



[2015] JMSC Civ 152

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 1409

BETWEEN DENTON SCOTT CLAIMANT

AND THE ATTORNEY GENERAL OF JAMAICA 1ST DEFENDANT

AND BALFORD BERRY 2ND DEFENDANT

Ms Catherine Minto for the Claimant instructed by Nunes, Scholefield, Deleon and Co.

Ms Deidre Pinnock for the 1ST Defendant instructed by the Department of State Proceedings

Heard: 14th, 19th November 2014 and 15th July, 2015

Negligence – Vicarious Liability – Employee driving Employers vehicle assigned to another – Without permission of the supervisor – Not in the execution of duty

G. BROWN, J

[1] The claimant filed an action against the defendants in negligence for damages arising from a motor vehicle accident along the Scotts Pass main road in the parish of Clarendon on the 6th of August 2002.

[2] In the statement of claim dated 26th March 2007 the claimant alleged that the second defendant was the driver of a Suzuki Vitara motor vehicle owned by the Ministry of Health and was at all material times the servant and agent of the first defendant.

[3] The first defendant filed a defence denying the claimant's allegation and instead

countered that the second defendant was on a frolic of his own. A judgment in default of appearance and defence was entered against the second defendant.

[4] The claimant in his witness statement gave his version of the collision as follows:

“On reaching the vicinity the train line in Scotts Pass, I saw when a white jeep pulled out from behind a line of traffic that was approaching me from the opposite direction and started to overtake the vehicles in front of it. On seeing this, I flashed my light to indicate that I was coming reduced my speed and pulled as close to my left side of the road as possible but the jeep kept on coming. I pulled off the road and came to a complete stop but the jeep still collided with the right front and side of my vehicle causing damage the vehicle that collided with my vehicle was a white Suzuki Vitara registered 20 2496 which was owned by the ministry of health and driven by Balford Berry”.

[5] The first defendant did not attempt to contradict the claimant's account but instead sought to prove that the employer was not vicariously liable for the negligence of his servant. They called two witnesses, namely, Orville Evans and Earl Campbell. In the circumstances, I find that the Claimant had established that the 2nd defendant was negligent.

[6] Orville Evans was employed to the Ministry of Health as an Electrical Engineer. He said that his motor vehicle was not working and the Suzuki Vitara was assigned to him to carry out his duties. In his witness statement he said: *“On Monday, August 5, 2002, Mr. Balford Berry, a plumber who was also employed to the Ministry of Health asked me to borrow the Grand Vitara motor vehicle that I was assigned and that I could use the one to which he was assigned. The motor vehicle to which he was assigned was a Toyota pickup. Mr. Berry told me that he wanted the motor vehicle to pick up his family at the Norman Manley International Airport and that they were not able to hold in the pick-up he was assigned. As he was my co-worker I decided to lend him with the agreement that he would take the motor vehicle back to me the same day. I gave him the keys for the Suzuki and took the keys for the Pick-up.”*

[7] Mr. Evans was not Berry's supervisor and was not employed in the same department. Earl Campbell was employed to the Ministry of Health as the Administrator, stationed at the Health Facilities Maintenance Unit. He was in charge of managing the department's fleet of vehicles. It was his evidence that the only vehicle assigned to the second defendant were pick-ups to be used in the execution of his plumbing duties. He explained that *"the department was responsible for the maintenance of certain Health facilities in the Corporate Area. These included the Dental Auxiliary School and the Government Lab. Mr. Berry would have to travel to these remote locations and carry his tools and equipment. Our operations were limited to the Corporate Area and would not be assigned to travel outside of this area."*

[8] Mr. Campbell also testified that the second defendant was required to return the assigned vehicle each day and was only assigned a vehicle on the request of his supervisor. The motor vehicle involved in the collision was not assigned to him and on that date, a public holiday, he was not assigned to do any work.

[9] The sole issue in this case was whether the employer is liable for the negligence of his employee while driving his employer's motor vehicle on his own business and without permission. Ms Catherine Minto and Ms Deidre Pinnock filed written submissions.

[10] A master is, in general, liable for the negligence of his servant while in the course of his employment. On the other hand he is not liable for acts done by the servant outside the scope of his employment. He is also not liable where the employee uses his employer's motor vehicle for his own purposes *without permission*. *"Where an owner of a vehicle is not himself driving it at the time of an accident, he is not liable for damage caused by the driver's negligence unless at the time the driver was his servant or agent and that ownership of a vehicle in these circumstances raises a prima facie case that at the material time the driver was so acting."* (Lord Donovan in **Rambarran v Gurrucharran** (1970) 1 All ER 749).

[11] *If at the time when the injury takes place the employee is engaged, not on his employer's business, but on his own, the employer's vicarious liability does not arise*

because the employee is not acting in the course of his employment. In such a case it is immaterial whether the employee is using his employer's property with his employer's permission, so long as he is clearly acting on his own business, or whether he is using it surreptitiously, and is therefore, as regards his employer, a trespasser Halsbury's Laws of England 5th ed. Vol. 97, para. 695.

[12] In **Morgans v Launchbury** [1972] 2 All ER 606 at p. 613 and 614 Lord Pearson said: *"My Lords, in my opinion, the principle by virtue of which the owner of a car may be held vicariously liable for the negligent driving of the car by another person is the principle 'qui facit per alium, facit per se'. If the car is been driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuant of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent. Also, the fact that the journey is undertaken partly for purposes of the agent as well as for the purposes for the owner does not negative the creation of the agency relationship"*.

[13] The gravamen of the 1st Defendant's case was that although the 2nd Defendant was authorised to drive vehicles owned by the Ministry of Health, he had surreptitiously obtained the motor vehicle without permission and at the time of the collision was engaged on his own business. He had taken the vehicle for his own benefit unconnected with his employment and was not acting in the course of his employment. Thus, his employer was not liable.

[14] Ms. Catherine Minto on behalf of the claimant submitted that the law on vicarious liability has drastically evolved since then, commencing with the decision of **Lister v Hensley Hall Ltd.** [2002] 1 A.C. 215 and which was applied in the Privy Council decision of **Clinton Bernard v A.G.** Privy Council Appeal No. 30/2003 She further submitted that *the court no longer applies or adopts the antiquated vicarious liability test of on your employers' business, acting within the scope of your employment, acting for*

the employer's benefit. The court she continued is now focused on an employer's duty to control what its employee does with its vehicles when the employee is permitted to take the employer's vehicles home.

[15] Ms. Minto cited the decision in **Princess Wright v Allan Morrison** (SCCA No. 39/2008) to support her assertion. Harris J.A. in her judgment discussed and reviewed the recent decisions in Bernard by the Privy Council and Lister by the House of Lord. He said: *"it cannot be denied that over the years, non intentional and intentional wrongs have been applied in determining vicarious liability. However, the "close connection test" does not introduce a new approach. Lord Steyn sought to put into perspective the application of Salmond's formula in relation to this approach. He indicated that in dealing with intentional torts, the issue as to "whether an act is a wrongful and unauthorised mode of doing some act authorised by the master" may produce an unjust and unfair result, as this formula may not invite an affirmative answer....The focus is the relative closeness of the connection between the nature of the employment and the and the wrongful act. In our judgment, the "close connection test does not create a dual approach as Miss Minto seems to suggest. To fully appreciate the intent and impact of the approach, the focal point must be the steps which are taken in making a decision as to an employer's liability for the acts of his employee's wrongful act. He continued: "in applying the requisite principles, consideration must first be given to the relative closeness of the connection between the nature of the employment and the particular wrong. Thereafter, an inquiry should be made as to whether the circumstances dictate that it is just and reasonable to assign liability to the employer. In doing so, consideration should be given to the danger to others created by the employer, who assigned duties, as well as the tasks given to the employee. All these factors, when taken cumulatively, would certainly apply to all actions falling within the ambit of the vicarious liability doctrine.....In our judgment, the test propounded by him (Lord Steyn) has not brought a traditional test but rather, in widening its scope, it permits the courts to adopt a broader perspective of the law."*

[16] Ms Minto contended that *"by the Ministry permitting the retention of the Grand Vitara by Evans in the evenings, it enabled the unlawful exchange of vehicles between*

Berry and Evans, and created the risk of injury to the Claimant. This, we submit, satisfies the second limb of the close connection test.” She argued that “Campbell was permitting Berry to take the vehicle home in the evenings and was in dereliction of his duties or had misrepresented the facts to the court. By permitting the retention of the vehicles by its drivers, the Ministry created the risk of the Claimant sustaining his injuries and therefore cannot escape liability.”

[17] She submitted that the Privy Council in **Bernard** has directed the Courts to adopt a broad approach to an employer’s *duty to retain control of their possessions, and respectfully, not a narrow approach of who loaned who what vehicle. An employer must retain control of all their possessions and is liable for injuries caused when there is a breakdown in that control.*

[18] In **Princess Wright v Alan Morrison** the Court of Appeal held that at time of the accident the employee was driving as the employer’s agent and with his consent. The employer was therefore liable. In allowing the appeal Harris J.A. said: *It was not denied that the respondent was the owner of the truck, that the driver was employed to run errands and to transport the respondent’s children to school and other activities. The respondent, in his witness statement stated that he permitted the driver to keep the vehicle at nights and weekends as it facilitated the collection of the children in the mornings. Significantly, in cross examination, the respondent stated that the driver would sometimes, on weekends, take the children to extra activities. The fact that with the respondent’s permission, the driver was allowed to retain possession of the truck on weekends and at nights, invites the reasonable inference that the driver had general permission in order to facilitates the transportation of his children at any time, be it on a weekday or weekend. Even if Connolly, at the time of the accident, had departed from that which he is permitted to do, little weight will be given to this. In **Williams v A & W Hemphill Ltd.** 1966 SC (HL) 31, a driver of a lorry deviated from his route and met an accident. Lord Pearson said, “The more dominant are the obligations of the master’s business with the lorry the less weight is to be attached to disobedient navigational extravagancies of the servant.”*

[19] It is my view that this judgment clearly did not in any way affect the principle of

vicarious liability as it relates to an employee driving his employer's motor vehicle without the employer's consent. In the present case, the question to be answered i.e. was Berry at the material time, driving in the capacity of the 1st defendant's servant and could the accident be said to have occurred in the scope of his employment so as to render the 1st defendant vicariously liable?

[20] Ms Minto had argued that by applying the close connection test the 1st defendant had retained control of the vehicle at all times notwithstanding that it was in the driver's possession and is therefore liable. Ms Pinnock on the other hand disagreed with her.

[21] It was clear from the unchallenged testimonies of Evans and Campbell that Berry did not have permission to drive the vehicle that was temporarily assigned to Evans as a traveling officer. He had exchanged the vehicle he was authorised to drive while on an assigned task, for the purpose of picking up his family from the airport. This journey was not in pursuance of an order or request or instruction from his employer but was for his sole purposes. This certainly was not a deviation while on the master's business. The evidence was that he did not return the vehicle to Evans that same day and the following day he collided with the claimant's vehicle in the parish of Clarendon.

[22] Campbell and Evans were subject to cross examination. However their testimonies were not discredited and I found them to be creditable witnesses. There was no evidence that Campbell had allowed Berry to take home any vehicle at the end of the day as asserted by Ms Minto. He was unaware that Berry had the Grand Vitara until after the collision. Neither Evans nor Berry had discussed the arrangement with him. It was Evans who had the employer's permission to retain the vehicle. Unlike Berry, he was not required to log in the vehicle each evening and also he had a general permission to use the vehicle for his own purposes.

[23] It was always the 1st defendant's contention that Berry was not on duty but was on a frolic of his own. He was a plumber and the vehicle assigned to him was a pick-up whenever he was on duty. The accident occurred on a public holiday outside the corporate area. Campbell said he would have been aware if Berry was required to work on the day of the incident.

[24] The evidence adduced by the 1st defendant showed that at the time of the collision the 2nd defendant was not on duty and the journey was unconnected to his duties. He had taken the vehicle without permission for his own benefit and was not acting within the course of his employment. I am satisfied that the 2nd defendant was not driving as the agent of his employer and without their consent. The 1st defendant is not liable.

DAMAGES

[25] The next issue to be determined is whether the damaged suffered by the claimant was caused by the 2nd defendant's negligence. It is settled law that a wrongdoer is liable in damages for the natural and direct consequences of his wrongful act, but he is not liable for every damaging consequence, however remote. The burden was on the claimant to prove his case i.e. to show affirmatively that damage under any head has resulted from the wrongful act of the defendant. The purpose of the award damages is to restore the claimant to his position before the loss occurred. He must act reasonably to mitigate his loss. The claimant is entitled to recover as special damage out of pocket expenses and loss of earnings actually incurred to the date of trial, but it must be specially pleaded and proved.

[26] Ms Minto submitted that the claimant was entitled recover as general damages the sum of \$2,500,000.00 for pain and suffering and loss of amenities and a further \$1,000,000.00 as loss of earning capacity or handicap on the labour market. It was her contention that the claimant's injuries had not healed when he was treated by Dr. Shaun Jones and was still seriously affecting him. Consequently, the report from Dr. Don Gilbert which was obtained 9 years after the accident was obtained to explain why the claimant's back pain persisted after he saw Dr. Jones.

[27] It is settled law that general damage need not be pleaded specially. In **Perestrello E Companhia Limitada v United Paint Co Ltd** [1969] 3 All ER 479 Lord Donovan said: "*There is plenty of authority for the proposition that a plaintiff need not plead general damage; but since the expressions 'special damage' and 'special damages' are used in such a wide variety of meaning it is safer to approach this*

question by considering what a plaintiff is required to plead rather than what he is not.....If a plaintiff has suffered damage of a kind which is not necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assist him in computing a payment into Court.....the same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded."

[28] In this case, the Particulars of injuries alleged that the claimant had back pain, chest pain, pain to the right arm and knee, tenderness to chest wall and right arm and swollen right arm. The medical certificate dated July 16, 2004 from Dr. Jones was attached to the claim form. It reads: *"the above-mentioned client was seen on August 11, 2002, with a history of being involved in a motor vehicle accident on August 6, 2002 and complained of back pain, chest pain, pain in the right arm and knee. On examination he was found to be suffering from tenderness to the chest wall and swelling of the right arm with associated tenderness. Chest X-Ray revealed no bony abnormalities. The patient was treated for a soft tissue injury and sent home.*

[29] Two receipts from Dr. Jones were also exhibited to support his claim that he was treated by him as a result of the accident. However, at trial the claimant testified that he was not healed and the pain continues despite the treatment from Dr. Jones. He subsequently sought treatment from another doctor and later resorted to bush medicine. The pain to his back had seriously affected his health and his ability to as a driver.

[30] The claimant also exhibited a medical report from Dr. Don Gilbert dated 30th January, 2012 who examined him on the 14th September 2011 for the purposes of assessment of his injuries and writing this medico-legal report. He diagnosed that the claimant has lower back pain due to a degenerate L5-S1 disc and facet joint arthropathy at this level. He said: *Mr. Scott was reviewed on the 4th January 2012 and reported that*

he has lower back pain on strenuous activity and stated that he did not have any back pain before the accident. On examination he had no tenderness in the lumbar spine and no limitation in flexion of the spine. Mr. Scott has degenerative disc disease which most likely developed due to injury to the lumbar disc at the time of the accident. Degenerative disc disease may also develop as a result of the aging process but those cases usually develop at the L4/5 level. He will continue to have bouts of lower back pain with strenuous activity, prolonged sitting or prolonged standing. If this pain becomes incapacitating then he will require epidural steroids which gives benefit in some patients and the last resort will be surgery which involves removal of the offending disc and fusion of the vertebrae. Surgery however does not relieve the pain in all cases.

[31] Dr. Gilbert made his diagnosis based on the claimant's statement to him nine years after the accident and without any reference to Dr. Jones who had first treated him. Dr. Gilbert in his report stated that the claimant was treated at the May Pen Hospital and sent home. The list of exhibits included the police report that named the apparent injuries to persons. The claimant was not mentioned as one.

[32] The claimant maintained that the doctors gave him prescriptions for pain killers over the years but did not tender into evidence any receipts for drugs. He further claimed that after a while he had no money to see a doctor. However in Dr. Gilbert's report the claimant was taking medication for hypertension which was not prescribed by him. This showed that he was in fact seeing a doctor up to the time he visited Dr. Gilbert.

[33] In his witness statement the claimant mentioned that *"he saw Dr. Jones until 2004, and then after that, I started seeing Dr. Barrie Hastings in relation to the back pains. He examined me and gave me pain killers, but it was not helping me. I then tried herbal medicine. I was using tuna and coconut water, and this helped. I had to find an alternative, as sometimes I wanted to go to the doctor, but could not, because of the cost. The tuna helped for a while, but was not permanent. In about 2011, it got to a stage where the pain was so bad, I had to see a Specialist. I went to see another doctor in Montego Bay, Dr. Don Gilbert...."*

[34] This accident occurred on August 6, 2002 and the Claim Form and Particulars of Claim which were filed in the Supreme Court on March 26, 2007 did not include any particulars of treatment. It did not indicate any special circumstances that would warn the defendants that the injuries were continuing. There was no application to amend the Particulars of Claim to show special circumstances or additional medical expenses. It was clear from Dr Jones report that he had treated him in August 2002 and that he again examined him when issued the medical certificate in 2004. He did not refer to any complaint from the claimant about continuing pain and suffering as he testified in court and therefore it would have concluded that his injuries had resolved when he was sent home. He had no medical report from Dr. Hasting which could support his case that he was been treated for his injury. It was also not true that he visited Dr. Gilbert for treatment as he claimed but was sent there by Counsel as confirmed in her written submission. I agree with Ms Pinnock that the claimant ought to have indicated in the pleadings that his injuries were continuing. Thus, to an award to the claimant for loss of earning capacity or handicap on the labour market would prejudice the defendants. Consequently the assessment of damage will be done on the medical certificate issued by Dr. Jones.

[35] Ms Pinnock submitted that a reasonable award for general damages would be the sum of \$1,400,000.00. I reviewed the cases cited by both counsels and concluded that it was an appropriate sum for pain and suffering and loss of amenities.

SPECIAL DAMAGE

[36] His motor bus was damaged as a result of the accident and caused him to suffer financial loss. He exhibited the assessor's report from MSC McKay (Ja.) Ltd. The pre-accident value of the vehicle was \$290,000.00 and the salvage at \$60,000.00. He said he did not repair the vehicle but sold the salvage. He was entitled to recover the sum of \$230,000.00 in addition to the cost of the assessor's report (\$4,485), the police report (\$1,000) and the wrecker fee (\$15,500).

[37] The claimant was also entitled to his loss of income/use for a reasonable period after the accident as the vehicle was a total loss and not repaired. He had a duty to

mitigate his loss by going to the market and purchase a similar vehicle. He said he purchased another some years later. In the circumstances I considered two months would be reasonable time to find a comparable vehicle. He estimated his income to be U\$70 per day but had no documentary evidence to confirm it as he did not usually issue receipts.

[38] The claimant said he was a member of Jamaica Cooperative Automobile and Limousine Tours (JACAL) and transported tourist from hotels and cruise ships. Miss Minto in her submission asserted that at the time of the collision he was transporting visitors to the annual independence 'Denbigh Show'. However, the police report exhibited by the claimant listed the names and addresses of the injured passengers in the claimant's vehicle. They were all from Dumfries, St James as the claimant which contradicted Ms. Minto's assertion. Additionally, there was no evidence such as the requisite licence from the Jamaica Tourist Board to support his claim that he transported tourist. He merely exhibited rate sheets for transporting tourist.

[39] Notwithstanding the lack of any credible evidence, Ms Minto submitted that the Court ought to accept the claimant's evidence of his loss of income without strict proof as tour operators do not issue receipts. Thus, the court should adopt the common-sense approach that has been accepted by Judges in assessing special damages in view of the nature of the claimant's business.

[40] It is opinion that this is not the proper case to depart from the well establish principle that the claimant should prove his special damage. In addition the claimant was in breach of Rule 8.7(5) of the Civil Procedure Rules as he claimed his loss of income in United States currency. It reads: *A claimant may make a claim for a specified sum of money in a foreign currency but must state the equivalent sum in Jamaican currency and the date and basis on which the calculation was made.* Consequently the claim for loss of income is disallowed.

[41] The claimant was without the use of his vehicle and was entitled to recover such sums expended by him during that period. He claimed \$21,000.00 as transportation costs to attend court in Porus. I disagree with Ms Pinnock that his attendance at traffic

court was remote from the direct loss resulting from the accident.

[42] The claimant was entitled to recover his medical expenses as pleaded i.e. \$4,300.00 and not \$68,800.00 as stated in Ms Minto's submission.

[43] I therefore make the following orders:

Judgment is entered for the 1st defendant against the claimant with costs to be agreed or taxed.

Damages assessed against the 2nd defendant

Special Damage \$276,285

General Damage \$1,400,000.00

Costs to be agreed or taxed