[2018] JMSC Civ. 101

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 02866

BETWEEN		**DELROY DOUGLAS**	**CLAIMANT**
AND	`	**BARBARA HEADLEY**	` **DEFENDANT**

Ms. Coleen Franklyn and Ms. Andrea Lannaman: instructed by Marion Rose Green and Co. for the Claimant.

Mr. Clifton Campbell: instructed by Archer Cummings and Co. for the Defendant.

HEARD: 9th and 10th July 2018.

CORAM: G. FRASER, J
(IN COURT NO. 17)

[1] It is the accepted law in this jurisdiction that where a person is injured as a result of the wrongful act, neglect or default of another, the common law allows the injured party to sue the person who has committed the wrong and to obtain monetary compensation or damages.

THE EVIDENCE

[2] The Claimant Mr. Delroy Douglas on the relevant date and time, being 17th day of March 2010 at approximately 5:15 PM, was lawfully cycling along Beechwood Avenue in the parish of St. Andrew. A grey motor vehicle driven by a male person of dark complexion, "suddenly pulled out of the line of traffic" that was heading in the opposite direction. This vehicle then turned into the path of the Claimant, causing the motor vehicle to collide into the claimant's bicycle hitting him to the ground. The rear wheel of the said vehicle then drove over the Claimant's "right foot". The Claimant did not take note of the licence plate number of the motor vehicle due to the fact that he was prostrate on the ground and in great pain. This evidence was supplied by his witness Mr. Paul Britton.

[3] Mr. Britton indicates he had observed the collision whilst looking through a window at his place of work, located along Beechwood Avenue. As the proverbial Good Samaritan, he left his security post and moved closer to the scene so as to lend assistance, having observed the Claimant thrown from his bicycle and falling to the ground. Mr. Britton testified that he had entreated the driver of the motor vehicle to render aid to the Claimant and to take him to seek medical attention; but that man callously refused seeming to be only interested in the state of the motor vehicle he was driving.

[4] The driver was further described as a most belligerent and recalcitrant person who drove off without a care for the injuried Claimant. It was his "aggressive and boisterous manner which had this spurred Mr. Britton to take thereafter write down the licence plate number on that vehicle. He had written down this number which he says is "6376EJ" on a piece of paper which he later handed over to the police. The only other information he had given to the police was that the vehicle involved was a Suzuki model. There was no indication of the colour or that it was a "Suzuki Swift" as he now relates.

[5] The Claimant avers that as a result of the collision he suffered injuries necessitating admittance to the Kingston Public Hospital (KPH) for some three (3) days. He was treated for a "fractured right tibia fibula" and his leg was put in a plaster cast for a significant period of time. Thereafter he had to continue treatment at the Orthopaedic Clinic and submit to a bout of physiotherapy. Mr. Douglas further alleges loss and damage; and alleges that his injuries loss and damage are caused due to the negligent driving of the driver of the vehicle which collided with his bicycle. Mr. Douglas has also averred that the vehicle in question belongs to the Defendant Ms. Headley and that she is liable for the actions of her "permitted driver, servant and/or agent", who had negligently "driven, managed and/or controlled" the Defendant's motor vehicle. Accordingly Mr. Douglas makes this claim for compensation against the Defendant.

[6] The defendant who was served with notice of claim on 17th May 2013, filed an acknowledgement of Claim as also a defence; wherein she categorically denies any involvement in the collision in any capacity whatsoever and denies liability. The Defendant having denied that she is liable has sought to put "the claimant to strict proof" of liability.

ISSUES

[7] The issues for the Court's determination are in the circumstances three-fold. The Court must decide, firstly whether the Defendants motor vehicle was any at all involved in the collision that resulted in Mr. Douglas' injuries, loss and damages. If the answer to this first question is yes, then I must secondly determine whether the Defendant was at the material time the master or principal of the driver or whether she permitted another to operate her motor vehicle and such person negligently caused injury to the Claimant. If this second question is answered in the affirmative, then a third question follows; that is, to what extent has the Claimant established the quantum of the damages sought? These are questions to be answered from the facts proven on the evidence.

[8] At the outset I point out that the Defendant does not dispute that Mr. Douglas was injured in a motor vehicle collision at the material time. Secondly there was no great resistance on the part of the Defence as to the quantum of damages claimed by Mr. Douglas either. In the circumstances this court accepts the Claimant's unchallenged evidence in that regard; as to how the collision occurred and that indeed he was injured in the manner alleged. The Court therefore makes the finding that in the circumstances as described, the driver of the motor vehicle who collided into Mr. Douglas' bicycle was indeed negligent.

[9] The Court also makes the finding that indeed Mr. Douglas suffered injury and loss as a result of the collision and is deserving of compensation. Who is however to pay the price? Usually the Defendant, but only if liability attaches. A Defendant's liability can arise in several ways. Firstly a Defendant Driver is liable for her acts and omissions whilst operating a motor vehicle on the roads. Particularly if her conduct is negligent and cause harm to other road users. In this case neither the Claimant nor his witness has alleged that Ms. Headley was the driver of the questioned motor vehicle at the material time. The both witnesses have testified that a thickset or strapping adult male of dark complexion was the driver on that occasion, that description obviously eliminates the Defendant as driver.

ANALYSIS OF LAW AND EVIDENCE

[10] This brings me now to a contemplation of the hotly contested issue of vicarious liability. Vicarious liability is a form of strict, secondary liability that arises under the common law doctrine of agency (respondeat superior); the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the right, ability or duty to control the activities of a violator. What is required to ground liability; is that the violator stands in a particular relationship to the defendant and the tort is referable in a certain manner to that relationship**.**

[11] The relationships falling within this category includes master/servant and principal/agent. In this case there is no evidence to ground the Claimant's averment that the relationship of master and servant existed between Miss Headley and the driver of the motor vehicle in question.

[12] Vicarious liability is not however peculiar to the relationship of master/servant but applies on similar principles to the relationship of principal/agent. As such the owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the motor vehicle has been loaned, as if the owner was a principal and the driver his or her agent (***Ormrod v Crosville Motor services Ltd.*** [1953] 1 W.L.R 1120; ***Morgans v Launchbury*** [1973] A.C 127)

[13] The principles relating to a presumption of agency was enunciated by the Privy Council in ***Rambarran v Gurrucharran***, [1970] 1 All ER 749; that:

> ***Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact. Additionally the onus of displacing the presumption is on the registered owner and if he fails to discharge that onus, the prima facie case remains and the plaintiff succeeds against him.***

[14] That these principles of law are applicable in this jurisdiction cannot be doubted, here I refer to the judgement of Clark, J. (of blessed memory) in ***Mattheson v Go Soltau and WT Soltau*** (1933) 1 JLR 72 where he said:

> ***"It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary, this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him."***

[15] In the Court of Appeal's decision of ***Lena Hamilton v Ryan Miller*** [2016] JMCA Civ 59 at para. 31; whilst recognising that there is a presumption of agency that arises from the fact of ownership; McDonald-Bishop JA nonetheless admonished that:

> ***"in order to establish a relationship of agency one has to look at the totality of the evidence" and further that "It is not sufficient, therefore, to simply base the fact of agency on the mere fact that someone is the registered owner of a vehicle, when there is evidence establishing other facts that would throw light on the issue".***

[16] Another precedent referred to by the learned Judge of Appeal is the case of ***Morgans v Launchbury*** [1973] AC 127, which she regarded as "another important case on this subject". In that case Lord Wilberforce posited at page 135 the following:

> ***"For I regard it as clear 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. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. 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".***

[17] The principles of law distilled from the above authorities are as follows:

I. The Claimant is duty bound to raise a prima facie case by the evidence that the motor vehicle belongs to the Defendant and that a relationship of principal/agency exists between the driver of the motor vehicle and the Defendant; or at the very least the Claimant must establish either directly or inferentially that the driver was operating the motor vehicle in question with the owner's permission.

II. If the Claimant succeeds in so doing then the evidential onus then shifts to the Defendant to displace or rebut the presumption,

III. Once there is evidence which raises a strong inference to the contrary, then the Court must decide the issue on the totality of the evidence.

[18] It is the evidence of Mr. Britton that the Court must scrutinize and to say whether his evidence is credible and cogent and whether through him the Claimant has forged the necessary causal link between his injuries and the Defendant. I bear in mind at this time that the onus of proof lies on the Claimant and that the standard of proof is on a balance of probability. I also bear in mind that witnesses can be untruthful but

nonetheless be convincing as also the converse that an honest witnesses can be mistaken and also be convincing even while being unaware that they are mistaken.

[19] I have considered all aspects of Mr. Britton's evidence as to the purported ID of the Defendant's motor vehicle at the scene of the collision, but in determining if his ID is correct I am duty bound to critically consider the inconsistency arising as between his witness statement versus that given orally by way of cross examination. Mr. Britton had said previously that the vehicle in question was a Suzuki Swift; in evidence he said it was a two door van. The Defendant's unchallenged evidence is that her motor vehicle while bearing licence plates with the numbers and letters "6376EJ" is nonetheless a small car with four (4) doors. The inconsistency in this instance I regard as significant because it touches and concerns a description of the motor vehicle said to be that of the Defendant, which the witness sought to place at the scene of the collision. Moreover this bit of evidence is the only casual link that could establish liability on the part of the Defendant.

[20] Counsel Miss Franklyn on the Claimant's behalf has asked the Court to regard Mr. Britton's inconsistency as the result of passage of time and fading memory and reminded the Court that the witness had said that at the time of the incident his focus was not so much on the state of the violating motor vehicle but rather on assisting the Claimant. Counsel sought to extend the witness' focus by adding that Mr. Britton would have been focused on recording the licence plate number. That however is not the evidence. I am not moreover impressed by these submissions, because it is such issues as passage of time, lapse of memory and unfocused attention to details relative to the violating motor vehicle that counsel has highlighted; that this Court now regards as weaknesses in the Claimant's case. Consequently the unreliability of the ID evidence is also made pellucid.

[21] I have also considered Counsel Mr. Campbell's submission as to the unreliability of Mr. Britton's purported ID of the Defendant's motor vehicle at the scene of the collision. Counsel has advocated that there can be no confusing a small Suzuki Swift motor car with a van and no confusing a 4 door car with a 2 door van. This must therefore be the result of a mistake on the witness' part in the recording of the licence plate number. Counsel also pointed out that no explanation has been given by the witness as to the inconsistency and neither is one established otherwise by some other source of evidence.

[22] The Court takes judicial notice that a Suzuki Swift motor car is indeed a small car as seen daily driving on the Jamaican roads. I would also agree with counsel Mr. Campbell, that there is no likely or honest reason for the witness' confusion as between two such different vehicles.

[23] I also consider that the witness did not give his statement until some 8 years after the incident and I do not expect that it is humanly possible that he would have retained that number in his conscious memory for all this time. There is no evidence that at the time he signed his witness statement that his memory would have been refreshed from the record he had made so many years ago of the licence plate number. In such circumstance, this court cannot be confident that the number recorded in his witness statement is the one and the same he had written down on that piece of paper or that it is in fact correct and or reliable. There is no evidence that Mr. Britton has seen that since he handed it over to the police.

[24] There is in fact a lacunae in the Claimant's case as to how the Defendant's motor vehicle was ID as the one involved in the collision and when coupled with the less than satisfactory evidence of the identifying witness, It is my view that the Court has not been put in a position where I am satisfied as to this crucial aspect of the evidence, albeit the proof is on a balance of probability.

[25] The Defendant on the other hand has not been discredited by the vigorous cross examination conducted by Ms. Franklyn. The witness has remained steadfast to he her denial. Her answers to questions posed by Miss Franklyn in my estimation were forthright and direct. She insisted that her vehicle at all material times was parked at her premises and therefore could not have been at the collision scene.

[26] In this case moreover the evidence which I accept and the findings that I made is that the evidence of Mr. Britton that Miss Headley's car was involved is unreliable and I therefore reject it. There is further no evidence that the driver of the motor vehicle involved in the collision is in any way, shape or form connected to Miss Headley **or that he was** an employee of the Defendant or that at the material time was operating the motor vehicle for her use and benefit.

[27] More importantly the Defendant has led convincing evidence which counterbalances any inference that could be drawn from the ownership of the violating vehicle. It is therefore my finding of fact that the relationship of agent and principal did

not exist at the material time between The Defendant and the unidentified driver and in all the circumstances of the case the issue of vicarious liability therefore fails.

[28] The Claimant has therefore failed to establish that it is more likely than might otherwise be the case that the motor vehicle involved in the collision belonged to this Defendant and that the negligent driver was operating the said motor vehicle with her permission. In the premises therefore judgement is given in favour of the Defendant with costs awarded to her in an amount to be taxed if not agreed.