Privy Council Appeal No. 2 of 1969

Harry Rambarran – – – – – – – – *Appellant*

v.

Gurrucharran – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF GUYANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JANUARY 1970

Present at the Hearing:

LORD HODSON
LORD DONOVAN
LORD WILBERFORCE

[*Delivered by* LORD DONOVAN]

The appellant, a chicken farmer in Guyana, in 1965 owned a motor car PL 799. On 14th November of that year this car was being driven by his son, Leslie. Due to Leslie's negligent driving the car collided with another motor car, PN 904, owned by the respondent, and caused considerable damage to it. The appellant himself had no direct responsibility for the accident. The respondent nevertheless brought an action in the High Court of the Supreme Court of Judicature in Guyana alleging that on the occasion in question Leslie was driving PL 799 as the appellant's servant or agent and that the appellant was thus vicariously liable to pay damages for the loss sustained by the respondent. The case was tried before George J. (Ag.) who on 2nd May 1967 gave judgment in favour of the present appellant, and dismissed the action with costs.

The present respondent then appealed to the Court of Appeal of the Supreme Court of Judicature in Guyana (Sir Kenneth Stoby, Chancellor, Persaud and Cummings J.J.) which, on 6th May 1968, gave judgment allowing the appeal, Cummings J. dissenting. Against that decision the appellant now appeals to the Board.

Before the trial judge the following facts were proved or admitted.

1. Leslie, the appellant's son, was permitted and authorised by his father to drive PL 799 at the time of the accident.
2. The appellant cannot and does not drive a motor car.
3. He bought PL 799 new in 1961 for the use of his family. He has a wife and 12 children, 9 of them sons.
4. Three of his sons were licensed drivers in 1965. They drove the car regularly, the appellant having no objection to their using it at any time.
5. Sometimes the car was used in the business of the appellant that is if the appellant wished to go to Georgetown on business, or to go home from his chicken farm. Besides being a chicken farmer he owns a sloop which, under the charge of another son, trades between Guyana and Trinidad.

6. On the day of the accident the car was not used by the appellant. It was at his home, Meadow Bank, Demerara. He himself was at his chicken farm at Soesdyke, some distance south of Meadow Bank. All his children lived in his home at Meadow Bank.

7. Also on the day of the accident he did not know that Leslie had taken the car out and met with an accident. This day was a Sunday, and after the accident had occurred a woman and five men were seen to get out of it.

Leslie was not joined in the proceedings as a defendant. Nor was he called by either side to give evidence. The trial judge accepted the respondent's evidence regarding the circumstances of the accident, and upon that evidence found that it was wholly due to Leslie's negligence.

He also accepted the appellant's evidence directed to establishing that on the occasion in question Leslie was not driving the car as the appellant's agent or servant or for some purpose of the appellant.

After examining certain authorities, George J. expressed his conclusion thus:

> " I accordingly do not feel that there is any evidence on the whole of the case from which I can properly say that the driver of the motor car was at the material time acting as the defendant's agent, that is, driving under the express or implied authority to drive on his behalf. *Hewitt v. Bonvin (1940) 1 K.B. 188.* Nor do I feel that I can come to the conclusion that the driver was a servant whether *ad hoc* or otherwise of the defendant, *i.e.*, that he was at the time of the accident acting under his order and consent in driving the vehicle."

He accordingly dismissed the action with costs.

Upon appeal, Sir Kenneth Stoby, Chancellor, after stating that the question was whether the appellant's car was being driven by his servant or agent at the time of the accident, referred to the decision in *Barnard v. Sully 47 T.L.R. 557*

> " where it was held that ownership of the car was *prima facie* evidence that it was being driven by the defendant, his servant, or agent."

This *prima facie* evidence, said the Chancellor, although rebuttable, had not been rebutted. The appellant had not given evidence of the true facts, and by the evidence which he did give had not rebutted the *prima facie* case of agency.

Persaud J.A. agreed with this conclusion. After reviewing the relevant authorities he said that it was well settled that where an owner of a vehicle is not himself driving it at the time of an accident, he is not liable for damage caused by the driver's negligence unless at the time the driver was his servant or agent,

> " and that ownership of a vehicle in these circumstances raises a *prima facie* case that at the material time the driver was so acting."

In the present case, he added, the Court was left without evidence as to the journey which was being made at the time of the accident " although, from his own lips " the appellant must have had that evidence available. Since on the day of the accident Leslie was driving with the appellant's permission " an ever-existing authority ", a strong *prima facie* case had been established on the whole of the evidence, which the appellant did not answer. Indeed the respondent was in a stronger position than merely having established such a case. It could be said from the state of the evidence that Leslie at the time of the accident was acting as the appellant's unpaid chauffeur.

In his dissenting judgment Cummings J.A. also reviewed the evidence and the authorities and came to the conclusion that there was no reason whatever for disturbing the trial judge's perception and/or evaluation of the evidence. He said he would therefore have dismissed the appeal.

Before expressing their conclusion their Lordships think it may be helpful to consider the relevant law as expounded in the authorities which have been cited in this case.

In *Barnard v. Sully 47 T.L.R. 557* (a case decided in 1931) Barnard sued Sully in the County Court for damage done to his van through the negligent driving of Sully's motor car. It seems to have been accepted that Sully was not driving himself, and he denied that the driver was his servant or agent. In the absence of evidence contradicting this denial the County Court judge withdrew the case from the jury. Barnard appealed to a divisional Court of the King's Bench, but Sully did not appear and was not represented. Allowing the appeal Scrutton L.J. with whom Greer and Slesser L.J.J. concurred, said:

> "No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners. . . . 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 motor-car 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."

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.

In *Hewitt v. Bonvin and Another* [1940] 1 K.B. 188 a motor car driven by the son of Bonvin was involved in an accident and a passenger in the car was killed as a result. The administrator of the deceased sued Bonvin senior for damages. Owing to a previous accident Bonvin senior had told both his sons that they were never to drive his car without his permission. He did however authorise his wife to give such permission, and on this occasion she gave it to the son concerned who wished to take home two girl friends whom neither the father nor the mother knew. Lewis J. held that in the circumstances the son, John Bonvin, was driving the car as the servant or agent of his father, and gave judgment against the father. This was reversed in the Court of Appeal. It was there held:

1. That if the plaintiff were to make Bonvin senior liable he must establish that the son was driving the car at the time as the servant or agent of the father.
2. That this cannot be established by mere proof that the son was driving a vehicle which at the time was the property of his father, though in the absence of any further explanation that might be some evidence of the proposition.
3. The evidence in the case showed no more than that the son was lent the father's car, and the father had no interest or concern in what the son was doing.
4. The fact that the son drove with the consent of the father (given through the mother) did not of itself establish service or agency.
5. Ultimately the question of service or agency is always one of fact.

A case raising an issue similar to that in the instant case arose in New Zealand in 1955—*Manawatu County v. Rowe* reported in 1956 New Zealand Law Reports 78. There the wife of Rowe, while driving her husband's motor car with his consent, was in collision with a vehicle driven by one of the appellant County's servants. Rowe brought an action against the County claiming damages. The trial judge held that both drivers were guilty of negligence, Rowe's wife being 75 per cent to blame. The question then arose whether her negligence could operate to reduce the damages otherwise recoverable by her husband: and this depended on whether at the time of the accident the wife was driving as the servant or agent of her husband. It was held both by the trial judge and a majority of the New Zealand Court of Appeal that she was not: and that Rowe was entitled therefore to recover the damages awarded against the County in full.

After considering the English cases of *Barnard v. Sully* and *Hewitt v. Bonvin* and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus:

1. The onus of proof of agency rests on the party who alleges it.
2. An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words, that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it.
3. It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns.

It is also interesting to observe that Hutchinson J., one of the majority who gave judgment for Rowe, remarked in the course of his judgment that the fact that the wife had the right to use the car whenever she pleased went a long way to destroy any presumption of agency on her part.

In coming to their conclusion the New Zealand Court of Appeal cited certain Australian decisions, where the like approach to similar problems has been adopted.

Their Lordships might also make reference to a recent Australian decision—*Jennings v. Hannon* (1969) 89 WN (Pt 2) (NSW) 232 in which the New South Wales Court of Appeal (Walsh J.A. and Jacobs and Holmes J.J.A.) seem to have decided that agency can in some cases be properly inferred from ownership, but that such inference is rebuttable.

Their Lordships were also referred to the decision in Ireland in *Powell v. M'Glynn and Bradlaw* (1902) 1 R. 154. They do not however think it necessary to go into the facts and the reasons given by the Court of Appeal in Ireland for their judgment in favour of the defendants in that case. There are certain pronouncements in the case which are difficult to reconcile with *Barnard v. Sully* (*supra*).

In the present case it is clear that any inference, based solely on the appellant's ownership of the car, that Leslie was driving as the appellant's servant or agent on the day of the accident would be displaced by the appellant's own evidence, provided it were accepted by the trial judge—which it was. Leslie had a general permission to use the car. Accordingly it is impossible to assert, merely because the appellant owned the car, that Leslie was *not* using it for his own purposes as he was entitled to do. The occasion was not one of those specified by the appellant as being an occasion when, for one of the appellant's own purposes, a son would drive

it for him. He was ignorant of the fact that the son had taken the car out that day; and he did not hear of the accident until a fortnight after it happened. In the face of this evidence the respondent clearly did not establish that Leslie was driving as the appellant's servant or agent. He had to overcome the evidence of the appellant which raised a strong inference to the contrary. The burden of doing this remained on the respondent and the trial judge held that he had failed to discharge it. His conclusion on this point was one of fact and he had ample evidence to support it.

In the Court of Appeal the learned Chancellor said that to rebut the *prima facie* evidence of service or agency, "the defendant who alone knows the facts must give evidence of the true facts": and Persaud J. commented that "the court is left without further information in the sense that the respondent (the present appellant) has not given . . . any evidence as to the journey which was being made at the time of the accident". These passages in the judgment of the majority of the Court of Appeal would seem to endorse one of the respondent's grounds of appeal namely that the appellant "failed to lead any evidence whatever to shew the circumstances in which his motor car No. PL 799 was being used at the time of the accident, and that such matters must be peculiarly within the knowledge of himself and his family and his servants and/or agents".

The argument based on this assertion was misconceived. The appellant, it is true, could not, except at his peril, leave the Court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. 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 defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant. In any event the complaint that the appellant led no positive evidence of the purpose of Leslie's journey comes strangely from the respondent who could have found it out by making Leslie a co-defendant and administering interrogatories, or compelled his attendance as a witness and asked him questions about it. He did none of these things.

In his dissenting judgment, Cummings J.A. said:

> "In the instant case as in *Hewitt v. Bonvin* (supra) the Court was not as in *Barnard v. Sully* without further information. There was ample information to justify the inferences drawn by the learned trial judge and his conclusion that the plaintiff had failed to establish the requirements as laid down in *Hewitt v. Bonvin*. Indeed I am myself unable to draw any different inferences or arrive at any other conclusion."

Their Lordships take the same view: and while out of respect for the learned judges of the Court of Appeal who took a different view, they have gone into this case in some detail, they can nevertheless summarise their conclusion by repeating that the question of service or agency on the part of the appellant's son Leslie was ultimately a question of fact; and that there was ample evidence upon which the trial judge could find as he did. They will therefore humbly advise Her Majesty that the appeal should be allowed. The respondent must pay the costs here and below.

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In the Privy Council

HARRY RAMBARRAN

v.

GURRUCHARRAN

DELIVERED BY

LORD DONOVAN

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