IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL C 248 OF 1995

BETWEEN	**LASCELLES**	**CAMPBELL**	**CLAIMANT**
AND	**CLIFTON**	**BENNETT**	**FIRST DEFENDANT**
AND	**STEVE**	**GARDENER**	**SECOND DEFENDANT**

Miss Deborah Dowding instructed by Arthur Williams and Company for the claimant

Mr. Debayo Adidepe and Mr. Donald Gittens for the first defendant

No representation for second defendant and second defendant not appearing

September 16 and 22, 2005

MOTOR VEHICLE ACCIDENT, VICARIOUS LIABILITY, RULE 64.6 OF THE CIVIL PROCEDURE RULES

SYKES J

1. A car driven by Steve Gardner, the second defendant, registered in the name of Clifton Bennett, the first defendant, hit Mr. Lascelles Campbell, the claimant, from his motor cycle on June 1, 1991, as he rode from Spaulding to Bauleyston in the parish of Manchester. The evidence is not clear but is seems that someone took Mr. Campbell to the Percy Junor Hospital and

then to the Kingston Public Hospital. There is some evidence to suggest that Mr. Campbell was unconscious between June 1 and 12, 1991.

2. The issue of the liability of Steve Gardner is not before me because judgment was entered against him on November 9, 1995, which has not been set aside. Therefore, the sole issue other than the quantum of damages is whether Clifton Bennett is vicariously liable for the negligence of Steve Gardner. To succeed, the claimant must establish that at the time of the accident Steve Gardner was the servant and/or agent of Clifton Bennett. I deal first with the issue of vicarious liability.

Vicarious Liability

3. The claimant relies upon the following dictum from Clarke J in ***Mattheson v G. O. Soltau*** (1933) 3 J.L.R. 73. At page 74 Clarke J is reported as saying:

> *The evidence produced on this point was that the defendant W.T. Soltau was then registered owner of the truck. 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.*** (my emphasis)

4. The continued vitality of this principle is not in doubt. The Judicial Committee of the Privy Council reaffirmed it in ***Rambarran v Gurrucharan*** [1970] 1 All ER 749, an appeal from Guyana. In that case, the appellant owned a car that his sons drove from time to time either on their or the appellant's business. On one occasion while Leslie, one of his sons, drove the car it was involved in an accident. The issue was whether the appellant was vicariously liable for Leslie's negligence. Lord Donovan,

in upholding the trial judge and reversing the majority of the Court of Appeal said at page 751h

> *Where no more is known about the facts, therefore, than that at the time of the 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.*

His Lordship added at page 753a

> *In the present case it is clear that any inference, based solely on the appellant's ownership of the car, ... would be displaced by the appellant's evidence, provided it were accepted by the trial judge...*

5. The passages suggest that rebutting the presumption raised by the fact of being the registered owner is not something of extraordinary difficulty. In ***Rambarran*** the appellant was the owner and it was a fact that his son sometimes drove on his behalf, yet he was able to rebut the prima facie inference that his son was his agent or servant at the time of the accident.

6. In order to demonstrate that I have no good reason to conclude that the prima facie inference has been rebutted Miss Dowding submitted that I should not accept the mere words of Mr. Bennett when he said that he sold the vehicle in November 1989 to Rohan Foster for JA$29,000, who then sold it to Steve Gardner. She said that Mr. Bennett has not produced any documentation in support of his assertion. She concluded by saying that since Mr. Bennett was the registered owner at the time of the accident and in light of his failure to produce documents in support of his contention I should conclude that Mr. Gardner was his servant or agent.

7. I suspect that Miss Dowding derived inspiration for her submission from page 74 of ***Mattheson*** where Clarke J observed that neither of the defendants produced much in the way of documentation to support their

version of events. However, it is clear that the real reason for allowing the appeal and fixing the registered owner with liability after he was exonerated by the trial court was not so much the lack of documentation as it was that the "*whole of the evidence given on behalf of both defendants was so replete with contradictions and improbabilities that no Court (sic) should have considered it sufficient to rebut the presumption that W.T. Soltau as registered owner was in control of the truck and its driver at the time of the collision*" (see page 74). What is being said is that the trial judge's conclusion was so unreasonable that no reasonable judge considering the contradictions and improbabilities should have accepted that the presumption was rebutted. This makes it clear that it was not the absence of documentation per se that led the court to reverse the trial judge but that the quality of the evidence adduced to rebut the presumption was very poor.

8. Miss Dowding's submission conflates two distinct things: ownership and being vicariously liable for the conduct of another. The fact that Mr. Bennett is the registered owner is only the beginning. The *prima facie* presumption is just that. It is only some evidence which *may* become conclusive if nothing more is known about the case or if the evidence adduced to rebut the presumption fails to do so. In the case before me, something more is known. There is the testimony of Mr. Bennett. Having examined the testimony of Mr. Bennett I find no contradiction or inconsistency that would cause me to doubt his word. Realising her difficulty, Miss Dowding submitted that it is possible that Mr. Bennett loaned the car to Mr. Foster who then loaned it to Mr. Gardner and if this is

so then Mr. Gardner would become Mr. Bennett's servant and/or agent. There is no evidence to support this submission and I do not accept it.

9. I therefore conclude that Steve Gardner was not the servant and/or agent of Mr. Bennett. Mr. Bennett has discharged the onus placed on him by the passages cited from Lord Donovan and Clarke J. As I have already indicated, judgment was entered against Mr. Gardner almost a decade ago and my remaining task is to assess the quantum of damages.

Assessment of damages

Nature and extent of injuries sustained

Report of Dr. Khang Soe

10. In this report, the doctor stated that Mr. Campbell had a 1½ inch star shaped laceration on the left posterior part of the parietal region. He also had a small laceration on the scrotum and as well as a small abrasion on the left shin. The injuries were not considered serious and not likely to be permanent. This was the opinion of Dr. Soe in 1991.

The nature and gravity of the resulting disability

Report of Dr. John Hall, Consultant Neurologist

11. The undated report indicated that Mr. Campbell complained of headaches that occurred spontaneously without any precipitant, particularly at nights. The headaches were initially localized over the right parietal region but may spread indiscriminately. They occurred about three times per week and vary from ½ an hour to many hours in duration. Mr. Campbell also complained of a loss of sharpness of memory.

The examination of Mr. Campbell showed there was "no cognitive deficit, recent memory loss or other clinically demonstrable neurologic signs". The EEG showed in the awake Mr. Campbell multiple foci of abnormal neurotransmitter activity. Dr. Hall stated that this finding, taken in isolation, might be interpreted as consistent with epilepsy but since the patient did not report any recent overt seizure activity the minimal interpretation is that of a non-convulsive seizure disorder resulting from the head injury he received on June 1, 1991. The report indicated that the EEG reading suggests the possibility of Mr. Campbell developing post-traumatic Parkinson's disease, post-traumatic Alzheimer's dementia or personality changes. There is no evidence that any of these possibilities has come to pass.

First report of Dr. Randolph Cheeks, Consultant Neurologist, dated May 26, 1992

This report speaks to the claimant developing focal motor fits affecting the right side of his face. The x-ray showed a linear fracture of the right occipital bone. Mr. Campbell, after discharge from the Kingston Public Hospital on June 14, 1991, complained of being "a little forgetful" and of stiffness in the distal inter phalangeal joint of his right little finger. He also complained of periodic headaches on the right side. The doctor said, at the date of this report, that it was too early to tell whether there would be residual neurological disability.

Second report of Dr. Randolph Cheeks dated August 6, 1995

Dr. Cheeks stated that it would be safe to assume that the patient had reached his maximum medical improvement. Mr. Campbell still complained of intermittent right-sided headaches that occured without any recognised precipitant and varied in duration from a few hours to days. The patient complained of forgetting small day to day things to the extent that he now had to use an aide memoir. The deformity of the right little finger pains him when he tried to make a fist.

The examination of the claimant showed a short term memory defect of 10% - 12%. His long term and medium term memory were normal. The doctor concluded that the impairment of short term memory function is equivalent to 5% disability of the whole man. The impairment to the right hand equates to 4% of the right hand and 2% of the whole man. The total permanent partial disability was diagnosed at 7% of the whole man.

Pain, suffering and loss of amenity

12. There is no evidence that Mr. Campbell suffered any pain until he woke up in hospital. Between June 1, 1991 and June 12, 1991, he did not experience any pain or suffering. After regaining consciousness he said he felt weak, dizzy and his head ached. He says that the headaches impeded his daily activities. By that he meant that his concentration was affected. It has already been stated that he has suffered 7% disability of the whole person.

Damages

Special damages

13. Mr. Campbell claims $14,125 for damage to his watch, trousers, shirt, traveling expenses, medical reports, x-rays and loss of earning for five months at $1,200 per month totaling $6,000. Mr. Campbell cannot recover the loss of earnings. There is no evidence that he did not work for five months after the accident and none to show that he did not work for five months because of the accident. He did not produce any receipts for the medical bills and related expenditures. However there is evidence that he was represented by the late Mr. Orrin Tonsingh. He said that he gave some of his receipts to Mr. Tonsingh. I have examined the sums claimed and they do not seem excessive. I accept the testimony that he gave them to his then attorney. Consequently, Mr. Campbell is able to recover $8,125 at 6% interest from June 1, 1991 to September 22, 2005.

General damages

14. There is no claim for loss of future earnings or loss of earning capacity. In her submissions on general damages Miss Dowding relies on five cases. The first is ***Tricia Thompson (b.n.f Alethia Sheriffe) v Junior Harriot*** (Suit No. C.L. 1989/T 0224) assessed on October 5, 1990. In that case, the claimant was briefly unconscious with minor concussion. She had a laceration on the left side of the head behind the ear and bruising on the left shoulder. There was a small laceration on the outer aspect of the left foot. There was dizziness and intermittent darkening of her vision. There was also impairment of recent memory and impairment of hearing in both ears. The risk of epilepsy was 4%. General damages were assessed at

$170,000. The next case citied was ***Ivan Tulloch v Esso Standard Oil*** (Suit No. C.L. 1989/T 115) assessed on November 23, 1990. The claimant in that case was a 70 year old who prior to the accident had osteoarthritis. The head injuries caused unconsciousness for twenty minutes. There was extensive degloving over the left fronto-parietal area of the scalp as well as a large abrasion with bruising over the left parietal eminence of the skull and an acute sprain of the right knee. He was hospitalised for 13 days. General damages were assessed at $5,000 for loss of amenities and $95,000 for pain and suffering. Then there was the case of ***Frederick Foulkes v Albert Thompson*** (Suit No. C. L. 1988/ F 118) assessed on December 20, 1990, the claimant received a severe blow to the head with abrasions to the face, right hand and right costal areas. He lost consciousness and suffered persistent headaches. General damages were assessed at $20,000. These three cases are found in Harrison and Harrison, ***Assessment of Damages for Personal Injuries*** (1997) (United Co-operative Printer Ltd) at pages 55 and 56. One more case was cited from Harrison's namely, ***Sobaram v Ruby Bicknell*** (Suit No. C. L. 1984/S 397) (page 207) where the claimant had minimal brain damage, open comminuted fracture of the right femur, closed fracture of the right humeral shaft and a three inch laceration over the right forehead.

15. Finally, there was the case of ***Muir v Metropolitan Parks & Markets Ltd*** (Suit No C .L. 1991/ 090), Khans Volume 4 at page 185. The claimant suffered the following: unconciousness, blow to left frontal region of head, laceration of left forehead, central concussion, compound fracture of skull. On neurological assessment he had headaches, loss of consciousness on five occasions with stiffening of the body, cramp in the left leg and a

change of personality and undue irritability. The doctor stated that headaches and irritability were features of post concussional syndrome that would be resolved in the future. General damages were $1,623,600 of which $1,500,000 were for pain, suffering and loss of amenities.

16. There is no doubt that Mr. Campbell has suffered lasting effects to his health and well being. His whole person is 7% disabled. Having said this there is no evidence that his enjoyment of life decreased significantly. He plays parlour games with his wife and children. He still engages in his normal and regular activities.

17. Of all the cases cited the one of most help to me is that of ***Frederick Foulkes***. The other cases are too dissimilar to be of any value. The CPI at the time of the award in ***Foulkes*** was 166.1. The CPI used as the current index is for April 2005 which is 1200.3. The updated value of the award is $144,527.39. This figure has to be increased to take account of the epileptic attack fact suffered by Mr. Campbell. I also take into account the headaches, injuries and whole person disability identified by the doctors. An award of $900,000 is appropriated for pain, suffering and loss of amenity. There is evidence that the writ of summons and statement of claim, to use the language of the old rules, were personally served on Mr. Gardner on June 21, 1995, by Mr. Felix Mitchell. This award attracts interest at 6% from June 21, 1995 to September 22, 2005.

Conclusion

18. Mr. Clifton Bennett is not vicariously liable for the negligence of Steve Gardner. The award is

a. special damages - $8,125 at 6% interest from June 1, 1991 to September 22, 2005;

b. general damages - $900,000 at 6% interest from June 21, 1995 to September 22, 2005.

19. On the question of costs the claimant is to recover costs against the second defendant. The first defendant is to recover costs against the claimant from July 9, 1997 to September 22, 2005. In respect of the order for costs regarding the first defendant I made this order for the following reasons. The evidence before me, which I have accepted, is that the Mr. Bennett sold the car in 1989 but he did not complete the process by seeing to it that the purchaser was registered as the new owner. This was so at the time of the accident. The effect of this was that it was quite reasonable for the claimant to sue him because of the prima presumption that arises from the fact of being the registered owner. However when the first defendant served his defence on the claimant on July 9, 1997, the defence stated that he sold the car to Rohan Foster who sold it to Steve Gardner, the second defendant. In other words, Mr. Bennett had made it clear from eight years ago that he was not vicariously liable because the driver was not his servant for the reasons stated in the immediately preceding sentence. Thus, even before the new rules came into being Mr. Bennett had complied with them by setting out his denial and the reason for his denial of liability. This should have alerted the claimant to the need to have more than just the fact of registration.

20. As it has turned out, the claimant's case did not advance beyond the presumption. The effect of this was that the burden of costs was imposed on the first defendant for a further eight years when the claimant must

have known that he had no evidence to rebut the assertions of the first defendant. Success for the claimant therefore rested solely on the ability of the cross examiner to demolish the first defendant, which regrettably for the claimant did not happen. In fact, no material was put before the court to suggest that Mr. Bennett's evidence, if not untrue, may be unreliable. The claimant was pursuing the first defendant in the hope that something may happen to turn the case in his favour.

21. Rule 64.6 (1) states that the general rule is that the unsuccessful party pays the cost of the successful party. This statement implies all the costs properly recoverable. The rule goes on to indicate that the general rule can be departed from. In so doing the court must have regard to a number of factors set out in rule 64.6 (3) and (4). I take into account rule 64.4(4)(d) and (e) in particular. The former speaks to the question of whether it was reasonable for a party to pursue a particular allegation; and/or raise a particular issue while the latter looks at the manner in which a party has pursued his case or a particular allegation. Added to this is rule 64.6(5) which sets out the type of orders the court may make including that a party pays costs from or until a particular date.

22. Having proceeded against the first defendant more on a hope and a prayer than on objective facts, the claimant cannot recover all his costs. The failure to discontinue in light of what was known to the claimant meant that a disproportionate share of the courts' and first defendant's resources were expended on this case. This is not in keeping with the spirit of the rules.

23. One of the purposes of the new rules is to deflect hopeless cases from the court system. This objective is supported by the need to provide

witness statements, statements of facts and issues, disclosure and inspection. It is expected that the parties would assess their case and decide whether, despite the brilliance of their legal representative, they are likely to succeed on the issues fundamental to their case, taking into account the response of their opponents, the evidence they have to rebut the opponent's case and the reliability of the evidence. Had this been done in this case, I have no doubt that the case against the first defendant would have discontinued some time ago. It is only fair and just that the claimant recovers costs against the first defendant up to July 8, 1997, when the defence was filed and the claimant pays the first defendant's costs from July 9, 1997, to today.