IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV1208 of 2005

BETWEEN	**PRINCESS WRIGHT**	**CLAIMANT**
AND	**ALAN MORRISON**	**1ST DEFENDANT**
AND	**RICHARD CONOLLY**	**2ND DEFENDANT**
AND BETWEEN	**ALAN MORRISON**	**ANCILLARY CLAIMANT**
AND	**LOVENDA WHYTE**	**ANCILLARY DEFENDANT**

Ms. Carol Davis for the Claimant

Ms. Minto instructed by Messrs Nunes, Scholefield, Deleon & Co. for the Defendant

Heard on 4th and 6th day of March 2008.

VICARIOUS LIABILITY

Gayle J (Ag.)

I Gave an oral decision in this matter on March 6, 2008 and I now put my reasons in writing.

The claimant Princess Wright seeks to recover damages from the 1st defendant Alan Morrison alleging that she suffered personal injury, loss and damages and incurred expenses due to the negligence of Mr. Morrison's servant and/or agent the 2nd defendant Richard Connolly.

The ancillary claim by the 1st defendant has been discontinued.

The Claimant's Case

Princess Wright said that on the 17th July, 2004 she was a passenger in a white Toyota vehicle license #RA9853 driven by Raphael Palmer. She was in the front seat. On reaching Peyton Place along Hermitage Road, leading to August Town, the driver stopped to let off a lady. The driver stopped on the left hand side of the road and was stationary. Whilst there stationary a van hit into the back of the car in which was a passenger. The van is a grey Nissan frontier registration #5311DQ. It was driven by Richard Connolly, but she learned that the owner is the 1st defendant Alan Morrison. She said that as a result of the accident she suffered injuries.

On cross examination, she admitted that she did not know the 1st defendant, that she had never seen him before and that the 1st defendant was not the person driving the vehicle on the 17th of July 2004.

The Defendant's Case

Mr. Alan Morrison said he is the registered owner of a 2001 Nissan Frontier pick-up truck license #5311DQ.

He said that in July 2004, Richard Connolly was employed to him as a driver and bearer. That as a bearer Mr. Connolly would run errands for his company. As a driver, Mr. Connolly was responsible for transporting his children to and from school and other activities. He said Mr. Connolly on occasions would also transport his (Mr. Morrison's) wife.

Mr. Morrison said that Mr. Connolly would use the said pick-up and any of the other three vehicles at times to carry out his duties. That as a bearer, Mr. Connolly worked from Monday to Friday during normal working hours. In his capacity as driver, Mr. Connolly would start the day earlier as he is required to pick-up the children at about 6:00 a.m. to take them to school and that during school hours he would run errands for the office and for that reason Mr. Connolly is permitted to keep the vehicle at his house

at nights and on weekends as it made it easier for him to collect the children in the mornings. It was not intended for his private use. That the vehicle is to be parked at Mr. Connolly's premises in the evenings and on weekends.

Mr. Connolly was not allowed to use the vehicle for his own business except with permission. That on the 17th July, 2004 about 4:30 p.m. he learned about the accident from Mr. Connolly. Mr. Morrison stated that Mr. Connolly was not on any business for him at the time of the accident, he had no duties assigned to him that day in relation to the children and he was not on office business. He also stated that he had not given Mr. Connolly any permission to use the vehicle on the 17th July 2004 and that Mr. Connolly had not sought his permission.

Under cross examination, he explained that Mr. Connolly was employed to provide service for him and his company. That Mr. Connolly was given the vehicle to do company business not for his own private use and that outside of company business or personal business it was only if he (Mr. Morrison) gave permission could Mr. Connolly use the vehicle. He said that the vehicle is sometimes parked at the other partner's premises but Mr. Connolly kept it that weekend. He said he gave no permission to Mr. Connolly to use the vehicle on that day.

SUBMISSIONS

Ms. Davis submitted that Mr. Connolly was employed to drive and was driving at the time of accident. That the fact that Mr. Connolly was driving the vehicle made Mr. Morrison liable. She relied on the Canadian Case of ***Pacific Railway Company v. Lockhart*** [1942] A.C. 592., which stated that an expressed prohibition by a master still makes the master liable if the negligence was caused by the servant carrying out an authorized duty or act by an improper and unauthorized method.

Ms. Minto submitted that Mr. Morrison was not liable because at the time of the accident Mr. Connolly had no permission to drive the vehicle. She contended

that Mr. Connolly was not on any business for Mr. Morrison or his company and that he was instead on his own private business. In her submission she relied on the case of ***Avis Rent-a-car Limited v Joyce Maitland*** (1980) 17 Jamaica Law Reports 153, which approved the principle that the employer will not be liable if at the time of the accident the vehicle was being used for purposes in which the owner had no interest or concern.

LAW

Ownership of a car is prima facie evidence that it was being driven by the owner, his servant and/or agent. It is well settled that where an owner of a vehicle at the time of an accident was not himself driving the vehicle, he will not be liable for damage caused through the negligence of the person who was in fact driving, unless at the time, the person driving was the servant or agent of the owner. Ownership of a vehicle in those circumstances raises an inference that at the time of the accident the driver was the servant or agent of the owner.

In the case of ***Rambarran v. Gurrucharran*** (1970) 1 All E.R. 752 Lord Donovan at p.751 said:-

> "*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.*"

He went on to say at p.753 that:

> *"The appellant, it is true could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in*

either of two ways. One, by giving or calling evidence as to [the driver'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 over thrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that [the driver] was not driving as his servant or agent, then the actual purpose of [the driver] that day was irrelevant."

It follows from the cases that in order to fix vicarious liability on the owner of the motor vehicle it must be shown that:

1) The driver was using the car for the owner's purposes under the delegation of a task or duty.
2) The owner 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.
3) The car is being used wholly or partially on the owner's business or in the owner's interest.

Consequently, the owner will only escape liability when it is shown that the vehicle was at the material time being used for purposes in which the owner has no interest or concern.

ANALYSIS

The claimant was unable to adduce any evidence to show that the 1st defendant had given the 2nd defendant permission to use the car on that day. The claimant strenuously sought to persuade the court that the 1st defendant was

vicariously liable based on the principle laid down in the Canadian Case of ***Pacific Railway Company v. Lockhart*** (Supra).

In that case the employer had issued specific prohibitions against employees using personal uninsured vehicles to carry out company business. One employee disregarded the prohibition and used his privately owned uninsured vehicle as a means of executing his work during which time he injured the claimant/respondent and the employer was held liable. The court held in that case that the means of transportation was incidental to the execution of that which he was employed to do, and that the prohibition against the use of an uninsured motor-car merely limited the way in which, or by means of which he was to execute the work, and that breach of the prohibition did not exclude the liability of the company to the respondent.

On the facts in this case the court could not be persuaded by ***Pacific Railway*** as counsel submitted, on the basis that the principle in ***Pacific Railway*** (Supra) presumes that the driver was carrying out an assigned and authorized duty, and the question for the court was merely whether the method by which he did so was sufficient to take the act out of the scope of his authorized duty. In the instant case the issue raised is not concerned with the fact that the 2nd defendant was driving the 1st defendant's vehicle but rather whether he was carrying out the purposes assigned by the 1st defendant in other words, whether he was driving with the permission of the 1st defendant, at the time of the accident. If the answer to the critical question in this case is no, then the prohibition not to use the vehicle without the 1st defendant's permission must be seen as continuing and the 1st defendant cannot therefore be held liable.

There is evidence coming from the owner indicating the occasions on which the driver would drive on company business and those occasions when he would drive for Mr. Morrison personally. When the accident occurred this was not one such

occasion when the driver would be driving for the company or for Mr. Morrison personally.

The evidence of Mr. Morrison was that he did not know that the 2nd defendant was driving the car that day. It was a weekend, school was out and there would have been no need for the 2nd defendant to pick up or drop of the children from school. Further he had not asked the 2nd defendant to do any business in relation to the company neither did the 2nd defendant seek his permission to use the vehicle on that day. The evidence of the 1st defendant is that the car was not being driven partially or wholly for his purposes that day, the 2nd defendant was on a frolic of his own.

No evidence was provided by the 2nd defendant as he was not served by the claimant.

FINDINGS

In the absence of any evidence to challenge the 1st defendant's evidence, I therefore find:

1) That the accident took place on the 17th day of July 2004
2) That the 2nd defendant was the driver on the 17th day of July 2004
3) That the 2nd defendant was employed to the 1st defendant as a driver
4) That the claimant sustained injuries as a result of the accident
5) That no permission was sought by the 2nd defendant to use the vehicle on the 17th day of July 2004
6) That no permission was given to the 2nd defendant to drive the vehicle on the 17th day of July 2004
7) That the vehicle was not being driven for the 1st defendant's purpose, interest or concern on the 17th day of July 2004

CONCLUSION

I accept the defendant's evidence as sufficiently cogent and credible. I find therefore on a balance of probabilities that the 1st defendant is not vicariously liable for the acts of Mr. Connolly on the 17th day of July 2004.

Cost to the 1st defendant to be agreed or taxed.