

Final ✓

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 03126/2004

BETWEEN	GEORGE BURCHELL	CLAIMANT
AND	DESMOND TOMLINSON	DEFENDANT

Mr. Ronald Parris for claimant

Mr. George Duncan and Mr. Leonard Green instructed by Chen, Green & Co. for defendant.

Heard: June 12, 2008 and November 7, 2008

**NEGLIGENT MISSTATEMENT – ECONOMIC LOSS – SPECIAL
RELATIONSHIP**

Straw J.

History

Jamaica Co-operative Automobile Limousine Tours Ltd. (JCAL) is an association of bus owners whose members provide motorized ground transportation largely for the tourist industry on the north coast of Jamaica. It is a company duly incorporated under the laws of Jamaica with offices at Claude Clarke Avenue, Montego Bay, St. James.

The claimant, Mr. George Burchell, is a tour bus operator and a member of JCAL since 1992 – 1993.

The defendant, Mr. Tomlinson, was the president of the said association between 1996 and 2006. As president, he chairs the executive with a board of directors. JCAL is organized by eleven (11) shareholders for the purposes described above. Members of the association must have vehicles. At the time in question, JCAL was allotted forty-four (44) parks at the Sangster International Airport. These parks are allocated to JCAL members who will have a bus in that area at the airport. The members must pay a monthly fee for the parks which are remitted by JCAL to the Airport Authorities.

No rules of the association were exhibited in court. The claimant has stated that he did not know the rules.

Mr. Tomlinson stated that if the fee is unpaid for a period of three months, the member would be replaced by another. In 1998, the claimant, who lives in the USA, had no bus. He returned to Jamaica after a telephone conversation with the defendant and contracted with one Richard Lawson for the purchase of an Isuzu bus. He deposited \$675,000.00 in a bank account in relation to the agreement. He did not receive the bus. He did not recover his money. Mr. Richard Lawson was later arrested and charged for fraud in relation to the transaction. He was subsequently sentenced to a term of imprisonment. Mr. Burchell has now brought this action against Mr. Tomlinson to recover damages. He asserts that Mr. Tomlinson induced him to enter into the contract with Richard Lawson falsely and negligently misrepresented to the claimant that Richard Lawson was an honest, reputable and trustworthy businessman with whom he could entrust his money for the delivery of the motor bus.

He is also claiming *inter alia*, loss of earnings from his designated parking space from December 2003 to 2004 and continuing.

The claimant's case

(1) Mr. Burchell states that Mr. Tomlinson called him in the USA sometime in 1998 and told him he was required to put a bus on the park and this was about five or six months after he had sold his last bus. He states that Mr. Tomlinson also told him that he had a man who could bring a bus into the island on his behalf (Mr. Burchell) and that he will bring the man to him and the man and himself can make arrangements as to the cost of the bus.

(2) One month later, Mr. Burchell travelled to Jamaica and is told by Mr. Tomlinson that the man had shown him a picture of the bus on the internet and that it looked good.

(3) The next morning, Mr. Burchell attends JCAL's offices between 6:30 to 7:00 a.m. in order to meet the man. While he is outside, Mr. Tomlinson and a man arrive on the compound. Mr. Tomlinson introduces the man as Richard Lawson and uses the following words to him, "This is the gentleman who will bring the bus into the island. This is the man you are going to purchase the bus from...."

(4) Mr. Burchell states that he was then invited by Mr. Tomlinson to travel with himself and Mr. Lawson on a jaunt to Kingston. Mr. Lawson does not return to Montego Bay with them. He never sees Mr. Lawson again.

(5) Mr. Burchell states that Mr. Lawson told him the bus would cost \$950,000.00 and gave him a piece of paper which contained his (Lawson's) company name. They agreed the deposit would be \$675,000.00 and that he would receive some papers from Mr. Tomlinson

(6) Mr. Burchell testifies that on the following day, he attends Mr. Tomlinson's office and that Mr. Tomlinson asked his secretary to write an account number on a piece of paper and told him to pay the money to that account at Jamaica Citizen's Bank. He paid the money the same day. The bank deposit slip was tendered into evidence. It is stamped 'Citizen Bank Limited' with date '24th December 1998.' At the top, there is a notation "credit account of Richard Lawson." It indicates that it was for the purchase of 1986 Isuzu 40-seater bus.

(7) Mr. Burchell states that JCAL was in the business of acquiring buses and that one Mr. Shakes, who was the immediate past president before the defendant, had ordered his first bus through Uni Motors. At that time, he had been given an account at Citizen's Bank to deposit money. He has stated that he cannot say if, in 1998, members of JCAL were making their own arrangements for buses. However, the authority to receive the duty-free concession for an imported vehicle was received through the association.

According to Mr. Burchell, he came to Jamaica to purchase the bus through the person recommended by the president and he relied on Mr. Tomlinson's recommendation as

president and Mr. Tomlinson knew that he was relying on his knowledge and recommendation.

The defendant's case

(1) Mr. Tomlinson has told this court that in 1998-99, he was introduced to Richard Lawson by a fellow member of JCAL as a person who could assist in the importation of vehicles on behalf of the members. He states that members have to have vehicles and he renders whatever assistance can be rendered to them so as to ensure that the association stays alive and grows. He stated that he had to look after the interest of members as this interest is their livelihood.

(2) In relation to the importation of vehicles, Mr. Tomlinson stated that once the member has a pro forma invoice, the president or secretary would sign the application in order for the member to receive the duty concession.

(3) He agreed that he did expect Mr. Burchell to obtain another bus to put in the park and that he knew he had interest in purchasing a bus. He stated that he did call Mr. Burchell and others who lived abroad. This admission is however, inconsistent with paragraph 5 of his witness statement where he denied that he knew Mr. Burchell was in the market to buy a coaster bus and denied that he had called him in the USA.

(4) Mr. Tomlinson further stated that he contacted Mr. Lawson, then informed members of JCAL and told them that interested members could make contact with him and that several members including Mr. Burchell made financial deposits to him. He also denied that either himself or the secretary gave any account number to Mr. Burchell.

(5) According to Mr. Tomlinson, Mr. Burchell and other members were present at a meeting of JCAL's board when he, Mr. Tomlinson introduced Mr. Lawson. He further stated that JCAL was not at any time a party to the arrangements made between members and Mr. Lawson. He also denied telling Mr. Burchell that Lawson had shown him a 40-seater bus on the internet. Again, his *viva voce* evidence reveals an inconsistency as his witness statement

had indicated that Mr. Lawson was introduced to Mr. Burchell in his presence, the inference being that he was not the one who made the introduction.

(6) Mr. Tomlinson stated that he did not 'single handedly' recommend Mr. Lawson to Mr. Burchell and that the board did not adopt a decision to use Mr. Lawson. He stated that the decision of the board was to make the introduction to the shareholders. He further stated that the board made no in-depth inquiries in relation to Mr. Lawson and that the board members were expected to make their own contact. He stated that four to five members ordered buses through Mr. Lawson and that none received any.

Analysis of the evidence

The court does accept that Mr. Tomlinson, as president of JCAL introduced Mr. Lawson to members, including Mr. Burchell, as one who could be contracted for the importation of vehicles into the island on their behalf.

The court also accepts Mr. Burchell's evidence as to the circumstances of his introduction to Mr. Lawson, that it was done informally and not at a meeting of JCAL's board. The court finds that Mr. Tomlinson has been less than candid in relation to some of his interaction with Mr. Lawson and Mr. Burchell. The unexplained inconsistencies in his evidence do affect materially my view of his credibility in that regard. I also accept the evidence of Mr. Burchell that he received Mr. Lawson's account numbers through JCAL's office.

However, there is no evidence that either Mr. Tomlinson or JCAL benefited economically from the deposit paid by Mr. Burchell. I find that Mr. Tomlinson and JCAL's offices merely facilitated the transaction between Mr. Burchell and Mr. Lawson.

The issue for determination is whether the claimant has proved that a special relationship existed between Mr. Tomlinson as president and Mr. Burchell as a member that

would create a duty of care on the part of Mr. Tomlinson to all the members at the time he made the recommendation.

Mr. Green, counsel for the defendant, has submitted that there is no evidence before the court that the defendant was paid as the president or that he had any special expertise in the area of managing the organization or that he had any specially identifiable functions that included the giving of advice to members for any purpose whatsoever. He has also submitted that there is no evidence that the defendant warranted that the vendor was reputable.

Mr. Green has also stated that the court would have to speculate on the words used that acted upon the claimant's mind which caused him to act as he did in transacting with Mr. Lawson and that the court cannot infer that the introduction was an endorsement of Mr. Richard Lawson as a dealer of repute. He further submitted that the introduction of Mr. Lawson was an attempt on the part of JCAL and not Desmond Tomlinson personally to provide a contact with someone selling vehicles. On the other hand counsel for the claimant, Mr. Parris, has submitted that there is a special relationship between both parties because the defendant as president of JCAL admitted that he had a financial interest in looking after the interest of members and this included ensuring that the claimant had a bus. He further submitted that the defendant breached his duty of care by failing to carry out any investigations of Richard Lawson before recommending him to the claimant and other members of JCAL.

Both counsel cited several cases on the issue of Negligent Misstatements for the court's consideration. These include the following:

Hedley Byrne & Co. Ltd. v Heller and Partners Ltd. (1963) 2 All ER 575.

Mutual Life and Ass. Co. Ltd. v Evatt (1971) 1 All ER 150.

Anderson & Sons v Rhodes 5 (Liverpool) Ltd. (1967) 2 All ER 850.

Wiggan v Morrison 2000 Supreme Court of Jamaica No E 360 A of 1996

Royal Bank & Trust Co. (Trinidad) Ltd. v Pampellonne 1986 35 WIR 392

The Court is grateful to counsel for their research and submissions.

The Law

The seminal case of **Hedley Byrne & Co. Ltd. v Heller and Partners Ltd.** (1963 2 All ER 575 established for the first time that a negligent misstatement whether spoken or written, which causes financial loss may give rise to an action in damages for negligence despite the absence of any fiduciary or contractual relationship between the parties.

However, there has not been any uniformity of approach since **Hedley** in relation to the basis of liability for negligent misstatement. **Gilbert Kodilinge in 'Commonwealth Caribbean Tort Law'** (3rd edition, Covendish Publishing Ltd) at page 114, states that subsequent cases (since **Hedley**) have done little to clarify the position. However, he further states that the following points are sufficiently clear:

- (a) "A duty of care will exist only where there is a 'special relationship' between the parties. A majority of the judges in **Hedley Byrne** considered that a special relationship would arise whenever, in the circumstances:
 - (i) It was reasonable for the plaintiff to have relied upon the care or skill of the defendant who made the statement and
 - (ii) the defendant knew or ought to have known that the plaintiff was relying on him. Thus professional advisers, such as accountants, bankers, commission agents and surveyors will owe a duty of care to their customers in respect of any professional advice given.
- (b) No duty of care will arise where advice is given on a purely social occasion (for example, advice 'cadged' at a cocktail party, or given on a bus or aeroplane by one passenger to another) since it would be neither foreseeable by the defendant that the plaintiff would rely on the advice, nor reasonable for the plaintiff to do so.
- (c) A non-professional person who gives information or advice on a 'business occasion (for example, one trader advising another as the credit worthiness of a potential buyer) owes a duty of care at least, if he has a financial interest in the transaction in question."

Is there a 'special relationship?'

In the present case, it is important to understand, the context of Mr. Tomlinson's 'financial interest.' He gave evidence that members have to have vehicles and that

whatsoever assistance could be given to members for this purpose would be done in order to facilitate the well being of the organization. He further stated that he had to look after the interest of members as this interest is their livelihood.

The benefit was a mutual one. Mr. Tomlinson did not gain any benefit above and beyond the benefit to all members. Certainly, as president or just a member, he gained no direct financial benefit in the transaction between the claimant and Mr. Lawson. Certainly, there is no evidence that Mr. Tomlinson was a professional adviser on the matter of importing vehicles or on the reputation of importers of vehicles.

An analytical sample of various cases highlights the lack of uniformity of approach by the courts on the issue:

- (i) In **Mutual Life and Citizens Assurance Co. v Evatt** 1971 1 All ER 150, the Privy Council, by a majority verdict, held that an insurance company would not be liable for gratuitous advice sought by a policyholder with regard to the financial stability of a sister company as the defendants were not in the business of giving investment advice. It was further held that the only duty owed is a duty of honesty.
- (ii) In **Imperial Life Assurance Company of Canada v Bank of Commerce (Jamaica) Ltd** (1985) Court of Appeal, Jamaica, Civil Appeal No 35 of 1981, the Jamaican Court of Appeal applied the majority verdict in **Evatt** (supra) and held that Imperial Life was in breach of its duty of care owed to the Bank of Commerce in failing to inspect the certificate of title to a property before advising the bank that the mortgage loan to A had been approved.

Imperial Life had explored the possibility of the bank providing A with a bridging loan. The bank had been led to understand that Imperial Life would be granting a mortgage to A and would repay the loan by the bank. **Imperial Life** later declined the mortgage after their solicitors discovered the existence

the bank. Imperial Life later declined the mortgage after their solicitors discovered the existence of another mortgage by another company on the title.

Rowe P summarized the principle as follows:

"In a case where a person carries on a business or profession which requires special skill and competence, or where by his conduct he makes it appear that he possesses special skill and competence in the subject matter, then, if he gives information to a person which is negligently given, and that person, in reliance on that information suffers damage he will be liable in damages to that other person."

In **Royal Bank Trust Co. (Trinidad) Ltd. v Pampellonne** 1986 35 WIR 392, the Court of Appeal (Trinidad) reversed the decision of the trial judge who found that the bank was not liable in negligence to one of its customers who solicited the advice of the bank manager in relation to a deposit taking company. The customer lost substantially after proceeding with an investment in the said company. The trial judge found on the facts that the bank manager had given information to customers about the company and had supplied them with the relevant literature and application forms, but that they had not relied upon the skill and judgment of the bank manager, neither did he believe they were relying upon such skill and judgment.

By a majority verdict, the Privy Council held that the question of whether the information provided by the bank was equivalent to advice depended upon the facts of the case, and in particular upon the circumstances in which the information was given.

Lord Goff (delivering the opinion of the majority of the members of the Board) stated as follows:

*"If the bank had provided advice to the **Pampellonnes** about the investments, it would in all probability have been held that the occasion was one of sufficient gravity to give rise to a duty of care, in which event the evidence --- concerning the extensive inquiries which, in his opinion, the bank should have made, would have become relevant."*

*---But once it was held, as the judge held, that at a brief meeting the bank was prepared to do no more than provide such information as was available to them, the judge was entitled to form the opinion on the evidence before him that no duty of care arose, other than (no doubt) to pass such information accurately to Mr. **Pampellonne**."*

The Privy Council reversed the decision of the Court of Appeal who had found that a duty of care rested upon the bank in relation to advice concerning the investments.

In **Wiggan v Morrison** 2000 Supreme Court Jamaica, No E360A of 1996 unreported, the plaintiffs, a Jamaican couple, returned from England to live in Jamaica and bought a lot of land in order to build a house. They purchased Lot 90, Greenwich Park, St. Ann. Before starting to build, they engaged the defendant, a qualified land surveyor, to survey the property for the purpose of verifying its location. The defendant carried out a survey and identified a particular lot as being "Lot 90." Relying on the defendant's representations, the plaintiffs started construction of a house, but when the building was 40% completed, they discovered that they been building on Lot 91, a neighbouring property, which had been wrongly identified as Lot 90. The building had to be demolished.

McIntosh J, the trial judge, found that a special relationship 'equivalent to a contract' existed between the parties, and that the defendant held himself out in his profession or otherwise as being in a position to give an opinion or advice on which reasonable persons would rely. The defendant was therefore held liable for the losses incurred by the plaintiffs.

While **Wiggan** (supra) falls neatly into one of the categories outlined by **Kodilinge** (supra), the circumstances of the present case do not.

It is clear that there appears to be no simple formula to which recourse can be had in order to provide in every case a ready answer to the question whether, given certain facts, the law will or will not impose liability for negligence (see **Caparo Industries Plc v Dickman** 1990 2 WLR 358).

In the present case, counsel for the claimant has submitted that a special relationship existed between the parties.

In the circumstances of the particular case, the court has made a finding that Mr. Tomlinson made a recommendation to Mr. Burchell and that the offices of JCAI were used to facilitate the payment of money by Mr. Burchell to one Richard Lawson. That recommendation, essentially, consisted of information given by Mr. Tomlinson to the effect that Mr. Lawson was someone who could import a vehicle into the island on Mr. Burchell's behalf. There is no evidence of any fiduciary relationship between any of the parties involved. There is no evidence that Mr. Lawson was a person of previous delinquent conduct and that Mr. Tomlinson ought to have known this. There is no evidence to suggest that the defendant held himself out as being in a position to advise Mr. Burchell on the reputation of Mr. Lawson.

The court cannot infer that Mr. Tomlinson held himself out as a professional or other advisor to give an opinion on the reputation of Mr. Lawson and that he ought to have known that his recommendation was one on which a reasonable person would rely. In fact, Mr. Burchell gave no evidence that Mr. Tomlinson stated that Mr. Lawson was honest and trustworthy. Neither did Mr. Burchell request or solicit his opinion on the reputation of Mr. Lawson.

There is no justification to induce the court to enlarge the category of cases in which people are held liable for negligent misstatements by imposing a duty of care on Mr. Tomlinson.

This court is of the view that the only duty of care owed by Mr. Tomlinson to Mr. Burchell was the duty of honesty and that duty was discharged.

This court therefore grants judgment to the defendant with costs to be agreed or taxed.