[2022] JMSC Civ 99

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021/CV01641

BETWEEN	**DAVIAN TOWNSEND**	**CLAIMANT**
AND	**ATL AUTOMOTIVE LIMITED**	**1ST DEFENDANT**
AND	**HENRY CAMPBELL**	**2ND DEFENDANT**

Ms. Alessandra Labeach instructed by Bignall Law for the Claimant.

Munroe Wisdom instructed by Nunes Scholefield for the 1st defendant.

Civil Procedure - rule 15.2 of the Civil Procedure Rules - application for summary judgment - whether the claimant has a real prospect of succeeding on the claim against the 1st defendant; Vicarious liability - whether hirer of a motor vehicle under a car rental agreement vicariously liable for the negligence of a party who hires the motor vehicle; whether the hirer to be named as party in claim for negligence of hiree

HEARD: 27 April & 1 July 2022

MASTER C. THOMAS (AG)

Introduction

[1] On 23 August 2020, along the Old Harbour Main Road in the parish of Saint Catherine, an accident occurred involving a Toyota Rav 4 motor car registered 1607JM driven by the claimant, and a Kia Sportage motor car registered 7648HZ, owned by the 1st defendant and driven by the 2nd defendant. The accident occurred when the Kia Sportage collided into the rear of the Toyota Rav 4.

[2] As a consequence of the accident, the claimant commenced the instant claim in which he averred, among other things, that the 2nd defendant "whether in his own right or as the servant and/or agent or permitted driver of the [1st] defendant so negligently drove, managed or controlled" the Kia Sportage motor car that it collided into the rear of the Toyota Rav 4 causing the claimant to "suffer injury, loss and damage and incur expense".

[3] On 13 May 2021, the 1st defendant filed its defence in which it admitted, among other things that it was the owner and the 2nd defendant was the driver of the Kia Sportage registered 7648HZ. It, however, denied that the 2nd defendant was its servant or agent and averred that it is in the business of renting motor vehicles. It admitted that the 2nd defendant was at all material times an authorized driver of the Kia Sportage motor car registered 7648HZ on "his own business unconnected with that of this defendant in accordance with rental agreement entered into on August 21, 2020". Although it averred that a copy of the car rental agreement dated 21 August 2020 was attached to the defence, it does not appear that this was done. No acknowledgment of service or defence was filed on behalf of the 2nd defendant and no affidavit of service was filed confirming whether the 2nd defendant was served.

[4] On 7 October 2021, the 1st defendant filed the application which is now before me for consideration. The substantive orders being sought are as follows:

1. That referral to mediation in the civil jurisdiction of the court is dispensed with.
2. That summary judgment is entered against the claimant in favour of the applicant/1st defendant.
3. In the alternative, that the claimant's statement of case as against the applicant/1st defendant be struck out.

[5] The grounds relied on are as follows:

1. Summary judgment is being sought on the ground that the Claimant has no real prospect of succeeding on the claim against the Applicant/2nd Defendant pursuant to Part 15.2(a) of the Civil Procedure Rules, 2006.

2. Alternatively, the claim ought to be struck out against the Applicant/Defendant pursuant to Rule 26.3(1)(b) and/or (c) as it discloses no reasonable grounds for bringing the claim against the Applicant/2nd Defendant.

3. The following issues arise for the Court's consideration:

   (a) That the Applicant/1st Defendant was at all material times a limited liability company duly registered under the Laws of Jamaica and operating as a rental company.

   (b) That motor vehicle registered 7648HZ was subject to a rental agreement entered into on August 21, 2020 by the Applicant/Defendant and the 2nd Defendant, Henry Campbell.

   (c) That at the time of the accident, the 2nd Defendant was not acting as a servant and/or agent of the Applicant/1st Defendant.

   (d) Furthermore, at the material time of said incident, the Applicant/1st Defendant had no interest in the purpose for which the said motor vehicle was being used by Henry Campbell.

(e) Accordingly, the Applicant/1st Defendant cannot be held vicariously liable for the actions of the 2nd Defendant.

[6] An affidavit in support of the application was sworn to by Mark Pike, the general manager of the 1st defendant. Mr. Pike deponed that on 21 August 2020, the 1st defendant entered into a car rental agreement with the 2nd defendant and that the motor vehicle registered 7648HZ was scheduled to be returned on 26 August 2020. He deponed that the 2nd defendant paid the application fee of US$242.92 and signed the document agreeing to its terms and conditions. A copy of the car rental agreement was exhibited. No affidavit in response was filed on behalf of the claimant.

Submissions

[7] Mr. Wisdom submitted that the central issue is whether the 1st defendant being a car rental company and having leased the motor vehicle to the 2nd defendant, can be held vicariously liable for the 2nd defendant's negligence. He referred to the rental agreement which was exhibited to Mr. Pike's affidavit and submitted that the vehicle was at all material times under a contract of rental. Mr. Wisdom argued that based on ***Island Car Rental (Montego Bay) Ltd v Lindo*** [2015] JMCA App 2, the owner and renter of a motor vehicle ought not to be held vicariously liable for the negligent driving of the person who hired it. Therefore, he submitted, in accordance with established principles of law, the claimant has no real prospect of succeeding on the claim on which it is alleging that the 1st defendant ought to be liable for the 2nd defendant's actions. Accordingly, summary judgment ought to be entered against the claimant.

[8] Ms. Labeach submitted that the claimant was not merely claiming agency; rather, as was clearly stated in the particulars of claim, the claimant is asserting that the 2nd defendant was the permitted driver of the 1st defendant. The inclusion of the 2nd defendant as permitted driver of the 1st defendant would cover situations where

there was a rental agreement between the defendants. Therefore, she submitted, authorities such as ***Island Car Rental (Montego Bay) Ltd v Lindo*** which applied ***Avis Rental Car v Maitland*** (1982) 32 WIR 294 are distinguishable in that they are dealing with situations where agency was alleged. By virtue of the rental agreement, the 2nd defendant was permitted to make use of the 1st defendant's motor vehicle and as such, she argued, the 2nd defendant had the permission of the 1st defendant to use its vehicle. Because of the use of "permitted vehicle", the 1st defendant was not put in a better position than anyone else who allows or permits another to use his vehicle. She submitted that the distinction between "permitted driver" and "agent" is succinctly laid out in ***Samuel Rose v Galaxy Leisure and Tours & Franklin Bosheuve*l** [2021] JMSC Civ 93.

Discussion and Analysis

[9] The relevant rule of the Civil Procedure Rules ("CPR") governing summary judgments is rule 15.2. The effect of the rule is that an applicant on a summary judgment application must show that the respondent has no real prospect of success. The burden of proof is on the applicant to satisfy the court that the respondent has no real prospect of success.

[10] Rule 15.5 of the CPR requires that the applicant file affidavit evidence in support of the application. The effect of this rule as well as the decision of their Lordships' Board in ***Sagicor Bank v Taylor Wright*** [2018] UKPC 12 is that the court will consider the evidence relied on in support of the application as well as the pleadings.

[11] It is now trite law that the test as to whether there is a real prospect of success is whether there is a real as opposed to a fanciful prospect of success (***Swain v Hillman*** [2000] 1 All ER 92). It seems to me that this being a claim for negligence, in order to succeed in its application for summary judgment, the burden of proof is on the 1st defendant to show that the claimant has no real prospect of success of establishing negligence against the 1st defendant. Based on the particulars of

claim, there are two bases on which the claim for negligence has been brought against the 1st defendant: the 2nd defendant was its servant or agent; and the 2nd defendant was its permitted driver.

[12] It is indisputable that the hirer of a motor vehicle is not by reason of the rental agreement governing the hireage of the motor vehicle vicariously liable for the actions of the person to whom the motor vehicle was hired or rented. This was established in ***Avis Rent-A-Car Ltd v Maitland*** [1980] 32 WIR 294, which was applied by our Court of Appeal in ***Island Car Rentals Ltd (Montego Bay) v Headley Lindo*** [2015] JMCA App 2. In the latter case Brooks JA stated:

> ***Avis Rent-a-Car Ltd v Maitland*** *(1980) 32 WIR 294 has long been accepted as the authority for the principle that a person who lets a motor vehicle out on hire, is not, by virtue of that transaction, vicariously liable for the negligent driving of the person to whom he hires the vehicle.*

[13] Indeed, this was not disputed by Ms. Labeach. Ms. Labeach's contention, however, is that the principle is inapplicable as the claimant has asserted by its pleadings that the 2nd defendant was the "permitted driver" of the 1st defendant and by virtue of this the 1st defendant is liable. To support this position, she relied on ***Samuel Rose v Galaxy Leisure and Tours Ltd & Franklin Bosheuvel*****.** In that case, Mott Tulloch-Reid J (Ag) (as she was then) stated (at paragraph [6]):

> *The position as set out in the* ***Avis Rent-a-Car*** *case is established law as it relates to the issue of a hirer/hiree situation where the claimant in his pleading pleaded agency. Where, however agency is not pleaded but the pleadings reveal that the hiree was driving the hirer's motor vehicle as an authorized/permitted driver, then other considerations can be made. Why else is a motor vehicle insured but to indemnify the owner or the owner's authorized driver against*

> *any claims that arise if it is proved that the owner or his authorized driver was negligent. To hold a different understanding of the law and governing statute (ie the Motor Vehicles Insurance (Third Party Risk) Act would be unfair.*

At paragraph [9], the learned judge stated:

> *To succeed on a claim, the claimant would properly have to plead that the defendant was an authorised driver pursuant to a rental agreement between the defendant and the rental car company and would therefore be covered under an insurance policy. Professor Gilbert Kodilinye in his book* <u>*Commonwealth Caribbean Tort Law*</u> *5th ed said:*
>
> *If the negligent driver is a person covered by the policy, it will not normally be necessary for the claimant to invoke the doctrine of vicarious liability in order to make the owner of the vehicle liable, as the insurance company will compensate the claimant under the terms of the policy and in accordance with its statutory obligation, under the motor vehicle legislation…*
>
> *If the hiree is found to be negligent then the insurance company would compensate the claimant under the terms of the policy in so far as it is able to do so [sic] indemnify the claimant. If the amount insured does not cover the extent of the award of the damages, I would not think that the hirer would be liable to cover any outstanding amounts as it is not liable for the actions of the hiree.*

Then at paragraph [14] she stated:

> *Given all of the above, a claimant who is injured because of the negligent acts of a person who rents a motor vehicle can be compensated by the insurance company if the court finds in his favour. What is important is that the pleadings must be set out in such a way as to properly show the relationship between the person who rents the car and the owner. Also of importance is the fact that the person who is driving the rented vehicle [at] the time of the accident, must be so authorized by the rental car company and is noted as an authorized driver on the insurance policy, and the driver of the motor vehicle, that is, the hiree, must be found liable by the court.*

[14] The learned judge relied on the Eastern Caribbean Court of Appeal's decision in the case of ***Eastern Caribbean Insurance Ltd v Bicar*** HCVAP 2008/014 (delivered 25 March 2010) in coming to her conclusion. In that case the Court of Appeal had held that an "insured person or person insured by the policy under section 4(1)(b) of the Motor Vehicles Insurance (Third Party Risks) Act of St Lucia [which is in *pari materia* to section 5(1)(b) of our Motor Vehicles Insurance (Third Party Risks) Act] includes not only the policyholder but any other person or class of persons as specified in the policy and there was no distinction in principle between a driver who is "permitted" and one who is "authorised". The court also found that section 4(7) of the Act (which is in *pari materi* to section 18(1) of our Act) "creates a statutory exception to the normal rules of privity so as to take account of a liability arising in respect of a person who was permitted or authorised to drive other than the policyholder. The section ensures that an authorised driver is in the same position as the policyholder in respect of the right to an indemnity from the insurer".

[15] Importantly, the Court of Appeal in **Bicar** also found that the grounding of the liability of the insurer to pay a judgment debt in respect of which an authorized

driver has become liable is not dependent on a finding of vicarious liability on the part of the policy holder. The obligations may arise quite separately and independently of the other once it can be shown that the driver falls within the category of persons specified under the particular policy as being covered thereunder.

[16] The ***Bicar*** case was referred to by our Court of Appeal in ***Mecheck Wilis v Globe Insurance Co of Jamaica Ltd*** [2015] JMCA Civ 36 where our Court of Appeal although finding that the case was of no assistance to the party in the appeal seeking to rely on it, did not disapprove of the principle expressed in ***Bicar****.*

[17] In the ***Bicar*** case an action had been brought by a third party (Mr Bicar) against an insurance company (Eastern Caribbean Insurance Company Limited) to satisfy a judgment that had been obtained against a negligent driver of a motor vehicle (Mr Montrose) which was insured by Eastern Caribbean Company Limited and owned by another party (Mr Noel). The trial court had found that Mr Noel was not vicariously liable. Mr Montrose failed to pay the judgment as did the insurance company. As a consequence, relying on the Motor Vehicle Insurance (Third Party Risks) Act of that jurisdiction, Mr. Bicar brought an action against Eastern Caribbean Insurance Company Limited to recover the judgment sum

[18] The issue in the ***Bicar*** case concerned the interpretation to be given to the relevant provisions of the Motor Vehicle Insurance (Third Party Risks) Act as to whether the insurance company was liable to satisfy a judgment obtained against a driver who was not its insured. It seems to me therefore that the principle that may be gleaned from the ***Bicar*** case is that the insurer of a motor vehicle which is let on hire is liable to satisfy a judgment obtained by a third party against the driver of the motor vehicle who was not the owner in circumstances where the driver was the permitted or authorised driver of the owner.

[19] With the greatest of respect, it seems to me that that case did not establish that the owner of a motor vehicle should then be held liable or be sued for the negligent

acts of the permitted or authorised driver where the owner is not vicariously liable. Indeed, the court noted that the finding of the liability of the insurance company to satisfy the judgment of the third party was independent of any finding of vicarious liability on the part of the owner.

[20] In the ***Mecheck Willis*** case, the appellant, who was the injured third party (Mecheck Willis) resulting from an accident with another party, had relied on **Bicar** to support his contention that the owners' insurance company (Globe Insurance Company) was liable to satisfy a judgment he had obtained against the owners (Yvonne and Patrick Flynn) in circumstances where the driver of the Flynn's motor car was not qualified to drive the motorcar. The resolution of the appeal required a construction of the relevant sections of the Motor Vehicle (Third Party Insurance) Risks Act including section 18(1) as well as the relevant motor vehicle insurance policy. The Court of Appeal found that the ***Bicar*** case was unhelpful in that it concerned a driver who fell within the category of persons specified under the insurance policy whereas in ***Mecheck Willis*** the driver being underage, fell outside of the insurance policy. It seems to me that in this finding, the Court of Appeal indirectly accepted the principle as stated in ***Bicar****.*

[21] Significantly, Phillips JA in her judgment in **Mecheck Willis** in commenting on section 18(1) of the Motor Vehicle Insurance (Third Party Risks) Act stated:

> *Section 18(1) of the [Motor Vehicle Insurance (Third Party Risks) Act directly empowers third parties to seek redress to force insurers to satisfy judgments against persons insured in respect of third party risks. This recoverable sum can either be the judgment sum, or the policy limit, whichever is lower.*

[22] I am of the view that in the light of **Bicar** and **Mecheck Willis** as well as the provisions of the Motor Vehicle (Third Party Risks) Act, there does not seem to be a basis upon which the provisions of that Act could be used to ground a claim for

negligence against the owner who is the hirer of a motor vehicle in circumstances where the owner was not involved in the accident and is not vicariously liable.

[23] To bring the claim against the owner who is not vicariously liable would be incongruous with the finding of the court in **Bicar** that the liability of the insurance company for the judgment is independent of any finding of vicarious liability on the part of the owner. It also seems to me that this would be inconsistent with the principle that a claimant ought usually to have a cause of action against a defendant. Indeed, ***Sebol Limited and Others v Pan Caribbean Financial Services Limited*** SCCA No 115/2007 (delivered 12 December 2008) demonstrates that the court will strike out a claim where there is no cause of action against a defendant.

[24] It is true that the court must be careful to ensure that all parties concerned in the dispute that is before the court, are before the court for it to effectively and completely adjudicate on all the issues involved in the case. The real issue in controversy in this claim is who was at fault in the accident that occurred on 23 August 2020 and by extension, who is liable. Was it the claimant or was it the 2nd defendant, who was the driver of the 1st defendant's motor vehicle? If there is no issue of vicarious liability on the part of the 1st defendant as hirer of the motor vehicle, then the presence of the 1st defendant as hirer is not necessary to resolve any of the issues in the case. The facts relevant to the negligence of the permitted driver in the accident giving rise to the claim can be established without any involvement in the claim by the owner.

[25] I am of the view that the 1st defendant having made clear by its defence and its evidence in support of the application for summary judgment that the 2nd defendant was a hiree of its motor vehicle and on his own business unconnected with that of the 1st defendant, and the claimant having been unable to bring forward any evidence to the contrary, the 1st defendant cannot be held vicariously liable for the actions of the 2nd defendant. As a result, the claimant has no real prospect of succeeding in his claim for negligence against the 1st defendant. By virtue of

sections 5(1)(b) and 18(1) of the Motor Vehicle (Third Party Risks) Act, if the claimant is successful in obtaining judgment against the 2nd defendant, he should be able to recover the judgment sum plus interest and costs from the 1st defendant's insurer, but that would be a separate proceeding from this claim. In these circumstances, it would be a waste of time and expenses to allow the claimant to continue to pursue the claim against the 1st defendant and therefore this is an appropriate case to grant summary judgment against the claimant.

[26] Having found that summary judgment should be entered in favour of the 1st defendant against the claimant, it is unnecessary to consider whether the claim should be struck out.

[27] In light of the foregoing, I therefore order as follows:

(i) Summary judgment is entered against the claimant in favour of the 1st defendant.

(ii) Leave to appeal is granted.

(iii) Costs to the 1st defendant to be paid by the claimant to be taxed if not agreed.