

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2014/CLE/gen/00690

BETWEEN

ERNESTINE POITIER

Plaintiff

AND

BAHAMAS EQUIPMENT RENTAL CO. LTD.

First Defendant

AND

HENRY CARILLO OLAYA

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

**Appearances: Glendon Rolle for the Plaintiff
Camille Cleare for the First Defendant**

11 April 2019, 21 August 2019

JUDGMENT

WINDER, J

This is a personal injury claim by the plaintiff (Poitier) arising from a traffic accident. The trial proceeded against the first defendant (BER) alone. The parties have agreed for a split trial. This is my decision on liability.

1. The relevant portions of the Statement of Claim of Poitier provides:

1. At all material times:
 - a. The Plaintiff was a citizen of the Commonwealth of The Bahamas;
 - b. The First Defendant was the owner of a 1995 Isuzu Big Horn Jeep, registration #202877 (hereinafter referred to as “the B.E.R vehicle”); and
 - c. The Second Defendant was the operator of the B.E.R vehicle.
2. On or about the 14th October, 2011 at approximately 3:15 pm, the Plaintiff was driving her 2009 Kia Sportage, Registration Number 218149 south on Bethel Avenue on the Island of New Providence, one of the Islands of the Commonwealth of the Bahamas.
3. As the Plaintiff approached the roundabout and her vehicle came to a stop, she was rear-ended by the B.E.R. vehicle driven by the Second Defendant.
4. A Royal Bahamas Police Force Medical Form was completed by the Officer-in-charge on behalf of the Plaintiff who, at that time, complained of neck and lower back pain.
5. Consequently, on the 17th October, 2011, the Plaintiff visited the Walk-In Clinic located at #35 Collins Avenue on the Island of New Providence aforesaid where she was assessed and diagnosed with muscle/musculoskeletal pain.

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9. As a result of the breach of duty and/or negligence of the Second Defendant, the First Defendant is held vicariously liable:-

PARTICULARS OF BREACH OF DUTY AND/OR NEGLIGENCE (SIC) OF THE FIRST DEFENDANT

- a) Failing to control the actions of the Second Defendant while in the course of his employment; and
- b) Failing to foresee the risk of the Second Defendant’s actions.

PARTICULARS OF BREACH OF DUTY AND/OR NEGLIGENCE (SIC) OF THE SECOND DEFENDANT

- a) Failing to drive with due care and attention;
 - b) Failing to exercise reasonable care and skill in the operation of a vehicle; and
 - c) Failing to meet the standard of an ordinary and reasonable driver.
2. Save for admitting ownership of the 1995 Isuzu Big Horn Jeep and giving permission to the second defendant, BER denied the claim. At paragraph 4 of the Amended Defence it says:
 4. The First Defendant denies the allegations of negligence in paragraph 9 of the Statement of Claim as alleged or at all and puts the Plaintiff to strict proof thereof. Further, the First Defendant says that the Second Defendant was given permission to use its 1995 Isuzu Big Horn Jeep but he was not its employee. The Second Defendant was employed as a specialized rig operator by the joint venture Solentanche Bachy Cimas & Bahamas Marine Construction, who were part of the project of Baha Mar.
3. At trial Poitier alone gave evidence. BER called no witnesses.
4. In my view, having assessed the evidence, liability for the second Defendant, Henry Carrillo Olaya (Carrillo) is not seriously in doubt. BER offered no evidence as to what transpired on 14 October 2011. I accept the evidence of Poitier, that on 14 October 2011 she was at a complete stop in the vicinity of Bethel Avenue, south of the roundabout, when she was rear-ended by the 1995 Isuzu Big Horn Truck driven by Carrillo. I am satisfied therefore that Carrillo breached his duty of care as a road user and that this breach of duty caused damage and loss to Poitier. The real issue for determination in this case is whether BER is to be held vicariously liable for the action of Carrillo.
5. The Statement of Claim alleges negligent driving against Carrillo and vicarious liability against BER on the basis that Carrillo was an employee/agent of BER at the time of the accident. The evidence of Poitier, in her examination-in-chief, was that Carrillo was an employee of BER. She accepted under cross examination that she could not say whether he was or not.

6. The Defence admits that BER owned the vehicle and that Carrillo was permitted to drive the vehicle but denies that he was its employee. BER alleges that Carrillo was employed by a joint venture between Soletanche Bachy Cimas and Bahamas Marine Construction and was acting to their order, if any, at the time of the accident.
7. BER called no witnesses but relies on a letter dated 5 January 2011 by Vania Villalobos on a letterhead purportedly captioned "*Soletanche Bachy Cimas/Bahamas Marine Construction Joint Venture*". The letter is addressed to a Mr. Moncur of Insurance Management. The letter provides:

Dear Mr. Moncur:
Insurance Management

- On October 16th 2011, Mr. Carillo was involved in an accident near Town Centre Mall; he rear-ended another vehicle while on his way home.
- The car Mr. Carillo was driving belongs to the company Mosko Construction.
- Police was called to the place of the event and took note of it.
- Mr. Carillo received two documents from the police and was told to go home.
- Mr. Carillo's job stopped for a break on November 10th 2011 so he was sent back to his natal Colombia
- Before Mr. Carillo left he handed the documents to his immediate boss.
- Days after I received the documents I went to 3 different police stations to find out how to proceed on this matter. I was told that Mr. Carrillo had to go to court.
- The firm Munroe and Associates was approached to push Mr. Carrillo's court date for when he returned to the island.
- Mr. Carrillo is employed as a specialized rig operator by the joint venture Solentanche Bachy Cimas & Bahamas Marine Construction who are part of the project of Baha Mar.
- I want to make note that Mr. Carrillo understands very little English and he is unfamiliar and unaware of how things proceed in the island, at the time of the accident he had been here for less than six months.

Mr. Carrillo has returned to the island today, please if you see necessary his presence in your office you can call me at 4490900 to arrange a meeting with you.

Regards,
Vania Villalobos.

No evidence was led as to who the writer of the letter, Vania Villalobos or the recipient of the letter, Mr. Moncur, are. Additionally the letter is clearly incorrect as it cites the ownership of the vehicle as belonging to Mosko Construction when BER has admitted it is the owner of the vehicle. I therefore attach little weight to the contents of the letter.

8. BER also relies upon a completed Motor Accident Report Form for Insurance Management which they say Carrillo completed on 12 January 2012. Under the rubric, The Insured, he answered the questions as follows:

Name: Bahamas Marine Construction

- a. Is the Vehicle owned by the Insured? Yes.
- b. –
- c. Was the Vehicle being used on the insured's order or with his permission? Yes
- d. For what purpose was the Vehicle being used? Business.

No evidence was led that Carrillo, who it is said does not speak English, did in fact complete the form himself. In fact, parts of the form is written in the third person suggesting he did not complete the form. Clearly the form contained inaccuracies as the car was said to be owned by Bahamas Marine when BER has admitted that the vehicle was owned by it and that it gave permission to Carrillo to use the said vehicle.

9. BER in its submissions sought to place reliance on what purported to be a release given by Attorney Anthony Thompson on her behalf. No evidence was led by BER as to how any purported lease came about save that it was solicited from the plaintiff that Anthony Thompson was her lawyer and Insurance Management settled some of her expenses. More importantly no reference to any release is pleaded by BER in its defence. In the circumstance these submission by BER were rejected by the Court.

10. BER relies on the dicta of Lord Wilberforce in MORGANS (WIDOW) V LAUNCHBURY (A.P.) AND OTHERS (A.P.) [1972] UKHL, [1973] AC 127 where it was stated:

“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 owners’ purposes, under delegation of a task or duty.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. And the appearance of the words in certain judgments (*Ormrod v Crosville Motor Services Ltd.* [1953] 1 W.L.R 409 per Devlin J. *ibid* 1120 per Denning L.J.) in a negative context (no interest or concern, therefore no agency) is no warrant whatever for transferring them into a positive test. I accept entirely that “agency” in contexts such as these is merely a concept, the meaning and purpose of which is to say “is vicariously liable” and that either expression reflects a judgment of value – respondent superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorized the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor’s conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorized or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well. They provide, if there is nothing more, a complete answer to the Respondents’ claim against the Appellant.”

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11. BER also relies on the Privy Council decision in ***Rambarran v Gurrucharran [1970] 1 ALL ER 749*** and the discussion by ***Lord Donovan*** who gave the opinion of the Board discussing the process of the shifting of the burden of proof. The inference is that the driver is a servant or agent of the owner of the vehicle but this “*may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes.*” Donovan LJ SAID:

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 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 defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant. In any event the complaint that the appellant led no positive evidence of the purpose of Leslie's journey comes strangely from the respondent who could have found it out by making Leslie a co-defendant and administering interrogatories, or compelled his attendance as a witness and asked him questions about it. He did none of these things.

12. I accept BER's admission in its defence that Carrillo was the driver of its vehicle and had its permission to use the vehicle as an inference that Carrillo was its servant or agent. Notwithstanding its denial in the defence, I find, on balance, that this inference was not *displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes*. In fact, BER gave no evidence at all as to the nature of the permission granted. Further notwithstanding Bahamas Marine Construction was identified as the owner of the vehicle, the purported statement of Carrillo was that he was engaged on the business of the insured, who was BER.

13. On the evidence which I accept, I find that Carrillo was, at the material time, acting as the servant or agent of BER and BER was therefore vicariously liable for his actions. I therefore give judgment for Poitier on the issue of liability and direct that the Registrar conduct an assessment of damages. Poitier to have her costs to be taxed if not agreed.

Postscript

14. The Judgment of the Court will not take effect until Tuesday, 28 April 2020.

Dated the 7th day of April A. D. 2020

Ian R. Winder

Justice