## VICARIOUS LIABILITY OF THE CAR-OWNER
## *ORMROD v. CROSVILLE MOTOR SERVICES LTD.*

The recent case of *Ormrod and Anor.* v. *Crosville Motor Services Ltd. and Anor.* (*Murphy 3rd Party*)[1] compels an investigation of the part played by the concept of agency in relation to the liability of an owner of a chattel for damage caused by the negligent use of it by another.

By an arrangement between the owner of two cars and a friend, it was agreed that the friend should drive car A to Monte Carlo while the owner, in car B, also drove to Monte Carlo as a competitor in a car rally. The friend was to drive in his own time and manner and was to visit friends at Bayeux en route. It was intended to use car A, after the rally, for a touring holiday for the owner and the friend and his wife. En route to Monte Carlo, car A, due to the negligent driving of the friend, was involved in a collision with an omnibus which was damaged as a result.

On the question of the liability of the owner of the car for that damage it was held that the arrangement amounted to a request by the owner of the car to the friend to drive it; as the owner of the car had an interest in the arrival of the car at Monte Carlo the driving was an act done for his benefit and the friend was under a social or moral obligation to comply with the request; and therefore the friend was acting as the owner's agent in driving the car, and the owner was liable for his negligence.

The judges purported to recognise in this case an agent who was neither a servant nor an independent contractor. In view of the circumstances he could not have been an independent contractor since there was no legal contract at all, and Devlin, J., who tried the case, did not consider him a servant, expressly stating: " . . . there is no question of Mr. Ormrod being a servant in the present case."[2] The Court of Appeal took the same view.

The grounds for the judges' emphatic denial that Mr. Ormrod was a servant do not appear in the judgment. It may be considered that in driving the car to Monte Carlo Mr. Ormrod was not doing work for the owner, although this is, to some extent, impliedly negatived by his holding that the driving was an act done for the benefit of the owner. Again, it may be that he concluded from the terms of the arrangement that Mr. Ormrod was not subject to the right of control of the owner in the manner in which he drove the car. However, this can be only conjecture, and at no stage of the judgments do the judges consider the right of control question. Whatever be the reasons for holding that Mr. Ormrod was not a servant, the fact remains that the owner was nevertheless held liable, and on the ground of agency. How far is this theory, that a person may be liable in tort for the negligence of another on the ground of agency and yet not be liable on the ground of master and servant, supportable? Perhaps the answer to this question can best be provided by a consideration of the various views taken as to the meaning of agency in the law of torts.[3]

### NARROWEST VIEW: AUTHORISED TORTS

The narrowest view of agency is that the term denotes the relationship existing between two persons where one has authorised or ratified the torts of another. This was the view adopted by MacKinnon, L.J., in *Hewitt* v. *Bonvin*[4] where he stated: "If A suffers damage by the wrongful act of B and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorised the act."[5] When used in this sense the term gives rise to little difficulty, if any, and there is no need to refer to the principles of vicarious

[1] (1953) 1 All E.R. 711, (1953) 2 All E.R. 753 (C.A.).
[2] *Id.* at 712.
[3] In the following classification of views the use made of the term agent as meaning one who is employed to bring his principal into contractual relations with others, is not discussed as it has no apparent relation to the liability for negligent use of chattels.
[4] (1940) 1 K.B. 188.
[5] *Id.* at 191.

liability, the principal himself being liable as a tortfeasor. However, this view of agency, though in accordance with that of Sir John Salmond[6], does not appear to be backed by the weight of authority.[7]

## AGENCY IN THE GENERIC SENSE

The more widely accepted use of the term agent is in the loose generic sense to describe one who acts on behalf of, or who is employed to do work for, another. The late Dr. W. T. S. Stallybrass considered that, in this sense, the agent, apart from his existence in the capacities of servant and independent contractor respectively, had no place in the law of torts. He stated: "A distinction is sometimes drawn between agents, servants and independent contractors. . . . Those whose employment is more or less continuous are usually called servants, those whose employment is intermittent or confined to a particular occasion agents. But, so far as the law of torts is concerned, there is no difference between the position of a servant and an agent in this narrower sense. . . . All agents are either servants or independent contractors."[8]

Thus all agents were classified by the late Dr. W. T. S. Stallybrass as either servants or independent contractors, and the same classification is adopted by a number of authorities on the subject, among them Bowstead[9] and the American Restatement.[10] There is, then, considerable support for the view that the agent as such has no independent existence in the law of torts.

## AGENCY IN THE DELEGATED DUTY SENSE

In *Ormrod* v. *Crosville*[11], Devlin, J., in holding the owner liable on the ground of agency as distinct from master and servant, relied on the view of agency propounded by Du Parcq, L.J., as he then was, in *Hewitt* v. *Bonvin.*[12] And this too was the only case to which the Court of Appeal referred. Du Parcq, L.J., there used the term agent to mean one who performs a delegated duty on behalf of another.

In that case a son obtained from his mother, who had authority to grant it, permission to drive his father's car for the purpose of taking two girls home. Neither the mother nor the father knew the girls and it was no concern of theirs that they should be driven home. On the return journey an accident occurred due to the negligent driving of the son, and another friend who had accompanied him was killed as a result. It was held that the son was not driving the car as his father's agent or servant or for his father's purposes and therefore the father was not liable. As regards agency, Du Parcq, L.J., had this to say:

> The driver of a car may not be the owner's servant, and the owner will nevertheless be held liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such a liability depends not on ownership, but on the delegation of a task or duty. Thus, in *Wheatley v. Patrick*[13] the Defendant, who had borrowed a horse and gig for an excursion in the country, permitted a friend to drive on the way home. The friend's negligent driving caused damage to the Plaintiff. The declaration alleged the Defendant had himself driven negligently, and the Court of Exchequer held that this allegation was supported by the evidence. The reason is plain. The Defendant had delegated to his friend the duty of driving and was personally responsible for his acts as the acts, not of a servant, but of an agent.[14]

His Lordship then went on to say that the decisions of the Privy Council and the Court of Appeal in *Samson* v. *Aitchison*[15] and *Parker* v. *Miller*[16] respectively were founded on the same principle.

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[6] Salmond, *The Law of Torts* (6 ed. 1924) 92.
[7] *Id.* (10 ed. 1945) 83.
[8] *Ibid.*
[9] W. Bowstead, *A Digest of the Law of Agency* (11 ed. 1951) 214.
[10] *American Restatement* § 409.
[11] (1953) 1 All E.R. 711.
[12] (1940) 1 K.B. 188.
[13] (1837) 2 M. & W. 650.
[14] (1940) 1 K.B. at 194-95.
[15] (1912) A.C. 844 (P.C.).
[16] (1926) 42 T.L.R. 408.

The suggested liability of a principal for an agent, in the sense in which the word is used here, is analogous in conception to the liability of an employer for the acts of an independent contractor who is employed to do work of an extra hazardous nature. In such a case the employer is liable for negligence by the independent contractor in the carrying out of that work.[17] The employer is there under a duty not only to take care but to see that care is taken. He cannot escape liability by delegating that duty to another, whether that other be servant or independent contractor. The basis of such a liability is not a vicarious one in the true sense, but rests rather on the breach of duty, on the employer's part, to see that care is taken. The duty cast upon the employer is, in the sense that he cannot delegate to another his responsibility for its due performance, an absolute one. In view of this let us examine a little more closely agency in the sense used by Du Parcq, L.J.

In the course of his judgment Du Parcq, L.J., stated: "In the present case, if the girls concerned had been the guests of the Appellant, or if it had been established that Mme. Bonvin had allowed her son to take the car because she felt that she or her husband were under some social or moral duty to convey them to their home, I should have thought that the finding of the trial judge ought not to be disturbed."[18] However, it is hard to see in this particular instance how a duty of this kind could not be delegated by the person upon whom the duty lay so as to escape liability for its negligent performance. If, for example, in such a case, the mother had employed an independent contractor, a taxi-driver, to convey the girls to their home, it seems inconceivable that she or her husband would have been liable for his negligence.

As another illustration of his theory, Du Parcq, L.J., relied on the case of *Parker* v. *Miller*.[19] There the Defendant had taken a friend and his daughter out driving in his car. On completion of the drive the Defendant stopped at his own place, got out, and then permitted or requested the friend to drive himself and his daughter home. The friend, on arrival at his place, left the car outside on a hill and it later ran down the hill and injured the Plaintiff. It was held that the Defendant was liable for the friend's negligence. Of this case Du Parcq, L.J., said: "The county court judge, whose decision on questions of fact was of course not open to review, must, I think, have drawn the inference that the Defendant had delegated the tasks of conveying the female passenger to her home and of looking after the car to his friend, who was therefore in charge of the car as his agent, and not merely as a bailee."[20] However, again as in the previous example, it does not seem feasible that the Defendant would have been liable if he had employed an independent contractor to perform the task or duty of conveying his passengers to their home.

The truth seems to be that Du Parcq, L.J., has pressed the reasoning in *Wheatley* v. *Patrick*[21] beyond intelligible limits. The duty resting upon the owner of a vehicle to drive carefully, if he drives at all, is a legal duty, not merely a moral or social one. And if it is true to say that where this duty is delegated the person delegating cannot thereby rid himself of the duty, any negligent driving by the delegate involves him in legal liability. But where the duty under discussion is merely moral, the argument that the duty still rests upon the principal despite the delegation will not support an inference of his *legal* liability.

Therefore, upon analysis, this view of agency as amplified by Du Parcq, L.J.'s, illustrations does not seem to be the true basis on which the owner of a car, who requests or allows another to use it, will be liable for damage caused by it in that use. Indeed, in the two foregoing illustrations, the agent in the sense used here is in reality a servant. Where the owner of a vehicle authorises

[17] *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.* (1934) 1 K.B. 191.
[18] (1940) 1 K.B. 196.
[19] (1926) 42 T.L.R. 408.
[20] (1940) 1 K.B. at 195-96.
[21] (1837) 2 M. & W. 650.

another to use it on his behalf, then the person in so using it is doing work for the owner. And it is submitted that, where one person is using a chattel on behalf of the owner, there will be a presumption that the owner retains the right to control the manner in which it is to be used for that purpose. Thus is established the second requisite of the master and servant relationship.

The agent in the sense of one performing a delegated duty of the kind to which Du Parcq, L.J., refers does not seem, therefore, to constitute a valid exception to the view that all agents are either servants or independent contractors. Are we then forced back onto the conclusion that there does not exist in this branch of the law an agent with an independent existence? Such a conclusion should not be reached without a closer examination of the reasoning in *Wheatley* v. *Patrick*[22], which, it is respectfully submitted, Du Parcq, L.J., misused.

### AGENCY IN THE ALTER EGO SENSE

The case of *Wheatley* v. *Patrick*[23], though in fact a case of master and servant, was, however, not so treated by the pleadings or by the court. The bailee of the vehicle, the person having the right to control, was there treated as himself having driven. The actual driver at the time of the accident was, it seems, regarded by the court not as being the servant but as being the agent of the bailee, in the sense of his alter ego. What constitutes the relationship of agency in this sense? The answer to this question can be found to lie in the cases of *Samson* v.*Aitchison*[24] and *Reichardt* v. *Shard*.[25]

In *Samson* v. *Aitchison*[26], the Respondent, a prospective purchaser of the Appellant's car, sued the Appellant for injuries sustained by her when the car, driven by her son in the presence and with the permission of the Appellant, was involved in an accident due to the son's negligent driving. It was held that the Appellant was liable and it was there laid down by the Privy Council that where the owner of a vehicle being himself in possession and occupation of it requests or allows another to drive, this will not of itself exclude his right and duty of control; and therefore in the absence of further proof that he has abandoned that right by contract or otherwise the owner is liable as principal for the damage caused by the negligence of the person driving. Lord Atkinson, delivering the judgment of the Council, stated:

> The learned judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, *perfect accuracy*[27], in the following passage: 'I think that where the owner of an equipage . . . is riding in it while it is being driven and has thus not only the right to possession but the actual possession of it, he necessarily retains the power and right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of the right or is shown by conclusive evidence to have in some way abandoned his right. . . . The owner indeed has a duty to control. The duty to control postulates the existence of the right to control. *If there was no right to control there could be no duty to control.*[28] No doubt if the actual possession of the equippage has been given by the owner to a third person—that is to say if there has been a bailment by the owner to a third person—the owner has given up his right to control.[29]

This case appears strongly to support the view that where one person remains in possession of his vehicle, thus retaining his right, power and duty to control, then he will be responsible for the acts of the person driving not as a master for the acts of his servant but as a principal for the acts of his agent, in the sense of the agent being his alter ego. He is, in effect, liable more for his own breach of duty to control than for any breach of duty by the driver. The duty to control is postulated by the right and power to control. Admittedly

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[22] *Ibid.*
[23] *Ibid.*
[24] (1912) A.C. 844
[25] (1914) 31 T.L.R. 34.
[26] (1912) A.C. 844.
[27] Italics supplied.
[28] Italics supplied.
[29] (1912) A.C. at 849.

*Samson* v. *Aitchison*[30] may be explained on the ground of master and servant and those who take the view that all agents are either servants or independent contractors have so explained it. However, that does not seem the basis upon which it was in fact decided. And, if we look at the case of *Reichardt* v. *Shard*[31], a Court of Appeal decision, the explanation that the owner's liability in this type of case rests on the basis of master and servant does not seem entirely satisfactory.

In *Reichard* v. *Shard*[32], as in *Parker* v. *Miller*[33], the report of the case is meagre. There the Defendant was held liable for the negligence of his son who was driving the car at the time of the accident. The Defendant himself was not present but his chauffeur was sitting beside the son, and the Defendant gave evidence that he never allowed the son to drive without the chauffeur going with him. Buckley, L.J., in delivering judgment, said that the question of whether there was any evidence on which the Defendant could be held liable depended on the question of what inference was to be drawn from the fact that the father always insisted that the chauffeur should accompany his son when motoring. Could that, he asked, be said to be giving up the control of the car? It appeared to him to be a reasonable view to take that the County Court Judge was entitled to say that, having regard to the person who accompanied the son, there was no evidence to go to the jury that the Defendant had given up the control of the car. If so, he said, the ruling of the judge was quite right.

Professor Winfield has evolved from the cases in this branch of the law a doctrine which he styles "Casual Delegation".[34] He says that where A, while retaining the right of control of his chattel, allows B to use it and B negligently injures C with it, A is liable to C. It is submitted that the doctrine is correct if it is understood subject to the qualification that the owner has the power to control in the practical sense. Thus analysed, it consists of no more than a reiteration of the doctrine of agency in the alter ego sense. The cases in which the owner of a chattel, who allows another to use it, will retain the right to control in any practical sense could, for most purposes, be reduced to two: (a) Where the owner remains in physical possession, and (b) where he is represented by a servant with authority and instructions to control the driver.

It seems, then, that where one person is using the chattel of another while that other still retains the right and power to control the manner in which it is is to be used, then the person using the chattel will, while he uses it within the limits permitted, be regarded as the agent, in the sense of an alter ego, of the owner in the event of his negligent use of the chattel.[35]

### CONSIDERATION OF ORMROD V. CROSVILLE MOTOR SERVICES[36] IN THE LIGHT OF THE FOREGOING VIEWS OF AGENCY

As previously stated, Devlin, J., in *Ormrod v. Crosville Motor Services*[37] relied on the view of agency expounded by Du Parcq, L.J. He appears, however, to have acted upon an erroneous interpretation of that view. Referring to the facts before him, Devlin, J., stated: " . . . it may be described as a case where, in the words of Du Parcq, L.J., there is a 'social or moral' obligation to drive the owner's car. Mr. Ormrod was under such a duty because if he had not driven the car as arranged the third party would have had a legitimate grievance."[38] However, the social or moral obligation adverted to by Du Parcq, L.J., was cast, not upon the driver, but the owner. Devlin, J., has reversed this and speaks of a duty resting upon the driver to comply with the owner's request to drive. This is the exact converse of the proposition of Du Parcq, L.J., upon which Devlin, J., relied as his authority. The decision cannot then be justified on the grounds given by Devlin, J., even though approved on appeal.

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[30] (1912) A.C. 844. [31] (1914) 31 T.L.R. 34. [32] *Ibid.* [33] (1926) 42 T.L.R. 408.

[34] P. H. Winfield, *Textbook of the Law of Tort* (5 ed. 1950) 121.

[35] *Wheatley* v. *Patrick* (1837) 2 M. & W. 650; *Samson* v. *Aitchison* (1912) A.C. 844; *Reichardt* v.*Shard* (1914) 31 T.L.R. 34. See also *Pratt* v. *Patrick* (1924) 1 K.B. 488.

[36] (1953) 1 All E.R. 711. [37] *Ibid.* [38] *Id.* at 712.

Is the decision therefore incorrect? There can be no doubt that Mr. Ormrod was indeed an agent in the generic sense in that he was acting on behalf of the owner. But, as the law now stands, that alone is insufficient to render his principal liable for his negligence. An independent contractor is an agent, but his principal is not, in general, liable for his torts. Before one person will be liable for the acts of his agent in this sense it must first be established that the agent is subject to the right of control of his principal, in which case he would be a servant. Was then Mr. Ormrod, in fact, the servant of the owner?

A servant is one employed to do work for another on terms that he is to be subject to the right of control of his principal in the manner in which the work is to be done. It is clear that in driving the car to Monte Carlo Mr. Ormrod was doing the work for the owner. There was but one other requisite necessary to constitute the relationship of master and servant, that Mr. Ormrod was to be subject to the right of control of the owner in the manner in which he drove. Now, since the driving was an act done in the main for the benefit of the owner, there would be a presumption that the owner retained the right to control. Only one further point arises. Was this presumption rebutted by the terms of arrangement? In agreeing that the friend should drive in his own time and manner, did the owner abandon his right to control?

In a strict or narrow sense it could be said that the owner of a car could never abandon the right to control the manner in which it is to be driven, other than by contract. However, in *Samson* v. *Aitchison*[39] the Privy Council referred to an implied abandonment of the right in the form of a bailment. It is submitted, therefore, that there could be abandonment of the right by express agreement, though not amounting to a binding contract, to do so.

It would appear, therefore, that the terms of the arrangement between Mr. Ormrod and the owner of the car were such that the owner had abandoned his right to control the manner in which Mr. Ormrod drove the car. Mr. Ormrod was not then a servant, and this conclusion seems strengthened by the finding of Devlin, J. Indeed, he appears to have been more in the nature of an independent contractor, who, in consideration of being allowed the use of the car for certain purposes of his own and of being taken on a touring holiday in the car, was to deliver the car to the owner at Monte Carlo. That is, he undertook merely to produce a desired result, the delivery of the car at Monte Carlo. It is therefore submitted that the decision is unlikely to stand the test of final review.

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## PUBLIC TRUSTEE AND SURRENDER OF LEASES— *ANDREWS* v. *HOGAN*

The case of *Andrews* v. *Hogan*[1] raises once again the vexed question of the status of the Public Trustee under section 61 of the Wills, Probate and Administration Act, 1898 (N.S.W.)[2] during the period between the death of a person and the grant of probate or letters of administration in respect of his estate. However, as is sometimes the position with judicial determinations of obvious importance, it is somewhat difficult to ascertain what the case actually decides.

Briefly, the material facts of the case were as follows: At the time of her death Mrs. D. was weekly tenant of a certain residential building. For some

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39 (1912) A.C. 844.

1 (1952) 86 C.L.R. 223.

2 Act No. 13, 1898 — Act No. 41, 1947; the section provides that "from and after the decease of a person dying testate or intestate, and until probate or administration . . . is granted in respect of his estate, the real and personal estate of such deceased person shall be deemed to be vested in the Public Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England".