IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO C.L. 1997/P - 160

BETWEEN	DEBBIE POWELL	CLAIMANT
AND	BULK LIQUID CARRIERS LTD	1ST DEFENDANT
AND	OSMOND PUGH	2ND DEFENDANT
AND	CARIBIC VACATIONS LTD	3RD DEFENDANT

IN CONSOLIDATION WITH
CLAIM NO. C.L. 2000/P - 037

BETWEEN	DEBBIE POWELL	CLAIMANT
AND	OSMOND PUGH	DEFENDANT

IN OPEN COURT

Norman O. Samuels for the claimant
David Batts instructed by Livingston Alexander and Levy for the first defendant
David Johnson instructed by Samuda and Johnson for the second defendant
Camille Wignall instructed by Nunes Scholefield Deleon and Co for the third defendant

VICARIOUS LIABILITY - WHETHER PERSON EMPLOYEE OF COMPANY - INDEPENDENT CONTRACTOR - WHETHER COURT ON MOTION CAN RAISE ISSUE OF SUMMARY JUDGMENT AT TRIAL

September 23, 24, November 30, December 1, 2009, January 15, 2010 and March 19, 2010

SYKES J

1. Miss Debbie Powell works in the hospitality industry in Ocho Rios in the garden parish of St. Ann. On September 29, 1994, she accepted a ride from Mr. Roderick Ellis, an employee of the Caribic Vacations Limited ("CVL"), who was driving one of CVL's buses from Ocho Rios to Montego Bay, St. James.

2. The trip turned out to be quite disastrous. When the bus reached that stretch of road known as the Rose Hall main road, it slammed into the rear of a trailer owned by Bulk Liquid Carriers Ltd ("BLC") which was drawn by a trailer head owned and driven by Mr. Osmond Pugh. Mr. Roderick Ellis succumbed to his injuries.

3. Miss Powell suffered injuries herself for which she now seeks compensation from BLC, CVL and Mr. Pugh. Her claim against BLC and CVL are predicated on the principle of vicarious liability which itself rests on the idea that an employee of BLC or CVL was negligent. Miss Powell alleges that Mr. Pugh and Mr. Ellis were the employees of BLC and CVL respectively at the time of the collision.

CVL's liability

4. I shall deal with question of whether CVL is liable first since that is easier to dispose of. I have concluded that CVL is not liable to Miss Powell because Mr. Ellis, although an employee of CVL at the time, was not acting within the scope of his employment at the time of the accident.

5. The evidence in the case is that Mr. Ellis was dispatched by CVL to pick up passengers at the Donald Sangster International Airport in Montego Bay. He was to take them to a hotel in Ocho Rios. This group of passengers was on an island tour. According to Mr. Oliver Townsend who testified for CVL, the driver of the bus is more than a driver. He is a driver/chaperone/tour guide/host. His company provides a unique service for its clients. The driver does not simply take the passenger to the hotel. He remains with the guests from their arrival to their departure. He stays at the same properties as the guests wherever they may be in the island.

6. The evidence is that Mr. Ellis was required to pick up the passengers, take them to their hotel and stay with them throughout their tour. To this end, hotel accommodations were also made for Mr. Ellis. On the face of it there was no need for Mr. Ellis to be traveling back to Montego Bay for any reason connected with company business.

7. In this particular case, no evidence was presented to the court to suggest that Mr. Ellis had any reason to be traveling back to Montego Bay from Ocho Rios. On the evidence, it is a fair inference to say that Mr. Ellis picked up the passengers and took them to Ocho Rios. He then decided to return to Montego Bay. It was on this trip back to Montego Bay that he picked up Miss Powell. There is no evidence that he was summoned to or was asked by the company to return to Montego Bay. There is no evidence that anything had happened that would necessitate a return to Montego Bay on company business. Neither is there any evidence that he was taking any of the passengers on any trip connected with the company's business at the time he was driving back to St. James.

8. Despite the valiant effort of Mr. Samuels I am unable to conclude that when Mr. Ellis was driving back to Montego Bay he was still on CVL's business. This trip was not a deviation within the scope of his employment. The evidence points to the conclusion that it was Mr. Ellis' independent decision to return to Montego Bay without any known reason when the totality of the evidence suggest that he would have no need to do so.

9. Mr. Samuels tried to say that since Mr. Ellis was an experienced and trusted employee of CVL, then he must have been coming back to Montego Bay for reasons connected with his employment, therefore he must have been acting within the scope of his employment and thus, CVL is vicariously liable. Speculation is not a substitute for evidence. My conclusion therefore is that assuming, Mr. Ellis was negligent, there is no factual basis for CVL to be held vicariously liable. The claim against CVL is therefore dismissed with costs to CVL.

BLC's liability

10. I have also concluded that BLC is not vicariously liable for any alleged negligence of Mr. Pugh. For the sole purpose of discussing BLC's liability I will assume that Mr. Pugh was negligent in parking the trailer along the roadway without adequate lighting.

11. The undisputed evidence in the case is that the trailer is owned by BLC and on the night in question when the collision occurred, the

trailer head was owned and driven by Mr. Osmond Pugh. At the material time, the trailer had cargo on it which was the property of BLC. Mr. Pugh was using BLC's trailer to take cargo from Kingston to BLC's storage facility in St. James.

12. Mr. Chester Chung, the managing director of BLC, and Mr. Pugh gave evidence about the nature of the contractual relationship between BLC and Mr. Pugh and how it was that Mr. Pugh came to be using the trailer of BLC to take goods for BLC. Mr. Chung said that BLC owns its own trailers including the one involved in the collision. He stated that Mr. Pugh was not employed to the company but belonged to a pool of freelance tractor head owners who would be used by BLC from time to time to take goods for BLC using BLC's trailers. Mr. Pugh would be paid for each trip made after an invoice from Mr. Pugh was submitted to the company.

13. The evidence showed that while BLC's trailer was being used by Mr. Pugh, he was not free to take goods other than that of BLC. BLC would specify to Mr. Pugh where the goods were to be picked up, where they were to be taken and after delivery, Mr. Pugh was required to take the trailer back to BLC's property. All these restrictions are in, in my view, contractual terms between Mr. Pugh and BLC. The fact that BLC restricts the use to which their property can be used is not sufficient to transform what is ostensibly an independent contractor into an employee.

14. Mr. Samuels puts forward the view that Mr. Pugh and BLC "were engaged in a joint enterprise, using their respective vehicles to further the common design of hauling goods owned by the [first] defendant" (see page 4 of written submissions). This language is more commonly found in the criminal courts but the basic point Mr. Samuels was making was that Mr. Pugh and BLC were operating a business together, namely haulage. He submitted that since the trailer was not leased or hired out to Mr. Pugh under a contractual arrangement, this was a powerful bit of evidence that would make Mr. Pugh the employee of BLC. Mr. Pugh, said Mr. Samuels, had no discretion to exercise in how he carried out his job. He was at the time under the strict management and supervision of BLC. With respect this is a misreading

of the situation. What BLC did was to restrict Mr. Pugh's use of its property but beyond that Mr. Pugh was free to execute the contract in anyway that he wished. There was no evidence that BLC, for example, dictated that only Mr. Pugh could drive the tractor head. There is no evidence that BLC restricted Mr. Pugh in who could be employed to execute the contract.

15. On the totality of the evidence I conclude that Mr. Pugh was not an employee of BLC for these reasons. There is nothing to say that BLC was responsible for the repairs or maintenance of Mr. Pugh's trailer head. Mr. Pugh was not paid a wage or a salary. He was employed on an ad hoc basis. He was under no obligation to undertake work with BLC. He always had a free choice of whether he made his trailer head available for work. Failure to respond to a request from BLC could not be a breach of contract because the contract did not come into existence unless and until he agreed to make a particular trip. Mr. Pugh hired his own staff and paid them from whatever money he earned. The evidence of Mr. Chung is that when the General Consumption Tax Act became law and imposed a consumption tax on goods and services, Mr. Pugh got a GCT number and began charging BLC the consumption tax. Indeed, Mr. Chung's evidence went further to say that if BLC provided any goods such as fuel, tyre, lubricating oil or filters to Mr. Pugh, he would have to pay for them. All these factors are inconsistent with an employee/employer relationship notwithstanding the fact that BLC's trailer was used by Mr. Pugh and during such use, Mr. Pugh was restricted in how he could use the trailer and also that he was prohibited from taking goods for other persons.

16. Assuming for the purpose of Mr. Samuels logic that control over the use of the trailer amounted to control over the mode of doing the job and assume further that such control is an important and indispensable criterion for deciding whether an employer/employee relationship exists, that fact is not determinative if the other aspects of the relationship are incompatible with that of employer/employee (see ***Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance*** [1968] 2 QB 497; ***Stevens v Brodribb Sawmilling Co. Pty Ltd.*** [1986] 160 CLR 16). In

this case, all the other factors pointed toward Mr. Pugh being an independent contractor. For all these reasons, Mr. Pugh was not an employee of BLC and so BLC cannot be held vicariously liable for any alleged negligence on the part of Mr. Pugh.

Mr. Pugh's liability

17. This aspect of the case depends on the view I form of the credibility of the witnesses. Let me state at the outset that Miss Powell cannot assist the court. She does not know how the accident occurred. I am therefore left with the evidence of Mr. Pugh and Mr. Llewellyn Reid. Both say that they were at or near the scene of the accident when the bus driven by Mr. Ellis ran into the back of the trailer. I will also have to examine the evidence of other witnesses who claim to have gone to the scene of the accident after it occurred to see if they provide evidence that will enable me to decide whether Mr. Pugh is liable.

18. Mr. Pugh says that he parked the trailer off the road with just a small part of the trailer on the roadway. He also said that when he parked the trailer, it was well lit. Mr. Llewellyn Reid, Miss Powell's witness, is saying that is not the case. He says that the trailer took up a substantial part of the left lane that it was in as one head to Montego Bay from Ocho Rios. He also says that the trailer was not lit.

19. Mr. Samuels urged that I should accept Mr. Reid as reliable and accurate when he said that there were no lights on the trailer or the trailer head. Mr. Reid stated that he was at the scene for three quarters ($\frac{3}{4}$) of an hour to a full hour after the collision occurred. He added that he assisted in removing Miss Powell from the bus and placed her in his pickup and took her to the hospital. What was surprising about Mr. Reid's evidence was that he was adamant that he did not see any cargo on the trailer at all.

20. Mr. Pugh said that at the time of the accident he had drums of kerosene on the trailer. The trip in question that was being made by Mr. Pugh was said by him to be in response to contract with BLC to take goods from Kingston to Montego. There is no reason to doubt this aspect of his evidence.

21. The evidence also suggests that at the time of the accident, Mr. Pugh had not yet reached his intended destination and neither was there any evidence to suggest that the goods he picked up in Kingston were unloaded at any time before the collision occurred. On a balance of probability, I find that the trailer had cargo on it. The trailer in question was a flat bed trailer. If this is so, then it is difficult to understand how Mr. Reid could have failed to see that there was cargo on the flat bed if he were there for as long as three quarters ($\frac{3}{4}$) of an hour. Mr. Pugh's evidence was that the flat bed had a full load. If Mr. Reid is unreliable on this point, which is significant, then is he likely to be reliable on the question of whether the trailer was lit or not? I think that in this case Mr. Reid should be regarded as not very observant. From this I conclude that Mr. Reid ought not to be relied on when dealing with the question of whether the trailer and trailer head were lit.

22. Miss Powell does not assist on the point of whether the trailer was lit or not. This means that the remaining evidence on this comes from Mr. Pugh and Mr. Chung. Mr. Chung arrived on the scene after the accident. He said that the trailer and the trailer head were lit but this evidence even if accepted does not answer the question of whether the trailer and trailer head were lit at the time of the collision.

23. The other witness on this lighting issue is Mr. Oliver Townsend who gave evidence on behalf of CVL. He said under cross examination that he cannot recall if the trailer had any lights. This answer in cross examination is to be contrasted with his evidence in his witness statement which reads: *It seems that the driver of the other vehicle, a steel truck about 44 feet long which was carrying steel drums parked the vehicle on the side of the road without leaving any light or an signals to indicate its presence.* This evidence in chief is quite tentative. What is critical is that in cross examination Mr. Townsend did not commit himself to the affirmative position that the trailer had no lights. At the very least this means that Mr. Townsend was uncertain whether the trailer had lights on when he got there. In any event, he, like Mr. Chung went to the scene after the accident. Thus

the only two persons who can really assist with whether the trailer was lit at the time of the accident are Mr. Pugh and Mr. Reid. I have already indicated that I will not rely on Mr. Reid on this point. This leaves Mr. Pugh. I accept Mr. Pugh's evidence that the trailer was lit at the time of the accident. On this premise, it does not matter too seriously whether the trailer was mostly off the road or on the road at the time of the accident because Mr. Ellis ought to have seen the trailer. If he did not see the trailer he was negligent. If he saw it and still ran into the rear of the trailer, then in the absence of an explanation, the conclusion would have to be that he was negligent.

24. The evidence before the court is that the bus was about 4 feet under the trailer. This would suggest significant force which would be more consistent with speeding. I conclude that Mr. Ellis was indeed negligent in his driving and was the sole cause of the accident. Unfortunately, Mr. Ellis' estate was not sued and so, in the final analysis, Miss Powell is without recourse.

A final word

25. When this matter came on for trial, the court asked Mr. Samuels how he intended to succeed against BLC in light of the pleadings and witness statements. Learned counsel was of the view that that inquiry by the court was unwarranted because the matter had been set for trial. He even suggested that the court should recuse itself on the grounds of bias. The court did not accept these submissions for these reasons.

26. It has to be recognised that a judge's powers of case management does not end merely because a case comes up for trial. A judge is still under an obligation to see that the court's resources are utilised efficiently which means that judicial time is not spent on case which has no real prospect of success.

27. In the case of ***Evans v James*** [2001] C.P. Rep 36, the trial judge on his own motion raised the issue of whether summary judgment should be granted. On the first day of trial the judge indicated that having read the documents and witness statements concluded that the defendant had no real prospect of successfully defending the claim

and entered judgment against the defendant. The defendant appealed. It was conceded that the trial judge had the jurisdiction to make the decision that he did. The Court of Appeal pointed out that had there been rigourous case management the case would not have reached the trial and the weakness of the defence would have been patent. This decision by the English Court of Appeal is reminder that a trial is not Columbus-like voyage of exploration where the litigant hopes to reach the promised land by an unknown route but if given sufficient time he may find some other route to success. The President of the court emphasised the importance of effective case management where issues are properly identified early in the day and their prospect of success examined. The learned President added that there 'is now a greater burden upon the Bar, solicitors and judges and district judges to exercise proper case management' so that there is not a disproportionate allocation of resources on a case that does not require such allocation.

28. This court therefore holds that it is always appropriate for any judge having read the documents to question whether a trial ought to proceed if the judge is of the view that either party has no real prospect of successfully presenting or resisting the claim. The issue of bias does not arise. It is all about case management and effective use of the public good of judicial time.

29. The consequence in the case at bar is that Miss Powell is now saddled with costs of two additional defendants that ought to have been dismissed from the case long ago.

Conclusion

30. BLC is not liable to Miss Powell because Mr. Pugh was not an employee of BLC and even if he were, he was not negligent because the trailer he drove had sufficient lights to enable approaching drivers to see the trailer. CVL is not liable to Miss Powell because Mr. Ellis was not driving within the scope of his employment at the material time. It is not the case that since he was employed to transport clients of CVL to various spots around the island it follows that any act of driving must necessarily be within the scope of his employment, as submitted by Mr. Samuels. The claim against all the defendants in both claims are

dismissed with costs to all the defendants to be agreed or taxed, except September 24, 2009 when Mr. Samuels became ill.

31. In light of my conclusions, the ancillary claim made by BLC against CVL and CVL's defence and counter claim to the ancillary claim do not arise for consideration.