[2022] JMSC Civ 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020/CV02168

BETWEEN	**DEMETRIUS SEIXAS**	**CLAIMANT**
AND	**TRICIA MADDIX- BLAIR**	**DEFENDANT**

IN CHAMBERS (by Video Conference)

Lance Lamey instructed by Bignall Law for the Claimant

Miguel C. Palmer for the Defendant.

Civil Procedure – Rule 15.2 of Civil Procedure Rules - summary judgment - whether the defendant has real prospect of success - Rule 26.3(1) of the Civil Procedure Rules - whether the defendant's case should be struck out.

HEARD: 12th May, 2022 and 7th July, 2022

MASTER C. THOMAS (AG)

Introduction

[1] The application before the court is one for summary judgment to be entered for the claimant against the defendant. In the alternative, the claimant seeks an order to have the defendant's statement of case struck out by the court.

Background

[2] The claim filed herein was commenced by way of claim form and particulars of claim filed on 23rd June 2020. The claimant alleges that on 4th March 2018, he was

driving along Old Harbour Road, when the defendant negligently drove her motor vehicle, causing it to collide into the rear of the car that was being driven by the claimant. The claimant asserts in his particulars of claim that as a result of the accident, he suffered multiple and serious injuries, necessitating extensive medical treatment, loss, damage and he also incurred expense.

[3] A defence was filed in response on 22nd October 2020. The defendant admits that there was a collision involving herself and the claimant. She however avers particulars of negligence of the claimant, and further asserts that the collision was caused solely by or contributed to by the negligence of the claimant.

[4] Subsequently, on 2nd March 2021, the claimant filed the application for summary judgment, with which this judgment is concerned.

Submissions

[5] It should be stated at the outset that although the claimant applied for summary judgment, and alternatively for the defence to be struck out, the arguments advanced by counsel on both sides were centred on the summary judgment application.

For the Claimant

[6] In support of the application, it was submitted that no account was given by the defendant in her defence as to the steps that were taken to avoid the collision. This, it was contended, means that an inference can be drawn that if the claimant's motor vehicle was stopped then this would have reasonably allowed the defendant's vehicle a fair opportunity to either slow down or stop. Counsel argued that the conclusion must be drawn that the defendant's motor vehicle was either travelling at an inappropriate speed or following too closely to take evasive action to avoid the collision. Counsel further submitted that the defendant did not take any steps to mitigate the impact of the accident. No emergency brakes were employed nor was the horn sounded.

[7] It was submitted that the defendant's case is a weak one and does not display a real prospect of successfully defending the claim against her. The defendant did not put forward enough to ground a defence that would necessitate a trial. In grounding this submission, reference was made to part 15 of the Civil Procedure Rules, 2002 ("CPR"), and the *locus classicus* of ***Swain v Hillman*** [2001] 1 All ER 91.

[8] Counsel also relied on ***Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd*** (RBC) et al [2015] JMCC Comm. 22, Sagicor Bank Jamaica Limited v Taylor- Wright [2018] UKPC 12 and ***Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels*** SCCA No 2/2005, (delivered 18 November 2005) in exploring the threshold of "real prospect of success".

[9] It was submitted by Mr Lamey that the defendant was negligent in that there existed a duty of care and this duty was breached by the actions of the defendant. For this submission, reliance was placed on ***Le Lieve v Gould*** [1893] 1 QB 491, page 497.

[10] Learned counsel highlighted that all users of the road owe a duty of care to other road users. Further, he submitted, motorists have a statutory duty and a common law duty to exercise reasonable care while operating their vehicles on the roadways. Counsel argued that drivers must maintain a proper distance whilst driving on the road to provide for exigencies on the roadway. Counsel referred to the dicta of Lord Cooper in the authority of ***Brown and Lynn v Western Scottish Motor Traction Co. Ltd***. [1945] SC 31, [1944] SN 59 to support this submission.

[11] Counsel also relied on ***Granger v Murphy*** *Court of Appeal*, The Bahamas, No. 11 of 1974 (unreported) for the submission that the defendant drove in such a manner that caused the collision into the back of the claimant's vehicle that had stopped ahead of him. This, it was submitted, displays a high degree of being potently causative of the injuries suffered by the claimant. Counsel argued that the collision and the claimant's injuries were attributable to the defendant's breach of duty of

care and the accident could not have been caused by the reasonable man traversing prudently on the roadway.

[12] Learned counsel submitted that the defence, even if proven could not relieve a defendant of his duty of care to follow at an appropriate distance behind another motor vehicle, so as to be prepared for exigencies which may arise. Mr Lamey argued that there could be no merit to a defence of 'sudden stop' resulting in a rear-end collision, and consequently, the defendant has no real prospect of successfully defending the claim.

For the Defendant

[13] Mr Palmer submitted that there was no dispute in relation to the law governing a summary judgment application; however, the point of departure was as to the application of the law to this case. He relied on ***Sagicor Bank Jamaica Limited v Taylor-Wright*** in relation to the approach of the court in summary judgment applications.

[14] Mr Palmer relied on the text, Gilbert Kodilinye, ***Commonwealth Caribbean Civil Procedure*** 2nd edn, to support his submission that summary judgment applications are not usually granted in negligence matters. He referred to the case of ***Cecilia Laird v Ayana Critchlow and Kinda Venner*** [2012] JMSC Civ 157 and submitted that the claimant has the burden of proving that the defendant has no real prospect of succeeding on her defence. Mr Palmer argued that the claimant's affidavit, which was filed on 2nd March 2021, does not speak to the circumstances of the accident. In light of this, he argued that the court would have to consider the pleadings filed by both parties.

[15] He submitted that it is accepted that there is a duty of care owed by a road user to all other road users to ensure that he proceeds carefully and cautiously**.** He referred to paragraphs four (4) and five (5) of the particulars of claim and submitted that these averments only touch on the circumstances, but not in great detail. He submitted that there were not sufficient facts to guide the court as to how the

accident occurred. Counsel emphasised that there are only two vehicles involved in the accident, and so, he argued, the inference to be drawn is that the claimant is asking the court to consider whether he had contributed to the accident. Consequently, Mr Palmer submitted, in these circumstances, liability is not a foregone conclusion and therefore, this issue should be reserved for determination at trial.

[16] Mr Palmer pointed out that the defendant is alleging, among other things, that the claimant failed to alert her of his intention to stop and also failed to keep a proper lookout. As a result, the defendant has also pleaded that the claimant contributed to the accident. Mr Palmer submitted that the issue of contribution has been raised by both parties and that as such, it should properly be ventilated by a court. He argued that this can only be properly achieved after the hearing of evidence from both parties. He submitted that the motor vehicle cases relied on by the claimant were distinguishable because they were decided on the particular facts of each case.

Discussion and Analysis

[17] The issues requiring the court's determination are as follows:

i. Whether summary judgment should be granted against the defendant;

ii. Alternatively, whether the defendant's statement of case should be struck out.

Issue i

Whether summary judgment should be granted against the defendant

[18] Summary judgment applications have the effect of actualizing the court's overriding objectives of dealing with cases in a manner that saves expense and ensures that the court's resources are not used up on unmeritorious matters.

[19] The procedure is outlined in part 15 of the CPR. The court is empowered to give summary judgment on either the entire claim or on a particular issue. The bases or grounds upon which the court can do so are set out in rule 15.2 of the CPR. It states:

> **"*Grounds for summary judgment***
>
> *15.2 "The Court may give summary judgment on the claim or on a particular issue if it considers that-*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue."*

[20] In determining whether to grant the application for summary judgment, I am guided by **Swain v Hillman**, which is authority for the test applicable to applications of this nature, that is, the prospect of success must be realistic as opposed to fanciful. I also take into consideration the following principles, which are not exhaustive, that have emanated from various authorities:

(i) The case must be more than just arguable; however, it does not require a party to convince the court that his case must succeed (**International Finance Corporation v Utexafrica SPRL** [2001] EWHC 508**,** relied on by Simmons J (as she was then) in **Cecelia Laird**).

(ii) The burden of proof is on the applicant to prove that the other party's case has no real prospect of success (**Island Car Rentals v Lindo** 2015 JMCA App 2; **Cecilia Laird**).

(iii) Where the applicant establishes a prima facie case against the respondent, there is an evidential burden on the

respondent to show a case answering that which has been advanced by the applicant. A respondent who shows a prima facie case in answer should ordinarily be allowed to take the matter to trial (*Blackstone's Civil Commentary* 2015, para 34.11).

(iv) The court will be guided by the pleadings as well as the evidence filed in support of the application (**Sagicor Bank v Taylor Wright**).

(v) The court must exercise caution in granting summary in certain cases, particularly where there are conflicts of facts on relevant issues which have to be resolved before a judgment can be given *(**Bolton Pharmaceutical Co 100 Ltd Doncaster*** [2006] EWCA Civ 1661**; Cecilia Laird**)

(vi) Summary judgment is not usually granted in negligence cases (*Commonwealth Caribbean Civil Procedure* 2nd ed; ***Island Car Rentals Ltd v Lindo***).

[21] It seems to me that the rule or practice that summary judgment is not usually granted in negligence claims recognises that in negligence matters, invariably the decision will be impacted by evidence given at the trial which will be dependent on the credibility of witnesses and an assessment of a witness' credibility cannot properly be determined in the absence of viva voce evidence. However, I am of the view that this rule must admit of some exceptions and should not be used to absolve a party of his duty to set out his case or to plead the facts on which his case is based. Therefore, it must surely be inapplicable in circumstances where there is no real case put forward by a defence. One such circumstance would be where the defence is a bare denial. The case of ***Amos Virgo v Steve Nam*** 2008 HCV 00201 (delivered 1 December 2009) is also another instance in which summary judgment was entered in a negligence claim. In that case, which also

involved a motor vehicle accident, the defendant admitted to the claimant at the scene of the accident that he was wrong. Further, upon being charged with careless driving, he pleaded guilty. The learned judge in that case found that in light of the defendant's several admissions, his prospect of successfully defending the claim "must be surely fanciful, if not delusional". Of course, these instances are not exhaustive of the circumstances in a negligence case where summary judgment may be entered.

[22] So then, even though this is a negligence case, it does not inexorably mean that this application must be dismissed. The application should be dismissed only if the claimant fails to demonstrate that based on the case that the defendant has put before the court, the defence is merely arguable and has no real prospect of success.

[23] In the instant case, as was submitted by Mr Palmer, the claimant's affidavit really does not add anything to the pleadings. It may be said to be a regurgitation of the pleadings. So, it may be said that other than the claimant's pleadings, there is nothing further being advanced by him to demonstrate that the defence has no real prospect of success. The same may be said for the defendant, that is, there is nothing being advanced by her, beyond her defence, to show that she has a defence that is more than arguable. I therefore agree with Mr Palmer that the resolution of this matter is to be determined solely on the pleadings.

[24] It is now necessary to examine the claimant's pleadings to determine whether a *prima facie* case of negligence has been made out against the defendant. At paragraphs 4-5, of the particulars of claim, it is stated:

> 4. On or about the 4th day of March 2018 along the Old Harbour Road, Spanish Town in the parish of St Catherine, where the defendant whether by himself his servant and/or agent and/or authorised driver, so negligently drove, managed or controlled a 1997 White Toyota Starlet motor car numbered 7308GH, owned

by the said defendant, that it collided into the rear of the 1997 Honda Accord motor car numbered 8593 FV, aboard which the Claimant was the driver at all material. times causing the Claimant to suffer injury, loss, damage and incur expense.

5. This accident was wholly caused and/or alternatively contributed to by the negligence of the defendant.

PARTICULARS OF NEGLIGENCE OF THE DEFENDANT

The Defendant whether by himself his servant and/or agent was negligent in that he:

a) Drove at an excessive and/or improper speed;
b) Failed to keep any or any proper lookout;
c) Drove without any or any sufficient consideration for other users of the road;
d) Failed to maintain sufficient control over the said motor vehicle;
e) Failed to apply brake within sufficient time or at all so as to prevent the collision occurring;
f) Failed to stop, slow down, swerve, turn aside or otherwise operate the said motor vehicle so as to avoid the said collision;
g) Failed to keep any or any proper and effective control of the 1997 White Toyota Starlet motor car numbered 7308GH he was driving.
h) Failed to keep the 1997 White Toyota Starlet motor car numbered 7308GH, at a safe distance behind another vehicle along the roadway. Being that said 1997 White Toyota Starlet motor car numbered 7308GH, along Old Harbour Road Spanish Town in the parish of Saint Catherine, drove in a

careless manner, failed to stop and collided into the rear of the 1997 Honda Accord motor car numbered 8593FV, aboard which the Claimant was the driver at all material times, that was travelling in the same direction and stationary in a line of traffic when the collision occurred, causing the Claimant to suffer injury, loss and damage and incur expense.

[25] At paragraphs 4 and 5 of the defence, in answer to these allegations, it is stated:

4. In answer to paragraphs 4 and 5 of the Particulars of Claim and/or Particulars of Negligence of the Defendant, the Defendant states that on 4th March, 2018 while she was travelling along the old Harbour Road, St Catherine when there was a collision between motor vehicle 8593FV driven by the Claimant and motor vehicle 7308GH driven by herself.

PARTICULARS OF NEGLIGENCE OF THE CLAIMANT

a) Failed to have regard for other users of the road.
b) Failed to keep any or any proper look out.
c) Stopped suddenly in the path of the Defendant
d) Failed to drive, swerve and/or otherwise manoeuvre motor vehicle 8593FV so as to avoid a collision.
e) Failed to alert the Defendant of his intention to stop.
f) Travelled at an improper speed in the circumstances.

5. In the premises, the Defendant avers that the collision was caused solely by or contributed to by the negligence of the Claimant.

[26] It may be said that though the claimant's pleadings include what may be regarded as generic pleadings of negligence, it demonstrates that in essence the claim is that the defendant was not travelling at a safe distance behind the

motor vehicle and collided into the rear of the vehicle while the claimant was stationary in a line of traffic. This is not denied by the defendant.

[27] Although counsel for the claimant has relied on a number of what may be regarded as road traffic cases, I find that it is sufficient for present purposes to refer to the provisions of the Island Traffic Authority Road Code ("Road Code"), promulgated under the Road Traffic Act, in determining whether the claimant has made out a prima facie case of negligence.

[28] I am of the view that the defendant's actions in colliding into the rear of the claimant's vehicle appear to be in breach of sections 4 and 7 of Part 2 of the Road Code. Section 4 provides:

> *Always be able to stop your vehicle well within the distance for which you can see the road to be clear, and make allowance when the road is wet or slippery.*

Section 7 provides:

> *Do not travel too closely to the vehicle in front of you.* ***Always leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops.*** *A good rule of thumb in good road conditions is to allow at least one vehicle length for each 10mph you are travelling. Double this gap on wet roads. (Emphasis supplied)*

[29] The Court of Appeal has held that breach of a provision of the Road Code does not inexorably result in a finding of negligence. It is one of the circumstances to be taken into consideration in determining whether there was negligence (see ***Leroy Samuels v Leroy Hugh Daley*** [2019] JMCA Civ 24 per Foster-Pusey JA).

[30] It seems to me that in light of the foregoing provisions of the Road Code, in circumstances where the claimant is alleging that the defendant was not travelling

at a safe distance behind him and collided into the rear of his motor vehicle while he was stationary in a line of traffic, a prima facie case of negligence has been raised. I therefore do not agree with Mr Palmer that the claimant did not put forward any facts to make it clear how the accident happened. The claimant having raised a prima facie case of negligence, it is for the defendant to put forward facts or circumstances in her defence which would show that she was not negligent.

[31] Mr Lamey argued that the defendant agreed with most of what happened and then went on to particularise the negligence of the claimant but did not put forward any facts to ground or substantiate the particulars of negligence. ***McPhilemy v Times Newspaper*** [1999] EWCA Civ 1464 which was referred to, with approval by our Court of Appeal in ***Grace Kennedy Remittance Services Limited v Paymaster Jamaica Ltd & Lowe*** SCCA No 5/2009 (delivered 2 July 2009) is authority for the principle that there is no need for extensive pleadings. The pleadings must, however, make clear the general nature of a party's case. In this case, no facts are pleaded to give the general nature of the defendant's case. I accept that while it may not be ideal, the facts may be contained in the defendant's particulars of negligence, as is the case with the claimant's pleadings; however, there are no facts contained in the defendant's particulars which give the general nature of her case. It seems to me that save for particulars (c), (e and (f), the particulars may be regarded as generic particulars pleaded in almost any negligence case and are too general to give any idea of the defendant's case.

[32] In so far as it may be said that particulars (c), (e) and (f) of the particulars of negligence set out the facts being relied on by the defendant, as was argued by Mr Palmer, these are not sufficient to make clear the general nature of the defendant's case. There is no indication of the circumstances in which the defendant is claiming that the claimant stopped suddenly in her path or failed to alert the defendant of his intention to stop. It seems to me that to be successful in her defence, the defendant would have to plead the circumstances in which the claimant stopping suddenly or failing to give notice of his intention to stop would have been negligent given that the defendant should have been at a safe enough

distance behind the claimant to allow sufficient time for her to stop so as to amount to negligence on his part. With respect to the particular of negligence that the claimant was travelling at an improper speed, the defendant does not indicate in what way the speed was improper and furthermore, in circumstances where the defendant collided into the rear of the claimant's vehicle, the speed at which the claimant was travelling could not cause the defendant to collide into the claimant's vehicle. In my view, these particulars are not sufficient to show that the defendant has a realistic prospect of success. It also cannot be ignored that the defendant, in opposing the application, had the opportunity to put forward facts in the form of evidence which demonstrated the claimant's negligence; but she chose not to avail herself of this opportunity.

[33] Mr Palmer also argued that both the claim and the defence raised the issue of contributory negligence and on that basis the claim should be allowed to go to trial. It seems that the pleadings as to contributory negligence on the part of the claimant is a generic pleading as there is no fact pleaded that would suggest that the claimant was negligent. In the absence of any facts pointing to contributory negligence, the defence must, in my view, standing on its own, plead facts that amount to contributory negligence. The defendant's particulars of negligence, without more, do not raise circumstances in which it could be said that the claimant in stopping suddenly or failing to give notice of his intention to stop was failing to look after his own safety.

[34] In my view, we have long progressed beyond the era of trial by ambush. While a defendant is not required to set out extensive pleadings, the claimant, and indeed the court, ought to have an idea as to general nature of his case sufficient to understand what are the circumstances in which he is contending that he did acts which did not amount to negligence. This is why part 10 of the Civil Procedure Rules has set out detailed provisions as to the contents of a defence. It is to ensure that only defences that have real prospect of succeeding are allowed to go to trial. It is not sufficient to plead what appears to be generic particulars of negligence and then reveal the nature of the defence in the witness statement. It seems to me

these circumstances do not pass the threshold of being more than merely arguable and cannot be regarded as having a real prospect of succeeding at trial.

[35] In view of my decision on the summary judgment aspect of the application, it is unnecessary for me to consider the application to strike out the defence.

Conclusion

[36] I am therefore of the view that even though this is a negligence case, the defence before the court is one that should not be allowed to go to trial as it has not demonstrated that it has a real prospect of succeeding. In the circumstances, I make the following orders:

1. Summary judgment is entered in favour of the claimant against the defendant

2. The matter to be scheduled by the registrar for a case management conference for assessment of damages

3. Costs of the application to the claimant to be taxed if not agreed

4. Leave to appeal is refused.