



[2018] JMSC Civ 121

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2004 HCV 03131

BETWEEN	LARKLAND LATOUCHE	CLAIMANT
A N D	JUNE CHUNG	1ST DEFENDANT
A N D	ORVILLE POLLOCK	2ND DEFENDANT
A N D	ALBERT TROWERS	3RD DEFENDANT

IN OPEN COURT

Mr. Ainsworth Campbell and Mr. Andrew Campbell for the Claimant

Mr. D. Scharshmidt QC and Mr. William McCalla instructed by Robinson, Phillips & Whitehorne for the 1st Defendant

Heard on 12th, 13th, and 14th March and 4th May, 2018

Negligence – Servant and/or agent – Agency- Vicarious liability – Motor vehicle accident – Transfer of motor vehicle.

CALYS WILTSHIRE J (AG).

Background

[1] Larkland Latouche alleges that on the 17th February, 2004, he was riding his pedal cycle along the Annotto Bay to Rosemount main road in the parish of St. Mary when a motor vehicle licensed 0633 DQ collided with him. Mr. Latouche avers that at the time of the accident, the motor vehicle was owned jointly and or

severally by June Chung and Orville Pollock and driven by their servant and or agent, Albert Trowers.

[2] Mr. Latouche by Claim Form and Particulars of Claim filed in December 2004 has asserted that Mr. Trowers negligently drove and or controlled motor vehicle licensed 0633 DQ so that it collided with him and caused him to sustain bodily injuries and to suffer pain, damage and be put to expense. In the particulars of negligence he alleges that Mr. Trowers was:

- (a) *Speeding excessively in all the circumstances.*
- (b) *Driving unto the Claimant's side of the road.*
- (c) *Failing to have any or any proper look out.*
- (d) *Colliding with the Claimant whilst the Claimant was on the soft shoulder on the Claimant's side of the road.*
- (e) *Driving without due care and attention.*
- (f) *Failing to have any or any sufficient regard for other users of the road including the Claimant.*
- (g) *Failing to brake, stop, slow down, swerve and otherwise manoeuvre to avoid the collision.*

[3] Mr. Latouche outlined the injuries that he suffered as follows:

- (i) *Shock*
- (ii) *Amputation of the right forearm just distal to elbow with severe crushing – degloving injuries to forearm. All muscles and bones divided. Distal segment attached by flap of string on the front. Bleeding heavily.*

- (iii) *25cm deep laceration on the posterior aspect of right thigh running oblique from lateral distal to proximal medial bleeding heavily. Severing of muscles noted.*
- (iv) *Deep laceration in the back.*
- (v) *Pain in the right hip.*

A sum of \$8,636,814.00 is being sought for special damages plus general damages at the rate of 12% per annum from the date of service until the date of judgment.

- [4] June Chung in her Defence stated that until the morning of the 17th February, 2004, she was the owner of "said motor vehicle a brown 1991 Toyota Corolla sedan license no. 1889 AR". Further that at about 8:30am Orville Pollock approached her and her husband to purchase said motor vehicle. Mr. Pollock paid the sum of \$100,000.00 in cash and was issued a receipt.
- [5] Mrs. Chung said that she then went to the tax office and signed the transfer of ownership form on the title and same was stamped. When she returned to hand over the transfer document, Mr. Pollock had taken the said motor vehicle and left. She denied being the principal of Albert Trowers and that he was ever her servant or agent. No admission was made regarding the ownership of any motor vehicle with the licence no. 0633 DQ. She further denied liability to the Claimant in all the circumstances.

Claimant's Case

- [6] Mr. Latouche relied on the evidence of Donald Shaw, who testified that he was present at the scene of the accident when he saw a Chinese woman come to the crashed car. He further stated that the Chinese woman spoke to the driver of the crashed car. Mr. Shaw pointed out Mrs. Chung in court as the woman that he saw at the accident scene.

- [7] Witness Keresha King-Williams as the manager of the National Motor Vehicle Registry, confirmed that both registration plates 1889 AR and 0633 DQ were assigned to a 1991 Toyota Corolla registered to June Chung. She stated that plate 0633 DQ was issued on 4th October, 2001 in substitution for plate 1889 AR. She also outlined the history of the transfer of said motor vehicle commencing with the transfer to Orville Pollock on April 20, 2004.
- [8] The third witness for the Claimant, Leon Pryce, said that he was an employee of Mrs. Chung between 1997 and 2004. He testified that he knew that Mrs. Chung owned and operated a brown Toyota Corolla. He stated that he heard something in early 2004 and then he did not see the brown Toyota Corolla for about a month.
- [9] According to him when he next saw the vehicle after about one month of it being away, it was repaired and refurbished and had been sprayed a darker colour brown. He said that he knew the car well because he used to drive it across the road from Mrs. Chung's house to her brother-in-law's house with dog food. He stated that he could not say exactly when the vehicle was sold by Mrs. Chung.

First Defendant's Evidence

- [10] Mrs. Chung testified that she was the owner of a brown 1991 Toyota Corolla that was licensed 1889 AR but one of the plates got lost and she subsequently applied for and got new plates 0633 DQ. She maintained that she sold the vehicle to Orville Pollock and transferred title to him on the morning of the 17th February, 2004. She also attended the insurance agency with the certificate of insurance and cancelled the insurance on the vehicle.
- [11] She did not see Mr. Pollock again until the following week, which was also when she learned about the accident with the vehicle. She indicated that she referred to 1889 AR as the vehicle she sold and made no admission regarding 0633 DQ in her Defence filed as she had forgotten about plate 0633 DQ and it was 1889

AR that was in her head. She said it was some time after that she was reminded that they were one and the same vehicle.

- [12] The first Defendant's son, Robert Chung, also gave evidence that the vehicle in question was sold to Orville Pollock on the morning before the accident occurred. He testified that Mr. Pollock approached him first about buying the vehicle and he in turn took him to his father's office. He said that he was present and witnessed the transaction that took place between Mr. Pollock and his parents. He also stated that whilst his mother was at the tax office, Mr. Pollock took delivery of the car and handed it to Mr. Trowers who drove it away.
- [13] He said that it was one week later when Mr. Pollock returned, that he became aware that the car had been involved in an accident on the same date it was sold.

Claimant's Submissions

- [14] Mr. Ainsworth Campbell submitted that the first Defendant did not file an adequate defence to the particulars of claim. This was premised on the contents of the defence which indicated that there was no admission made regarding 0633 DQ in contrast with the first Defendant's affidavit to set aside default judgment which admitted ownership of said vehicle up to the morning of the accident.
- [15] Counsel also submitted that when it came to the driving of a motor vehicle, there was a presumption in law that the vehicle is either being driven by the owner or his servant and/or agent. It was further submitted that the integrity of the witness Leon Pryce was not questioned, therefore, the court should find that Mr. Trowers was driving 0633 DQ for and on behalf of Mrs. Chung and that the said vehicle was owned by Mrs. Chung and continued in her possession for several months after the 17th February, 2004.
- [16] It was finally submitted that Mrs. Chung had not been frank with the court and all arguments of agency should be concluded in favour of Mr. Latouche.

Defendant's Submissions

[17] Mr. Scharschmidt Q.C. submitted that the case was one of vicarious liability and resolution of the ownership of vehicle 0633 DQ, would not resolve the issues before the court. Counsel relied on pages 43-44 of Salmon on Law of Torts, 18th edition that stated that even permission or consent of the owner did not fix him with liability.

[18] The following cases were cited by Counsel in support of his submissions:

Morgans v Launchbury & Ors [1973] A.C. 127

Avis Rent -A-Car v Joyce Maitland (1980) 17 JLR 153

Lena Hamilton v Ryan Miller et al [2016] JMCA Civ. 59

It was submitted that the language of the cases was that ownership per se was not determinate of vicarious liability. The court must make a finding of agency and if there is no agency, then there can be no vicarious liability.

Issues

[19] The resolution of this matter lies in determining whether,

- June Chung was the owner and/or co-owner with Orville Pollock of vehicle licensed 0633 DQ at the time of the accident.
- Albert Trowers was the servant and/or agent of June Chung.
- June Chung was vicariously liable for the actions of Albert Trowers.

Law

[20] Ownership of a motor vehicle is determined by the Road Traffic Act and its regulations. Section 2 of the Act defines an owner as :

“.....the person for the time being in whose name any motor vehicle or trailer is registered.”

There is therefore a presumption that if a vehicle is registered in your name then you have custody and control of said vehicle. This presumption is rebuttable and if raised by the registered owner, the evidential burden shifts to said person. That registered owner must show that although the vehicle is still registered in his name, the ownership, custody and control have been passed to someone else.

[21] There is the long established principle in **Barnard v Sully** (1931) 47 TLR 557 that in the absence of satisfactory evidence to the contrary, ownership of a vehicle is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. If the registered owner pleads otherwise, the onus is on him to displace said presumption. If he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him.

[22] That principle was confirmed and clarified in the Privy Council case of **Rambarran v Gurrucharran** [1970] 1 All ER 749 at page 751 where it was stated:

*“Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A’s ownership affords **some** evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence.”*

[23] McDonald-Bishop JA further expounded in **Hamilton v Miller et al** (supra) at paragraph 31,

“The law, therefore, recognises that in order to establish a relationship of agency one has to look at the totality of the evidence, albeit that there is a presumption of agency that arises from the fact of ownership. The presumption is therefore rebuttable and the onus is on the registered owner to do so. It is not sufficient, therefore to simply base the fact of agency on the mere fact that someone is the registered owner of a vehicle, when there is evidence establishing other facts that would throw light on the issue.”

[24] Agency itself arises either expressly from a written document or orally, or impliedly from the conduct of the parties or from the nature of the employment. The nature of the relationship between agent and principal is such that the agent consents to act on behalf of the principal and has the authority to create legal relations between the principal and third parties. It must be determined whether such a relationship existed between June Chung and Albert Trowers.

Analysis of the Evidence

[25] The Claimant's case is that June Chung was the owner of the vehicle in question at the time it collided with Mr. Latouche. The Claimant brought Leon Pryce to challenge the first Defendant's evidence that ownership, custody and control had been passed to someone else. He said that he knew the vehicle was owned by Mrs. Chung and it disappeared for a while, early in the year. It then reappeared, in a repaired state, and was being driven by Mrs. Chung until it was sold in the early part of 2004. Mr. Pryce said he knew the vehicle well because he used to drive it on a Sunday afternoon from Mrs. Chung's house to her husband's brother's house.

[26] Under cross examination he said that he could not say that it was sold in February but it could have been. Then further in answer to a suggestion that it was sold in February, he said, "No Sir. All the vehicles were there up to September." Finally in answer to a suggestion that the car was sold by April 2004, he answered, "I don't know anything about that."

[27] June Chung's evidence is that she sold the vehicle on the morning of the 17th February, 2004. It is not disputed that her name remained, as the registered owner of the vehicle until April 2004. The Claimant produced evidence that the transfer to Mr. Pollock was done in April 2004. From Mrs. Chung's evidence she did not do a full transfer on the morning of 17th February, 2004, as she said that she alone went to the tax office and signed the back of the title.

- [28]** The question therefore is whether she relinquished custody and control to someone else. Her evidence is that on the payment of the sum of \$100,000.00 a receipt was issued to Mr. Pollock. A copy of that receipt was identified by Mrs. Chung during her cross examination and marked as Exhibit 10. She said that Mr. Pollock left with the car and she had nothing to do with it after that.
- [29]** Mrs. Chung was extensively cross examined and challenged on her neither admitting nor accepting ownership of 0633 DQ, not identifying both registration plates as belonging to the same vehicle and on the authenticity of the receipt issued to Mr. Pollock. When challenged by counsel about the inconsistencies in the evidence of her knowledge of the two plates, she responded that it was the same car but she only remembered the 1899 AR and had forgotten about the 0633 DQ.
- [30]** Counsel further cross examined Mrs. Chung on the fact that in her amended defence, dated 25th September, 2017, she had still not acknowledged that both plates belonged to the same vehicle but acknowledged it in her witness statement dated 10th January, 2018. She further admitted that in her affidavit in support of her application to set aside the default judgment, she had stated that she was never the owner, joint or several, of any motor vehicle with licence number 0633 DQ.
- [31]** Although there is this inconsistency regarding the knowledge that both plates were on the same vehicle, the court is of the view that it is of no moment. It is not in dispute that the relevant motor vehicle was the 1991 Toyota Corolla and that both plates were assigned to same. Mrs. Chung's witness statement acknowledges that. The court accepts the explanation given by Mrs. Chung that she did not remember the previous licence plate 0633 DQ. She stated that she only had one car and when the man came, she sold the one car. She also explained that she realised that the plates related to the same vehicle when counsel for the Claimant sent a note from the tax office.

- [32] Robert Chung gave evidence that he was present and saw the receipt being written and handed over to Mr. Pollock. He denied knowing Mr. Trowers and stated that Mr. Trowers was on the outside on the morning of February 17th. He maintained that Mr. Pollock had the car because “they bought it” and denied that Mr. Pollock had it with Mrs. Chung’s permission to help in the business.
- [33] I accept that Mrs. Chung sold the vehicle to Mr. Pollock on the morning of 17th February, 2004. Both witnesses for the defence remained steadfast and consistent regarding the events that transpired that morning. I accept the receipt tendered as cogent evidence of the sales transaction and of Mrs. Chung’s intention to relinquish custody and control of the vehicle.
- [34] Mr. Pryce’s evidence under cross examination left the court with the impression that he could not say for sure whether Mrs. Chung had custody and control of the vehicle at the time of and after the accident.
- [35] Mr. Shaw said he saw a Chinese woman at the scene of the accident talking to the driver of the car. The identity of said woman is not revealed in his witness statement. It was in response to Mr. Campbell’s question on the amplification of his evidence that he pointed out Mrs. Chung in open court as the said Chinese woman. The Defence chose not to challenge Mr. Shaw on that piece of evidence and it was never suggested to Mrs Chung that she was on the scene of the accident. I find that Mr. Shaw’s identification in open court was one of convenience and I view it with great scepticism.
- [36] I accept as satisfactory and credible the 1st Defendant’s evidence and find that it has rebutted the prima facie presumption of service and/or agency which existed because the vehicle remained registered in her name at the time of the accident. On the Claimant’s case however, service and/or agency has been alleged, and the legal burden of proof lies on the party who alleges.
- [37] The Claimant has not produced any evidence that Albert Trowers was employed to June Chung and/or acting within the scope of something he was ordinarily

authorised to do on her behalf. There is nothing on which the court can draw any conclusion that Mr. Trowers was driving for any purpose of Mrs. Chung. For vicarious liability to arise, there must be evidence that she had delegated to him “the execution of a purpose of her own over which she retained some control.”

[38] Mrs. Chung denied knowing Mr. Trowers. Under cross examination she denied that he was employed to her business as a security guard or as a driver. The Claimant failed to adduce any evidence that remotely resembled a relationship of agency or employment between Mrs. Chung and Mr. Trowers. On the totality of the evidence I therefore find that,

- Albert Trowers was not the servant and/or agent of June Chung.
- June Chung is not vicariously liable for the actions of Albert Trowers.

Judgment for the first Defendant. Costs awarded to the first Defendant against the Claimant to be taxed if not agreed.