[2015] JMSC Civ. 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 04377

BETWEEN	**REVEREND DR. RALPH GRIFFITHS**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**CONSTABLE NELSON**	**2ND DEFENDANT**
AND	**THE TRANSPORT AUTHORITY**	**3RD DEFENDANT**

IN OPEN COURT

Nelton Forsythe and Gloria Forsythe, instructed by Forsythe and Forsythe, for the Claimant

Tamara Dickens, instructed by the Director of State Proceedings, for the 1st and 3rd Defendants

Heard: November 10 & 11, 2014 and January 26, 27 & 30, 2015

NEGLIGENCE – WHETHER DUTY OF CARE OWED – WHETHER BREACH OF DUTY OF CARE HAS OCCURRED – WHETHER CLAIM FOR 'PURE ECONOMIC LOSS' CAN BE MAINTAINED IN RESPECT OF TORT OF NEGLIGENCE – DETINUE – WHETHER UNLAWFUL SEIZURE OF MOTOR VEHICLE OCCURRED – ELEMENTS OF TORT OF DETINUE – NEED TO PROVE UNEQUIVOCAL DEMAND – NEED TO PROVE UNQUALIFIED REFUSAL – PROOF OF SPECIAL DAMAGES – WHETHER TRANSPORT AUTHORITY FUNCTIONS AS A CROWN SERVANT OR AGENT – PARTY TO BE SUED IN CLAIMS WHEREIN ALLEGED TORTFEASOR WAS ALLEGEDLY FUNCTIONING AS A CROWN SERVANT OR AGENT WHEN TORT WAS COMMITTED

ANDERSON, K., J

Reasons for Judgment

[1] The Crown is sued and it is alleged that the Crown, as represented by the Attorney General, is vicariously liable for certain allegedly unlawful actions of the 2nd and 3rd defendants.

[2] Claimant is seeking to be awarded judgment in his favour against all defendants and if he is to be awarded that judgment, it will be because he has proven his claim against the defendants for damages for negligence and damages for unlawful detention of his motor vehicle, with registration no. PB 9407 and which is a Toyota motor car.

[3] The defendants have been sued jointly and severally, in that, the Attorney General, is, as the Crown's representative for the purposes of this claim, sued in accordance with the legal principles of vicarious liability, this on the basis that, the allegedly unlawful actions of the 2nd defendant and 3rd defendants were committed by them, in their capacity as Crown servants or agents. Even if though, this court disagrees with the applicability of vicarious liability to the facts of this particular case, as such alleged applicability is being disputed by defence counsel, nonetheless, the 2nd and 3rd defendants have also been sued, severally. In other words, it is open to this court, for the purposes of this claim, to conclude that the 2nd and/or 3rd defendant (s) are liable or not liable to the claimant, as a person (in the case of the 2nd defendant), or statutory corporation (in the case of the 3rd defendant), capable of being sued in their own name (s).

[4] On the point as to whether the Transport Authority is a Crown servant or agent this court has taken careful note, of the dicta from England's Court of Appeal, in the case of **Tomlin v Hannaford** – [1950] 1 K.B. 18. Whilst it is true therefore, that a great deal of ministerial and thus, governmental control is exercised over the Transport Authority, that authority is nonetheless a corporation and has within its powers, all of the powers of a corporation, as set out in **section 28 of the Interpretation Act**. There is no provision in the Transport Authority Act which expressly provides that the Transport Authority is either to be treated as being a Crown servant or agent, or as a government

servant or agent. In the circumstances, as there is expressly provided in the Transport Authority Act, at section 3 thereof, that the Transport Authority shall be a body corporate, to which, the provisions of section 28 of the Interpretation Act shall apply, this court has no doubt in its mind, that the Transport Authority is not a servant or agent of the Crown. On that legal point alone therefore, the claimant's claim must fail in its entirety, since the claimant has alleged that at all material times, the 3rd defendant was functioning as a Crown servant or agent. As such, it will be recognized, further on in these reasons, that this court's considered opinion, is that, as such, the claimant could not properly have maintained his claim against the 3rd defendant and also, since it is also this court's considered opinion that the 3rd defendant, does not, when carrying out its functions under the Transport Authority Act, or even when merely purporting to carry out those functions, do so, as a Crown servant or agent, it inevitably follows that this court is also not of the view that the claimant's claim against the 3rd defendant can properly succeed.

[5] In the event though, that this court is wrong in both of those respects, it will hereafter go on to set out its reasons for concluding that the claim as particularized, is only properly maintainable against the 1st defendant – if it can properly be maintained at all and also, to set out other important conclusions of law and fact which are pertinent to the claimant's case

[6] The claimant has alleged that, at all material times, the 2nd and 3rd defendants were functioning as Crown servants or agents, and has not alleged, even in the alternative, that either the 2nd defendant was acting in his personal capacity, or that the 3rd defendant was acting in any private capacity. It was, in the absence of such allegations, not open to the claimant, to properly or successfully pursue his claim as against the 2nd and 3rd defendants. What was the only option available to the claimant, if he wished to have any chance at successfully proving his claim against either the 2nd or 3rd defendants, is that he would have had to have made the appropriate allegation, as against them, as aforementioned, further or alternative to that which was the main thrust of his allegation. That main thrust, if there had been an alternative allegation as to the

capacity in which the 2nd and 3rd defendants had been functioning when they carried out their respective actions in respect of which complaint to this court is being made, would have been that at all material times, they were functioning as Crown servants or agents. As it was though, as particularized in the claimant's third further amended particulars of claim, no alternative allegation has been made in that respect. The claimant has instead, solely contended, in that respect, that at all material times, the 2nd and 3rd defendants were functioning as Crown servants or agents.

[7] That being so, this claim, it must be declared by this court, can only, if it is to succeed at all, properly succeed as against the Attorney General. This is so because, the **Crown Proceedings Act, at section 13 (a)** provides that – *'Civil proceedings against the Crown shall be instituted against the Attorney General.'* As a matter of law, since that statute – **Crown Proceedings Act**, has clearly specified the party against whom claims against the Crown are to be instituted, it is not open to a claimant, who is not claiming against anyone or any entity, other than someone or some entity whom or which he alleges, was, at the material time, functioning as a Crown servant or agent, to pursue his claim against anyone other than the Attorney General. The statutory provision at **section 13 (2)** would be redundant if it were otherwise. The latin maxim – *'expressio unius est exclusio alterius,'* which is a principle that may be used as a guide by the courts in interpreting certain statutory provisions, can properly and should and indeed, will be applied by this court, in interpreting the legal effect of **section 13 (2) of the Crown Proceedings Act**. See: **The Attorney General and Gladstone Miller** – Supr. Ct. Civ. App. no. 95 of 1997.

[8] In the circumstances, for that reason alone, the claimant's claim against, the 3rd defendant fails and judgment on that claim is awarded in favour of the 3rd defendant. The costs of that claim are also awarded to the 3rd defendant, with such costs to be taxed, if not sooner agreed. As there was no acknowledgement of service or defence filed by the 2nd defendant, this court made enquiry of counsel, at the onset of the trial of this claim, as to whether the 2nd defendant, was ever served with these claim form proceedings. This court was then informed by the claimant's counsel that the 2nd

defendant was never served and therefore, it follows that the claim against him, has now expired. See **rule 8.14 of the CPR** in that regard. Even if service of these claim form proceedings had been lawfully effected upon the 2nd defendant and he had been in default of filing and serving, either an acknowledgement of service, or a defence within the requisite time period, nonetheless, a default judgment could not lawfully have been entered against him by the Registrar, since it follows, from the wording of portions of my reasons for judgment, as earlier set out, that no judgment against him personally, can lawfully be obtained, in view of the manner in which the claimant chose, through his attorneys, to particularize his claim.

[9] As regards the claim against the Crown, with the Attorney General being the 1st defendant and the only defendant against whom, if it is to succeed at all, this claim can properly be proven, it is this court's conclusion that the claimant needed to have proven, not merely that his vehicle was unlawfully detained, but furthermore that that there was made by him or by an agent of his, or employee of his, such as for instance, an attorney-at-law (agent), an unqualified demand for the return of his vehicle to him and an unjustifiable and unqualified refusal by the relevant Crown servant or agent, to have delivered the same to him, within a reasonable time after such demand had been made. See: Suit No. C.L. 1990/ G 096 – **Owen Grant and Supt. Gladstone Grant and The Attorney General; and George and Branday Ltd. v Lee** – [1964] 7 WIR 275.

[10] Even if the claimant had been able to prove that there was the unlawful detention of his motor vehicle by the 2nd and 3rd defendants, acting in conjunction with one another, it is apparent that the claimant has been wholly unable to prove that he or any agent of his, had, at any time, made any unqualified demand for the return of the vehicle, or that, there was any unjustifiable refusal by Crown servants or agents, in particular, the Transport Authority, to release his vehicle to him within a reasonable time thereafter.

[11] In any event, the claimant was, according to his own evidence, either personally using, or having his vehicle (in respect of which, this claim surrounds), be used, on the

day when it was seized by a constable of the Jamaica Constabulary Force (JCF) – being the 2nd defendant, without a road licence. In other words, his vehicle was being unlawfully used on the day when it was seized and it was being so unlawfully used, either by him, or by one of his employees, who used to drive his taxis. Incidentally, this court does not accept the claimant's evidence from the witness stand, that he was driving the vehicle, just before it was stopped and seized by the constable. The documentary records which were prepared by the claimant and transmitted by him to others, specify otherwise.

[12] Furthermore, not only would said vehicle have been being unlawfully used to traverse Jamaica's roads on the day when it was seized, in that there was not then in place, in favour of the claimant, the applicable road licence, this court has also, drawn that which is, in the circumstances, not only a reasonable inference which can be drawn, but perhaps even further, the only reasonable inference that can be drawn from the proven facts (although, it being the only reasonable inference, is not something which the court needs to find, in order to be able to draw and apply that inference, in a civil case). That reasonable inference is that, as at the time when his vehicle was seized, his vehicle did not have in place, any insurance for the purpose of its utilization to perform hackney carriage services, or for that matter, any insurance whatsoever. Of course though, its having been insured to cover its usage as a hackney carriage, would have been required, if it were to have been lawfully used as a hackney carriage on our nation's roads.

[13] In her evidence in chief, given on behalf of the 1st and 3rd defendants, Ms. Benjamin testified and this court accepts, that at the time when the claimant had, on March 29, 2005, made his application for the renewal of his hackney carriage licence pertaining to his motor vehicle – PB 9407, he did not submit a copy of any current and valid certificate of insurance, pertaining to that motor vehicle. The claimant needed to have submitted same to the Transport Authority, in order to even have been in a position whereby he could reasonably have expected to have had the hackney carriage licence pertaining to that vehicle, issued to him. This court has inferred that at the time

when the vehicle was seized, there was no such insurance in place. His vehicle was seized, on November 17, 2005. At that time, the claimant had no licence for that vehicle (o/c a road licence). In the circumstances insurance for that vehicle could and would not likely then, or prior to then, between the time when his last road licence for that vehicle had expired and the time when that vehicle was seized, have been issued in his favour.

[14] **Section 9 of the Motor Vehicle Insurance (Third Party Risks) Act**, makes it clear that to obtain a licence for a motor vehicle, there shall be appended to the application for that licence, a certificate of insurance, or a certificate of security, or '*shall produce such evidence as may be prescribed that either (a) on the date when the licence comes into operation there will be in force the necessary policy of insurance or the necessary security in relation to the user of the motor vehicle by the applicant or by other persons on his order or with his permissions or (b) the motor vehicle is a vehicle to which this Act does not apply.'* In the circumstances, the 3rd defendant did not act unreasonably, or carelessly, in having not issued a licence to the claimant following upon his application for same. The 3rd defendant was acting in accordance with the laws of Jamaica, in not having issued the licence to him. The claimant's vehicle was at all times, a motor vehicle in respect of which, the provisions of **the Motor Vehicles Insurance (Third Party Risks) Act**, was applicable. It is of course, also, an offence under that Act, to drive one's vehicle, without insurance for that vehicle, if one is driving same, on any of our nation's roadways. See: **section 4 of that Act,** in that regard.

[15] In the circumstances, the 3rd defendant and by extension, the 1st defendant, did not breach any duty of care that was owed to the claimant in terms of his vehicle licence application. The issuance of a vehicle licence is not a matter of unqualified right, nor is it automatic that a person who applies for a vehicle licence must be issued with same. At most, it is a qualified right, if one is in compliance with the law in terms of meeting the requirements for the obtaining of a vehicle licence, that one can reasonably then expect to be issued with said licence, within a reasonable time after all of those requirements have been met.

[16] The claimant's particulars of negligence have alleged that such alleged negligence of the 3rd defendant, consists of:

> *'(a) Failing to deliver the road license to the claimant in due course of time of at all;*
> *(b) Misplacing the claimant's application for renewal of his road licence;*
> *(c) Failing to make available and deliver a duplicate road licence to the claimant.'*

[17] There is evidence which has been provided during the trial of this claim, from the 1st and 3rd defendants, through their witness, Mrs. Banneta Benjamin, who was at the time when she testified, the acting licensing manager of the 3rd defendant and also, a document which was admitted into evidence as an agreed document – that being a letter which was written by the 3rd defendants then legal officer – Miss Jean Williams, which make it clear that the 3rd defendant's file pertaining to the claimant's application of March 29, 2005, to renew hackney carriage licence, had been misplaced by the 3rd defendant. There exists through, no oral evidence from anyone, nor any documentary evidence admitted during trial, nor any information provided by any of the defendants in response to any request for information which could have been made of them, by the claimant and which information, if it had been provided, would then have formed part and parcel of the 3rd defendant's statement of case, specifying how long that file was misplaced for. The claimant's failure to provide any such evidence to the court, whether through, or by means of cross-examination of the only defence witness that testified, or otherwise, must inevitably mean that said misplacement of that file, cannot, by any means, in and of itself, be properly considered by this court, as constituting anything more than a factual scenario which, even though proven, goes no further than enabling this court to draw an inference that, at some point in time and for some uncertain period of time, the 3rd defendant may have been less than sufficiently careful, in safeguarding the file and contents thereof pertaining to the claimant's relevant application for renewal of hackney carriage licence. Even if this court were minded to draw such inference, which incidentally, it is not, since, if this court were to do so, it would in reality, be doing nothing more than acting on speculation, nonetheless, such an inference, if drawn, could not be properly accepted by this court as constituting evidence of that which is

known in law, as the cause of action – negligence. The reasons for the court being unable to so accept that; are set out in some detail, further on, in these reasons for judgment.

[18] As far as particulars (a) and (c) of the claimant's particulars of negligence, are concerned, it is worthwhile noting, at this juncture, that the only means by which said particulars can properly be accepted by this court, as constituting negligence on the part of the 3rd defendant, arising from which, the claimant should be awarded judgment in this claim, is if this court were minded to also conclude that the claimant ought to have been granted a hackney carriage licence for the vehicle registered as PB 9407, at some point in time between when it was that he applied for same, that having been on March 29, 2005 and when it was, that a license was, at best from the defendants' perspective, according to the evidence of the only defence witness, 'printed' by the 3rd defendant, on January 10, 2008 – albeit that said license, when printed, was printed as pertaining to the period of April, 2005 to March, 2006. (See para. 28 of the witness statement of Banneta Benjamin in that regard). At worst from the defendants' perspective, it would be the period between when it was that the claimant applied for the licence – March 29, 2005 and the time when the claimant's vehicle was sold by the Transport Authority, for the sum of $50,000.00 pursuant to an auction which was held for that purpose – this having no doubt, been legally permissible, in accordance with the provisions of **section 13 (3) (c) of the Transport Authority Act**. There exists no direct evidence before this court, as to precisely when it was that the said vehicle was sold. There does though, exist evidence from which this court can reasonably infer that said vehicle was not sold until sometime after June 9, 2008. This court does so infer, based on the letter which was admitted into evidence at trial, by agreement between the parties and which is under the hand of the 3rd defendant's then managing director – Mr. Keith Goodison and which is dated June 9, 2008. In that letter, which was addressed to and in fact received and responded to, by the claimant, Mr. Goodison offered to release the motor vehicle to the claimant. As such, it is reasonable to infer that at least up until then, said vehicle had not yet been sold by the 3rd defendant.

[19] It is the claimant who had, resting on his shoulders, at all times throughout this trial, the burden of proving negligence against the 1st and 3rd defendants, or either of them. Furthermore, it is he who had the burden of leading such evidence as would have been sufficient to prove his claims in detinue and negligence, on a balance of probabilities. Even further still, he was limited at trial in seeking, to prove the particulars of negligence as alleged, as those particulars, would have been expected by the defendants and also, by this court, to outline the ambit of the primary bases underlying the claimant's claim against the 1st and 3rd defendants, for damages for negligence. The claimant has, for several equally compelling reasons, all of which will be set out in some detail, further on in these reasons, failed to meet the evidentiary burden and accordingly also, the legal burden of proof, of negligence.

[20] This court shall now delve into some detail, as to why it has so concluded. In order for a claimant to establish by proof, a claim for damages for negligence, that claimant is required to prove various things, firstly, that he was owed a duty of care by the defendant. Secondly, that the defendant breached that duty of care. Thirdly, that arising from the breach of the duty of care which was owed by the defendant to the claimant, the claimant suffered losses/or damage and fourthly, that the loss and/or damage which was so suffered by the claimant, was of a nature/type, which was reasonably foreseeable by the claimant.

[21] The case of **Donoghue v Stevenson** – [1932] AC 562, definitively established the general rules of law underlying how it is that a court ought to go about its task of determining whether or not one person owes a duty of care to another, in the context of a particular factual scenario. The Donoghue case established that a duty of care is owed by one, to one's neighbour. In that case, the term 'neighbour' was defined as being, 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.' (See, per Lord Atkin, at para. 580).

[22] What has been set out above, as was laid down by the House of Lords in the **Donoghue case**, is though, notwithstanding its broad level of applicability, nothing more than a general rule. It is only a general rule because, it cannot be doubted, that well-established exceptions to same, not only do exist, but are accepted by courts as being required to exist and be applied by courts, as matters of conjoined justice and policy. It is said that the categories of negligence are not closed. See: **Donoghue case**, per Ld. Macmillan, at p. 619. Equally too though, it must be stated that the categories of either whole or partial immunity from any duty of care, or of limited duty of care, are certainly not closed either. Equally, over time, as has been clearly stated in the text – **Winfield and Jolowicz on Tort, 13th Edition** [1989], *'in any event, many of the immunities with which a lawyer of a previous generation would have been familiar have been swept away, a process in which Parliaments, as well as the courts, has played a substantial part.'* For example, as regards straying animals, advocates, defective premises, an occupier's duty now owed to trespassers and the non-repair of highways, duties of care that were, once upon a time, not owed in those categories of cases, are now, indisputably so owed.

[23] Among the areas in respect of which either no duty of care arises, or a limited/restricted duty of care exists are as follows:

i) 'Economic loss,' or, as it is sometimes more commonly termed in the caselaw – 'pure economic loss; and

ii) Nervous shock; and

iii) 'Negligent' misstatement.

Those three categories ought though, by no means, to be considered by anyone, as constituting an exhaustive list. For the purposes of this claim however, what this court is concerned with, is the claimant's claim for economic loss, arising from that which he has alleged, was the commission by the defendants, in relation to him, of the tort of negligence.

[24] As such, there exists and indeed, have long existed, boundaries to the so-called 'neighbour principle, which was so eloquently and pellucidly laid down by Lord Atkin in

the **Donoghue case** *(op. cit)*. Indeed, in the text – **Charlesworth and Percy on Negligence**, 9th ed. [1997], the learned authors have devoted several paragraphs of that text, to addressing those boundaries. Thus, insofar as the law of negligence is concerned, the parameters of which, are largely determined by judicial decisions delivered in accordance with the applicable 'common law' at the time, it has long been widely recognized that, as a general rule, there is a duty imposed by the law on anyone and everyone to take reasonable care in carrying out one's daily activities. The common law though, as regards claims founded on the tort of negligence, has always been reluctant to extend a duty to anyone, to avoid causing, by one's action, non-physical, or that which is often termed as, 'pure economic loss,' to another. This is because judges have often been of the view that if the law were otherwise to be applied in that respect, the floodgates would be opened to liability in an indeterminate amount, for an indeterminate time and to an indeterminate class. Thus, insofar as the law of negligence is concerned, the courts had, initially rejected any claim for economic loss which was not consequent upon any physical injury or damage to property. See: **Weller & Co. v Foot & Mouth Disease Research Institute** – [1966] 1 Q.B 569. Over time though, the common law evolved and it is now at the point whereby, it is the law, which has been recognized by the Privy Council – Jamaica's highest court, that in order for pure economic loss to be recoverable, pursuant to a claim for damages for negligence, in circumstances wherein, no injury to the person or damage to property is being alleged, it must be shown that there also existed, as between the party who/which is pursuing the claim for damaged for negligence and the defendant to that claim, a 'special relationship', or in other words, sufficiently close 'proximity' between the parties, whereby the defendant (s) has/had knowledge, or, at least, the means of knowledge that a particular person and not just a member of an unascertained class of persons will rely upon them and would be likely to suffer economic loss as a consequence of their negligence, and possibly; (3) it must be fair, just and reasonable that the law should impose a duty of the scope contended. These points have been clearly set out in the text – **Charlesworth and Percy on Negligence** *(op.cit)* at paras 2-121 and are exemplified in the following cases: **Candlewood Navigation Corp. Ltd. v Mitsui O.S.K. Lines Ltd.** – [1985] 2 All E.R. 935 (P.C). and **Muirhead v Industrial Tank**

Specialities Ltd. – [1985] 3 All E.R. 705; and **Simaan General Contracting Co. v Pilkington Glass Ltd. (No. 2)** – [1988] 1 All E.R. 791; and **Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.** – [1972] 3 All E.R. 557 and **S.C.M. (United Kingdom) Ltd. v W.J. Whittall & Son Ltd.** – [1970] 2 All E.R. 417.

[25] Now therefore, this court comes to the important task of applying the law to the particular facts of this particular claim.

[26] This court had, raised the 'economic loss' issue to the litigants' attorneys, during their respective closing submissions which were, in compliance with this court's order for same to be done, presented orally to this court, albeit that the same were also, with this court's leave, also presented by both parties, to this court, in writing.

[27] For present purposes, all that this court will need to state, is the following:

i) This court disagrees with the claimant's counsel's submission, that his client's claim for damages for negligence is not a claim which is seeking to recover for 'economic loss'. This court disagrees with the claimant's counsel's said assertion to this court because, there cannot be any serious dispute that the claimant's claim for damages for negligence is not one brought as a consequence of any injury to any person, or any damage to his property. It is instead, a claim brought, arising from the non-issuance by the 3rd defendant, which it has been alleged, was at all material times in that regard, functioning as a Crown servant or agent, to the claimant, of a licence for his vehicle registered as: PB 9407. As a consequence, the claimant is claiming for damages in terms of loss of profits, arising from his having been unable to have used his vehicle for hackney carriage (taxi) purposes during the material time. Also, he is claiming for the value of the vehicle, as it is his allegation that said vehicle was sold by the 3rd defendant, as a consequence of it having been unlawfully detained by the 3rd defendant, over a lengthy period of time. The **Transport Authority Act, at section 13 (3)** thereof, provides that a vehicle which is under detention by the Transport Authority, may be sold, to cover the costs of the vehicle's detention. Further, he is claiming for loss of use of the vehicle, to perform domestic functions. He is claiming a specific sum as

damages, in each of those three respects. In the circumstances, the claimant's claim for damages for negligence is patently one, seeking to recover, for economic loss. Indeed, that is all which the claimant is seeking to recover in circumstances wherein there has been no alleged damage to his property, or injury to his person.

[28] This court, it must now be stated, also disagrees with the submission of defence counsel that no 'special relationship' existed between the parties. This court disagrees with that assertion because it is clear that at the material time the 3rd defendant would have been aware that the claimant had applied to it for a vehicle licence pertaining to the relevant vehicle. The 3rd defendant would also have been aware that the claimant had applied for a hackney carriage licence and that as such, it was the claimant's intention to utilize that vehicle for the purpose of transporting persons for hire. As such, the 3rd defendant would have at all material times, either known, or at the very least, have been in a position to know, that if they acted negligently either in terms of failure to make available to the claimant at all, the licence which he had applied for, or in failing to make same available to him, within a reasonable time after he had applied for same, such negligence could, in all reasonable likelihood have caused to the claimant, financial loss. When considered carefully, this court has no doubt in concluding that at all material times, the required 'special relationship' did exist as between the claimant and the 3rd defendant, such that a duty of care was owed by the 3rd defendant to the claimant, to treat with his application for the hackney carriage licence, in an appropriate and responsible manner. In addition, this court believes it to be fair, just and reasonable, based on the particular facts of this particular case, that the law of negligence should impose such a duty of care on the 3rd defendant and if the 3rd defendant is considered as having been, for that purpose, functioning as a Crown servant or agent, then by extension, that duty would have been owed by the Crown, as represented by the 1st defendant, to him. If, on the other hand, at all material times, the 3rd defendant was not functioning as a Crown servant or agent, then, no duty of care could possibly have been owed by the 1st defendant to him and thus, at worst for the defendants, who are collectively represented by the office of the Director of State Proceedings, it would and could only be, if such is the case, the 3rd defendant which

would be exclusively held liable. The same would also be the case, as regards the claimant's claim for damages for detinue.

[29] For reasons earlier provided, since it is that the claimant had chosen to pursue his claim against the defendants, collectively, on the basis that at all material times, the 2nd and 3rd defendants were functioning as Crown servants or agents, it is only the 1st defendant, if any of the defendants at all, who can properly be held liable to the claimant to pay damages for detinue or negligence.

[30] This court now returns to its next important consideration, as regards whether the claimant's claim for damages for negligence, should succeed. It is the critical issue of whether the 1st defendant, had owed a duty of care to the claimant to ensure that he was issued with a vehicle licence for the relevant vehicle, within a reasonable time, after he had applied for same. This is an important consideration at this juncture, since two of the three particulars of negligence alleged, which are particulars which the claimant is not only bound by, but also, limited to seeking to prove his claim for damages for negligence, based upon, are essentially contending that the 3rd defendant was negligent in not having issued to the claimant a hackney carriage licence for the relevant vehicle, within a reasonable time, or at all, whether such licence be in the form of an original, or duplicate thereof.

[31] Should the evidence which was presented to this court during the trial of this claim, lead this court to the conclusion that any such duty of care was owed by the Crown, to the claimant, or by the 3rd defendant to the claimant? This is a mixed question of fact and law and the simple answer to it is – 'No.' This court cannot so conclude because, firstly, the claimant's evidence does not at all suggest that he was entitled to get a licence based upon the documentation which he had presented to the Transport Authority both in terms of the application form itself and in particular, whatever information he would have provided in that form, as well as any additional documentation which he would have provided when he made that application.

[32] Even worse though, for the claimant, insofar as his attempts to prove his claim against the defendants for damages for negligence, is concerned, is that the defence put forward a witness, who testified that at the time when the claimant applied for the licence, the relevant vehicle was not insured. As such, of course, in accordance with the provisions of **section 9 of the Motor Vehicle Insurance (Third Party Risks) Act**, no licence for that vehicle could lawfully have been issued to him, unless and until that omission on his part, had been rectified. There is no evidence from either party, as to when same was rectified, or if same was rectified at all. It is true, as per the evidence of the respective parties, that for some unknown reason, a licence was printed in relation to the relevant vehicle on January 10, 2008 and that when printed, that licence related to the period – April, 2005 to March 2006, but no evidence was provided to this court by anyone, based upon which it could even be appropriately inferred, that this means that the claimant did in fact provide to the 3rd defendant, the insurance certificate, or insurance cover note, for the relevant vehicle, for the period of April 2005 to March 2006, or for that matter, draw any inference whatsoever, as to when said insurance certificate or insurance cover note, would have been provided to them by the claimant. Of course, therefore, the printing of that licence, as and when same was printed by the 3rd defendant, is not capable of constituting evidence which either assists the claimant in proving any aspect of his claim, or for that matter, assists the defendant in disputing any aspect of the claimant's claim. That evidence was entirely weightless. Also, the effect of the printing of that licence in 2008, so as to purportedly have same be pertinent to a period of time between 2005 and 2006, was weightless. Clearly, if one is driving a vehicle on any of this nation's roads, in 2008 with a vehicle licence which has long since expired, by means of the effluxion of time, then it would mean that one is driving an unlicensed motor vehicle, unlawfully, on this nation's roads! A licence for a vehicle, pertaining to the year of 2005-2006, can hardly constitute a valid licence in the year 2008, or at any time thereafter! The printing of same was thus, an entirely pointless exercise.

[33] In any event though, not only is there no evidence which was led before this court by anyone, which would have entitled this court to draw the conclusion that the

claimant ought to have obtained a licence for the relevant vehicle, in point of fact, the evidence given by the only defence witness and which is unchallenged in that regard, has been that the claimant was not entitled to have got a licence until he submitted his vehicle's proper insurance documentation and further, there is no evidence from anyone, that the claimant ever did submit same.

[34] In the circumstance, there having been no duty of care owed by the Crown, or by the 3rd defendant, to the claimant to award him a licence or to provide him with a licence whether in original or duplicate form in respect of the relevant motor vehicle, it inexorably follows that the negligence as particularized at (a) and (c) of the claimant's particulars of negligence, have been wholly unproven.

[35] As regards the alleged negligence of the 3rd defendant and by extension, the Crown, in having misplaced the claimant's application for the hackney carriage licence, for the relevant vehicle, it being entirely unknown by this court, as to why said application was misplaced, or in other words, without knowing anything as to the circumstances surrounding the misplacement thereof, it would not even be open to this court to properly conclude that such misplacement must have been, or was likely caused by carelessness. Everything must be considered in its proper context and if the court does not know that context, it is never properly open to this court, to speculate as to same.

[36] Also, this court needed to have been provided evidence by someone, or at the very least, an answer to a request for information which could have been made by the claimant in that regard, specifying how long a period it was, that the claimant's application was misplaced for. Surely, if it was only misplaced and thus, temporarily lost for one day, the consequences thereof, for the applicant whose application has been lost, may not be as detrimental to him, as it may have been, if his application had been temporarily lost, for a period of over two years! Everything must be considered in its proper context.

[37] It was the evidence of the only defence witness – Ms. Benjamin, as was given to this court by her, during her testimony in chief, that the Transport Authority has a Licensing Management Information System ('LMIS') which is an electronic database, in which all applications for licences are inputted. That database states when applications are made and the supporting documents that are submitted along with the applications. 'LMIS' was operational at the Transport Authority in 2005 when the claimant made his application for renewal of hackney carriage licence. (See para. 14 of Ms. Benjamin's witness statement). The 'LMIS' confirms that, at the time when the claimant submitted his application for renewal of hackney carriage licence, that the valid and current insurance certificate was outstanding.

[38] Ms. Benjamin went on to state in her testimony in chief, that the first time that the Transport Authority became aware of the issue of the seizure of the claimant's vehicle, was when the Public Defendant sent them a letter about same, in 2007. Following on their receipt of same, the 3rd defendant's then legal officer – Ms. Jean Williams, had responded by way of letter dated July 17, 2007, and therein, advised that the file relating to the claimant's application had been misplaced and that as such, Mr. Griffiths was to come to the Transport Authority and submit the documents relating to the motor vehicle – this of course notwithstanding that, as has also been accepted by Ms. Benjamin, this claimant had, on March 29, 2005, made application to the Transport Authority for the renewal of the hackney carriage licence, for the relevant motor vehicle and then submitted, along with that application , various documentation pertaining to that vehicle. (See paras. 23 and 6 of Ms. Benjamin's witness statement, in that regard). According to Ms. Benjamin, in continuation of her testimony in chief, as per para. 24 of her witness statement, *'It is to be noted however that the file was not beneficial to the process as said file contained only motor vehicle documents as our Licensing Management Information System contained all information needed. In the interest of Mr. Griffiths, he was asked to resubmit said documents which he refused.'*

[39] This court does not accept the evidence of Ms. Benjamin, either as regards the claimant having allegedly refused to resubmit the said documents, or as to the file not

being 'beneficial to the process.' If indeed, the latter assertion was true, why then would the 3rd defendant's attorney, have required the relevant documentation to have been re-submitted? Also, as regards the assertion that the claimant 'refused' to resubmit said documentation, this is belied by Ms. Benjamin's own evidence, also given during her testimony in chief, that – *'The claimant came in to the Transport Authority sometime in 2007 and re-submitted documents as well as the Certificate of Fitness, so that a hackney carriage licence for the period April 2005, to March 2006 could be processed.'*

[40] It will though, in the final analysis, make no difference whatsoever, in assisting the claimant to prove his claim, that this court disbelieved that evidence of Ms. Benjamin, in either of those aforementioned two respects. Firstly, this is because, it is of course, open to this court to accept part of a witness' evidence and not accept another part. This court accepts as being both truthful and accurate, all other aspects of Ms. Benjamin's evidence. Secondly, even though it is this court's conclusion that the application file was pertinent to the process of approving a hackney carriage licence application and also therefore, in the process of issuing a hackney carriage licence, that, nonetheless, does not obviate the fact that in the absence of there having been in place, an insurance certificate for the relevant vehicle, a hackney carriage licence could not lawfully have been issued to the claimant, with respect to that vehicle. Once again, it is worthy of reiteration, that there exists no evidence from anyone, as to when, if at all, the claimant ever submitted to the Transport Authority, a valid insurance certificate pertaining to the said vehicle. What is known though and accepted by this court, is Ms. Benjamin's testimony in chief, as per para. 27 of her witness statement, that a Certificate of Fitness for the relevant motor vehicle, was submitted to the Transport Authority by the claimant, sometime in 2007. There is no doubt therefore, that in the absence of the claimant proving that he had submitted all required documentation to the 3rd defendant and by extension, the Crown, prior to the application file in which such documentation should have been kept, having become misplaced and that, it was therefore, as a consequence of the misplacement of that file, that the relevant hackney carriage licence was not issued, the claimant's claim for damages for negligence, based upon misplacement of the relevant application file, cannot properly succeed.

[41] Misplacement of that file, in the absence of there existing any evidence as to how it became misplaced and/or for how long said file remained misplaced and in the absence of any evidence capable of satisfying this court that it was due to the misplacement of same and not any other reason – such as, the failure by the claimant to submit all required documentation prior to that file having been misplaced, must and does lead this court to the conclusion, bearing in mind other conclusions already drawn by this court, that the claimant has wholly failed, to prove his claim against the crown, for damages for negligence.

[42] This court will now briefly address another aspect of this overall claim, this being as to whether the relevant vehicle was lawfully seized. If the claimant's evidence were to be wholly believed, his vehicle was stopped and seized by a constable, in circumstances wherein there did not then exist for that vehicle, a hackney carriage licence and yet, that vehicle was then being operated as a taxi.

[43] **Section 1 (1) (a) of the Transport Authority Act**, authorizes a constable (who would in law, be any member of the Jamaica Constabulary Force, or even, the Island Special Constabulary Force – (as once existed), to stop and inspect any public passenger vehicle to ensure compliance with the terms of the road licence and any relevant road traffic enactments. In addition, **Section 13 (2) (v) of the Transport Authority Act** and also, **Section 61(4A) of the Road Traffic Act**, expressly permit a constable to seize any vehicle which is either being used, or caused or permitted to be used on any road, without the owner of that vehicle then being in possession of a 'road licence' for that vehicle. **Section 61 (4B) of the Road Traffic Act**, expressly provides that:

> 'S*ubject to subsection 7(b), a vehicle shall be kept in the possession of the police or Transport Authority, as the case may be, until the licence required under this part is obtained and produced to the Police or the Transport Authority.' Section 61 (7b) of the Road Traffic Act, read along with: Section 13 (3) (c) of the Transport Authority Act, make it clear that if the vehicle remains in the possession of the Police or the Transport Authority for more than six (6) months the vehicle may, subject to such conditions as may*

> *be prescribed be sold by the Police of the Transport Authority, as the case may be, to recover the cost of storage.'*

[44] It was also Ms. Benjamin's evidence, that the relevant vehicle was so seized and sold. In the absence of there having not been in place any valid licence for that vehicle at any time prior to when it was sold – this bearing in mind of course, that for reasons already given herein, the licence which was printed in 2008, clearly could not and would not have been valid or effectual, the vehicle was lawfully detained and lawfully sold and also, lawfully seized – if it was, as the claimant has testified, seized in his presence, as he was driving the vehicle just before it was stopped and then seized by the 2nd defendant – a constable.

[45] Of course though, this court had earlier concluded that it does not accept that the claimant was present and driving the said vehicle just before it was seized. This means therefore, that this court also accepts there exists no credible evidence before this court, as to whether or not it was a constable that had seized the relevant vehicle. What is known by this court though and accepted, is that the said vehicle was seized and was in the possession of the Transport Authority, thereafter. As such, negotiations were being engaged in between the claimant and the Transport Authority, for the return of the vehicle to the claimant. It is apparent therefore, that the said vehicle was seized pursuant to an official act, because if not, the said vehicle would not have been in the possession of the Transport Authority. As stated in the text – The Modern Law of Evidence, by Adrian Keane, 2nd ed. [1989], at p. 474 – *'On the proof of admission of the basic fact that a public or official act has been performed, it is presumed, in the absence of evidence to the contrary, that the act has been regularly and properly performed.'* This is an application of the latin maxim, - *'Omnia Praesumuntur rite esse acta.'*

[46] Even if this court were to be wrong in applying that presumption though, it will make no difference whatsoever, as regards this court's conclusion that the claimant has wholly failed to prove his claim for damages for detinue. The essence of a claim for damages for detinue is not proof, as against the defendant, of the unlawful seizure by the defendant, of an item which the claimant either had possession of, prior to that

seizure, or had a right to the possession of. In fact, as a matter of law, there need not be proof of any unlawful seizure at all, in respect of a claim for damages for detinue. Furthermore, even if the detention of that item was unlawful, that in and of itself, does not mean that the party who/which has unlawfully detained same, has committed, in relation to the person/party who/which has a right to possession of that item, the tort of detinue, in relation to that item. There must also be proven that there was an unqualified demand for the return of same, which was made by the person/party entitled to the possession of same. The claimant has, in respect of this claim, failed to prove this. Also, he has failed to prove another important element of this tort, which is that there was following upon such unconditional demand for the return of the item having been made, an unqualified refusal to return same within a reasonable time.

[47] For the reasons already given, it is this court's conclusion that the claimant not only failed to prove the last two aforementioned elements of that tort, but furthermore, he even failed to prove that the relevant vehicle was being unlawfully detained. In the absence of the proof by him, of each and all of those elements of that tort, his claim for damages for detinue, must and does fail. See: **Carl Brown and Attorney General of Jamaica and Constable Clive Nicholson** – Claim No. 2005 HCV01141.

[48] Solely for the sake of guidance to legal practitioners and litigants and potential litigants alike, this court will give some brief guidance on proof of special damages in respect of any claim. Firstly, as a general rule, special damages must be specially pleaded and specially proven. See: **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** – SCCA No. 109/2002.

[49] A court can relax that general rule, because, in some circumstances to do otherwise, would result in the creation of injustice, due to the court being pedantic. On that point, see: **Desmond Walters v Carlene Mitchell** – [1992] 29 J.L.R. 173. In some circumstances, documentary proof of losses may not be available, as in those circumstances, such type of proof will not usually, ever exist. In other cases, documentary proof of losses/expenses, may be either lost or destroyed. As such, it is

only a general rule that special damages must be specially pleaded and specially proven, albeit that this court recognizes and accepts that such general reason should not be departed from, unless there exists good reason to do so.

[50] The claimant has claimed $160,000.00 for the loss of his vehicle. How he came to be of the conclusion that his vehicle was, as at the time of this trial, worth $160,000.00, is completely unknown to this court. What is known to this court though, is that there was no evidence provided to this court by anyone, during the trial, from which even an inference can be drawn, that the claimant has any training or experience in motor vehicle appraisal or valuation. In the circumstances, this court could not properly have accepted and does not accept the claimant's evidence as to the value of his vehicle.

[51] The claimant has also claimed for a sum of over $6,000,000.00 arising from his alleged inability to have used his vehicle as a taxi driver, ever since as of November 17, 2005. The claimant has just thrown this figure at this court and wishes this court to accept it. This court would, in any event, have done no such thing. For two reasons, this court would not have done so. One, because, that figure is unsupported by any evidence as to how it was calculated, or as to why it was calculated, in the way in which it was. Two, because, there is no evidence for the claimant that the said figure represents reasonably anticipated net earnings for the relevant time period. See: **British Transport Commission v Gourley** – [1955] 3 All E.R. 796. On the unacceptability to a court, of figures claimed as special damages, being merely 'thrown at the court,' see: **Lawford Murphy v Luther Mills** – [1976] 14 JLR 119.

Conclusion

1. Judgment on this claim, is awarded in favour of the 1st and 3rd defendants.

2. The 1st and 3rd defendants are awarded the costs of this claim, as against the claimant, with such costs to be taxed, if not sooner agreed.

3. The 1st and 3rd defendants shall file and serve this order.

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Hon. K. Anderson, J.