[2018] JMSC CIV. 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 04486

BETWEEN	**DWIGHT TYNDALE**	**CLAIMANT**
AND	**KENNETH EDGAR**	**1ST DEFENDANT**
AND	**TAX ADMINISTRATION JAMAICA**	**2ND DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**
AND	**FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED**	**4TH DEFENDANT**

IN OPEN COURT

Miss Cavian Vaughan instructed by Zavia T. Mayne and Co. for the Claimant

Miss Kristen Fletcher instructed by the Director of States Proceedings for the 2nd and 3rd Defendants

Mr. Jonathan Morgan and Miss Francine Darby instructed by Dunn Cox for the 4th Defendant

The 1st Defendant was not served.

Negligence – Duty of care owed by statutory body; Exception to whom duty of care is owed; Criminal activity vitiate duty of care; Variance between pleadings and evidence

Heard: October 1 and 2, 2018 and December 7, 2018

CORAM: PUSEY J, (Actg.),

BACKGROUND

[1] The claimant is seeking to recover damages arising from the purchase and transfer of a motor car to him by the 1st defendant, who was not served.

[2] On the 27th June 2008 the claimant and the 1st defendant entered into an agreement for the sale to the claimant of a 2002 Hyundai Sonata motor car with chassis number KMHEN41BR2A661054 for approximately $1,000,050.00. Unknown to the claimant the 1st defendant had purchased the said car with the proceeds of a loan of $918,000 from the 4th defendant. The loan is evidenced by a Bill of Sale and is secured by a registered Lien on the vehicle.

[3] The 1st defendant defaulted on the loan and was contacted numerous times by the 4th defendant, culminating in an advisory that the car would be repossessed by the 4th defendant.

[4] In these circumstances the 1st defendant decided to sell the motor car. He took the title to Tax Administrator of Jamaica's (TAJ) office and, as required, completed the portion on the back needed to effect a transfer. He also presented a Discharge of Lien purportedly executed by the 4th defendant and TAJ discharged the lien by stamping the document. Subsequently he gave the title to the claimant along with the stamped Discharge of Lien, in exchange for the purchase money for the car.

[5] At a later date the claimant attended TAJ's office in Kingston and effected the transfer of the car to himself. He enjoyed the use and possession of the car until 22nd day of July 2013 when agents of the 4th defendant seized the car based on the lien. The claimant has been unsuccessful in locating the 1st defendant. He filed a Claim Form seeking the following;

1. Damages for fraudulent misrepresentation,

2. Damages for fraud,

3. Damages for negligence,

4. A declaration that he is entitled to possession of motor car with registration numbers and letters 8151 EW,

5. Delivery up of motor car registered and numbered 8151 EW or the value thereof,

6. Damages for its detention,

7. Damages for the its loss of use at a continuing rate of $1,000.00 per diem,

8. Costs,

9. Attorney's fee,

10. Such further and other relief(s) as this Honourable Court may deem just.

[6] Before the date for trial, the Director of State Proceedings filed a Notice of Application for Court Orders on behalf of the 2nd and 3rd defendants seeking to strike out the claim as being an abuse of process, as the pleadings disclosed no reasonable grounds for bringing the action against the 2nd and 3rd defendants. On the 25th September, 2018 the court ordered, among other things, that;

> *- The part of the claim alleging fraud or fraudulent misrepresentation is struck out as disclosing no reasonable basis for bringing the claim against the 2nd and 3rd defendants,*
>
> *- The claim is to proceed to trial as there are issues of facts and law to be determined by the trial judge.*

[7] Based on the relief being sought in the Claim Form, the only issue to be resolved involving the 2nd and 3rd defendants is whether the 2nd defendant was negligent in its dealings with the transfer of the motor car. In relation to the 4th defendant all issues are on the table.

THE CLAIMANT'S CASE

[8] The claimant, the sole witness for his case, gave evidence that on the 27th June 2008 he entered into a contract with the 1st defendant to purchase from

him a 2002 Hyundai Sonata motor car. In carrying out his due diligence he was advised by the 2nd defendant that there was no lien registered on the title for the car which caused him to complete the purchase by paying $850,000.00 to the 1st defendant, leaving a balance of $200,000.00 on the purchase price. The 2nd defendant effected the transfer of the car to him and issued to him new registration plates for the car.

[9] He took the car into his possession and on the 22nd July, 2013 the 4th defendant seized the car from him claiming that it had a lien over the car and the 1st defendant had no lawful right to sell the car to him.

[10] He was cross-examined by only the 4th defendant and agreed, that at the time of the purchase of the vehicle he did not see the title for the vehicle, only the Certificate of Fitness and the Registration Certificate, which satisfied him that the vendor was the owner of the car. He maintained that the 1st defendant was not the person who transferred the vehicle to him but rather it was the 2nd defendant.

[11] He explained that when he said in his Witness Statement that the 4th defendant unlawfully seized the vehicle on the 22nd July, 2013, he meant that it was taken without his permission. He averred that the 1st defendant gave him, attached to the Certificate for the car, a lien discharge form and he was therefore aware that a lien was on the car.

[12] In relation to the particulars of fraud and fraudulent misrepresentation in his Particulars of Claim, he agreed with the 4th defendant that it made no representations to him personally, regarding the transfer or seizure of the car or made any false statements or presented to him any false or fraudulent document.

[13] The claimant further gave evidence that he collected title for the vehicle at the tax office and went back to Mandeville and then, upon getting insurance for the vehicle, went to the tax office in Kingston to transfer the vehicle to himself.

CASE FOR THE 2ND AND 3RD DEFENDANTS

[14] These defendants called one witness, Mrs. Latoya Atlan-Harris, who at the material time was the Manager of the Motor Vehicle Registry located at the Constant Spring Tax Office. She gave evidence concerning the procedure at the tax office regarding the transfer of motor vehicles, which was followed by the claimant and the vendor herein. I will return to her evidence in due course.

[15] In answer to cross-examination by counsel for the 4th defendant, the witness said she was not present when the transactions were conducted and did not see the stamping of the documents or their execution but obtained her information from the records of TAJ that she is custodian for. Further she agreed that there is no evidence that shows that the Notice of Discharge of Lien was prepared by the 4th defendant.

CASE FOR THE 4TH DEFENDANT (No case submission)

[16] The 4th defendant made an application at the close of the claimant's case that no case had been made out against it.

Counsel relied on Civil Procedures Rules (CPR) 2002 39.9 which states,

> *Where the court considers that a decision made on an issue substantially dispose of the claim or makes a trial unnecessary, it may dismiss the claim or give such other judgment or make such other order as may be just.*

[17] He argued that the claimant himself, by the evidence he gave has absolved the defendant of any wrongdoing in the matter. He argued that paragraphs 5, 9 and 10 of the Particulars of Claim are the only pleadings that refer to the 4th defendant - Paragraph 5 describes the 4th defendant as a company duly incorporated under the laws of Jamaica, purporting to be the holder of a Bill of Sale over the vehicle in question. Paragraph 9 speaks to the seizure of the vehicle on the 22nd July 2013 pursuant to the lien and paragraph 10 alludes to the 4th defendant being in possession of the vehicle ever since.

[18] By admitting that the 4th defendant presented no forged or fraudulent documents to him at any time or made any or any fraudulent representations

to him whatsoever, the claimant has failed to prove what he pleaded in the particulars of claim and has contradicted his own pleadings. There is therefore no case for him to respond to and the court should decide this preliminary point at this juncture of the trial.

[19] To further underpin his submission, counsel referred to the Agreed Bundle of Documents admitted in evidence at the start of the trial, which includes, as Exhibit 16, the Bill of Sale dated the 9th September 2006 and Recorded at the Island Records Office on the 13th October, 2006, as undisputed proof of the indebtedness of the 1st defendant to the 4th defendant and the 4th defendant's right to take possession of the vehicle in the manner it did.

[20] Counsel for the 4th defendant referred to the decision of the Court of Appeal in **National Commercial Bank Jamaica Ltd. and Owen Campbell v Toushane Green** [2014] JMCA Civ. 19, which was concerned with an unregistered lien on a motor car. At paragraph 34 Phillips JA, delivering the majority judgment of the court explained what a Bill of Sale is,

> *There is no dispute that a bill of sale transfers property in chattel from the grantor to the grantee. In **Johnson v Diporse.** Lord Esher MR stated that "A bill of sale" is a document given with respect to the transfer of chattels where possession is not intended to be given. The learned Master of the Rolls further stated that the bill of sale ...would give to the grantee an absolute right to the property in the goods assigned and a right to possession of them.....*

[21] Further in the judgment, Phillips JA in speaking to the effect of the registration of the Bill of sale in the Island Records Office, referred to section 4 of the **Deeds Wills and Letters Patent Act**, which provides for the registration. At paragraph 37 of the judgment she says;

> *The effect of this section, it seems to me, is to render the bill of sale, once it is recorded or registered at the Island Records Office, sufficient evidence of the title to the chattels claimed therein by the grantee. It is noticeable that the section does not merely provide that it is evidence of an interest claimed. The wording of the section, in my mind, indicates that the bill of sale in these circumstances is to be*

treated as being akin to a title ***and may only be defeated by a better title....***

Emphasis supplied

[22] In her response counsel for the claimant argued that the unlawful seizure of the vehicle had been pleaded in the Particulars of Claim and the court has a responsibility to look at the Particulars of Claim as a whole. She urged that one of the factors established in the evidence is that an original title was given to the claimant and therefore he has a claim to the vehicle. That vehicle was taken by the 4th defendant without his permission and in disregard to his title and ownership of the vehicle. On that basis, she argued, the cause of action that arises against the 4th defendant is the unlawful seizure of the vehicle. It naturally arises on the pleadings, she urged, and the court should not accede to the application of the 4th defendant and find that a case had not been made out.

DECISION

[23] I agreed with counsel for the 4th defendant that in relation to the allegations of fraud and fraudulent representation, the claimant had clearly contradicted the pleadings in his Particulars of Claim when he asserted that the 4th defendant did not act fraudulently in its dealing with him and the vehicle in question and presented no forged or fraudulent documents to him.

[24] Regarding the 4th defendant taking possession of the vehicle on the strength of its lien over the vehicle - the authorities have established over centuries, that the peculiar feature of a bill of sale is that it transfers title to chattel. The practice is that the chattel remains in the possession of the debtor. This title can only be defeated by a better title to the chattel. The contention that the claimant had a valid title, issued by the 2nd defendant, is insufficient, in my mind, to defeat the title of the 4th defendant pursuant to the registered lien. The claimant had to establish that that title is a better title than that held by the 4th defendant. The claimant, in his closed case, has not provided any evidence to show that he has a better title to the chattel.

[25] Judgment was therefore entered for the 4th defendant, with cost to be agreed or taxed. It took no further part in the trial.

THE CLAIM FOR NEGLIGENCE AGAINST THE 2ND AND 3RD DEFENDANTS

[26] The Orders on the application by the 2nd and 3rd defendants to strike out the claimant's claim, reserved 'issues of facts and law to be determined by the trial judge.' Focusing on that order, it appears that the only issue left to be resolved, is whether the 2nd defendant, and ipso facto the 3rd defendant, is liable in negligence for the 2nd defendant's handling of the transfer of the vehicle from the 1st defendant to the claimant.

THE CLAIMANT'S CASE

[27] On this issue the claimant in his Particulars of Claim set out his statement of case thus;

> *7. The claimant in carrying out his due diligence at the time of the purchase was advised by the 2nd defendant that there was no lien registered against the subject motor car. In reliance on the information provided by the 2nd defendant the claimant paid over to the 1st defendant the agreed price of $850,000.00....*
>
> *8. The 2nd defendant in carrying out the instructions of the 1st defendant, accepted the title presented by the 1st defendant and did transfer the said motor car to the claimant. The claimant was allowed to register the vehicle in his name as the new lawful owner of the motor car..... The claimant was also issued registration plates by the 2nd defendant.....*

[28] These Particulars was reproduced verbatim in the claimant's witness statement, which was allowed to stand as his evidence in chief.

[29] The claimant also itemized the Particulars of negligence thus;

a. *Negligently advising the claimant that the title presented by the 1st defendant was genuine and original;*
b. *Negligently advising the claimant that the lien against motor car....was discharged;*
c. *Negligently issuing 2 original titles for motor car*

d. Causing or procuring the transfer of motor car.....when it ought to have known that the title presented by the 1st defendant was forged.

[30] The claimant was not crossed examined by the 2nd and 3rd defendants but in answering the 4th defendant's question he asserted that;

> *'I had not seen the certificate of title for the car when I paid the $850,000.'*

[31] He also asserted that he is aware of the process of transferring a car at TAJ and that it was not the 1st defendant that did the transfer, it was TAJ. He said based on the lien discharge that the 1st defendant attached to the title, he was aware that there had been a lien on the vehicle.

THE 2ND AND 3RD DEFENDANTS' CASE

[32] In response, as alluded to before, the defendants called Mrs. Atlan-Harris. Her evidence is that the vendor, the 1st defendant, attended on the tax office and presented a title for the vehicle. He completed Section 1 on the back of the title which allows for the transfer of the vehicle. He presented proper identification verifying who he was, which corresponded with the name on the title. He also presented a Notice of Discharge of Lien which corresponded with a Lien registered on the face of the title. Her evidence is that the documents presented had all the features and information required to carry out the transactions the 1st defendant wanted to do and was accepted by the TAJ staff and stamped with their seal. There was nothing suspicious about either the title or the Discharge of Lien.

[33] Sometime after, the claimant attended on the office of the TAJ and presented the said title and Notice of Discharge of Lien. He completed Section 11 on the back of the title to effect the transfer of the vehicle from the 1st defendant to himself. Mrs. Atlan-Harris was clear that TAJ did not advise the claimant about a lien on the vehicle. The existence of the lien was on the face of the document and the Notice of Discharge of Lien was attached to the title. All TAJ did was accept the documents and did what was requested to be done

and upon the surrender of the old title, the claimant was instructed to apply for a new title.

[34] Mrs. Atlan-Harris was cross-examined by counsel for the claimant to establish that the TAJ plays a critical role in the transfer of motor vehicles. TAJ creates and issues motor vehicle titles. She was asked, but did not know, whether a title was an 'instrument of security' or allows a person to get loans and is therefore an important document.

[35] Strong objection was taken by the 2nd and 3rd defendants to a line of questions seeking to elicit from the witness the content of the title as well as the duty of the TAJ related to validly transferring a vehicle, on the basis that these issues are not in the pleadings of the claimant and not disclosed in the evidence for the claimant. The germ of the objection was that the claimant was seeking to elicit evidence which it had not advanced through the witnesses it called, from the witnesses called by the 2nd and 3rd defendants to prove its case. It was not allowed.

THE CLAIMANT'S SUBMISSIONS

[36] The claimant submitted that he is entitled to recover damages for negligence against the 2nd and 3rd defendants 'for causing or procuring the transfer' of the vehicle in question, when it ought to have known that the title presented to it was forged. He argued that the 2nd defendant admitted in cross-examination that a title is an 'instrument of security' and could be used to borrow money. Consequently it was foreseeable that persons could attempt fraudulent activities with titles. The claimant argued that the 2nd defendant should have put effective systems in place to detect fraudulent titles being used through its offices. They had a duty of care to the claimant to prevent it or be held liable in negligence for the financial loss which the claimant suffered.

[37] The claimant argued that the real issue in the matter is whether a duty of care was owed by the 2nd and 3rd defendants to the claimant; whether that duty was breached and the quantum of damages to be awarded for that breach.

[38] In seeking to establish whether a duty of care exists between the parties, the claimant applied the three ingredients test laid down in **Caparo Industries plc v Dickman** [1990] 2AC 605**, (the Caparo case**) that is, that the damage that occurred is foreseeable, that the relationship of the parties is characterised by 'proximity or neighbourhood' and thirdly the circumstances should be such that the court considers it fair, just and reasonable to impose a duty of care.

[39] On the issue of foreseeability the claimant cited the case of **Santander UK plc v Keeper of the Registers of Scotland** [2013] S.L.T. 362, where it was said that there is a 'high responsibility' on the functionary to ensure that the licensing authority is properly maintained. Mutatis mutandis, he argued, the TAJ has a high responsibility when transferring titles to motor vehicles.

[40] In relation to proximity, counsel relied on dicta in **Donoghue v Stevenson** [1932] AC 562 to define who your neighbour is, as those who you ought reasonably to have in your contemplation, so your actions do not cause them harm. Counsel argued that by accepting the title from the 1st defendant and processing the transfer, the 2nd defendant was representing to the claimant that the title was valid. The fact that the claimant would act on that representation to his detriment should have been in the contemplation of the 2nd defendant when it made the representation. The claimant was sufficiently proximate to the 1st defendant that it should have thought of him suffering loss, if it negligently made representations to him.

2nd and 3rd DEFENDANTS' SUBMISSION

[41] The 2nd defendants deny giving any advice or making any representation to the claimant concerning the validity of the title. It asserts that it followed its procedure to complete the transfer. It verified that the information in the Discharge of Lien corresponded with information on the title and stamped the document to say that. It had no reason to question the validity of the discharge or the title, as the Discharge of Lien was not prepared by it and bore the stamp of the grantor, while the title had all the security features of a valid title. There was therefore nothing to trigger any suspicion on the part of the 2nd defendant. Therefore they are not liable.

[42] The 2nd and 3rd defendants contended that in order for the claimant to succeed it must establish evidentially the existence of a duty of care, the breach of that duty and the resultant damage on a balance of probabilities.

[43] The 2nd and 3rd defendants challenged the claimant's case on the pleadings. They argued that the pleadings or statement of case of the claimant, does not disclose a cause of action in negligence and there is no evidence from the sole witness, the claimant, that buttresses or supports a claim in negligence. They objected strongly to efforts by the claimant, through cross-examination of the 2nd and 3rd defendants' witness, to elicit information concerning the role of the TAJ and the duty, if any, it has towards its client public. The claimant, they argued, in neither its statement of case nor the evidence it presented averred or proved the essential ingredients of the tort of negligence – duty of care, breach of that duty and consequential damage. To use the words of counsel '*the claim as it stands has not properly set out the bases for the remedy sought*.' Therefore there is no case presented for the court to consider.

[44] In support of this contention the case of **Nomura International plc v Granada Group Limited and others** [2007] EWHC 642 Comm was cited. In that case the court, considering an application to strike out a claim, held that if the claimant could not properly identify the essence of the tort or breach of contract complained of, it could not have an intention to prosecute the matter, as it had no basis for doing so and it could not issue a claim form in the hope that something might turn up in the trial to prove its case.

[45] In **Spencer et al v Barclays Bank plc** (unreported) [2009] EWHC 2823 (Ch) delivered September 23, 2009 the court having dissected the Particulars of Claim found that the it did not enable the bank to see the case it was to meet and ruled that the claim could not be maintained.

[46] The 2nd and 3rd defendants further argued, that the only thing gleaned from the statement of case regarding the nature of the duty owed, is that the 2nd defendant was to register and transfer the vehicle. This however, she argued, was absent from the evidence.

[47] The 2nd and 3rd defendant furthered argued that the claimant had notice, before the trial of this matter, that there were issues surrounding its pleading from the application to strike out the claim. Nevertheless they did not seek to amend their statement of case.

[48] In relation to the neighbour principle enunciated in **Donohgue v Stevenson** the defendant relying on **Moorgate Mercantile Co. Ltd. v Twitchings** [1977] AC 890, warned the court about the risk of extending duties where none exists. Counsel argued that **Hill v Chief Constable of West Yorkshire** [1989] AC 53 is instructive on the issue of the class of persons to whom a duty of care is owed. It was found that there was no general duty of care owed to individual members of the public who might suffer injury through third party criminal activities, unless there was an exceptional factor that established sufficient proximity between the parties.

[49] Finally the 2nd and 3rd defendants argued that the claimant has not particularized or proved his loss.

LAW AND ANALYSIS

[50] The essential ingredients of negligence are the existence of a duty of care between the parties, the breach of that duty and the resultant damage for which damages is claimed. The determination of the existence of the duty of care is crucial in establishing negligence and the crux of this matter between 2nd defendant and the claimant. The judgment of the House of Lords in **the Caparo case**, Per Lord Bridge of Harwich, sets out a broad historical analysis of the duty of care in the tort of negligence.

[51] In outlining the metamorphosis of the approach to the determination of the existence of the duty of care, Lord Bridge spoke of a traditional approach i.e. examining the existence of a duty in a myriad of circumstances and when a new set of circumstances presents itself, find a sort of match or authority and apply it. Commenting on this approach Lord Atkin in **Donogue v Stevenson** concluded,

> *...and yet the duty which is common to all the cases where liability is established must logically be based upon **some element common** to the cases where it is found to exist.*
>
> *Emphasis mine*

[52] This observation by Lord Atkin paved the way for a more modern approach which led Lord Reid in **Home Office v Dorset Yacht Co. Ltd.** [1970] AC 1004, 1026H to say,

> *In later years there has been a steady trend towards regarding the law of negligence as **depending on principle** so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it.*

[53] The approached was articulated in **Anns v Merton London Borough Council** [1978] AC 728. Since that decision the courts have questioned the propriety of a single principle being practically applicable to every situation. According to Lord Bridge in **the Caparo case,** what has emerged is a three tiered test for the existence of a duty of care – foreseeability of damage, a relationship of neighbourhood or proximity and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of care.

[54] When these three factors are analyzed, they really amount to different labels for the time honoured general principles of negligence. As a result Lord Bridge concluded that the courts are now moving back to the approach of giving significance,

> *'to the more traditional categorizations of distinct recognizable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes'.*

[55] The application of this analysis to the matter at Bar should determine whether the 2nd and 3rd defendants have a duty of care towards this claimant by using the time honoured principles.

[56] The evidence of Mrs. Atlan-Harris from TAJ is that the procedure for the transfer of motor vehicles is that the owner registered on the title, in the

presence of a Collector of Taxes, completes Section 1 on the reverse side of the title, after satisfying the Collector about his identity. The Collector stamps the title denoting that the vehicle can be transferred. In the case at Bar, the 1st defendant attended the tax office and this procedure was followed. There is no evidence that the claimant was present.

[57] In relation to the discharge of a lien, the procedure is that the discharge document is presented and its contents checked against the endorsement on the title and if they correspond, the document is stamped and returned to the owner on the title. This procedure was done in the matter at Bar without the claimant being present.

[58] In these circumstances did the 2nd defendant have a duty of care to the purchaser, a stranger to the procedure, to ensure that the title and the discharge document were valid?

[59] The function of the 2nd defendant and the titling system is to ensure that a person who transfers a motor vehicle is the rightful owner. This offers a measure of protection to would- be purchasers when they deal with the title. All the procedures adopted by the 2nd defendant are to ensure that the transfer is safe – checking the identity of the transferor and ensuring that the title has all the security features of a valid title. Surely they do this with a new owner going on the title in mind. To use the jargon of negligence, the purchaser is in a 'neighbourhood' relationship with TAJ and should be in their contemplation when they effect a transfer. To that extent I agree with the claimant that ***prima facie*** the 2nd defendant owes a duty of care to a purchaser to ensure that there is a valid title endorsed for transfer by the true owner.

[60] However, that is not the end of the matter. Lord Wilberforce in **Anns v Merton London Borough Council** said that having established that ***prima facie*** a duty of care exists because of the relationship of proximity,

> *It is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of persons to whom it is owed*

*or the damages to which a breach of it may give rise: see **Dorset Yacth** case [1970] AC 1004 per Lord Reid at p. 1027.*

[61] The matter was discussed in **the Santander case**, where The Keeper of the Register, who is responsible for endorsing mortgages on the Register, accepted a forged discharge resulting in loss to the mortgage holder. In deciding whether the duty of care existed, the court made a distinction between the court's power to deal with actions that are based on policy consideration as distinct from actions that derive from operational issues and concluded that,

> *The courts generally will not impose a duty of care in respect of policy decisions but will do so in respect of operational decisions.*

[62] The distinction between what is operational and what is policy is not always clear and the evidence and submissions in this matter provide little assistance in determining this issue.

[63] There is, however, an important factor that gives rise to considerations that may limit or negative the imposition of a duty of care in the instant case. The claimant has asserted that the title processed by the 2nd defendant is a fraudulent document. The same is true of the Discharge of Lien document as there is no evidence that the 4th defendant was the author of that document. The natural corollary to such an assertion is that the claimant is the victim of wrongful or criminal activity, which, according to the claimant, the defendants are liable for.

[64] The House of Lords in **Hill v Constable of West Yorkshire (Supra)** in deciding whether police officers were liable in negligence for the death of a victim of a serial killer who they had failed to apprehend although there were, in hindsight, good clues to his identity, held that no duty of care existed for the claimant, the estate of a person killed by the serial killer and further decided, (from the headnote),

> *...nor did they owe a duty of care to individual members of the public who might suffer injury through the criminal's activities save where their failure to apprehend him had created **an exceptional***

> ***added risk, different in incidence from the general risk to the public at large from criminal activities****, so as to establish sufficient proximity of relationship between the police officers and the victims of the crime;*

[65] The upshot of this is that criminal activities of third parties is a limiting factor in ascribing liability for negligence against public institutions, unless there are special circumstances that place the particular claimant at exceptional risk of harm. In this matter the 4th defendant did not issue a Discharge of Lien or provide the title to allow the sale to the claimant. Their production must be the result of criminal or wrongful activities perpetrated against the claimant by the 1st defendant. The claimant has established no exceptional circumstance to bring him within any exceptional class to be given special protection that could result in liability being found in the 2nd and 3rd defendants for not recognizing that the transaction was tainted.

[66] The 2nd and 3rd defendants have not sought to aggressively challenge the existence of the duty of care between the claimant and the 2nd defendant. The main thrust of their defence is that the pleadings have not disclosed sufficient factors to establish the tort of negligence and the evidence presented has not buttressed any deficiency in the pleadings. They have thus avoided the issue of liability but on the evidence, have sought to augment their procedure by now checking with the grantor, Discharges of Lien when they are presented

[67] A statement of case is defined in Civil Procedure Rules 2002 (CPR) 2.4 to include a Particulars of Claim. In Blackstone's Civil Practice 2004, the purpose of a statement of case was expressed at paragraph 24.19 in this way,

> *A good claim or defence should enable the parties and the court to narrow down and identify the central issues in dispute..... For example a defendant is entitled to know not merely the cause of action against him, but also the manner in which it is alleged that he was in breach of his duty.....*

> *Thus, as in the past, a claim or defence which discloses little or nothing about the party's case is liable to be (and today almost certainly will be) struck out.*

[68] The statement of case does not have to include the evidence on which the party relies, but must provide enough detail to allow the case to be properly set out and so allow the defendant to know the case he is to meet. The evidence should support the pleadings to assist the court's determination.

[69] An examination of some of the issues with the pleadings in the matter at Bar, is instructive.

[70] The claimant asserts in his pleadings and evidence in chief that while he was doing his due diligence certain representations were made to him by the 2nd defendant, and relying on the representation he purchased the car. The pleadings do not speak to the time, circumstances or the place when this happened. There is nothing concerning who and in what context and what representations were made to him. Instead, a conclusion is made that by accepting the documents and processing the transfer, inferentially, it warrants that they are good documents. The problem that is created is uncertainty for the 2nd and 3rd defendants as to the manner in which the breach was committed.

[71] The evidence speaks to the claimant only interfacing with the 2nd defendant **after** he had made a decision to purchase the car, having seen the Registration Certificate and the Certificate of Fitness and had paid a substantial portion of the purchase price. This evidential chronology does not show a due diligence exercise being carried out **at the time** of the purchase involving TAJ. On the evidence the purchase was completed before the claimant went to the offices of TAJ. The evidence therefore is at variance with the pleadings, does not provide a consistent case for the 2nd and 3rd defendants to meet and does not support any reliance on any representation by the 2nd defendant in purchasing the car.

[72] On the issue of the title being invalid, the claimant argued that the 2nd defendant issued two original titles for the same car and concludes that one

must be invalid. While this is particularized in the pleadings, no evidence supporting why and how the title is invalid was forthcoming. All that is outlined is the purchase of the vehicle, followed by a visit to the tax office and transferring the titles, the surrender of the old title and the advice to apply for a new title. Where is the evidence regarding the 1st defendant issuing a second title?

[73] The defendants argue, that the state of the pleadings and the evidence is such that no evidentiary basis and no pleading have been drawn establishing the cardinal principles of negligence – existence of a duty of care, the breach of that duty and damage resulting. They agrued that the claimant should not be allowed to cross-examine Mrs. Atlan-Harris to establish the pillars of his case (duty, breach, damage) but must stand or fall on his pleadings and the evidence he has put before the court.

[74] I agree with the submission. Pleadings are the skeleton on which a case is laid and the evidence supplies the meat that gives it shape and form. No matter how forceful the arguments of counsel for the claimant are, there must be some evidentiary underpinning that connects the facts with the law and the argument and inform the defendant about the case it is to meet. This is woefully missing from the claimant's case.

CONCLUSION

[75] Prima facie a duty of care exists between TAJ and a purchaser of a vehicle based on the proximity principle, that TAJ must have him in his contemplation when he processes a transfer. However, if the breach of the duty owed results from the criminal activity of a third party, the court will not impose liability for negligence unless exceptional circumstances exist for the claimant, different from any other member of the public, that causes him harm. Irrespective of this statement of the law, the claimant must plead and prove the facts on which it relies to establish its case. By so doing it narrows the issues and inform the defendant of the case it is to meet. The claimant cannot rely on the defendant's witnesses to prove its case through cross-examination. The adage "he who avers must prove" is apt.

ORDER

[76] **I**t is hereby ordered;

1. Judgment for the 2nd and 3rd defendants
2. Cost to the 2nd and 3rd defendants be agreed or taxed.