IN THE SUPREME COURT OF JUDICATURE

CLAIM NO. 2010 HCV 03067

BETWEEN	**NICKISHA JONAS**	**CLAIMANT**
AND	**DAVID MOWATT**	**1ST DEFENDANT**
AND	**ATLAS PROTECTION LTD.**	**2ND DEFENDANT**

Negligence – Vicarious liability – whether employer liable when employee, to the knowledge of the Claimant, is on a frolic of his own

Danielle Archer instructed by Kinghorn & Kinghorn for Claimant.

Patrick Thompson for 2nd Defendant

Leroy Equiano instructed by Kingston Legal Aid Clinic for 1st Defendant

Heard: **13th February, 7th March, 21st March, 11th April and 9th May, 2014**

Coram: BATTS J.

[1] At the commencement of this matter the parties agreed that the documents listed as 1 to 6 in the Claimant's Notice of Intention to Tender in Evidence Hearsay Statement dated 20th January 2014 (and filed 22nd January 2014), would be agreed. The Claimant expressly abandoned reliance on documents numbered 7 to 12. The 2nd Defendant applied for an Order that its Ancillary Claim and the 1st Defendant's acknowledgement be allowed to stand. There was no objection to that application and I ordered accordingly.

[2] The Claimant Nickisha Jones then gave evidence. Her witness Statement signed on the 11th February 2013 stood as her evidence in chief Exhibits 1 to 6 were admitted by consent being the documents so listed on Claimants Notice of Intent to Tender Hearsay Statements referred to above.

[3] The Claimant's evidence in chief indicated that she now resides in the United States of America and is a 27 year old nurse's assistant. On the 18th November 2007 she lived at Marverly Drive Kingston 10. She states that at one or two o'clock that morning her friend 'Mr. Hutchinson" called and asked if it was alright for himself and his friend (the First Defendant) to stay at her place until they got a call. She told them to come. She was aware they worked with Atlas Protection Ltd. (the 2nd Defendant) as security guards. She stated that they were on "24 hour duty."

[4] The Claimant says further that she let them in to her premises and she made a bed available to them and they all went to sleep. At approximately 6:00 a. she got up and was getting ready for church. At 6:30 a.m. Mr. Hutchinson told her he received an urgent call. She gave him the keys to open the carport grill gate. He opened the carporte and reversed the car out onto the sloping driveway.. The 1st Defendant opened the main gate for the car to go through. Mr. Hutchinson then came out of the car and up to her at the grill gate to say something. Her paragraphs 9 and 10 are as follows:-

> "9. I was now outside the carporte in the process of closing the grill to the carporte. I was standing in front of the grill. I noticed that the 1st Defendant was now in the driver's seat of the car. I continued closing the grill to the port and continued talking to Mr. Hutchinson.
>
> 10. Suddenly I felt an impact to me and I heard Mr. Hutchinson shouting out and making a lot of noise. The next thing I recall was being pinned between the carporte grill and the front of the car.

[5] She describes her pain and subsequent treatment and recovery, as also her losses costs and expenses.

[6] When cross examined by Mr. Equiano, she stated that on the night in question she had been at a party at the Mas Camp on Oxford Road. She denied asking Mr. Hutchinson to come pick her up and take her home. She denied that he had picked her up at Mas Camp. She admitted he was driving a car belonging to the 2nd Defendant. She denied that Mr. Hutchinson was her fiancé at the time. She denied having an intimate relationship with him. She admitted that the 1st Defendant "chose to remain" in the car that only Mr. Hutchinson entered her house. She says the 1st Defendant joined them later. They sat around the dining table and had a few drinks. She said she was standing outside the carporte grill while closing it after the car had exited. She said that Mr. Hutchinson had gone to open the main gate. She admitted that her back was not to the grill gate while she was closing it. She denied that while the car was moving she placed herself in a position which was dangerous.

[7] Mr. Patrick Thompson in his cross examination established that the Claimant had no contract with Atlas Protection Ltd for the provision of security services. When at the house she admitted they were not performing duties for Atlas Protection Services. She said that the 1st Defendant and Mr. Hutchinson took her to hospital and did not respond to the urgent call. She knew other drivers in the company. After the accident the company's drivers would give her assistance to go to the hospital and get around. She denied knowing where Mr. Hutchinson was prior to coming to her house; and then having been refreshed by Para. 3 of her Statement admitted he had told her at what party they were working.

[8] There was no reexamination of the witness. The Claimant's next witness was unavailable and the matter was adjoined to the 18th February 2014. On that date the court as advised that he had been in a motor vehicle accident and was recovering. The matter was further adjourned to the 7th March 2014 at which date the 21st March was fixed for continuation. On that date the Claimant's Counsel indicated no other witness would be called and closed her case.

[9] The First Defendant then gave evidence. His witness statement dated 6th February 2014 was allowed to stand as his evidence in chief. In that statement he said that on the 18th November 2007 he was assigned response duty along with Mr. Basil Hutchinson. They were to have been working in the Norbrook area. Mr. Hutchinson was his senior, the assigned driver and the team leader. At approximately 2:00 a.m. whilst they were still on duty Mr. Hutchinson stated that he wanted to go and pick up his girlfriend from Mas Camp on Oxford Road and take her to her home at Marverly Drive. The girlfriend, who was the Claimant, opened the gate when they reached her home and Basil Hutchinson drove the car inside. The First Defendant says he remained in the car whilst Mr. Hutchinson and the Claimant went inside. They stayed until approximately 5:30 a.m.

[10] He says when they were ready to leave Mr. Hutchinson asked him to reverse the car outside. He stated,

> "9. Basil opened the gate and while I was backing out the car I heard when the Claimant screamed out and I realized that the motor vehicle had made contact with her."

[11] When Cross examined by the Claimant's Counsel the 1st Defendant said he did not know about the Claimant reporting the accident to the police. He said at the time of the impact the Claimant was neither in front nor behind the car but a little to the side. He admitted that he was still on duty and if they got a call he would respond. He said he is a licensed diver but not a company driver. Mr. Hutchinson was supposed to drive the vehicle. He admitted that he did not see the Claimant and so was not able to avoid hitting her.

[12] In answer to the 2nd Defendant's Counsel, the 1st Defendant stated that they were supposed to be working in the Norbrook area. They were to secure European Union premises in Cherry Gardens and Norbrook. Going to the Claimant's house

was not part of their duty. They were not supposed to leave the base unless called to patrol or visit a property. He admitted that in going to the Claimant's house they were not acting on the Company's business. The incident occurred at dawn so it was not too dark nor too light. He said the car was in the carporte. Mr. Hutchinson pulled the carporte gate and instructed him to reverse. He then went to the gate at the road and opened it. The following exchange occurred,

> "Q. When you began to reverse the car do you recall seeing Miss Jones
> A. No, I did not see her I was looking behind while I reverse."

[13] The first Defendant indicated that he saw when the Claimant and Mr. Hutchinson exited the house but did not see her again until he heard her scream. It was the right front side of the car that squeezed her against the open grill gate. The rest of the car had safely reversed passed her when she received the injury. He denied there was any damage to the carporte gate or that he had paid for any such repairs.

[14] There was no reexamination but in answer to the court the 1st Defendant said:

> "A: While reversing first Mr. Hutchinson they were talking. I because the carporte was so narrow I slow down and listen to him say come back come back. Only front side was left to come out. Actually following his instructions."

This ended the case for the 1st Defendant.

[15] The Second Defendant gave evidence via Ralson Pessoa its Managing Director. His witness statement dated September 27th, 2013 stood as his evidence in chief. He corrected references in Paras. 11, 13, 21, 37, 38,39, 41,42,43 which said 2011. They should all read 2007. Claimant's Counsel objected as the witness was Managing Director of the Atlas Group of Companies. I overruled the objection as the statement indicates the witness was authorized to give evidence

on behalf of the 2nd Defendant which was a part of the group. Furthermore the matter could be explored in cross examination.

[16] The evidence in chief details the duties that were assigned to the 1st Defendant on the 17th – 18th November 2007. He said there was no contract to provide security at Mas Camp on that night. The First Defendant was not acting on behalf of the Company when he drove the Company's vehicle and injured the Claimant. The Company wanted an indemnity from the 1st Defendant.

[17] The Claimant's Counsel in cross examination sought to elicit that the witness did not personally give instructions to Mr. Hutchinson or to the 1st Defendant. The witness indicated that a supervisor personally interacted with them. However he stated,

> "This location is E.U. Delegation and is a unique contract. I give personal attention on any given day I know who is scheduled."

The witness also said that the assigned driver Mr. Hutchinson was forbidden to give the keys to anyone else.

[18] The 1st Defendant had no questions of the 2nd Defendant's witness. There was no reexamination. The parties were directed to file and exchange written submissions on or before the 4th April 2014 and a date set for continuation on the 11th April 2014. On that date I heard oral submissions limited to a response to each other's written submissions

[19] The respective submissions treat with issues of liability and damages. I shall refer to the submissions only to the extent necessary to explain my findings and decision. Two main issues arise:

a. Is the 1st Defendant liable that is, was he negligent in his handling of the motor vehicle?

b. Is the 2nd Defendant the employer of the 1st Defendant and the owner of the motor vehicle vicariously liable for the 1st Defendant's conduct?

[20] Each issue invokes mixed questions of law and fact. As regards the questions of fact I accept the 1st Defendant as a witness of truth. Where his evidence conflicts with that of the Claimant his to be preferred. It was not just the fact that his demeanour impressed me. It was also the fact that he gave a coherent clear account. Furthermore he did not seek to avoid the responsibility to his employer or to deny his breach of the company rules. The Claimant on the other hand was inconsistent, her account varied between cross examination and her witness statement. Her attempt to deny a relationship with Mr. Hutchinson was not convincing. It also is rather incredible as the Claimant would have the court believe that she took a taxi home. This because she says that Mr. Hutchinson and the Claimant were on duty at the same Mas Camp party which she attended. Indeed they arrived at her home from that party according to her at about the same time she did. This again is an effort to distance herself from the wrongful conduct of Mr. Hutchinson and the First Defendant. I did not find her to be a witness of truth.

[21] My findings of facts are therefore as follows:

a. On the morning of the 18th November, 2007 the First Defendant an employee of the 2nd Defendant was assigned specific duties. These mandated that he be in a specific location (the Norbrook area) from 7 p.m. on the 17th November to 7 a.m. on the 18th November, 2007.

b. The First Defendant was not authorized to drive the 2nd Defendants motor vehicle.

c. At approximately 2:00 a.m. on the 18th November the 1st Defendant team leader one Mr. Hutchinson, drove the 2nd Defendant's motor vehicle to collect the Claimant at a party and take her to her home. Mr. Hutchinson was accompanied by the 1st Defendant.

d. The Claimant was aware that Mr. Hutchinson and the 1st Defendant were not authorized either to convey her or to remain at her house.

e. The said Mr. Hutchinson and the Claimant were intimate friends. Mr. Hutchinson and the First Defendant remained at the Claimant's premises until 5:30 a.m.

f. At 5:30 a.m. Mr. Hutchinson decided to leave. He had not received any call instructing him to do so.

g. The 1st Defendant got into the driver's seat whilst Mr. Hutchinson opened the carporte grill gate.

h. Mr. Hutchinson also opened the gate to the yard with a view to allowing the car to exit.

i. Mr. Hutchinson was the one giving instructions to the First Defendant as he reversed and maneuvered the car out of the carporte and up the driveway which sloped downwards.

j. The Claimant suddenly and without warning stepped to the side of the vehicle, (perhaps in an attempt to say one further farewell to Mr. Hutchinson or with a view to pulling the carport grill gate shut after the car exited), and as a result was trapped between the right front fender of the motor vehicle and the open carporte grill gate.

k. The First Defendant could not reasonably have expected such a movement focused as he was on reversing the vehicle safely up the driveway through the gateway behind him. Knowing that Mr. Hutchinson was outside the gate giving instructions he could reasonably expect to be warned of any danger.

[22] I am fortified in these findings when regard is had to the medical reports on which the Claimant relies. Exhibit 2 is a report from Dr. Christopher Rose dated 23rd October 2008. He examined her on the 12th August 2008. On examination he saw a 2.5 x 2 cm irregular scar along proximal antero-medial aspect of the right leg. The neurovascular status was intact in both her lower limbs. There were no abnormalities of right hip, right knee, and right ankle. He concluded that she had "soft tissues injury to the right leg." She had 0% permanent impairment of the whole person. This report is consistent with Exhibit 3 a report dated 6th May 2008

from the University Hospital of the West Indies. In that report Dr. J. Williams-Johnson described a 4 cm diameter open wound to medial aspect of right leg which was normal. Exhibit 4, the physiotherapist report, confirmed a full recovery.

[23] Had this accident occurred in the manner described by the Claimant she would in all probability have received injuries to both legs. She states that she was standing outside the carporte grill gate which she was in the process of closing when the car hit her. In cross examination she said it hit her from behind and pinned her against the gate. In all probability also her injuries could be expected to be far more serious if, as she contends the vehicle was driven forward off the slope and into her. The nature of the injuries was more consistent with a small slow movement backwards as the vehicle brushed passed her whilst she was standing to the side. The fact that it was her right leg is consistent with her either going towards the gate (and to the right of the reversing vehicle) or standing with her back against the opened carporte grill gate and facing the right side of the reversing vehicle.

[24] Be that as it may I find that the First Defendant did not breach a duty of care to the Claimant. The Claimant is not a child. He could not reasonably have foreseen that she would have placed herself in a position of such danger. She knew the vehicle was being reversed out of the very small carporte. She knew or ought reasonably to have known that the driver's attention would be directed towards the gate through which the vehicle was to pass. It was foolhardy, reckless and unexpected of her to move between the open grill gate and the motor vehicle at the time she did. The First Defendant would not have expected her to go into that position before the motor vehicle had completely exited the carporte. The first Defendant has therefore not been proven to be negligent.

[25] This being my findings in relation to the First Defendant it renders consideration of the 2nd issue unnecessary. However in the event another court takes a view

contrary to my own and to save perhaps the costs of a retrial I express my finding on the 2nd Defendants vicarious status. On this issue the parties relied on various authorities.

[26] The Claimant urges this court to find that the 2nd Defendant was vicariously responsible for the 1st Defendant's acts or omissions. It is submitted that matters not that he had left his post and that when reversing from the Claimant's house he was not acting for his employer. In this regard I have found as a fact that the 1st Defendant and his colleague were not responding to any call made to them. Rather they were intent on returning to their post before the shift ended at 7:00 a.m. The Claimant relies on ***Lister v. Hesley Hall Ltd*** in which Lord Millet approved a passage from **Salmond on Torts 1st edition** which ended,

> ***"But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them."***

[27] Claimant's Counsel relies also on ***Clinton Bernard v Attorney General of Jamaica C.L. B023/1991*** judgment of McCalla J 9th June 2000 upheld by the Judicial Committee of the Privy Council (2004] UKPC 47. There however their Lordships stated,

> ***"21. Vicarious liability is a principle of strict liability. It is liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases of vicarious liability where employers were at fault. But it is not a requirement. This consideration underlines the need to keep the doctrine within clear limits." And at para. 26 and 27,***
>
> ***26. Approaching the matter in the broad way required by Lister, the constable's subsequent act in arresting the plaintiff in the hospital is explicable on the basis that the constable alleged that the plaintiff had interfered with his execution of his duties as a policeman. It is retrospectant evidence which suggests the constable had purported to act as a policeman immediately before he shot the plaintiff.***

27. Moreover, one must consider the relevance of the risk created by the fact that the police authorities routinely permitted constables like Constable Morgan to take loaded service revolvers home and to carry them while off duty. The social utility of allowing such a licence to off duty policemen may be a matter of debate. Bu the state certainly created risks of the kind to which Bingham JA made reference. It does not follow that the using of a service revolver by a policeman would without more make the police authority vicariously liable. That would be going too far. But taking into account the dominant feature of this case, viz that the constable at all material times purported to act as a policeman, the risks created by the police authorities reinforce the conclusion that vicarious liability is established."

[28] The Claimant also cited the judgment of Sykes J in ***Campbell v National Fuel and Lubricants Ltd***. **Ray D'Cambre, Solomon Russell unreported judgment 2 November 2004 Suit 1999 CL262.** In that case a gas tanker driver unlawfully and contrary to his contract of employment, unloaded fuel for his private gain. While doing so the tanker caught fire, causing damage to an innocent person's property. Sykes J found the driver's employers to be vicariously liable. Having reviewed the authorities in detail he said,

> "**67**. **What Bernard has done is to indicate to employers that they must address their minds specifically to management of risks that may be inherent in their activities. The more inherent the risk and the more serious the risk of the employee doing the type of act that is called into question the more likely it is that the court will conclude that the employer bears the loss via vicarious liability….**
>
> **68. Therefore as far as Jamaica is concerned the proper considerations in determining whether vicarious liability should be imposed in any given situation include:**
>
> **a) What is the duty to the Claimant that the employee broke and what is the duty of the employee to the employer broadly defined;**
>
> **b) Whether there is a serious risk of the employee committing the kind of tort which he has in fact committed.**
> **c) Whether the employers purpose can be achieved without such risk**

d) Whether the risk in question has been shown by experience or evidence to be inherent in the employer's opportunities

e) Whether the circumstances of the employee's job merely provided the opportunity for him to commit the tort. This would not be sufficient for liability

f) Whether the tort committed by the employee is closely connected with the employees duties, looking at those duties broadly."

Sykes J, it must be remembered was speaking in the context of a deliberate act and not just mere negligence. I believe also that the list is not in order of import so that for example item (f) is perhaps the most important factor. A further factor to be considered and Sykes J did say the list was not exhaustive, is whether the employee purported to be acting for the employer when the tort occurred**.**

[29] In treating with the fact that an unauthorized driver was driving the 2nd Defendant's vehicle, the Claimant relied upon ***Ilkiw v. Samuels (1963) 1 WIR 991 and Brown v. Brown (1972) 12 JLR 883.*** In both those cases however the unauthorized driver was using the vehicle for the employer's business at the time of the accident. This is a relevant distinction.

[30] In the case at bar the vehicle was not being used for the employer's business (nor was it purportedly so used) and the driver was not authorized. Furthermore the vehicle was not yet even on the highway. It had been parked at the Claimant's premises. The Claimant was well aware that its use was unconnected to the 2nd Defendant's business and in breach of its rules. She knew the two gentlemen were not where they were supposed to be.

[31] I therefore hold that on the facts of this case the 2nd Defendant is not liable for the negligence of the first Defendant. He was not then acting as their servant or agent nor was he doing something closely connected to his employer's business. Further the employer could not be expected to view the risk of an employee going to visit his girlfriend as inherent nor that he might injure his girlfriend while doing so as probable. There is no reason in policy or principle to hold the 2nd Defendant liable in the circumstances of this case.

[32] My decision is fortified by the authority of ***Attorney General of the British Virgin Islands v. Hartwell [2004] 1 WLR 1273*** cited by the 2nd Defendant. In that case a policeman abandoned his post and wrongfully used his employer's firearm to fire shots at his girlfriend, this in a fit of jealous rage. The court found that his employer (the government) were not vicariously liable because his action was wholly unconnected to his job. However, the employer was found, liable in negligence. This because by ignoring, or failing to take appropriate steps, after 2 previous incidents involving the same employee, they breeched a duty of care to the Claimant. The Court held that when entrusting a police officer with a firearm reasonable care should be taken to ensure that he was a suitable person to be entrusted with such a dangerous weapon. In my view therefore the 2nd Defendant is not liable vicariously or at all to the Claimant.

[33] In the event I am wrong on the issue of liability I will indicate shortly the damages I would have awarded. I do so in order to avoid the need for another trial. I have already described the Claimant's injuries. For general damages an award in the range of $600,000 to $800,000 was claimed. Reliance was placed on ***Trevor Benjamin v Henry Ford HCV 028767 2005*** **Unreported judgment dated 23 March 2010.**

[34] The First Defendant submitted that $250,000 was the appropriate award. They rely on ***Thelma McCarty v. Hubert Simms Suit CL 1989 M178*** **Karl Harrison's publication page 361;** ***Smith v. Reid Suit #CL 1984 S320*** **Karl Harrison Assessment of Damages for Personal Injuries page 362*; Stephens v James Bonfield Suit CL 1992 S230.***

[35] Having reviewed the authorities I am of the view that an award for Pain Suffering and Loss of Amenities in the amount of $500,000 would have been appropriate.

[36] As regards Special Damages Counsel for the 1st Defendant took objection to several items. Those are detailed in his written submissions. The Special Damages are proved by Exhibits 5 and 6 being receipts. I would have awarded the following: $2,850.00 for crutches, $25,000 to Caduceus Ltd. for physical therapy January 4 to January 30th 2008; $10,000 Caduceus for report; $2,000 Caduceus visit 1st February 2008; $1,500 Medical Report UHWI; Mancare Pharmacy $2,542,00; York Pharmacy $2,000; Mancare Pharmacy $3,550.00; Mancare $2,896.00; Mancare $3,114.00; Mancare $3,114.00;

Mancare $3,550.00; York Pharmacy $1,868.81; Transportation total $1,650.00; Clock Tower Pharmacy $3318.00; UHWI $1151.91; UHWI $350.00; UHWI $100.00. I disallowed the other items as they did not relate to the relevant injury or appeared to be duplicated. I accepted that physiotherapy may reasonably have been required. The physiotherapist's report was in evidence and the doctor was not called to challenge its necessity. I therefore would have awarded the expense for physiotherapy.

[37] In the result however I find that the Defendants are not liable to the Claimant. Had it been necessary I would have given judgment for the 2nd Defendant against the 1st Defendant on its ancillary claim for an indemnity. This did not arise having regard to my findings on liability. There is therefore judgment for the 1st and 2nd Defendants against the Claimant. Costs to the Defendants to be taxed if not agreed.

David Batts
Puisne Judge
9th May, 2014