J A M A I C A

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL NO. 56 OF 1971

BEFORE: The Hon. President
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Robinson, J.A. (Ag.)

CARGILL BROWN	PLAINTIFF/RESPONDENT	
v.		
CLIFTON BROWN	1st DEFENDANT	APPELLANTS
and		
LLOYD BROWN	2nd DEFENDANT	

Emile George, Q.C. for 1st defendant/appellant
Dr. Lloyd Barnett for plaintiff/respondent.
No appearance by or on behalf of 2nd defendant/appellant.

MAY 10, 1972

JULY 3, 1972

FOX, J.A.:

At the trial of an action in negligence arising out of a collision at about 5.30 p.m. on 21st January, 1969 on the main road at Salem in the parish of Saint Ann between a volkswagen motor car owned and driven by the plaintiff and a morris mini-van owned by the first defendant, Clifton Brown and driven by the second defendant, Lloyd Brown, the learned Resident Magistrate for the parish of Saint Ann found that the accident was entirely due to the negligent driving of the second defendant. The collision occurred on a long stretch of asphalted road between Saint Ann's Bay and Runaway Bay, and directly in front of the shop of Lee Lim which is on the left side of the road going towards Runaway Bay. The van was coming in the opposite direction.

In a carefully stated and reasoned judgment, the magistrate said that he accepted as true the evidence of the plaintiff and his witness, a passenger in the car, as to how the accident occurred; and of the investigating constable as to measurements and observations he made at the scene of the accident. The magistrate "found as a fact that the Volkswagen was being driven on its correct side of the road at a speed of about thirty five to forty miles per hour; that when it was about six to eight feet from the Morris van the said Morris van which was on its correct side of the road suddenly and without any warning being given turned to its right and crashed into the right side of the Volkswagen motor car; that the Morris van did not move after the impact and the Volkswagen continued on its way and, as a result of the thrust it received from the impact of the Morris van on it", collided with a Zephyr car parked in front of Lee Lim's shop.

In relation to the liability of the first defendant, the undisputed evidence before the magiatrate was that he was the owner of the van. He employed one Vincent Rowe to drive and to obtain jobs for the vehicle. Rowe fixed charges, collected moneys, and made returns to the first defendant. The second defendant is a plumber. On the morning of the accident, he had travelled from Salem to his workplace at

Priory as a passenger in the van whilst it was being driven by Rowe. In his evidence given on behalf of the first defendant, Rowe said that about 5 p.m. he drove the van to a supermarket at Runaway Bay. He went into the supermarket to make purchases leaving the switch key in the vehicle. When he came from the supermarket, he saw the second defendant sitting behind the steering wheel. His testimony continued:

> "I now said to him "make I drive." He replied that he would like to get a drive off the van. As I know he has a General Driver's License I just let him drive it. He had never driven that van before that day. I now sat beside him in the van. He, Lloyd Brown, drove the van towards Salem."

The magistrate accepted this evidence as true. In doing so he rejected as untrue the evidence of the second defendant that Rowe had complained of feeling ill at Runaway Bay, and had asked him to drive the van. The magistrate found that the second defendant was a competent and a licensed driver, and that this fact was known to Rowe.

In paragraph 42 of his reasons for judgment, the magistrate stated the factual context within which the liability of the first defendant should be considered. He said:

"My findings therefore were that Vincent Rowe the only person whom Clifton Brown the registered owner had authorised to drive the Morris van, had without any sufficiently good reason and without authority from Clifton Brown, permitted Lloyd Brown a competent driver of a motor vehicle to drive the said van and through the negligence of Lloyd Brown in driving the van damage was caused to the Volkswagen motor car of the Plaintiff Cargill Brown. I also found that when Vincent Rowe permitted Lloyd Brown to drive the van Vincent Rowe was acting in the course of his employment."

The Magistrate then considered a number of authorities to which he had been referred, and concluded that the answer to the question of the vicarious liability of the first defendant was supplied by the ratio decidendi in Ricketts, vs. Thomas Tilling Ltd. [1915] 1 K.B. p. 644. In this respect the magistrate said:-

"A reading of the three judgments in this case of Ricketts vs. Thomas Tilling Ltd. shows that what the case decided is that (a) the permitting by the authorised servant, in the course of his employment, of any other person to drive and (b) the authorised servant's failure to exercise sufficient control over

the driving of the permitted person are themselves acts of negligence committed in the course of his employment and if damage or injury results the master of the authorised servant is vicariously liable."

Applying this principle to the facts which he had found the magistrate considered that he had no choice but to give judgment for the plaintiff against the first defendant.

The substantial matter argued on appeal was that the magistrate was wrong in regarding the competence of the second defendant to drive the van as an irrelevant circumstance in determining the liability of the first defendant. Mr. George submitted that in a case of this nature the owner of a vehicle was liable only if his authorised driver allowed an incompetent substitute to drive the vehicle. In permitting this the authorised person would in breach of his duty of care to third parties who were in sufficient proximity to the negligent act. It was for a jury to say whether on the evidence there was such a breach, and whether that breach was the effective cause of the accident. Mr. George contended that it was only where there was an affirmative answer to these two questions that the owner could be held vicariously liable for the negligence of the

authorised driver. He emphasised the actual facts in Ricketts v. Thomas Tilling Ltd. where the substitute driver, the conductor, was incompetent, and submitted that the test laid down in the case of negligence in the authorised driver, and thus of vicarious responsibility in the owner, was whether the negligent act of the substitute driver was forseable by the authorised driver or not.

These submissions do not correctly state the law. The critical question is not so much whether the substitute driver was competent or not, but whether the authorised driver was present when the negligent driving was going on, and in a position to control the substitute driver. As Pickford L.J. puts it in Ricketts v. Thomas Tilling Ltd. at p. 650, l:-

> ....'where a man is entrusted with the duty of driving and controlling the driving of a motor omnibus and is sitting alongside a person who is wrongfully driving and the motor omnibus is negligently driven and thereby an accident happens, there is evidence at any rate of negligence on the part of that driver in having allowed that negligent driving. I do not at all say that on an investigation of the facts it might not appear that the act of negligence was so sudden and

> unexpected that he had no reason to see it; and therefore it would come back to the question of whether he was responsible for allowing the other man to drive. It seems to me at any rate that there is evidence of negligence on his part, he being there and still having the duty of the controlling and the driving of the omnibus, in allowing the omnibus to be negligently driven whereby the accident happened."

This view of the law was also reflected in the judgments of Buckley, L.J. and Phillimore, L.J. Admittedly, the passage quoted is capable of supporting a contention that if "the act of negligence was so sudden and unexpected" that the authorised driver could not have forseen it, a jury may very well hold that the authorised driver was not negligent in the discharge of his duty to third parties; that duty being, as Buckley, L.J. described in Ricketts v. Thomas Tilling Ltd. at p. 646 (ibid), "the duty to prevent another person from driving, or, if he allowed another person to drive, to see that he drove properly." To that extent therefore, the judgments in Ricketts v. Thomas Tilling Ltd. support the submissions of Mr. George. But the support is merely obiter dicta and is not consistent with the ratio of previous and

subsequent cases. In Sampson v. Aitchison (1912) A.C. 844, the owner of a car who was himself present and in occupation of it when it was negligently driven by a person whom he had allowed to drive, was held liable for damage caused by the negligence of the driver, on the simple ground that the owner had not surrendered his right and his duty to control the vehicle. This was clearly emphasised in the judgment of the Privy Council delivered by Lord Atkinson at 850 (ibid) in this passage:

> "And if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving thecar, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury."

It is true that in that case the owner was in the car when it was negligently driven, and that that is a circumstance which distinguishes the facts of that case from the present, but the relevant point to notice is that the liability of the owner was not considered to be dependent upon his ability to foresee the negligent act of the driver but simply upon his retention of the control of the car.

The same ratio was allowed to be decisive in

Reichardt v. Shard (1914) 31 T.L.R. 24 where the owner of a car was held to be responsible for the negligent driving of it by his son whom he permitted to use the car but only when he was accompanied by the chauffeur employed to the owner. The Court of Appeal (consisting of the same judges who had decided Ricketts v. Thomas Tilling Ltd.) upheld the direction of the trial judge that the owner had not parted with the control of the car, and affirmed the jury's verdict for the plaintiff which was based upon that direction. In his judgment, Buckley, L.J. stated that the presence of the chauffeur was "no evidence to go to the jury that the defendant had given up control of the car."

In Trust Co. v. deSilva /1956/ 1 W.L.R. 376 the point involving the ability of the authorised driver to foresee the negligent act of the actual driver was entirely ignored. In that case the Privy Council held that the appellant company was liable for the negligent driving of a substitute driver who was driving for the authorised driver (Perera), simply on the ground that the authorised driver was exercising control of the car as a servant of the appellant. This view was expressed in the judgment of Their Lordships delivered by Lord Tucker in the following passage:-

> "It is now well settled that the person in control of a carriage or motor vehicle - though not actually

driving - is liable for the negligence of the driver over whom he has the right to exercise control . (see Wheatly v. Patrick /1837) 2 M. & W. 650/; Sampson v. Aitchison and Reichardt v. Shard. Perera was at all times in control of the car. He was exercising that control as a servant of th company on its behalf. Any consequential liability attaching to him is a liability of the company."

This decision has been severly criticised on the ground that it makes a master vicariously liable for the vicarious liability of his servant, and is a short cut, and an ill considered solution to a difficult question. (vide Atiyah, Vicarious liability in the law of Torts, 1967 edition, p. 148, 244). In Ilkiw v. Samuels /1963/ 2 All E.R. 879 Diplock, L.J. stated in unobjectionable terms the jurisprudential basis of the liability of the owner of a vehicle for the negligent driving of the substitute driver who is driving for the authorised driver.. In that case the trial judge had found against the owners on two separate and distinct grounds, -

(1) that the owner's servant, Waines, the authorised driver of the owner's lorry, was negligent in permitting a substitute and incompetent driver Samuels, to drive the lorry without making enquiries as to Samuels' ability to drive, and that that negligence caused the accident, and

(2) that Waines gave his permission and remained on the lorry whilst the negligent manoeuvre was being carried out in close conjunction with Samuels and that Waines was still in control of the lorry.

It is of relevant significance to Mr. George's submission to notice the several reasons given by Diplock, L.J. in the first part of his judgment for the difficulty he had in upholding the judgment on the first ground. The learned judge affirmed the judgment on "the second and much broader ground." He said: (at p. 888, 889).

> "In my view, the defendants' liability does not depend on the fact that Samuels was an inexperienced driver who had never driven a lorry in a confined space before, but on the fact that the lorry was driven negligently while being used for the purposes of the defendants' business under the control of the defendants' servant, Waines, he being their servant employed by them to take charge and control of the vehicle while engaged on the task which was being performed when the accident took place. In my view, their liability would have been the same if Samuels had been a highly experienced driver, provided that his negligent driving on this occasion was the cause of the plaintiff's injuries."

and at p. 890;

....but in the present case the accident occurred while the vehicle was being used for the purpose of the defendants' business ; it was being moved for the purpose of facilitating the completion of the loading by sheeting the sacks. Waines, as the person in charge and control of the lorry, was under a duty to the plaintiff so to control it that it was driven with reasonable care. He could not divest himself of that duty to the plaintiff by authorising Samuels to move the lorry unless he also abandoned his right to control the lorry, which he was under no duty to the plaintiff (though he was to his master) to retain."

The judgment then proceed to consider the contention that since on this analysis, Waines was treated as being vicariously liable for the negligence of Samuels, and since Waines had no authority from the owners of the lorry to delegate its driving to another person, Waines could not make the owners liable for the negligence of someone to whom he had purported to delegate this, (Atiyah's objection to Trust Co. Ltd v. DeSilva) - and continued, at p. 890:

"But this, I venture to think is fallacious. He did not delegate his duty owed to the plaintiff in tort so to control the vehicle that it was driven

with reasonable care because in law he could not delegate that duty without abandoning his right of control of the lorry.

The duty in tort of which he was in breach was, in my view, a duty delegated to him by the defendant under his contract of employment, and for that breach the defendants are vicariously liable ....."

This judgment of Diplock L.J. provides a sufficient answer to the criticisms of the decisions of the Privy Council in Trust Co. Ltd. v. DeSilva and this was recognized by Atiyah in his work on vicarious liability at p. 244 et.seq. The approach of Diplock L.J. is also consistent with the thinking which makes an owner's liability for negligence on the part of the driver of his car dependent upon the owner's right of control of the vehicle, coupled with the circumstance that at the time when it was negligently driven, it was being used wholly or partly on the owner's business or for the owner's purposes. (vide Denning L.J. in Ormrod v. Crosville Motor Services Ltd. [1953] 2 All E.R. 753 at 755). Of course, whether in any particular case, a vehicle is being used for the purposes of the owner or someone else is a question over which there may be sharply divergent opinions (vide Launchbury v. Morgans [1971] 1 All E.R. p. 642 where the Court of Appeal

found by a majority, Denning M.R. and Edmund-Davies L.J.; Megaw, L.J. dissenting; that a family or 'matrimonial" car used in common by a husband and wife for the daily purposes of both which was being driven on behalf of the husband by a friend on a 'pub-crawling' expedition at the time of an accident in which the friend and the husband were killed and passengers injuried, was being used for the purposes of the wife who, as owner, was therefore held to be liable. This decision was reversed in the House of Lords; the law Lords being unanimously of the view that the wife had no interest or concern in the purposes for which the car was being used, and was therefore not vicariously liable. (The Times, May, 10, 1972.) No such difficulty arises in this case before us. The evidence and the submissions at the trial and on appeal, affirmed that at the time of the collision, the van was being driven on the business and for the purposes of the defendant. A contrary view was incapable and was never advanced.

In the light of these considerations we are of the view that the magistrate was right in holding the first defendant liable for the negligent driving of the van, and in entering judgment for the plaintiff against him.

At the outset of his submission Mr. George suggested that the account of the accident which the magistrate accepted was so improbable as to indicate that it was not true and should

have been rejected. The suggestion was faintly made and was not pressed. It is without merit as an examination of the evidence makes abundantly clear. For these reasons we considered that the appeal should be dismissed with $50.00 costs to the plaintiff, which sum together with $31.00 agreed between the parties as the costs to the plaintiff of an adjournment on February 9th makes an aggregate of $81.00 costs to the plaintiff.

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