JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2023APP00121

BETWEEN	**OWEN SHIELDS**	**APPLICANT**
AND	**ROBERT ANTHONY REID**	**RESPONDENT**

Ms Khadine Dixon instructed by Dixon & Associates Legal Practice for the applicant

Glenroy Mellish instructed by Byfield, Mellish & Campbell for the respondent

12 and 16 February 2024

Civil procedure – Supreme Court – Claim in negligence – Motor vehicle collision – Defence of inevitable accident – Refusal of summary judgment/striking-out application – Application for permission to appeal – Real chance of success of appeal – Permission to appeal granted – Rule 1.8(7) of the Court of Appeal Rules, 2002

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] This is an application for permission to appeal the order of Mason J (Ag) made in the Supreme Court on 31 May 2023. The applicant is Mr Owen Shields, who brought a claim in the Supreme Court against the respondent, Mr Robert Anthony Reid, claiming damages in negligence for personal injuries he sustained in a motor vehicle collision.

[2] The respondent filed a defence in response to the claim in which he averred, primarily, that the collision was an inevitable accident resulting from a brake failure.

[3] Following the filing of the defence, the applicant applied for summary judgment or, alternatively, that the defence be struck out on the basis that the defence has no real prospect of succeeding. He also sought costs and any further relief deemed necessary by the court.

[4] The application was supported by the applicant's affidavit. In that affidavit, the applicant deposed, in keeping with his averments in his statement of case, that on 10 July 2017, while he was washing his motor vehicle on the soft shoulder of the roadway along Job's Lane in the parish of Saint Catherine, the motor vehicle (a truck) driven by the respondent's servant and/or agent veered off the roadway and violently collided with him causing him bodily injuries. He deposed to the respondent's response in his defence that the driver had reported that the truck had a brake failure at the time of the collision. He also indicated the respondent's pleadings in his defence that the collision was inevitable and that his failure to keep a proper lookout while washing his vehicle contributed to the collision.

[5] The applicant contends that the defence is hopeless as the collision was caused solely by the negligence of the respondent's servant and/or agent's failure to control the truck and to provide it with proper upkeep and maintenance.

[6] In his response to the application for summary judgment and the applicant's affidavit evidence, the respondent effectively repeated the averments in his defence, albeit with a bit more specificity. He deposed that the truck driver reported that the brakes failed and the driver had lost control of the truck. The driver further reported that he had to swerve to the left to avoid a head-on collision with an oncoming vehicle. He lost control and ended up on the soft shoulder, where the truck collided with the applicant. The truck was removed to a garage on the respondent's instructions, and he has asked the garage operators to give a witness statement to his attorneys that "will assist the Court in deciding whether the accident was avoidable or not".

[7] The respondent also averred that the applicant contributed to the collision "by carrying out car washing on the busy thoroughfare without keeping a proper look while doing so". The respondent contended that his defence deserves to be tried, and it has a real prospect of success since his truck was disabled when it left the scene of the collision.

[8] After considering the parties' contentions, the learned judge did not see the case as one fit for summary judgment or the striking out of the defence for reasons not yet made available to this court. Aggrieved by the learned judge's decision, the applicant applied in the court below for permission to appeal, which was refused. As he is entitled to do, the applicant has renewed the application before this court. He proposes to pursue his appeal on eight grounds. The overarching ground is that the learned judge wrongly exercised her discretion when she refused to grant summary judgment or strike out the respondent's statement of case on the basis that the defence had a real prospect of success. The primary contention is that the learned judge failed to have sufficient regard for the evidence and the defence of inevitable accident. As a result of these errors, she disregarded the merits of the defence and its likely outcome if the case proceeds to trial.

[9] Relying on authorities that deal with the defence of inevitable accident, particularly in the context of collision cases, counsel for the applicant, Ms Dixon, argued that the learned judge erred in refusing the applicant's application for summary judgment. She submitted that there was no defence with a real prospect of succeeding, and she cited three authorities in support of her contention: **The Merchant Prince** [1892] P 179; **Barkway v South Wales Transport Co Ltd** [1948] 2 All ER 460; and **Browne v Browne** (unreported), West Indies Associated States Supreme Court, Saint Vincent and the Grenadines, Appeal No 13 of 1967.

[10] Informed by the learning from these authorities, Ms Dixon contended that the applicant's case raises a *prima facie* case of negligence given how the collision occurred and the reason advanced for it. In the circumstances, the defence embodied in the pleadings and evidence is insufficient to rebut the presumption of negligence on the part

of the respondent. Therefore, the learned judge erred in permitting the case to proceed to trial.

[11] Counsel for the respondent, Mr Mellish, submitted that the learned judge properly exercised her discretion, and there is no proper basis on which this court should disturb it. He contended that the respondent is not required, at this stage, to produce all the evidence on which he intends to rely. Therefore, he should be allowed to proceed to trial to bring expert evidence to prove his case. Mr Mellish also posited that the respondent has asserted that the applicant contributed to the collision and so, this is an issue to be ventilated at a trial. Accordingly, permission to appeal should not be granted. Counsel relied on **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 and **Island Car Rentals Ltd (Montego Bay) v Headley Lindo** [2015] JMCA App 2.

[12] Having considered the application and supporting evidence that was before the learned judge, the submissions of counsel and the authorities cited in this court, especially those treating with the defence of inevitable accident, cited in the court below, we are propelled to grant permission to appeal.

[13] Rule 1.8(7) of the Court of Appeal Rules, 2002 provides that, as a general rule, permission to appeal in civil cases should be granted if the appeal has a real chance of succeeding. As the authorities have established, a real as opposed to a fanciful prospect of success is what is required (see, for example, **Duke St John-Paul Foote v University of Technology and Another** [2015] JMCA App 27A at para. [21]).

[14] We believe that the applicant has a real prospect of successfully satisfying this court that, in the face of the application for summary judgment, the respondent had failed to demonstrate facts which would rebut the presumption of negligence that arises on the applicant's claim.

[15] The law derived from the authorities on which the applicant relies, when juxtaposed against the facts of this case, could lead a court to conclude that the respondent has failed to rebut the presumption of negligence or *res ipsa loquitor*, on

which the claim is premised. There is more than a reasonable possibility that a court could conclude that the fact that the respondent's truck left the roadway and proceeded onto the soft shoulder of the roadway, where the applicant was washing his car, is sufficient to raise a presumption of negligence against the respondent, requiring him to prove affirmatively that he and his driver had exercised all reasonable care. As the court in **Barkway v South Wales Transport Co Ltd** instructively held, to displace the presumption of negligence, it would not be sufficient for the respondent to show that the immediate cause of the collision was a brake failure because that, *per se*, would be equally consistent with negligence or due diligence on their part. The respondent must prove either that the brake failure itself was due to a specific cause which does not connote negligence or, if he could point to no such specific cause, that he had used all reasonable care in the maintenance of the brakes.

[16] The duty cast on the respondent to successfully establish the defence of inevitable accident is also demonstrated by the case of **Browne v Browne**, which bears factual similarities to the instant case. In **Browne v Browne**, the defendant's motor car brakes failed while descending a steep hill. The magistrate accepted his defence to a plea of *res ipsa loquitor* that he had applied his brakes while descending the hill but found none. It was held on appeal that this was not enough to rebut the presumption of negligence on the part of the defendant. The Court of Appeal stated that the defendant should have gone beyond saying he applied his brakes but found none. The court gave full expression to the statement of principle stated above in **Barkway v South Wales Transport Co Ltd** by holding that it was incumbent on the defendant to prove that he exercised due diligence in the driving of the car, equal due diligence in the maintenance and use of his vehicle, and that negligence was not a probable cause of the accident.

[17] With this guidance in mind, it is observed that the respondent has raised nothing in either his pleaded defence or the evidence filed in opposition to the summary judgment application to even faintly suggest, at least, that he had maintained a reasonable system of inspection or maintenance regarding the brakes and that he was not guilty of negligence regarding the maintenance of the brakes. He adduced no evidence at the

interlocutory stage to satisfy the court that he could prove at trial that negligence was not a probable cause of the collision.

[18] In resisting the application for permission to appeal, it is not enough for the respondent to state, as he has done, that he had requested a witness statement from the garage to assist the court in determining whether the collision was avoidable. All the evidence the respondent requires to ward off the grant of summary judgment should have been brought forward at the interlocutory stage where the application was made in the court below. The summary judgment application required all cards on the table, as Ms Dixon aptly put it. Therefore, Mr Mellish's submission that permission to appeal should not be granted because the learned judge was correct to refuse the orders sought by the applicant on the basis that there is outstanding evidence to be deployed at trial is not accepted.

[19] Having reviewed the parties' statements of case and the evidence adduced by them in the interlocutory proceedings before the learned judge, we conclude that the case is one for this court to investigate the approach and the decision of the learned judge complained of, against the background of the relevant law that governs the defence of inevitable accident. Indeed, it is arguable, with a real chance of success, that the learned judge failed to have regard or sufficient regard for the defence of inevitable accident, and the authorities relied on by the applicant in support of the summary judgment application. If this ground succeeds, which is highly probable, then it would mean, in effect, that the learned judge had failed to properly exercise her discretion in refusing to grant summary judgment or to strike out the defence, thereby justifying the interference of this court.

[20] The argument of the respondent that he has raised the question of what seems to be contributory negligence is not accepted as a potent one sufficient for the respondent to resist the grant of permission to appeal. The strength of that argument is one for this court to ultimately assess in the light of the applicant's case in the substantive appeal. In the premises, we would grant the order as prayed by the applicant in the notice of

application for permission to appeal filed on 13 August 2023 and make the following orders:

1. Permission is granted to appeal the order of Mason J (Ag) made in the Supreme Court on 31 May 2023.

2. The notice and grounds of appeal shall be filed and served on or before 4 March 2024.

3. Costs of the application for permission to appeal shall be costs in the appeal.