[2017] **JMSC Civ 2**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV00496

BETWEEN	**TRUDY DEANS**	**CLAIMANT**
AND	**HOWARD MURRAY**	**DEFENDANT**

Ms. Dorothy Lightbourne Q.C., Ms. Jody-Ann Carter and Mr. Bjorn Spence for the Claimant

Ms. Annette Johnson for the Defendant

Negligence – Motor Vehicle Collision – Vicarious Liability -Agency

December 1, 2016 and January 12, 2017

WINT-BLAIR, J (Ag)

Facts

[1] This matter concerns a motor vehicle collision on the 23rd March, 2003 on Shortwood Road in the parish of St. Andrew, between a vehicle in which the claimant was a passenger and a vehicle in which the defendant was the driver. The claimant had been wearing a seat belt and was seated on the front seat of the vehicle in which she was a passenger driven by Diane Headley. The collision occurred at approximately 2:00am. The fact of the collision, date, time, place, how it occurred, ownership of both vehicles and the injuries suffered by the claimant are all undisputed.

[2] The driver of the defendant's vehicle was Christopher Kerr, the adult nephew of the defendant's wife. He had come to the Murrays' residence on the day before the collision and remained all day until 8:00pm when Mrs. Murray retired to bed.

She did so leaving her nephew watching television with her eight year - old son, taking her handbag and car keys to her bedroom with her. She was awakened in the wee hours of the next morning by the police requesting information as to the whereabouts of the defendant's vehicle and its driver. It was then that Mrs. Murray learnt that the defendant's vehicle had been involved in a collision and that the driver thereof had fled the scene.

[3] The sole question for the court's consideration is whether the defendant can be held vicariously liable for the actions of Christopher Kerr, the admitted driver of the defendant's vehicle.

[4] The issue of vicarious liability has been discussed in several cases. The settled law is generally, a person will be vicariously liable only where the tortfeasor is that person's servant/agent acting in the course of his employment or on the business of the owner.

The Law

[5] **Morgans v Launchbury [1973] A.C. 127** is the leading case on this question. Lord Wilberforce stated at page 135:

> *"For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on "interest" or "concern" has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability. And the appearance of the words in certain judgments (Ormrod v. Crosville Motor Services Ltd. [1953] 1 W.L.R. 409, per Devlin J.; [1953] 1 W.L.R. 1120, per Denning L.J.) in a negative context (no interest or concern, therefore no agency) is no warrant whatever for transferring them into a positive test. I accept entirely that "agency" in contexts such as these is merely a concept, the meaning and purpose of which is to say "is vicariously liable," and that either expression reflects a judgment of value - respondent superior is the law saying that the owner ought to pay. It is this imperative which*

the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well. They provide, if there is nothing more, a complete answer to the respondents' claim against the appellant."

[6] Lord Pearson described the nature of the agency relationship at page 140:

> *"For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent."*

[7] Lord Denning in **Ormrod v Crossville Motor Services Ltd**. [1953] 1 WLR 1120 in describing the nature of the agency relationship between driver and owner said:

> *"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes…*
>
> *…The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: see Hewitt v Bonvin."*

[8] In ***Hewitt v.*** **Bonvin [1940] 1 K.B. 188** the defendant's sons were expressly prohibited from using his motor car without his permission or that of his wife. The wife had permitted the son to drive said motor car when it was involved in a collision which resulted in the death of a passenger. The administrator of the deceased's estate sued for damages. On appeal the court affirmed **Barnard v Sully**. Mackinnon L.J. stated, the question for the court was whether the driver

was or was not the servant of the owner. Du Parcq L.J., defined agency as follows:

> *"The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."*

[9] In the well trodden case of **Barnard v Sully** (1931) 47 TLR 557, the plaintiff was driving his horse and van when the defendant's motor car collided with it causing damage. The defendant admitted to owning the motor car but denied that its driver was his servant or agent or was acting within the scope of authority of a servant or agent. On appeal it was held that the trial judge should have allowed the case to go to the jury. Scrutton, L.J. held:

> *"But apart from authority, the more usual fact was that a motor car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motorcar was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts."*

[10] In **Mattheson v G.O. Soltau and W.T. Soltau** (1993) 1 JLR 72 there was a collision between the plaintiff's omnibus and the defendant's truck driven by Mr. Lee. The defendant G.O. Soltau was Mr. Lee's employer. However, the truck was registered to W.T. Soltau. The defendant argued but did not prove that the truck had been sold to G.O. Soltau. The court held that Mr. Lee's negligent driving was the cause of the accident and that the defendant was liable as his employer. On appeal it was held that W.T. Soltau was vicariously liable as the evidence was "replete with contradictions and improbabilities so that no court should have considered it sufficient to rebut the presumption."

[11] In **Rambarran v Gurrucharran** (1970) 1 All E.R. 749, PC. L., the son of the appellant, negligently drove the appellant's car causing a collision. The respondent sued the appellant in that at the material time the appellant's son was the servant or agent of the appellant. The car was originally purchased for use by the appellant's family. L. and his three brothers had a general permission to

use it at any time. The appellant was unaware that L was driving the vehicle on the day of the collision. The Court of Appeal of Guyana held that the presumption that L was driving as agent of the appellant had not been rebutted, since the appellant had not given evidence as to the purpose of the journey which was being made when the collision occurred. Further, the presumption was strengthened by the fact that on the day of the collision, L was driving with the appellant's permission under an 'ever-existing authority.'

[12] On appeal to the Privy Council it was held that ultimately the question of agency is one of fact and the burden of proof lies on the party who alleges it. In the present case the inference of agency arising from proof of ownership was displaced by the evidence that L had a general permission to use the car, since it was impossible to assert, merely because the appellant owned the car, that L was not using it for his own purposes as he was entitled to do.

[13] Lord Donovan went on to hold as follows:

> *"These passages in the judgment of the majority of the Court of Appeal would seem to endorse one of the respondent's grounds of appeal, namely, that the appellant:*
>
> *"…failed to lead any evidence whatever to show the circumstances in which his motor car was being used at the time of the accident, and that such matters must be peculiarly within the knowledge of himself and his family and his servants and/or agents.*
>
> *The argument based on this assertion was misconceived. The appellant, it is true, could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that assertion by means of sufficiently cogent and credible evidence to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent then the actual purpose of Leslie on that day was irrelevant. In any*

event, the complaint that appellant led no positive evidence of the purpose of Leslie's journey comes strangely from the respondent, who could have found it out by making Leslie a co-defendant and administering interrogatories, or compelled his attendance as a witness and asked him questions about it. He did none of these things."

[14] In the case of **Eric Rodney v Alan Werb** 2010 JMCA Civ 43 (consolidated), Phillips, J.A. held:

> *"… the court must be satisfied as to the credibility of the evidence adduced in order for the presumption to be rebutted. …Mr. Rodney does not discharge his evidentiary burden by merely putting forward evidence as to the use of the vehicle at the material time, or otherwise, in order for the claimant to be required to discharge the legal burden of proof of agency. The presumption that the driver is the servant or agent of the owner must first be rebutted by satisfactory, credible evidence. This is a burden on the registered owner, and if that onus is not discharged, the prima facie case remains and the person alleging the agency succeeds."*

Having reviewed the decision of the Board in **Rambarran v Gurrucharran** (supra) Phillips, J.A. goes on to state at paragraph 43 adopting the dicta of Lord Donovan that:

> *"This case makes it clear that where the only fact known is that the defendant is the owner of the vehicle, the court will draw the inference that at the time of the the incident, the car was being driven by the owner or his servant or agent. However, if other facts are known which are accepted by the court, then the question of service or agency will be determined on an assessment of all the evidence. The onus is on the owner of the vehicle to provide sufficient credible evidence to satisfy the court that the driver is not his servant or agent. What this case says is that he could do this in two ways: he could show the object of making the journey in question, and that it served no purpose of his, or he could assert that the vehicle was not being driven for any purpose of his and such provide such supporting evidence as is available to him."*

Analysis

[15] The claimant filed her claim with the singular knowledge that the defendant owned the vehicle which had caused the collision. That the driver fled the scene

was an undisputed fact, she would not have known that until the police gave her the information about the collision. The reason the defendant and his wife knew who the driver was can be inferred from Mrs. Murray's reaction when first taxed. There was no evidence of the car keys going missing, but for some reason she had no cause to believe the driver was anyone else other than Mr. Kerr. The legal presumption then obtained. That is, the court could then infer that at the time of the collision, the car was being driven by the registered owner, or the servant or agent of the registered owner.

[16] What other facts presented themselves? The evidence is to be found in the witness statements of the defendant and of Mrs. Murray. The relevant portions of the statement of Geraldine Murray have been set out. At paragraph 3 she stated that:

> *"At approximately 8:00pm after putting my baby to bed, I retired for the night and went upstairs to my bedroom leaving Mr. Christopher Kerr sitting in my living room watching television with my eight year old son. I took my handbag and the car keys with me to my bedroom."*

At paragraph 5 she stated that having been awakened by the police at 4:00am.

> *"I was immediately asked by the policeman as to the whereabouts of my motor car. I looked at its usual parking space and realized that the motor car was missing. I then told the police that Christopher Kerr my nephew who had been at my home must have taken the car. The police then told me the motor car had been in an accident and that the driver had fled the scene of the accident. I was in shock."*

She went on in the next paragraph to confirm to the police that the defendant owned the car and

> *"…I surmised that Mr. Christopher Kerr had taken the car surreptitiously while I was asleep. After the police left, I went back to bed and tried telephoning Mr. Christopher Kerr without success."*

At paragraph 7 she stated:

> *"At no time did I ever permit Mr. Kerr to drive the subject motor vehicle belonging to my husband Mr. Howard Murray. In fact Mr. Kerr was at that stage in his twenties and got around independently*

by his own means. At no time did I ask Mr. Kerr to drive the subject vehicle for the purpose of any errands undertaken on behalf of myself. Mr. Kerr was not in the habit of driving my husband's vehicles and on March 22, 2003 he was not driving the vehicle for any purpose of mine. On March 22, 2003 Mr. Kerr was driving the vehicle without the my [sic] knowledge, permission or consent."

[17] The evidence as contained in the witness statement of Dr. Howard Murray, dentist, at paragraph 5 was that:

> *"Christopher Kerr was never my servant or agent in any capacity and he was not my servant and or agent at the time of the accident. I have never employed him to drive the motor vehicle registered 3039BM or any other vehicle of mine nor have I ever employed him in any capacity whatsoever. On the morning of the accident, Sunday March 23, 2003, Christopher Kerr was driving motor vehicle registered 3039 BM without my consent or knowledge. He was not driving for any purpose of mine, nor was he running an errand on my behalf at the time of the accident. At the time of the accident Christopher Kerr was driving the vehicle during the early hours of Sunday March 23, 2003 for his own purpose."*

[18] He supported this position by exhibiting patient dental records to show that he had been at his practice in Mandeville on Friday March 21 and Saturday, March 22, 2003 returning to Kingston on Sunday March 23, 2003 whereupon his wife told him what had happened. At paragraph 7 he states:

> *"Being totally occupied with my patients in Mandeville for the entire day, at no time did I have any conversation with Mr. Christopher Kerr giving him permission to drive the aforementioned motor vehicle for my purpose or for any purpose whatsoever. Moreover I specifically gave no permission to Mr. Kerr to be driving at 3:45am on March 23, 2003 or at all."*

He *went further to state at paragraph 8:*

> *"That the driver of the motor vehicle Mr. Christopher Kerr was not driving the motor vehicle registered 3039BM with my permission or consent on March 22, 2003 into the wee hours of March 23, 2003. That I have no master/servant relationship with Mr. Kerr nor was he my agent. That Mr. Kerr has never driven that car with my permission or consent prior to March 22, 2003 and I have never asked him to perform errands using the said motor vehicle."*

[19] These facts were challenged in so far as counsel Ms. Lightbourne, Q.C. submitted that the proper interpretation of Mrs. Murray's evidence was that the court should view it as insufficient to discharge the legal presumption. Her nephew was accustomed to borrowing the car as Mrs. Murray was comfortable enough with her nephew to leave him with her child without further knowledge until 4:00am when the police came a-knocking. She left the keys where he could gain access to them. There was no alarm when the police questioned her. This reaction was so as there was nothing unusual in her nephew taking the car. She was only in shock when she learnt of the accident and the behaviour of the driver. This shock is attributable to her certain knowledge that the driver was her nephew as opposed to a thief. It is only then that she tells the police it was her nephew who had surreptiously taken the car. She did not tell the police her nephew had stolen the car. She did not tell her husband until he arrived home. She did not go to Mr. Kerr's home, she merely telephoned him without success. Did the defendant simply repair his vehicle?

[20] These submissions however did not form part of the cross-examination of Mrs. Murray. There was therefore no test of her credit in relation to her reaction in the presence of the police; her comfort level with Mr. Kerr; where she had placed the keys having taken them upstairs; had she placed them so as to allow access to them, why she felt shock at learning the car had been in an accident and that the driver had fled the scene; why she had not used the word "stolen" the car rather than "surreptiously" taken the car to the police; what would be the practice as relates to the car whenever Mr. Kerr visited.

[21] The defendant wasn't asked what became of his vehicle; what efforts were made to locate Mr. Kerr; what were the arrangements between himself and his wife in respect of his car; did Mrs. Murray have the authority to permit anyone to drive the defendant's car; what was the custom when Mr. Kerr visited his wife. There were major gaps in the evidence on the claimant's case.

[22] On the totality of the evidence, it is open on the facts to conclude that there was no permission granted to Mr. Kerr by the defendant or his wife to take the defendant's vehicle. The driver, Mr. Kerr, was on a frolic of his own. This was unchallenged by the claimant.

[23] This, however, is not enough. The presumption that the driver is the servant or agent of the defendant must be rebutted. What evidence was adduced which the court could find was cogent and reliable to discharge the legal burden of proof of agency?

[24] The evidence is as set out above in the witness statements of both Dr. and Mrs. Murray. Each witness stated categorically that neither had given any permission to Mr. Kerr to drive the motor car. Dr. Murray went further to state that this was not a practice as he had never given Mr. Kerr consent to drive that motorcar before that day, nor had he ever asked him to drive the motorcar to perform any errands. There was no evidence that the defendant was connected to or had an interest in Christopher Kerr's enterprise as had Mr. Kerr had permission to drive the vehicle he would not have had to remove it surreptitiously under cover of darkness. There was no proof that Mr. Kerr was the servant and or agent of the defendant or that the defendant was in any way connected to the enterprise Mr. Kerr had embarked upon on the morning of the collision.

[25] While it was argued by Ms. Lightbourne, QC that Mrs. Murray trusted Christopher Kerr with her child she clearly did not trust him with her car keys or handbag as both of these were taken to her bedroom when she retired to bed. I find that this is evidence of precaution on the part of Mrs. Murray. She did not loan the vehicle to Mr. Kerr and there is no evidence that she did, in fact by removing the keys it demonstrates that she had no such intention. Mr. Kerr had remained in the house all day until that night like a jackal waiting to pounce. Mrs. Murray could not be said to have created an opportunity for Mr. Kerr to remove the car without her knowledge. That she was not surprised when the police came is proof of this. She had wanted to prevent her nephew from removing the car but had failed to

do so as he had outwitted her thereby confirming the need for her precautionary posture. Her response to the police that her nephew must have taken the car is merely an expression of her acknowledgment that despite her efforts to prevent this very occurrence she had failed. She could not get a call through to him and she has not spoken with him since.

[26] There is not one scintilla of evidence to show that the defendant was a party to the deception perpetrated upon Mrs. Murray by her nephew or that Mr. Murray had authorized Mrs. Murray to loan his vehicle to her nephew; that there was a request or relationship between the defendant and Mr. Kerr to suggest that Mr. Murray could have authorized such a loaning of his vehicle. Mere permission has been held not to be enough, accordingly surreptitious removal does not qualify to attribute liability to the defendant as the cases demonstrate.

[27] I hold that the evidence of the defendant and Mrs. Murray is such that it meets the standard of proof on a balance of probabilities required to discharge the legal presumption that the Mr. Kerr was driving as the servant or agent of the defendant or for any purpose connected to the defendant or Mrs. Murray. The prima facie case has been displaced.

[28] The sad reality is that the innocent victim of the collision cannot succeed in a claim against the defendant based on vicarious liability given the state of the law. The claimant's claim fails.

[29] The court hereby makes the following orders:

1. Judgment is entered for the defendant.
2. No order as to costs.