[2020] JMSC Civ 182

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 01045

BETWEEN	**MIRIAM BARRETT**	**CLAIMANT**
AND	**FREDRICK TRUMAN**	**DEFENDANT**

IN CHAMBERS

Ewan Thompson for the Applicant

Everton S. Bird for the Respondent

Heard: June 8, 14, 26 and 28; July 7, 21, 28; August 3, 2017 and August 31, 2020.

Application Summary Judgment – Rule 15.2 CPR 2002 - Effect of plea of guilty in criminal case - Effect of Request for and or refusal to give Information to party – Rule 34 CPR 2002 - Test for Summary Judgment – Defence inevitable accident.

DAYE, J.

[1] On the 30th August, 2016 the claimant filed an application for court orders. They are as follows:

(1) That the court do strike out the Defence of the Defendant on the grounds that it disclose no reasonable grounds for defending the claim and is an abuse of the process of the court.

(2) That the court order summary judgment on the claim to the claimant.

(3) That an order be made that the matter should proceed to an assessment of damages on a date to be fixed by the Registrar, or on such date that the court can conveniently fix.

(4) Such further and other relief as This Honourable Court deems fit.

(5) Costs to the applicant to be agreed or tax

[2] Rule 15.2 of CPR, 2002 provides for the grounds for summary judgment:

> *"The court may give summary judgment on the claim or on a particular issue if it considers that –*
>
> *a) The claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *b) The defendant has no real prospect of successfully defending the claim or the issue."*

[3] Then under Rule 26.3(1) the court is given power to strike out a claim as follows:

> *"… the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *(a)*
>
> *(b) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim; or*
>
> *(d)*

There is some similarity between R. 15.2 and 26.3 though they are not exactly the same. It appears that an application for an order to strike out and an order for summary judgment when filed together are alternative applications. In this application for summary judgment the applicant relies on R.15.2(b) that the defendant has no real prospect of successfully defending the claim. This call for

an examination of the **claim** and the **particulars of claim** and the **defence** in the pleadings.

Pleadings

[4] On the 28th February, 2014 the claimant issued a **Claim Form** to recover damages and consequential loss. She alleged that on the 26th August, 2012 at about 1:45 a.m. she was a pedestrian walking along the side of Lacovia Main Road, in the parish of St. Elizabeth when she was hit by a Nissan Sunny motor car driven, by the defendant, negligently in the same direction she was walking. She alleged further that as a result of this impact she suffered personal injuries, loss and damage. Therefore, she claims:

(i) General Damages

(ii) Special Damages

(iii) Costs and Attorneys-at-Law costs

(iv) Interest on such damage

[5] In her **Particulars of Claim** filed on the same date, 28th February, 2014 she supplied the particulars hereunder:

PARTICULARS OF NEGLIGENCE OF THE DEFENDANT

(a) Failed to keep a proper look out.

(b) Driving too fast in all the circumstances

(c) Failed to brake, swerve or avoid colliding with the claimant

(d) Driving without due care and attention.

(e) Failed to have regard for the claimant's presence on the side of the road

The claimant relies on **res ipsa loquitur** (the thing speak for itself).

PARTICILARS OF INJURIES OF CLAIMANT

a) Blunt trauma to right lower limb secondary to motor vehicle accident.

b) strained anterior cruciate ligament (ACL).

c) Torn medial collateral ligament (MCL) with evidence of healing.

d) Medial meniscal injury.

TREATMENT ADMINISTERED

1. Analgesics.

2. Anti-inflammatory medication for pain and inflammation.

3. Physiotherapy.

DISABILITY/ IMPAIRMENT ARISING FROM ACCIDENT

(a) Twenty two percent (22%) impairment of right knee.

(b) Nine (9%) whole person impairment

(c) Increased rate of progression of her degenerative joint disease as a result of her injuries.

[6] On the 4th April, 2014 the defendant filed acknowledgement of service of claim form and denied therein any admission of the whole claim or any part of the claim. The defendant on the 9th May,2014 filed a Defence.

Defence

[7] The defendant denied the claimant's particulars of negligence (para 4). The defendant denied the Particulars of injuries and treatment of the claimant (para 5 and 6). He contends the claimant did not show any sign of injuries when he saw her, at her usual place of vending right after the accident. He challenged the

medical evidence of her injuries and a medical record from the Black River Hospital (BRH) about the claimant's injury.

[8] He also denied the particulars of the Claimant's Disability/Impairment (para 7 and 8).

[9] He made no admission that he pleaded guilty to Careless Driving in the Santa Cruz Traffic Court to the negligence alleged in the claim (para 9). He then raises the defence of inevitable accident. His account of the accident is:

> *"9. That the Claimant was walking alongside a male person on a bicycle when the said male person suddenly swerved to the right in the path of the defendant's motor vehicle. The defendant then applied the brakes of his motor vehicle while simultaneously swerving to the left to avoid hitting both the rider of the bicycle and his travelling companion."*

The Issue

[10] The defence of inevitable accident is a defence open to a defendant in an action for negligence. The question is whether the defendant is permitted to put forward this defence in the face of a plea of guilty to driving without due care and attention in an accident in which the claimant was the complainant.

[11] This defence as pleaded accepts by reasonable implication that the claimant was present on the side of Lacovia Main Road on the 26th August, 2012 and the motor vehicle the defendant was driving came into contact with the claimant. In other words, there was one accident on the day in question that the defendant and claimant were involved. If the defendant has pleaded guilty to careless driving in these circumstances can he still maintain the defence of inevitable accident?

[12] Another issue was raised by the defendant at the hearing of the application for summary judgment that the application should not proceed as the claimant refused to answer the defendant written request for information, served on the 16th. December,2016, within a reasonable time about medical proof of injury of the complainant from the Black River Hospital. In fact, the defendant adjusted submission to the ground that the answer to his request was served on him late,

only two days before the hearing. He actually filed an amended Notice of Application for Court Orders on 26th June 2017. This request for information was based on Rule 34 of the CPR 2002. Also the defendant filed a Notice of Application for Court Orders on the 14th April 2017, to be heard with the application for summary judgment. for orders that the court summon the doctor and medical person responsible for the medical records of the Black River Hospital to attend the hearing to answer about the alleged injury and treatment of the complainant on the 26th August 2012. Counsel further asked for orders to strike out paras 5, 6, 7 and 8 of the claimant's Particulars of Claim dealing with the injury and treatment and disability and special damages of the claimant.

[13] It is necessary to address this issue first as some preliminary points arises. Rule 34 allows a party to an action to serve a written request for information. If the party to whom the request is made refuse to supply the information the requesting party may apply to the court for an order to compel the other party to supply the information. The court has a discretion in the interest of a fair hearing of the issues raised to compel the receiving party to supply the information. The power of the court does not extend under this rule to striking out a claim or particulars of claim. At a summary judgment hearing the court is not permitted to engage in mini trial of disputed facts. The application for court orders to secure the attendance of the doctor from the Black River Hospital relates to the credibility of the claimant about her alleged injury and treatment arising from the accident in question. This fact in issue is relevant but has to deal with damages and quantum of damages if that stage is reached. Such an issue is not to be merged with an application for summary judgment. In any event Rule 34 does not give the court power to grant the orders requested by the defendant. The case of **Reiss v. Woolf** [1952 R. No. 1648] does not assist the defendant. It deals with the striking out of a defence for failure to supply further and better particulars within a specified time under R.S.C., order 19, r. 7 the former U.K. rules of procedure. This is not applicable to the power of the court to make an order where there is refusal to answer a request for information. But as indicated there was an answer to the request though it was late

and the court duly granted the defendant an adjournment to take any necessary instructions from his client.

Grounds of Application Summary Judgment

[14] I return to this application The claimant deposed in her affidavit (para 3) in support of the application that she:

> *"verily believe that the Defendant's plea of guilty to Careless driving in the Traffic Court, arising from the same collision, is an admission of negligence in the driving of the motor car, that collided with me and the Defendant has no real prospect of successfully defending the claim that I filed against him for negligence."*

The grounds of the application are substantially embodied in para 3 of this affidavit.

The test for summary judgment

[15] The words "no real prospect of succeeding" points to the test of summary judgment. Lord Woolf MR in **Swain v. Hillman** [2001] 1 All E.R. 91 stated the words quoted above speak for themselves. The word "real" distinguishes "fanciful" prospect of success They direct the court, he said, to the need to see whether there is a "realistic" as oppose to a "fanciful" prospect of success. In an application to set aside a default judgment where the test "real prospect of success" was considered in the Court of Appeal of Jamaica by Harrison, J.A. in **Gordon Stewart v. Andrew Reid Bay Rock Ltd. and Merrick (Herman) Samuels** SCCA, 20/2005 at p. 6-7, the learned judge said that the prime test required that the learned judge do an assessment of the party's case to determine its probable ultimate success or failure.

Applicant's Submissions

[16] The claimant submitted in a written submission of December 14, 2014 that:

(1) The defendant's plea of guilty to careless driving in the Traffic Court is an admission of negligence.

(2) A plea of guilty is evidence of confession and this is admissible in subsequent civil proceedings. **Carlson Jones v. Bevin Montaque** [2012] JMCA Civ. 28 and **Dummer v. Brown and another** (1953) 1 All. E. R. are authorities the claimant rest on.

(3) The defendant's denial of negligence and the plea of inevitable accident is a collateral attack on his guilty plea in the Traffic Court and is an abuse of the process of the court. **Hunter v. Chief Constable of West Midlands and Anor** (1981) 3 All E.R.

(4) A witness who was present in court and heard the defendant's guilty plea can give evidence of this, **Hollington v. Henthorn and Company Limited** (1943) 2All E. R. 35 at 42.

(5) The Defendant who pleads guilty to careless driving in the Traffic Court should not be permitted in a civil court to say he is not negligent where the question in issue is the same as that he admitted to in the Traffic Court. In other words, the defendant should be estopped.

(6) For the reasons advanced above the claimant contend the defendant has no prospect of successfully defending the claim.

The Defendant's Submission

[17] The defendant filed three written submissions in response to the claimant's submission:

"On the 16th December, 2016 the first submission was filed. It consisted of six pages. The defendant submitted:

1. The basis on which the defence was struck out in **Dummer v. Brown** is that the defence did not disclose a reasonable ground of defending the claim was not applicable to the defendant plea because in that case the defence was a bare denial and the defendant did not respond to the

claimant's affidavit. In the present defendant's case his defence was more than a bare denial and he responded to the affidavit. There is merit to that extent in that submission. The facts of the case are that the deceased widow brought a claim under The Fatal Accident Act as administratrix of her late husband estate. He was killed in a motor vehicle accident when he was a passenger in a vehicle which was owned by the defendant but the other defendant was the driver. But as I commented this application is a summary judgment and the application to strike out is an alternative application

2. The defence of inevitable accident is not a collateral attack on the plea of guilty to the offence of careless driving in the Traffic Court. **Hunter v. Chief Constable of West Midland and Anor.** did not apply to this defendant on the facts of the case the claimant who was convicted of murder on a confession held to be voluntary and admissible, brought a civil claim seeking a remedy that the prison authorities had extracted an involuntary confession from him. Whereas this present defendant was not bringing any claim. He was presenting a defence to a claim. There is also merit in the distinction identified. However, one must consider what is the effect the civil defence of inevitable accident have on the plea of guilty to careless driving arising from the same facts."

[18] In **D and F Man Liquid Products Ltd. v, Patel and Anor.,** [200] EWCA Civ. 472 was an application to set aside a default judgment under provisions similar to R. 13.3(1) of CPR 2002, as amended where a defendant who is seeking to have the court exercise its discretion in his favour should show that he has a defence that has a real prospect of successfully defending the claim. This test is similar to the test in R.15 .2 CPR 2002 for summary judgment. The court held where there is a claim or judgment for money and issues of fact are raised by a defendant for the first time which, standing alone would demonstrate a triable issue, if it is apparent with full knowledge of the facts raised, the defendant has previously admitted the debt and/or made payment on account of it, a judge would be justified in taking

such acknowledgement into account as an indication of the likely substance of this issue raised and the ultimate success of the defence belatedly advanced. This approach is applicable to the present defendant acknowledgment that his motor vehicle made contact with the claimant and his later assertion that it made no contact with the claimant. The later assertion has no substance and severely weaken his chance of successfully defending this claim. (see Brooks, J. A. discussion and application of **ED & F Man** in **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ. 37).

[19] In **Swain v. Hillman** the court observed that in some cases there is no substance in factual assertion made particularly if contradicted by contemporary documents. The court said that issues that are dependent on those factual assertions may be susceptible of disposal at an early stage. In the case of this defendant there is an internal inconsistency with his pleaded defence and later assertion of the facts of how the accident took place. This inconsistency is irreconcilable and will damage his chance of successfully defending this claim and resisting summary judgment.

[20] There is a lacuna in the evidence in proof of any injury to the claimant from this accident as there is no immediate post-accident medical report of her injuries or the report was deficient and the orthopaedic surgeon medical report. This is a weakness in the claimant's case. But it is not fatal to the case nor does it mean the defendant can successfully defend this claim in light of the admissions and other inconsistencies that affect his defence.

[21] The issues of the plea of guilty to careless driving are different from the claim that he negligently injured the claimant in the accident he was involved in on the 26th August 2012. This submission is affected also by the inconsistent assertion of facts relevant to the issue of driving without due care and attention. The defendant cannot on one hand plead by implication of the defence of inevitable accident that the motor vehicle he was driving come into contact with the claimant which he knows well and other hand assert there was no contact between his motor vehicle

and the claimant at all on the 26th August 2012. If such a defence is maintained it could not survive a trial.

[22] Having filed the firs submissions referred to the defendant on the January 6, 2017 filed a supplemental submission of six pages. These submissions are a repetition of the first one. So too are the further submissions filed on July 21, 2017. The additional submissions responded to the cases cited by the claimant. It is not necessary for the court to address them again seriatim. Suffice to say that the law is now established that a plea of guilty to a traffic offence such as Careless Driving is an admission of negligence and can be relied on in a civil action. The relevant authorised and the principle therein are summarised in next paragraph.

[23] The court in the case law of **Dummer v Brown and Anor** [1953] 1 All ER 1158 found that the 2nd Defendant's plea of guilty to the offence of dangerous driving which resulted in the death of the deceased, included within it an admission of negligence. The court held that damages should be assessed by a judge of High Court in favour of the Plaintiff.

[24] In **Virgo v Nam** Claim No. 2008 HCV 00201 Evan J. Brown, J. (Ag.) posited that:

> *"An admission anywhere is good everywhere… If **Hollington v. Hewthorn** laid down any rule, it is this, in all its untruncated glory, whereas a conviction arising from a verdict of guilty in a criminal trial is inadmissible, in a subsequent civil trial, a conviction based on a plea of guilty or any other admission during the course of the criminal trial is admissible."*

[25] In the case of **Jones v Montague [2012]** JMCA Civ 28, the Appellant and the Respondent were involved in a fight over a bicycle. Both parties were injured in the altercation; however, the Appellant initiated a claim for damages at the Saint Elizabeth Parish Court for the said injuries and the Respondent counter claimed. The Parish Court Judge awarded damages to the Respondent.

[26] It is to be noted that prior to the civil action for damages both parties were prosecuted in the Saint Elizabeth Children's Court. Further, the Respondent was charged with unlawful wounding and he subsequently pleaded guilty.

[27] In **Jones v Montague,** Brooks JA postulated that:

> *"Where there is a plea of guilty, evidence of that confession, is admissible in subsequent civil proceedings … the learned Resident Magistrate was wrong in finding that the fact that Mr. Montague had pleaded guilty in the Children's Court, was inadmissible in evidence before her."*

[28] The Court quashed the judgement of the Resident Magistrate (now known as Parish Court Judge) and awarded damages to the Appellant.

The current law regarding the defence of Inevitable Accident:

[29] Inevitable Accident was defined by the authors of Winfield and Jolowicz on Tort, Twelfth Edition, at page 717, adopts Sir Fredrick Pollocks definition, in Torts, 15 Edn. 97, that it is an accident, "not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take."

[30] In **Rumbold v London County Council** (1909) 25 TlR 541, 53 SOL LO. 502, CA., it was established that in a case of negligence the defence of inevitable accident need not be specifically pleaded.

[31] In the case of **Ritchie's Car Hire Ltd. v Bailey** (1958) 108 LJ 348**,** a driver of a motor vehicle who had been sued, advanced the defence that his collision with a kerbside tree had occurred as a result of the fact that a cat had suddenly and unforeseeably darted out in the road in front of him from his 3 near side, and he had swerved in an effort to avoid the said collision. The defence of inevitable accident was successful.

[32] The case of ***Lloyd Wisdom v Janet Johnson*** Suit No: C.L. 1996/W – 240 jud. Del. June 11, 2002, established that for the defence to succeed, the Defendant

has to prove that something happened over which he had no control, and the effect of which could not have been avoided by the exercise of care and skill.

[33] In the case of **Bolton v Henry et al** [2012] JMSC Civ. 25, the Claimant was a passenger in a public passenger motor vehicle. Further, she was injured after the motor vehicle being driven by the 4th defendant collided with the motor vehicle driven by the 2nd defendant. Counsel for the Defendants sought to rely on the defence of inevitable defence. However, in analysing the evidence before the court, Campbell J posited that:

> *"The essence of the defence is whether the failed actions or precautions taken to prevent or avoid the accident were reasonable in all the circumstances of the case. It is clear that the definition excludes a circumstance where the cause of the accident originates with the defendant, or where he invites or volunteers himself in the unfolding circumstances."*

[34] Further, Campbell J found that the Defendants contributed to the injury sustained by the Claimant and damages were apportioned between the 2nd and 4th defendants.

Conclusion

[35] In view of the authorities and discussion of the submission the court orders are as follows:

(a) Notice of Application for court orders filed by defendant dated March 29, 2017 is hereby dismissed.

(b) Summary Judgment on the claim for the claimant.

(c) Assessment of Damages on a date to be fixed by the Registrar.

(d) Costs to the applicant to be agreed or taxed.