



[2020] JMSC Civ 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 02238

BETWEEN	MONICA BROWN-MURRAY	CLAIMANT
AND	ANTHONY CLARKE	1ST DEFENDANT
AND	ALBERT SPENCER	2ND DEFENDANT

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Mr. Hamilton McDermott instructed by Campbell McDermott for the 2nd Defendant

Heard 11th November, 2019 and 10th January, 2020.

**Motor vehicle accident- Negligence- Servant and/or agent – Sale of motor vehicle –
Vicarious liability**

WILTSHIRE J,

BACKGROUND

[1] On the 22nd November, 2008, Mrs. Brown-Murray was a passenger in a motor vehicle registration 3467 EC travelling along the intersection of Olympic Road and Morrison Avenue. On reaching a section of the roadway, Mr. Anthony Clarke, who was driving motor vehicle 3845 DG, caused same to collide into the left side panel of the motor vehicle in which Mrs. Brown-Murray was travelling, pushing it into a wall.

[2] Mrs. Brown-Murray has claimed that by presumption of law Mr. Clarke is and was at all times the servant and/or agent of the 2nd Defendant, Mr. Albert Spencer. Mr. Clarke's negligence was particularised as follows:

- (i) Causing motor vehicle registration number 3845 DG to collide into motor vehicle registration 3467 EC
- (ii) Failing to see motor vehicle registration number 3467 EC within sufficient time or at all
- (iii) Driving along the said road in a careless manner
- (iv) Driving at too fast a rate of speed in all the circumstances
- (v) Failing to apply his brake within sufficient time or at all
- (vi) Driving along a major thoroughfare without due care and consideration for the other users of the said major road
- (vii) Failing to stop, slow down, swerve or otherwise conduct the operation of motor vehicle number 3845 DG so as to avoid the said collision.

Mrs. Brown-Murray claims that as a result of the collision she sustained serious injury and suffered loss and damage.

[3] Mr. Clarke was not served and was not before the court. Mr. Spencer in his Defence has denied that Mr. Clarke was his servant and/or agent. His response is that prior to 22nd November, 2008, he had entered into an agreement to sell the motor vehicle licensed 3845 DG and pursuant to said agreement he had passed custody and possession to the purchaser. He denied both knowing Anthony Clarke and authorising him to drive said vehicle.

Claimants case

- [4] Mrs. Brown-Murray stated that she was a front seat passenger in a vehicle registration number 3467 EC which was travelling along Olympic Road, the main road. The vehicle reached the intersection with Morrison Avenue when suddenly there was a hard impact to the left panel of the car. The impact pushed the car off the road and it ended up in a wall. She realised that motor vehicle 3845 DG which was travelling on Morrison Avenue had collided into the vehicle in which she was travelling.
- [5] She testified that the driver, Anthony Clarke came and apologised to her. She further indicated in her testimony that she learned his name from his driver's licence and she did not know either him or Albert Spencer prior to the accident. In response to Mr. McDermott's suggestions that Mr. Clarke was not authorised by Mr. Spencer to drive the car, was not employed by Mr. Spencer, was not doing anything for Mr Spencer and was not Mr Spencer's servant or agent at the time of the accident, she responded, "I don't know sir."

Defendant's Case

- [6] Albert Spencer, the 2nd Defendant, denied that the driver and 1st Defendant was his servant and/or agent and stated in his Defence that prior to the date of the accident, 22nd November, 2008, he had entered into an agreement to sell motor vehicle licensed 3845 DG. Further that pursuant to that agreement, custody and possession of said motor vehicle had passed to the purchaser. He denied personal knowledge of who was driving the vehicle and authorising Anthony Clarke to drive the vehicle.
- [7] Mr. Spencer admitted that he was the owner of the vehicle in question. He testified that he and his nephew, Donald Clarke, purchased the vehicle together but it was licensed, registered and insured in his name as Mr. Clarke did not have a driver's licence. In about late October 2008 he and Mr. Clarke verbally agreed that Mr. Clarke would buy out his share in the vehicle and immediately, Mr. Clarke took

possession of the vehicle. The vehicle however remained registered and insured in Mr. Spencer's name as Mr. Clarke did not pay him then.

[8] He stated under cross examination that he received the payments in two parts. Further that it was after he got the first payment on either the 1st or 2nd of November that he gave him the vehicle and by the first part of December Mr. Clarke had paid him the balance for the vehicle and hence he transferred same to him then. Mr. Spencer said that on or about 22nd November, 2008, Mr. Clarke told him that the vehicle was involved in an accident and told him the name of the driver but he does not know how the accident occurred and anything about the person who was driving the vehicle at the time.

[9] Mr. Spencer agreed that he gave Mr. Clarke the vehicle with his registration plates and his documents because he had given him part of the money and that he transferred the vehicle after the accident. He however insisted, in response to suggestions in cross examination, that he had sold it before the accident, had no control over it, that he did not know Mr. Anthony Clarke or consent to his driving the vehicle and he was not his agent at the time of the accident.

Issues

[10] To resolve this matter, the court must determine whether,

- (2) Albert Spencer was the owner of the motor vehicle at the time of the accident,
- (3) Anthony Clarke was the servant and/or agent of Albert Spencer,
- (4) Albert Spencer is vicariously liable for the actions of Anthony Clarke.

Law and Analysis

[11] There is a presumption in law that if a motor vehicle is registered in your name then you have custody and control of said vehicle. It is however rebuttable and if relied on by the registered owner, then the evidential burden shifts to said owner.

The onus is then on him to show that although the vehicle was still registered in his name, the ownership, custody and control have been passed to someone else.

- [12] The above is grounded in the long established principle expounded in **Barnard v Scully** (1931) 47 TLR 557, and reiterated by Clarke J in **Mattheson v Soltau and Anor** (1933) 1 JLR 72 that,

“It is now accepted in our courts that in the absence of satisfactory evidence to the contrary, this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him.”

The Privy Council confirmed the principle and added clarification in **Rambarran v Gurucharran** [1970] 1 All ER 749 at page 751 where it 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.”*

- [13] The court also finds the decision of our Court of Appeal in **Hamilton v Miller et al** [2016] JMCA Civ 59 to be of great assistance on the issue of the service or agency being alleged by the Claimant. This is so because in the instant case Mr. Spencer admits that at the time of the accident the vehicle was still registered and insured in his name but he had sold it and he did not know the person who was driving the vehicle. McDonald-Bishop JA therefore in light of Rambarran’s case stated at paragraph 31 of Hamilton’s case that,

“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.”

- [14] Mr. Spencer has not produced any evidence of the sale of the motor vehicle. Mr. McDermott has submitted that the nature of the sale and handing over of the vehicle to his nephew was indicative of a familial arrangement. The court is therefore left with assessing Mr. Spencer's credibility based on his demeanour and his responses under cross examination. There were some inconsistencies in his evidence on the dates of his receipt of the payments and the transfer of the vehicle. In his evidence in chief he said he received the first payment in late October and immediately handed over the vehicle to his nephew. Under cross examination however he said that it was early November. I do not find that these inconsistencies in dates are major and indicative of dishonesty on the part of Mr. Spencer.
- [15] What has remained unchallenged is Mr. Spencer's evidence that he handed over the vehicle with his registration plates and insurance in his name to his nephew, Donald Clarke, on his receipt of a part payment of \$25,000.00 prior to the accident happening. The court accepts Mr. Spencer as a witness of truth. He remained resolute that he had passed the vehicle to his nephew and did not have control of it at the time of the accident. In light of the fact that he and his nephew owned the vehicle jointly, the court does not find the arrangement for sale and his handing over of the vehicle with the plates and insurance to be unbelievable. Unfortunately, that action, though irregular, has become the accepted norm in transactions of this nature. The court therefore finds that at the time of the accident, Mr. Spencer had sold the motor vehicle and had passed control of same to his nephew. The Claimant has therefore displaced the presumption of agency which had arisen because the motor vehicle was still registered in his name.
- [16] But whether or not Mr. Spencer was the registered owner of the vehicle, on the totality of the evidence, the court is hard pressed to find any evidence of agency. What was the relationship between Mr. Spencer and Anthony Clarke? He said that he does not know that person. He was told that he was the driver by his nephew, the co-owner of the vehicle, to whom he had passed control of the vehicle. He stated that Anthony Clarke was not driving the vehicle with his consent. I accept Mr. Spencer as a witness of truth in this regard. There is no evidence that Anthony

Clarke was either employed to Mr. Spencer or “acting within the scope of something he was ordinarily authorised to do on his behalf”.

- [17]** For there to be a finding of vicarious liability on the basis of servanthood or agency, there must be, on the totality of the evidence, a principal/agency relationship between Mr. Spencer and Anthony Clarke. There must be evidence that Mr. Spencer had delegated to Anthony Clarke “the execution of a purpose of his own over which he retained some control.” In the absence of that evidence, I find that Mr. Spencer cannot be held vicariously liable for the actions and negligence of Anthony Clarke.

Judgment for the 2nd Defendant.