THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2006/0155

BETWEEN:

McLEE HENRY
AGNES HENRY

Claimants

and

GLORIA JOSEPH
GAVIN MATTHEW

Defendants

Appearances:
Ms. C. Debra Burnette & Ms. Jasmine Wade for the Claimants
Mr. Charlesworth O.D. Brown for the Defendants

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2007: November 27
2008: September 26
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JUDGMENT

[1] **Harris J:** The first-named Claimant, McLee Henry, a retired Director of Pharmaceutical Services with the Government of Antigua and Barbuda, was driving his left hand drive vehicle in a westerly direction along the All Saints main road. His wife Agnes, the 2nd named Defendant, was sitting in the right side front passenger seat at the time. The second-named Defendant, Gavin Matthew was at the same time driving a motor vehicle owned by the 1st Defendant, Gloria Joseph. He was driving some distance and out of site behind McLee Henry but in the same direction, on All Saints Road.

[2] On approaching the exit to Herberts Road, McLee Henry could see some 300'[1] behind him, at which point the bend in the road prevented any further view of oncoming traffic. Herberts Road was located to the right hand side of All Saints Road and required McLee Henry to cross over from his lane, through the oncoming right side lane and onto Herberts Road. On giving notice of his intention to turn onto Herberts Road by putting on his right indicator light, he slowed down and, ensured the path was clear behind him by looking into his rear view mirrors, he proceeded to make a right turn across All Saints Road.

[3] At the same time, Gavin Matthew was proceeding along the said road and in the same direction as that of McLee Henry, at a fast rate of speed. On passing from the back, along the right side of Mr. Henry's vehicle, he collided with Mr. Henry's vehicle as he, Mr. Henry, started to make his right turn across the All Saints main road.

[4] On impact, the vehicle driven by Gavin Matthew careened across the road and into a ditch coming to a standstill up to some 269'[2] feet away from the point of impact. Considerable damage was done to both vehicles.

[5] The 1st Claimant is alleging that he took all reasonable precautions by slowing down, putting his indicators on and looking into his side and front rear view mirrors before attempting to cross over to Herberts Road. The Claimants aver that the Defendant, Gavin Matthew, was driving at a fast rate of speed and Mc lee Henry suggested that fact, as why he saw no oncoming vehicle through his rear view mirror for the 300' unobstructed view that he had; and that the defendant's rate of speed was so fast that he, the defendant, travelled the 300' between Mc Lees Henry's rear mirror observation and the point of his slight turn to cross the road to Herberts Road.

[6] The 2nd Defendant, Garvin Mathew, on the other hand, is alleging that he saw the Claimant from a distance. He, the claimant, was at a stand still on the verge of the road in the vicinity of the Herberts Road intersection, alleges Garvin Mathew. He said that without

[1] The 2nd defendant's evidence was that the distance is approx. 330'-400'.
[2] The claimant gave evidence of the Defendant's vehicle travelling a far distance before coming to rest. The defendant did not dispute this, but sought instead to explain why he ended up so far away.

any notice McLee Henry drove onto the roadway and partially across it, into the path of his vehicle. Gavin Matthew alleges further, that in the circumstances he was left with no time to take any evasive action. The Defendant contends that the Claimant is wholly at fault or substantially contributed to the collision and damage.

[7] There arise several issues in this matter, namely:

(i) Whether the 1st named Claimant, McLee Henry was negligent or contributarily Negligent in driving his motor vehicle in such a manner so as to cause the collision with Gavin Matthew, the 2nd named Defendant or substantially contribute to the resulting Loss and Damage.

(ii) Whether the 2nd Defendant, Garvin Mathew, was negligent or contributarily negligent in driving his motor vehicle in such a manner so as to cause the collision with Mc Lee Henry or substantially contribute to the resulting Loss and Damage.

(iii) Whether the Claimants and/or Defendants suffered any loss, damage and injury.

(iv) Whether the 1st named Defendant/vehicle owner, is vicariously liable for the loss and Damage occasioned by the negligence of the 2nd named Defendant.

ISSUE (i)

Was the Claimant negligent and caused the collision with Gavin Matthew or substantially contribute to the damage and loss occasioned by the collision?

[8] The evidence of the 2nd Defendant, Gavin Matthew is that he observed the vehicle of the 1st Claimant, McLee Henry, at a standstill on the left verge of the All Saints main road. Further that he observed the Claimant's vehicle move suddenly onto the road and across his path without giving any signal or other notice of the manoeuvre. The Claimant disputes this[1].

[9] McLee Henry contends that he was neither at a standstill on the verge of the All Saints main road nor did he fail to indicate that he was turning into Herberts Road. He said that he did look through his rear view mirrors and did not see the Defendants vehicle for the

[1] In cross-examination: "I did put on my indicator light. I did not omit to take the signal … I did indicate to make sure it was safe for me to turn. My indicator was working".

300' distance to the bend on the road. In his evidence when the suggestion was put to him by counsel for the Defendant, he answered in the affirmative to the question from counsel for the defendant, that there may have been a "blind spot" in his rear view mirror span-of - vision. Further, he acknowledged that he did not physically turn around to look back at the traffic behind him. In the circumstances of this case, the conditions on the roadway at the material time and the manner in which the question to the Claimant was framed, I do not find that the Claimant's acknowledgment that there may have been a blind spot using his mirror, is proof of or in any event amounts to, an act of negligence[1] on the part of the claimant**.** He was merely acknowledging its theoretical possibility when put to him.

[11] For Gavin Matthew to have come around the clear bend some 300' behind the Claimant, after McLee Henry had observed the road as clear and to end up alongside the Claimant just as he was turning towards Herberts Road, Garvin must have been travelling at a faster rate of speed than was appropriate and safe in the circumstances. Our road conditions routinely present intersections in close proximity to blind corners at which cars are at a stand still or turning across the roadway to enter the abutting minor road. A driver must drive with these conditions in mind. It is simply an inescapable and perpetual incidence of responsible driving in this jurisdiction.

[12] I accept the evidence that the Claimant was on the main road, slowed down and indicated his intention to turn right just as any prudent driver would be required to do in the circumstances. I do not find that the Defendant's vehicle, as contended by the 2nd Defendant, was *'lost'* in any contrived *'blind spot'* in the Claimants rear view mirror. The facts in this case, as I have found them to be, do not support the allegation of negligence on the part of the Claimant. In the absence of a finding of negligence on the part of the claimant; I find further, that there is no sufficient evidence to suggest that the claimant negligently did anything or failed to do any thing, that substantially contributed to the loss and damage occasioned by the collision.

[1] In cross-examination of McLee Henry: *"There was no indication that the vehicle was in my blind spot".*

ISSUE "(ii)"

Was the 2nd Defendant, Garvin Mathew, negligent and caused the collision with the vehicle of Mc Lee Henry or substantially contribute to the Damage and Loss occasioned by the collision?

[13] The 2nd Defendant Gavin Matthew, asserted that the Claimant was at a standstill on the verge of All Saints Main Road[1]. He said further, that when the Claimant suddenly moved off from the verge of the road onto the main road and crossed his path, the Claimant did so without any indication of his intent. The Defendant denied driving fast as alleged by the Claimant[2]. He said that he tried to avoid the collision by swerving away, but was unable to avoid it. Further, that upon impact, his vehicle lost power and as a consequence he lost control over it and ended up in a ditch some greater distance away than he would have, had he had control over it.

[14] I do not assess the 1st Claimant as a man with a "death wish". I do not accept that McLee Henry, with full view and knowledge of the Defendant's oncoming vehicle to the back of him, attempted to drive across the main road to make the turn onto Herberts Road. I accept that the Defendant was driving at a fast rate of speed and oblivious to the indications, the real and not fanciful possibilities in relation to the claimant's vehicle movement and oblivious to the actual movements of the Claimant's vehicle at the well known and not insignificant intersection[3].

[15] Both Claimants spoke of their observation of the Defendants fast rate of speed. I accept this evidence as inherently consistent with the other factors that point to the rate of speed. This evidence is coupled with the evidence of the extent of the damage to both vehicles and the resting place as it were, of the Defendant's vehicle after the collision[4]. Further, I

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[1] In cross-examination Gavin Matthew said: *"As you take the corner you have 300'-400' visual sight to the point of impact."*

[2] *"I disagree that it would take 5 seconds from the corner to the point of impact driving at 70 mph. I cannot say how long it would take. I cannot say how long I took. I was travelling about 40-45 mph'.*

[3] The Defendant acknowledged in cross-examination that: *"...I am familiar with the Highway Code. I am familiar with the rules which forbids taking over another vehicle at a junction" and later on "I was going to drive past the Claimants vehicle".*

[4] I have considered the 2nd Defendant's explanation for the post collision distance travelled.

accept the evidence of the Claimant that he observed the road behind him clear for some 300', shortly before turning towards Herberts Road. The short time[1] it took the Defendant to travel the 300' leaving the Claimant with no reasonable reaction time suggests a fast rate of speed.

[16] I note that the Defendant alleges to have had the Claimant's vehicle in his sight from about 300' away[2]. The Defendant ought to have been wary of the possible manoeuvre of the Claimants car at an intersection. His attention appeared to have been drawn to the Claimants car for it caught his attention, by his evidence, from 300' away. In cross-examination, Gavin Matthew, said that he did not stop, slow down, or blow his horn before the accident not having had the opportunity to do so but however, he took his **"***…precaution from up the road, long time. I did not indicate to the Claimant any caution because he was on the side of the road***"**. The defendant apparently just plunged his vehicle into the intersection without regard to the road conditions and the state of the traffic at the time.

[17] I find that Gavin Matthew, faced with the circumstances that prevailed at the time, including the existence of an intersection, the Claimant's car approaching the intersection at a slow rate of speed, the direction indicators activated showing the intended manoeuvre of the Claimant, and the fast rate of speed of the Defendant, ought to have earlier taken such steps and so managed his vehicle so as to avoid the collision. The Defendant did not have a classic right of way from which he could have assumed a primary passage. The Defendant acted negligently in the face of his duty as a driver confronted with the said circumstances. Whereas the claimant had to turn right across the main road to get access to Herberts Road; the Defendant did not have to overtake at that time for him to facilitate his continued journey along the main road. In short, there was no pressing utility in the actions of the Defendant. Further, the claimant in my judgment could not reasonably have avoided the consequences of the Defendants negligence.

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[1] The 2nd Claimant, Agnes Henry in cross-examination said: "*The Defendant's vehicle was just there, like a blink of an eye. The vehicle came very fast".*

[2] "I saw the vehicle from about 300' on the side of the road".

ISSUE "(iii)"

Did the Claimant and/or Defendant suffer any loss, damage and injury?

[18] The loss and damage alleged by the parties in these proceedings, evidence-in-chief and cross-examination remain unchallenged and the successful party entitled to an award as pleaded. Save however, for the 1st Defendant's counterclaim for loss of use for 90 days. There is no evidence that it takes 90 days to fix the vehicle. Delay related to the mechanics work load, or indecision of the Defendant is not to be wholly attributed to the Claimant. 30 days would have been a reasonable loss of use period. Both parties led supplemental evidence to reduce the value of the loss of the vehicle by their respective salvage values. Neither party led evidence of actual financial outlay between the accident and trial for the court to apply any interest to.

ISSUE "(iv)"

Is the first named Defendant, Gloria Joseph, vicariously liable for the negligence of the 2nd named Defendant?

[19] There is no dispute that Gloria Joseph is the owner of the vehicle driven by Gavin Matthew. She acknowledges the vehicle as her own in paragraph 2, 3, 5, 6 of her witness statement at pp 34 of the Trial Bundle and tacitly, in her evidence in cross-examination.

[20] Gloria Joseph's evidence is that: *"on or about October 31, 2004, the Second Defendant was driving my said vehicle with my consent and approval'"*. In amplification of her evidence at trial she said that she was a business woman. In cross-examination she said that: *"I run a supermarket for 21 years. It is Gloria's Supermarket".*

[21] Gavin Matthew gave evidence that he was a floor manager at Gloria's Supermarket and that he had a passenger in the car with him, one Laurencia Joseph, a family friend, and that they were: *"… going back down to the supermarket to collect something".*

[22] Neither Gloria Joseph nor Gavin Matthew gave sufficient evidence to establish for whose benefit the trip to the supermarket was. In the absence of evidence to the contrary, the

facts give rise to the cogent presumption that Garvin was driving at least, in part, for some purpose of the 1st defendant.

THE LAW - VICARIOUS LIABILITY

[23] Put shortly, generally a person will be vicariously liable only where the tortfeasor is that person's servant acting in the course of his employment[1].

[24] This principle extends liability upon an owner of a vehicle or 'casual agents' of the owner where the agent drives wholly or partly for the purposes of the business of the owner. ***Kodilinyne*** has described the 'casual agents' to include the owner's wife, son, daughter, friend or even a stranger.

[25] I take the law applicable to this case with respect to vicarious liability to be that which is set out by Denning LJ in **Ormrod v Crossville Motor Services Ltd 1953 2 All ER 753, pp 754, 755**. I set it out here for convenience:

> **"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent that to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owners purposes.**
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> **The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his fiend or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver".**

[26] Where do the facts of this case fall? Clearly Gavin Matthew did have the "consent and approval" to drive the vehicle, from the owner Gloria Joseph. Whether the vehicle was not wholly or partly used on the owners business or for her purposes is somewhat unclear.

[27] In **Hewitt v Bonvin [1940] 1 KB 188**, where a father lent his son his car to take the son's female companion home, the father was held not liable for the loss and injury caused by the sons negligent driving.

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[1] See Commonwealth Caribbean Tort Law, Gilbert Kodilinye 3rd edit, pp 338

[28] The Claimant must discharge the burden of proving the liability – vicarious in this case – of Gloria Joseph, the 1st Defendant. . The claimants must prove; **(i)** that Gavin Mathew was the servant or agent of Gloria Joseph; and **(ii**) that the act of negligent driving of Garvin occurred during the course of his employment or agency. The Defendant as an employee of the vehicle owner/1st Defendant and using his employers vehicle with her consent and approval and he returning to the work place in the employers vehicle to pick up something in the employers business place and his work place, all add up to a factual matrix supportive of the presumption that it was the Employer/1st defendant's business or for her purposes (in whole or in part) that the vehicle was being driven at the material time. In the absence of sufficient evidence to rebut this[1], the Court here finds that the 2nd Defendant is vicariously liable for the negligence of the 2nd Defendant, Gavin Mathew.

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[29] The counterclaim against the Claimants is therefore dismissed. The 1st Defendant's counterclaim falls with the judgment on liability against the 1st and the 2nd Defendant.

ORDER

[30] Judgment for the Claimants in the sum of **(i)** $33,185.00 in special Damages **(ii)** Interest on the Judgment sum at the rate of 5% from the date of Judgment to payment. **(iii)** The Defendants counterclaim is dismissed **(iv)** The Defendants to pay the Claimants Costs on the Prescribed Costs scale on the judgment sum above unless costs are otherwise agreed between all the parties within 12 days of this order.

DAVID C. HARRIS
Judge
High Court of Justice
Antigua and Barbuda

[1] See cases on the presumption of service or agency; Barnard v Sully (1931) 47 TLR 557, Alphonso v Ramnath (1997) 56 WIR 183 p 183 per Satrohan Singh JA , Rambarran v Gulcharan [1970] 1 All ER 749 PC, Manawatu County v Rowe [1956] NZLR 78. The presumption arises in favour of the Claimant in this case.