IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. - C.L.M100/79

BETWEEN	CARMEN MASON (Administratrix of the estate of EUSTACE WILBERFORCE MASON, deceased)	PLAINTIFF
A N D	MARTINS TOURS LIMITED	1ST DEFENDANT
A N D	AINSLEY TAYLOR	2ND DEFENDANT
A N D	EXECUTOR/EXECUTRIX ADMINISTRATOR/ADMINISTRATRIX of the estate of EZEKIEL MASTERS	3RD DEFENDANT
A N D	MARTINS TOURS LIMITED	3RD PARTY

D. Daley and R. Fairclough instructed by Thwaites, Fairclough, Watson and Company for Plaintiff.

Ferdy Johnson and Hillary Phillips instructed by Perkins, Tomlinson, Grant, Stewart and Company for 2nd Defendant.

Hugh Levy Jnr. and Mrs Andrea King-Bird instructed by Hugh Levy and Company for 3rd Party.

Third Defendant not served.

Heard: 7th, 8th, 9th November, 1983

Delivered: 12th April, 1984

GORDON J.:

About 8:30 a.m. on 29th September, 1978 mini-bus lettered and numbered FR 5164 owned and driven by Eustace Mason along the main road at Faith's Pen in the parish of St. Ann collided with motor car lettered and numbered FR 3041, owned by the third party, hired by the second named defendant and driven by Ezekiel (Hezekiah) Masters the servant or agent of the second named defendant. The mini-bus was proceeding towards Montego Bay and the car in the opposite direction. Both drivers died in the crash.

This action brought by the widow and administratrix if Eustace Mason seeks to recover damages under the Fatal

Accident Act for the benefit of the dependents of the deceased and under the Law Reform (Miscellaneous provisions) Act for the benefit of the Estate of the deceased Eustace Mason. Martins Tours Limited was sued as first named defendant by the plaintiff but this action was subesquently discontinued and the second named defendant thereafter brought third party proceedings against Martins Tours Limited.

The plaintiff alleges that the defendants were responsible for the accident. The second named defendant claims the collision was caused or alternatively contributed to by the negligence of Eustace Wilberforce Mason. The Particulars of Negligence pleaded followed the pattern usual in cases of this nature. Each side pleaded the other drove on the wrong side of the road. The secondnamed defendant counter-claimed for personal injuries suffered by him.

The second named defendant as against the third party claimed he was entitled to be indemnified by the third party in accordance with the terms of the rental agreement executed by him and the third party when he, the second named defendant, rented from the third party the motor car FR 3041. The third party claimed the second named defendant was not entitled to an indemnity or damages for breach of contract.

Plaintiff's Case:

Mr. Roslyn Shields a casual worker gave evidence that he was a passenger on the mini-bus at the time of the collision. He was on his way to Falmouth to spend the week-end at a hotel with his family. He sat in the front of the mini-bus on the extreme left. Another passenger sat between himself and the driver. The mini-bus was negotating a series of corners down a slight grade. The bus kept blowing its horn. The mini-bus was driven correctly on its left hand side at a moderate speed, his estimate 30m.p.h. The driver of the mini-bus sounded the horn as he approached a slight left hand corner. As the bus reached the middle of the corner the car appeared travelling

on its incorrect side and crashed into the fight front of the mini-bus. He estimated the speed of the car at the time as 90m.p.h. The minibus then was not more than one foot from the left of the road. He lost consciousness and recovered in the Linstead hospital some seven days later.

It was a bright day, the road surface was dry asphalt. He did not hear horn of car. He rejected the suggestion that the bus was travelling on its incorrect side of the road when the accident occurred.

The second witness called by the plaintiff was Miss Mavis Ricketts. She is a secretary and at the time was a co-worker of the witness Smith. She also was going to spend the week-end at the hotel in Falmouth. She sat in the back of the bus enjoying the pleasant ride then there was this big bang. She was thrown from her seat. She blacked out. She was awakened by someone shaking her, taken from the bus she was told to lie on the left of the bus on the soft shoulder but she observed a culvert on the right side of the road and at her request she was taken there to sit. The left side of her face was injured. She observed that the bus was on the left of road against the bank, the right front of the mini-bus was hitched into the right front of the car and the body of the car was across the road. The front of the mini-bus was in the middle of the road. No vehicle could pass on the road. The vehicles had to be pulled apart to make way. After the vehicles were pulled apart traffic passed between the mini-bus and the car, i.e. to the right of each vehicle.

In cross-examination she said the mini-bus travelled quite normal, not fast. It was driven close on the left all the way. The mini-bus blew its horn.

The car was pulled across the road so that vehicles could pass. The mini-bus was not moved while she was there.

The police came on the scene. She was taken to the Linstead hospital.

Defendant's Case:

Corporal Lloyd McDonald of Moneague Police Station received a report about 8:30a.m. on the 29th September, 1978. He went to the scene. There he saw a large crowd and the two vehicles. The mini-bus he said was on the right of the road as one proceeds from Kingston to Moneague. The car was on the left as one goes in the opposite direction, both vehicles faced each other. The drivers were dead in their respective vehicles which were extensively damaged. He took measurements which he recorded in an Accident Report booklet. This booklet was submitted to his head office in St. Ann's Bay for transmission to the Courts office about one week after the incident. He had not seen the book since. From memory he gave the measurements he had taken of the position of each vehicle.

The road was 23' wide; from the left front wheel of the car to the left bank measured 3'. From the left rear wheel to said left bank was 5'. From the left front wheel of the mini-bus to left bank was 10' 9". From the left rear wheel to left bank was 11' 1". The mini-bus was 5' 9" wide, the car about 5' 6" wide.

At first he said there was no corner or bend at the place where accident occurred then he said there was a slight bend. He did not remember if the bend was to the left as one goes towards Moneague. He saw no injured person on the scene when he arrived there. Miss Ricketts was not there. The two vehicles were about 4' apart. They faced each other squarely. Because the mini-bus was wider than the car the mini-bus overhung the car on the car's right. He saw broken glass scattered and dirt from under the fender indicating the point of impact but he could not recall taking any measurements from that point.

Defendant Ainsley Taylor was a passenger in the car driven by Hezekiah Masters, his employee. He was asleep in the car at the time of the accident and he awoke in the Linstead hospital some fifteen (15) to twenty (20) hours later. He sustained a broken nose, a broken collar bone, lacerations to face, chin, chest and right knee. After three days in Linstead hospital he was four to five days in Medical Associates and was examined by Professor John Golding whose findings were admitted as exhibit 2.

Finding:

I saw and heard the witnesses, I assessed them and I was impressed by Miss Mavis Ricketts. I did not form a favourable impression of the witness Lloyd McDonald. He purported to give from memory detailed measurements he took over five years before, measurements he submitted to his headquarters in St. Ann's Bay within a week after they were taken and had not seen since. His evidence was at variance with that of Roslyn Shields who described the time of the accident as "bright; one could see the corner from about 42 - 43ft away" and with that of Mavis Ricketts who described it as a cool morning - a pleasant ride. In contrast the witness McDonald said "the road was very foggy".

Miss Ricketts was on the scene at the time of the accident, she saw the vehicles, immediately after the accident, stuck together and saw people separate them and "they pulled the car across the road and vehicles passed". Although injured, but not seriously, she remained on the scene until the police arrived and was subsequently taken to the hospital. McDonald insisted that "no injured persons were on the scene when I went".

I find that when the officer arrived on the scene the position of the vehicles had been altered from that in which they were immediately after the accident. This was done to facilitate passage of other vehicles on the road. McDonald's attempt to place them on one side facing each other squarely and 4ft apart caused

problems with the measurements he purported to recollect. In this position the measurements he gave would have the right front wheel of the bus 6' 6" from the right bank while the left front wheel of the car from the said bank was 3'.

I reject the evidence of Corporal McDonald. I accept that of the plaintiff's witnesses Roslyn Shields and Mavis Ricketts. I find that the plaintiff's vehicle was travelling on its correct side of the road at a normal speed, the driver blew his horn, the second named defendant's vehicle travelling in the opposite direction collided into the right front of the plaintiff's vehicle. Both vehicles were stuck together until they were separated by willing hands and both drivers died on the spot.

I find that the driver of the second named defendant's car was solely to be blamed for the accident. There will therefore be judgment for the plaintiff against the second named defendant

Third Party Proceedings:

The second named defendant Mr. Ainsley Taylor is a director of Taylor Enterprises Limited. In this capacity and as an individual he had from time to time hired cars for use in his business operations and privately. There were a number of car rental firms in the Montego Bay area but he dealt with the Third Party, because they offered facilities not offered by other car rental firms. The facilities extended to insurance coverage - comprehensive and third party. These terms were specified on the back of the contract form.

Being aware of the facilities offered, the second named defendant on the 26th September, 1978 rented a Toyota Corolla lettered and numbered FR 304 from the third party after he had enquired if the usual terms applied and after he had satisfied himself they were incorporated in the contract form. Mr. Taylor signed the contract. When he hired the car he intended to use it to go to Kingston to collect his motor car which was in a garage there.

Hezekiah Masters was his driver and as a term of Masters' employment Mr. Taylor kept his driver's licence. This licence was admitted as exhibit 3. A photocopy of the contract form and a print out (typed) of the terms on the back were admitted as exhibit 4 and 4a respectively. Mr. Taylor said that clause 3e and 4g are the terms he asked for and agreed to.

Clause 3(e) reads -

> "Renter agrees that said vehicle shall not be operated:
>
> ..... (e) by any person other than (1) the Renter or additional Renter who signed this agreement and (2) any employee or employer of the Renter or member of the Renter's immediate family who is 21 years of age or older and a duly qualified licence driver".

Clause 4 -

> "Renter expressly acknowledges personal liability to pay lessor on demand -
>
> (g) Lessors cost to repair all damages to said vehicles provided however, if said vehicle is operated in accordance with all the terms hereof. Renters liability for such damage shall be waived if Renter has purchased in advance the collision damage waiver as evidenced by his initials in the space provided herein."

Mr. Taylor said on execution of the contract he was given a copy which he kept in the car pocket. It was in the car at the time of the accident. The original contract was apparently retained by the Lessor. It was not produced but a photo-copy which Mr. Taylor identified by his signature, was produced by Mr. Hugh Levy. Mr. Taylor said at the time of execution of the contract he told Martins' representative that he intended to have some one else drive the car. He was aware of Clause 3(e).

Mr. Headley Buchanan, the third party's representative who prepared the contract for Mr. Taylor's signature was unaware of the provisions of the clauses on the back of the contract.

In particular he was unaware of clause 3(e) and clause 5. He said "I have read some of the fine print of exhibit 4. I am aware clauses on back of exhibit 4 are terms and conditions of contract". It is because of his ignorance of the provisions of the clauses he said "not to my knowledge is employee or employer of Renter allowed to drive motor-car. Not to my knowledge is wife or member of family over twenty-one allowed to drive".

When he gave evidence on 8th November, 1983 he said he was a Car Rental agent employed to third party and was so employed in 1978 when Mr. Taylor executed the contract. It is perhaps because the print on the contract is so fine he was after some five years unaware of what was written as conditions on the back of the contract. It is perhaps for this reason why a typed copy of these conditions instead of a photo-copy was supplied.

Mr. Taylor however was aware of the conditions. He had lost his copy of the agreement in the accident and exhibits 4 and 4a were produced by the third party. Mr. Taylor testified he had endeavoured without success to get a copy from the third party. Mr. Taylor as an astute business man knew of the conditions of the contract hence his preference of the third party when he had to rent a car. He sought to avail himself of the favourable conditions offered by the third party.

The third party contended that it was a condition of the contract that the particulars of the additional driver be given at the time of execution of the contract and that the driver signs the contract. Provision is made for the name and particulars of an additional driver to be inserted on the contract but there is no provision for this driver's signature. The only requirement in the contract for signature is in clause 3(e):

> "Renter agrees that said vehicle shall not be operated by any person other than (1) The Renter or additional Renter who signed this agreement" -

and Mr. Taylor said he told the agent at the time he rented the motor car that someone else would be driving the motor car. The agent Mr. Buchanan said Mr. Taylor told him he would be the only driver of the car. In the light of the evidence of Mr. Taylor that he was going to Kingston to fetch his car from the garage and Mr. Buchanan's testimony that "Mr. Taylor come to me and said he wanted a car to go into Kingston". I do not accept Mr. Buchanan's evidence on this aspect as truthful.

The defence of the third party was -

> 2. Paragraph 2 is denied in that the 3rd Party contends that the 2nd Defendant acted in breach of the Contract of Hireage in permitting another driver other than the renter himself to have control of the 3rd Party's motor vehicle, thereby exposing the 3rd Party to risk which was not contemplated at the time of making the Contract.
>
> 4. Paragraph 4 is denied. AND the 3rd Party says that the 2nd Defendant read and signed the Contract of Hireage which made no reference to the employees of the 2nd Defendant. The 3rd Party denies having agreed or represented that employees of the 2nd Defendant would be covered by a policy of insurance.

I need merely to refer to the provisions of Clause 4(e) (2):

> "The Renter agrees that the said vehicle shall not be operated by any person other than any employee or employer of the Renter or member of the Renter's immediate family who is 21 years of age or older and a duly qualified licensed driver."

There is no stipulation that the "employer, employee or member of the Renter's immediate family" should sign the contract. The stipulation as to signature relates only to the Renter or additional renter. There is however a requirement that this driver be "21 years of age or older and a duly qualified driver." The contract does not require that this driver be vetted by the Lessor. Practical

difficulties would arise in the event this was stipulated, because the Renter had the right to travel at large over the island of Jamaica. The onus is placed on the Renter to see that this clause is carefully observed. Failure on the Renter's part to ensure compliance with this requirement could result in the Lessor being absolved from liability should a claim be pursued under Clause 5 of the contract.

I hold the view that if the Renter produces to the Lessor the particulars of the driver at the time the contract is executed, these particulars may then be inserted in the contract. If he does not then the onus of proving compliance with this stipulation rests on the Renter.

In proof Mr. Taylor tendered the drivers licence of Hezekiah Masters. He had taken it from him when he employed him. It is a general drivers licence issued on 31st June, 1975 in lieu of a private drivers licence issued on 31st June, 1972. The Road Traffic Regulations made under the provisions of the Road Traffic Act provide as Regulation No.45 (5):

> "No person shall be granted a General Drivers Licence to drive public passenger vehicles who is less than 21 years of age."

Omnia praesumuntur rite et sollenniter esse acta. I saw the licence and I accept it as valid. The second named defendant has therefore discharged the onus of proving that Hezekiah Masters was over twenty-one (21) years of age and a duly qualified driver.

The second named defendant has now established that at the time of the accident the car he rented from the third party was being driven by a duly qualified driver in accordance with the terms of the contract. The relief he sought are contained in his statement of claim against the third party VIZ:

1) Damages for breach of contract.

2) A declaration that the defendant is entitled to be indemnified as aforesaid.

3) Judgment for any amount that may be found to be due from the second defendant to the plaintiff.

4) Judgment for the amount of any costs which the defendant may be adjudged to pay to the plaintiff and for the amount of his own costs incurred in his defence of this action and the proceedings of the 3rd Party herein.

The second named defendant claims he is entitled to be indemnified by the third party in respect of third party claims. He relies on the provisions of Clause 5 of the contract set out hereunder:

> "5) Renter participates as an insured in the benefits of automobile bodily injury and property damage liability insurance and is bound by and agrees to the terms, conditions, limitations and restrictions thereof even though all of them are not outlined herein. Such insurance provides Third Party unlimited liability for bodily injury or death to individuals not being passengers in the insured vehicle .....".

These words are clear and unambiguous. One does not require a super intellect to intrepret and understand them. The second named defendant is an intelligent man, he was aware of this and other clauses at the time he executed the contract, and he claims he is protected by them in this action, hence the third party proceedings. If the Renter is covered by insurance then it follows that his servant or agent, be that person an "employer, employee or a member of his immediate family" is also covered provided he is a duly qualified driver over the age of twenty-one (21) years. Mr. Taylor was in the car being driven to Kingston by his employee Hezekiah Masters when the accident which gave rise to this suit occurred. Paragraph 2 of the defence to third party statement of claim indicates that the third party is unaware of or ignores Clause 3(e) of the Standard Rental Agreement exhibit 4a. Mr, Headley Buchanan the rental agent was certainly ignorant of this clause. Contrary to what is pleaded in Clause 4 of the third party defence the contract of hireage does make reference to the

employees of the second named defendant.

The contract authorises the Renter to permit his employee to drive the car. When this employee is driving within the scope of his authority the normal rules of agency apply and he as the servant or agent of the Renter, makes the Renter vicariously liable for his acts. Looking at the contract as a whole the Standard Rental Agreement in Clauses 1,2,3 & 4 requires the Renter to agree to certain terms and conditions. Having accepted those terms he is told in Clause 5 that he then participates as an insured. This insurance provides "Third Party unlimited liability for bodily injury or death to individuals not being passengers in the insured vehicle". It necessarily follows that the insurance provided must cover the vicarious liability of the Renter for the acts of his servant or agent.

In this context I think it is instructive to refer to S;C.C.A. 26/27 Avis Rent-a-car Limited vs. Joyce Maitland etc. (unreported) July 18, 1980.
The plaintiff as Executrix of the estate of Headley George Howell, deceased, brought an action against the defendant/appellant and another claiming that the defendant appellant was liable in agency for the negligent driving of Frederick Henry, which resulted in the death of the deceased, when the car Henry hired from the defendant /appellant crashed. At first instance Parnell J. found for the plaintiff. (See Maitland etc vs Avis Rent-a-car and other 15 J.L.R. page 155). This decision was reversed on appeal. The Court was required to deal with the question of vicarious liability without reference to the provisions, if any, of a contract of hire. The Court of Appeal (Zacca P.) said in the penultimate paragraph of the judgment -

> "We are of the opnion that legislation is urgently necessary to protect members of the public who may suffer personal injury and damage due to the negligence of drivers of "U-Drive" cars. The legislature has the provisions of the Motor-Vehicles Insurance (Third

> "Party Risks) Law which can act as a guide for future legislation and we are of the opinion as the court was in Morgan's case, supra, that it is too late now for the courts to extend the boundaries of agency to compensate one in the respondent's position for the injury done to him."

This case differs from Maitland's in that a contract of hire with a clause re vicarious liability for third party injury falls to be intrepreted. The concern of the Court of Appeal is, in my view, answered satisfactorily in this rental agreement and I hope in future Renters of U-drive motor-cars will ensure that they are covered against third party claims by the terms of the agreement. The motor vehicle (Third Party Risks) Act, Section 4(1) requires that no motor vehicle should be driven on the road unless there is in force in respect to the user of the vehicle by the driver a policy of insurance giving protection to third parties. If all car-rental firms are required to have every vehicle they hire thus covered, then what occurred in Maitland's case is disturbing. Can it be interpreted to indicate that there are cars owned by U-drive car rental firms being driven on our roads in contravention of the clear terms of this section?

Mr. Levy submitted that third party proceedings in these circumstances were misconceived and totally wrong in Law as the Court was asked to try two things, one in negligence and one in contract. He referred to Order 16 Rule 1 which he said did not apply. He read from Civil Court in Action by David Bernard (Bullerworth) chapter 5 page 120 and referred to cases. I found no merit in his submissions. I hold that the second named defendant is entitled to the reliefs sought.

Assessment of Damages

General:

It is claimed on behalf of the plaintiff that there were five persons that qualified as near relations; the widow and four children:-

1)	Carl born	30th March, 1957
2)	O'Niel born	31st May, 1963
3)	Dennis born	5th October, 1958
4)	Merchelle born	3rd December, 1961.

All the children lived at home and were maintained by the deceased husband. I find that these persons qualified as dependents. I accept the figures submitted and the calculations done by Mr. Daley as reasonable and accurate save except that whereas he submitted that weekly contributions to the household expenses of $240.00 made by the deceased should bereduced by $\frac{1}{6}$, I reduce it by 1/6. I therefore assess the weekly dependency as $280.00. The deceased was fifty-six (56) years old. I allow 4.2 years purchase. In so doing I arrive at the figure of $61,152. After taking into account the increase in the cost of living, the diminished value of money and allowing for the vicissitudes of life. I increase this sum by 10%. I therefore award under the Fatal Accidents Act the sum of $67,267.00.

Special Damages:

The amount claimed for funeral expenses has been proved and I award under this head special damages $3,060.00. For the loss of the mini-bus I award $5,000.00. The total award for special damage is $8,060.00.

Conclusion:

There will be judgment for the plaintiff against the second named defendant for the sum of $67,267.00. General Damages and $8,060.00 special damages with costs to be taxed if not agreed.

There will be judgement for the second named defendant against the Third Party for the sum of $75,327.00 with costs to be taxed if not agreed. The Third Party is to pay the costs incurred by the and defendant in this action.

There will be interest on special damages of $8,060.00 at 4% from 29th September, 1978 to date.

The award under the Fatal Accidents Acts is apportioned as hereunder:-

Widow	$28,828.60
Carl	3,203.20
Dennis	6,406.40
Merchelle	12,812.80
O'Neil	16,016.00
	$67,267.00