IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. CLW 322A/1995

| | | |
|---|---|---|
| BETWEEN | ALAN WERB | CLAIMANT |
| AND | ERIC RODNEY | 1st DEFENDANT |
| AND | PATRICIA PHILPOTTS (Representative of the Estate of Lascelles Philpotts, deceased) | 2nd DEFENDANT |

Mr. Charles Piper and Ms. Tamika Tomlinson for the Claimant

Mr. Anthony Williams for the 1st Defendant

Heard: June 11, 2008 and November 5, 2008

**Negligence – Liability of Owner of Vehicle – Presumption of Liability Arising from the fact of being Registered Owner – Whether Prima Facie Principal Displaced**

Straw J

On the 4th January 1994, Mr. Werb, the claimant, was involved in a collision with a motor truck driven by Mr. Lascelles Philpotts (who is now deceased) while driving a motor cycle on a bridge along the Rock Main Road in Trelawny. He sustained injuries for which he was treated both in Jamaica and the United States of America and is now seeking compensation against both defendants.

At the time of the accident, the motor truck, a Toyota which bore the licence plates CC8574 was registered in the name of the first defendant, Mr. Eric Rodney. The said vehicle was insured in Mr. Rodney's name with NEM Insurance Company (Ja.) Limited and the coverage was scheduled to expire in February 1994.

Mr. Philpotts died prior to the trial of the action and an order was granted on May 16, 2007 appointing Mrs. Patricia Elaine Philpotts, the widow, as the representative of the second defendant's estate for the purpose of the proceedings. On the actual trial date, there was no appearance for the second defendant.

Mr. Werb's testimony in relation to the accident was not challenged. The court has accepted his evidence in that regard and finds that the negligent driving of the deceased, Mr. Philpotts was the cause of the accident.

The issue for the court to determine is whether Mr. Philpotts was the servant or agent of the first defendant at the time of the accident.

The claimant has stated that he had no knowledge of the connection between the driver of the motor truck and the owner of the said vehicle. However, the court is being asked to draw the inference that the relationship of servant or agent existed between the first defendant and the deceased. Although the vehicle was registered and insured in Mr. Rodney's name on January 4, 1994, he has denied that Mr. Philpotts was either his servant or agent.

Mr. Rodney contends that he sold the vehicle to Mr. Philpotts on October 29, 1993 for a full purchase price of $60,000.00 and that he received the said sum by means of a cheque from Mr. Philpotts. He further stated that he handed the registration booklet and

the vehicle over to him and that they made arrangements to meet some days after at the office of the Collectorate of Taxes in order to effect the transfer of title to the said vehicle.

Mr. Rodney states that up to the date of the accident, he was unable to effect the transfer as Mr. Philpotts never complied with the initial or any of his subsequent requests to meet with him and to have the transfer effected. He did, however, state that he allowed Mr. Philpotts to drive away the vehicle on October 29, 1993 with his (Mr. Rodney's) licence plates affixed and the insurance still in place although he knew that the insurable interest could not be transferred. A lodgement slip – Exhibit 6 – was tendered in evidence to support his claim that the vehicle was sold.

On examination of the slip, the court notes the following details:

1. It is a Scotia Bank deposit slip with the stamp of the Port Maria branch dated October 30, 1993.
2. It refers to an account 4102 and bears the name Eric Rodney with the depositor's initials 'E.R.'
3. The total amount is given as $60,000.00 and the cash specification reveals the amount was made up of six hundred $100.00 bills.
4. At the top of the slip there is a notation, 'Sale of 1975 Toyota Pick-up Van.'

Mr. Rodney informed the court that at that time, the bank required that the lodgement slip should state the reason for depositing such a large amount of money to an account.

Mr. Rodney also called a witness, Mr. Reginald Smith. Mr Smith testified that he knew both Mr. Philpotts and Mr. Rodney and the said vehicle. He further stated that

sometime in October 1993, he was driving with Mr. Rodney in the said vehicle when Mr. Philpotts stopped Mr. Rodney on the road. He said both men spoke. Mr. Philpotts then took what appeared to be a cheque from his pocket and handed it over to Mr. Rodney. He said further that Mr. Rodney handed the key for the vehicle over to him, said something, then Mr. Philpotts drove off in the said vehicle.

Mr. Smith has further testified that Mr. Philpotts was a contractor with Courts Jamaica Limited, that he had seen him almost daily transporting goods for Courts prior to the above described transaction and subsequent to the transaction using the said truck.

**Submissions on the issue of Liability of the First Defendant**

The following authorities were relied on by Counsel for the claimant and first defendant:

- **Mattheson vs. G.O. Saltau and W.T. Saltau** (1933) JLR 72.
- **Hewitt vs. Bonvin and Another** 1940 1 KB, 188
- **Rambarran vs. Gurrucharran,** 1970 1 All ER, 749
- **Barnard vs. Sully,** 1931, 47 TLR 557

In **Barnard vs. Scully** (supra), the court held that the fact of ownership of a motor car is *prima facie* evidence that at the material time, the motor car was being driven by the owner, or by his servant or agent. However, this evidence was liable to be rebutted by proof of the actual facts (per Scrutton LJ pg 558).

In the case of **Mattheson v G.O. Saltau, et al**, the same principle was applied by the Jamaican Full Court. However, the court held that the onus of displacing the 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.

In **Hewitt v Bonwin** (supra), a son obtained the permission of his mother (who was authorized to grant it) to drive his father's motor car. The son used the car for his own purposes. A passenger in the vehicle was killed as a result of the negligent driving of the son. The Court of Appeal ruled that the son was not driving the car as his father's servant or agent or for the father's purpose and therefore, the father was not liable for the son's tortious act.

Although the principle in **Barnard v Sully** was reiterated there is an onus of proof on the party alleging to establish that the driver is a servant or agent of the owner.

Mackinnon LJ stated at page 192:

> *"---before any question as to the right of control and direction over the tortfeasor arises at all, it must be established that in doing the act complained of he was employed by the third party to do work for him. This cannot be established by mere proof that the tortfeasor is using a chattel or driving a vehicle, which is the property of a third party, though that may, in the absence of any further explanation, be some evidence of the proposition."*

He also stated as follows (pages 192-193):

> *"---the* plaintiff, *to make the father Bonwin liable must establish (1) that the son was employed to drive the car as his father's servant and (2) that he was, when the accident happened, driving the car for the father and not merely for his own benefit and for his own concerns. In my opinion, the plaintiff did not establish either of these propositions. The boy took out and used the car, following upon an interview with his mother. Treating the mother as the fully authorized agent of her husband, all that she said -- amounts to no more than: "I will lend you your father's car for you to use." He was not employed to drive it as his father's servant and when the accident happened he was not doing any work of his father's. He was driving his own friend, for his own purpose and the father had absolutely no interest or concern in what he was doing."*

In **Rambarran v Gurrucharran** (supra), the appellant's son negligently drove his father's car which caused considerable damage to the respondent's car.

The Privy Council held that, although ownership of a motor vehicle is *prima facie* evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact.

The Privy Council held in the above case that the respondent did not clearly establish that the son was driving as the father's servant or agent (per Lord Donovan at pg 753c):

> *"He had to overcome the evidence of the appellant which raised as many inferences to the contrary. The burden of doing this remained on the respondent and the trial judge held that he had failed to discharge it. His conclusion on this point was one of fact and he had ample evidence to support."*

Once there is evidence to rebut the presumption, evidence which raises a strong inference to the contrary, the court must decide the issue on the totality of the evidence. The court must consider and answer the following questions:

(1) Has the claimant discharged the onus of proof?

(2) Is there any evidence which counterbalances the inference to be drawn from the ownership of the vehicle?

In **Rambarran** (supra) Lord Donovan stated (at pg 753 f – g) that there were two ways that the owner of the vehicle could repel any inference:

> *"One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of*

*the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant and proving that assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of deferring the respondent's case instead of the other."*

In the present case, the first defendant testified that the second defendant was not driving the motor truck for any purpose of his (the first defendant).

He has asserted that he sold the vehicle, although the transfer of the title had not yet been effected and he had allowed him (Mr. Philpotts) to drive away the vehicle based on the existing insurance coverage.

He also testified that he had visited the office of his insurer's during the week of the sale and informed them that the vehicle had been sold and that he later reported to them that Mr. Philpotts had not presented himself to effect the transfer.

However, in a document "Notice Supplying Further and Better Particulars" dated the 9th day of July 1996, Mr. Rodney stated as follows:

"1.2 (a) .....

(b) .....

(c) .....

11 (a) .....

(b) .....the consideration for the sale was Sixty-Two Thousand Dollars ($62,000.00).

(c) .....

(d) Payment was made in full (one payment) by the second-named defendant to the first-named defendant by a cheque drawn by the

second-named defendant --- which was lodged by the first-named defendant to his account ...

(e) The formal transfer of the said motor vehicle from the first-named defendant to the second-named defendant was done on the 5th day of January 1995 at the office of the Collector of Taxes ...

(f) (1) No notice of the sale of the said motor vehicle was given by the first-named defendant to any insurer.

(11) Notice of the sale of the said motor vehicle was given to the Collector of Taxes on or about the 5th day of January 1994."

Mr. Piper has submitted that there are several material inconsistencies existing between the evidence of Mr. Rodney and answers given in the above-mentioned document.

He further submitted that the bank's deposit slip does not supply any cogent or compelling evidence to support Mr Rodney in relation to the sale for the following reasons:

(1) The answers in the Notice Supplying Further and Better Particulars indicate that the full purchase price of $62,000.00 was paid by cheque.

(2) The said cheque was lodged to Rodney's bank account.

However, the bank deposit slip records the deposit of $60,000.00 in cash. He states that Mr. Rodney's evidence to repel the presumption is therefore unreliable and incredible.

In **Mattheson v. G.O. Soltau & W.T. Soltau** (supra), the issue turned on the quality of the evidence given on behalf of the defendants.

Clarke J. having examined the evidence, stated as follows (pg. 75):

> *"The whole of the evidence given on behalf of both defendants was so replete with contradictions and improbabilities that no Court*

*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. The inference to be drawn from the intrinsic incredibility of the whole story is overwhelmingly in favour of the view that the prima facie presumption was not displaced but rather strengthened."*

**Analysis of the First Defendant's Case**

It is clear that there are material inconsistencies between the evidence of Mr. Rodney and the answers he supplied in the Notice Supplying Further and Better Particulars. This is also true in relation to the lodgement slip, Exhibit 1. While the court is prepared to find that the issue as to whether the vehicle was ever transferred could be explained by a lapse in memory between 1996 and 2008, the court cannot be so generous in relation to the other issues.

It is crucial whether or not Mr. Rodney made a report to the insurance company shortly after the sale of the vehicle. It would supply compelling evidence as to the genuineness of the sale. There is no explanation why such a discrepancy exists. Mr. Smith's evidence does not assist him on this point. It is limited in its nature.

The inconsistencies in relation to the bank deposit slip and the evidence of the first defendant are also unexplained.

These inconsistencies affect the root of the first defendant's case.

These material contradictions have led the court to draw certain unfavourable inferences and have led to the view that the first defendant has not displaced the presumption.

The court rejects his evidence as to the circumstances under which Mr. Philpotts was operating the vehicle. Mr. Rodney has not sought to say that he lent or hired the vehicle to Mr. Philpotts to be used for purposes in which he had no interest or concern. If

he had done so, the court might have been induced to conclude that the claimant failed to establish that Mr. Philpotts was driving the vehicle as either the servant or agent of Mr. Rodney.

However, in light of the above circumstances, the court is of the view that the presumption of ownership and control has not been rebutted by the first defendant and that the claimant has discharged the onus of proof.

Both the first and second defendants are therefore liable to the claimant for the injuries he received.

**Assessment of Damages**

The court awards special damages as follows:

Medical related expenses -

JA$ 2,544.00

US$30,020.33 to be calculated at the Bank of Jamaica rate as of July 31, 2008 with interest at 3% from January 4, 1994 to July 31, 2008.

**General Damages**

Based on the report of Dr. George Donaldson who examined the claimant at the Cornwall Regional Hospital on January 4, 1994, the following injuries were noted:

1. 2cm laceration to left side of nose bridge.
2. 0.5m wound to lower right leg with abrasions.
3. Fractured distal third of right tibia (larger bone of leg extending from knee to ankle) and right fibula (smaller two bones of leg extending from knee to upper ankle).

Debridement and plaster of Paris done under general anaesthesia in operating theatre. He was discharged on the second day and returned to USA for further treatment.

Dr. Carmen Dimario examined him on April 7, 1994. He noted the following:

(1) Septal deviation with airway obstruction and nasal bone deformities

(2) Four discoloured scars on right eyelid.

(3) Three discoloured scars on nose

(4) Hypertrophic scars on right lower eyelid

(5) Two depressed scars on patient's upper lip

(6) Three scars on right shoulder

(7) Four masses on right forearm

(8) Three discoloured scars on patient's back

(9) Discoloured scar on patient's left knee

(10) Multiple scars on lower legs

(11) Cast on right leg

There is no medical evidence associating injury number one with the accident.

Dr. Dimario spoke to a proposal to perform multiple scar revisions on patient's face and right arm which would improve the appearance of scars.

Mr. Werb's witness statement speaks to continuing pain in his shoulder and that an x-ray revealed a fractured shoulder. Again, there is no medical evidence in relation to the shoulder.

He stated he continued to experience pain in the shoulder which diminished with time and that he commenced physiotherapy to assist in regaining the mobility in shoulder.

In relation to the left leg, he stated that an external fixater was affixed to the said leg, however, he developed an infection. The fixater was removed and full length cast substituted.

Mr. Werb stated he remained in the cast for 10½ months.

Dr. Dimario saw him in the cast in April 1994.

Mr. Piper cited the case of **Douglas Fairweather v Joyce Eloise Campbell** in Khan's volume 5, page 74.

The claimant in that case suffered the following injuries:

1. 1" laceration to left chest wall
2. Compound fracture of left tibia and fibula
3. Chipped right upper molar tooth
4. Severe tenderness and stiffness to back of neck
5. Marked tenderness and stiffness of upper spine
6. Battered and painful shoulder
7. Whiplash

The claimant was admitted and remained in hospital between July 28, 1976 to October 26, 1976. His whiplash was assessed as severe. He also was assessed with 7-10% permanent functional impairment of the left lower limb.

The award in May 1999 is $1,300,000.00 and the updated award using the consumer index of July 2008 (134.0) is $1,742,000.00.

Mr. Piper has asked me to award Mr. Werb the amount of $3,250,000.00 for pain and suffering and loss of amenities. I believe this figure was due to an error while

updating the award. However, bearing in mind the differences in the injuries sustained, this would not be a helpful case to make a comparable award.

The court was actually unable to locate one particular case with similar injuries. The court therefore reviewed several cases involving injuries including the ones in the present case in order to make an appropriate award.

(1) **Collette Brown v Dorothy Henry et al** Khan 5, pg 42

Injuries involved tenderness over pubic bone, minor bruises and laceration of legs, fracture of right and left superior and inferior ramu without impairment. She was assessed with permanent partial disability at 5% whole person.

Damages for pain and suffering and loss of amenities were awarded at $500,000.00 in June 2000.

CPI then – 131.4

July 2008 – 134.0

Updated award $670,000.00

(2) **Suzette Campbell v Wilbert Dillon,** Khan 5, pg 50

Injuries included:

a. Abrasions to face

b. Swelling over forehead

c. Severe bony tenderness involving right hemi pelvis

d. Multiple Fractures involving right hemi pelvis

e. Fracture of the rami of the ischium

f. Fracture of pubic bone without significant displacement.

g. Fracture of the acelabulum.

The claimant was admitted to hospital on August 22, 1998 and discharged on October 2, 1998.

In the doctor's opinion she would be prone to long term complications like ostheo-arthritis.

On review, Dr. Ali found that there was distortion of the pelvic ring *(inter alia)* that might affect delivery at child birth. She was assessed as having permanent partial disability as 10% of the whole body. Damages for pain and suffering and loss of amenities were in the amount of $1,300,000.00 in June 2000.

June 2000 – 1311.4

July 2008 – 134.0

Updated award 1,742,000.00

In both cases above, the injuries sustained were more serious than in the present case.

(3) **Cecil Gentles v Artwell's Transport Co. Ltd. et al,** Khan 5, pg 66

The claimant was 70 years old. He suffered bimalleor fracture of left ankle and treated with below knee plaster. He was likely to have arthritis of left ankle though no evidence of it seen on last visit.

In February 2000, he was awarded $300,000.00 for pain and suffering and loss of amenities.

February 2000 – 1273.1

July 2008 – 134.0

Updated award is $402,000.00. In this case, the injury was less than what was sustained by Mr. Werb. However, there was the issue of the possibility of arthritis.

(4) **McKenzie v Christopher Fletcher et al,** Khan 5, pg 72

The claimant suffered pain, swelling, tenderness of the right leg, comminuted fracture of middle third of tibia, transverse fracture of middle of right fibula.

He was not expected to have any impairment.

In March 1998, he was awarded $420,000.00 as general damages. The award does not indicate that it was for pain and suffering and loss of amenities only.

The court is of the opinion that the injuries sustained by Mr. Werb should attract a higher award as there were injuries to his nose, pain suffered to the shoulder and some amount of scarring.

March 1998 – 1115.9

July 2008 – 134.0

Updated $562,800.00

(5) Finally, the court considered the case **Mahesh Mahttani v Audley Wright et al,** Khan 5, pg 94.

In May 1999, an award of $350,000 for pain, suffering and loss of amenities was made.

Injuries sustained included tenderness along clavicles with obvious deformities, mild tenderness of chest, and numerous abrasions on right upper limb as well as along anterior aspects of both knees and fractures involving mid portions of both clavicles.

His shoulder was placed in a sling. The incident took place on July 20, 1988. He was re-evaluated in March 1989. There was a bony prominence along the mid portion of the clavicle due to overlapping of the fragments. Although there was full range of motion

of the left shoulder, the claimant still complained of intermittent pain. There was no functional disability but discomfort at the site of the bony prominence.

May 1999 - $350,000.00 for pain and suffering and loss of amenities.

May 1999 – 1190.6 - CPI

July 2008 – 134.0 - CPI

Updated award $469,000.00

When the court examines the scale of these awards, the court considers that a fair and just award for pain and suffering and loss of amenities would be using the base of $562,800.00. However, the award does appear to be on the higher end of the scale and there is no indication it was for pain and suffering only.

In all the circumstances, this court is of the view that the award for pain and suffering and loss of amenities should be in the amount of $600,000.00 with interest at 3% from November 22, 1995 to July 31, 2008.

Costs to the claimant to be agreed or taxed to include cost of travel from USA to Jamaica and subsistence while here for the purpose of the trial.

Judge