[2024] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO 54/2017

BETWEEN	**RAINFORD WADE**	**APPELLANT**
AND	**NORMAN MCBEAN**	**1ST RESPONDENT**
AND	**RUPERT CAMPBELL**	**2ND RESPONDENT**

David Johnson instructed by Samuda & Johnson for the appellant

John Clarke and Lemar Neale instructed by Bignall Law for the 1st respondent

13 November 2023 and 19 January 2024

Negligence – vicarious liability – liability of owner – car driven by friend of owner to transport owner's relative – rebuttable presumption of agency

STRAW JA

[1] This appeal arises from the judgment of A Lindo J ('the learned trial judge') delivered on 16 May 2017 in the Supreme Court, in which she found that the appellant, Mr Rainford Wade ('Mr Wade') was vicariously liable in damages to the 1st respondent, Mr Norman McBean ('Mr McBean'), for injuries he sustained in a motor vehicle accident which took place on 26 April 2011 within the vicinity of the Chalky Hill Main Road in the parish of Saint Ann.

The background

[2] Mr McBean's amended claim form, filed on 30 September 2015, and further amended particulars of claim, filed on 24 January 2017, claimed that the 2nd respondent, Mr Rupert Campbell ('Mr Campbell') was at all material times the driver of Mr Wade's

motor vehicle registered 3165 EJ ('the motor vehicle') and that Mr Campbell was Mr Wade's servant and/or his agent. Mr McBean sought damages for the injury, loss and damage that he suffered as a result of the motor vehicle accident. At the time of the accident, Mr McBean was the driver of a 1999 white Corolla motor car with registration number 2234 EG whilst the motor vehicle owned by Mr Wade was being driven by Mr Campbell.

[3] In his amended defence, filed on 15 October 2015, Mr Wade contended that Mr Campbell was operating the motor vehicle for his personal use and was, therefore, not acting as his servant and/or agent. Mr Wade further advanced that Mr Campbell was merely the authorised driver of the motor vehicle at the time of the accident.

[4] There was no dispute that the accident took place at the time and place as stated above nor that the accident involved Mr Wade's motor vehicle. However, Mr Wade contested that the collision was caused by the negligence of Mr Campbell.

Evidence of Mr Wade at trial

[5] Mr Wade in his witness statement, dated 20 June 2016, stated that he was a customs officer. In April 2011, he owned a Mitsubishi Lancer with registration number 3165 EJ. In or around April 2011, his cousin Calvin visited from New York in the United States of America.

[6] On or about 26 April 2011, Mr Wade agreed to lend the motor vehicle to facilitate a request of his cousin. The vehicle would be driven by Mr Campbell, a friend of Mr Wade, to whom he gave the keys. Mr Wade asserted that he did not ask Calvin nor Mr Campbell to do anything for him on the road, nor did they offer to do anything for him. Mr Wade also stated that the question of payment did not arise about the use of the motor vehicle as he was just lending it to them because Mr Campbell was his friend and Calvin was his cousin. According to Mr Wade, all they did was put back in the gas that they used.

[7] Mr Wade also stated that while Calvin and Mr Campbell had the motor vehicle, he walked to and from work. He also asserted that he did not tell Mr Campbell or Calvin where or how to drive the motor vehicle as they were going about Calvin's business and not his.

[8] During cross-examination in the court below, Mr Wade admitted that Mr Campbell had driven his car previously, although, from the notes of evidence, it is not clear in which context. He stated he had never driven with Mr Campbell on previous occasions; and that he did not hire the car to him and had no intention of hiring the car to Calvin and Mr Campbell. He also stated that he did not travel in the car that morning as he had to be at work. Under re-examination, however, Mr Wade clarified that he had no intention to travel in the car for that day.

The trial judge's findings

[9] The learned trial judge found that on a balance of probabilities, Mr Wade was liable in negligence for the collision and was, therefore, responsible for the injuries suffered by Mr McBean. She further found that a principal/agency relationship existed between Mr Wade, the owner of the motor vehicle and Mr Campbell, the driver of the motor vehicle at the material time; and, that Mr Wade was vicariously liable for the negligence of Mr Campbell based on agency. In coming to her decision that Mr Wade was vicariously liable for the actions of Mr Campbell, the learned trial judge opined at paras. [31] through [34] of her judgment that:

> "[31] The critical question for this court is whether [Mr Campbell] in driving [Mr Wade's] vehicle was acting on his instructions. What I find significant is that [Mr Wade] pointed out that it was his cousin who was to be transported and he handed the keys to [Mr Campbell]. [Mr Wade] in my view is taken to have retained control of his vehicle although [Mr Campbell] was the driver and the fact that it was driven by [Mr Campbell] it would have been reasonably foreseeable that he could have been involved in an accident. [Mr Wade] would have known or ought to have known that if [Mr Campbell] operated the car in a negligent manner some harm could come to him or to a third party. By allowing [Mr Campbell]

to drive the vehicle there was therefore a risk, created by the [Mr Wade], of a third party sustaining injuries and as a result would be liable.

[32] On the totality of the evidence I find that [Mr Campbell] was driving [Mr Wade's] motor vehicle at [Mr Wade's] express request and on his instructions for the benefit of [Mr Wade] and for a purpose solely related to him, as opposed to [Mr Campbell]. [Mr Campbell] was not using the car for his own purposes but for the purpose of transporting [Mr Wade's] cousin with [Mr Wade's] consent and permission. This leads me to conclude that at the time of the accident [Mr Campbell] was clearly acting within the scope of what he was authorised to do by [Mr Wade] and was therefore driving [Mr Wade's] car as his agent and with his consent.

[33] I find that there existed between [Mr Wade and Mr Campbell] a relationship which gave [Mr Campbell] the capacity to create legal relations between third parties and [Mr Wade]. This relationship subsisted at the time of the accident as [Mr Campbell] was authorised to act on behalf of [Mr Wade] and this authority in my view was clearly and expressly given when [Mr Wade] handed the keys to [Mr Campbell] with the intention that he would be the driver to transport his, [Mr Wade's], cousin who had come from overseas, to his destination.

[34] I therefore find on a balance of probabilities that a principal/agency relationship existed between the two named [respondents] and as such I find that [Mr Wade] is vicariously liable for the negligence of [Mr Campbell] on the basis of agency and will therefore proceed to assess the damages to which the [appellant] may be entitled."

Grounds of appeal

[10] Mr Wade filed seven grounds of appeal, which were as follows:

"1. The learned trial judge erred in law in finding that a Principal/Agency relationship existed between the Appellant and [Mr Campbell] and that the Appellant was therefore vicariously liable for the negligence of [Mr Campbell];

2. The learned trial judge erred in law in finding that a relationship existed between the Appellant and [Mr Campbell] giving [Mr Campbell] the capacity to create legal relations between third parties and the Appellant;

3. The learned trial judge erred in Law by applying the wrong test to determine whether [Mr Campbell] was acting as the Appellant's agent while driving the Appellant's motor car at the time of the accident in issue;

4. The learned trial judge erred in making a finding of fact that the Appellant had retained control of his motor car by indicating that it was his cousin who was to be transported and by handing the keys to the motor car to [Mr Campbell];

5. The learned trial Judge erred in making a finding of fact that [Mr Campbell] was driving the Appellants' motor car at the Appellant's request and on his instructions for the Appellant's benefit and for a purpose solely related to the Appellant;

6. The learned trial Judge erred in making a finding of fact that [Mr Campbell] was authorized to act on behalf of the Appellant by giving [Mr Campbell] the keys to the motor car with the intention that the [Mr Campbell]] would be the driver to transport the Appellant's cousin to his destination;

7. The learned trial Judge failed to have any or any sufficient regard to the totality of the evidence concerning the purpose for which the Appellant's motor car was being used on the date of the accident in issue."

[11] The issue of the liability of Mr Campbell as well as the quantum of damages awarded have not been appealed. Mr Campbell neither appeared nor took part in the trial. According to the evidence of Mr Wade, Mr Campbell died on or around 21 May 2013.

[12] On 6 November 2023, counsel for Mr McBean, Mr John Clarke, filed a notice of application for court orders seeking, *inter alia*, that leave be granted for fresh evidence to be adduced on appeal, namely an affidavit of Lemar Neale, who represented Mr McBean at the trial. Mr Neale in his affidavit deponed that aspects of Mr Wade's witness statement, specifically in relation to para. 5, had been struck out during the course of the trial.

[13] Para. 5 of Mr Wade's witness statement as filed in the record of appeal stated thus:

> "5. Early in the morning of April 26, 2011, or some day close to that day, Calvin came and asked if he could borrow my car to go to Saint Ann to visit his girlfriend. Calvin told me that it was going to be Rupert driving. I agreed to lend my car to them and gave the keys to Rupert."

[14] Mr David Johnson, who appeared for Mr Wade, did not oppose the application. The effect of this was that para. 5 of Mr Wade's witness statement was edited so as to read:

> "5. I agreed to lend my car to them and gave the keys to Rupert."

The issue

[15] Noting the seven grounds of appeal filed by counsel for Mr Wade, the overarching issue for this court's consideration is whether, having regard to the totality of the evidence before her, the learned trial judge erred when she found that Mr Wade was vicariously liable for injury caused to Mr McBean by virtue of Mr Campbell acting as Mr Wade's agent and/or servant at the time of the accident.

Submissions

[16] Mr Johnson, acknowledged that a rebuttable presumption of agency exists in circumstances where the owner of a motor vehicle permits a third party to drive the said motor vehicle. Counsel relied on the case of **Rambarran v Gurrucharran** [1970] 1 WLR 556 ('**Rambarran**'), and in particular page 559, in support of his assertion.

[17] Counsel further submitted that there was nothing in Mr McBean's witness statement that elevated the alleged agency relationship between Mr Wade and Mr Campbell to more than the usual presumption in law and that based on the evidence presented, the presumption had been rebutted.

[18] Counsel sought to highlight the pronouncements of the learned trial judge in her written judgment and quoted para. [31] of the judgment (set out at para. [9] above), in which the learned trial judge stated that she found it significant that it was Mr Wade's cousin who was to be transported; and that he Mr Wade handed the keys to Mr Campbell.

[19] Counsel submitted that the available evidence did not support the said findings made by the learned trial judge in light of the editing to paragraph five of Mr Wade's witness statement. He further submitted that the evidence of Mr Wade was not understood by the learned trial judge and, consequently, the learned trial judge fell into error in finding that, as a matter of law, a relationship of principal and agent existed between Mr Wade and Mr Campbell, thereby rendering Mr Wade vicariously liable for the negligence of Mr Campbell. Counsel posited that:

> "The statement made by the trial judge in paragraph 31 of the written judgment viz; '***What I find significant is that the [appellant] pointed out that it was his cousin who was to be transported and he handed the keys to Rupert, the 2nd [respondent]***', requires clarification. That statement is not to be understood to mean that the Appellant's evidence, either in his witness statement or given viva voce, was that he told [Mr Campbell] to transport [Calvin] to Saint Ann and at that time provided Rupert with the keys to the motor vehicle.
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> Paragraph 5 of the Appellant's witness statement clearly indicates that [Calvin] simply asked to borrow the motor vehicle and told the Appellant that [Mr Campbell] would be driving. The Appellant agreed to lend the motor vehicle to [Calvin] and [Mr Campbell] and gave Rupert the keys." (Emphasis added)

[20] At the heart of the findings outlined above is, it is submitted, a misunderstanding of the evidence relating to the manner in which the motor vehicle came to be driven by Mr Campbell at the material time. Counsel contended that the only evidence on Mr McBean's case on this issue is that elicited in the cross-examination of Mr Wade.

[21] Counsel submitted that the question which arises is whether, on the totality of that evidence, the learned trial judge was in a position to properly conclude as a matter of

law, that Mr Campbell was Mr Wade's servant and/or agent at the material time. It was submitted that the evidence did not properly support such a finding.

[22] Counsel for Mr McBean, however, countered that Mr Wade had not demonstrated that the learned trial judge erred in her understanding of the law and its application to the facts as she found them to be. He further argued that Mr Wade, in order to succeed in this appeal, was required to convince the court that the particular circumstances of this case would form a basis for the court to arrive at a contrary conclusion and make orders in Mr Wade's favour.

[23] He highlighted the well-known principle in law that an appeal court should only interfere with a trial judge's conclusion on primary facts if the court is satisfied on its review that the trial judge was plainly wrong. He referred the court to the cases of **Volpi v Volpi** [2022] EWCA Civ 464, **Thomas v Thomas** [1947] 1 All ER 582; **Algie Moore v Mervis L Davis Rahman** (1993) 30 JLR 410; **Piglowska v Piglowski** [1999] 1 WLR 1360; **Cablemax Limited & anor v Logic One Ltd** [2012] JMCA Civ 14; and **Rohan Sudine v Shay Newman & Dwayne Chambers** [2023] JMCA Civ 49.

Law and analysis

[24] As counsel Mr Clarke submitted, this court will only interfere with the trial judge's conclusions on primary facts if it is satisfied that he/she was plainly wrong. This court does not concern itself with whether this court considers it would have reached a different conclusion. In the consideration of an appeal, "What matters is whether the decision under appeal is one that no reasonable judge could have reached" (see **Volpi v Volpi** at para. 2 per Lewison LJ.

[25] In **Cablemax Limited & anor v Logic One Ltd** [2012] JMCA Civ 14, McIntosh JA, at para. [12] set out the principles applied by this court when required to review a trial judge's findings of fact. In setting out the principles, the opinion of Viscount Simon in **Watt v Thomas** [1947] 1 All ER R 582 was highlighted:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[26] The principle pertaining to the issue of vicarious liability through agency is also well settled. The principle was reiterated by McDonald Bishop JA in **Lena Hamilton v Ryan Miller and Others** [2016] JMCA Civ 59. At para. [35], McDonald Bishop JA quotes from the judgment of Lord Wilberforce in **Morgans v Launchbury**:

> "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."

[27] Mr Wade, as the owner of the vehicle, must rebut the presumption of agency. But if he has done that based on the factual circumstances, Mr McBean would have the burden to prove on a balance of probabilities that Mr Campbell was in fact acting in the capacity of an agent for Mr Wade. This principle can be extracted from the judgment of Lord Donovan in **Rambarran**. The issue is, therefore, fact sensitive.

[28] In **Rambarran** at para. 559, Lord Donovan stated thus:

> "Where no more is known of 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."

[29] Mr Johnson contends that the learned trial judge erred in her assessment of the facts as the evidence before her as to the circumstances as to how Mr Campbell came to be driving the vehicle was only based on what Mr Wade stated. This evidence was to the effect that the car was driven by Mr Campbell at the request of Mr Wade's cousin, Calvin. There was no evidence before the learned trial judge that the motor car was being operated by Mr Campbell for any purpose in Mr Wade's interest and for his benefit.

[30] In that regard, it is important to consider the totality of the evidence of Mr Wade. While para. 5 of his witness statement was edited to delete what was said to him by Calvin, paras. 6 and 7 are also instructive. Certain inferences could be drawn by the trier of facts from these paragraphs in conjunction with what remained of para. 5.

[31] Paras. 6 and 7 are set out below:

> "6. I have never met the girlfriend Calvin was going to visit and I do not know who she is. I didn't ask Calvin or [Mr Campbell] to do anything for me while they were on the road and they did not offer to do anything for me either.
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> 7. The question of [Mr Campbell] or Calvin paying me to use the car did not come up because I was lending it to them because [Mr Campbell] was my friend and Calvin was my cousin; all they did was put back in the gas they used."

[32] The evidence reveals, therefore, that Mr Wade agreed to lend his vehicle to Calvin and Mr Campbell; that Calvin, his cousin, would be visiting his girlfriend, and Mr Campbell, his friend, who had used Mr Wade's vehicle previously, was given control of the keys to the car. The learned trial judge may have been incorrect in stating as a verbatim report

that Mr Wade "pointed out" that it was his cousin who was to be transported and he handed the keys to Mr Campbell. Strictly speaking, no admissible evidence could be led as to what Calvin said to him. Therefore, there is no direct evidence as to whether Mr Wade gave the specific instruction to Mr Campbell to transport Calvin. Yet, there is inferential evidence as to why he handed over the keys for the vehicle to Mr Campbell. This was to facilitate Calvin's visit to his girlfriend and solely at the request of Calvin. In one sense, Mr Johnson would be correct that the evidence does not establish that Mr Campbell was using the car for Mr Wade's purpose or business. On the other hand, Mr Campbell was clearly not on a frolic of his own or about his own business. He was authorised by Mr Wade to drive the car to facilitate a purpose connected to Mr Wade's cousin and for the benefit of that cousin. Also, there is no evidence that Mr Campbell approached Mr Wade with a request to borrow his car.

[33] In Halsbury's Laws of England, 3rd Edn, Vol 28 at page 71, the authors noted that:

> "…The owner is, however, responsible only where he has delegated to the driver the execution of a purpose of his own over which he retains some control and not where the driver is a mere bailee, engaged exclusively upon his own purposes."

[34] The evaluation of the facts in the case at bar rested with the learned trial judge. The deference of this court to the findings of a trial judge on the facts include, not only the advantage he or she may have in seeing the parties and assessing credibility and findings of primary facts but also includes his or her evaluation of those facts. In **Piglowska v Piglowski**, a judgment of the United Kingdom House of Lords, Lord Hoffman referred to his judgment in **Biogen Inc v Medeva Ltd** [1997] RPC 1 where he stated thus:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor

> qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

[35] Mr Johnson is correct that the factual issues are nuanced. But, in balancing the facts that were before the learned trial judge, there was a margin of appreciation for her to evaluate those facts as she did. It cannot be said that she was in error, as it was open to the learned trial judge to conclude that the presumption of agency had not been rebutted by Mr Wade. This is so as the "execution of the purpose" in relation to the use of the motor vehicle could not be said to be that of Mr Campbell. The learned trial judge would, therefore, be engaged in evaluating the sparse facts that were before her. As Lord Hoffman approved in **Piglowska v Piglowski**, "It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere" (see **Piglowska v Piglowski** at page 1372).

[36] The case of **Carberry (formerly an infant but now of full age) v Davies & Anor** [1968] 2 All ER 817 ('**Carberry**') bears some similarity to the case at bar. In that case, the car- owner, a coal merchant, had three lorries engaged in delivery of coal in his business: one of them was driven by his employee, the defendant car-driver, who was a servant at a wage. The car-owner also had a Ford motor car which he regarded as the family car. Apart from himself, he only allowed the defendant car-driver, who was his employee to drive the Ford motor car. The car-owner allowed his 16-year-old son to go out in the evening for his own purposes in the car on condition that it would be driven by the defendant car-driver. The car-owner asked the defendant car-driver if he would drive the son about in the evenings and the defendant car-driver agreed. While the defendant car driver was driving the son, for the son's own purposes one evening, he drove negligently, causing the car to collide with a motor-cycle and injure a motorcyclist. It was held that the defendant car-driver was driving on the car-owner's behalf and with his authority, and so the car-owner was liable in damages to the motor-cyclist for the defendant car-driver's negligent driving. In arriving at his decision Harman LJ stated:

> "…The whole case turns, I suppose, and I think this is true (as Diplock LJ first pointed out), on how the arrangement was made. Did the defendant car-owner make the arrangement so that his son could have the use of the car, or was it the other way about, that the son made the arrangement and simply asked his father's permission? Who originated the arrangement? The judge has come to the conclusion—and he says that he has little doubt about it—that it was the father's arrangement, and the question is whether we can reject that conclusion. **It is very near the line. The judge might well have decided the other way: if he had done so I should not have felt I could contradict him, but as he has seen the witnesses and we have not, and as he arrived without any doubt at the conclusion which I have read, I do not feel that we are at liberty to quarrel with it, and I would therefore dismiss the appeal**." (Emphasis supplied)

[37] Notwithstanding its similarities, **Carberry** is distinguishable on its facts from the case at bar. In **Carberry**, there was evidence before the trial judge of the type of arrangement which existed between the car-owner and the defendant car-driver. They had an existing employer/employee relationship and the car-owner would only allow the motor car to be driven by himself or the defendant car-driver. In addition, there was evidence on which the trial judge was able to find that the arrangement for driving was the father's arrangement.

[38] On the other hand, in the case at bar, there was insufficient evidence before the court on which it could be definitively said as to how the arrangement originated. I would borrow Harman J's words in **Carberry** that "it is very near the line". Therefore, the burden was left for Mr Wade to rebut the presumption that Mr Campbell was his servant in that particular set of circumstances. Considering para. 5 of the witness statement as it was left, Mr Wade would have had to do something more by way of evidence to rebut the presumption.

[39] Having regard to all of the above circumstances and the legal issues, I am not of the view that the learned trial judge was plainly wrong in her assessment of the evidence. As such, there is no merit in the grounds advanced. I would, therefore, dismiss the appeal.

FOSTER-PUSEY JA

[40] I have read in draft the comprehensive reasons for judgment of Straw JA. I agree with them and there is nothing that I could usefully add.

SIMMONS JA

[41] I also have read in draft the reasons for judgment of my sister, Straw JA. I agree with her reasoning and conclusion and have nothing useful to add.

STRAW JA

ORDER

1. The appeal is dismissed.

2. Costs of the appeal to the 1st respondent to be agreed or taxed.