RAM PAL

v.

ISE LUN trading as WING FAT BAKERY

[SUPREME COURT, 1971 (Hammett C.J.), 29th May 1970, 19th February 1971]

Appellate Jurisdiction

Negligence—onus of proof—personal injury caused by negligent driving—proof of ownership of vehicle—sufficient to place onus of disproof of agency of driver on owner where no evidence of identity of driver—aliter where there is evidence of identity and purpose for which driver used vehicle.

Evidence and proof—onus of proof—motor vehicle accident—extent to which proof of owership of vehicle will affect onus of proof of agency of driver.

In an action for damages caused by negligent driving, in the total absence of any direct evidence of the identity of a negligent driver, upon proof of the ownership of the vehicle, the onus of proof passes to the owner to show that at the material time it was not being driven by the owner, his servant or his agent. When, however, there was direct proof of the identity of the driver and the purposes for which he was using the vehicle the onus still rested on the plaintiff to prove that the driver was the servant or agent of the owner before the negligence of the driver could properly be imputed to the owner.

Cases referred to :

Barnard v. Sully (1931) 47 T.L.R. 557.

Timaru Borough v. Squire [1919] 38 N.Z.L.R. 151.

Hewitt v Bonvin [1940] 1 K.B. 188: 161 L.T. 360.

Vandyke v. Fender [1970] 2 All E.R. 335; [1970] 2 W.L.R. 929.

Appeal against a judgment of the Magistrate's Court in an action for damages.

F. M. K. Sherani for the appellant.

H. A. L. Marquardt-Gray for the respondent.

The facts sufficiently appear from the judgment of the learned Chief Justice.

19th February 1971

HAMMETT C.J. :

The plaintiff/appellant was driving a van owned by his employer on

21st July, 1969, on the Kings Road when another van owned by the defendant/respondents, the four partners of a firm trading as Wing Fat Bakery, was driven on to the Kings Road from a side road.

A collision occurred between these two vehicles in which the plaintiff received personal injuries. He brought an action in the Court below claiming damages for negligence against the driver, the 1st Defendant, and the owners of the van who were collectively called the 2nd Defendants. Before the hearing in the Court below the plaintiff discontinued his action against the driver and continued only against the 2nd Defendants as the owners.

In his judgment the learned trial Magistrate reviewed the evidence and then gave his decision in the following terms :

> "As far as the accident is concerned I find the driver of the bread van was negligent to a degree which for reasons appearing hereinafter I need not assess. As far as the 2nd Defendants are concerned, I find as a fact that the *Plaintiff* was driving the bread van with their consent and knowledge. But I know of no authority for saying that that saddles them with responsibility for his negligence. If I lend my car to someone and he drives it in a negligent manner, I am not personally responsible for damage he does, although my Insurance Company may well be responsible for any Judgment against him. Had the 1st Defendant who was the driver of the bread van been before me in this action, I would have found a high degree of liability against him. However, I can see no authority for saying that the 2nd Defendants are liable and the Plaintiff's claim against them must therefore be dismissed with costs to be taxed if not agreed."

It was realised at the hearing of the appeal that the word "Plaintiff" in the 4th line of this extract from the judgment was used by mistake for the term "1st Defendant" and the Judgment has been so interpreted.

The Plaintiff has appealed against this decision on the following grounds:

> "(a) That the defendants/respondents failed to prove that the driver concerned was not the agent or servant of the defendants/respondents, the onus of proof of which was on the defendants/respondents;
>
> (b) there was sufficient evidence to hold that the driver concerned was acting as the servant or agent of the defendants/respondents."

It is the contention of the plaintiff/appellant that upon proof that the defendant/respondents' firm was the owner of the vehicle of which the driver had been held guilty of negligence, the onus of proof passed to them to prove that the driver was not their servant or agent and that they were not therefore vicariously liable for his negligence.

I note that in the statement of claim, the vicarious liability of the defendants/respondents was based on the allegation that their van was being driven at the material time with their "knowledge, authority and

consent". No allegation of agency or of a master and servant relationship between the owners and driver of the vehicle was made. The plaintiff relied solely on the existence of a relationship of bailor and bailee. The defendant/respondents denied any "knowledge, authority and consent" in their defence. The Court below did, however, find against the defendants on this issue. Although the evidence upon which such a finding was based is of an extremely tenuous nature and is based upon inference only there was, in fact, some evidence upon which this finding could be based. No cross appeal has been lodged and no complaint was made by or on behalf of the defendants against this particular finding and I shall therefore deal with this appeal on the basis of the unchallenged findings of the Court below on this issue.

I will deal first with the second ground of appeal that there was sufficient evidence to hold that the driver of the respondents' vehicle was acting as the servant or agent of the defendant/respondents.

I have examined the record and there is no direct evidence on this issue to support such a finding. The only evidence on this issue is all to the effect that at the time of the collision the driver was using the vehicle for his own social purposes. The driver was the son of one of the partners in the defendant firm who was using the firm's car for his own personal social purposes. He was, in fact, out driving with a lady friend whom he had also on many previous occasions taken out for social purposes in the firm's vehicle.

No evidence whatever was given by the witnesses in the Court below upon which a finding of the existence of any relationship of Master and Servant or Principal and Agent could have been based. This disposes of the second ground of appeal.

I now turn to the first ground of appeal which is based on the submission that upon proof that the vehicle was being driven with the authority of the owners at the material time the onus of proof passed to the owners to prove that the driver was not their servant or agent at that time, and that unless the owners discharged such onus, they were liable for the negligence of the driver of their vehicle.

In support of this submission, Mr. Sherani has cited a number of authorities.

Firstly, he relies on the decision in *Barnard v. Sully* (1931) 47 T.L.R. 557.

In that case the Plaintiff claimed damages against the defendant, the owner of a motor car, in respect of the negligent driver of his car by the defendant's servant or agent. The defendant denied that the driver of his car was his servant or agent and this was the issue upon which the case was decided.

At the trial the plaintiff proved that the defendant owned the car, but did not prove who was driving it at the material time. The defendant did not give evidence and called no witnesses. The County Court Judge ruled that there was no evidence that the car was being driven by the defendant's servant or agent. He did therefore withdraw the case from the jury on this ground and entered judgment for the defendant. The plaintiff appealed.

A On appeal it was held that it was more usual for a car to be driven by the owner or the servant or the 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 car was being driven by the owner or his servant or agent. It was pointed out that this evidence was liable to be rebutted by proof of the actual facts, but that since this had not been rebutted the plaintiff was entitled to succeed.

B There are two points of difference from the present case and that of *Barnard v. Sully*.

In the first place, in *Barnard v. Sully*, the plaintiff claimed damages in respect of the negligence of the defendant's "servant or agent". Vicarious liability was alleged in the pleadings on the basis of a relationship between the owner and driver of the car of either "Master and Servant" or "Prin-
C cipal and Agent".

In this case no such relationship was pleaded by the plaintiff. In his statement of claim, which was drawn by counsel, it was not alleged against the owners of the vehicle that the driver was their servant or agent. The plaintiff sought to make the owners vicariously liable for the negli-
D gence of the driver on the ground that he was driving with their "knowledge, authority and consent."

The plaintiff did, in fact, rely on a relationship of bailor and bailee, between the owners and the driver upon which to impute the negligence of the driver to the owners of the vehicle.

E Furthermore, the evidence in this case was not, as in *Barnard v. Sully*, entirely silent on the issue of the identity of the driver. The evidence showed that the driver was the son of one of the four partners in the defendant firm "Wing Fat Bakery". There was no allegation in the pleadings that this son was an employee or agent of these partners or of his father and no evidence to support such a finding. On the contrary,
F from the evidence of the first witness for the defence, it is clear that the driver was out in the van driving his girl friend — in fact two ladies — on a social expedition of his own, as had been the case on a number of previous occasions.

This case is therefore distinguishable from *Barnard v. Sully* on two grounds. Firstly, because the plaintiff did not in this case, as was done
G in that case, plead that the driver was the servant or agent of the owner of the vehicle but merely pleaded that he was a bailee.

Secondly, because in that case the defendant did not give or call any evidence and there was no evidence whatever on the issue of who was the driver at the material time. It was therefore entirely a matter of inference that in the absence of any testimony at all on that issue the
H driver was either the owner, or his servant or his agent. Whereas in this case there is some evidence that was neither challenged not contradicted that the driver was the son of one of the partners of the firm that owned the vehicle and that he was out driving on a personal social occasion of his own at the material time.

The next case relied on by the plaintiff is *Timaru Borough v. Squire* (1919) 38 N.Z.L.R. 151. A

In that case the driver of the car was the daughter of its owner. She was driving a friend who was a guest staying in her parent's home where the daughter resided. It was held that proof of ownership was sufficient prima facie evidence in these circumstances that the negligence of the daughter driver was imputable to the owner without affirmative proof that the driver was his servant. B

The basis of this decision is to be seen in the words of Simm J. at page 154 where he said —

> "In such circumstances his daughter would be the respondent's agent to invite the guest to his house and his agent to bring her there in the car."

The father owner's liability was therefore based on a finding that his daughter was, at the material time, his agent. He was held to be liable as a principal for the negligence of his agent. C

Later in his judgment Simm J. went to amplify this in very relevant terms by saying :—

> "If the evidence had made it clear that Miss Squire was engaged on what Parke, B. in *Joel v. Morison* called a frolic of her own, then the presumption of agency would be rebutted. If, for example, it had been proved that Miss Squire had used the car merely to visit one of her own friends in Timaru, then the business would be her own and not her father's. Nor would it be his business if, with his permission, she had used the car to take Miss Moore on a visit to some neighbour's place, because, as is pointed out in *Salmond on Torts*, a master is responsible for what he employs his servant to do for him, and not for what he allows him to do for himself. A master may be responsible, however, for the negligence of his servant, although the principal business of the expedition is the servant's own. That is clear from the case of *Patten v. Rea*. In the present case the business on which Miss Squire was engaged certainly concerned the respondent, for she was creating the relation of host and guest between him and Miss Moore — a relation which would impose on him certain legal responsibilities. In the absence of any evidence to the contrary, that ought to be treated as the respondent's business, and the presumption of agency, therefore, has not been rebutted." D E F

The much later case of *Hewitt v. Bonvin* [1940] 1 K.B. 188 appears to be very much in point. It was the decision of a strong Court of Appeal which took into account the decision of *Barnard v. Sully* and indicated the limits within which the principle laid down in that case was applicable. G

The facts in that case were that a son was driving his father's car with permission. He used the car solely for his own purposes to drive a man friend with two girl friends from London to Wisbech. On the return journey a collision occurred as a result of the son's negligence. H

The statement of claim averred that at the material time the son was driving the car, as the servant or agent of his father. The negligence of the son was proved and the ownership of the car by his father was admitted.

At page 194 du Parcq L. J. then said —

A

> "The question in dispute is whether the evidence proved that the son was driving in such circumstances as to make the appellant liable for the consequences of his negligence.
>
> It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands . . . . . It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his: *Barnard v. Sully* 47 T.L.R. 557; but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data."

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He held that the "father-owner" of the car could only be held liable for the negligence of the "son-driver" if the evidence proved that the son was acting for or on behalf of the "father-owner."

D

He went on later to say —

> "Before us counsel for the respondent relied on the fact that the driver of the car was the son of the appellant. Although it would be absurd to say that such a relationship is of itself evidence of agency I agree that when considered in combination with other circumstances it may be in some cases both relevant and significant."

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I have given careful consideration to the other cases cited by Mr. Sherani for the appellant and more particularly the recent case of *Van Dyke v. Fender* [1970] 2 All E.R. 335, in which the facts were, however, quite different.

F

The authorities are quite clear that in order to impute to the owner of a car the negligence of its driver, it must be proved that the driver was the servant or agent of the owner.

If the Court is left without any other information than the name of the owner of the vehicle, it is legitimate for it to draw the inference that the negligent driver was either the owner himself or some servant or agent of his on the authority of *Barnard v. Sully* 47 T.L.R. 557.

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Where however, as in this case, there is evidence that the driver was not the owner, but the son of one of the partners in a firm that owned the vehicle, the Court is not left to draw an inference from what du Parcq L.J. referred to as "incomplete data."

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In this appeal, the driver, a son of one of four co-owners, was driving two ladies on a social occasion. The evidence of this is not very cogent but it was given and it was neither challenged on cross examination nor contradicted by other testimony.

The plaintiff in the Court below in his statement of claim pleaded that the vehicle was being driven with the consent of the owner as the basis upon which he sought to establish the liability of the owner for the driver's negligence. At the hearing he relied on proof of this bailment to establish his case. This was not enough. It was necessary both to allege and establish that the driver was the servant or agent of the owner. It was not enough merely to show that the driver was driving the vehicle with the owner's consent as a bailee.

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In these circumstances, whilst it is undoubtedly true that in the total absence of any direct evidence of the identity of a negligent driver, upon proof of the ownership of the vehicle, the onus of proof passes to the owner to show that at the material time it was not being driven by the owner, his servant or his agent, different considerataions apply when there is direct proof of the identity of the driver and of the purposes for which he was using the vehicle.

C

Upon proof that the driver of the vehicle was the son of one of the partners of the firm that owned the vehicle, it was no longer a matter of necessary inference that this son must have been the servant of the firm or its agent at the material time. The evidence before the Court below was equally consistent with the driver being a mere bailee of the vehicle.

D

In these circumstances, the onus still rested on the plaintiff to prove that the driver was the servant or agent of the owners of the vehicle before the negligence of the driver could properly be imputed to the owners. This onus was never discharged.

E

This could possibly have been done or attempted by cross examination of the witness called by the defendant in the Court below who gave evidence of the identity of the driver. She clearly knew the driver well and had repeatedly been out driving with him on social occasions in a vehicle owned by the firm of which the driver's father was one of four partners. She was not asked any questions on this issue. This was apparently because the plaintiff did not rely upon any other basis for imputing the driver's negligence to the owners of the vehicle than that the driver was driving with the owner's consent i.e. a relationship of bailor and bailee. This was not enough. The plaintiff should both have alleged and proved either a relationship of Master and Servant or Principal and Agent before the driver's negligence could properly be imputed to the owner.

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I am of the view that on the evidence before the Court below, the learned trial Magistrate was correct in holding that there was insufficient grounds upon which the respondents, the partners of the firm that owned this vehicle, could properly be held liable for the negligent driving of the son of one of the partners when he was out driving the firm's vehicle on a purely personal social occasion.

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For these reasons the appeal is dismissed with costs to be taxed.

Appeal dismissed.