IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO CL C 471 OF 1997

BETWEEN	**CURVEY CAMPBELL**	**CLAIMANT**
AND	**FERDINAND FLASH**	**FIRST DEFENDANT**
AND	**WINSTON YOUNG**	**SECOND DEFENDANT**

Mr. Burchell Brown for the claimant

Mr. Lawton Heywood for the first defendant

July 6 and 12, 2004

Sykes J (Ag)

NEGLIGENCE (MOTOR VEHICLE ACCIDENT)

Vicarious liability

(a) The submission

A fairly important point of vicarious liability has arisen in this case. If the number of reported cases is anything to go by, it does not arise too frequently. Mr. Heywood has submitted that Curvey Campbell - the claimant - has not established that Winston Young, the second defendant, was the servant or agent of Ferdinand Flash, the first defendant. Counsel admits that Flash was the owner of the car at the material time but submits that there is a denial, in the pleadings of Flash, that Young was his servant or agent. This denial, without more, according to Mr. Heywood means that the claimant must now adduce positive evidence to prove the agency or service. The issue can be stated in this way: where a motor

vehicle is involved in an accident and it was not driven by the owner at the time of the accident, is proof of ownership sufficient, without more, to extend the arm of liability to the owner? The short but qualified answer is yes.

(b) The facts

I will state only such facts, at this point, as are necessary to resolve this specific issue. On Sunday August 14, 1994 Curvey Campbell was riding his motorcycle along Constant Spring Road when he was hit by a car owned by Ferdinand Flash and driven by Winston Young. The accident occurred when Campbell was executing a right turn into Oakwood Apartments. That Flash owns the car is not in dispute. There is no evidence showing how Young came to be the driver of the car at the material time. I will endeavour to demonstrate that in these circumstances proof of ownership raises a rebuttable presumption that the driver (assuming it was someone other than the owner) was the servant or agent of the owner.

(c) The controlling legal principle

It is true that in cases where the owner of the negligently driven vehicle is not the driver, he cannot be liable unless the driver was his servant or agent. The question therefore is, what is the minimum evidence required in these kinds of cases to establish service or agency?

The law is that where a car is negligently driven by some one other than the owner, the fact of ownership alone, in the absence of any other information about the circumstances under which the driver was driving the car may be sufficient to make the owner liable. The fact of ownership provides the primary fact from which the inference may be drawn that the driver was the servant or agent of the owner. Whether that inference is drawn depends on all the information available. Once ownership is established the greater the information deficit, the easier it is to

draw the inference of service or agency. I will now examine the cases that establish this proposition.

In ***Rambarran v Gurrucharan*** (1970) 15 WIR 212 the Judicial Committee of the Privy Council in an appeal from Guyana stated the law in this area. Lord Donovan said at page 213:

> *In Barnard v Sully ((1931), 47 TLR 557, DC, 36 Digest (Repl) 104, 524) (a case decided in 1931) Barnard sued Sully in the County Court for damage done to his van through the negligent driving of Sully's motor car.* ***It seems to have been accepted that Sully was not driving himself, and he denied that the driver was his servant or agent. In the absence of evidence contradicting this denial the County Court judge withdrew the case from the jury.*** *Barnard appealed to a divisional court of the King's Bench, but Sully did not appear and was not represented. Allowing the appeal* SCRUTTON LJ, *with whom* GREER *and* SLESSOR LJJ, *concurred, said ((1931), 47 TLR at p 558):*
>
> > *No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners.... But, apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts.'*
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> *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. 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.* (my emphasis)

It is important to observe that in ***Sully's*** case, cited by Lord Donovan, the defendant denied that the driver was his servant or agent. The Court of Appeal in reversing the county court judge found for the plaintiff on the basis that there was no evidence to rebut the prima facie inference that is derived from the fact of ownership. It was accepted by the Board that the defendant had denied liability.

Lord Donovan also approved the decision of the Court of Appeal of England in the case of ***Hewitt v Bonvin*** [1940] 1 KB 188. In that case the following analysis appears in the judgment of Du Parcq LJ at page 194:

It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands. See the judgment of Littledale J. in Laugher v. Pointer (1), where the distinction is drawn between the responsibility of the owner of movable property and that of the occupier of a house or land. This part of the judgment of Littledale J. was expressly approved by the Court of Exchequer in Quarman v. Burnett,per Baron Parke. (2) ***It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his: Barnard v. Sully (3); but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data.*** (my emphasis)

While at first sight the opening words of Du Parcq LJ may seem inconsistent with the highlighted portion of the text, it is my view that what he was saying was this: when looking at vicarious liability in these kinds of cases a good starting point is always ownership of the vehicle. At this point one does not leap to the conclusion that the owner is liable as this is only the beginning of the analysis. The second stage is to see what other information there is concerning the circumstances that led to the person driving the vehicle. If the analysis reveals that there is evidence showing, for example, that the driver was on his own business then the owner may escape liability. On the other hand if the analysis produces no other information then one goes back to the fact of ownership. It is only after this second-stage-analysis is done with the result just indicated that the fact of ownership is now covered with the robe of presumption of agency or service. Thus the once naked fact of ownership, now attired as a presumption, has climbed the pedestal of prima facie evidence. The pedestal of prima facie evidence, if not deflected, then elevates the fact of ownership, dressed as it now is, on to the stage of conclusive proof of agency or service. It necessarily means from this that, after ownership has been established, a bald denial of agency or service, without supporting evidence, is

not good enough to derail the conclusion of vicarious liability. It is also my view that this is how the following passages from Viscount Dilhorne in ***Morgans v Launchbury*** [1973] AC 127 and Clarke J in ***Matheson v G.O. Soltau and W.T. Soltau*** [1933] J.L.R. 72 are to be understood.

The House of Lords in accepted ***Hewitt v Bonvin*** as correctly stating the law. Viscount Dilhorne in ***Morgan*** said at page 139 – 140:

> *Thus, it was held [in Hewitt v Bonvin] that, whether it be alleged that the driver was the servant or the agent, to establish liability on the part of the employer or the principal it must be shown that the driver was acting for the owner and that it does not suffice to show that the driving was permitted.*
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> ***Just as the inference may be drawn, from proof that the vehicle was owned by another, that the driver was driving as servant or agent of the owner*** *(Barnard v. Sully (1931) 47 T.L.R. 557),* ***so may a presumption arise, where it is proved that the driver at the time of the negligence was doing something which was in the interest of the owner or for his benefit, that the driver was then acting as a servant or agent of the owner. But when the full facts are known as they were in Hewitt v. Bonvin and as they are in the present case, such an inference and presumption may be unwarranted.*** *A person permitted to drive another's car does not become the latter's agent if, on his own volition, he uses it for the owner's benefit; a son driving his father's car with permission does not become his father's agent because, remembering that his father has a suit at the cleaners, he uses the car to collect it. Whether or not the driver is acting as agent of the owner is a question of fact. If the journey is at the owner's request as in Ormrod v. Crosville Motor Services Ltd. [1953] 1 W.L.R. 1120 or where the owner asks someone to bring the car down to the station to meet him, then the driver is doing an act for the owner and acting as his agent.*

Lest it be thought that these principles have never visited the shores of Jamaica let me refer to the case of ***Matheson***. In that case there was a collision between a truck driven by Herbert Lee and a bus owned by the plaintiff. At the trial it was held that the truck driver was solely to blame. One of the defendants was W.T. Soltau who was proved to be the owner of the truck. The other defendant, G.O. Soltau, brother of W.T. Soltau, was Herbert Lee's employer. Judgment was given in favour of W.T. Soltau and against G.O. Soltau. The plaintiff appealed against

the judgment in favour of W.T. Soltau. Clarke J speaking for the Full Court of the Supreme Court of Jamaica (the court that heard appeals before the establishment of the Court of Appeal in 1945) stated at page 74:

> *The onus was on the plaintiff of proving who was the master or principal of the truck driver at the time of the collision.*
>
> *The evidence that he produced on this point was that the defendant W.T. Soltau was then registered owner of the truck.* ***It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this 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.*** (my emphasis)

No cases were cited in support of this proposition. The case is not the worse for this because Clarke J was of the view that the proposition was so well accepted by the courts in Jamaica that nobody could seriously contend otherwise. This was as far back as 1933, two years after ***Barnard v Sully*** and seven years before ***Hewitt v Bonvin***. His Lordship went on to examine the evidence given by the defendants to rebut the presumption and concluded that it was not credible. The expression used to describe the evidence was "intrinsic incredibility". The effect of this "incredibility" was that "the prima facie presumption was not displaced but rather strengthened" (see page 75).

It is therefore plain as plain as can be that where there is proof that a vehicle was negligently driven by a person other than the owner, the fact of ownership, in the absence of any other fact, is prima facie evidence that the driver was the servant or agent of the owner. A denial in the pleadings that the driver was not the

servant or agent of the owner is not sufficient. There needs to be evidence in support of the denial. This is the only logical explanation for the decision in ***Barnard v Sully***. If a simple denial in the pleadings was sufficient then ***Sully's*** case could not possibly have been decided in the way that it was since, like Flash, all he did was deny the service or agency.

It seems to me that the rational for taking this approach to vicarious liability in this type of case rests upon the idea that in many instances it may well be impossible or difficult for the claimant to establish the full facts surrounding the agency or service if that is the case. In many instances the driver is not available. He may be named as a defendant but often times he cannot be served or made to physically appear at court. This judicially devised solution to the problem seems to be effective. There is no risk of injustice to the owner since the presumption is not difficult to rebut. An examination of the cases show this. However as ***Matheson*** points out, the rebutting evidence has to be credible. Surely the owner ought to be better able than the claimant to say what the relationship was between himself and the driver. What the cases also show is that although not much evidence is required to rebut the presumption, should it arise, but an unsuccessful attempt to rebut the inference may have the unintended effect of strengthening it (see ***Matheson***). Nothing is wrong with this approach.

In the present case the claimant has pleaded that Flash was the owner of the car. Flash has accepted that he was the owner. This admission has the effect of relieving the claimant of the burden of adducing evidence on this point since it is now an agreed fact. This therefore is the primary fact that may lead to the inference that the driver was the servant or agent of the owner. It is common ground that Winston Young was the driver of the car. Is there any other information in this case that would displace the inference of agency or service based upon the fact of ownership? It is at this point of the analysis I depart from Mr. Heywood. He says the denial is enough. It is not, because a denial does not

raise any presumption. A denial is not evidence. The denial does not have the same legal effect as an admission of ownership. The admission of ownership by Mr. Flash amounts to proof of ownership. However a denial of agency, unless accepted by the other party, does not establish that fact.

Like Sully, Flash has simply denied that the driver was his servant or agent but did not adduce evidence in support of the assertion and so like Sully, he will be vicariously liable if it can be established that the driver was indeed negligent. There is simply no more information illuminating the question of the possible service or agency. The conclusion in ***Rambarran*** was different from mine in this case because there was evidence coming from the owner, who was the father of the driver, that his son had authority to drive the car on his (the son's) own account as well as on the business of the father. The father had given evidence of the occasions on which his son would drive on the father's business. When the accident occurred the occasion was not one in which the son would be driving for the father. The evidence was that the father did not even know that his son was driving the car that day. Lord Donovan demonstrated that ***Rambarran*** did **assert and prove by evidence** that the car was not being driven for the father's purposes (see page 216). The instant case is one of mere denial without evidence. The evidence called on behalf of Flash in the person of Leonard Edwards did not provide any information at all. He simply said that he did not know if the driver of the car was driving with the permission or consent of the owner. The only remaining issue here is whether Winston Young was negligent.

Was Winston Young negligent?

(a) The claimant's testimony

The evidence from Curvey Campbell was that he was riding his motorcycle up Constant Spring Road towards Constant Spring. He decided to turn right, into Oakwood Apartments, across the right lane in which oncoming traffic would be

traveling. Mr. Campbell stated that before he turned, he was riding on his correct side of the road and when he reached the spot to turn right he stopped on the left side of the white line, waited and then he turned. As he turned he saw a car rushing towards him. He was hit when he was between 2 and 4 feet from the entrance to the apartments.

What was it that caused him to wait? The claimant testified that as he approached his turning off point he saw a car coming towards him. This car was not the car that hit him. This first car as it approached, turned on its right indicator. Another car had approached him from the opposite direction. This other car passed him on his right and went on its way. He added that while he was waiting by the white line, a car passed him on his left. This car also passed the car that had on its indicator. There is no evidence that the car that had on its indicator ever stopped. The impression is that that car was always in motion and Campbell stopped to determine which direction it would go. It was the switching on of the right indicator that revealed to Campbell that it intended to turn right.

As the car with the indicator began its right turn Campbell began his right turn. In other words the turning movement of himself and the car with the indicator was simultaneous. As he turned he saw the car that struck him careening down on him. It was speeding down to the car that was turning right, swung left to avoid hitting that car, then bore down on him and collided with him.

Mr. Campbell said that he did not see the car that hit him until it was 21 feet away. He added that at the point of impact he was about 2-4 feet from the entrance of Oakwood Apartments. He testified that the car swung further in his direction. However in my view as my subsequent analysis should demonstrate this manoeuvre by the driver of the car seemed to have been an agony of the moment decision.

I will now examine the details of Mr. Campbell's testimony more closely. I will set out the critical parts of the testimony as it relates to distances, movement and

visibility. Any evidence of distance and visibility is to be found in cross examination since his examination in chief is silent on these issues. He said that he could see for 100 feet in front of him from where he had stopped. He pointed out the distance that was estimated to be approximately 33 yards or 99 feet. Immediately on giving this answer he said that the maximum distance he could see was two chains. This would be 132 feet.

In answer to the court he drew on a piece of paper the relative positions of himself and the car that was turning right. By his demonstration he as well as this car was on the same side of the white line, namely his correct side as one goes to Constant Spring. This would have to mean that he ought to have had a clear view of the right lane in which traffic coming towards him would be traveling. If this is so why didn't he see the car that hit him before it was 21 feet away?

The clue to the answer is to be found in the following evidence. He said when he first saw the car that was turning right it was 30 feet from him. He knew from the indicator that it would be turning right. Here is the crux of the matter. He says that he actually saw the car turn right. He moved off before the car actually turned right. **At the time when he moved he saw the car that hit him coming from Constant Spring Road direction.** I believe he meant Constant Spring. When he saw the car that hit him coming he had already moved from the middle of the road where he had stopped. He did not see this car until, on his evidence, it swung from behind the car that was turning right. By the time he saw it, he was already moving across its path. This account raises this question: if he was keeping a proper look out why didn't he see this car? This evidence stands in sharp contrast to the diagramme that he drew indicating positions of himself and the car turning right. It will be recalled that based on his drawings he ought to have seen the car that hit him. This difficulty in the evidence raises two questions: was the car that hit him also on the incorrect side of the road if indeed it suddenly appeared from

behind the turning car? or was it traveling on its correct side while the turning car was on the wrong side of the road? This was not cleared up in reexamination.

The claimant alleges that car that struck him was traveling very fast. It seems to me however that the real difficulty for the claimant was that he was moving from a position of rest. The car was in motion. If he first saw the car when it was 21 feet away having himself just moved off from a state of rest, it is not surprising that he would think that the car was traveling quickly. Assuming without deciding, for example, that it was traveling at 20 miles per hour it would have covered 29.33 feet in one second. In other words it would have borne down on Mr. Campbell very quickly indeed. If it was traveling at 30 miles per hour it would have reached to him even faster; at 50 miles per hour as alleged by the claimant, even quicker yet. If the car was traveling at 20 miles per hour it would have covered the 21 feet in just about the time that is called the reaction time.

On the claimant's testimony alone it is difficult to resist the conclusion that he was not keeping a proper look out. He says that he could see in front of him for 100 or 132 feet from where he had stopped. He saw the car that indicated that it was turning right approach him. There is no explanation for his failure to see the car that hit him other than his own negligence in not making sure that it was safe to turn before he did turn. There is no evidence that the car that hit him came from any place or direction other than from the same direction as the car that was turning right.

From all this testimony the mental picture that I have is this: as he approached his turn off point, he saw, coming towards him, the car that was turning right. He stopped. The car turning right was still in motion. At that point a car passed him on the left whicl also passed the car turning right. When the car actually began the turn, he, being now convinced that it was in fact turning right, began to move just as it began its turning motion and rode into the path of the oncoming car that he did not see because he was not keeping a proper look out. This is why, although

he could see 100 or 132 feet in front of him, he did not see the car until he had turned and it was 21 feet from him.

On this evidence I cannot conclude that Winston Young was negligent. I have arrived at this conclusion based solely upon the claimant's full evidence after cross examination. The evidence of Leonard Edwards, who testified for the first defendant, is of doubtful quality. At one point early in cross examination I began to wonder if he knew anything about the accident. What seemed to have unlocked his until then, very poor memory, was the question, how did the accident happen? His shuffling and muttering in the witness box when asked what should have been easy questions to answer if he were really there did not create a favourable impression at all. I do not accept it as reliable.

Conclusion

Winston Young was not negligent or contributorily negligent in the way that he drove the car. The cause of the accident was the failure by Curvey Campbell to ensure that it was safe before he turned across the path of on coming traffic. There is no other rational and reasonable explanation for his inability to see the car driven by Winston Young. When he saw the car at 21 feet away even if the car was traveling at 20 miles per hour it would have been down on him in less than a second to say nothing of the greater speed he indicated.

Judgment is therefore entered for the first defendant. Costs to the first defendant to be agreed or taxed.