Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CL 1998/G150

BETWEEN	ALTON GORDON	PLAINTIFF
A N D	TANKWELD LTD.	DEFENDANT

Miss Sandra Johnson instructed by Sandra C. Johnson and Company for the Plaintiff.

Miss Daniella Gentles instructed by Livingston, Alexander and Levy for the Defendant.

HEARD: February 26, 28 and June 13, 2003

BESWICK, J.

The plaintiff seeks to recover damages from the defendant, alleging that he suffered serious personal injury, loss and damage and incurred expenses due to the negligence of the servant and/or agent of the defendant.

Mr. Gordon, the plaintiff, testified that on March 15, 1995 whilst employed at Nembhard's Service Station at Molynes Road he was leaning on a wall there when suddenly he saw a truck come round a corner and pin him to the wall. He remained there in pain, panicking. Then the truck reversed and he dropped. His foot became swollen immediately. His boss/supervisor who had been sitting on a column at the scene of the accident took him to a doctor where he received medicine and went home.

About a week later, he noticed that the pain continued and his leg was "crook up". He therefore went to another doctor, Dr. Mutebi, and received treatment in the form of pain-killers and was sent to be x-rayed at the Kingston Public Hospital.

It is Mr. Gordon's evidence that his right leg remained "crook up" for almost a year and that he had to use a stick. Indeed, even up to the time of giving evidence, some eight years later, he had had no ease from the pain in his leg.

He testified that the truck that pinned him to the wall bore licence number 1930 CC. However, he never saw who was driving it at the time. Specifically, he did not know if a hustler, Winston, was driving the truck at the time of the incident.

According to Mr. Gordon, in March 1995, he used to earn $500.00 weekly doing odd jobs and sweeping at the station and he would also do "roasts" such as washing cars.

In cross-examination Mr. Gordon said that he was paid according to how many mornings he worked doing odd jobs and handyman work. However from the time of the accident he never worked until 1997 when he had to do security work to "help out."

He received food from his supervisor and had to use that to feed his many children. This source of help dried up when the supervisor died. He was no longer able to buy medication and his foot became swollen with little bumps, exuding bloody water.

His evidence in chief was that he paid Dr. Mutebi one thousand dollars ($1000.00) for the first visit and on his next visit, one thousand five hundred dollars ($1500.00). For the medical report he paid one thousand dollars ($1000.00). In cross-examination his evidence was that he paid Dr. Mutebi about one thousand five hundred dollars ($1500.00) for the first examination and paid for the certificate as well as the x-ray on the second visit.

Mr. Gordon's evidence was imprecise concerning expenditure for medication. It is his

evidence that he never considered it necessary to keep the receipts.

Initially, he named specific amounts, which ranged between $2500.00 and $80.00 but in cross-examination he said it was $1200.00 that he paid for painkilling tablets and at the same time he also testified that he paid amounts between $1500.00 and $80.00 for medication depending on what he bought. Then again he said that he thought that he had spent $5000.00 on medication.

For transportation he spent $250.00 on two occasions to attend the doctor's office and $150.00 twice to go to the hospital.

The defendant's witness, Mr. Glenton Taylor, testified that he is a haulage contractor and in March 1995 he worked at Tankweld. He had been sent by his boss to Nembhard's Service station to fit tyres on a truck owned by Tankweld. He and drivers from Tankweld used to go to Nembhard's many times to take gas oil, wash vehicles and change tyres. He knew Frankie to be the man in charge – the supervisor or manager.

On March 15, 1995 he went to the Service Station and gave Frankie the purchase order to fit new tyres for the truck. Thereafter, on the instructions of Frankie, he parked the truck by the tyre shop.

He further testified that he gave the key for the truck to Frankie, left it under Frankie's control and returned to Tankweld. He expected that the truck would be driven only by Frankie or by someone instructed by Frankie. He gave no permission or consent for anyone else to drive the vehicle.

In cross-examination he testified that it was normal for him to leave the keys for the truck at the Service Station. In fact that morning it was necessary to leave the keys because the

truck would have had to be moved to be worked on or for the area to be used otherwise. He had never seen any Tankweld vehicle moved at Nembhard's by anyone besides Frankie or someone he instructed.

Mr. Taylor testified that he had neither been a party nor a witness to any incident at the Station that day. However, later that day Frankie handed him the keys for the truck and gave him some information.

Miss Johnson for the Claimant, submitted that the evidence was unclear as to whether the supervisor at the scene of the collision was Frankie.

She thereafter submitted that Tankweld and Nembhard's Service Station had a contractual relationship as Nembhard's accepted Tankweld's service order and Tankweld's driver had handed over keys to the man in charge at Nembhard's Service Station. This, she said, was a contract of services and gave rise to a principal and agent relationship with Nembhard's Service Station being the agent for Tankweld with authorization to move the vehicle from one place to another.

She contends that the vehicle was being driven where Tankweld expected it to be driven and that there is no evidence that the truck was not being moved in pursuance of a delegated task.

She invited the Court to find that in this case, where the plaintiff was pinned to a wall by the truck, there was an inevitable accident and the doctrine of res ipsa loquitur applied. It followed therefore, that there would be no onus on the plaintiff to prove negligence but the onus would instead be on the defendant to prove the absence of negligence on its part.

CLIFFORD BAKER v. LEWIS (1986) 23 JLR 407 was cited to provide support for this argument.

She urged the Court to presume that the truck had been lawfully driven. The Court should therefore find that there was agency even without there being a contractual relationship.

She argued that Tankweld would be liable unless evidence came from Tankweld to show that an unauthorized person had been driving.

Miss Gentles, for the defendant submitted that the issues to be determined were whether (1) permission or authorization was given by Tankweld for the driver to drive the truck and (2) whether the person driving the truck was the servant or agent of Tankweld.
There is no evidence as to who was driving but there is evidence that a supervisor/manager was sitting on the column at the time and therefore was not driving. However, this person was unnamed.

It is her argument that the Plaintiff failed to discharge the onus of proof that the person driving the truck at the time of the incident, had permission to drive. She contends that even if the driver had been authorized by Frankie of Nembhard's Service Station to drive, there is no evidence that Tankweld had given such permission. Nor is there evidence as to the purpose for which the driving was being done, therefore the driver could not be presumed to be an agent of Tankweld. He might have been about to take a "joy ride" with the truck.

She relied on RUMBARRAN v. GURRUCHARRAN (1970) 1 All E.R. 752 for her

submission that the onus of proving that an owner of a motor vehicle is vicariously liable for damages for negligence on the basis that the driver of his vehicle was his servant or agent, rests on the party who alleges it. Counsel argues that the plaintiff failed to discharge the onus of proof that the driver was the defendant's agent or servant or was permitted to drive.

Miss Gentles submits further that when Frankie assumed possession of the truck, he did so as a bailee of Tankweld, who in effect surrendered its right to control and custody of the motor vehicle as was the case in KENNISHA HARRIS v. HALL et ors. SCCA 31, 32, 65/93.

As regards Miss Johnson's submission that the doctrine of res ipsa loquitur applied Miss Gentles' response was that that must be pleaded, and that was not done.

Lord Donovan in the Privy Council decision of RAMBARRAN v. GURRUCHARRAN (supra) at p. 751 said:-

> "Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords *some* evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently know, then clearly the problem must be decided on the totality of the evidence."

He referred to BARNARD v. SULLY (1931) 47 TLR 557 where Sir Kenneth Stoby C, said that "ownership of the car was prima facie evidence that it was being driven by the defendant, his servant or agent."

At pg. 753 Lord Donovan continued:-

> "The appellant, it is true, could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference based on this fact, that the driver was his servant or agent in either of two ways."

One way was to provide evidence as to the driver's object in making the journey in question and establishing that it served no purpose of the owner.

The other way was to simply assert that the vehicle "was not being driven for any purpose of the appellant" and providing any supporting evidence of this assertion which is available.

In this case, there is no evidence as to who the driver was. It follows therefore, that there is no evidence of the driver's object in making the journey and whether it served a purpose for the owner. Indeed, there is not even evidence that the truck was being driven at the time.

The defendant, through its witness, gives evidence that it does not know anything about the accident. It provides no evidence as to what occurred.

Both Counsel relied on MORGANS v. LAUNCHBURY and others [1973] AC 127 to support their respective submissions. There, the House of Lords reviewed the law of agency. Lord Wilberforce at p. 135 said: -

> "The owner ought to pay, [common law] says because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes."

Lord Salmon at p. 149 embraced the law as stated in HEWITT v. BONVIN [1940] KB118 that "liability depends not on ownership, but on the delegation of a task or a duty" but pointed out that ultimately the question is always one of fact.

Reference was made to several other authorities including KENNESHA HARRIS v. HALL et. ors. SCCA 31 & 32 & 65/93 and CARBERRY v. DAVIES [1968] WLR 1103, which all discussed the principles of liability. However they involved situations where there was evidence of the circumstances in which the accidents occurred and decisions on known facts were made.

Here, Tankweld's ownership of the truck is not in dispute and no evidence has been provided that it was not being driven by its servant or agent. No attempt has been made to provide supporting evidence that the vehicle was not being driven for Tankweld's purpose.

I therefore, infer from the ownership that the vehicle was being driven by an agent or servant of the owner. The inference has not been repelled by the defendant. Employees of Nembhard's Service Station might well have furnished the answers to many questions. However neither party sought to provide any such additional information from that source.

I find that liability rests in the defendant and the quantum of damages must now be determined.

I turn first to special damages. Though there is no documentary evidence to support evidence of his wages, I accept the plaintiff's evidence that he earned $500.00 weekly.

He put no figure on earnings from "roasts".

The plaintiff seeks earnings lost until 1997. The picture which the plaintiff paints of the severity of his injury differs greatly from the medical evidence tendered. In the absence of any independent evidence of his time away from work I allow for a period of 8 weeks. *Loss of earnings* would therefore be $4,000.00.

As to visits to the Doctor, the medical report indicates $2,000.00 was paid. The plaintiff says a total of $2,500.00 but pleaded $1,000.00 and has not sought to amend that amount. For *Doctor's visits* I award $1,000.00.

For *medical report* his evidence is that he believes he paid $1,000.00 something. His pleading states that he paid $1,500.00. I award $1,500.00.

His evidence concerning expenses for medication was decidedly imprecise as described earlier. His Counsel asks for $3,000.00 based on the sum of some of the figures of which he speaks. Counsel for the defendant submits he should get nothing because he is clearly guessing, has no receipts and ought to be only claiming for painkillers which had been prescribed. The award for *medication* is $2,000.00.

The award for *transportation* is $800.00 as agreed by Counsel.

Concerning general damages for pain and suffering, Miss Gentles submitted that $60,000.00 to $65,000.00 would be the appropriate figure. She based that on BECKFORD v. BICC (CARIBBEAN) LIMITED and STEPHENS v. BROMFIELD both reported in Volume 4 of **Khan's Recent Personal Injury Awards** at p. 234 and p. 212 respectively.

The plaintiff testified of pain continuing from 1995 to the present time. He also describes a "crook up" leg and a stick being necessary to walk.

The medical report speaks of "tenderness on the chest and right leg but no bleeding or bruises". No other injury is described therein.

Miss Johnson said that she would not invite the Court to make an award on unsupported evidence but sought $100,000.00 based on STEPHENS (supra).

The award for pain and suffering and loss of amenities is $75,000.00.

The Order of the Court therefore is Judgment for the Plaintiff. Damages assessed in the amount of $75,000.00 for general damages and $9,300.00 for special damages. Interest on general damages at the rate of 6% per annum from date of the service of the Writ to today.

Interest on special damages at the rate of 6% per annum from March 15, 1995 to today.

Costs of this action to the Plaintiff to be agreed or taxed.