[2010] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE M^{C}INTOSH JA (Ag)

SUPREME COURT CIVIL APPEAL NO. 136/2008

BETWEEN	**ERIC RODNEY**	**APPELLANT**
AND	**ALAN WERB**	**RESPONDENT**

AND

SUPREME COURT CIVIL APPEAL NO. 138/2008

BETWEEN	**ALAN WERB**	**APPELLANT**
AND	**ERIC RODNEY**	**1st RESPONDENT**
AND	**PATRICIA PHILPOTTS (Representative of the Estate of Lascelles Philpotts, Deceased)**	**2nd RESPONDENT**

Alexander Williams and Anthony Williams instructed by Usim Williams & Co. for Eric Rodney

Charles Piper for Alan Werb

12 April and 3 December 2010

HARRISON JA

[1] I have read in draft the judgment of my sister Philips JA. I agree with her reasoning and conclusion and have nothing further to add.

PHILLIPS JA

[2] This consolidated appeal arises from the judgment of Straw, J who on 5 November 2008 made the following orders:

> "That there be judgment in favour of the Claimant as follows:-
>
> (1) Special damages in the sum of $2,101,633.10 with interest at the rate of 3% per annum from 4th January 1994 to 31st July 2008.
>
> (2) General damages in the sum of $600,000.00 at 3% per annum from 22nd November 1995 to 31st July 2008.
>
> (3) Costs to the Claimant to be agreed or taxed, such costs to include traveling from United States of America and subsistence while in Jamaica for the purpose of the trial."

[3] In appeal no.136/2008 the appellant Eric Rodney (Mr Rodney) challenges the orders mentioned above and asks this court to enter judgment in his favour. Mr Rodney particularly challenges the fact that the learned trial judge found that the 2nd defendant (Mr Philpotts) was his servant and/or agent, and that the pick-up truck with license no. CC875C, which was being driven by Mr Philpotts at the material time, was "owned" by him. Mr Rodney further challenges the learned trial judge's findings of law in that Mr Rodney says that the learned trial judge held that a finding as to the ownership of the said pick-up truck would determine the issue of vicarious liability and that the

presumption that the ownership of a motor vehicle was sufficient evidence that the motor vehicle, at the material time, was being driven by the owner, or by his agent, (vide ***Barnard v Sully*** (1931) 47 TLR 557) was rebuttable only by evidence as to whether or not the owner had an interest in the journey which led to the accident.

[4] Mr Rodney filed 6 grounds of appeal which are set out below:

> "(a) The learned Trial Judge failed to appreciate that the legal presumption which was the *ratio decidendi* of the decision in ***Barnard v Sully*** was only applicable where there was no evidence as to the facts surrounding the use of the vehicle at the material time.
>
> (b) The learned Trial Judge failed to appreciate that, even if it were found that the 1st Defendant/Appellant remained the owner of the vehicle for the purposes of the presumption held in ***Barnard v Sully,*** the evidence showed that the 2nd Defendant had the general permission of the 1st Defendant/Appellant to use the vehicle for the sole purposes of the 2nd Defendant; and the 2nd Defendant was therefore not the servant and/or agent of the 1st Defendant/Appellant.
>
> (c) The learned Trial Judge failed to appreciate that once the 1st Defendant/Appellant discharged his evidentiary burden of putting forward evidence as to the use of the vehicle at the material time, then the ordinary legal burden of proof of agency as between the 1st Defendant/Appellant and the 2nd Defendant rested on the Claimant/ Respondent.
>
> (d) The learned Trial Judge erred in holding, or impliedly holding that the Claimant/Respondent had discharged his legal burden of proving that the 2nd Defendant was a servant and/or agent of the 1st Defendant/Appellant at the material time.
>
> (e) The learned Trial Judge failed to appreciate that there was no, or no sufficient evidence before her to show that the 2nd Defendant was the servant and/ or agent of the 1st Defendant/Appellant at the material time of the accident.

(f) The learned Trial judge paid no, or no sufficient regard to the principle that personal injury awards should be reasonable, assessed with moderation and that comparable injuries should have comparable awards.

(i) In that, the learned Trial Judge failed to appreciate that the Claimant/Respondent could only recover for reasonable medical expenditure as a result of the injuries rather than for actual expenditure abroad.

(ii)The learned Trial Judge's award for pain and suffering in view of the proven injuries was manifestly excessive."

Ground of appeal f is also relevant to the issues raised in appeal no. 138/2008 and so I will deal with the same accordingly. I must note, however, that no arguments were advanced in relation to ground f (i). The appeal in respect of damages related only to the amount awarded for general damages.

[5] In appeal no. 138/2008, Alan Werb challenges the particular order mentioned in paragraph [1] above with regard to the amount awarded for pain and suffering and for loss of amenities, and asks for that award to be set aside and a sum substituted therefor, commensurate with the injuries sustained and the treatment undertaken, on the basis of four grounds of appeal. These are as follows:

"(a) The Learned Judge erred in her assessment of the amount by which the Appellant should be compensated for the pain and suffering and loss of amenities having regard to the nature of the injury, the diagnosis and nature and period of treatment.

(b) The Learned Judge (sic) amount of $600,000.00 awarded (sic) for pain and suffering and loss of amenities is grossly inadequate against the background of the injury and the decided cases.

(c) The Claimant's evidence of his injury and treatment, set out at paragraphs 6 to 13 of his Witness Statement, coupled with the

medical report of Dr. George Donaldson dated October 20, 1994 and the medical report of Dr. Carmen DiMario dated June 21, 1994 presented a case of serious injury which warranted a significantly larger award for pain and suffering and loss of amenities than that of $600,000.00 awarded by the Learned Trial Judge.

(d) The sum of $600,000.00 awarded for pain and suffering and loss of amenities is unreasonable in the circumstances."

[6] The issues in this consolidated appeal can easily be condensed as follows:

(1) Was it open to the learned trial judge on the evidence before her, or was she plainly wrong, to find Mr Rodney vicariously liable for the negligence of Mr Philpotts, in relation to the collision that occurred on 4 February 1994?

(2) Was the amount of $600,000.00 awarded to Alan Werb for pain and suffering and loss of amenities reasonable in all the circumstances of this case?

Background facts
Pleadings and evidence

[7] The undisputed facts of the case are that on 4 January 1994, the claimant Alan Werb was riding a motor cycle along the Rock main road in the parish of Trelawny when a collision occurred with a Toyota pick-up motor truck driven by Mr Philpotts (now deceased). Mr Werb sustained injuries for which he had to undergo treatment in Jamaica and the United States of America. At the time of the accident the motor truck was registered and insured in the name of Mr Rodney.

[8] In paragraph 2 of Mr Werb's statement of claim he alleged that Mr Rodney was the owner of the truck and Mr Philpotts was his servant and/or agent. This was denied by Mr Rodney in his defence. Mr Philpotts' response was that he was the owner and driver of the truck at the material time. Mr Werb alleged that Mr Philpotts drove his vehicle fast on the wet road approaching a bridge, skidded, got out of control and collided with his motor cycle on his correct side of the road. Mr Philpotts' response was that the claimant's handling of the motor cycle, namely by traveling in a zig-zag manner, at an excessive speed, onto the incorrect side of the road, caused the accident. He claimed by way of set off and counterclaim, that he had suffered loss, damage and incurred expenses to the amount of $112,611.00 for wrecker fees, cost of parts for his vehicle, labour and repairs to the vehicle, and loss of use of the same.

[9] At the hearing of the summons for directions the claimant was granted permission to request further and better particulars of the defences and also to administer interrogatories. Some of the answers given played an important part at the trial. I will refer to those I believe appeared to be the most telling and relevant to this appeal. In the further and better particulars supplied by Mr Rodney he stated inter alia that:

(i) On 4 January 1994, he was the registered owner of the truck, and registration plates had been issued to him in his name.

(ii) He had no knowledge whether the truck was insured on 4 January 1994 or who the insurer was.

(iii) The sale of the truck to Mr Philpotts was made orally, the consideration was $62,000.00, of which payment was to be made in full on delivery of the vehicle and completion was to be immediate.

(iv) Payment was made in full by way of one payment, a cheque drawn to Mr Rodney by Mr Philpotts and lodged to Mr Rodney's account at the Bank of Nova Scotia Jamaica Ltd (BNS), Port Maria branch on or about 15 October 1993.

(v) The formal transfer of the truck was effected on 5 January 1994 at the Collector of Taxes Office in Port Maria, Saint Mary, and notice of the sale was given to the said tax office on that day. No notice of the sale of the truck was given to any insurer by Mr Rodney.

[10] In answer to interrogatories Mr Rodney averred in an affidavit that:

(i) Although on 4 January 1994, the truck was registered in his name, he was not in fact the true and legal owner thereof, but Mr Philpotts was, and on the day in question Mr Philpotts drove the truck in that capacity.

(ii) At the time of the sale of the truck, in October 1993, he delivered the truck to Mr Philpotts, but the formal transfer was not done at the time of the sale, but on 5 January 1994, when his name was formally removed from the records as registered owner.

(iii) He did not know whether Mr Philpotts had effected any insurance in respect of the truck between October 1993 and January 1994.

(iv) He had not advised N.E.M. Insurance of the sale of the truck, nor had he made a report to N.E.M Insurance of the accident, although he had been contacted by an agent of the company.

[11] Mr Philpotts gave two affidavits in answer to the interrogatories made of him pursuant to the summons for directions. He said that:

(i) He was not the legal registered owner of the truck, but he had the permission of Mr Rodney to operate the vehicle on 4 January 1994.

(ii) There was a policy and certificate of insurance relating to the said truck in effect on 4 January 1994, and it was issued by National Employer Mutual Assurance Society Limited to Mr Rodney.

(iii) He had not obtained any insurance other than that which was in place for the operation of the vehicle because "among other things", the transfer "was not executed".

(iv) He had handed back the policy and certificate of insurance to Mr Rodney when he had transferred the vehicle into his name, and that not only had he not obtained any other insurance, but he was using Mr Rodney's registration plates with his permission as the transfer had not been executed.

At the hearing

[12] Mr Werb in his witness statement gave detailed evidence of how the accident occurred and the extent of the injuries sustained. He said that he later discovered that the vehicle was owned by Mr Rodney and was being driven by Mr Philpotts, but in cross-examination he said that he "cannot say who was the owner of the truck". He also did not know the connections between the driver of the motor truck and the person who owned it.

[13] In his witness statement, Mr Rodney now indicated that he had sold the vehicle for $60,000.00 to Mr Philpotts on 29 October 1993. He said the monies were paid all at once and he lodged the same to his savings account at BNS, Port Maria Branch and the lodgment slip, which he still had in his possession, and which was tendered into evidence, as exhibit 6, bore the reason for such a large deposit. Mr Rodney said that the insurance for the vehicle was still in his name as the insurable interest was not transferable. The registration booklet had been handed over to Mr Philpotts, but the vehicle was still registered in his name as he had not been able to get Mr Philpotts to attend at the Inland Revenue Department to formerly endorse the transfer in the booklet. He said that he was unable to cancel the insurance as the insurance company required proof of the sale and the and/or neglected to have the transfer recorded. He now said that he had informed N.E.M. Insurance of the sale of the truck and all the difficulties that he had been experiencing with regard to obtaining the booklet. He said that he was informed of the accident, and that Mr Philpotts had made a claim on the insurance company which had denied the same in writing to him (Mr Philpotts) by letter

dated 5 February 1996, written by attorneys on its behalf on the instructions of the insurer. The letter informed Mr Philpotts that the vehicle had been sold by Mr Rodney to Mr Philpotts at the material time, the policy of insurance was not transferable and N.E.M. Insurance Company Ltd was therefore not the insurer of the vehicle at the material time. It stated further that Mr Philpotts was therefore driving the vehicle in his own right and was not the servant and/or agent of Mr Rodney. This letter was tendered in evidence by Mr Rodney, as the paragraphs in the witness statement referring to the contents of the same were struck out, being inadmissible documentary hearsay.

[14] In cross-examination, Mr Rodney said that when Mr Philpotts drove off in the vehicle, as far as he was concerned the vehicle was insured. Mr Philpotts did not come to transfer the vehicle the following Monday as he had promised and even up to the time of giving evidence the vehicle had not been transferred into Mr Philpotts' name. Mr Rodney maintained that the registration had not been transferred on 5 January 1995, even though he was confronted with his affidavit in answer to the interrogatories which stated to the contrary. He also now said, consistent with his witness statement, although not with his affidavit, that he had been to the insurers the said week that he sold the vehicle and told them of the sale. He also now said that he had been to the insurers the day after the accident having heard that the accident had occurred the day before. He said that the insurance would have expired on 16 February 1995, and as far as he was concerned, the insurance policy was never cancelled. He also said that he had not made any report to the police that the vehicle had been taken by Mr Philpotts and not insured. But he said that Mr Philpotts was a Sergeant in the Special

Constabulary Force and he did not think of reporting him to his seniors. He also insisted that the truck had been sold for $60,000.00 and not $62,000.00.

[15] Mr Reginald Smith gave evidence in support of Mr Rodney and it was one of the contentions on appeal that the learned trial judge did not fully understand the import of his evidence. In his witness statement he said that he was 77 years old and that he had known Mr Rodney for over 50 years. They both supplied goods to Sandals Boscobel Hotel (Beaches). In fact, he had supplied goods to the hotel over a period of three years, most times using Mr Rodney's truck. He had known Mr Philpotts for over 40 years, who lived in a district adjoining the one where he resided. They also met socially. Mr Smith said that sometime in October 1993, he was traveling in Mr Rodney's truck when Mr Philpotts stopped the vehicle and spoke to Mr Rodney, and thereafter took out what appeared to Mr Smith, to be a cheque which Mr Philpotts handed to Mr Rodney, who accepted the same. Mr Rodney, he said, also handed Mr Philpotts the keys to the truck and Mr Philpotts drove off. He said prior to this incident he had seen Mr Philpotts transporting goods for Courts (Jamaica) Limited almost every day, and subsequent to the same he had seen Mr Philpotts transporting goods for Courts (Jamaica) Limited, driving the said truck, which Mr Smith said he had purchased from Mr Rodney.

[16] In cross examination he stated that he had sold a vehicle in the past and when he transferred the title for the vehicle he ceased to be the owner of the vehicle and in his opinion if the title was not transferred he would still be the owner. So, when he saw

Mr Philpotts driving the truck, it was his understanding that the truck had been transferred to Mr Philpotts.

[17] By the time the matter came to trial, Mr Philpotts had died, and an order had been made appointing Mrs Patricia Elaine Philpotts, the widow, as the representative of Mr Philpotts' estate for the purpose of the proceedings. He was however not represented at the trial, and the learned trial judge accepted the evidence of Mr Werb with regard to how the accident occurred, and found that the negligent driving of Mr Philpotts caused the accident. She correctly stated therefore in her reasons for judgment, that the issue for the court to determine was whether Mr Philpotts was the servant and/or agent of Mr Rodney at the time of the accident. She also accurately recounted the evidence and indicated that both counsel relied on the same four authorities (which they also did on appeal) and she set out the principles to be gleaned therefrom, and their applicability to the facts as she found them in the case at bar.

[18] The cases are as follows: ***Barnard v Sully*** (1931) 47 TLR 557; ***Mattheson v G.O. Soltau and W.T. Soltau*** (1993) 1 JLR 72; ***Hewitt v Bonvin and another*** [1940] 1 KB 188 and ***Rambarran v Gurrucharran*** [1970] 1 All ER 749. In her reasons for judgment the learned trial judge dealt with each case separately. She stated that:

> "In ***Barnard v Scully*** (supra) (sic), the court held that the fact of ownership of a motor car is prima facie evidence that at the material time, the motor car was being driven by the owner, or by his servant or agent. However, this evidence was liable to be rebutted by proof of the actual facts (per Scrutton LJ pg 558)."

The learned trial judge also stated that:

> "In the case of ***Mattheson v G.O. Soltau, et al*** (supra) the same principle was applied by the Jamaican Full Court. However, the court held that the onus of displacing the presumption is on the registered owner and if he fails to discharge that onus, the prima facie case remains and the plaintiff succeeds against him."

She referred to the ruling of the Court of Appeal in ***Hewitt v Bonvin***, indicating that on the facts of that case, the son who was driving the father's car with the permission of his mother, who was authorized to give it, was not driving the father's car as his servant and/or agent or for the father's purpose, and the father was not therefore liable for the son's tortuous act.

[19] The learned trial judge went on to recognize that although the principle in ***Barnard v Sully*** was reiterated in ***Hewitt v Bonvin***, there remains thereafter an onus of proof on the party alleging, to establish that the driver is a servant or agent of the owner. The learned trial judge quoted extensively from the judgment of Mackinnon, LJ wherein he made it clear that for liability to attach as a result of the tortfeasor's act, there must be evidence that he was employed by or doing work for that party.

[20] She then set out the principles as enunciated by the Privy Council in ***Rambarran v Gurrucharran***, namely that:

> "Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the

> owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact."

The learned trial judge noted also that, "once there is evidence to rebut the presumption, evidence which raises a strong inference to the contrary, the court must decide the issue on the totality of the evidence". As she put it, the court must consider and answer the following questions:

1. Has the claimant discharged the onus of proof?

2. Is there any evidence which counterbalances the inference to be drawn from the ownership of the vehicle?

She then relied on the statement of Lord Donovan in ***Rambarran*** which indicated two ways in which an owner can repel the inference, which are:

> "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 deferring the respondent's case instead of the other."

[21] The learned trial judge referred to some of the evidence tendered in the case, namely that of the sale of the car, the two different prices mentioned, the manner in which the price was supposed to have been paid and the differing evidence in respect of the report to the insurance company. She had also earlier in her judgment, set out in detail the contents of exhibit 6 (the deposit slip), indicating that it bore the date stamp of 30 October 1994, referred to an account 4102 and the name Eric Rodney with the

depositor's initials "E.R," and had the total amount deposited as $60,000.00 with a cash specification of 600 $100 bills; at the top there was a notation, "Sale of 1975 Toyota Pick-up Van". She recorded counsel for Mr Werb as having submitted that Mr Rodney's evidence to repel the inference that he was not the owner of the car was unreliable and incredible.

[22] She indicated that in ***Mattheson v G.O. Soltau et al*** the issue turned on the quality of the evidence submitted. She noted the dictum of Clarke J, who had stated:

> "The whole of the evidence given on behalf of both defendants was so replete with contradictions and improbabilities that no Court should have considered it sufficient to rebut the presumption that W.T. Soltau as registered owner was in control of the truck and its driver at the time of the collision. The inference to be drawn from the intrinsic incredibility of the whole story is overwhelmingly in favour of the view that the prima facie presumption was not displaced but rather strengthened."

[23] The learned trial judge gave her analysis of Mr Rodney's case which is set out hereafter. She noted that there were material discrepancies in Mr Rodney's case particularly between his evidence and the answers supplied in the notice supplying further and better particulars and the contents of exhibit 6, which in the latter situation, at the end of the case remained unexplained. She said whilst one could understand a lapse of memory with regard to the transfer of the registration of the vehicle, the other issues posed a more serious and difficult problem. The learned trial judge stated:

> "It was crucial whether or not Mr. Rodney made a report to the insurance company shortly after the sale of the vehicle. It would supply compelling evidence as to the genuineness of the sale. There is no explanation why such a discrepancy

exists. Mr. Smith's evidence does not assist him on this point. It is limited in its nature.″

[24] The learned trial judge then made the following findings:

"These inconsistencies affect the root of the first defendant's case.

These material contradictions have led the court to draw certain unfavourable inferences and have led to the view that the first defendant has not displaced the presumption.

The court rejects his evidence as to the circumstances under which Mr Philpotts was operating the vehicle. Mr. Rodney has not sought to say that he lent or hired the vehicle to Mr Philpotts to be used for purposes in which he had no interest or concern. If he had done so, the court might have been induced to conclude that the claimant failed to establish that Mr Philpotts was driving the vehicle as either the servant or agent of Mr. Rodney.

However, in light of the above circumstances, the court is of the view that the presumption of ownership and control has not been rebutted by the first defendant and that the claimant has discharged the onus of proof.

Both the first and second defendants are therefore liable to the claimant for the injuries he received."

The Appeal
Appeal No:136/2008
The appellant's submissions

[25] Counsel for Mr Rodney argued that the issue of the ownership of the vehicle was not the central issue in the case, and the presumption of agency was rebuttable once there was evidence to show lack of agency. The issue in the case, he submitted, was the question of vicarious liability. He attempted to draw a distinction between the facts in ***Barnard v Sully*** and the case at bar, as he said in ***Barnard v Sully*** nothing else was known of the facts and there was no evidence to show lack of agency. He challenged ***Mattheson v G. O. Soltau et al*** on a similar basis in that the issue in the

case was who was the master or principal of the truck driver at the material time and there was no evidence to rebut the presumption that the driver was acting as servant.

[26] It was counsel's contention that the learned trial judge having found that the evidence with regard to the ownership of the vehicle was contradictory, should still have gone on to consider on the totality of the evidence whether Mr Philpotts was the servant and/or agent of Mr Rodney which included the evidence of Mr Smith. It was not, it was submitted, incumbent on Mr Rodney to advance evidence to show that he had no interest in the purpose for which the vehicle was being used. Additionally, since Mr Rodney had parted with the keys for the vehicle and the registration booklet, that should suggest that he had parted with permanent possession of the vehicle, and that he retained no interest in any journey that Mr Philpotts may have undertaken, and any such journey would not have been of any benefit to him. Mr Rodney's evidence was that he had given up control of the vehicle, which evidence did not appear to have been challenged. How then could the learned trial judge have found, queried counsel, that he had not given up control of the vehicle? In this regard, he submitted, she would have been plainly wrong. Further, Mr Werb was not in a position to say that he knew of any connection between the parties and he had not attempted to do so.

[27] It was also submitted that if he were a bailee of the motor vehicle, at common law, Mr Philpotts would have been responsible for any injury to third parties. In any event, counsel argued, Mr Smith's evidence, which was unchallenged, was sufficient to

rebut the presumption, and Mr Werb was therefore required to prove agency. The learned trial judge did not indicate whether she believed Mr Smith's evidence.

The respondent's submissions in reply

[28] Counsel for Mr Werb submitted that Mr Rodney had attempted to rebut the presumption that Mr Philpotts was his servant and/or agent, and had done so by alleging that he had sold the truck to Mr Philpotts and the latter had driven it away on that basis, but the learned trial judge had rejected this. She rejected the evidence of Mr Rodney and his witness as to the circumstances under which Mr Philpotts was operating the vehicle. Counsel argued that there was no doubt that the motor vehicle in question was registered as being owned by Mr Rodney, and therefore the presumption that the person who was driving it at the material time was the servant and/or agent of the owner was applicable, and called for credible evidence from the owner in order to rebut the presumption. However, in this case, counsel submitted, no such evidence was forthcoming. There was no evidence put forward with regard to Mr Philpotts' purpose and use of the vehicle, and if the sale of the vehicle to him was not considered by the learned trial judge to be genuine, then one could ask why were the keys and booklet given to Mr Philpotts? For what purpose? It was submitted that at the end of the day, one did not know. And since Mr Rodney's case was based on a sale, and the learned trial judge had rejected that, then in the absence of any credible evidence with regard to the circumstances under which Mr Philpotts was permitted to drive the vehicle there was no material on which the learned trial judge could find that the presumption had been rebutted. Counsel also referred to the answers to the interrogatories given by Mr

Rodney and submitted that the learned trial judge was right when she said that the inconsistencies affected the root of Mr Rodney's case. He argued further that the inference to be drawn from the failure of Mr Rodney to advise the insurer of the alleged sale of the vehicle was that the vehicle was being used with the full consent and authority of the owner so that he could get the benefit of the insurance.

[29] Counsel therefore submitted that the learned trial judge had reviewed the evidence, the cases and the applicable principles, and had come to the correct decision on the issue of liability.

Analysis - Issue 1

[30] As indicated earlier in this judgment, both counsel relied on the same four authorities that had been submitted in the court below.

[31] The case of ***Barnard v Sully*** is of some antiquity and remains the *locus classicus* for the doctrine espoused therein. The facts of that case were that the plaintiff was driving his horse and van in Brixton when the defendant's motor car collided with the plaintiff's van and caused damage. The defendant admitted ownership of the motor car but denied that the driver of the motor car was his servant or agent or was acting within the scope of a servant's or agent's authority. The learned trial judge withdrew the case from the jury on the basis that there was no evidence that the motor car was being driven by the defendant or his servant. On appeal, it was found that the learned trial judge had erred in withdrawing the case. In allowing the appeal, the court laid

down the principle which was referred to and relied on by Straw J. (para 17 supra) and which bears repeating here. Scrutton L. J. put it this way:

> "But, apart from authority, the more usual fact was that a motor car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motorcar was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts."

[32] In this case, the motor vehicle was registered at the material time in the name of Mr Rodney, so there was prima facie evidence that it was being driven by his servant and/or agent. It was also insured in his name at the material time. It was the submission of counsel for Mr Rodney, and it formed a ground of appeal, that this presumption is only applicable when there is no evidence as to the facts surrounding the use of the vehicle at the material time. Mr Rodney did not give any evidence of the use of the vehicle at the material time. Mr Smith gave evidence that he had seen the vehicle being driven by Mr Philpotts transporting goods for Courts (Jamaica) Limited. However, he had also given evidence that he had supplied goods to Sandals Boscobel Hotel (Beaches) over a period of three years using Mr Rodney's truck. So, the ground of appeal which states that the evidence showed that Mr Philpotts had the general permission of Mr Rodney to use the vehicle for the **sole purpose** of Mr Philpotts is without merit. In fact, there is no such evidence and the vagueness and the omission in relation to the said use of the truck when the vehicle remained registered and insured in Mr Rodney's name, although the keys and the booklet were with Mr. Philpotts, do

not, in my view, provide proof of actual facts to rebut the presumption (grounds (a) and (b)).

[33] The Jamaican case of ***Mattheson v G.O. Soltau et al*** deals more specifically with the quality of the evidence to be placed before the court. The facts of the case are that on 15 July 1930, there was a collision between the omnibus of the plaintiff and a truck driven by Herbert Lee. G.O. Soltau was the employer of Lee and it was later discovered that the truck was registered in the name of W.T. Soltau. It was decided that the damage to the plaintiff's omnibus was solely due to the negligence of Lee and judgment was given against G.O. Soltau as his employer. On appeal, the plaintiff argued that judgment should have been given against W.T. Soltau since he was the registered owner of the truck. Clarke J. in referring to the principle established in ***Barnard v Sully*** said:

> It is now accepted in our Courts that in the absence of **satisfactory evidence** to the contrary this evidence [ownership of the vehicle] is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him."

[34] W.T. Soltau sought to rebut the presumption by giving evidence that the truck was sold to G.O. Soltau and that at the date of the collision the truck was not under his control nor was it being used for his business. He stated that G.O. Soltau had paid $100.00 for the truck but that no receipt was given until October 1930. Despite these allegations, with the exception of the receipt, no document was produced in respect of

the transaction nor were there any entries in any books kept by W.T. Soltau or by G.O. Soltau as to this sale. Further, G.O. Soltau gave a different account of the transaction, stating inter alia, that he bought the truck in August. The court found the evidence to be "replete with contradictions and improbabilities so that no Court should have considered it sufficient to rebut the presumption". On the contrary, these inconsistencies were found to strengthen the presumption. W.T. Soltau was therefore found to be vicariously liable.

[35] The facts of this case are somewhat similar to the instant case, and what also emerges from this authority is that the court must be satisfied as to the credibility of the evidence adduced in order for the presumption to be rebutted. Thus, the position taken by Mr Rodney in ground of appeal (c) is untenable. Mr Rodney does not discharge his evidentiary burden by merely putting forward evidence as to the use of the vehicle at the material time, or otherwise, in order for the claimant to be required to discharge the legal burden of proof of agency. The presumption that the driver is the servant or agent of the owner must first be rebutted by satisfactory, credible evidence. This is a burden on the registered owner, and if that onus is not discharged, the prima facie case remains and the person alleging the agency succeeds.

[36] In the instant case, Mr Rodney failed to put forward satisfactory and credible evidence. The learned trial judge highlighted the inconsistencies of Mr Rodney's case and stated that they affected the root of his case, and led to her drawing "certain unfavourable inferences", which led to her forming the view that Mr Rodney had not

displaced the presumption. The issue is, on the evidence in this case, was that a finding where one could say that she was plainly wrong?

[36] Mr Rodney was unclear as to whether this vehicle, which had been in a collision in which Mr Werb had been seriously injured, was at the time of trial still registered in his name. This was curious to say the least, considering that at best he was at first alleging that the registration had been transferred the day after the collision. The evidence of the sale is curious also. Was it effected and the possession of the vehicle passed over on 15 October 1993, with the one payment by way of the cheque? Or was it effected by payment of the 600 $100.00 bills on 30 October 1993? Was the price $62,000.00 or $60,000.00? Why was there such a clear statement that the insurer was neither advised of the sale nor notified of the accident, which statement was completely reversed later on? Why was there no evidence from Mr Rodney as to the use of the vehicle after the "sale"? His own witness appeared to have had use of the said vehicle for transporting goods at one period of time. So, did he continue to have any residual interest in its use while Mr Philpotts was driving the same, also transporting goods, until the balance of the purchase price was paid, or until the date of the expiry of the insurance which was in the year following the accident?

[38] The learned trial judge stated clearly that she rejected the evidence as to the circumstances under which Mr Philpotts was operating the vehicle. It is interesting to note that the evidence as to the operation of the truck came from Mr Smith, who attempted to support the sale by stating that he saw when the "cheque" was handed

over. Yet, as previously stated, the amount "lodged" to Mr Rodney's account was 600 $100 bills, so contrary to the submission of counsel for Mr Rodney the learned trial judge impliedly rejected the evidence of Mr Smith when she indicated that she did not believe that the sale of the truck was genuine, and rejected the evidence of the circumstances of its operation subsequent to the alleged sale. This was clearly a matter of fact for the learned trial judge and she decided accordingly, as she was entitled to do. Can Mr Rodney say that the learned trial judge was plainly wrong in light of the inconsistencies and contradictions in the evidence? I do not think so.

[39] The learned trial judge concluded that as Mr Rodney had not sought to say that he had lent or hired the vehicle to Mr Philpotts to be used for purposes in which he had no concern, then she would not make a finding that Mr Werb had not established that Mr Philpotts was driving the vehicle as the servant and/or agent of Mr Rodney. The presumption would not have been rebutted, the onus on Mr Rodney not having been discharged. I can find no fault in this reasoning and conclusion.

[40] The facts of the instant case are therefore quite different from the English Court of Appeal case of ***Hewitt v Bonvin and Another,*** which case addresses the distinction between a relationship of service or agency as opposed to the bailment of a chattel. In that case, a motor car driven by the son of the defendant was involved in a collision resulting in the death of a passenger in the car. The defendant was subsequently sued for damages by the administrator of the deceased's estate. At the trial, evidence was led that the defendant had told his sons that they were not allowed

to drive the car without his permission. He however authorized his wife to give such permission and she gave it to the son concerned, who wished to take home two girlfriends. Neither the mother nor the father knew these friends. At first instance, the learned trial judge decided that the son was driving with the consent of the father and was therefore his servant or agent and gave judgment against the defendant. On appeal this decision was reversed, that being said to be a wrong statement of the law. The court endorsed the principles of ***Barnard v Sully,*** although stating that in ***Hewitt*** all the facts were ascertained unlike in the former case where all the facts were not known, and the court had to draw inferences from incomplete data (which is somewhat similar to the case at bar). The court found that the finding of the learned trial judge that the evidence disclosed that the son was driving the car to take his own friends home, was a "finding consistent with a mere loan or bailment of the car". The question was whether the son was driving for and on behalf of the father. Ultimately, it was a question of fact.

[41] In the instant case, if Mr Rodney had alleged that he had lent the truck to Mr Philpotts for his (Mr Philpotts) own use and had provided evidence to support this allegation, he may have been successful in rebutting the presumption and, in the circumstances of this case, Mr Werb might not have satisfactorily proven the agency.

[42] Finally on this aspect of the appeal, counsel for Mr Rodney relied on the Privy Council case of ***Rambarran v Gurrucharran.*** The principles established in ***Barnard***

v Sully were again confirmed and somewhat clarified. In the judgment of the Board it was stated:

> "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."

The facts of this case were that the son of the appellant, while driving the appellant's car, collided with a car owned by the respondent. The accident was as a result of the negligence of the appellant's son. The respondent sued the appellant alleging that at the time of the accident the son was driving as the appellant's agent or servant. At the trial, it was brought out in evidence that the appellant could not and did not drive the car, which was bought for the use of the family. He had nine sons, three of whom were licensed drivers, including the son who was driving the car at the material time, and he had no objection to their driving the car at any time. At the time of the accident he did not know that the son had taken the car, and met with an accident. The son was not using the car for any purpose of the appellant and he did not hear of the accident until a fortnight after it had occurred, all of which the learned trial judge accepted. The appellant was held not to be vicariously liable at the trial, but this decision was reversed on appeal. The Privy Council affirmed the decision of the learned trial judge and decided that the evidence adduced by the appellant having been accepted by the learned trial judge, was sufficient to overcome the inference that the son was driving as his agent or servant.

[43] This case makes it clear that where the only fact known is that the defendant is the owner of the vehicle, the court will draw the inference that at the time of the incident, the car was being driven by the owner or his servant or agent. However, if other facts are known which are accepted by the court, then the question of service or agency will be determined on an assessment of all the evidence. The onus is on the owner of the vehicle to provide sufficient credible evidence to satisfy the court that the driver is not his servant or agent. What this case says is that he could do this in two ways: he could show the object of making the journey in question, and that it served no purpose of his, or he could assert that the vehicle was not being driven for any purpose of his and provide such supporting evidence as is available to him.

[44] In this case Mr Rodney did neither, and such evidence that he gave was rejected by the learned trial judge as not being credible. This was a question of fact for her determination. She finally decided as a matter of law that, in her view, the presumption of ownership and control had not been rebutted and Mr Werb had discharged the onus of proof. In my opinion, by doing so, she had indicated that the very first evidential hurdle had not been satisfactorily crossed, no other facts had either become known or been accepted by her, requiring her to address the totality of the evidence. Mr Rodney had not discharged the onus placed on him, the presumption was therefore not destroyed, so Mr Werb had to succeed.

Grounds of appeal (d) and (e)

[45] In my view, the finding by the learned trial judge that Mr Rodney and Mr Philpotts were liable to Mr Werb for the injuries he received, was correct and this appeal should therefore be dismissed.

Appeal No.138/2008

[46] This appeal relates to issue 2. Was the amount of $600,000.00 awarded to Mr Werb, on this appeal in respect of general damages, reasonable in all the circumstances?

[47] In the particulars of claim Mr Werb pleaded that he had suffered the following injuries:

(i) 2 cm laceration to the left side of the nose bridge
(ii) 0.5 cm wound to the lower right with abrasions
(iii) fractured distal third of right tibia and right fibula
(iv) fracture of the left shoulder
(v) permanent disability

These injuries, save and except those mentioned at (iv) and (v) above, were duly noted in the report of Dr George Donaldson (who examined Mr Werb on 4 January 1994), on which Mr Werb relied at trial and which the learned trial judge accepted. The report also indicated that debridement and plaster of paris were done under general anesthesia in the operating theatre and that Mr Werb was discharged on the second day for further medical treatment/follow-up in the United States.

[48] There was a further report by Dr Carmen Dimario who saw Mr Werb, three months after the accident, in Pennsylvania. The following was noted in the report and faithfully recorded by the learned trial judge in her reasons for judgment:

> "(1) septal deviation with airway obstruction and nasal bone deformities
>
> (2) four discoloured scars on right eyelid
>
> (3) three discoloured scars on nose
>
> (4) hypertrophic scars on right lower eyelid
>
> (5) two depressed scars on patient's upper lip
>
> (6) three scars on right shoulder
>
> (7) four masses on right forearm
>
> (8) three discoloured scars on patient's back
>
> (9) discoloured scar on patient's left knee
>
> (10) multiple scars on lower legs
>
> (11) cast on right leg."

The learned trial judge however, concluded that there was no evidence associating injury number one with the accident. In her view, "Dr Dimario spoke to a proposal to perform multiple scar revisions on (sic) patient's face and right arm which would improve the appearance of the scars". However, this is what was stated in the report:

> "My examination revealed a septic deviation with airway obstruction and nasal bone deformities which the patient stated had been present since the time of the accident and due to the accident."

There was no statement in the report that the doctor did not accept that what she observed on examination and noted in her report was not consistent with the report of the patient/appellant.

[49] The learned trial judge also indicated that in his witness statement, Mr Werb had spoken to continuing pain in his shoulder and that an x-ray revealed a fractured shoulder, however there was no medical evidence in respect of the shoulder. With this I agree. Counsel for Mr Werb entreated the court to proceed, in the absence of any challenge to the credit of Mr Werb, to consider on a balance of probabilities whether Mr Werb sustained injury to his shoulder.

[50] In his witness statement, Mr Werb gave detailed evidence of the injuries received, the pain suffered and the treatment obtained over a prolonged period: he was unconscious, his right leg was badly broken, he had injuries to his left leg, left shoulder, his head and face, his nose, chest and back; he had surgery the day of the accident, and a cast placed on his leg which was removed in Pennsylvania to allow for further surgery; a metal device was implemented with screws and later another cast was put on his leg which remained for 10 ½ months. Throughout this period there was continuing pain and discomfort.

[51] In the court below, and on appeal, Mr Werb relied on six previous awards, all of which were dealt with in great detail by the learned trial judge, namely:

- **Douglas Fairweather v Joyce Eloise Campbell (Executrix of Estate of Griffiths Campbell,Deceased**), Vol. Khan's Personal injury Awards Made in the Supreme Court of Judicature (Khan's) page 4

- **Collette Brown v Dorothy Henry et al**, Vol. 5 Khan's page 42
- **Suzette Campbell v Wilbert Dillon**, Vol. 5 Khan's page 50
- **Cecil Gentles v Artwell's Transport Co. Ltd** at Vol. 5 Khan's page 60
- **Mahesh Mahtani v Audley Wright et al** Vol. 5 Khan's , page 94
- **McKenzie v Christopher Fletcher et al**, Vol. 5 Khan's page 72

[52] Counsel for Mr Werb submitted that the learned trial judge had failed to take into consideration the *"septal deviation with airway obstruction and nasal bone deformities",* and the shoulder injury and pain in the absence of medical evidence which, he submitted, was plainly wrong. He submitted that the amount awarded was too low as there was at least 10½ months of disability, and he pointed out to the court, finally, that there had been serious arithmetical miscalculations in arriving at the updated figures in the awards given in earlier cases relied on in her judgment.

[53] He relied on the ***Douglas Fairweather*** case as being an appropriate guide for the learned trial judge. In that case the claimant had suffered a number of injuries including whiplash, stiffness of the upper spine, battered shoulder, fracture to the left tibia and fibula, and stiffness to the back of the neck. The award in that case was $1,300,000.00 and the updated award using the consumer index of May 1999, would have been $3,579,329.83, which, he submitted, was stated in error by the learned trial judge to be $1,742,000.00. The trial judge decided in any event, that this was not a helpful case in light of the differences in the injuries sustained. In my view, she was correct as the injuries were more severe (whiplash and spinal injury) and the claimant in that case had been assessed with 7-10% permanent functional impairment of his left

lower limb, whereas in the instant case there had been no indication of any permanent partial disability although initially pleaded in the particulars of claim.

[54] In **Collette Brown,** with injuries including the fracture of the right and left superior and inferior rami, tenderness over the pubic bone, minor bruises and laceration of the legs, the claimant was assessed with permanent partial disability of the whole person at 5%. An updated assessment (November 2008) would amount to $1,251,376.14. In **Suzette Campbell** the claimant suffered multiple fractures involving the right hemi pelvis, the rami of the ischium, the pubic bone and the acetabulum, and was consequently prone to long term complications like osteo-arthritis. She also suffered a distortion of the pelvic ring which might affect delivery at child birth. She was assessed as having permanent partial disability of 10% of the whole body, which updated would amount to $3,253,577.98. In **Cecil Gentles** the claimant was 70 years old and suffered a bimalleolar fracture of the left ankle, with no permanent disability, but with the possibility of arthritis, which translated to $772,075.47 in November 2008. In **Mahesh Mahtani** the claimant sustained fractures involving mid portions of both clavicles had tenderness to the chest and abrasions to the right upper limb and anterior aspects of both knees. The updated amount in this case amounted to $966,396.76.

[55] In the **McKenzie** case, the claimant suffered the following injuries:

(1) pain, swelling and tenderness of the right leg
(2) comminuted fracture of the middle third of the tibia
(3) transverse fracture of the middle of the right fibula

He was not expected to have any impairment and was awarded $420,000.00 for general damages. The learned trial judge stated that the award did not indicate that it was for pain and suffering and loss of amenities only. However, she did state that in her opinion, Mr Werb would attract a higher award as there were injuries to his nose, pain suffered to the shoulder and some amount of scarring. I agree with her, and this recognition by her shows that she did not entirely disregard the injuries sustained by Mr Werb to the nose and the pain he was experiencing in the shoulder, although in her view, both were not supported by medical evidence. The updated figure amounts to $1,33,857.41 and the details of the calculation are shown in paragraph 56.

[56] During the hearing of the appeal, counsel for Mr Rodney referred to two other cases. In ***Isaac Lewis v The Attorney General & Trevor Thorpe***, (CL1986/I-240-Assessment of Damages for Personal Injuries (revised edition of case note issue 2 at page 360)) the claimant suffered a compound fracture of the right tibula and fibula, was totally disabled for four months and partially disabled for a further four months with no significant final disability. In ***Andrea Gayle v Marvin Grey and the Attorney General,*** (CL 1988/G-33 [of the same text] page 361), the claimant sustained a minor fracture of the tip of the right fibula with lacerations on her right forearm and over the left eye. The updated assessment of these cases amount to $598,245.61 and $592,263.15 respectively. It is clear from the reports of these cases that the injuries suffered by Mr Werb were far more serious and they did not therefore provide much assistance.

[57] I agree with counsel for Mr Werb that the correct formula to be used for updating past awards is as follows:

Present CPI (November 2008)

CPI at date of award in earlier case x **Award in earlier case**

Counsel for Mr Rodney has also utilized this formula in his submissions to this court.

[58] I also agree that the learned trial judge made some errors in her calculations of the updated figures and I have indicated the correct amounts accordingly. I have set out below the basis of the updated calculation in the McKenzie case and I have also included the updated calculation and figures in the cases submitted by counsel for Mr Rodney.

Case name		**Updated award**
McKenzie v Christopher Fletcher et al 134 x $ 420, 000.00 46.43 (March 1998)	=	$1,212,147.31
Isaac Lewis v the Attorney General et al 134 x $25,000 5.70 (April 1990)	=	$587,719.29
Andrea Gayle v Marvin Grey et al 134 x $ 24,750 5.70 (May 1,1990)	=	$581,842.10

[59] Counsel for Mr Rodney urged the court not to disturb the amount awarded by the learned trial judge for general damages unless the court was convinced that the learned trial judge had acted upon some wrong principle of law, or that the amount

awarded was so high or so small that the court could only conclude that it must be erroneous.

[60] In this case, the learned trial judge's assessment of the damages suffered by Mr Werb, having reviewed comparable awards, was fair. However, her calculations, with regard to the accepted formula to arrive at the updated award, were flawed, and her finding concerning the lack of medical evidence in respect of the injury to Mr Werb's nose was inaccurate.

[61] In the final analysis, I agree with the learned trial judge that the **McKenzie** case is the most applicable in the circumstances, particularly as there was no permanent partial disability stated. As stated above, the updated figure amounts to $1,233,857.41 as opposed to the $ 562,800.00 stated by the learned trial judge, in her reasons for judgment, in error. This amount however, must also, as stated by the learned trial judge, be increased based on the greater severity of the injuries sustained in the instant case. We have adjusted the amount awarded to reflect the injuries received to the appellant's nose, and to pain in the shoulder, but we did not in computing the damages give any consideration to a fracture of the left shoulder. I am of the view that the correct award for general damages in this case should be $1,500,000.00.

Conclusion

[62] In light of all of the above, appeal no. 136/2008 is dismissed, with costs to Mr Werb. Appeal No. 138/2008 is allowed, and the sum of $I,500,000.00 is substituted

for the amount of $ 600,000.00 awarded for general damages, with interest at 3 % per annum from 22 November 1995 to 31 July 2008, with costs to Mr Werb. The order below in relation to special damages remains the same.

M^{c}INTOSH JA

[63] I too have read the judgment of Phillips JA and agree with the reasoning and conclusion therein. There is nothing further I wish to add.

HARRISON JA

ORDER

[64] 1. Appeal No. 136/2008 is dismissed with costs to Alan Werb to be taxed if not agreed.

2. Appeal No. 138/2008 is allowed, and the sum of $I,500,000.00 is substituted for the amount of $ 600,000.00 awarded for general damages, with interest at 3 % per annum from 22 November 1995 to 31 July with costs to Alan Werb to be taxed if not agreed.

The order below in relation to special damages remains the same.