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JAMAICA

IN THE COURT OF APPEAL

R.M. Civil Appeal No. 107/70.

BEFORE: The Hon. Mr. Justice Luckhoo - presiding
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Hercules (Ag.)

DERVAL CLARKE)
PARFUMS JA. LTD.) v. WINSTON BROWN

Mr. Maurice Tenn for second-named defendant/appellant
Mr. H. Edwards, Q.C. for plaintiff/respondent.

15th January, 1971.

HERCULES, J.A.(Ag.):

This is an appeal from the judgment of the learned Resident Magistrate for the parish of St. Catherine delivered on the 27th of October, 1970. The plaintiff/respondent had claimed against the first and second-named defendants to recover the sum of seven hundred and seventy-six dollars and thirty cents ($776.30) damages for negligence, for that on or about the 24th day of February, 1970, the first-named defendant whilst acting as servant or agent of the second-named defendant/appellant drove motor vehicle lettered and numbered AE 560 owned by the second-named defendant/appellant negligently and or carelessly along Brunswick Avenue in the parish of St. Catherine and that vehicle collided with motor vehicle AF 229 which was owned and driven by the plaintiff/respondent.

The second-named defendant/appellant counter-claimed to recover the sum of five hundred and twenty-two dollars and sixty-six cents ($522.66) also for negligence, alleging that the plaintiff/respondent's vehicle ran into and collided with the second-named defendant/appellant's vehicle thereby causing damage. The learned Resident Magistrate entered judgment for the plaintiff/respondent in the sum of six hundred and fifty dollars ($650) against both defendants with costs fifty-one dollars and sixty cents ($51.60), and he also dismissed the counter-claim. It is to be noted, that at the trial, the second-named defendant/appellant did not attend, but the first-named defendant appeared in person. Now, at this appeal, the second-named defendant/appellant is represented

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and not the first-named defendant.

The facts of the case have not been touched in the argument of learned counsel for the second-named defendant/appellant, but what was submitted was that the learned Resident Magistrate could not award judgment against the second-named defendant/appellant as there was no evidence on which he could properly come to the conclusion that the first-named defendant was the servant or agent of the second-named defendant/appellant. But the first-named defendant gave evidence that he was the driver of the vehicle and that the said vehicle was owned by the second-named defendant/appellant. Learned counsel submitted that that evidence was inadmissible.

That submission is not acceptable. It seems that the evidence which came from the first-named defendant was clearly admissible.

Learned counsel also submitted that although there was a counter-claim by the second-named defendant/appellant, the counter-claim is not factual, it is merely suggestive and cannot be held against the second-named defendant/appellant. I find that the counter-claim forms part of the record of the proceedings in the case, and the learned Resident Magistrate could properly take notice of this.

It was held in the case of Brown v. Stamp and Others that: "Where there was no evidence as to the relationship between the owner and the driver at the material time there was prima facie presumption that the driver was the servant or agent of the owner." This case is reported at (1968) 13 W.I.R. 146, following the well known case of Bernard v. Sully (1931) 47 Times Law Reports, 557. This principle was again adverted to in the case of Rambarran v. Gurrucharran, (1970) 1. A.E.R., 749. At page 751, in the judgment of Lord Donovan, paragraph h, it is 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 ..."

/ I find -

I find that on the evidence before him, on the state of the record, and in the light of the authorities referred to above, the learned Resident Magistrate had ample material upon which to come to the conclusion that the first-named defendant was the servant or agent of the second-named defendant/appellant.

This was the only point raised by learned counsel for the second-named defendant-appellant, and I see no reason to disturb the findings of the learned Resident Magistrate. I would therefore dismiss the appeal with costs thirty dollars ($30.00) to plaintiff/respondent.

R. O'M. Hercules.

I agree J. A. Luckhoo

I agree S. Field.