



1/1/12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. C.L. 1998 S 038

BETWEEN	WESTON BINNS	CLAIMANT
AND	MOXY SIMPSON	1 st DEFENDANT
AND	ISRAEL SINCLAIR	2 ND DEFENDANT

Miss Dale Porter instructed by Donald Gittens attorney at law for Claimant

Mr. Debajo Adedipe instructed by Clarke, Nembhard and Company for Defendants

Employer – Employee – Negligence of Employee-Scope of Employment – vicarious
liability of Employer of Motor Vehicle Driver who deviated from Route – Injury to
Driver of other Vehicle – Liability of Employer

Heard: 28th April, 11th June 2008

Thompson-James J (Ag.)

At about midday on the 13th September 1997 a collision occurred between a Toyota Hilux motor truck owned by the first defendant Mr. Moxy Simpson and driven by Mr. Israel Sinclair and a Ford Cortina motor car owned and driven by Mr. Weston Binns at Cheapside in the parish of St. Elizabeth.

The plaintiff Mr. Weston Binns claims against the defendants Mr. Moxy Simpson and Mr. Israel Sinclair jointly and or severally to recover damages for negligence, for that on September 13, 1997 along the Cheapside Main Road in the parish of St. Elizabeth the second defendant acting as the agent and employee of the first defendant so negligently

managed and operated a Toyota Hilux motor truck licensed CC 5324 owned by the first defendant that it collided with the plaintiff's Ford Cortina motor car licensed PP 2366, travelling in the opposite direction. Whereby the plaintiff sustained injuries, suffered damages and loss and incurred expenses.

The defendants contend that the collision was caused or contributed to by the plaintiff's negligence and counterclaimed for loss of vehicle and assessors' fees. This counterclaim was not pursued.

Mr. Weston Binns' Account

Mr. Weston Binns, a taxi owner and operator, testified that on the 13th September 1997 sometime after midday at Cheapside, St. Elizabeth he was travelling in a Toyota motor car licensed PP 2366 at about 20mph going up on the left hand side of the road, when he saw another vehicle traveling at a very fast rate of speed and overtaking several vehicles approaching from the opposite direction. The road surface was good.

He pulled over to the left hand side of the road came to a standstill and the other vehicle came and collided into his vehicle.

He could see clearly on the road for a distance of 50 – 75 yards.

He received injuries to his neck, right side of back, head, above his left eye as well as to his right shoulder. He was hospitalized for four (4) days, with thirteen (13) follow up visits to Kingston Public Hospital and University Hospital of the West Indies for treatment. He was unable to work for eight (8) months and two (2) weeks after the accident. He incurred medical and transportation expenses and his vehicle was totally destroyed.

He denied driving in a negligent manner. He denied obstructing the free flow of traffic. He denied stopping in a corner and asserts that he had stopped 50 yards away from the nearest corner in the direction from which he was traveling, and about 25 feet in the direction that he was traveling towards. The driver of the oncoming vehicle should have seen him from at least 50 yards away.

In Cross-Examination

He maintained that his car was written off. One year later he procured another motor car and resumed his taxi business. Within the same period of time his vision returned. His vision which was not right for six (6) months became right on the 15th January 1998. He denied stopping to allow passengers to disembark and was adamant that he did not stop in a corner.

At the point at which he stopped the road curved very slightly to the left and he had to stop there as the other vehicle was on his side of the road. There was no vehicle traveling behind him and he had no knowledge of a police vehicle traveling behind him.

He was unconscious as a result of the accident and suffered memory loss as well. He did not know if Mr. Simpson's pick up was written off.

The Account of the Defence

Mr. Moxy Simpson testified that in September 1997 he was the owner of a Toyota Hilux motor vehicle registered CC 5324 and on the 13th September 1997 he dispatched Mr. Israel Sinclair to Mandeville in the Parish of Manchester and from there to Leeds, St. Elizabeth. Mr. Sinclair deviated from his journey, went to Junction, St. Elizabeth and at Cheapside he was involved in an accident.

He denies liability for any negligence of Mr. Sinclair, as Mr. Sinclair was not acting as his servant or agent at the time of the collision.

The accident occurred on a road on which he did not send Mr. Sinclair. When travelling from Lititz, where he resides, to Leeds one does not have to go through Cheapside. When travelling from Mandeville to Leeds one would have to turn off about two (2) to three (3) minutes to get to Cheapside and a further minute from Cheapside to Junction and then on to Leeds.

He asserts that the seriousness of Mr. Binns injuries as well as his period of incapacity was not as Mr. Binns states, as shortly after the collision, Mr. Binns purchased another motor car and was operating it himself.

In Cross-Examination

He admits that he did not tell Mr. Sinclair exactly where to drive whilst running his errands neither did he give Mr. Sinclair instructions to complete the journey within a certain time. Further it was in Mr. Sinclair's discretion whether he journeyed to Leeds first or to Mandeville. If Mr. Sinclair had gone to Leeds before he went to Mandeville he would not have to travel to Cheapside.

Mr. Israel Sinclair testified that on the 13th September 1997 he was employed to Mr. Simpson. He went to Mandeville and returned to Mr. Simpson's home where he collected an item to take to the machine shop in Leeds. His vehicle was involved in a collision with Mr. Binns vehicle whilst on his way back from Junction. He had gone to leave some money and bread for his children.

The accident occurred at Cheapside where Mr. Binns had stopped in a corner. A police patrol car traveling in the same direction as Mr. Binns came around Mr. Binns parked car.

The patrol car swerved to a shop and was coming towards him, in order to avoid loss of the officers' lives he applied his brakes, the van got out of control and collided with Mr. Binns car. The patrol car was intact. There was nothing he could have done to avoid the accident as Mr. Binns was parked in the corner.

In Cross-Examination

He testified that the shop was about 7 – 9 feet from the road and that is the space that the patrol car utilized.

He was travelling at 27 m.p.h when he saw the patrol car and about 25 feet away from Mr. Binns car. The road surface was wet from the passage of a water truck. He denied overtaking a number of cars and whilst doing so went over onto Mr. Binns' correct side of the road.

He denied that he was traveling at a fast rate of speed resulting in the accident.

In Re-Examination

He testified that if he had kept on his side of the road he would have crashed into the police patrol vehicle.

It is not in issue that there was a collision between the vehicle driven by Mr. Binns and Mr. Sinclair and that Mr. Binns was injured in the collision and his motor car totally damaged. Further that Mr. Binns was hospitalized as a result of the collision and incurred expenses.

The issues to be determined are:-

1. Whether Mr. Sinclair drove negligently.
2. Whether Mr. Moxy Simpson is vicariously liable for Mr. Sinclair's negligence.

3. Whether Mr. Binns is wholly or partially to be blamed for the accident on the basis of contributory negligence.
4. Whether Mr. Binns suffered the financial loss and expenses that he alleges in his particular of claims.

I find the following inconsistencies:-

On Mr. Binns Evidence

He testified at first that his vision was back in one (1) year then he went on to say that his vision was not right for six (6) months as his vision came back in February. He further testified that the doctor at Kingston Public Hospital said his sight was right in January 1998, five (5) to six (6) months after the accident which occurred in September 1997.

He said he did not stop in a corner but in a very slight bend on the road.

Of course there is his preposterous response to learned counsel for the defendant Attorney-at-law, Mr. Adedipe's question whether he could see behind him, "I don't have eyes in the back of my head".

Finding of Facts

On a balance of probability I accept the evidence of Mr. Binns and find as a fact that on the 13th September 1997 he observed Mr. Sinclair's vehicle coming in the opposite direction overtaking several cars. On seeing this he pulled as far to his left as he could go, became stationary and Mr. Sinclair's vehicle collided into his vehicle. I reject Mr. Sinclair's evidence when he asserts otherwise.

I accept Mr. Binns' evidence and find as a fact that he could not do anything but stop where he did.

I accept Mr. Binns' evidence when he said Mr. Sinclair was overtaking several vehicles whilst approaching him at a fast rate of speed prior to the impact and reject Mr. Sinclair's evidence when he denied this.

I accept Mr. Binns' evidence when he said that no vehicle was travelling behind him and he had no knowledge of a police patrol vehicle travelling behind him.

I find the action of the members of the police patrol vehicle quite interesting and perhaps uncharitable, if the accident had occurred as outlined by Mr. Sinclair, which I reject.

The men in the police patrol car in the face of an accident and a near serious collision on their part went on their way without stopping.

I find as a fact and accept Mr. Binns evidence in this regard when he said his memory loss was as a result of the collision.

I have observed the demeanor of the witnesses and listened carefully to the evidence and despite the inconsistencies in Mr. Binns evidence, on a balance of probability I prefer his evidence to that of Mr. Sinclair and I am prepared to rely on it. I find that these inconsistencies are slight. I find as a fact that Mr. Sinclair in overtaking several vehicles that day ended up on Mr. Binns side of the road thereby causing the collision.

Is Mr. Moxy Simpson vicariously liable for Mr. Binns negligence?

Charlesworth and Percy on Negligence tenth Edition at page 134 states that –

An employer is liable for negligence of the employee if committed in the course of his employment but is not liable for negligence which is committed out of the scope of his employment. -

In **Marsh v Moore** 1949 2KB 208 at page 218 Kynsky J stated that

“It is well settled law that a master is liable even for acts which he has not authorized provided that they are so connected with the acts which he has authorized that they might rightly be regarded as modes, although improper modes of doing them. On the other hand, if the authorization and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of the employment but has gone outside of it.”

In Lister and others vs Hesley Hall Ltd. 2001 WLR page 1311 at page 1316 Lord Steyn said, Vicarious liability is legal responsibility imposed on an employer although he is himself free from the blame for a tort committed by his employee in the course of his employment.

It is Mr. Simpson's evidence which I accept that Cheapside is entirely out of the way whether to Leeds or to Mandeville traveling from where Mr. Sinclair was dispatched.

On Mr. Sinclair's own admission he had gone to his house to leave bread and money for his children. Clearly this journey was not connected to that on which Mr. Simpson had sent him. Mr. Sinclair's journey to Junction I find is an independent act outside the scope of his employment. This journey was for Mr. Sinclair's own private ends.

Therefore Mr. Simpson is not vicariously liable for Mr. Sinclair's negligence.

Is Mr. Binns to be wholly or partially blamed for the accident on the basis of contributory negligence?

Charlesworth and Percy on Negligence (Supra) at page 170 states that

“Contributory Negligence means that there has been some act or omission on the claimant’s part which has materially contributed to the damage caused and it is of such a nature that it may properly be described as negligence. For these purposes ‘negligence’ is to be taken in the sense of careless conduct rather than in its technical meaning involving breach of duty and other concomitants of the tort.”

In Randall v. Tarrant 1955 1AER page 600 –

It was held that when there is a collision between a moving vehicle and a stationary vehicle which is plainly visible the onus is on the driver of the moving vehicle to show that he has taken all reasonable care.

I accept Mr. Binns evidence when he said that Mr. Sinclair should have seen him from about 50 yards away.

It is Mr. Binns evidence which I accept that he was not letting off passengers at the point where he had stopped, neither could he do anything but come to a stop as Mr. Sinclair was overtaking several vehicles and approaching him at a fast speed.

Having rejected the presence of the police car and having found that Mr. Sinclair left his correct side of the road and ended up on Mr. Binns correct side of the road means that Mr. Sinclair is responsible for the collision with no

contribution from Mr. Binns. I find no contributory negligence on Mr. Binns' part.

Did Mr. Binns suffer the financial loss and expenses that he alleges in his Particulars of claim?

I find that Mr. Binns car was totally damaged as a result of the accident. This is his unchallenged evidence supported by that of the assessor's report which I accept.

I also find that he suffered injuries as outlined in exhibits "1" and "2", medical reports of Doctors Randolph Cheeks and Clive Lloyd respectively.

Assessment of Damages

Special Damages

Mr. Binns in support of his special damages tendered into evidence a number of receipts as well as reports.

I will allow the following items pleaded in his Particular of Special Damages and strictly proven.

(a) Total loss of said motor car less salvage	\$ 100,000.00
(b) Assessor's Fee	\$ 6,750.00
(c) Wrecker's Fee	\$ 1,500.00
(d) Mr. Binns testimony is that at the time of the accident he was earning between \$15,000.00 to \$20, 000.00 per week. I will allow loss of earnings for twenty-one (21) weeks at \$15,000.00 per week	\$ 315,000.00
(e) Transportation to get medical attention	\$ 35,000.00
(f) Medical Expenses	<u>\$ 16,388.00</u>
	\$ 476,168.75

Special damages in the amount of \$476,168.75

General Damages

Exhibit “2” the medical report of Dr. Clive Lloyd of the Mandeville hospital dated 1st March 1998 discloses that Mr. Binns sustained injuries to his head, neck and lower limb with loss of consciousness for an undetermined period. He had (i) a 6cm laceration to the occipital area (ii) trauma with possible clinical cervical spine injury to the neck (iii) small abrasions to the lower limb.

He was given a cervical collar and was assessed as having subluxation of the cervical spine. The prognosis is good and no disabilities are expected.

Exhibit “1” The medical report of Dr. R.E. Cheeks of the Kingston Public Hospital dated 1st March 1998 outlines that Mr. Binns was recovering from a concussion, as far as Neurological injuries were concerned. General and neurological examinations were unremarkable. Formal testing of visual functions reveals normal findings. There is no permanent neurological disability.

Mr. Binns suffered no permanent partial disability.

In arriving at an award for General Damages, I am guided by the authority of **Anthony Simpson vs Lloyd McMohan suit No. C.L. 1987 S.460** reported at Volume 4 Khan at page 206. Apart from head injuries with loss of consciousness and abrasions to the lateral aspect of the right thigh and knee, the Claimant sustained an eight (8) cm laceration to the parietal region of the scalp, multiple three (3) cm lacerations to the left side of the face and three (3) lacerations to the right side of the face 5-7 cm in length. He was awarded an amount of \$180,000.00 for General Damages updated this is now worth \$857,404.58 as of April 2008 index 124.8.

Mr. Binns injuries, I find were less severe than those suffered by the claimant. In **Anthony Simpson vs Lloyd McMohan** (supra).

I am also guided by the case of **Dalton Barrett vs Poncianna Brown and Leroy Bartley Claim No. 2006 HCV 1358**, Judgment delivered on the 3rd November 2006.

The Claimant suffered lower back pain as well as mild cervical strain with “zero percent” permanent partial disability. He was awarded \$750,000.00. This award updated using the April Index of 124.8 is now worth \$939,759.04.

In **Dalton Barrett’s** case (supra) – Physical therapy and life style modification were prescribed. He was cautioned that he would quite likely experience lumbar pain upon resumption of prolonged driving. It seems to me that the effect of Mr. Barrett’s injuries may well be more serious than those suffered by the Claimant in the present case.

In the circumstances I am of the view that an appropriate award for Mr. Binns is \$800,000 for his pain and suffering a loss of amenities.

Order

1. Judgment for the Claimant against the 2nd Defendant
2. Judgment for the 1st Defendant with cost against the Claimant to be agreed or taxed.
3. Special Damages awarded to the Claimant in the sum of \$476,168.75 at 6% interest from the 13th September 1997 to June 21, 2006 and thereafter at 3% to June 11, 2008.
4. General Damages awarded to the Claimant in the sum of \$800,000.00 at 6% interest from April 9, 1998 to June 21, 2006 and therefore at 3% to June 11th 2008.

5. Costs to the claimant against the 2nd Defendant to be agreed or taxed.