In the Supreme Court of Judicature of Jamaica

In the Civil Division

Claim NO. 2008/HCV00201

Between	Amos Virgo	Claimant
And	Steve Nam	Defendant

Practice and procedure – application for summary judgment- Rule in Hollington vs. Hewthorn – admissibility of pleas of guilty in criminal case- whether defendant should be allowed to explain plea in civil trial.

The Rule in Hollington v. Hewthorn is not authority for the proposition that a defendant's conviction in a criminal court, based on his plea of guilty cannot afterwards be relied on in a civil trial. If Hollington v. Hewthorn laid down any rule, it is this, in all its untruncated glory, whereas a conviction arising from a verdict of guilty in a criminal trial is inadmissible in a subsequent civil trial, a conviction based on a plea of guilty or any other admission made during the course of the criminal trial is admissible.

Mr. Everton Dewar instructed by
Kinghorn & Kinghorn for the Claimant.

Miss Stacia Pinnock for the Defendant.

Heard: *22nd October 2009, 9th November 2009 & 1st December 2009.*

Coram: Evan J. Brown, J. (Ag.)

1. Sometime in the morning on the 28th May, 2007, the aesthetically pleasing, picturesque precincts of the entrance of the world renowned Dunns River Falls in the garden parish of St. Ann, was

transformed into a scene of twisted metals, fractured bones and stressed muscles. That was the result of a motor vehicle accident from which the claimant was carried away probably thinking, no good deed goes unpunished. Driving his motor vehicle towards St. Ann's Bay he stopped to allow a motor truck to exit Dunns River Falls. Vehicular traffic proceeding from St. Ann's Bay also stopped. That is, all except the defendant who overtook the line of traffic, and crashed head-on into the claimant's stationary vehicle. For this act of courtesy the claimant spent approximately two weeks in hospital.

2. In his affidavit the claimant said "from the very outset the defendant admitted that he was wrong and that he was rushing to go to work. He admitted this to me at the scene of the accident." In the next ensuing paragraph, that is number four (4), the claimant deponed that the defendant was in consequence of the accident charged with careless driving for which the defendant pleaded guilty on the 13th July, 2007. That fact is amply supported by a letter under the hand of an official of the Resident Magistrate's Court for the parish of St. Ann. The affidavit containing these matters was served on the defendant's insurers, NEM Insurance Co. (Ja.) Ltd on 4th February, 2009.

3. NEM's in-house Attorney is the Attorney-at-law on record for the defendant. Exhibited to the claimant's affidavit at "A.V.3," are two

unanswered, perhaps unanswerable letters, to counsel for the defendant. The first of the two, dated 17th October, 2008, contended, "you have already paid in for the property damage claim for the vehicle that our client was driving." The second missive, 13th January, 2009, referred to the first correspondence and threatened the insurers with the making of this application.

4. The defendant in his affidavit said the motor vehicle drove out from the entrance of Dunns River Falls. That in an effort to avoid colliding with its rear, he swerved right and crashed into the claimant's vehicle. He accepted that he twice admitted culpability but that he did so without the benefit of advise. In the one case without any advice and in the other, without any legal advice.

5. In his defence, annexed to his affidavit, the defendant said the motor truck "drove from the access road of Dunns River Falls onto the main road and turned right and he slowed down on the soft shoulder." He was in the act of slowly passing the truck when, without warning, the driver of the motor vehicle swerved right. In paragraph number two (2) of the exhibited defence, the defendant said:

> 'The driver of motor truck registered CE 9796 drove from a parked position on the sidewalk into the path of the

defendant's motor car causing him to collide with the Toyota Hiace motor bus being driven by the claimant.

The defendant in his re-filed ancillary claim, against the owners and driver respectively of the motor truck, repeats the averments in the defence, omitting paragraph number two (2). Predictably, both ancillary defendants deny being responsible for the accident.

6. By Notice of Application for Court Order filed on 28th January, 2007, the claimant sought, *inter alia,* to have the defence struck out or to have summary judgment entered. Learned counsel for the claimant predicated his argument on the admissions adverted to in the claimant's affidavit.

7. Counsel for the defendant launch a two-pronged attack upon the application. First, she submitted, no reliance can be placed on the defendant's plea of guilty. To do so would be to run afoul of the rule in ***Hollington v. Hewthorn Co. Ltd. [1943] 1 KB 587,*** "which states that evidence of this criminal conviction is inadmissible." The submission was that ***Hollington*** is still good law in Jamaica although it has been overruled in England, land of its birth, and other jurisdictions. Further, counsel argued, even in present day England, where the conviction is entered into evidence, it's a question of weight. For this proposition, she cited Lord Denning's

dictum in ***JW Stupple v. Royal Insuracnce Co. Ltd. [1970] 3 All ER 230.***

8. Learned counsel for the defendant submitted that it was the 2nd ancillary claimant, the driver of the motor vehicle, who either "caused and, or significantly contributed to [the] accident." Counsel prayed in aid section 51 (1)(c) of the Road Traffic Act, which obligates the driver of a motor vehicle not "to cross or commence to cross or to be turned into a road if by so doing it obstructs any traffic." The 2nd ancillary defendant was in breach as he drove from the Dunns River road, 'a minor road', onto the Ocho Rios main

9. The court's power to give summary judgment is enshrined in the provisions of Part 15 of the Civil Procedure Rule 2002 (CPR), revised as at 18th September, 2006. Rule 15.2(b) states, in so far as is germane, "the court may give summary judgment on a claim or on a particular issue if it considers that – the defendant has no real prospect of successfully defending the claim or issue."

10. Rule 15.2 makes reference to R. 26.3, under which the application is framed in the alternative. It is therefore useful to set out the relevant sections of R. 26.3.

Rule 26.3(1):

In addition to any other powers under these Rules, the court may strike out a statement of case or a part of a statement of case if it appears to the court –

(b). That the statement of case to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of proceedings;

(c). That the statement of case or part to be struck out disclose no reasonable grounds for bringing or defending a claim.

11. It is trite law that the exercise of the power to strike out a statement of case should be the last option. Being a last resort course, it behoves a court to tread with utmost caution and a statement of case will be struck out as disclosing no reasonable grounds for defending a claim only where, it is obvious that the defendant has no real prospect of defending the claim: ***S & T Distributors Ltd. v. CIBC Ja. Ltd. (2007) CA (Ja). Civ. App. & 112/04.*** According to Cooke, J.A.:

> ***The consideration under R.26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirements for a prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim.***
>
> ***(Gordon Stewart v. John Issa SCCA # 16/2009 24th September, 2009).***

That being said, the power to strike out for an abuse of process is one:

> ***which any court of justice must posses to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right-thinking people.***
>
> ***Per Lord Diplock in Hunter v. Chief Constable of the West Midlands Police [1982] AC 529, 536.***

12. It would be an expression of dissent aversion to disagree with McDonald – Bishop J. (Ag.) as she then was, in ***Dotting v. Clifford (2007) #2006 HCV0338, (unreported).*** According to the learned judge:

> ***The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable ground [for defending] the claim seems to be, essentially, the same as that in granting summary judgment, that is ; is the [defence] one that is fit for trial at all?***

Nevertheless, I elect to treat with this application as one for summary judgment.

13. Resting, as the application does, on the substratum of admissions, attention is now adverted to their consideration. The rule in ***Holliington vs. Hewthorn*** (*ibid.*) falls first for examination. In that case Goddard L.J. considered both the admissibility of a conviction

arising from a verdict of guilty and a plea of guilty, in subsequent civil proceedings. After a review of the authorities, Goddard L.J. concluded, in respect of the former at pages 594- 595:

> ***In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages.***

The court therefore held that evidence of the criminal conviction was inadmissible. The ground given in the authorities for rejecting that class of evidence is *res inter alios acta.* That is a rule of considerable vintage and for its sixty-six (66) years, remains venerable in this jurisdiction.

14. However, what the claimant seeks to rely on in the instant case is not a returned verdict of guilty, but one entered by the defendant of his own volition, albeit, the defendant contends, without legal advice. Goddard, L.J. expressly and succinctly distinguished the former circumstances from the latter in his perspicuously written judgment. At pp. 599 – 600 he articulated:

> ***It may frequently happen that where bigamy or any other crime was to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of***

> *the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.*

15. Hollington was applied in ***Dummer v. Brown and Anor. [1953]1 All ER 1158.*** In Dummer the plaintiff applied for leave to sign judgment in her favour upon the basis that the 2nd defendant had pleaded guilty to a charge of dangerous driving. That claim was made under the **Fatal Accidents Acts**, the plaintiff's husband having been killed in an accident involving a motor coach of which the 2nd defendant was the driver. The judgment in favour of the plaintiff was upheld on appeal to the Court of Appeal.

16. On appeal it was contended, among other things:

> *that the admission made by the second defendant, an admission made in the face of the court, of guilt of the act of dangerous driving, was not an admission that included within it an admission of negligence. It seems to me clear that it did include such an admission.*
>
> *Per Morris, L.J. Morris*

Morris L.J. then cited with approval the section quoted above from the judgment of Goddard L.J. ——

> *It seems to me therefore, that, once the learned judge was satisfied by the evidence before him he had satisfactory proof that the second defendant had made an admission*

> ***of negligence, and that that admission was such as to entitle the plaintiff to judgment.***

17. In ***George Stephenson v. Dalvester Smith Cl. 2004 HCV00990 (unreported)*** 11th April, 2006, the defendant sought to place reliance on ***Hollington v. Hewthorn*** to say he had a defence with a real prospect of success. The claim was to recover damages for the defendant's negligence, the defendant having pleaded guilty to the offence of Inflicting Grievous Bodily Harm with Intent. Brooks J. distinguished ***Hollington*** and found "that Mr. Smith's previous plea of guilty ..... undermines Mr. Smith's credibility in the defence he seeks to advance in this case."

18. Although counsel for the defendant dealt with the admission of the defendant in the face to the court, that the defendant made an admission at the *locus in quo* was conspicuously absent from counsel's submission. Counsel said the defendant is 22 years old but not a word of his occupation. Neither in the submission nor the defendant's affidavit is mention made of his occupation, in breach of the CPR 2002. That would have assisted greatly in helping to assess the defendant's level of sophistication.

19. But perhaps that omission was not the progeny of inadvertence. Exhibits "A.V.3" alleged the settlement of the claimant's property damage arising out of the same accident. The defendant's insurers

were thereby indemnifying the defendant. That begs the question, on what basis were they doing so? The indemnification cannot properly proceed without an unequivocal acceptance of the insured's liability.

20. Whether that acceptance was grounded on the defendant's acceptance of liability or the insurer's own investigation is moot. Either way, it is a superlative example of cognitive dissonance, if no more, to say in one breath, we are responsible for the property damage arising from the accident but not the personal injury claim arising therefrom. The incongruity of it all is so stultifying as to render true expressions of incredulity ineffable. The defendant admitted at the scene; then to his insurers, either directly or indirectly and in the face of the court. That he now seeks to recant and recoil from the consequences of his admissions renders his credibility of no more durability than that of dew in the face of the rising sun.

21. So then, it is against the background of these consistent confessions that counsel for the defendant submitted that the defendant be allowed to explain why he pleaded guilty in the Resident Magistrate's Court. At the trial, the confession in the Resident Magistrate's Court would be buttressed and fortified by what he said at the scene and the actions of his insurers. When so juxtaposed, it

is difficult to see how any court would weigh the defendant's explanation in his favour. ***J.W. Stupple*** is therefore no rock to shelter a defendant who with such constancy says, it is my fault.

22. So, is there a real prospect of successfully defending the claim? In what may be regarded as the *locus classicus,* ***Swain v. Hillman [2001] 1 All ER 91,*** Lord Woolf MR. said- "No real prospect of succeeding" was self-explanatory. The word 'real' directs the court to ascertain whether there was a realistic prospect, in contradistinction to a 'fanciful' prospect of success. The phrase is said not to mean 'real and substantial' prospect of success. Neither does it mean that summary judgment will only be granted when the claim is 'bound to be dismissed at trial.'

23. The defendant's prospect of successfully defending this claim, in light of his several admissions, must surely be fanciful, if not delusional. While it is uncommon for summary judgment to be entered in negligence claims, it is not without precedent. In fact, ***Dummer v. Brown***, *supra*, was itself a negligence action in which summary judgment, was entered. There, as here, the application for summary judgment was grounded on the defendant's *ex ante* confession of guilt. That confession in the instant case is further supported by the defendant's contemporaneous admission and the *ex post facto* indemnification in respect of the property damage. So,

if summary judgment was properly entered there, a *fortion*, summary judgment may be entered in this case.

24. The foregoing brief review of the cases makes it plain, that ***Hollington v. Hewthorn*** is not authority for the proposition that a defendant's conviction in criminal trial, based on his plea of guilty, cannot afterwards be relied on in a civil trial. An admission made anywhere is good everywhere. Even if that admission is to be weighed in the balance according to learning in ***J. W. Stupple,*** its admissibility is not thereby impugned in any way. If ***Hollington v. Hewthorn*** laid down any rule, it is this, in all its untruncated glory, whereas a conviction arising from a verdict of guilty in a criminal trial is inadmissible, in a subsequent civil trial, a conviction based on a plea of guilty or any other admission during the course of the criminal trial is admissible.

25. Accordingly, summary judgment is entered in favour of the claimant against the defendant. The claim is to be set down for assessment of damages. Costs of this application to the claimant to be taxed if not agreed.

26. As a postscript, although an election was made to treat with the application as one for summary judgment, finding as the court has, that the admissions made by the defendant make the case against him impregnable, the statement of case could have been struck out.

That is, the defence is wholly unfit to go to trial. Surely it would bring the administration of justice into disrepute if a defendant were allowed to admit liability in respect of the property damage arising from a motor vehicle accident but deny liability in respect of the personal injury claims. The defendant ought properly to withdraw the ancillary claim against the ancillary defendants.