[2015] JMSC Civ. 244

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HVC 02874

BETWEEN	**LASCELLE SAMMS**	**1ST CLAIMANT**
AND	**JILLIAN SAMMS**	**2ND CLAIMANT**
AND	**LANE INVESTMENTS LIMITED**	**1ST DEFENDANT**
AND	**MILEX SECURITY SERVICES LIMITED**	**2ND DEFENDANT**

Mr. Floyd Green instructed by Wentworth S. Charles & Co. for the Claimants

Mr. Jeffrey Daley & Ms Debra McDonald instructed by Betton-Small Daley & Co. for 1st Defendant

Mr. Gavin Goffe & Mr. Jermaine Case instructed by Myers, Fletcher & Gordon for the 2nd Defendant

Heard: 28/6/ 15, 31/7/2015 and 17/09/2015

Occupiers liability – Duty of care – Whether owner of car park owes duty of care to prevent vehicle from being stolen.

G. Brown, J.

[1] On the 10th May, 2013 the claimants filed a Claim Form and Particulars of Claim against the defendants for negligence arising from the loss of a motor car at the Lane Plaza car park along Barbican Road.

[2] The 1st defendant is in the business of leasing commercial space to various businesses operating in the Lane Plaza and provides parking facilities to its tenants for the benefit of their customers.

[3] The 2nd defendant is a security company contracted to provide security in the parking lot.

The claimants in the statement of claim particularized the negligence as follows:

The defendants, its servants or agents were negligent in that they:

a) Failed to keep proper watch of the 1st claimant motor vehicle licence number 1764 EM.
b) Failed to have or maintain proper control of the said parking facility.
c) Failed to have any or any proper regard to the said presence of the 1st claimant's motor vehicle in the car park.
d) Failing to take any or any adequate precautions for the safety of the 1st claimant's motor vehicle.
e) Failed to give adequate supervision, instruction or training to its servants or agents.
f) Failed to put up any notice or warning sign in the said parking lot.

[4] The defendants filed their respective defence and have also filed Application for Court Orders to strike out the claimants' statement of case and or for Judgment against the claimants in accordance with rule 26.3(1)(b), 26.3(1)c and 15.2(a) of the Civil Procedure Rules.

[5] The issue in this case is whether the claimants' case has any real prospect of success. A court may strike out any pleading which discloses no reasonable cause of action. This means a cause of action with no chance of success when only the allegations in the pleadings are considered. However, the court will not strike out the statement of case on the ground that the case is weak or not likely to succeed at the trial.

[6] It is settled law that under the Occupier's Liability Act an occupier of premises owes a common duty of care to all his visitors except where by agreement his duty is restricted, modified or excluded. This duty is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there. The duty of care owed to visitors by the occupier is in relation to dangers due to the physical state of the premises or to things done or omitted to

be done by the occupier and others for whose conduct he is under a common law liability. The duty is to take reasonable care that the condition of the premises is not a source of danger.

[7] In this instant case the issue is not about the physical state of the premises as that injury did not arise as a result of things done or omitted to be done on the premises. The complaint was that the defendants failed to prevent the 1st claimant's motor car from being stolen from the parking lot. In order for the defendants' applications to be successful the court must determine whether the defendants owed a duty of care to the claimants.

[8] The 1st claimant alleges that on the 18th day of May 2012, she drove her motor car to the Orchid Village Plaza on Barbican Road. She was directed by a security guard to park in a parking lot marked "additional parking" operated by the 1st defendant and connected to the Orchid Village Plaza by way of a passage. Another guard opened the gate and directed her as to where she should park. She locked up the motor car and on her return about two hours later discovered that it was stolen. There was no allegation that this was the act of the 1st or 2nd defendant's servants or agents. However she blamed the defendants for her loss.

[9] The defendants contends that the claimants' case is ill conceived and without merit as they owed no duty of care to her and two signs were displayed "park at your own risk". Thus, they argued that based on the common law principles as it relates to car parks, the claimants have no real prospect of establishing negligence.

[10] It is trite law that the Occupiers' Liability Act is concerned with injury caused by the physical condition of premises. It has not affected the common law as it relates to persons who suffered loss due to the acts or omission caused by strangers. The occupier may be liable to his visitor for his negligent acts or omissions done on his premises by himself or others whom he exercise control over. At common law the rule is that one man is under no duty of controlling

another man to prevent his doing damage to a **third. In *Smith v Leurs (1945) 70 CLR 256 at 262**, Dixon, J said:*

[11] But, apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of a third person could not have taken place but for his own fault or breach of duty. There is more than one description of the duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third persons. It is, however, exceptional to find in the law a duty to control another's action to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving reasonable risk of injury to others.

[12] Secondly, an occupier is under no duty to guard goods brought onto the premises by visitors against the risk of theft unless there is a special relationship. In **Tinsley v Dudley [1951] 2 K.B. 18** a customer at a public house left his motor cycle in a covered yard, marked garage, from which it was stolen. The court held that defendant would not be liable for the loss of the motor cycle unless the inference could be drawn from the circumstances that the plaintiff had actually or constructively delivered the bicycle into safe keeping. This was a general invitation to customers, if they so minded to leave their vehicles in the yard and this were accepted by the plaintiff, but there was no deliver of possession, either actual or constructive.

[13] In Tinsley's case Sir Raymond Evershed, M.R. in his judgment said:

"The point, however, is whether or not there was a contract whereby custody or possession of the car was handed over to the car park owner. The distinction, therefore, was, I think, between licensee or invitee, on one hand, and bailor, on the other. Ashby v Tolhurst is of some importance, because it laid down clearly that one who leaves his motor car in a car park cannot assume or assert against the car park proprietor any obligation to use reasonable care to look after the car."

[14] Jenkins, L.J. in his judgment was pellucid when he wrote:

> *"There is no warrant at all on the authorities so far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third person. That implied liability, so far as I know, is unknown to law. It would be a liability of a most sweeping and comprehensive character and would have entered into a very great number of cases if it existed*."

[15] In the Australian case of **Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61** the plaintiff was attacked and badly injured while walking to his car in the outdoor car park of a suburban shopping centre. In a majority decision the court accepted that the defendant owed a duty of care to persons lawfully on its premises, but it was held that the duty of care did not extend to taking reasonable care to protect persons in the position of the plaintiff from the criminal conduct of third parties.

[16] In this instant case the 2nd claimant appeared to have felt that the motor car would be reasonable safe due to the presence of the security guard who had assisted her to park in the additional parking lot. Consequently she locked up her motor car and left with the keys to do her business. There was no contractual relation between the claimants and the defendants which could give rise to a

bailment. The relations were clearly that of licensor and licensee. It was clear she retained possession or custody of the car and did not hand it over to the 1st or 2nd defendant. Thus, the defendants were under no duty to guard the claimants' motor car against the risk of theft.

[17] I therefore agree with the application that the statement of case be struck out as it has no reasonable prospect of success.

Let judgment be entered for the defendants with costs to be agreed or taxed.