EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCV 2009/0004

BETWEEN:

MONTSERRAT ENTERPRISES LTD.

Claimant

AND

JONE MARTINEZ GOMEZ

Defendant

Appearances:

Mr. Jean Kelsick for the Claimant.

Mr. David Brandt for the Defendant.

2010: June 08

2012: March 06.

JUDGMENT[1]

Introduction

[1] **LEIGERTWOOD-OCATVE J:** Montserrat Enterprises Ltd ["the Company"] is engaged in the business of the rental of motor vehicles. Some time towards the end of July 2009, the Defendant ["Ms. Gomez"] entered into an oral contract with the Company to hire a vehicle. Whilst driving the vehicle, Ms. Gomez was involved in an accident and the vehicle was extensively damaged.

[2] In these proceedings, the Company has alleged that the collision was caused by Ms. Gomez's negligent driving and that she has failed as a bailee to take reasonable care

[1] Approved by Octave J for delivery subject to editing corrections

of the vehicle whilst it was in her care and custody. The Company also alleged that Ms. Gomez breached the oral agreement by failing to take due or proper care of the vehicle and by returning it to the Company in a damaged condition. They have claimed special damages in the sum of $30,960.00.

[3] In her Defence, Ms. Martinez Gomez has denied any liability for the collision or for any loss or damage suffered by the Company. She has claimed that the vehicle as delivered to her by the Company was not in a roadworthy condition or fit for the purpose for which it was hired. She has counterclaimed for damages for personal injuries and consequential loss.

The Oral Contract

[4] When Ms. Gomez approached the Company on 25th July 2008 to rent a vehicle, she spoke with Ms. Veronica Hixon, who Mr. Daniel Edwards ["Mr. Edwards"] testified was authorized to enter into rental agreements on behalf of the Company. Mr. Edwards, the Company's Managing Director, was not present at any time during their conversation, he had never spoken to Ms. Gomez on the matter and he admitted in cross-examination that he did not have first-hand knowledge of what was agreed. There are some matters however that are not disputed between the parties, namely, that the rental period would commence on 28th July 2009 for a period of one week and that the daily rate was US$40.00.

[5] As Ms. Hixon was not called as a witness of the case, Ms Gomez is the only person who was in a position to give any details regarding the oral contract. She claimed at the time of entering the contract she had told the Company's officer who she had dealt with that she was staying in Old Towne and she was concerned about the state of the roads and the importance of safety for her two young sons. The following terms were expressly agreed:

> *"[a] The vehicle would be not only road worthy but in good condition, have rear seatbelts for [her] children's safety car seats and [she] would ^the additional daily rate to have a jeep, after being reassured by the Claimant that it would have an even better tyre grip than a regular vehicle.*
>
> *[b] The vehicle would be comprehensively insured so that if [she] was involved in an accident [she] would not incur any liability or be liable in damages. Except for the excess on the insurance policy which would*

be the standard rate as discussed with the Claimant on our initial telephone conversation…

[c] The said vehicle was safe and suitable for the purposes for which it was hired and that the tyres would have a good grip… that the Claimant would provide a 4 x 4 vehicle that would have a better grip than a regular vehicle."

[6] In cross-examination by Mr. Kelsick Ms. Gomez insisted that these were the terms that she had agreed with the Company.

The Delivery of the Vehicle

[7] After the contract between the parties was in place, Mr. Edwards delivered a Toyota Rav-4 jeep to Ms. Gomez's home on 27th July 2008. It is common ground that Mr. Edwards did not speak with Ms. Gomez when he delivered and he had left the keys and the Company's standard Auto Rental Agreement Form with her husband James Wood ["Mr. Wood"].

[8] Mr. Edwards stated that the vehicle he delivered to Mr. Wood was in a good and roadworthy condition. The tyres were adequately threaded and capable of gripping the road properly. He denied that they were bald as alleged by Ms. Gomez. Ms. Gomez stated in cross-examination she had not actually inspected the vehicle but on reflection she realized that she should have carefully examined the tyres, particularly as there did not appear to be any minimum standards in Montserrat. If she had examined them and seen that the tyres were bald and dangerous she would not have accepted the vehicle.

The Collision

[9] The collision involving the rented vehicle occurred around midday on 28th July 2008 on the Logwood Main Road in Old Towne.

[10] Ms. Gomez version of events is that it occurred without any negligence or fault on her part. She was driving the vehicle properly and carefully along the road at about 20 miles per hour and had just taken a bend coming down the hill going slowly. It had started to rain and there was ash and pumice on the road. Suddenly, the vehicle went into a skid, she applied the brakes trying to get out of the skid and to maintain her side of the road or to turn the car in the opposite direction but even though she had

exercised reasonable care and skill, she could not control the vehicle and it careened across the road into Rolston Daley's ["Mr. Daley"] vehicle as it was coming up the hill.

[11] Mr. Daley recalled that he had stopped on the Logwood Main Road and had just moved off in the direction of the corner opposite Levon Watts' house, he was travelling at about 25 miles per hour. The road was wet because it had rained not too long before but there was no ash or pumice on the road at the time.

[12] As he approached the corner he saw the vehicle coming towards him travelling at 30 to 40 miles per hour, in his opinion. When he saw it, it was in the middle of the road. It skidded and Ms. Gomez unsuccessfully tried to turn the vehicle back on to the left side, which was her side of the road. He pulled over onto his side as much as possible and both of his truck's left wheels were on Mr. Watts' grass verge and the front of his truck was touching his hibiscus hedge. He brought his truck to a standstill and the front of the vehicle collided forcefully with the right front side of his truck.

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[13] Immediately after the accident, and because of the way in which the vehicle had skidded at such a low speed, Ms. Gomez checked the tyres. She found that some were bald especially on the inside areas. She showed them to Mr. Edwards and one of the police officers when they arrived on the scene.

[14] She was challenged in cross-examination as to the truth of that statement in light of the fact that in the Insurance Form, which she had completed within a month of the accident, she had recorded that "*the jeep had a bald tyre on the inside part*" on the front driver side. She responded that she was not misleading the court, she had been very upset when she filled in the form and the tyres were all worn and what she probably meant was that one of them was very bald.

[15] Ms. Gomez was not the only witness to observe the state of the vehicle's tyres at the scene of the accident. Mr. Daley had looked at them and found that they were not brand new but that they were in fairly good condition. Police Officer Earl Daway, who was the investigating officer at the scene of the accident, stated that Mr. Wood had pointed out the tyres to him and he had observed that the inside of the front tyres were smooth. He also observed that the road surface was wet and ashy.

[16] Ms. Gomez's evidence is that the bald tyres were the main contributing factor in the accident and she was adamant that her application of the brakes had played no part because she knew that to get out of a skid, she should not press them very hard. At the scene of the accident, she explained what happened to Officer Daway in these words "… *I was driving about 20 mph. The road was wet when I saw the truck I applied my brakes to take the road better and the car slid across the road and we collided.*" Mr. Daley's statement was that *"… I saw a red Jeep coming around the corner, which was actually sliding across the road. I tried to get closer over to my side and we collided."*

[17] As a result of the accident, the vehicle was extensively damaged, the front chassis was bent and it was a total loss in the opinion of Dave Taylor ["Mr. Taylor"], a motor mechanic of some 30 years experience, who examined it some time after the accident. He had commented that the five tyres that he had seen on the vehicle were less than 50% worn, they were in a satisfactory condition and did not contribute to the accident the vehicle was involved in. He however admitted in cross-examination that he could not say that those were the tyres on the vehicle at the time of the accident.

[18] Mr. Edwards testified that as the vehicle was a total loss and he had sold it for parts in April 2009. Its pre-accident value was $18,063.00. The Company's standard daily rental rate for the vehicle was US$40.00 or EC$108.00 and its claim of $12,960.00 for loss use represented 4 months rental.

The Law

[19] This case involves the ancient common law concept of bailment, a concept in which the law which is today, is the same as it was in 1703, as expounded by Sir John Holt, Chief Justice of the King's Bench in the landmark case of **Coggs v Bernard**[2]. Bailment describes a legal relationship which is created when the property of one person [the bailor] is physically transferred to another [the bailee], who then assumes possession of that property[3].

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[2] [1703] 2 Ld Raym 909
[3] Ibid

[20] In his judgment, Holt CJ identified six categories of bailment and on the facts of this case, it is the third category which is applicable. It is when goods are left with a bailee to be used by him for hire, this is called "*locatio et conductio*".

[21] **Coggs v Bernard**[4] most importantly established the principle that a bailee was only liable if he had been negligent, overturning **Southcote's Case**[5], the leading authority on bailment at that time which held that liability was strict.

[22] A bailee's duty is to take due care of the bailed property and to return them at the end of the bailment[6]. If the property is damaged while in his possession, there is a presumption that it is his fault and the bailor can bring action against him in either contract or in tort[7], as the Company has done in this case. Once the bailor proves bailment the onus shifts to the bailee to rebut the presumption of negligence[8] and he must prove that he took reasonable care of the property[9] and exercised the standard of care demanded by the circumstances of the particular case[10].

[23] I now turn to the authorities on negligence on the tort limb of the Company's claim. In an action for negligence, the burden is on the Claimant to prove on a balance of probabilities that the accident was caused by negligence on part of the Defendant[11]. It is a general burden of proof that does not shift but in some cases proven facts raise a prima facie inference that the accident was caused by the Defendant's negligence and that puts an evidential burden on the Defendant to displace that prima facie inference[12].

[24] One example where the court has held that there is a presumption of negligence is "*… the defendant's vehicle collides with the plaintiff's vehicle which is travelling in the opposite direction, the point of impact being on the plaintiff's side of the road.*[13]"

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[4] Supra
[5] [1601] Cro Eliz 815
[6] Joseph Travers & Sons Ltd. v Cooper [1915] 1 K.B. 73
[7] Clerk & Lindsell on Torts 16th ed. para. 10-102
[8] Houghland v RR Low Luxury Coaches Ltd. [1962] 1 Q.B. 694
[9] Joseph Troavers & Sons Ltd. v Cooper [1915] 1 K.B. 73
[10] Houghland v RR Low Luxury Coaches Ltd. [1962] 1 Q.B. 694
[11] Henderson v Henry Jenkins and Sons [1970] AC 282
[12] Ibid.
[13] Gilbert Kodilinye in Commonwealth Caribbean Tort Law 3rd ed. at page 95

[25] A second example is where the accident was due to skidding[14]. As Lord Greene MR stated in **Laurie v Raglan Building Co Ltd**[15]**,** a skid by itself is neutral as it may or may not have due to negligence but if on the facts a prima facie case of negligence arises, the onus is on the Defendant to show that he was not negligent in the circumstances.

[26] In a third example, **Richley v Faull**[16], an unexplained and violent skid was ruled to be evidence of negligence and the court found for the Plaintiff as the Defendant had failed to prove that the skid had happened without his fault.

[27] With regard to the duty of care, in circumstances where skidding is a proven fact, the **7th edition of Charlesworth & Percy** sums it up aptly. The fact that a vehicle, such as a motor car is liable to skid in certain circumstances, it is incumbent on the driver to use additional care, proportioned to the greater risk, both with regard to his driving and also the condition of his tyres[17]. The editors seemed to criticize the decision in **Laurie v Raglan Building Co Ltd**[18] that the fact of a skid was a neutral circumstance, which assisted neither party. Instead they proposed that a skid might suggest that the driver had been driving too fast or had applied his brakes too fiercely and suddenly, having regard to the road conditions prevailing at the time and so as to be evidence of his negligence. While on the other hand, the skid could be consistent with the driver having exercised proper caution but it was caused by an inevitable accident.

[28] Inevitable accident was raised briefly in the closing addresses, so I would look at how it is defined. Where a Defendant relies on the defence of inevitable accident, he must prove that for some reason beyond his personal control, and even with his skill and care, the accident, or skidding could not have been avoided and that he was negligent[19].

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[14] Laurie v Raglan Building Co Ltd [1941] 3 All ER 332 and Richley v Faull (Richley, Third Party) [1965] 3 All ER 109
[15] Supra
[16] Supra
[17] Charlesworth & Percy on Negligence 7th ed. para. 10-154
[18] Supra.
[19] Hunter v Wright [1938] 2 All E.R. 621

Analysis

[29] I will first deal with the issue of bailment and this would be an appropriate juncture to deal with the issue raised by the Defendant that the Company did not own the vehicle. I agree with Mr. Kelsick that this was not a part of Ms. Gomez's pleaded case. The Company pleaded it in their Statement of Claim and it was not disputed in the Defence. As a matter of fact, it arose for the first time in the written submissions. I have no difficulty finding that there is no merit in the objection.

[30] Mr. Brandt has submitted that to determine liability on this issue, the court must look at the terms of the bailment, to see if Ms. Gomez' had breached any of its terms. He invited the court to consider her witness statement to determine if she had been in breach, if she was not, the Company could not succeed in its claim for damages.

[31] I do not agree with Mr. Brandt, if bailment is established and I find on the facts that bailment has in fact been established in the case, on the authority of **Coggs v Bernard**[20] because Ms. Gomez did take physical possession of the Company's vehicle, the next step would be to look at what happened to the vehicle. From the evidence of Mr. Edwards, Mr. Daley and Ms. Gomez herself, the vehicle was extensively damaged. As a bailee, Ms. Gomez had a duty to take due care of the vehicle and to return it in the condition that she received it.

[32] As the Company has proved bailment, she must now rebut the presumption of negligence and satisfy the court that she took reasonable care of the vehicle in all the circumstances. The next step therefore would not be to look at the terms of the bailment but at her rebuttal evidence.

[33] Similarly in relation to the negligence, because the skidding is one of the factors in this case, coming from both Ms. Gomez and Mr. Daley, it gives rise to the presumption of negligence. Ms. Gomez therefore has an evidential burden to displace the presumption[21].

[20] Supra
[21] Henderson v Henry Jenkins & Sons supra

[34] The court must then consider what she said in her evidence in relation to both presumptions. She states that before the accident as she was turning a bend coming down the hill, the Longwood Main Road was wet, because it had just rained and there was ash and pumice on the road. Mr. Daley, the only other person involved in the collision only agreed that the road was wet. Officer Daway, who Mr.Kelsick described as an "*unfavourable witness*" support Ms. Gomez on the fact that there was ash on the road.

[35] She was travelling at about 20 miles per hour when the vehicle began to skid. Her next steps were to apply brakes to try to get out of the skid, to maintain her side of the road or to turn the vehicle in the opposite direction. In the end she could not control the car and it went across the road colliding with Mr. Daley's truck.

[36] Mr. Daley put Ms. Gomez's travelling speed at 30 to 40 miles per hour. He first saw the vehicle in the middle of the road, it skidded and she unsuccessfully tried to turn the vehicle back on to her side of the road. He came to a standstill as far as he could on his side of the road but the vehicle still struck his truck.

[37] The only difference really between Ms. Gomez's evidence and Mr. Daley is the issue of speed. Mr. Daley was asked the basis on which he determined the speed. He said it was an opinion, an estimation but gave no further details. He was never even asked if he was an experienced driver. In his witness statement he says that he is a landscaping and gardening contractor. There is nothing on which I can determine that he had expertise in these matters. There is therefore no basis for accepting his evidence over Ms. Gomez on this critical point.

[38] Having found that I accept that she was travelling at 20 miles per hour, I now consider the bald tyres, which Ms. Gomez insists was the main contributing factor in the accident. Mr. Edwards who delivered the vehicle said that the tyres were not bald and Mr. Taylor could not assist because he could not say that the tyres he examined were the ones on the vehicle at the time of the accident. My question is however, if the tyres were not bald, and I make no finding that they were, did that change the fact Ms. Gomez might have done all in the circumstance to take reasonable care to avoid the

collision, in the circumstances of a wet road, going down hill, in a vehicle that was out of control. The answer in my judgment must be in the negative.

[39] Having considered the authorities and the proven facts of this case, it is my judgment on the negligence issue that Ms. Gomez has discharged the evidentiary burden placed on her to establish that she was not negligent in the accident. On the bailment issue, I similarly find that she has successfully rebutted the presumption that she failed to take due care of the vehicle while it was in her possession.

[40] I therefore conclude that Ms. Gomez has no liability to the Company either in tort or in contract and I dismiss the Company's claim with prescribed costs awarded to Ms. Gomez.

Ms Gomez's counterclaim

[41] Ms. Gomez has counterclaimed for special damages and damages for personal injuries. I will start with the claim for personal damages, I cannot see that it has any basis. There is no proof that she was injured in the accident. There must be some medical evidence on which the court can rely. Ms. Gomez is a lawyer and she has not stated that she has any medical expertise that would allow me to rely on her evidence as proof of her injuries.

[42] Special damages must not only be pleaded, they must be proved. There were no receipts before Court to support the claims. The court is not concerned with the location of the receipts, to be considered they must be part of the case.

[43] There is therefore no basis for making an award of damages under either head.

Order

[44] For the reasons that I have stated in this judgment, I make the following order:

1. MNIHCV2009/0004 is dismissed with prescribed costs to be paid by the Company to Ms. Gomez in the sum of $9,000.00, in accordance with Rule 65.5(2)(b) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

2. Ms. Gomez's counterclaim in MNIHCV2009/0004 is dismissed.

Ianthea Leigertwood-Octave

High Court Judge