[2019] JMSC Civ 104

ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 02533

BETWEEN	**TANESSE JONES**	**1ST CLAIMANT**
AND	**RAYMOND JONES**	**2ND CLAIMANT**
AND BETWEEN	**SPIKE INDUSTRIES LIMITED**	**1ST DEFENDANT**
AND	**ANDREW SMITH**	**2ND DEFENDANT**
AND	**RICHARD SMITH**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Clifford Campbell instructed by Archer Cummings and company for the claimants

Mr. Mathew Royale instructed by Samuda and Johnson for the first defendant

Heard: February 13 and 15, 2019 and May 31, 2019

IN OPEN COURT

CORAM: J. PUSEY. J

BACKGROUND

[1] The trial of this claim proceeded against the first defendant only as an Interlocutory Judgement in Default of Acknowledgement of Service has been entered against the other defendants.

INTRODUCTION

[2] The claimant, then a grade 10 student at the St. Andrew High School for girls, was, on the November 2, 2007 during the lunch break, sitting on a ledge, provided for that purpose, in the lunch area. A delivery truck bearing registration numbers and letters CB6483, which would not normally deliver goods at that time and in that area, drove up, stopped and negligently swung open its delivery door which hit the claimant causing injury to her. The truck was owned by the second defendant and driven by the third defendant. The truck was 'wrapped' with an advertisement of the first defendant's products. 'Wrapping' is the placing of a picture depicting the first defendant's goods over the entire vehicle.

[3] The claimant filed this action against the first defendant claiming that the third defendant (driver) was either the servant or agent of the second defendant or the first defendant or both of them and so the first defendant is vicariously liable in negligence for the personal injuries she sustained.

ISSUE

[4] The issues for determination are firstly, whether the third defendant is the servant of the first defendant, resulting in the first defendant being vicariously liable for the damage caused to the claimant by the action of the third defendant and if so, secondly, what damages are recoverable for the personal injuries sustained.

VICARIOUS LIABILITY

[5] In Winfield and Jolowicz on Tort, 12th Edition the learned authors defined vicarious liability as;

> *....the liability which A may incur to C for damage caused to C by the negligence or other tort of B..... What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship. The commonest*

instance of this in modern law is the liability of a master for the torts of his servants done in the course of their employment.

[6] The relationship of master and servant is at the heart of this type of liability. It is, in most instances, a question of fact.

[7] What is being relied on in the instant case to establish a master and servant relationship between the first and third defendants is the advertisement of the first's defendant's goods on the second defendant's truck and the delivery of those goods to retailers.

[8] The evidence discloses that the claimant knows that the owner of the truck is the second defendant and there is no difficulty in finding vicarious liability in him. However, the claimant is speculating that the second and third defendants are the employees of the first defendant company. In the Particulars of Claim at paragraph 5 she says;

> *That while the claimant was in the designated eating area, and while motor vehicle registered CB 6483 was being driven and/or operated by the 3rd defendant,* ***the servant and/or agent of the 1st and/or 2nd defendant,*** *a door of the said vehicle negligently hit the claimant.*
>
> *Emphasis mine.*

[9] In her Witness Statement (evidence in chief) and cross-examination she maintains the same posture.

[10] Counsel for the claimant submitted that it is the duty of the first defendant to disclose documents generated in the course of his business that shows categorically whether the second and third defendants are his servants or his customers. If he fails to do so, an inference adverse to him, can be drawn that the relationship of master and servant exists. Counsel relied on dicta in **Gordon v Gordon** [2015] JMMC MC 2 Per Morrison J. In that case two (2) witnesses

who had supplied affidavits and were ordered to be present for cross-examination in the trial of a case commenced by a Fixed Date Claim Form, were absent without an explanation from the trial. Adopting principles regarding the circumstances necessary for an adverse inference to be drawn from the absence or silence of a witness distilled in **Wisniewski v Central Manchester Health Authority** [1992] Lloyd's Report med 223 by Brooke LJ, Morrison J felt compelled to draw adverse inferences against the defendant whose witnesses were absent. The witnesses were to address a fact in issue and could influence the credibility of the defendant.

[11] In the instant case, the first defendant was asked by counsel for the claimant in cross-examination whether he had documentary ***records*** of his customers and he responded affirmatively. He, however, did not put any of this documentary evidence before the court. The issue the documents would speak to is whether the second and third defendants were customers of the first defendant or its servants. The inference to be drawn by the absence of the documents, it was argued, is that they were servants of the first defendant.

[12] Among the principles on which Morrison J relied from **Wisniewski v Central Manchester Health Authority** *Supra* is;

> *...there must have been some evidence, however weak, adduced to the former on the matter in question before the court is entitled to draw the desired inference. In other words, there must be a case to answer on that issue.*

[13] Apart from the distinguishing factor that the **Wisniewski** case is concerned with the absence of a witness, the question raised by the principle quoted is that the issue about which the inference is to be drawn must be established by evidence, prima facie, by the claimant. In the instant case the claimant has pleaded in a somewhat speculative manner, 'and/or', clearly demonstrating that she does not know or is able to establish by evidence whether the driver is the servant of the first or second defendants or both of them. This is a fact in issue critical for the

claimant to succeed. There is therefore, to use Morrison J's formulation, no prima facie case on the claimant's evidence, in answer to which the defendant has failed to put forward rebuttable evidence, and that failure allows adverse inferences to be drawn against him. What the claimant's contention amounts to is that the burden to prove the existence or non-existence of the master/servant relationship has been shifted to the first defendant by counsel for the claimant. To my mind the claimant has failed to establish by evidence a fact in issue she is obliged to prove since she is averring that fact. She said in cross-examination;

> *I am saying he (driver) is employed to the second defendant and the second defendant is the owner of the truck. I don't know if he is employed to the first defendant.*

[14] What counsel for the claimant is arguing is since the claimant does not know and the defendant is saying the second defendant is a customer and has documents to establish that categorically, he must put it before the court or adverse inferences should be drawn against him. This, to my mind, should have been settled in Case Management by the process of disclosure. The claimant to my mind must establish by evidence her case that he is a servant and it will be for the first defendant to disprove it by the defence he mounts.

[15] Notwithstanding this observation, I examined the first defendant's case. The first defendant admits placing the advertisement on the truck to promote the sale of its goods with the permission of the second defendant. He asserts that the second defendant purchases goods from him weekly at a discount and sells and delivers them to retail shops, using the truck which he owns, on which the advertisement was placed. The third defendant is a driver employed by the second defendant. He has no master/servant relationship with them and he should not be before the court.

[16] The evidence does not disclose any other factual basis for the claimant's contention that the relationship of master and servant exists between the second and third defendant and the first defendant, other than the wrapping of the truck

with his logo. She is obliged to prove this on a balance of probabilities. In cross-examination the claimant said;

> *I don't know if the logo identifies the truck as belonging to Spike Industries or is a logo advertising for Spike Industries.*

[17] This lack of particularity about the logo cannot be the basis for saying that the truck owner and driver are the servants of the first defendant. In fact the rebuttable presumption is that the driver is the servant or agent of the owner of the vehicle. In **Werb v Rodney** [2010] JMCA Civ 43 reference was made to this dictum by Clarke J in **Barnard v Scully,** in these terms,

> *It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary this evidence (ownership of the vehicle) is prima facie proof that the driver of a vehicle was acting as servant or agent of it registered owner. The onus of displacing this presumption is on **the registered owner**, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him.*
>
> *Emphasis mine*

[18] It is therefore for the second defendant to rebut the presumption that he is the master of the third defendant and not the first defendant.

[19] I therefore find that on the evidence before the court, the first defendant is not vicariously liable for the injuries sustained by the claimant, as it is not established by evidence that the tortfeasor is the servant or agent of the first defendant, but rather prima facie he is the servant or agent of the second defendant. Consequently the claim against the first defendant must be dismissed with cost.

ASSESSMENT OF DAMAGES AGAINST 2ND AND 3 DEFENDANTS

[20] Judgement having been entered against the second and third defendants, damages are to be assessed against them.

General Damages

[21] Counsel refers to the case of **Valentine Worgs v Leon Bell** [2018] HCV JMSC Civ 25 decided in February 2018 where there was an award of $1,250,000.00 where the injuries were similar to the claimant's injuries except that there were multiple discs herniation with L5 nerve root impairment.

[22] These are more serious injuries than in the instant case.

[23] He also referred to the case of **Andrea Perelman v Patrick Anglin et al** (Khan's Vol. 4 Pages 197-200) decided in 1964 which had even more serious injuries and different from the injuries sustained by the claimant herein. These include facial injuries, broken ribs, and injuries to both legs. I find it difficult to rely on this as similar to the case at Bar. It is no surprise that the award of $500,000.00 in 1964 is substantially high as the injuries are more serious. When adjusted it amounts to $3,071,023.84 today.

[24] I found of greater assistance the 2000 case of **Iris Smith v Arnett McPherson and Donald Oldfield** (Khan's Vol. 5, page 246) where the injuries sustained were dissimilar except for a 5% whole person impairment. The award was $350,000.00 updates to $1,633,119.26.

[25] Based on the injuries sustained by the claimant from which she still has pain and the authorities cited, an award for general damages of $1,400,000.00 is, to my mind, appropriate.