[2022] JMSC Civ 248

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV04788

BETWEEN	**ANNMARIE ALEXANDER**	**CLAIMANT / APPLICANT**
AND	**DENTON LEWIS**	**1ST DEFENDANT / 1ST RESPONDENT**
AND	**SIMONE MCGOWAN**	**2ND DEFENDANT / 2ND RESPONDENT**

IN CHAMBERS

Mr Vaughn Bignall instructed by Bignall Law for the Claimant/Applicant

Miss Tashauna Grannum for the Defendants/Respondents

Heard: October 20, 2022, and November 25, 2022

Civil Procedure – Summary Judgment – Claim in negligence arising from rear-end motor vehicle collision – Agony of the Moment Defence – Part 15 of the Civil Procedure Rules

M. JACKSON, J (AG)

THE APPLICATION

[1] This is a notice of application for court orders brought by the Applicant, Miss Annmarie Alexander, for summary judgment to be entered in the claim brought by her against the Defendants/Respondents. The application is made pursuant to Part 15 of the Supreme Court of Jamaica Civil Procedure Rules, 2002 ("CPR").

[2] The grounds relied on in support of the application were as follows:

a. Pursuant to rule 15.2(b), the Respondent's defence has no real prospect of successfully defending the issue of liability;

b. Pursuant to Rule 16.4(1) and 16.4(2)(b), the court is empowered to give directions for the trial of an issue of quantum on the hearing of an application for summary judgment;

c. Pursuant to rule 26.3(1)(b) and (c), the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case is an abuse of process of the court and is likely to obstruct the just disposal of the proceedings; and the statement of case discloses no reasonable grounds for defending the claim; and

d. Pursuant to rule 1.1, and in particular, rules 1.1(2) (b) and (d), the granting of the orders sought will enable the court to proceed with the claim fairly and expeditiously.

THE BACKGROUND

[3] The Applicant's evidence in support of the application is that on the 26th day of April 2019, she was a passenger in a motor vehicle travelling along a slip road leading off Red Hills Road and heading towards Washington Boulevard (a major road) in the parish of Saint Andrew when the 2nd Respondent, who was driving the 1st Respondent's motor car, collided in the rear of the motor vehicle she was travelling causing her significant injuries.

[4] The Applicant is contending that the 1st Respondent was vicariously liable for the acts of the 2nd Respondent, as he was the owner of the motor car being driven by the 2nd Defendant and the 2nd Respondent was his servant and/or agent or permitted driver.

[5] The Respondents have denied liability for the incident. The substratum of the 1st Respondent's defence is captured by his pleadings in which he averred that he loaned his vehicle to the 2nd Respondent to carry out her own personal errands which were wholly unrelated to him.

[6] The 2nd Respondent agrees that the motor car was loaned to her by the 1st Respondent to carry out her personal errands. She further contends that the collision occurred because the motor vehicle in which the Applicant was travelling stopped suddenly and, in the agony of the moment, she collided in the rear of that motor vehicle.

[7] Having been served with the Respondents' Defence, the Applicant contends that the Defendants have no real prospect of successfully defending the claim and, as such, summary judgment should be entered against them.

THE GOVERNING LAW

[8] The applicable law relevant to these proceedings is fully established under Part 15 of the CPR dealing with summary judgments. Specifically, rule 15.2 of the CPR empowers the court to give summary judgment on a claim or on a particular issue if it is considered that the claimant or the defendant has no real prospect of succeeding on, or successfully defending, the claim or the issue.

[9] Rule 15.6 of the CPR also outlines the powers of the court in respect of an application for summary judgment. This rule provides that:

> *"15.6 (1) On hearing an application for summary judgment the court may -*
>
> *(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
>
> *(b) strike out or dismiss the claim in whole or in part;*
>
> *(c) dismiss the application*
>
> *(d) make a conditional order: or*

(e) make such other order as may seem fit.

(2) Where summary judgment is given on a claim, the court may stay execution of that judgment until after the trial of any ancillary claim made by the defendant against whom summary judgment is given.

(3) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference."

[10] It is beyond dispute that this provision allows a judge to exercise his or her discretion to resolve a claim or an issue within a claim at a very early stage of the proceedings, without the need to embark on a trial, where it is clear that there is no reasonable prospect of success in pursuing or defending the claim or the issue. This, of course, is in keeping with the overriding objective under Part 1 of the CPR. This has been repeatedly stated in a number of seminal cases within the jurisdiction. Most recently, Lord Briggs in **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12 at paragraphs 16 and 17, helpfully articulated this in these terms:

> ***"****16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial.* ***Those parts of the overriding objective (set out in Part 1), which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.***
>
> *17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense". (My emphasis)*

[11] Also, Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 94, aptly stated that:

> *"It is important that a judge in appropriate cases should make use of the power contained in Part 24 [which is similar to rule 15.2 of the CPR]. In doing so he or she gives effect to the overriding objective contained in Part 1. It saves expense; it achieves expedition; it avoids the court resources being used upon cases where this serves no purpose, and I would add generally that it is in the interest of justice.* ***If a Claimant has a case that is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position.***

> ***Likewise, if a claim is bound to succeed, a claimant should know as soon as possible."*** *(My emphasis)*

[12] His lordship further went on, at page 95, to state that:

> *"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial… the proper disposal of an issue under Part 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases where there is no real prospect of success either way to be disposed of summarily."*

[13] With regard to the meaning of the words "no real prospect of succeeding", Lord Woolf MR, on page 92, stated that:

> ***"****The words 'no real prospect of success of succeeding' do not need any amplification, they speak for themselves.* ***The word 'real' distinguishes fanciful prospects of success or… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*** *(My emphasis)*

[14] **In Three Rivers District Council v Governor and Company of the Bank of England** [2001] UKHL 16, Lord Hobhouse provided much useful guidance to a judge in the approach that must be adopted in dealing with the applicable test of a reasonable prospect of success. At paragraph [158], he stated:

> *"The important words are 'no real prospect of succeeding'. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospect of success of the relevant party. If he concludes that there is 'no real prospect', he may decide the case accordingly."*

[15] In **ASE Metal NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37, the Court of Appeal stated that:

> *"[14] The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant…. The applicant must assert that he believes that that [sic] the respondent's case has no real prospect of success. In* ***ED & F Man Liquid Products Ltd v Patel and Another*** *[2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:*
>
> > *'...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success...'*

> *[15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of **ED & F Man**). The defendant must show that he has 'a 'realistic' as opposed to a 'fanciful' prospect of success'."*

[16] Also, in **S v Gloucestershire County Council; L v Tower Hamlets London Borough Council and another** [2000] 3 All ER 346, it was held that an application for summary judgment would not succeed unless the court was satisfied that:

(i) It had before it all substantial facts relevant to the claimant's case which are reasonably capable of being before the court;

(ii) those facts are undisputed or there is no real prospect of successfully disputing them; and

(iii) there is no real prospect of oral evidence affecting the court's assessment of the facts.

[17] The Learned author Stuart Sime, in the book, **A Practical Approach to Civil Procedure** (23rd Edition), at paragraph 24.19 stated that on an application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting one or more of the following:

(a) a substantive defence, for example, *volenti nonfit injuria*, frustration, illegality etc;

(b) a point of law destroying the claimant's cause of action; or

(c) a denial of the facts supporting the claimant's cause of action.

[18] From the foregoing, I distilled these few principles as being pivotal to the resolution of this matter:

a. A claimant may apply for summary judgment on a claim or on a particular issue in cases the defence is obviously and patently weak

and there is no real prospect of succeeding on, or successfully defending, the claim or the issue.

b. The party making the application for summary judgment has the overall burden of proving that he is entitled to summary judgment and thus must establish that there are grounds for his belief that the respondent has no real prospect of success.

c. A defendant seeking to demonstrate that he has a real prospect of success is required to show that he has more than a mere arguable defence.

[19] I will bear these in mind and at the same time, stay clear of any analysis or conduct that will cause me to denigrate into a mini-trial.

THE ISSUES

[20] The primary issues for consideration in these proceedings are twofold:

(a) Whether the 1st Respondent has a real prospect of successfully defending the claim against him.

(b) Whether the 2nd Respondent has a real prospect of successfully defending the claim against her.

(a) Whether the 1st Respondent has a real prospect of successfully defending the claim against him

[21] The Applicant's case against the 1st Respondent is rather straightforward. She is contending that he is vicariously liable for the acts of the 2nd Respondent, as the 2nd Respondent was his servant and or agent at the material time of the accident.

[22] Both Respondents have refuted that assertion. The core of their defence is that at the time when the accident occurred, the 2nd Defendant was using the 1st Respondent's car exclusively for her own personal business and to the exclusion of the 1st Defendant.

[23] The assertion by both Respondents that at the material time the motor car was being used by the 2nd Respondent purely for her personal use and business, has put into issue whether the 1st Respondent may be held vicariously liable in the event that the 2nd Respondent is found to have acted negligently.

[24] The law in relation to vicarious liability for any proven negligence is well-established and settled in this jurisdiction (see **Lena Hamilton v Ryan Miller and others** [2016] JMCA Civ 59, **Avis Rent-a-Car Ltd v Maitland** (1980) 32 WIR 294, and **Mattheson v Go Soltau and WT Soltau** (1933) 1 JLR 72).

[25] Mr Bignall, on behalf of the Applicant, has contended that the Applicant's case is not on all fours with the principles taken from **Avis Rent-a-Car Ltd v Maitland** relied on by the Respondents. He argued that the Applicant's claim is not merely that the 2nd Respondent is the servant/agent of the 1st Defendant. Rather, as is clearly stated in the particulars of claim, the Applicant is also asserting that the 1st Respondent permitted/authorized the use of his motor car by the 2nd Respondent at the material time of the accident. In this regard, he relied on **Samuel Rose v Galaxy Leisure and Tours Ltd and Franklyn Bosheuvel** [2021] JMSC Civ. 93.

[26] In the oft-cited case of **Morgans v Launchbury** [1973] AC 127, a decision from the House of Lords, Lord Wilberforce, at page 135, stated that:

> *"…in **order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty**… Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but **it has never been held that mere permission is enough to establish vicarious liability**." (My emphasis)*

[27] This principle was relied on by our Court of Appeal in the case of **Lena Hamilton v Ryan Miller and others**, where, at paragraph [34], it was stated by McDonald-Bishop JA:

> *"[34] …the law is clear that permission, by itself and without more, does not give rise to an agency, especially in circumstances where it is accepted that there was no employment relationship."*

[28] Therefore, despite there being no dispute that the 1st Respondent had permitted the 2nd Respondent to use his motor car, I find that there is a triable issue on the facts as to whether the 2nd Respondent was using the 1st Respondent's car exclusively for her own personal business and to the exclusion of the 1st Respondent. The court has not been placed in any position to determine this issue summarily.

[29] Though the Privy Council in **Sagicor Bank Jamaica Limited v Taylor-Wright**, at paragraph 20, made it clear that "the court is not, on a summary judgment application, confined to the parties' statements of case" as rule 15.5 of the CPR makes provision for the parties to file affidavit evidence, the Claimant has not provided any such evidence on affidavit to rebut the account of the Respondents as to their relationship regarding the use of the motor car.

[30] This court is, therefore, entirely in agreement with the submission of Miss Grannum that the law in relation to vicarious liability is a two-pronged test. While there is clear evidence that the 2nd Respondent had permission to drive the 1st Respondent's car, there is no evidence placed before this court to show that the 2nd Respondent was driving the car wholly or partly for the benefit of the 1st Respondent.

[31] On the face of the pleadings by the Respondents, this court, without any evidence to the contrary, cannot grant the application for summary judgment as prayed in respect of the 1st Respondent on the issue of vicarious liability. This matter has to be ventilated through a trial.

(b) Whether the 2nd Defendant has a real prospect of successfully defending the claim against her

[32] Lord Briggs at paragraph 33 of **Sagicor Bank Jamaica Limited v Taylor-Wright** opined that: "[a] defendant seeking to resist summary judgment must put her cards upon the table as to the available defences, rather than keep them up her sleeve…". Against this principle, I consider it necessary at this juncture to provide a detailed account of the defence advanced by the 2nd Defendant.

[33] The 2nd Respondent has pleaded the following:

> *"The 2nd Defendant says the collision occurred in circumstances where-*
>
> *She was driving the Honda along the Red Hills Road towards the Boulevard; upon reaching the vicinity of the slip road which leads onto the Boulevard, she noticed the Toyota ahead of her proceeding onto the Boulevard; suddenly and without warning, the Toyota stopped, and this dilemma caused the Honda in the agony of the moment to collide into the rear of the Toyota.*
>
> *This dilemma and the collision were wholly caused or contributed to by the driver of the Toyota…"*

[34] By this defence, the 2nd Respondent is contending two things: (1) that she lost control because the Applicant's vehicle stopped suddenly in front of her; and (2) that in the "agony of the moment" she collided in the rear of the Applicant's vehicle.

[35] Mr Bignall has argued that this defence does not evince a reasonable prospect of success. He rested his submissions on two major planks. Firstly, he contended that the defence lacked substance and critical details regarding how the accident occurred. He further contended that the 2nd Respondent merely made a general statement about the collision. He highlighted that she failed to provide a detailed account of the steps, if any, taken by her to avoid a collision or mitigate the impact of the collision.

[36] Secondly, he submitted that 2nd Respondent had breached her duty of care to the Applicant which arose under the proximity ingredient in proving negligence. In this regard, he resorted to well-established principles that all road users owe a duty of care to the other road users and drivers of motor vehicles have a duty by statute and at common law to exercise reasonable care while operating their vehicles on the roadway. See **Le Lievre v Gould** [1893] 1 QB 491**, Granger v Murphy** (unreported), Court of Appeal of The Bahamas, Civil Appeal No. 11/1974, judgment delivered June 25, 1975, and **Hughes v Lord** [1963] AC 837.

[37] Counsel also submitted that a driver must maintain a proper distance whilst driving on the road to provide for the exigencies on the roadway. In this regard,

he relied on **Brown and Lynn v Western Scottish Motor Traction Company Limited** [1945] SC 31, where it was held that:

> *"The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors- their speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up, and many other things. The following driver is, in my view, bound, so far as reasonably possible, to take up such a position and to drive in such a fashion, as will enable him to deal successfully with all the traffic exigencies reasonably to be anticipated: but whether he has fulfilled this duty must in every case be a question of fact, just as it is a question of fact whether, on any emergency disclosing itself, the following driver acted with the alertness, skill and judgment reasonably to be expected in the circumstances."*

[38] In her submission on behalf of the 2nd Respondent, Miss Grannum has advanced that in order to prove that the 2nd Respondent is liable, the Claimant needs to prove to the Court, on a balance of probabilities, that the 2nd Respondent breached her duty of care owed to the Applicant.

[39] Miss Grannum further submitted that the 2nd Respondent's defence is not a mere denial and has asked the court to have regard to the factors that a court has to consider when deciding whether the 2nd Respondent has met the threshold of establishing that she has a real prospect of success in defending the claim against her.

[40] Counsel further argued that it matters not whether the defence is bound to be dismissed at trial and that given the factual circumstances of this case, the matter should be placed before the trial court for the court to assess the credibility and reliability of the witnesses' evidence. In the round, she argued that to do otherwise would be engaging in a mini-trial.

[41] This court is aware of the well-established principle that a motorist owes a duty of care to other road users whilst traversing the road and not to cause any injuries or damage to other road users. Additionally, paragraph 7(c) of Part 2 of the Road Code gives the following directives:

> *"Do not travel too closely to the vehicle in front of you. Always leave enough space between you and the vehicle in front so that you can pull up safely if it*

slows down or stops. A good rule of thumb in good road conditions is to allow at least one vehicle length for each 10 m.p.h. you are travelling."

[42] The 2nd Respondent has put forward a defence of "agony of the moment*".* In the Australian case of **Leishman v Thomas** (1957) 75 WN (NSW) 173, Street CJ considered the principle of the "agony of the moment" in answer to a claim of negligent conduct. At page 175, he stated that:

> *"**This so-called principle of acting in the "agony of the moment" is merely an application of the ordinary rule for ascertaining whether or not the conduct of any party has been negligent by looking to all the surrounding circumstances and ascertaining whether the defendant behaved in such a fashion as a reasonably prudent man, in the light of those circumstances, would not have behaved.** It is a circumstance, and one possibly of great importance, that the defendant, charged with negligence, may have been forced to act in a sudden crisis or emergency, unexpected and unheralded, without that opportunity for calm reflection which makes it easy after the event to suggest that it would have been wiser if he had done something else. **The jury are required to judge his conduct in the light of the happenings of the moment, and a man is not to be charged with negligence if he, not being the creator of the crisis or emergency which has arisen, finds himself faced with a situation which requires immediate action of some sort and if, in the so-called "agony of the moment", he makes an error of judgment and takes a step which wiser counsels and more careful thought would have suggested was unwise**." (My emphasis)*

[43] Further, in the recent Australian case of **Reardon v Seselja** [2021] ACTCA 4, the Australian Capital Territory Court of Appeal in considering the "agony of the moment" defence stated that:

> *"15. … in determining whether or not a party has acted in breach of their duty of care, the court must have regard to all the circumstances including an emergency or threat confronting that party."*

[44] After assessing the 2nd Respondent's defence, I find that it is lacking in detail. The Respondent has raised a defence of "agony of the moment" but has failed to outline in her defence any circumstance to which this court could find that she was confronted with a crisis or emergency immediately before the accident for which she was not the creator.

[45] Stuart Sime in his book, **A Practical Approach to Civil Procedure** (23rd Edition) at paragraph 14.30, states the following:

> *"Any denial of an allegation in the particulars of claim must be backed up by reasons in the defence. A defendant who intends to put forward a different version of events from the one advanced by the claimant has to state the alternative version in the defence (r 16.5(2)). A denial must go to the root of the allegation in the particulars of claim, and must not be evasive.*
>
> *Any affirmative case and any defence must be expressly set out. Each defence should be set out in a separate paragraph. The defence must specifically set out any matter, such as performance… which is a defence to the claim or which might take the claimant by surprise or which raises issues of facts not included in the particulars of claim. Failing to set out such matters may debar the defendant from raising them at trial (Shell Chemicals UK Ltd v Vinamul Ltd (1991) The Times. 7 March 1991, CA)"*

[46] The circumstance which the 2nd Defendant has averred that gave rise to the "agony of the moment" is that the Applicant stopped suddenly and without warning. She has pleaded nothing else that speaks to circumstances creating an "agony of the moment". It is a worthy reminder that rule 10.5(1) of the CPR places a duty on a defendant to set out all the facts on which he relies to dispute the claim. In the court's view, there are a plethora of questions that the 2nd Respondent's defence does not avail any useful answers, questions such as:

(i) What was the dilemma faced by the 2nd Respondent?

(ii) What was the crisis or emergency that caused her to be unable to avoid the collision?

(iii) What was the distance between the motor vehicle she was driving and the Applicant's motor car?

(iv) What speed was she travelling at when she saw that the Applicant's motor car had stopped?

(v) What steps, if any, did she take to avoid the collision or to mitigate the impact of the collision?

[47] In the absence of evidence with respect to these critical questions, it would not be in keeping with the overriding objective for this matter to proceed to a trial. I see nothing to suggest that the 2nd Respondent has a real prospect of successfully defending the claim by relying on the defence of "agony of the moment". The circumstances giving rise to the accident, as pleaded by her, do not support such a defence. There is nothing raised by the 2nd Respondent in her Defence that could successfully challenge the Applicant's averment that the accident was a result of the 2nd Respondent's negligence.

[48] In arriving at my determination of this application, I am guided by the authority of **National Commercial Bank Jamaica Ltd v Owen Campbell and Toushane Green** [2014] JMCA Civ. 19, where Brooks JA (as he then was) opined that:

> *"[73] In considering applications for summary judgment, the judicial officer is not required to conduct a mini-trial but where the case of one party or another is untenable that party should not be allowed to go to trial on that case. There is authority for the principle that parties to litigation must know at the earliest opportunity whether their cases have a real prospect of success. The judicial officer considering the application exercises a discretion whether or not to grant the application…"*

[49] Equally, it was held in **Sharma v Jay** [2003] All ER (D) 284 that:

> *"16. …it is clear that on [applications for summary judgment] the judge should not conduct a mini-trial. On the other hand it is open to a judge at an interlocutory stage to make findings of fact adverse to the party against whom summary judgment is sought if he or she comes to a conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly find such facts in favour of that party."*

[50] Having considered the foregoing principles, I cannot accept the submissions of Miss Grannum that the 2nd Respondent has a real prospect of successfully defending the claim.

Disposition

[51] In light of the foregoing, this court in the final disposition of the application makes the following orders:

1. The notice of application for court orders for summary judgment against the 1st Defendant is refused. Costs of the application to the 1st Defendant to be taxed if not agreed.

2. The notice of application for court orders for summary judgment against the 2nd Defendant is granted. Costs of the application to the Claimant to be taxed if not agreed.

3. Any Assessment of Damages against the 2nd Defendant is to await the determination of the question of liability in respect of the 1st Defendant.

4. Leave to appeal is granted.

5. The Claimant's attorney–at–law is to prepare, file and serve this order.