

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2017/0014

BETWEEN:

DONNA MANDISON

Claimant

and

[1] BRENT LEWIS
[2] RANDY JOSEPH

Defendants

Appearances:

Mr. Cosbert Cumberbatch Counsel for the Claimant

Ms. Eunica Anthony-Victor Counsel for the 2nd Defendant

2020: February 3rd;
2020: February 7th

JUDGMENT

Preliminary

- [1] **KELSICK, J [Ag.]:** The 1st Defendant was served with the Claim Form and Statement of Claim on 13th January, 2017 but he has taken no part in the proceedings to date, and, as far as I can tell from the file, was not served with the notice fixing the case management conference nor the orders made thereat or any adjournment thereof.
- [2] The trial was therefore restricted to the claim against the 2nd Defendant.
- [3] At the trial, Mr. Cumberbatch indicated that Mr. Radford Peters was not available to give evidence. To avoid vacating the trial date, I suggested that, as Mr. Peters was a witness as to the quantification of damages, the trial could proceed on the issue of liability only. The parties agreed and the trial proceeded accordingly.

Issues

- [4] The Claimant seeks damages against the 2nd Defendant arising out of a motor vehicle accident which occurred on 15th January, 2014. The Claimant's motor vehicle, whilst in a parked position outside her home on Alley Road, St. John's was struck by a motor vehicle being driven by the 1st Defendant, but owned by the 2nd Defendant. The basis of claim against the 2nd Defendant is that he is vicariously liable for the negligence of the 1st Defendant.
- [5] At the trial, the issue whether the 1st Defendant was negligent in colliding with the Claimant's vehicle was not canvassed and attention was paid primarily to the issue of vicarious liability. This is perhaps not surprising because absent a credible explanation, it is more probable than not that collision with a stationary vehicle is the result of negligent driving.

Vicarious Liability

- [6] There was no controversy between the parties as to the circumstances in which vicarious liability is engaged. It will therefore be sufficient to refer briefly to two statements of principle.
- [7] In **Nicholls v Tutt** [1992] 41 WIR 140, Floissac CJ cited the following statement by Lord Wilberforce from **Morgan v Launchbury** [1972] 2 All ER 606 at page 609:

“For I regard it as clear that in order to fix vicarious liability on the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on ‘interest’ or ‘concern’ has nothing in reason or authority to commend it.”

- [8] In **Omrod v. Crosville Motor Services Ltd** [1953] 1 WLR 1120, Singleton LJ said:

“It has been said more than once that a driver of a motor-car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency...”

The Case Against the 2nd Defendant and the Evidence

- [9] In paragraph 4 of her Statement of Claim, the Claimant referring to the 1st Defendant stated, “the driver of the vehicle C10894 was driving the said vehicle with the knowledge and authority of the Second Defendant...and that the said Second Defendant is also vicariously liable for the act of the First Defendant”.

- [10] As is plain from the extract from **Omrod** set out above, this pleading is clearly insufficient to found vicarious liability.
- [11] In paragraphs 5 and 6 of his Defence, the 2nd Defendant provided more detail of the circumstances. He stated that the 1st Defendant was an employee of Keeve's Car Wash situated in Urlings Village and that it became a settled course of conduct for the 2nd Defendant to deliver his vehicles to the car wash to be washed and cleaned after which the 1st Defendant would return the vehicles to the 2nd Defendant. On or about the 14th day of January, 2014 as part of this settled course of conduct the 2nd Defendant delivered one of his vehicles to the 1st Defendant with specific instructions to have it driven to the car wash the following morning. For this purpose the 1st Defendant was authorised to drive the vehicle to his home in Bolan's Village and park it there overnight.
- [12] This pleading opened the door to a different basis of liability other than that pleaded by the Claimant: because the vehicle was delivered to the 1st Defendant to be driven to the car wash, was it being driven at the relevant time by the 1st Defendant for the 2nd Defendant's purpose?
- [13] This is the central issue in the case.
- [14] The Claimant unsurprisingly gave no relevant evidence, save for one matter to which I shall return later. She was not privy to the arrangements between the Defendants.
- [15] The 2nd Defendant's witness statement was much to the same effect as his Defence. He said that he delivered the vehicle to the 1st Defendant at about 5:00 p.m. at Jolly Harbour. He said further that the 1st Defendant was according to the expressed understanding and agreement prohibited from driving the vehicle to any other destination for any other purpose. He drove by the 1st Defendant's home some hours after 11:30 p.m. to midnight and was satisfied that the vehicle was safely parked there.
- [16] It is common ground that the accident occurred at some time around 4:00 a.m. It is not necessary to determine the precise time.
- [17] In cross-examination, the 2nd Defendant stated that the accident occurred in St. John's which was in an opposite direction to where the car wash was relative to Bolan's Village where the 1st Defendant lives. After the accident, the Claimant, also in cross-examination, said she observed the 1st Defendant, whom she knew, and saw that he did not appear to be in work clothes. In re-examination, she said that by this she meant that the 1st Defendant was in jeans and a T-Shirt. For the first time she also indicated that there was a second man in the vehicle with the 1st Defendant but (in answer to a question from the Court) that this second man was not the 2nd Defendant.
- [18] In cross-examination of the 2nd Defendant, counsel for the Claimant sought to elicit evidence to suggest that the 2nd Defendant ought to have been aware that the 1st Defendant would use the vehicle for his own purposes and to suggest that the 2nd Defendant ought to have exercised more control over the 1st Defendant.
- [19] This evidence would have been relevant to a claim against the 2nd Defendant that he owed a duty to the Claimant to ensure that he did not provide a vehicle to a driver of whom it was reasonably

foreseeable that he would get into an accident because, for example, he was an obviously incompetent driver. However, no such case was ever pleaded by the Claimant.

Findings and Conclusion

[20] I find as follows.

[21] The vehicle was delivered by the 2nd Defendant to the 1st Defendant on 14th January, 2014 for the sole purpose that the 2nd Defendant take it to the car wash the following morning. The vehicle was driven by the 1st Defendant to his home in Bolan's Village and parked outside his house where it remained when the 2nd Defendant drove by his home some hours after 11:30 p.m. to midnight.

[22] At some point between when the 2nd Defendant drove by the 1st Defendant's home and about 4:00 a.m., the 1st Defendant drove the 2nd Defendant's vehicle to St. John's where he damaged the Claimant's vehicle.

[23] In so driving, the 1st Defendant was not engaged in any purpose of the 2nd Defendant. This finding is based on the evidence of the parties referred to above as well as on the factor that the burden of proof is on the Claimant. The Claimant led no evidence as to the purpose for which the 1st Defendant was driving the vehicle at the relevant time and the time of the accident and the evidence she gave as to the 1st Defendant not being in work clothes suggests it was not work related.

[24] The 2nd Defendant is therefore not vicariously liable for the damaged caused to the Claimant's vehicle by the 1st Defendant.

[25] In the result, I order as follows:

1. The Claim against the 2nd Defendant is dismissed;
2. The Claimant shall pay the 2nd Defendant's costs in an amount to be assessed if not agreed within 21 days.

Damian Kelsick
High Court Judge (Ag.)

By the Court

Registrar