**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2010/CLE/gen/01289**

**BETWEEN**

**LANCE H. SANDS SR.**
**(father of the deceased Lance H. Sands Jr.)**
**AND**
**LONICE SANDS**
**(a Minor suing by LANCE H. SANDS SR., her Grandfather and next Friend)**
**AND**
**D'ANGELO SANDS**
**(a minor, suing by LANCE H. SANDS SR., his grandfather and next friend)**
**AND**
**LANCE H. SANDS III**
**(a minor, suing by BRIDGETTE D. MILLER, his mother and next friend)**

**Plaintiffs**

**AND**

**JIMMY EVELYN**

**First Defendant**

**AND**

**COMMONWEALTH BREWERY LIMITED**

**Second Defendant**

Before Hon. Mr. Justice Ian R. Winder

Appearances: A Pamela Sturrup Thompson for the Plaintiffs

Genell K. Sands for the Second Defendant

**25 July 2018, 13 February 2019**

## JUDGMENT

**WINDER, J**

This is a claim in negligence by the plaintiffs seeking damages arising from a traffic accident which claimed the life of Lance H. Sands Jr.

1. The named First Defendant (Jimmy Evelyn) was never served with any process, does not reside in the jurisdiction and as such was not a party to the proceedings. The allegation against the Second Defendant ("Commonwealth") is that it is vicariously liable for the negligence of Jimmy Evelyn.
2. The Statement of Claim outlined the claim of the plaintiffs, as against Commonwealth, as follows:

> 2. At all material times the deceased was a rider on a Black and Yellow Suzuki GSX 600cc Motor Cycle, registration number 944, and The First Defendant Jimmy Evelyn of Sandy Port, was at all material times the driver of a Silver 2008 Ford Explorer, Licence Plate Number 205362 registered to the Second Defendant by whom he was employed.
> 3. On or about the 25th October, 2009 around or about 1:05 a.m. the deceased was travelling south on Prospect Ridge Road in the vicinity of the Water and Sewerage Plant Station when the accident occurred.
> 4. On approaching the junction just south of the said pumping station, the First Defendant driving a Ford Explorer, registration number 205362 registered to the Second Defendant emerged from the side road and pulled out across the traffic and caused a collision with the motor cycle of the deceased.
> [5] As a result of severe injuries sustained from the collision, the deceased, who was born on 10th January, 1970, succumbed on 31st October, A.D., 2009 in ICU of the Princess Margaret Hospital.
> [6] The said collision and resultant death was caused by the negligence of the First Defendant, the Servant or Agent of the Second Defendant as hereinafter set out, who is vicariously liable for the same, of which his estate and dependants suffered loss and damage.
>
> PARTICULARS OF NEGLIGENCE
>
> The First Defendant was negligent in that he:
>
> 1) So negligently drove his said vehicle in an aggressive manner and/or at an excessive speed;
> 2) Failed to take any or any sufficient steps to brake, steer, or otherwise maneuver his said vehicle, so as to avoid colliding with the Plaintiff's said motor cycle;
> 3) Failed to keep any or any proper lookout or to observe or to heed the presence of the Plaintiff's said motor cycle;
> 4) Failed to heed and/or obey a mandatory traffic instruction to stop.

5) In the premises, drove his said vehicle without reasonable concern for the safety of other road users, and in particular, the safety of the deceased.
6) By reason of the Defendants negligence the Plaintiff has suffered pain and injury, loss and damage, and thereafter succumbed in ICU of Princess Margaret Hospital.

3. Commonwealth's defence is contained in paragraph 7 of the Defence which provides:

> 7. Further in response to Paragraph 5 of the Statement of Claim, the Second Defendant denies that it is vicariously liable for the alleged acts and omissions and negligence of the First Defendant as alleged in Paragraph 5 of the Statement of Claim or at all, which said acts, omissions and negligence are denied. The Second Defendant denies that at the time of the collision the First Defendant was driving as the servant or agent of the Second Defendant.

4. The singular issue for the resolution of this dispute is the question of vicarious liability. It is not in dispute that Jimmy Evelyn was employed by Commonwealth and that the vehicle he drove that night was owned by Commonwealth. As a general rule, a person will be vicariously liable only where the tortfeasor is his agent acting in the course of the employment. Likewise, the vehicle owner is liable only where the driver was driving for some purpose of the owner.

5. The learned authors of ***Commonwealth Caribbean Law of Torts (3rd ed)***, engaged in a useful survey of Caribbean cases involving vicarious liability in traffic accidents. Under the rubric, ***Vehicle Owners and Casual Agents,*** the following was discussed at pages 365-367:

> In *Hopkinson v Lall [1959 1 WIR 382]*, the claimant/appellant was injured when a car in which he was a passenger and which was being driven by R, a friend of his, collided with a concrete post. The appellant sought to make the defendant/respondent, the owner of the car, liable for R's negligent driving, contending that R was, at the time of the accident, acting as the respondent's agent. There was no evidence as to the purpose for which R had borrowed the car from the respondent, but it was proved that, on the night of the accident, R had driven himself and the appellant to a club in Georgetown, where they had dinner, and that it was whilst returning from the club to the place where he was to meet the respondent that the accident happened.

It was held that, since the journey was undertaken solely for the purposes of the appellant and R, and not for any purposes of the respondent, the respondent was not vicariously liable for the negligence of R. Lewis J said:

> It was urged on behalf of the appellant that on the authority of *Barnard v Sully* ((1931), 47 TLR 557, DC, 36 Digest (Repl) 104, 524), in the absence of any other evidence as to the purpose for which Rodrigues took the car from Queen's College, he must be presumed to have been driving it as the respondent's agent, and that as in this case the respondent had not called or given evidence in rebuttal of that presumption the agency must be deemed to have continued up to the moment of the collision. In my view, *Barnard's v Sully* case ((1931), 47 TLR 557, DC, 36 Digest (Repl) 104, 524) only applies where the court finds that a vehicle was negligently driven and that the defendant was its owner, and is left without further information. That is not the position in this case, for it was clearly proved, and admitted in argument, that the drive from the appellant's home along the East Coast and to the Cactus Club was undertaken solely for the pleasure of Rodrigues and the appellant and no way on the business of the respondent.
>
> But it is said, there is evidence that the respondent had told Rodrigues to "turn up", or to "come back", for him at Queen's College, and it may be inferred from this that Rodrigues was carrying out the instructions of the respondent to bring the car back for the respondent's use, so that at any rate the respondent would have an interest in the return journey. It was submitted that in such circumstances the respondent would be liable for Rodrigues' negligence. In support of this proposition counsel for the appellant relied on the case of *Ormrod v Crosville Motor Services, Ltd*([1953] 2 All ER 753, 97 Sol Jo 570, CA, 3rd Digest Supp). This submission could admittedly not be maintained without the assistance of evidence, excluded by the trial judge, that Rodrigues had told the appellant, after leaving the Cactus Club, that he was on his way back to Queen's College for the respondent. In my opinion, in the absence of other evidence that Rodrigues was the respondent's agent, this evidence was rightly excluded.
>
> The learned trial judge held that the suggested inference could not reasonably be drawn from the admitted statements of the respondent, and I see no reason to differ from him. Even if this inference could properly be drawn, however, and the excluded evidence were admissible, the appellant's action, in my opinion, must still have been unsuccessful. Rodrigues was under an obligation to return the car which he had borrowed and in this case this obligation was to be fulfilled by returning it at Queen's College. The fact that it may have been intended that after the return of the car it was to be used for the joint purposes of Rodrigues and the respondent does not, in my view, affect the purpose of the return journey, which remains solely the fulfilment of Rodrigues' obligation.
>
> I regard the facts of this case as being materially different from those of *Ormrod's v Crosville Motor Services, Ltd* case ([1953] 2 All ER 753, 97 Sol Jo 570, CA, 3rd Digest Supp), where the main purpose for which the river set out on his journey was to comply with the owner's request that he should drive the car, containing the owner's suitcase, from Birkenhead to Monte Carlo. I do not read *Ormrod's v Crosville Motor Services, Ltd* case ([1953] 2 All ER 753, 97 Sol Jo 570, CA, 3rd Digest

> Supp case) as laying down a rule that, wherever it is intended that on the completion of one journey a vehicle is to be used for the joint purposes of the owner and the driver, the owner must be deemed to have such an interest in the first journey as to make him liable for the driver's negligence. The instant case appears rather to fall within the exception mentioned by Lord DENNING, where he says ([1953] 2 All ER at p 755):
>
> > 'The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: see *Hewitt v Bonbon*([1940] 1 KB 188, 109 LJKB 223, 161 LT 360, 56 TLR 43, 83 Sol Jo 869, CA).'
>
> In *Avis Rent-A-Car v Maitland*, FH rented a car from the appellant for an unspecified period. He was required to bring the car for checking at the end of each week. He was also required to make a weekly payment for the hiring. While FH was driving the car on a 'mission', carrying out private investigation work, the car went out of control and crashed. FH's passenger, GH, was killed. The accident was caused entirely by the negligence of FH. The trial judge held that FH was driving the car as the appellant's agent, since 'where a car rental firm hires a car to any person by way of business and under an arrangement at the one proved in this case, the hirer would not be driving merely for his own benefit... The driving of the car is of benefit to the firm renting the car.'
>
> The Jamaican Court of Appeal, overruling the trial judge, held that FH was not driving on the appellant's business at the material time and he was not the appellant's agent.

6. As indicated, it is not in dispute that Jimmy Evelyn was employed by Commonwealth and that the vehicle he drove that night was owned by Commonwealth. The plaintiffs however led no evidence in the trial as to the purpose of Jimmy Evelyn's journey in the vehicle at 1:05 am on the morning of the accident. This was their obligation as they allege vicarious liability. Vicarious liability is not presumed by the mere fact of employment and ownership. At trial the Court did hear evidence from Sherry Brown, the agent for JS Johnson Insurance Co. who were Commonwealth's insurers. At paragraph 2 of her Witness Statement Ms. Brown stated,

> "Mr. Jimmy Evelyn was permitted to drive a 2008 Ford Explorer motor vehicle which was owned by Commonwealth Brewery Limited. Mr. Jimmy Evelyn completed a J.S. Johnson Motor Accident Report Form dated October 26, 2009, in which Mr. Evelyn stated that at the time of the motor vehicle accident involving Mr. Lance Sands, Jr., (deceased) the 2008 Ford Explorer motor vehicle was being used for his personal use/leisure and that his wife Plus Nancy Evelyn was a passenger at the time. "

7. In all the circumstances, having considered the evidence before me, I find that there was no evidence that at the time of the accident, whilst in the company of his wife, Jimmy Evelyn was engaged in any undertaking for the purposes of Commonwealth. In the premises therefore the action cannot succeed against Commonwealth and must be dismissed, with costs to Commonwealth. I so order.

Dated the 28th day of February 2019

Ian Winder
Justice