JAMAICA

IN THE COURT OF APPEAL

R.M. ~~CRIMINAL~~ CIVIL APPEAL No. 61/71

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A.

JOYCE WARREN - PLAINTIFF/APPELLANT

vs.

BONSWELL PITT

and

GUSSETT DAVIS - DEFENDANTS/RESPONDENTS

Earle DeLisser for Plaintiff/Appellant.
Leo Rhynie for Respondent Pitt.
Norman Wright for Respondent Davis.

Heard: 20th and 21st January, 1972;
10th and 14th April, 1972

FOX, J.A.

At about 3.45 p.m. on August 25, 1968, the plaintiff's Magnette car was being driven by her husband, Jervis Warren up the Hagley Park Road in Saint Andrew. He intended to turn to his right into O'Mara Road and put out his right indicator to signify this intention. Other vehicles were coming in the opposite direction down Hagley Park Road. He brought the car to a stop and waited for these vehicles to pass. A Rover car driven by the defendant Davis came up Hagley Park Road and struck the Magnette car at its right back bumper propelling it forward across the road into the bank on the other side and thereby occasioning extensive damage to its front. This was the description of the accident given by Jervis Warren. If it had been accepted by the magistrate, he would have been bound to hold that the collision was entirely due to the fault of Davis. But the account of Jervis Warren was rejected. The magistrate accepted Davis' version of the accident "in preference to that of the plaintiff on a balance of probabilities".

Davis said that as he drove up Hagley Park Road, he saw the Magnette car about three chains ahead of him going in the same direction. When the Magnette was about one chain from O'Mara Road it "middle" the road. Davis

said he kept the Rover car close to the left and came close to the left hand side of the Magnette car which was still moving. The evidence of Davis continued:

> " I saw a 'bus coming down Half-Way-Tree ahead of me coming on the righthand side coming to me. The M.S. (Magnette) swing back to my right it swing to its left and my front headlamp hit his back lefthand tail light. I climbed the bank, the lefthand bank. When I saw it swing I applied my brakes. It then swung across the road over to its right. I do not know what happened to the 'bus. It swung on me to give the 'bus way."

Under cross-examination by counsel for the plaintiff, Davis stated further:

> "I was travelling about a chain behind the car, it did not give a signal that going to turn on O'Mara Road. I did not see a signal. It went to middle of the road there was space for my car to pass. ----- Accident happened right at the corner, a little above O'Mara Road. I now say MS (Magnette) not at a standstill when in middle of the road, it did not stop at all. When I saw it swing to the right I made an attempt to pass it on its left, 'bus then about 2 chains in front of M.S. car. M.S. swing back over to the left. It did not damage the M.S. left side, it was the left back it damaged. ---- He was in the middle of road do not know what up to."

In the face of this evidence, the magistrate completely exonerated Davis. This finding is unsupportable. On his own account, it is clear that Davis was not only attempting to overtake on the wrong side of the road a car ahead of him (vide s.44(1)(a) Road Traffic Law Cap.346) but doing this at a time when (a) he did not have "a clear and unobstructed view of the road ahead" (s.44(1)(g)), and (b) when the approaching bus presented an obvious risk of danger to the car ahead. In these circumstances the only valid conclusion is that the accident was caused entirely by the negligence of Davis, and I would substitute this finding, in place of that of the magistrate which held the driver of the Magnette car entirely to blame.

The Rover car was licensed in the name of the defendant Pitt. He is the proprietor of a garage. In August 1968, Davis was employed to him as a mechanic in his garage. On the day of the accident Davis was not a licensed driver. On 27th August, 1968, Pitt went to the Half-Way-Tree police station and gave a statement to Constable Ivan Hunt who had attended at the scene of the accident on August 25, and made investigations.

The substance of the statement reads:

"Gussett Davis of 43 Shortwood Road Kingston 8 is employed to me as a mechanic. He has been in any employment for the past five months. About four months after Davis had been employed to me I asked him he had a Drivers Licence he said yes. I told him I would like to see the drivers licence before I could allow him to driver for me. He then said the drivers licence was in the custody of his sister who was living at the same address. The following day I went to his sister and ask her to show me the drivers licence at her business place at the Four Road, Shortwood Road and she tole me he really had a drivers licence and she had it at her resident 43 Shortwood Road in her custody because he owned he fifty seven Pounds (£57) and she would not give him the licence until he paid her. But she told me she would show it to me some other time but she would not give it back to him unless in any event where it was required to be produced by the police.

From his sister's remarks I accepted her story and decided to let him driver on errands to buys parts for the garage.

This previllidge was granted to him and I then gave him permission that he could drive any motor in connection with my garage.

On Sunday 25th August 1968 in the moring he drove the car out of the garage testing the brakes to see if they were operating correctly as he had been working on them.

On Monday 26th of August 1968 at about 6.00 p.m. I was informed that my private Rover car licensed V955 had involved in an accident along the Hagley Park Road.

Subsequently after the police investigated in this accident I was informed that Gussett Davis did not have driver's licence."

Constable Hunt was called in support of the plaintiff's case. In the course of his testimony, Pitt's statement was received in evidence without objection by counsel for the defence. In crossexamination, the truthfulness of the constable was not questioned. The magistrate must therefore have believed him.

At the trial, Pitt set up the defence that at the material time Davis was not his servant or agent, and was not driving the car on his behalf or for his purpose. In his evidence he said that although the car was licensed in his name, it was not his property. It had been sold to Davis prior to the accident for £40. Davis was paying him £1 a week and up to the time of the accident had paid him £2. This transaction was confirmed by Davis who said also, that at the time of the accident he was "going home" and "was doing nothing for Pitt".

In relation to the plaintiff's claim against Pitt, the Magistrate said in paragraph 7 of his reasons for judgment that "the issue here was his liability for defendant Davis if he was his servant or agent at the material time". This is not a sufficiently precise statement of the relevant law. The owner of a car is liable for the negligence of the driver, if that driver is his servant acting in the course of his employment. "The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes." (per Denning L.J. in Ormrod v. Crossville Motor Services [1953] 2 All E.R. 753 at 754). Further on in his judgment, Denning L.J. comprehensively states the principle at p.755 (ibid).

> "The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

In his evidence Jervis Warren had said that, at the scene of the accident, Davis had told him that he worked at H.E. Robinson "and the foreman sent him out to do something and it will be O.K. the foreman will have the car fixed". The magistrate rejected Warren's evidence to this effect, and in the only other reference to the liability of Pitt, concluded his reasons for judgment thus:

> "The defendant Davis was in fact employed to the defendant Pitt at the material time.
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> I accepted the defendant Davis' version of the incident in preference to that of the plaintiff on a balance of probabilities. I accordingly gave judgment for both defendants versus the plaintiff."

Nowhere in the reasons for judgment is there any attempt to analyse the evidence in terms of the principle of vicarious liability. No finding of fact is stated which supports a judgment in favour of Pitt. In particular, there is a total silence as to the significance of the statement given to the police by Pitt. As indicated above, the magistrate must have accepted that it was given. Mr. Rhynie submitted that it could not be regarded as evidence bearing upon the question whether Davis was driving in the course of his

employment, but was relevant only to the credit to be accorded the testimony of Pitt. This submission is palpably fallacious. If Pitt had admitted either orally or in writing that the brakes of his car had been adjusted by his mechanic, Davis, and that at the time of the accident Davis was driving it for the purpose of testing this adjustment, such an admission would be direct evidence of those facts which Pitt, to use the words of Lord Kenyon C.J. in Maltby v. Christie -(Nisi Prius: 1795. 1 Esp. 340. 170 E.R. 378) would be "precluded from disputing". Pitt's statement is capable of being construed so as to produce exactly that effect. In this respect it should be observed that when he was giving information to the police concerning the accident, Pitt did not seek to avoid the awkward consequences which could have resulted from permitting a car licensed in his name to be driven by an unlicensed driver by explaining that the car had been sold to Davis. Instead, he alleged ignorance of the fact that Davis was unlicensed and endeavoured to describe a situation which excused that ignorance.

In his evidence, Pitt admitted that the car was not used exclusively by Davis on Davis' business, but was also used by Davis for the purpose of the business of the garage. Davis had custody of the keys of the garage "to lock shop and open it in the mornings". It would seem that for this purpose, Davis was permitted to take the car to his home not only on week days but on weekends as well. Pitt also admitted that he was prepared to pay from his own pocket for repairing the plaintiff's car, a sum as high as £200. The payment was not made because the repair bill exceeded that sum. The inference which is suggested by these circumstances is that Davis used the car, at the lowest, partly on Pitt's business and for Pitt's purposes.

The magistrate arrived at his conclusion of fact by considering the probabilities arising from the evidence. If these conclusions were in any way influenced by the effect of the demeanour of the witnesses, the magistrate did not say so in his reasons for judgment. In drawing its own inferences from the admitted facts, this court is therefore entitled to consider that it is not under any particular or significant disadvantage resulting from not having seen and heard the witnesses. In arriving at probabilities on the evidence it is in as good a position as the magistrate.

In my view, when the significance of the evidence in Pitt's statement to the police is considered together with the effect of his other admissions,

the overwhelming probability is that at the time of the accident Davis was driving the car as a servant and in the course of his employment to Pitt. The judgment of the magistrate in favour of Pitt should therefore also be reversed, and a judgment entered against him in favour of the plaintiff.

As to damages. The repair bill was £271.1.6. It took three weeks to effect the repairs. There was some delay in commencing the work due to the uncertainty caused by Pitt's initial suggestion to effect the repairs at his garage. I consider the claim for loss of use for 24 days at £3 a day reasonable. I would disallow the cost of preparing the estimate for repairs, and allow for depreciation £50. I would therefore allow this appeal, set aside the judgment entered by the magistrate, and enter judgment for the plaintiff against both defendants for £393.1.6 with costs to be taxed or agreed.

HERCULES J.A.

I agree.

EDUN J.A.

I agree with the conclusion arrived at by my learned brother Fox, because of the particular facts and circumstances of this case. I would, however, like to add that the submission of Mr. Leo-Rhynie is correct, so far as the assessment of Pitt's evidence by the resident magistrate is concerned. It so happens in this case, that Ivan Hunt's evidence, if believed, would establish the truth of Pitt's admission and the lack of creditworthiness as to Pitt's testimony. Mr. Leo-Rhynie at no time questioned the admissibility of Hunt's evidence.

FOX J.A.

The appeal is allowed. The judgment entered by the magistrate is set aside. Judgment is entered against both defendants for £393.1.6 with costs to be taxed or agreed. The appellant is allowed the costs of this appeal fixed at $40.