IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Civil Appeal No. 19 of 1978

BETWEEN: AZAAD SHAH s/o Attimullah Shah Appellant

and

ALI MOHAMMED s/o Nasir Ali Respondent

Mr. Jai Raj Singh, Counsel for the Appellant
Mr. A. Patel, Counsel for the Respondent

J U D G M E N T

This is an appeal against the judgment of a magistrate in a civil claim arising out of a collision between 2 motor vehicles.

It is not disputed that the appellant (deft. No.1) owned one of the motor vehicles which was driven by Dharam Lingham (second defendant).

The appellant (1st deft.) filed a Statement of Defence in which no denials or admissions of negligence were made. No defence was filed by the 2nd defendant.

At the hearing there was evidence on which the magistrate could, and did, find that defendant 2 was negligent. No evidence was given by either defendant and in fact defendant 2 did not appear. The magistrate gave judgment against the appellant on the ground that he was vicariouly liable for the negligence of his servant or agent deft.2.

The appellant (Deft.No.1) had submitted at the close of the plaintiff's case that he had no case to answer. He contended that agency cannot be inferred and it had to be proved that the driver, deft.No.2, was servant or agent of the owner i.e. the appellant. The learned magistrate referred to Barnard v. Sully 1931 47 T.L.R. 557 as deciding that ownership is prima facie evidence that the driver is the servant and he acted upon that authority. He also referred to the judgment of Lord Denning M.R. in Launchbury v. Morgans 1971 1A.E.R. 647. Although that judgment was overruled by the House of Lords in Morgans

v. Launchbury 1972 2 A.E.R.606, it was in relation to its references to the law of vicarious liability prior to 1971. The learned magistrate ruled that by pleading that one defendant owned and that the other drove the vehicle the plaintiff had thereby implied an allegation of a relationship of master and servant or agency between the two defendants.

His judgment followed his ruling and he held that the appellant was vicariously liable for the negligence of his servant or agent namely, the second defendant.

The first defendant, now appeals on the grounds that:

(1) the plaintiff had not pleaded that the second defendant was the appellant's servant or agent.

(2) the appellant's Statement of Defence specifically denied the relationship of master and servant or agency.

(3) there was no evidence to support an allegation of servant or agent.

(4) the appellant's Statement of Defence pleaded that the 2nd defendant had taken away the truck without the appellant's knowledge.

In Launchbury v. Morgans(supra) Lord Denning said at p.646, f,

"The fact ofownership was prima facie evidence th that the relationship of master and servant existed: see Bernard v. Sully. The judge also met it by extending the doctrine of vicarious liability. They applied it so as to make the owner or hirer of a vehicle liable, not only when the driver is his servant acting in the course of his employment, but also when the driver is his agent, driving the car wholly or partly on the business of the owner or hirer or for a purpose in which he has an interest or concern. This principle was first adumberated by Du Parcq L.J. in Hewitt v. Bonvin."

Although Lord Denning's decision was overruled by the House of Lords as I have stated, it was not overruled on the foregoing quoted passage which was not adversely commented upon by the House of Lords who in no way critised the decisions in Barnard v. Sully & Hewitt v. Bonvin.

In Hewitt v. Bonvin, 1940, 1 K.B. 188 at 194 Du Parcq L.J. stated:-

> "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, see Barnard v. Sully."

In my view it is clear from the foregoing that where A drives B's car then A is presumed to be the servant or agent of B; that is, the fact that B owns the car is prima facie evidence that the driver, A, is his servant or agent. Consequently, it was sufficient for the plaintiff to plead, as he did, that the appellant owned the vehicle driven by the deft. No.2 to raise the presumption that deft. No.2 was the servant or agent of the appellant. It is obvious that the appellant appreciated the inference from the allegation that the deft.2 was driving the appellant's vehicle because in his Statement of Defence he specifically denied the implied allegation that deft.2 was the servant or agent of the appellant.

Ground 1 fails.

Turning now to ground 3 that there was no evidence that the deft. 2 was the servant or agent of the appellant. I have already referred to the decisions which shows that the relationship is presumed to exist. It was therefore necessary for the appellant to give evidence of facts to rebut that presumption. Of course the plaintiff is free to adduce evidence, if he can, to establish the relationship of master and servant or of agency. The presumption was rebutted in Ramharran v.

Gurucharan, 1970 1 A.E.R. 749 the headnote of which reads as follows:-

> "Although ownership of a motor vehicle (which at the time of accident is being driven by another for his own purpose and without the knowledge of the owner) 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 being ultimately a question of fact."

Lord Donovan stated at p. 753, f,

> "The appellant could not, except at his peril, leave the Court with no other knowledge than that the car belonged to him. But he could repel any inference, that he 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 in 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."

His Lordship makes it abundantly clear that there is a presumption that the driver is the owner's servant or agent and that the presumption has to be rebutted by the owner adducing evidence to the contrary.

On that basis alone ground III fails. However, the plaintiff did support the presumption of service or agency by adducing evidence through P.W.3 that deft. 2 frequently drove for the appellant and that he had seen deft. 2 driving the appellant's vehicle on 10 to 15 occasions. There was also the appellant's unchallenged admission of liability in the evidence of P.W.2, (plaintiff's driver) who stated that the appellant on the day of the accident agreed to pay for the damage.

/5.

Ground 3 fails.

Grounds 2 & 4 can be taken together. They both complain that the magistrate has ignored emphatic pleading in the Statement of Defence denying existence of any agency and in fact alleging that the deft. 2 had taken the appellant's vehicle without permission.

It appears that the appellants is under the misapprehension that allegation in pleadings denying the relationship of master and servant are sufficient to rebut the presumption that it does exist.

As I have pointed out, the speech of Lord Donovan (supra) shows that the presumption must be rebutted by evidence. It does not lay an unduly heavy burden upon the appellant because it is something peculiarly within his own knowledge as to whether the deft. 2 was his servant or agent. The appellant elected to call no evidence and to rest on his submission of no case to answer. Consequently the presumption and the evidence supporting it was not rebutted.

Grounds 2 & 4 fail.

The appeal is dismissed and the appellant will pay the respondent's costs which I fix at $45 excluding disbursements.

LAUTOKA,
24th November, 1978.

(sgd.) J.T. Williams,
JUDGE