

[5] Summarised from the Defendant's Defence.

Claimant to risk of damage or injury, the Defendant contends that it cannot be held liable for the incident; the harm from the shooting was the deliberate unforeseeable and illegal act of a third party not under the control or direction of the Defendant/Ancillary Claimant. The Defendant/Ancillary Claimant contends that even if there was a duty of care to the Claimant, the Claimant has not proved **(i)** foreseeability and **(ii)** the related ingredient of causation ("*but for*…"), that an act or omission of the Defendant/ancillary claimant caused or was the substantial cause of the Claimant's loss and damage. Further, they contend that factually, no record of any previous similar incident existed so as to found any assertion that the occurrence on the fateful day, was foreseeable.

4. In total, six (6) security guards of the Ancillary Defendant were on active security duty for the Defendant/Ancillary Claimant's premises in the immediate vicinity of the incident.

5. The Defendant/Ancillary Claimant filed an **Ancillary Claim** against the security firm contracted by the said Defendant in 2001 to provide security services including securing the premises of the Defendant/Ancillary Claimant[6]. The Defendant/Ancillary Claimant claims that it is entitled to be indemnified by the Ancillary Defendant for any sums awarded by the Court to the Claimant, should the Court rule in the Claimant's favour. They rely on an indemnity clause in the contract.

6. The Defendant/Ancillary Claimant contends that the Ancillary Defendant failed to perform its contracted security function adequately or at all, in breach of its contractual arrangements with the Defendant/Ancillary Claimant thereby invoking the application of the indemnity clause. In particular, the Ancillary Defendant was contracted among other things, to prevent the Claimant from being exposed to the risk of damage or injury by patrolling and securing the premises; establish a system of prevention aimed at deterring incidents of violence, malicious damage and disregard for security, and safety of persons, including the Claimant.

7. The Ancillary Claimant contends that pursuant to the said contract indemnity Clause, 3.22 of the 2001 agreement, the Ancillary Claimant/ Defendant is entitled to recover such damage and costs (that the court may award the Claimant) from the Ancillary Defendant in the terms there set out in the clause.

[6] See footnote 5

8. **The Ancillary Defendants case**: In pleading its case,[7] the Ancillary Defendant contends that the Ancillary Claimant/ Defendant cannot rely on Clause 3.22 of the 2001 agreement which at the date of the incident had already expired and no formal renewal, oral or written agreement was in its place at the material time. Even if the agreement remained in force, contends the Ancillary Defendant, any loss and claims for injury or damage by the Ancillary Claimant do not arise in consequence of the performance by the Ancillary Defendant of the agreement. They fully discharged their duties under the agreement and are not obligated to indemnify the Ancillary Claimant under the terms of the agreement or otherwise. There was nothing more it was required to do under the agreement that would have prevented the incident from occurring. There was no suspicious or disruptive behavior on the part of the shooter prior to the shooting so as to reasonably put the Ancillary Defendant's security guards on alert. The circumstances of the shooting were not reasonably foreseeable or indeed in any event preventable, having regard to, among other things, the contractual arrangement for the provision of 'baton' guards only and not armed guards.

9. The Ancillary Claimant relied substantially on the fact that the agreement did not require the Ancillary Defendant to provide armed guards, physically search or scan all persons entering the premises. The contractual obligations of the Ancillary Defendant were prescribed and specific. They contend that not only were they not contracted to bear arms, but that the presence of armed guards would have acted as a deterrent to criminal activity including shootings, on the compound.

ISSUES TO BE DETERMINED

10. This is a case of Negligence. The issues to be resolved are those common to negligence matters; put loosely as: *duty, breach and damage*. This trial is on liability only so the question of damages do not arise here. No party has denied the existence of the broad duty of an employer to provide a safe place of work for its employee or indeed of a public service provider – a public hospital in this case - to provide a safe place of business for its employees and users.

[7] Summary of the Ancillary Defendant's case as extracted from the Defence.

11. In the end, this case turns on the issues of foreseeability and causation. What are tests for each of those two related ingredients?

12. Also relevant in the determination of this matter are the sub-set issues of; **(i)** *novus actus interveniens* – whether the action a third party (the shooter) broke the chain of causation; **(ii)** whether any liability falls to the independent contractor (the Ancillary Defendant) and **(iii)** the distinction between the omission to do something and the commission of some act and how liability can accrue under one or the other.

THE LAW

Negligence

13. The general principles of the law of negligence were set out in Halbury's Laws of England:[8]

> *"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. ……Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which it can be reasonably foreseen may cause harm to the claimant's interests in so far as they fall within the scope of the duty" (emphasis mine)*

14. When considering whether a notional duty of care applies in a particular situation, the courts will consider three questions as outlined in Halsbury's Laws of England: **(i)**whether the damage is foreseeable; **(ii)** whether there is a relationship of proximity between the parties; and **(iii)** whether the imposition of a duty would be fair, just and reasonable.

[8] Halsbury's Laws of England/Negligence (Volume 78 (2018)) at paras. 1, 2 and 4; Volume 97 (2015) at para. 497

Statute- duty of care

15. Section 6(1) of The Occupational Safety and Health Act Chap.88.08 provides that; "it shall be the duty of every employer to ensure , so far as is reasonably practicable, the safety, health and welfare at work of all its employees".

16. **Foreseeability**:

> *"Speaking generally, one of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of reasonable care, harm of the relevant description might be suffered by the plaintiff or members of a class including the plaintiff? "Might be suffered" embraces a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. Bearing in mind that the underlying concept is fairness and reasonableness, the degree of likelihood needed to satisfy this prerequisite depends upon the circumstances of the case…….* ***There must be reasonable foreseeability of a risk which a reasonable person would not ignore. The risk must be "real" in the sense that a reasonable person would not brush [it] aside as far-fetched"*** [9] *[Emphasis added]*

17. **Causation and Novus actus interveniens**:

> *"A Defendant who is in breach of a duty in a tort cannot be held responsible for the loss suffered by the Claimant unless the Defendant's conduct was a cause of that loss."*[10]
>
> *Lord Reid in Dorset Yacht Co Ltd v Home Office [1970] AC 1004 observed, at page 1030, that where human action forms one of the links between the original wrongdoing of the defendant and the plaintiff's loss* ***that action must "at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation".*** *He added that "a mere foreseeable possibility" is not sufficient.*[11] *[Emphasis added]*

[9] The Attorney General v Craig Hartwell (British Virgin Islands) [2004] UKPC 12 at para. 21
[10] Charlesworth & Percy on Negligence 13th Ed. at para. 6-01
[11] The Attorney General v Craig Hartwell (British Virgin Islands) [2004] UKPC 12 at para. 23

18. It is argued by the Defendant/Ancillary Claimant here, that the Claimant's injury was caused by the deliberate, reckless, unlawful act of the shooter discharging his gun in the hospital's premises. The question then is whether this action of the shooter would ***"at least have been something very likely to happen."***

19. Then there is the distinction between the omission to act, the commission of an act and in what circumstances liability is imposed by law. The common law does not generally impose liability for a pure omission, save where there is the existence of ***special circumstances***. These special circumstances are set out in the academic works of; ***Tofaris and Steel, "Negligence Liability for Omissions and the Police*** (2016)75 CLJ 128 ("*Tofaris*") and as also notably at para 34 of the case **Robinson (Appellant) v Chief Constable of West Yorkshire Police (Respondent)** [2018] UKSC 4: "*In the Tort of negligence, a person A is not under a duty to take care to prevent harm occurring to a person B through a source of danger not created by A unless **(i)** A has assumed a responsibility to protect B from that danger, **(ii)** A has done something which prevents another from protecting B from that danger, **(iii)** A has a special level of control over that source of danger; or **(iv)** A's status creates an obligation to protect B from that danger*."

20. In the circumstances of the instant case, the Defendant/Ancillary Claimant is represented as "A" in the ***Tofaris*** representation above.

21. Further, in the said ***Robinson*** case at para. 69(iv) it is explained as follows:

> *"The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies)."* (Emphasis mine)

22. **Liability of the independent contractor (the Ancillary Defendant):**

> *"The duty of an employer to employees, other than as imposed by statute, is to take reasonable care for their safety. It is a single personal duty which is non delegable.*[12] *Generally for the duty to be fulfilled, the place of work must have such protective devices as experience has shown to be desirable in other working places of the same or similar kind. Even where such devices are not provided in other working places, it will not necessarily absolve the employers from liability."*[13] *More specifically to the independent contractor:*
>
> *"The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation, the employer is liable for the non-performance of the duty":* ***Mc Dermid v Nash Dredging & Reclamation Co Ltd [1987] AC 906*** *at 919 per Lord Brandon.*[14]

23. This reflects the position in the earlier cited case of ***Wilson & Clyde Coal Company Limited v English***.[15]

THE EVIDENCE

24. The most relevant evidence was given by Mr. Morris for the Defendant and Mr. Aberdeen for the Ancillary Defendant. Both testified to having over 30 years in the security services industry and well qualified to speak to their own experiences.

25. The evidence is that activities of criminal character were taking place in and around the hospital. Further, the court takes judicial notice of the location of the hospital in the proximity of 'at risk' neighborhoods. The undisputed evidence is that it was observed by the hospital and indeed the security guards that as the 'gang' related criminal activity increased in the area (and in Trinidad and Tobago) so did the number of victims of that crime finding their way into the hospital as

[12] Charlesworth & Percy on Negligence 13th Ed. at paras. 11-02 and 11-05
[13] Charlesworth & Percy on Negligence 13th Ed. at para. 11-19
[14] See page 874 at footnote 27
[15] [1938] A.C. 57

patients and with them, were their associates in attendance. This fact gave rise to a concern with the Defendant as indeed it ought to have. The 'Sweeney Report' sets out the concerns.

26. Mr. Morris for the Defendant testified to the Defendant doing all it reasonably could to provide the security services on the compound including doing patrols, searching cars where necessary and so on. He indicated, as did Aberdeen for the Ancillary Defendant, that the hospital is a public place to which the public have the right of access and present themselves with medical issues of various levels of gravity. I accept this evidence. This circumstance is peculiar to a medical facility and often times necessitates the liberal and timely access to the facility (see the evidence of Aberdeen). I accept this evidence.

27. The Ancillary Defendant also relied upon the "quality Assurance review" forms, exhibited in this matter[16] as evidence of their discharge of their obligations under the contract between the parties; ***Amalgamated*** and the ***NWRHA***. Indeed both Mr. Morris of the Ancillary Claimant/Defendant and Mr. Aberdeen of the Ancillary Defendant, under cross examination, provided the evidence in support of the defined and limited contractual functions of the security firm and its discharge of those functions.

28. The evidence need not be repeated at length here, but it is accepted by the court that the contract did not provide for the security to be armed or for the searching of persons individually or the provision of and operation of a scanner for instance. However, there is no evidence that these features could not have been provided for and operationalized if it was determined that it was required. Indeed the accepted evidence is that subsequent to the incident and the Sweeney report, armed security personnel have been introduced. No sufficient evidence was led to suggest that notwithstanding the provision of the armed personnel, the incidents in and around the hospital has persisted. This court agrees with the Defendant/ancillary claimant's counsel's submissions that the introduction of an armed *rapid response* unit is an after-the-fact response and the court concludes that the actual 'response' dimension to that service would have no direct real time effect on physically preventing the occurrence of the incident. It is however, the

[16] See exhibit "MA3" Witness Statement of Melvin Aberdeen, page 205-229 of the Ancillary Defendant's Trial Bundle.

knowledge of the existence of that armed service on the hospital compound that would act as a deterrent to those contemplating criminal activity on the grounds of the hospital.

29. The evidence of Mr. Aberdeen is strong evidence. He testified that in his view the provision of armed guards would deter criminal occurrences such as what led to the injury sustained by the Claimant. I accept that conclusion and add that even the knowledge of an after-the-fact armed response unit would have that deterrent effect.

30. Further, Mr. Aberdeen, with reference to the contract, testified to the Ancillary Defendant's compliance with the contract and discharge of their obligations thereunder[17]. He testified that they provided the number of officers provided for; with batons as provided for; manned the stations and compound, the entrances, searched cars where necessary. Mr. Morris for the Defendant did not provide the testimony sufficient to counter that of Mr. Aberdeen and indeed in several material particulars was at *ad idem* with Aberdeen[18].

ANALYSIS AND FINDINGS

31. That the Defendant owed the Claimant a duty of care to provide and maintain a safe place of work is patent. This so both by Statute[19] and undoubtedly, at common law.

32. The Claimant was injured at the place of work by a third party. The risk of the injury occurring as it did, on the evidence, was real, such that no reasonable person would "*brush [it] aside*". Indeed the commissioning of the report and its conclusions suggest that the Defendant had observed the evolving and escalating risk factors over at least 6 months prior to the incident. I do not hold that it was at the commissioning of the enquiry and receipt of the report that for the first time observation was made on reflection, as to the developing circumstances over the previous 6 months. It must have been that the circumstances were observed all along and the Defendant/ancillary claimant beset with inertia of sorts, failed to act upon the observed facts until after the crisis incident. The burden of proof was on the claimant in the principal claim and with

[17] See heading: "OBLIGATIONS OF THE COMPANY" in the contract.
[18] See paras 15-17 of the Morris witness statement and his evidence in cross examination with the same import.
[19] The Occupational Safety and Health Act Chap. 88:08; section 6(1).

respect to the allegation of a prior shooting incident on the hospital premises there have not discharged their burden. The reference to the shooting on the hospital premises made its appearance in a letter from one Mrs. Ali[20], of the Defendant. This letter was exhibited and admitted into evidence. Mrs. Ali, the maker of the document, was not called as a witness and the occurrence of the incident was not confirmed by any other percipient witness. In fact the evidence concerning the alleged prior shooting incident on the compound (as opposed to nearby) was scant and did not provide the detail that one would expect of a real live occurrence. On a balance of probabilities, I do not accept that it happened. In the end, not much turns on this finding.

33. At the very minimum, in the peculiar circumstances of this case, the risk of the injury was very likely to happen and ought to have been guarded against.

34. How would the Defendant/Ancillary Claimant have guarded against this risk? Well it is not for the Claimant (or the court for that matter) to provide the answer to that question. What has come to light and is acknowledged by the key security witnesses for the Defendant/ancillary claimant and the Ancillary Defendant is that the provision of armed guards would have acted as a deterrent to armed insurrection of the type that led to the Claimant's injury. Counsel further drew attention to the likely preventive outcome of the provision of scanners for the search of individuals.

35. The court drew to the attention of all counsel, that notwithstanding the public and patients right of timely access to the hospital, a similar if not more entrenched right of access to a public space, such as Parliament for instance, is not a right that displaces the need for a security search of the individual. Further, the immigration/customs process for large numbers of exiting travelers at the Piarco International Airport for instance, is met with a multiple security check[21]. The provision of a comprehensive security system for an institution, including one of the peculiar nature of a

[20] Letter dated 8th May 2018 with attachments from Mrs. Wendy Ali CEO of the NWRHA, to Ms. Faith Agard, signed by Mrs. Wendy Ali; Amended Bundle of Documents filed 18th March 2019 in Sch II at No. 12.

[21] The Defendant's evidence is that some 200 persons a day pass through the security posts at the hospital (seems to the court like an understated number). It would appear in any event that consistent with an international airport such as that in Trinidad and Tobago, thousands pass through the airport and sufficient resources are presumably allocated to achieve the ends.

hospital, catering as it does for emergency circumstances and anxious persons, seems to be a function of manpower and technology which at the bottom line is a matter of cost. Did the Defendant take a calculated risk in saving costs to expose the Claimant to avoidable risk? The issue of the *cost* against *function* balance/tradeoff was not canvassed in this case. But, suffice it to say, notwithstanding the Defendant's submissions as to the impracticality of the Defendant doing anything more than it did to ensure a safe place of work, the fact is, it did not earlier take the further steps that its own report subsequently recommended albeit after the fact, and which in any event common logic suggests ought to have been patent well before the incident. Indeed, this court would suggest that having regard to the published high violent crime statistics in Trinidad and Tobago and in the city for years before the incident, the risk would have been patent even well before the 6 month period the report referred to.

36. The principal allegation against the Defendant is not that it did something ("commission") that resulted in the increased risk and realization of that risk[22]; but that the Defendant failed to do something ("omission") that resulted in the increased risk and ultimately led to the realization of that risk.

37. This court on this issue is guided by the learning in the ***Tofaris and Steel, "Negligence Liability for Omissions and the Police*** (2016)75 CLJ 128 and as also set out at para 34 of the ***Robinson*** case.[23]

38. Applying ***Tofaris:*** The hospital had a level of control over the source of danger by way of the provision of adequate security safeguards and systems. The Defendant assumed the responsibility to provide a safe place of work for the Claimant by first, the imposition of that duty by statute and by common law, both of which require the employer to provide a safe place of work that would contemplate a person being safe from being shot by a 3rd party. They instead entered into a woefully inadequate contract for the provision of security services that fell short of that which the evidence discloses they ought to have had and in part, subsequent to the incident, did put in place. The terms of the contract, on the evidence from both the Defendant/Ancillary Claimant and the Ancillary Defendant and upon the agreed fact of the direct cause and injury to the Claimant, could

[22] But, see below for court's view on the inadequacy and effect of the contract for the provision of security services by the ancillary defendant that the ancillary claimant/defendant did enter into.

[23] Robinson (Appellant) v Chief Constable of West Yorkshire Police (Respondent) [2018] UKSC 4

not have ensured a safe place of work. Suffice it to say, it was the decision of the Defendant to enter into a contract bare of the sufficient safe guards that at the very least, according to the evidence of the key witnesses for both Defendants, would have increased and improved the safety of the environment – the hospital - over which it had the control, responsibility and a duty to secure as a safe place of work and indeed also for bona fide users and members of the public. I note further, that the fact that the Defendant entered into a contract for security services at all, reflects their assumption of a duty to protect the persons on the premises, not least of which would have been the employees. To the extent that liability of the Defendant is alleged as arising from an *omission*, then the circumstances described in this para above provide for the "*special circumstances*" set out in the authorities above ***(Robinson; Tsofaris***) that found a liability for an *omission*. This case thus attracts liability for an *omission* to provide a safe place of work. However, it appears to the court that this case is not one of a pure omission to act. Part of the Defendant's default or negligence if you will, is the entering into a contract – a *commission* - for the provision of security services that given the facts known to them at the time or ought reasonably to have been known to them did not, even when given a liberal interpretation, sufficiently provide for the adequate provision of systems and equipment that would reasonably ensure the safe place of work.

39. The Defendant has contended that the Claimant has failed to show that the *omission* and/or the *commission* caused the loss and damage to the Claimant. It is a good starting point to note the obvious, that no measures to provide a safe place of work are absolute. If one were to apply the "but for" test for instance, it begs the question; would the presence of armed security (as opposed to the 'baton' security that was provided for in the contract) have deterred the shooter or further, would a personal body search have detected the firearm? The answer to these questions, on the evidence is that it would likely have led to the avoidance of the shooting incidence. That the personal search of persons entering the compound from the public road in the first instance is impractical, is the submission of counsel from the bar table and not the evidence. In any event it was not sufficiently detailed even in argument, what exactly would have made that process impractical. It is for this reason the court raised during the closing addresses the apparent prevailing circumstances at the Trinidad Airport customs/immigration that process in some detail large amounts of people, a process visibly speeded up (and that would logically stand to reason) by the application of more personnel and scanners etc., at any one time. In any event as I stated

earlier it is not for the Claimant to provide the solution to the Defendant's dilemma and responsibility.

40. This is not a case of assault and battery for instance, where the principal offender is the shooter. There can be no argument that the direct source of the loss and injury is the bullet discharged by the unknown shooter. This instead is a case of Negligence; in the failure of an employer to provide the employee with a safe place of work. In this cause of action, a shooter is not necessarily a party. It is to the employer who has that particular duty and to whom we look for the defence, if any. To be clear, one can envisage many circumstances where the employer would not be liable in Negligence for the deliberate and/or unlawful actions of a third party (including a 3rd party shooter). This in the court's view is one such a circumstance.

41. The Defendant has sought to sue the security service provider in the ancillary claim. In this ancillary claim the Ancillary Claimant/Defendant has the burden of proof. The Ancillary Defendant is alleged to have **(i)** failed to adequately perform its duty to provide adequate security services under the contract and **(ii)** if so, to be obliged under the contract to indemnify the Defendant against the claimant's losses flowing from the Ancillary Defendant's failure to perform under the contract[24].

42. Not much more need be said about the ancillary claim I think. The duties of the Ancillary Defendant under the contract are set out. The Ancillary Defendant has not been shown to be deficient in its performance under the contract; it provided the requisite compliment of security; armed them with batons; did patrols and so on. More details of the Defendant/Ancillary Claimant's apparent satisfaction with the Ancillary Defendant's services are gleaned from the *quality assurance review* forms, the contract and the testimony of *Morris* and *Aberdeen*. Counsel for the Ancillary Claimant sought to dwell on the Ancillary Defendant's contractual obligations to provide recommendations for improving the security system. This is provided for in clause 3.18 of the contract and leaves the decision to do *anything about anything*, with the Ancillary Claimant in any event. Even on this point, the Ancillary Claimant has not proved the default. There is

[24] See the pleadings and the ancillary claimant's case as *put* in cross examination of Mr. Aberdeen, for the full scope of the duties and alleged breach thereof by the ancillary defendant.

documentary affirmation of the Ancillary Defendant's compliance with the requirements of the contract. Further still, both Mr. Morris of the Ancillary Claimant no less, and Mr. Aberdeen, have by their evidence, more particularly in cross examination, identified the Ancillary Defendant's compliance with the limited terms and scope of the services provided for under the contract. The cross examination on the specific services the contract provided for and what services were actually performed showed up the inadequacy of the contract more than anything else. Further, the perusal and proper construction of the said contract by the court also concludes its inadequacy to provide for the services that the employer would needed to have provided in order to discharge its duty to the employee. It was at all times the duty of the Defendant/ancillary claimant to enter into an arrangement that in the end provided for a safe place of work in relation to the Claimant.

43. The Ancillary Defendant unnecessarily and indefensibly raised the issue of the contract having expired before the date of the shooting incident and no renewed contract was signed or otherwise entered into. However, it was not alleged nor was it denied that the said same security services continued to be supplied up to the incident. I must have been so supplied on the basis of some agreement, which was undoubtedly an oral one with the terms of the earlier written agreement and all its clauses. There was a binding agreement and a contractual responsibility of the ancillary Defendant to indemnify the Ancillary Claimant in accordance with the prior contract terms. No evidence to the contrary has been led. The short disposition of this ancillary matter however, is that the Defendant has not proved the Ancillary Defendant to have failed to perform its end of the bargain. In these circumstances, the indemnity clause cannot be invoked. The ancillary claim is dismissed.

DISPOSAL

44. The Claimant has proved the existence of the duty of the Defendant to provide a safe place of work to protect against the very incident that resulted in her loss and injury. The Claimant has proved that the Defendant has breached that duty and in doing so caused the loss and damage she suffered. The Claimant has proved that she suffered consequential loss and damage and that she is entitled to damages for the loss and damage that resulted from the gunshot wound she sustained.

45. The Ancillary Claimant/Defendant has not proved the case against the Ancillary Defendant. The Ancillary Defendant performed its end of the contract for specified security services it had entered into and continued with the Ancillary Claimant. The fact that the Ancillary Claimant did not ensure adequate services were provided for in the contract in order for it to properly discharge its duty to the employee is not the fault or within the peculiar knowledge of the Ancillary Defendant. The Ancillary Defendant, having performed its obligations under the contract, the indemnity clause does not spring into effect. The Ancillary Defendant is entitled to the dismissal of the ancillary claim and Costs of that action.

46. For the reasons provided above **IT IS HEREBY ORDERED** that:

    i. Judgment for the Claimant against the Defendant/Ancillary Claimant in Negligence, with Damages, Interests and Costs;
    ii. The said Damages, Interest and Costs, unless otherwise agreed between the parties, to be assessed before a Master or Registrar respectively on a date to be fixed;

    iii. The Ancillary Claim is dismissed;

    iv. Judgment for the Ancillary Defendant against the Ancillary Claimant/Defendant on the said Ancillary Claim with Costs on the Prescribed Cost Scale unless otherwise agreed between the ancillary parties;

DAVID C. HARRIS
HIGH COURT JUDGE
APRIL 17, 2019