



[2020] JMSC Civ 45

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2007HCV02488**

<b>BETWEEN</b>	<b>WINSTON MENZIE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CHARMAINE ELLIS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>TYRONE WILLIS</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

Andrew Willis and Raquel Willis instructed by A W Willis & Associates for the claimant

Clifton Campbell instructed by Archer Cummings & Company for the 1<sup>st</sup> defendant

2<sup>nd</sup> defendant absent and unrepresented

*Burden of proof on claimant to establish that vehicle and driver involved in accident correctly identified and that correct party is before the court based on the principles of vicarious liability and the separate legal personality of a company. Importance of statement being in compliance with rule 29. 4 (2) of the Civil procedure Rules when a witness is illiterate*

**20, 21, 23 June 2017; 21 July 2017 and 23 March 2020**

**D. FRASER J**

**INTRODUCTION**

[1] On 21 July 2017, I awarded judgment on the claim to the 1<sup>st</sup> defendant and awarded costs in her favour to be agreed or taxed. I promised then to put my

reasons in writing. This promise I now keep, with sincere apologies for the delay in its fulfilment.

- [2] The claimant sought to recover damages for negligence against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for injuries he sustained in a motor vehicle accident that occurred on 13 February 2006 along the Roaring River Main Road in the parish of Saint Ann. The claimant filed a claim form and particulars of claim on 18 June 2007 in which he claimed that the accident was caused by the negligence of the 2<sup>nd</sup> Defendant, Mr. Tyrone Willis in his operation of International Paystar 5000 Motor Truck, registered CB 6748 which was all material times owned by the 1<sup>st</sup> Defendant. He suffered serious injuries in the accident including a broken left tibia.

#### **THE ISSUES**

- [3] Two main issues arose for determination in this matter:
- a) Whether or not the claim correctly identified the truck involved in the accident with the car driven by the claimant;
  - b) If the answer to a) is yes, was the 1<sup>st</sup> defendant the proper party to be sued by virtue of the principle of vicarious liability?

#### **ANALYSIS**

##### **Issue 1**

- [4] The claimant in his witness statement, which was permitted to stand as his evidence in chief, indicated that on 13 February 2006, at approximately 9:30 p.m., he was driving his Daihatsu Applause motor car, registered 2238 DK along a section of the Roaring River main road on his left side of the road, when the driver of the motor truck registered CB 6748 coming from the opposite direction failed to keep to his side of the road, went to the right and collided in the front of his vehicle.

- [5] In cross-examination it became apparent the claimant had no first-hand knowledge of who the driver of the truck was or which truck collided in his vehicle. He admitted that he did not see the licence plate of the truck, either before or after the collision; a failure he attributed to the fact that at the time of the accident the area was dark. The claimant further admitted that he had not been able to make out the colour of the truck nor could he himself say who the driver was. He also indicated that after the accident he lost consciousness but not for long.
- [6] The lynchpin of the claimant's case was the witness Devon McLean. Mr. Mclean in his witness statement said he "got a drive from a pre-mix motor truck which was coming from St. Ann's Bay direction towards Ocho Rios". According to Mr. McLean when the driver reached the section of the road where the accident occurred, he encountered a pile of dirt on his side of the road, the driver swerved to the right to avoid the dirt and collided with a motor car coming from Ocho Rios direction. He further indicated in his statement that. *"This driver of the truck alias name is "Titas" I wrote down the registration number and letters of the truck which was CB 6748. I assisted the injured car driver to the St. Ann's Bay Hospital."*
- [7] Cross-examination however revealed several weaknesses and improbabilities in Mr. McLean's account. He indicated that he had never seen the driver before the time he got the lift and the driver never told him his name during the drive. He explained that he got to know the driver's alias as when he was getting the drive, *"a man who know him seh Titus drop mi bredren a Ochi"*. It was also revealed that Mr. Mclean was unable to read. Notwithstanding that handicap, he maintained that he wrote down the number of the truck with the aid of the brake light and the normal light on the back of the truck. He said he used a pencil he took from out of his hair and wrote down the number on a piece of paper he found on the side of the ground. All of this he did while the claimant whom he knew before as "Carlton" was in the crashed car. It was therefore after he wrote down the number, he went to assist Carlton.

- [8] Mr Mclean also gave conflicting evidence about how the licence number got to the police. Initially in cross-examination he stated that he gave the police the number that very night. Then he later said he gave the number to Inspector Sutton, but that was not the same night, and that the police never came until the morning. He subsequently reverted to his initial position in re-examination when he indicated that, *“Likkle after I was helping the man the police came and I gave him the number. Is this police [pointing to Inspector Sutton seated in court] I gave.”*
- [9] The significance of this discrepancy was immediately evident. Inspector Wayne Sutton (a Special Corporal at the time of the accident), gave evidence just before Mr. McLean. He indicated in his witness statement, which was allowed to stand as his evidence in chief that he was notified of the accident on 14 February 2006. He never indicated the source, but based on investigations he conducted, his statement records that he was led to International Paystar 5000 motor truck registered CB 6748 and Tyrone Willis and formed the conclusion that the licence plate belonged to (sic) the Strident Concrete Mix.
- [10] Inspector Sutton’s evidence is largely hearsay and incapable of fixing the identity of the driver or the truck involved. However it assists in exposing the weaknesses in the evidence of Mr. McLean. It is farcical that in the aftermath of an accident involving a person whom he knew, Mr. McLean an illiterate man, would stop to record the licence number of the truck in which he was travelling; before assisting the injured man! Mr. McLean’s insistence that he gave the number to then special corporal now Inspector Sutton that same night, when Inspector Sutton indicates he wasn’t engaged with the matter until the following morning, conspicuously reveals the utter unreliability of his evidence.
- [11] Mr. Junior Hall also gave evidence on behalf of the claimant. His statement was permitted to stand as his evidence in chief. On cross-examination, it quickly became evident that like Mr. McLean, Mr. Hall could not read. While there had been no objection to Mr. McLean’s witness statement standing as his evidence in chief, counsel for the 1<sup>st</sup> defendant took the point in relation to Mr. Hall that his

witness statement which had been allowed to stand, should be struck out, as it had not been executed in compliance with rule 29.4(2) of the Civil Procedure Rules (CPR). He relied on the case of **George Bryan v Grossett Harris** CL 2000/B 089 (jud del. 21 October 2005), in which Sykes J, (as he then was), adjourned a trial pending an application for relief from sanctions as the claimant was illiterate and his witness statement had not been certified in accordance with rule 29.4(2) of the CPR.

[12] I adjourned the trial overnight to facilitate counsel for the claimant making an application for relief from sanctions. That application accompanied by the necessary affidavits was made the following morning. Significantly counsel for the claimant in his affidavit indicated that he had not been advised by Mr. Hall of his inability to read and upon the presentation of the statement to him he took the document and “supposedly perused it” after which he was invited to sign and did. Counsel’s affidavit also explained that “by virtue of Mr. Hall’s conduct/demeanour he appeared to understand and to have been literate.” Having determined that there was no indication that the contents of the statement, would have changed if the statement had been in compliance with the rules, I concluded that the circumstances weighed in favour of the application for relief being granted. I therefore ruled that the statement already in evidence be permitted to stand notwithstanding its defect, and awarded costs of the application to the 1<sup>st</sup> defendant.

[13] Mr. Hall’s evidence was that he was travelling about 1 ½ chain behind the claimant from Ocho Rios towards the Saint Ann’s Bay direction, when he witnessed the accident caused, as previously indicated by Mr. Mclean, by the truck coming from the opposite direction, swerving into the claimant’s path to avoid a heap of dirt on his side of the road. He however never saw the driver and was not able to give the licence plate of the truck, but knew it was a blue and white truck and where it was based.

- [14] This was the parlous state of the evidence in support of the claim at the end of the claimant's case.
- [15] The defence case was that the International Paystar 5000 Motor Truck, registered CB 6748 was not on the road being driven by the 2<sup>nd</sup> defendant at the time of the accident, and was not involved in the accident with the claimant. The 2<sup>nd</sup> defendant's evidence from her witness statement which was allowed to stand as her evidence in chief, was that she was the owner of the truck and a director of Striders Building Construction and Joinery Limited to which the truck was contracted. In amplification of her witness statement, a data sheet that has the date of dispatch, drivers' names and the licence numbers of the trucks and the contents carried by the trucks was received in evidence as Exhibit 6. It showed that on 13 February 2006 truck CB6748 was assigned to W. Brown. She also indicated that it was not until August 2006 that the police came inquiring about the International Paystar 5000 Motor Truck, registered CB 6748 and were shown the documents for the truck. She maintained that there was no dent or anything on the truck to indicate it had been in an accident.
- [16] In cross-examination she indicated that she knew the 2<sup>nd</sup> defendant and that he had worked for the company, before and after the day of the incident, but that she had no record that he was in the company's employment on the day of the incident. She stated that the 2<sup>nd</sup> defendant also used to work for Rockwell concrete.
- [17] The main witness for the 1<sup>st</sup> defendant was Mr. Wilton Brown. In his witness statement allowed to stand as his evidence in chief, he stated that he was the only designated driver of the motor truck registered CB 6748 on 13 February 2006, which he drove from 8:00 a.m. to 7:00 p.m. He indicated that he stayed at the plant after returning the truck at 7:00 p.m. and observed that no work was being done after that time and that the truck remained parked from 7:00 p.m. onwards. He stated in cross examination that the keys for the truck was taken to the office and put in a safe and the person who controlled the key lived off the compound. He said at bedtime no truck could drive out. He also indicated he knew the 2<sup>nd</sup>

defendant who used to drive for the company from 2000 – 2004 and then again from sometime in 2006, but he could not remember the date.

[18] The first issue is one which is resolvable entirely on the facts. No witness for the claimant can properly identify the driver or the truck that was involved in the accident. The 2<sup>nd</sup> defendant was never served and was not a part of the trial. There is no evidence of any physical damage to the International Paystar 5000 Motor Truck, registered CB 6748, at any time, let alone at the time of the incident. The attempt to link that truck to the accident through Mr. McLean was laid bare and to put it kindly unsustainable. The person who had charge of the truck on the day the accident occurred indicated that the truck was safely stowed away at its home port hours before the accident. There was no suggestion that it left again that night. It was therefore manifest that the claimant had failed to prove that the International Paystar 5000 Motor Truck, registered CB 6748 was involved in the accident. The evidence proved the opposite. It was not.

## Issue 2

[19] The resolution of issue 1 in the negative makes it unnecessary to go on to consider issue 2. However I will go on to quickly address it as even if issue 1 had been resolved in favour of the claimant, and it had been proven that the 2<sup>nd</sup> defendant was the driver at the relevant time, the claim would have failed against the 1<sup>st</sup> defendant on the basis of issue 2.

[20] The 1<sup>st</sup> defendant is the owner of the International Paystar 5000 Motor Truck, registered CB 6748 and a director of Striders Building Construction and Joinery Limited to which she said the truck was contracted.

[21] Denning LJ in the case of ***Ormrod and Another v Crosville Motor Services Ltd and Another (Murphie, Third Party)*** [1953] 2 All ER 753 stated at page 754 that:

The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the

owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. **The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern.** (Emphasis supplied).

- [22] The effect of the principle enunciated by Denning LJ is that the owner of a motor vehicle will not be liable for the acts or omissions of the driver unless it can be shown that there existed a relationship of principal or agent. The mere fact that the owner of the vehicle is a director of the company which had control and management of the vehicle does not mean that the principle should be applied differently. The company is a separate legal entity from its directors, it therefore means that by virtue of the fact that the International Paystar 5000 Motor Truck, registered CB 6748 was contracted to Striders Building Construction and Joinery Limited, it would be the company that had custody and control of the vehicle thereby rendering the company liable for the negligence of its agents. (see **Lee v Lee's Air Farming Ltd** [1960] 3 WLR 758.)

#### CONCLUSION

- [23] The claimant failed to prove that the International Paystar 5000 Motor Truck, registered CB 6748 was involved in the accident which caused his injuries. The evidence also revealed that, had that truck been involved in the accident, the 1<sup>st</sup> defendant would not have been the proper party to be sued on the basis on vicarious liability, given that the truck had been contracted to Striders Building Construction and Joinery Limited. The foregoing reasons thus outline the full bases of the disposition of the claim as outlined at paragraph 1.