ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

JUDGMENT

CITATION: Abdul Hakim Wadi v. Tricia Smith

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 316 of 2012

DELIVERED ON: 6th June 2013

CORAM: Her Worship Magistrate Nalini Singh

St. George West County

Port of Spain Petty Civil Court Judge

REPRESENTATION:

Mr. Harish F.T. Jacelon appeared for Abdul Hakim Wadi

Mr. Lemuel Murphy and Mr. Joseph Sookoo appeared for Tricia Smith

TABLE OF CONTENTS

TABLE OF CONTENTS 2

PREFACE 5

PART ONE 6

INTRODUCTION 6

THE ISSUES 7

PART TWO 8

THE LAW 8

Whether the deceased was the agent of the defendant 8

The law relating to vicarious liability based on an agency relationship 8

Presumption of an agency relationship 9

The presumption of an agency relationship is capable of being rebutted 12

The nature of the owner's purpose concept 16

Did the defendant in this case repel the presumption of an agency relationship? 18

Evidence of the defendant 19

Summary of basis for disputing the presumption of an agency relationship 21

Competing submissions of counsel 22

Submissions by counsel for the defence 22

Submissions by counsel for the claimant **26**

Discussion **32**

The Court's finding on whether the deceased was the agent of the defendant **36**

Whether the deceased drove negligently **38**

How did the collision occur **38**

The evidence of the claimant **39**

The Court's findings on the manner in which the collision occurred **40**

Did the deceased reverse when it was unsafe to do so? **40**

Is the claimant guilty of contributory negligence? **43**

The Court's findings on whether the deceased was negligent **45**

Whether there is adequate proof of damages **45**

Special damages must be proved **45**

The Principle regarding the measure of damages awarded when chattel is damaged **49**

The evidence of special damages **50**

The evidence of the claimant **50**

Exhibit evidence **50**

The Court's findings on proof of special damages **51**

PART THREE **53**

THE COURT'S FINDINGS **53**

PART FOUR **56**

INTEREST **56**

COSTS **56**

THE FINAL ORDER OF THE COURT **57**

POSTSCRIPT **58**

PREFACE

The trial into this matter commenced on the 13th May 2013. Evidence in the case concluded on the 17th May 2013. Counsel for the defendant filed closing arguments on the 22nd May 2013 and counsel for the claimant filed his closing arguments on the 27th May 2013. The matter was fixed for the 3rd June 2013 for oral submissions. The case was then adjourned to the 6th June 2013 for the Court's Decision.

These are the reasons for the decision of the Court. It is divided into four parts.

Part 1 contains an introduction and sets out the issues which arose in this case.

Part 2 addresses the law and the evidence considered by the Court before arriving at its decision in this matter.

Part 3 sets out the facts as found by the Court in arriving at its decision in this case.

Part 4 relates to the manner in which the matter was eventually disposed of.

PART ONE

1.0 THE INTRODUCTION

1.1 On the 13th August 2008, the claimant Abdul Hakim Wadi (hereinafter referred to as "the claimant"), was driving his vehicle PCC 1633 along the La Horquetta Boulevard when he had cause to bring his vehicle to a stand-still. Whilst in this stationary position it is the case for the claimant that vehicle PBY 1176 driven by the deceased mechanic Ronaldo Montrichard (hereinafter referred to as "the deceased") and owned by the defendant Tricia Smith (hereinafter referred to as "the defendant"), reversed onto the front portion of his car.

1.2 The claimant filed an ordinary summons on the 10th August 2012 wherein he claimed against the defendant damages in the sum of $14, 440.17 TTD arising out of the collision. The basis of this claim is that the claimant alleges firstly, the deceased was negligent in the circumstances and secondly, the deceased was the agent of the defendant at the time the collision occurred.

1.3 In her defence the defendant states that the deceased told her that her car was damaged whilst it was parked outside in the roadway when the vehicle driven by the claimant came into contact with it. Further, the defendant stated that the scope of work she hired the deceased to perform did not necessitate the car being test driven. Additionally, she expressly forbade the deceased to drive her car. In the circumstances the deceased was not driving the car for her purpose and therefore, he cannot be considered her agent. As such she is not liable for the sum claimed.

2.0 THE ISSUES

2.1 From the evidence which was led, three issues arise for my determination in this matter. They are:

1. Whether the deceased was the agent of the defendant.

2. Whether the deceased drove negligently.

3. Whether there is adequate proof of damages.

I will now address each of these issues in turn.

PART TWO

3.0 THE LAW

1. WHETHER THE DECEASED WAS THE AGENT OF THE DEFENDANT

The Law relating to vicarious liability based on an agency relationship

3.1 Vicarious liability on the part of the owner of a motor vehicle may attach by reason of the fact that the driver of that motor vehicle is the servant or agent of the owner. Indeed Lord Wilberforce observed in the case of **Launchbury v. Morgans [1973] AC 127 at page 135** that:

> "I regard it as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty... I accept entirely that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable' and that either expression reflects a judgment of value—respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct".

Then Viscount Dilhorne in the same case made the point at page 139 in referring to the case of **Hewitt v. Bonvin [1940] 1 KB 188** that:

> " Du Parcq LJ thought that the better way of putting the respondent's case was on the basis of agency, and said ([1940] 1 KB at 194, 195):
>
> > 'The driver of a car may not be the owner's servant, and the owner will be nevertheless 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 liability depends not on ownership, but on the delegation of a task or duty'.

Thus, it was held that whether it be alleged that the driver was the servant or that he was the agent, to establish liability on the part of the employer or the principal, it must be shown that the driver was acting for the owner and that it does not suffice to show that the driving was permitted".

3.2 With this in mind, a logical place to start in determining liability in this case would therefore be with a determination of whether the deceased was driving the defendant's motor vehicle as her agent.

Presumption of an agency relationship

3.3 It is a principle of law that an inference may be drawn from proof that a motor vehicle is owned by another, that the driver of that motor vehicle is driving as servant or agent of the owner. This point is made in **Charlesworth & Percy on Negligence 12th ed. at paragraph 3-171** where it is stated that:

> "The fact that the defendant is the owner of the car in question is evidence that it was being driven by him or his servant or agent at the material time. Alternatively, it can give rise to such an inference being drawn".

The authority for this proposition is **Barnard v. Sully (1931) 47 TLR 557**. This was a case where the claimant claimed damages for the negligence of the defendant's servant or agent in driving, management and control of the defendant's motor vehicle which collided with his van.

The defendant denied that the driver of the motor vehicle was his servant or agent or was acting within the scope of a servant's or agent's authority. It was held by the County Court Judge that there was no evidence that the motor vehicle was being driven by the defendant's servant or agent and withdrew the case from the jury and entered judgment for the defendant.

3.4 On appeal it was held that where in an action for negligence it is proved that damage has been caused by the defendant's motor vehicle, the fact of ownership of the motor vehicle is *prima facie* evidence that the motor vehicle was, at the material time, being driven by the owner, or by his servant or agent. Lord Justice Scrutton in giving judgment in the matter set out the principle at page 558 in this way:

> "No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners. As illustrations of that there were the numerous prosecutions for joy riding, and there were also the cases where chauffeurs drove their employers' motor-cars for their own private folly. 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".

3.5 I understand this case to be saying that <u>where nothing more</u> on the issue is proved beyond the mere fact of ownership, in other words, if no more is known other than the fact that at the

time of the collision, a car is owned but not driven by A, proof of ownership will constitute *prima facie* evidence that at the time of the accident:

(a). The driver was A's servant or agent and,

(b). The driver was acting within the scope of his employment or agency.

3.6 Although this is a case which has been daubed "a somewhat obscure decision" by Gilbert Kodilinye[1] it is nevertheless a principle which is recognized as "applicable"[2] in this jurisdiction. It also happens to be a principle which has been alluded to in various decisions from other jurisdictions. In the Australian case of **Christmas v. Nicol Bros Pty. Ltd. (1941) 41 NSWSR 317 at page 320**, His Lordship Jordan J made the point that:

> "Ownership of the vehicle by the person alleged to be vicariously responsible for the act of the driver becomes, however, significant, if in the circumstances of the particular case the fact of ownership enables or assists the inferences that at the time of the accident the driver was probably the employee of the owner and was then acting within the scope of his employment. There is no hard and fast rule for determining what evidence may be regarded as sufficient to enable these inferences, or when and how ownership is material; and there is no difference in principle between a commercial vehicle and a private vehicle. It is a matter of common sense, depending in each case upon the circumstances".

3.7 Then in another case emanating from that jurisdiction; **Wiseman v. Harse (1948) 65 WN (NSW) 159,** it was said at page 160 by His Lordship that:

[1] Gilbert Kodilinye, "Vicarious Liability of Vehicle Owners in the Commonwealth Caribbean," *Anglo-American Law Review* 6 (1977): 18-33 at p. 28.
[2] Per Mendonça JA in **Vaughn Williams v. Farzan Rahim CA No. 220 of 2009 at paragraph 28.**

> "In my opinion, it is now established by the authorities referred to in Christmas v Nicol Bros Pty Ltd and Another (1941) 41 SR 317 at 320-321, that in the case of a commercial vehicle, and probably also in the case of a private vehicle, evidence that at a particular time it was being driven is, in the absence of evidence sufficient to justify a different conclusion, evidence that it was being driven by or on behalf of its owner. This is because it is a matter of common knowledge that it is more usual than not for vehicles to be used by or on behalf of their owners".

3.8 It is noted in passing that the courts have not differed from this principle in the decisions out of Fiji; **Prakash v. Khan [2009] FJHC 160**, New Zealand; **Manawatu County v. Rowe [1956] NZLR 78**, East Africa; **Karisa v. Solanki [1969] EA 318**, Malaya; **Kayat v. Lim Yew Seng [1972] 1 MLJ 26**, Ghana; **Fynhout Production Ltd v. Kwayie [1971] 1 GLR 475**, Sierra Leon; **Ngombui v. Hall (1963) 3 SLLR 61** and Nigeria; **Pedrocchi & Co. v. British Insulated Callender's Cables Ltd. (1968) 1 ALR Comm. 233.**

The presumption of an agency relationship is capable of being rebutted

3.9 It is an equally pertinent principle of law that evidence of ownership is not conclusive and may be rebutted by the circumstances in which the motor vehicle was actually being driven at the time. Indeed the point is made in **Charlesworth & Percy on Negligence 12th ed. at paragraph 6-11** that:

> "... it is always open to the defendant to call evidence contradicting or nullifying any inference which is sought to be drawn from the claimant's evidence" (emphasis mine).

Similarly, in **Phipson on Evidence 16th ed. at 6-17** it is stated that:

> "Where a rebuttable presumption of law applies in favour of a party, on the proof or admission of one fact, another fact is to be presumed. Once the presumption applies, the persuasive or evidential burden (as the case may be) is on the other party to disprove the presumed fact".

3.10 This concept was specifically illustrated in **<u>Rambarran</u> v. <u>Gurrucharran</u> [1970] 1 All ER 749** where the Privy Council found that the presumption of a servant or agency relationship had been capable of and was in fact rebutted by the defendant. On the facts of this case, the defendant owned a motor vehicle which he allowed his sons to use as he himself did not drive. One day, an accident occurred whilst one of his sons was driving. In attempting to rebut the presumption of a servant or agency relationship, the defendant gave evidence at the trial that he did not know that his son was using the car on the day the accident occurred since he was not at home where the car was kept and was not therefore in a position to see when it left the compound or, who was driving it. Further, the purpose for which his son was driving the car at the material time was not one specified as the defendant's own purpose. Finally the defendant did not even become aware of the accident until some two weeks after the fact. The Court of Appeal of Guyana held that the defendant had not rebutted the *prima facie* case of agency arising from the fact of ownership of the car since he had left the court without evidence as to the journey during which the accident occurred.

3.11 It was held on appeal to the Privy Council that the defendant was not liable as the evidence he had adduced destroyed the presumption of a servant or agency relationship and

raised a strong inference that the son was not driving as the defendant's servant or agent. The basis for this decision was that there was evidence before the court -which came from the defendant, that the car was not being used for his purposes on the day of the accident and this was sufficient to rebut the inference. The point was then made that viewed in this light, it was not necessary that the defendant should adduce proof of what his son's purpose was in using the car if he proved that his son was not driving as his servant or agent on the day in question because in these circumstances, the son's purpose would be irrelevant. This is how the matter was stated at pages 562-563 by Lord Donovan:

> "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" (emphasis mine).

3.12 I understand this case to amplify the rule in *Barnard v. Sully (supra)* by establishing that although proof of ownership affords some evidence that a motor vehicle may be driven by an owner's servant or agent, it is a presumption that is capable of being rebutted. So, once there is

additional "cogent and credible" evidence before the court which bears on the question of the servant or agency relationship, and in particular:

(a). evidence that the motor vehicle was being used for some purpose which served no purpose of the owner; in other words, cogent and credible evidence that shows that the journey which was embarked upon was for a specific purpose which by inference shows that it was not for the owner's purpose, or,

(b). evidence that the car was not being driven for any purpose of the owner; referring to cogent and credible evidence that the car was not being used for the owner's purpose so what is being led is actual evidence of a negative fact,

then the issue of whether the presumption is displaced would be a live one which must be decided by considering the totality of the evidence.

3.13 I have found that this principle was clearly explained by His Lordship Jamadar JA in his dissenting judgment[3] in the case of **Vaughn Williams v. Farzan Rahim CA No. 220 of 2009 at paragraph 18** where he set out succinctly the principle in *Rambarran v. Gurrucharran (supra)* in this way:

> "18. What is key to understanding the approach of Lord Donovan, is to recognize that the evidential onus shifts onto the owner to show that the vehicle was not being used for his purpose. This can be done, Lord Donovan suggests, in one of the two ways; though arguably, once it is sufficiently demonstrated by the owner that is enough to rebut the presumption. As Lord Donovan pointed out, the Appellant had to show (by evidence) **either** what was Nurse's object in using the

[3] Similar sentiments were expressed by His Lordship Mendonça JA with whom His Lordship Bereaux JA agreed at paragraph 22.

car and that it (the object) did not serve any purpose of the Appellant **or** that the vehicle was not being driven for any purpose of the Appellant and proving this by sufficiently cogent and credible supporting evidence".

3.14 The case of *Manawatu County v. Rowe (supra)* is in line with these principles. This was a case where the majority of the court, agreeing with the conclusion of the trial judge, was of the view that a wife using her husband's car with his authority was not his agent when returning from a social visit which she had undertaken without reference to her husband and in which he did not have any obvious interest or concern. It was held that although an inference can be drawn from ownership that the driver was the servant or agent of the owner it was an inference which could only be drawn in the absence of all other evidence bearing on the issue or, if the other evidence which was available on the issue, failed to counterbalance it.

3.15 The authorities therefore suggest that a presumption of a servant or agency relationship is capable of being displaced if there is "cogent and credible" evidence that the trip was something other than in pursuance of the owner's purpose or, it was not made in pursuance of the owner's purpose so as to counterbalance the presumption of a servant or agency relationship.

The nature of the owner's purpose concept

3.16 A number of cases have illustrated the operation of the owner's purpose rule. One such case is **Ormrod v. Crosville Motor Services Ltd. & Another [1953] 2 All ER 753.** On the facts of this case, a car owner who was taking part in the Monte Carlo car rally, arranged with his friend for the friend to drive the car with the friend's wife as a passenger, in the friend's own

time, and meet him at Monte Carlo before the end of the car rally. Once the three met up, the plan was that the car would be used by the three for a holiday in Switzerland. A suitcase belonging to the car owner was conveyed in the car en route to Monte Carlo. During the journey, the car was involved in a collision and the owner of the other vehicle sued the car owner for damages caused by the negligent driving of the friend. The basis of the finding of vicarious liability on the part of the car owner for the friend's negligent driving was that the friend was driving the car partly for the car owner's purpose. According to Singleton J at page 754:

> "It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency, but the purpose for which this car was being taken down the road on the morning of the accident was either that it should be used by the owner, the third party, or that it should be used for the joint purposes of the male plaintiff and the third party when it reached Monte Carlo. In those circumstances it appears to me that the judgment of Devlin J, that at the time of the accident the male plaintiff was the agent of the third party was right, and the third party's appeal on that head should be dismissed" (emphasis mine).

3.17 Then in the Hong Kong case of **Chan Hung-wing & Anor v. Lam Kam-ching & Anor [1977] KHLR 505** the owner of a lorry left the lorry with a garage proprietor for the vehicle to be serviced. The plaintiff was injured when the lorry was being conveyed by the garage proprietor to his new premises with the permission and on the instructions of the owner of the lorry. The plan was that the lorry would remain at this location until the owner of the lorry was

ready to collect it. It was found that the owner of the lorry was vicariously liable for the negligent garage proprietor's driving. The basis of this finding was that the lorry was being moved to the new premises for the benefit of the owner of the lorry.

3.18 So, too in another case from that jurisdiction: **Kung Kit-shing v. Star Synthetic Flower Factory (a firm) & Others [1987]** it was found that the use of a van would have been for the benefit of the defendant van owner and on this basis he was vicariously liable for the negligent driving of his employee.

3.19 Similarly, in **So Wing Kwong v. ChengChi Kwong & Others [1999] 3 HKLRD 689** the owner of a car had delegated to a restaurant's car parking service, the task of parking his car. The plaintiff was injured whilst the car was being negligently driven by an employee of the car parking service. In these circumstances the owner of the car was still held to be liable on the basis that the parking had been for his benefit.

Did the defendant in this case repel the presumption of an agency relationship?

3.20 In this case, the defendant did not attempt to adduce cogent and credible evidence to show what the object of the deceased driver's journey really was, and therefore argue inferentially that it did not serve any purpose of hers -which would be the first option available to defendant car owners according to *Rambarran v. Gurrucharran (supra).* Instead what the defendant did was, she attempted to pursue the second option available to her under the principles in *Rambarran v. Gurrucharran (supra)* and adduce what was offered as cogent and credible evidence showing that it was not within her contemplation that it would be necessary for

there to be a test drive in giving effect to the scope of work the deceased was retained by her to do. Furthermore, she did not give the deceased permission to drive her car because she knew he was under twenty five years and not therefore covered by her insurance policy; ergo the car was not being driven at the time of the collision, for any purpose of hers.

Evidence Of The Defendant

3.21 This is how the evidence unfolded. The defendant testified that on the 13th August 2008 she drove her vehicle PBY 1176 to La Horquetta Boulevard at the home of Ronaldo Montrichard who was a mechanic and who had previously changed fluids in her vehicle. She told the Court that she asked him to change the oil, coolant and brake fluid in her vehicle and they agreed that she would return for the vehicle later on that day.

3.22 She stated that she returned later that day to collect the vehicle and the deceased told her that he had completed the job. According to the defendant, the deceased also related an incident which occurred with her vehicle earlier on that said day. He explained that while her vehicle was parked on the roadway, another vehicle came into contact with it causing minor damages to her car. He then pointed to a small dent on the rear bumper of PBY 1176. He also explained that the driver of the other vehicle admitted liability and agreed to fix his own vehicle. The defendant testified that the damages to her vehicle were negligible and it was her intention to do a body job as she was preparing to sell the vehicle so she did not bother to take further action regarding the matter at that time. The defendant then said she took her vehicle and drove away.

3.23 She stated emphatically that when she handed over her vehicle to the deceased she was of the considered view that he was not required to drive her vehicle for any reason nor was it necessary for him to do so based on the scope of work she instructed him to do. It was also her evidence that based on previous conversations with him, when she first started to give him the vehicle to change fluids, they agreed that he was not to drive her vehicle as he was not covered under her insurance since he was under twenty five years of age at the time. In any event, due to the nature of the job the defendant informed the Court that the deceased was not required to drive the vehicle.

3.24 She stated that the car was parked in front of his home at La Horquetta Boulevard. More specifically, in front of his driveway facing east on the side of the roadway.

3.25 In cross examination the defendant told the Court that she was at work at the time the accident occurred and was not therefore at the scene when the accident occurred. The defendant agreed that the deceased was retained by her to change the fluids.

3.26 The defendant admitted that she was not a mechanic but she could still say that it was not necessary to drive the car or test drive the car in order to test the brakes. At this point the defendant also reiterated to the Court that there was an agreement that the deceased was not to drive her car.

3.27 The defendant stated that she is a police officer attached to the Fraud Squad and she agreed that she did not report the accident to the police. She explained this by saying that as far

as she was concerned the onus was on the drivers in the accident to report same to the police. This was notwithstanding the fact that one of the cars which was involved in the accident belonged to her and she therefore had an interest in it. Further the defendant agreed that she did not provide the Court with any documentary evidence that the fluids in her car was what really needed to be changed on the 13th August 2008. According to her this was because the incident occurred in 2008 so she did not have those documents.

3.28 The defendant admitted that she believed the "young boy" mechanic when he told her his version of how the accident occurred.

3.29 The defendant also conceded that she was not an expert but she still had a view which was that it was not necessary for the deceased to drive her car given the scope of works she had retained him to do.

3.30 Finally, the defendant confirmed that her car was parked to the front of the deceased driveway.

Summary Of Basis For Disputing The Presumption of An Agency Relationship

3.31 From the evidence given by the defendant, it is the understanding of the Court that it was disputed that the deceased was her agent because if he was driving at the time the collision occurred, it was not for any purpose of hers. This is so for two reasons:

(a). The scope of works she retained him to do did not necessitate him driving her car so it could not be said that it was within her contemplation that the car would be test driven in the process of giving effect to her purpose for hiring him.

(b). She prohibited the deceased from driving her car because he was under twenty five years and was not covered under her insurance policy.

3.32 Counsel for the defendant submits that the rule in *Barnard v. Sully (supra)* does not apply as it cannot be said that "nothing more" was known by the claimant on the issue of the purpose for which the car was driven. After all, according to Mr. Sookoo the claimant pleaded in the particulars of claim, the fact that there was an agreement whereby the defendant hired the deceased to change fluids in the defendant's car. As such Mr. Sookoo contends that the claimant should have adduced positive proof of agency and the rule in *Barnard v. Sully supra* can not apply. Alternatively he submits that in any event enough evidence was led on the case for the defendant to displace the presumption of an agency relationship.

3.33 Counsel for the claimant on the other hand, submits that the presumption was never displaced in the first place and so the presumption of an agency relationship remains. I will now deal with the submission of counsel on this point in more detail.

Competing Submissions Of Counsel

Submissions by Counsel For The Defence

3.34 Mr. Sookoo for the defendant submits that there is no evidence establishing that the deceased was acting under the defendant's authority or under any actual, implied or usual agency.

3.35 Counsel relied on the local Court of Appeal judgment of **<u>Singh and Another</u> v. <u>Ansola</u> CA No. 169 of 2008**, where His Lordship Mendonça JA stated at paragraphs 29 to 31 with respect to the liability of an owner in agency that:

> "29. Apart from the master servant relationship, the owner may be liable on the principle of agency. As Lord Pearson noted in *Morgans v. Launchbury and Others [1972] 2 ALL ER 606, 613:*
>
> > "If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving.
>
> In that case it was held that to establish the existence of an agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions, and was doing so in the performance of a task or duty delegated to him by the owner.
>
> 30. I think in this case it is clear that at the time of the accident the driver was not using the car pursuant to an express or implied request by the owner or on his instructions nor was he doing so in the performance of a task or duty delegated to him.
>
> 31. In my judgment, therefore, the Judge was wrong to find the owner liable for the negligent acts of the driver. The orders of the Judge against the owner must therefore be set aside and the claim against him dismissed".

3.36 Counsel also drew the Court's attention to the local Court of Appeal matter of *Vaughn Williams v. Farzan Rahim (supra)* where His Lordship Mendonça JA ruled at paragraphs 15 and 19 that:

> "15. … To establish that Nurse was at the material time driving the motor vehicle as the Appellant's agent, it must be proven that at the time of driving the vehicle, he had the authority to drive the vehicle and to do so for the purposes of the Appellant. In other words, it must be shown that at the material time he was authorized to use the vehicle for the purposes of the owner. It is appropriate to refer to a few of the many authorities which establish that principle…
>
> 19. The onus of proof of agency rests on the party who alleges it. If there is evidence that establishes that the owner gave his permission or authority to use his vehicle for his purposes and the vehicle was being so used at the material time and that is accepted by the Court then the claimant should succeed in his claim".

3.37 Based on these authorities, counsel contends that in the current matter, it is only if the Court has sufficient evidence before it showing that the deceased was using the defendant's car at the owner's request, express or implied, or on her instructions, and was doing so in the performance of a task or duty delegated to him by the defendant, that it could determine that an agency exists to make the defendant liable for the acts of the deceased.

3.38 Mr. Sookoo maintains that this option is not available to the Court given the state of the evidence led by the claimant in this case. According to counsel, the claimant alleged that the

deceased was acting as agent of the defendant but led no evidence to support the allegation, relying solely upon the fact that the defendant's car was being driven by the deceased. This was necessary according to counsel because it cannot be said that the claimant knew "nothing more" about the circumstances under which the car was driven by the deceased given the fact that those circumstances were set out in the claimant's particulars of claim.

3.39 Balanced against this failure was the point that, according to counsel, the defendant advanced sufficiently clear and cogent evidence as to the actual facts regarding the deceased man's lack of authority to drive her car. Once this occurred, based on the Court of Appeal Judgment from the Eastern Caribbean States **Nicholls v. Tutt (1992) 41 WIR 140**, it became necessary for the claimant to adduced evidence as to the necessity for the deceased to test drive the defendant's car in light of the positive denial of the defendant to the contrary. For this proposition, counsel depended on the specific part of that case where it was said that:

> "… Therefore, by the appellant's own admission, it was not necessary for the mechanic to drive the car in order to ascertain whether the pump was properly installed. Had such necessity been established, it would have been evidence that the driver drove the car in performance of his own task or duty or in pursuit of his own purposes. But there was no evidence of such necessity. Nor was there evidence of any fact from which such necessity could properly be inferred in defiance of the appellant's positive denial of such necessity…".

Since the claimant failed to provide evidence of the necessity of the deceased to drive the defendant's vehicle, Mr. Sookoo contends that an agency relationship has not been established.

Submissions By Counsel For The Claimant

3.40 Mr. Jacelon for the claimant submits that once the defendant admitted under cross-examination that she employed the deceased to work on her car, that admission established agency (*Barnard v. Sully (supra)* and *Rambarran v. Gurrucharran (supra))* and that is sufficient to take the matter further which means that is now for the defendant to rebut the presumption of an agency relationship by adducing sufficiently cogent credible evidence. But, according to counsel, there are a number of reasons why in his view, it cannot be said that the evidence proffered by the defendant to negative the presumption of an agency relationship is sufficiently cogent and credible evidence.

3.41 He contends firstly, that based on the nature of the work the deceased was retained to perform on the defendant's vehicle, it would not have been unreasonable or outside the course of the deceased man's employment to test drive the vehicle. Counsel makes the point that the defendant testified that based on the work she retained the deceased to perform it would not be necessary to drive her car. This view according to counsel, was offered by the defendant even though she admitted in cross examination that she was not a mechanic and could not verify that it really was not necessary to test drive her vehicle given what she hired the deceased to do. As such this evidence according to Mr. Jacelon, is opinion evidence from a non expert which means that little weight can be ascribed to it.

3.42 Mr. Jacelon argues further that the very fact that according to the defendant, she parked her car in front of the deceased house in front the driveway, makes it unreasonable to conclude in the circumstances that the deceased would not have moved the car.

3.43 Counsel also questions the cogency and credibility of the evidence proffered by the defendant when she said that her reason for not allowing the deceased to drive her car was because he was under twenty five years and not covered by her insurance policy. Counsel makes the point that the assertion of the deceased man's age was never supported by any documentary evidence to prove age. For this reason Mr. Jacelon submits that the Court is left with no choice but to place very little weight on this evidence as well.

3.44 Counsel submits in the alternative that even if the Court finds as a fact that the deceased was prohibited by the defendant from driving her car and he went against these instructions and drove the car, this would still, according to counsel, not destroy the presumption of the a master/servant relationship. This is because the deceased would be committing a "wrongful mode" of doing some act authorized by the defendant; the wrongful mode being driving the car and the authorized act being to act in the capacity of a mechanic as agreed by the defendant, to change the oil, coolant and brake fluid. Counsel predicated this submission on learning from a number of authorities. One was **Salmond and Heuston The Law of Torts (21st ed., 1996) p.443:**

> "If the unauthorized and wrongful act…is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it".

Counsel then referred the Court to the case of **Bayley v. Manchester, Sheffield and Lincolnshire Rly Co (1873) LR 8 CP 148, 42 LJCP 78, 28 LT 366 at para 6.56**, where it was found that:

> "Where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do".

Counsel also cited **Subhaga v. Rahaman [1964] L.R.B.G. 112 (High Court British Guiana)** in support of his argument. In this case the Learned Judge Bollers stated that:

> "It is well settled that where the relationship of master and servant exists, the master is liable of the torts of his employment. The tort or wrongful act is deemed to be done in the course of employment if it is either 1) a wrongful act authorized by the master, or 2) a wrongful mode of doing something authorized by the master…it follows, then, that the master is liable even for acts which he has not authorized, provided that, when all the surrounding circumstances are considered, there are so connected with acts which he has authorized that they may be regarded as modes, although improper modes, of doing them. The submission of counsel for the defence in this case was that the driver's duties did not include the conveyance of passengers and therefore such conveyance was not incidental to his duties. With this submission I cannot agree" (counsel's emphasis).

3.45 Finally, by way of illustration, counsel referred the Court to the matter of **London County Council v. Cattermoles (Garages) Ltd [1953] 2 All ER 582.** In this case the defendants, who were the owners of a garage, employed P in a general capacity as a garage hand, part of his duty being to move cars in the garage so as to make way for other cars. He had no driving licence and he was forbidden to drive vehicles. In front of the garage were petrol pumps,

and on the 7th February 1950, the attendant asked P to remove a van, which was stationary in front of the pumps, so as to allow some motor lorries to obtain petrol. Instead of pushing the van out of the way, P drove it. Finding that there was not sufficient space to drive straight into the garage out of the way of the lorries, he drove on to the highway, intending to turn there so as to come back to the garage behind the lorries. On the highway a collision occurred between the van which P was driving and a van belonging to the plaintiffs, which was damaged.

3.46 It was held that P's duty being to move cars in the garage, it was impossible to define the scope of his employment as that of pushing cars by hand in contra-distinction to moving them by other means, including that of driving them, and, notwithstanding the fact that he was expressly forbidden to drive cars, his action in moving the van by means of its own engine, instead of by pushing it, was within the scope of his employment, being a wrongful and unauthorised way of performing an act which he was employed to perform. So the excursion on to the highway was merely incidental to moving the van out of the way of other motor vehicles on the defendants' premises, the work for which P was employed, and, therefore, although it was illegal for P to drive on the highway as he had no licence, the fact that the accident occurred when he took the van off the garage premises on to the highway did not affect the result, and the defendants were liable in damages to the plaintiffs for P's negligence.

3.47 According to Mr. Jacelon, these cases demonstrate that the law is that where a tort committed by the employee falls within the scope of the authority to be implied from his employment, the employer cannot escape liability on the ground that he gave his employee no authority to commit torts, or even on the ground that he had expressly prohibited the employee

from committing the tort in question. Indeed, the employer has put the employee into a position to do a particular class of acts on his behalf, and he must therefore accept responsibility for the manner in which the employee conducts himself in the performance of any such act. It follows that even if the act the deceased was performing was an unauthorized or a wrongful way of performing what he was employed to perform the defendant as car owner and employer would still be liable once it was within the scope of his employment. Counsel also submits that the fact that the collision with the plaintiff's vehicle occurred within close proximity of the mechanic's garage makes it a reasonable probability that the deceased was testing the vehicle within the scope of his employment. Since driving the car was within the scope of the deceased employment with regards to ensuring the brakes were functioning correctly, the defendant is still liable.

3.48 Another point which was made was that in law, where a servant does an act where he has no express authority to do, but which is nonetheless intended to promote his master's legitimate interests, the master will be liable in the event of its being tortious, unless the act is so extreme or so outrageous that it cannot be regarded as incidental to the performance of the servant's allotted duties. Counsel's point is that in the present matter the evidence did not demonstrate that such acts of the deceased were so outrageous as to discharge the liability of the owner. So if the deceased drove the vehicle in excess of his instructions by the defendant that excess is not so great as to take the act of driving the car out of the course of employment. Illustrating this principle was the case of *Ormrod v. Crosville Motor Services Ltd. (supra)* where it was held that it is sufficient for liability if the driver was driving partly for the owner's purposes at the material time. Additionally, in **South v. Bryan and Confidence Bus Service Ltd. [1968] G1 L.R. 3 CA**

Jamaica, B was employed as a driver by the bus company with general authority to drive the company vehicle while B was reversing at a gas station which was a quarter mile off his route, B negligently collided with the plaintiff. It was held that the company was vicariously liable for B's negligence. It was stated by J.A. Moody:

> "that there was no precise evidence as to what took the driver of this bus to this gas station, and there is no evidence to indicate that he was acting on a frolic of his own…the presumption in *Matheson v. Soltau* that the vehicle was on the business of the master was not rebutted…the mere fact that a driver deviates from his fixed route in order to carry out some business of his own which is not stated, would not remove the liability of the master in respect of the negligence of the driver on such an occasion".

3.49 These cases according to counsel illustrate that although there is no evidence of why the deceased was driving the vehicle and also no evidence to show that the deceased was on a frolic of his own, even though the deceased may have had a passenger or passengers in his car for his own purpose, the driving of the motor vehicle could still be said to be in the course of his employment, and therefore for the owner's main purpose as well as his own, which would not nullify the liability attributed to the owner as a result of the accident.

3.50 In short, Mr. Jacelon argues that the presumption of agency is met by the fact that the defendant has not denied ownership of the vehicle in question and the fact of ownership of the vehicle is *prima facie* evidence that the vehicle was being driven at the material time by the agent of the owner as propounded in the case of *Barnard v. Sully (supra).* Once this presumption

is established, it is for the defendant to rebut same if the defendant seeks to avoid liability and in this case, the defendant has not sufficiently discharged this burden due to a lack of cogent and credible evidence.

Discussion

3.51 I am of the view that firstly, the presumption in *Barnard v. Sully (supra)* must apply to the facts of this case. The question of whether more is known of the circumstances under which a car is driven by individual A and whether A is acting as agent of the owner of the car, is one which must necessarily be answered by looking at the state of knowledge of the claimant at the time of the collision and not after the fact where the claimant may in all likelihood obtain additional information: as was the case in this matter where the claimant was able to obtain details concerning the status of the driver and the owner of PBY 1176 and plead it in his particulars of case after corresponding with the defendant.

3.52 That said, I find that the evidence which was led by the claimant is sufficient to give rise to the presumption of an agency relationship and the burden has shifted to the defendant to offer cogent and credible evidence to negative the presumption of an agency relationship. This leads to the question of whether the defendant has succeeded in this regard.

3.53 With respect to the assertion by the defendant that she believed that the scope of work did not necessitate her car being test driven by the deceased so if it was driven by him it was not for a purpose of hers, I have to confess that I have found insufferable difficulty in understanding how it can realistically be said by the defendant that she would give her car to a mechanic so that

oil, coolant and brake fluid could be changed and not expect -in fact confidently proffer a considered view to the Court that such a scope of work would not require her car to be test driven. It would be one thing to make such a bold assertion were the job which the deceased was retained to do, one which was essentially external in nature such as the patching of a hole, the replacing of wiper blades, the replacing of light bulbs or some other superficial work of that nature. In those circumstances surely, one can appreciate that it would not be in one's contemplation that it would be necessary that a test drive be undertaken. Indeed this is exactly what was held in the Hong Kong case of **Ng Loy Yau v. Wong Tin Sang and Others [1980] HKCFI 106.** On the facts of this case the defendant owner of a vehicle testified that he discovered a hole in the rear of his vehicle and upon visiting a garage, he left his vehicle parked outside the garage with instructions that the hole be patched and the area sprayed. The Court immediately concluded at paragraph 4 in recounting the facts that the "nature of the work so entrusted would require no test drive". Indeed on the facts of that case the defendant owner told the court that he never gave any authorization for his car to be moved -not even to another site for body or paint work. The main theme therefore was that a test drive was never contemplated and the owner never authorized such. The Honorable Lui J concluded on these facts that at the time of the accident, the driver from the garage was not an agent of the defendant owner. This is how the matter was put at paragraph 12:

> "The vehicle suffered from no apparent defect, and no instructions other than for body work and greasing were given. A test drive was uncalled for".

The scope of work to be done in this case does not allow me to reach a similar conclusion. I find that at least one aspect of the scope of work touches and concerns the proper functioning of one critical component in the defendant's car or in fact any other car: the brakes. So it is by no means

surface body work or other work of that nature which can reasonably be contemplated as a class of work which does not require a test drive to be undertaken. In arriving at this conclusion I have been careful not to venture into the realm of speculating on the precise operation automotive braking or even fluid dynamics as I recognise that this is the sort of evidence which must come from an expert. As such I find that this part of the defendant's evidence to be unconvincing.

3.54 Additionally the defendant admitted to the Court that she was not a mechanic so it cannot even be said that by virtue of her training she held the honest though misguided belief that the scope of work she retained the deceased to perform did not require the car to be moved.

3.55 The fact that the defendant told the Court she left her car parked in front the drive way of the deceased man's home is the second reason for disbelieving that the defendant never contemplated that it would be necessary that her car would be driven at some point whilst it was in the care of the deceased. Surely it is within the ambit of common sense that if one is to park one's vehicle in front a driveway of anyplace, the car may very well have to be moved to make way for the free passage of other cars entering and or leaving that compound during the course of the day. Against this backdrop, drivers -and in particular the defendant, cannot convincingly argue that they would not expect their car to be moved. So for this reason as well I maintain that the defendant's evidence on this issue is rejected.

3.56 For all these reasons the Court is of the view that it is passing strange that the defendant could seriously contend that it was never in her contemplation that the car would be required to

be test driven given the scope of work she retained the deceased to perform. As such I reject her evidence on the first limb relied upon in establishing that the car was not driven for any purpose of hers when the collision occurred.

3.57 The second limb relied upon by the defendant to make her defence that the car was not driven for any purpose of hers and therefore the deceased was not her agent was that she prohibiting the deceased from driving her car because she knew he was under twenty five and was therefore not covered under her insurance policy -so if the deceased was driving it could not have been for a purpose of hers. I find the evidence on this second point to be equally unable to withstand scrutiny. The Court notes that it was never told of the manner in which the defendant would have in the ordinary course of dealings, come by this fact. That aside, the Court was not privy to any documents supporting this *viva voche* evidence of the deceased man's age which in the circumstances would be hearsay -a fact which I bear in mind in assessing and concluding that little weight is to be placed on this evidence of age. The defendant is not required to prove the age of the deceased and certainly hearsay evidence is admissible if it goes toward explaining the state of mind of an individual, but in failing to proffer any evidence of same the Court is left with little upon which it is to conclude that the defendant's contention that she prohibited the deceased from driving her car because of his age, was an <u>honest</u> one in the circumstances which could conceivably, <u>reasonably</u> be held by the defendant. I therefore reject the defendant's evidence on this point also.

3.58 Before moving off of this point the Court agrees that in matters of this type, ascertaining whether the relationship of a servant or agency exists is always a fact sensitive matter. On the

facts of this case it cannot be ignored that on the case for the claimant, the collision took place along the same road that the deceased resided. This in the Court's view is not inconsistent with the car being driven for the defendant's purpose. Were the collision to have occurred some distance away from the deceased man's home such as say *en route* to Maracas Beach for instance, then that would in the Court's view, be more consistent with a journey being undertaken for some purpose other than that of the car owner. The fact that there was someone in the car with the deceased at the time of the collision does not detract from this conclusion as the Court was presented with no evidence of the identity of this person so he could have been a garage hand assisting the defendant or really just someone the deceased had recruited to accompany him on a frolic of his own. As such, I draw no inferences from his presence in the car as it would amount to speculation.

3.59 I have arrived at these conclusions by having regard as well to not just what was said by the defendant but how it was said. In this regard the Court observed the demeanor of the defendant and formed the view after a careful consideration of the voice tone, facial expressions, body language, manner of testifying, and the witnesses' attitude whilst testifying, that the defendant was not credible.

The Court's Finding On Whether The Deceased Was The Agent Of The Defendant

3.60 For these reasons I now set out my findings on whether the presumption of an agency relationship was repelled. Being in the unique position to judge, and after hearing and seeing the defendant testify in this case, and after weighing the inherent probabilities and improbabilities in this case on the totality of the evidence, I do not believe the defendant and find that it is glaringly

improbable that she could honestly say that it was not within her contemplation that a test drive would be necessary given the work the deceased was retained to do and the position she left the car in the deceased man's driveway. I also disbelieve the defendant when she testifies that she specifically prohibited the deceased from driving her car because of his age.

3.61 This means that the defendant has failed to discharge the evidential burden on her to rebut the presumption of an agency relationship. It follows that the entire defence as to purpose collapses. Since I am left with the evidence of ownership and no cogent or credible evidence from the defendant otherwise, I find that the *prima facie* presumption of an agency relationship which arose from the evidence of ownership of PBY 1176 remains undisturbed.

3.62 The implications of this finding are:

(a). It is not necessary for the claimant to adduce affirmative evidence that a test drive would have been necessary given the scope of work the deceased was retained to do. Indeed this would only have become a live issue according to the learning in *Nicholls v. Tutt (supra)* were the evidence adduced by the defendant found by the Court to have been cogent and credible evidence to displace the presumption of an agency relationship.

(b). It is not necessary for the claimant to predicate its claim on a presumption of a master/servant relationship and rely on the cases cited herein. This is just as well as I have found that the deceased mechanic would not have been in the position of servant to the defendant owner of the vehicle.

3.63 In light of the conclusion on the existence of an agency relationship, it is now necessary to consider the second issue in this case which is whether the deceased driver was negligent in driving the defendant's car at the material time.

2. WHETHER THE DECEASED DROVE NEGLIGENTLY

How Did The Collision Occur?

4.1 There are two significantly different versions of how the collision took place in this case. Firstly, there is the account which is put forward on the case for the defence. In summary, is that the defendant's car was parked at the side of the road when the claimant's car collided with it. This evidence comes from the defendant who testified as to what was told to her by the deceased regarding the way in which her car was damaged whilst it was in his care.

4.2 Mr. Jacelon for the claimant suggests that this is hearsay evidence since the deceased informed the defendant about the accident and the deceased was not called as a witness in this case -which I venture to add, isn't beyond the realm of the expected given the fact that the mechanic is deceased. As such, Mr. Jacelon urges the Court to accord very little weight to this evidence. I agree with counsel and find that this evidence as recounted by the defendant is hearsay. I bear this in mind in assessing the weight to be ascribed to such evidence and conclude that little or no weight can be attached to this version of the events. The description of how the collision occurred on the defendant's case is accordingly rejected.

4.3 This leaves the Court with the account on the claimant's case. The evidence of the claimant is that his car was at a stationary position on the La Horquetta Boulevard when the car driven by the deceased reversed onto his car occasioning damage to his vehicle.

The Evidence Of The Claimant

4.4 The claimant gave evidence that the collision occurred this way. On the 13th August 2008, he brought his car to a stationary position on the La Horquetta Boulevard road facing east when PBY 1176 collided with his Toyota Corolla PCC 1633. He was heading east and the other vehicle was coming from the west. That other vehicle reversed onto his vehicle. It was being driven at a speed of 20 or 30 km per hour at the material time.

4.5 It was a rainy day and the claimant testified that he drove with caution and was very aware of what was happening around him. According to the claimant, before his vehicle was even hit, he had his foot on the brakes and his hand was on the horn to indicate to the driver in front that he was behind and the deceased still hit him. Notwithstanding these efforts by the claimant, the deceased continued to reverse onto the claimant's car until he stopped eventually.

4.6 In cross examination the claimant confirmed that on the day in question, there was a lot of rain and the road was wet. It was not raining for the entire day. The rain fell for about two hours and caused flooding. At the time the collision occurred it was raining. He made several observations that day. He observed that there were flood waters ahead at the intersection further up the road, there were children at the side of the road closer to the pavement, and the road which was a dual carriageway, had no cars on the other lane next to the claimant.

4.7 The claimant testified that he stayed a distance away from the car driven by the deceased. About two car lengths to be specific. This meant that the deceased reversed two car lengths and still hit the claimant's vehicle -even though the claimant said he was keeping a good look out. There were no cars behind the claimant yet he did not reverse his car to avoid the accident.

The Court's Findings On The Manner In Which The Collision Occurred

4.8 I have found the claimant to be a reliable witness. He gave his evidence in a simple, clear, direct and logical manner and was in no way shaken in cross examination. I am satisfied that he was driving in a sensible manner and I do not think that it could be faulted in the circumstances of this case. I therefore reject the evidence that the collision occurred whilst the defendant's vehicle was parked at the side of the road outside the driveway of the deceased home. I find that the collision occurred whilst the claimant's vehicle PCC 1633 was at a standstill position along the La Horquetta Boulevard and the vehicle owned by the defendant and driven by the deceased reversed onto the front portion of PCC 1633.

Did The Deceased Reverse When It Was Unsafe To Do So?

4.9 The question therefore is whether the deceased exercised sufficient care in reversing down La Horquetta Boulevard.

4.10 Regarding the law in respect of reversing, **Code 38 of the Highway Code issued by the Licensing Authority in accordance with Motor Vehicle and Road Traffic Act, Section III (1) of Motor Vehicle and Road Traffic Act Chap. 48: 50** states:

" Before you reverse make sure that there are no pedestrians or obstructions behind you".

Additionally, **Code 40 of the Highway Code issued by the Licensing Authority in accordance with Motor Vehicle and Road Traffic Act, Section III (1) of Motor Vehicle and Road Traffic Act Chap. 48: 50** offers the following guidance:

"If your view is restricted, get help before reversing".

4.11 The law in respect of driving a car at a safe speed as per **Code 9 of the Highway Code issued by the Licensing Authority in accordance with Motor Vehicle and Road Traffic Act, Section III (1) of Motor Vehicle and Road Traffic Act Chap. 48: 50** is this:

" Never drive at such speed that you cannot stop well within the distance you can see to be clear. Go much slower it the road is wet".

4.12 Whereas a failure on the part of a driver to observe any of the provisions of the **Highway Code issued by the Licensing Authority in accordance with Motor Vehicle and Road Traffic Act, Section III (1) of Motor Vehicle and Road Traffic Act Chap. 48: 50** does not of itself render that person liable to criminal proceedings of any kind:

"such failure may in any proceedings (whether civil or criminal, and including proceedings for and offence under this Act) be relied upon by any party to the proceedings as tendering to establish or to negative any liability which is in question in those proceedings".

4.13 On the claimant's case, the deceased reversed when it was not safe to do so, whilst the roads were wet and in so doing he was unable to bring his car to a stop in time to avoid colliding with the claimant's car. Each of these aspects of the driving of the deceased contravene the **Highway Code issued by the Licensing Authority in accordance with Motor Vehicle and Road Traffic Act, Section III (1) of Motor Vehicle and Road Traffic Act Chap. 48: 50** and therefore establish liability in this civil matter.

4.14 Furthermore, guidance on the issue of reversing in the context of negligence is provided in the case of **Blehm v. Corby 92 B.C.L.R. (2d) 270**. On the facts of this case, the plaintiff testified that she came to a stop on a road behind a truck. She thought the truck was making a right turn and then she observed that the truck's back-up lights came on and then the truck backed into her car. The trial judge accepted the plaintiff's version of events, but found her sixty percent at fault. The plaintiff appealed. On appeal it was held that the truck driver was clearly at fault in backing up when it was not safe to do so. The case law is therefore in line with the tenor of the **Highway Code issued by the Licensing Authority in accordance with Motor Vehicle and Road Traffic Act, Section III (1) of Motor Vehicle and Road Traffic Act Chap. 48: 50** where liability is affixed once there is reversing in circumstances in which it is unsafe to do so.

4.15 Applying the law to the facts of this case as I have found them, I hold that the deceased was negligent in the manner in which he drove PBY 1176 on the 13th August 2008 because he reversed in circumstances in which it was unsafe to do so. For the sake of completeness and in relation to the matter of causation, I hold further that the collision would not have occurred but for the deceased man's negligence.

Is The Claimant Guilty Of Contributory Negligence?

4.16 An issue which arose in this case was whether there was any onus on the claimant to take evasive action to avoid the collision. This was what was said on the matter by Lambert JA at paragraphs 9 to 10 of *Blehm v. Corby (supra):*

> "Once it is accepted that the back-up lights of the truck were not on as the plaintiff came up behind the defendant, then the evaluation of the plaintiff's conduct must rest, first, on whether a reasonable person would have understood, before those back-up lights came on, that the defendant's truck was going to back up and would have left a space for it to do so or, second and alternatively, whether a reasonable person would have done something that the plaintiff did not do after the lights came on and it became apparent that the defendant's truck might back up without the defendant satisfying herself that she could do so in safety.
>
> In <u>my opinion, either of those courses of action would require a higher standard of care than the standard that a reasonable person would have adopted in the circumstances</u> I have described. Accordingly, I would allow the appeal and attribute 100% of the fault in this case to the defendant driver" (emphasis mine).

4.17 It was canvassed by Mr. Sookoo in cross examination of the claimant that he should have taken some evasive action to avoid the collision as the claimant's reverse gear was working and there were no cars behind him to prevent him from reversing out of the deceased man's way. In light of the learning set out above, I am of the view that to hold the claimant in this case to such a

standard would be subjecting him to a standard that is higher than would be expected of the reasonable man in the circumstances.

4.18 In this regard I have also found the case of **<u>Heldt</u> v. <u>Jack Cewe Ltd.</u> 1981 Carswell BC 972** to be equally helpful. In this case, the plaintiff's wife was killed when the defendant driver reversed a large loader truck over her vehicle. On appeal it was found that it would have been reasonable for her to conclude that the large loader truck would move forward after it passed her rather than reverse. In these circumstances the wife was not required to put her car into reverse to anticipate a possible change of direction by the large loader truck. As such it was held that the plaintiff was not guilty of contributory negligence. According to Anderson JA at paragraph 13:

> "There is no duty to foresee that the driver of another vehicle will conduct himself in a dangerous fashion as, for example, by backing up a machine without being able to ascertain whether another vehicle is in his path".

Applied to the facts of the instant matter, it would have been reasonable to expect that PBY 1176 being in front of the claimant's vehicle would continue to move forward or stop the vehicle in light of the flood waters ahead, rather than reverse. For this reason it cannot be expected that the claimant would have put his car in reverse so as to ultimately avoid the collision. In any event the claimant did tell the Court that he sounded his horn in an effort to alert the deceased that his car was behind. I find this to be reasonable steps in the circumstances. Therefore I conclude that the claimant in this matter is not guilty of contributory negligence.

The Court's Findings on Whether The Deceased Was Negligent

4.19 I therefore find on a balance of probabilities that the claimant has established actionable negligence on the part of the deceased. This leads to the next issue which is whether there is proof of damages caused by this negligence.

3. WHETHER THERE IS ADEQUATE PROOF OF DAMAGES

Special Damages Must Be Proved

5.1 According to the **18th edition of the McGregor on Damages at paragraph 44-013** it is stated that "evidence in proof of special damage must show the same particularity as is necessary for its pleading".

5.2 The requirement that special damages be proved is a point which has been made in a number of authorities. Lord Macnaghten for example stated in **Stroms Bruks Bolag v. Hutchinson [1905] AC 515** that:

> "General damages… are such as the law will presume to be the direct natural or probable consequence of the action complained of. 'Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in character and, therefore, they must be claimed specially and proved strictly".

Similarly, Lord Dunedin in **The Susquehanna [1926] AC 655 at 661** underscored the need to prove special damages when he said:

> "If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved, will be awarded".

And, in same vein, Lord Goddard CJ in **Bonhan Carter v. Hyde Park Hotel (1948) 64 TLR 178 at 179**[4] stated that:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and so to speak throw them at the head of the Court saying 'this is what I have lost, I ask you to give me damages'".

5.3 These sentiments have been echoed in local jurisprudence as well. This was the case in the matter of **Uris Grant v. Motilal Moonan Ltd. & Frank Rampersad CA No. 162 of 1985**[5]

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[4] Followed in **Ramdeo Dabideen v. Beryl Worrell No. 1648 of 1979 at p. 3, Gladys Sankar v. Deopersad Seunarine & The Public Transport Service Corporation No. 798 of 1979 at pg. 7, Dave Ramlackhan v. Austin Mohammed & Caroni (1975) Limited No. 1447 of 1979 at pg. 24, Christopher Lucas v. Bisnath Boodram Civ. App. No. 10 of 1982 at pgs. 6 and 8, Sharif Mohammed v. Furness Trinidad Limited & Furness Ice and Cold Storage Limited CvA. No. 46 of 1993 at pg. 16, Kent Hector v. Indranie Bhagoutie & Reinsurance Company of Trinidad and Tobago Limited No. 1115 of 2000 at pg. 3, Anil Reds v. Nyan Rattan & Inshan Salim Claim No. CV 2007-00903 at para. 25, Nimrod Joseph v. Roy Edwards & Presidential Insurance Company Limited Claim No. CV 2008-00500 at para. 26** and **Shamshudeen Haitula v. Chris Mahabir & Capital Insurance Limited Claim No. CV2009-04776 at para. 25.**

[5] Followed in **Bernadette Williams & Kerry Williams v. Sylvester Joseph Lezama & National Union of Government and Federated Workers HCA No. 935 of 1979 at pg. 3, Dave Ramlackhan v. Austin Mohammed & Caroni (1975) Limited No. 1447 of 1979 at pg. 25, Ramsawak Maharaj & Heamdai Maharaj v. Abraham Nahoum HCA No. 3696 of 1983 at pg. 10, Mildred Alexander & Albert Alexander v. Ken Clarke & Maureen Eminess HCA No. 1734 of 1986 at pg. 4, Sonny Mungroo v. Trinidad and Tobago Electricity Commission HCA S1255 of 1988 at pg. 18, Kanta Persad v. Leekhandath Dube HCA No. Cv1271 of 1990 at pg. 7, Krishna Balkaran v. Ramyad Rampersad HCA No. S355 of 1990 at pg. 5, Ramnarace Ramdath v. David Sookhoo & Austin Sookhoo HCA No.Cv. S54 of 1991 at pg 5, Veshcham Harricharan v. Leonard Benjamin HCA No. Cv. 2275 of 1992 at pgs. 6-8, Sharif Mohammed v. Furness Trinidad Limited & Furness Ice and Cold Storage Limited CvA. No. 46 of 1993 at pg. 16, Celea Parillon-Ogiste v. Eleanor Smith No. 3735 of 1993 at pg. 5, Esther Cole Sammy v. Jaleel Fyzool & Mohanlal Nandlal HCA 2178 of 1993 at pg. 4, Andrew Lee Kit & Ryan Hosein v. Carol Charles HCA Cv. 3870 of 1995 at pg. 12, Everard Carter v. Rambaran Nandlal HCA No. Cv. 2363 of 1995 at pg. 9, Lalchand Ramoutar in his Personal capacity and the said Lalchand Ramoutar in his capacity as Administrator of the Estate of Phyllis Ramoutar, deceased v. Trinidad and Tobago Electricity Commission HCA No. S822 of 1996 at pgs. 25-26, Keron Christopher v. Clarance Rampersad & Merle Rampersad HCA No. SCv1063 of 1996 at pg. 13, David Sookoo & Auchin Sookoo v. Ramnarace Ramdath Cv. App. No. 43 of 1998 at pg. 3, Nimrod Joseph v. Roy Edwards & Presidential Insurance Company Limited Claim No. CV 2008-00500 at para. 26, Newton Elliot et al v. Roderick Joefield & Kurt Joefield Claim No. T90 of 1988 at para. 35, Lewis Jack v. Sookraj Seepaul HCA No. 212 of 2001 at pg. 8, Narine Charles v. Mohan Rampersad, Amalgamated Sanitation Company Limited & The Beacon Company Limited HCA No. 2128 of 2003 at pg. 11, Shirley Jones Rajkumar v. Merle Taurel John Claim CV 2005-00439 at pg. 9, Siewnarine Buchoon, Johnny Buchoon & Nicole Webber v. The AG of Trinidad and Tobago CV 2006-01846 at para. 19, Anil Reds v. Nyan Rattan & Inshan Salim Claim No. CV 2007-00903 at paras. 26**

where a claim was made for special damages to cover the cost of replacing furniture and other household items which had been damaged or destroyed. The claim was supported by a list which was prepared by the plaintiff which particularized the items which had been damaged or destroyed and next to each item particularized was a figure which was described as a "price". The Court of Appeal held that this evidence on its own –which was not supported by evidence from a qualified valuer, was sufficient proof of special damages to allow an award to be made. In arriving at this decision, Bernard CJ emphasized the need not only for special damages to be pleaded and particularized but stated that it was imperative that same be proved. At page 11 of the judgment this is what he had to say on the matter:

> "I quite agree that special damage, if sought, must be pleaded and particularized – see Ilkiw v Samuel (1963) 2 All ER 870 –and that it must be "strictly" proved. In regard to the latter requirement the question which necessarily arises, in my view, is what is the degree of this "strictness" that is required? The nearest answer to this seems to be that which Bowen LJ gave in the leading case of Ratcliffe v Evans supra where at page 532-533 he said this:
>
>> In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must ne insisted on, both in pleading and proof of damage, as is reasonable, having

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and 30 and **Shamshudeen Haitula v. Chris Mahabir & Capital Insurance Limited Claim No. CV2009-04776 at para. 25.**

regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be he vainest pedantry."

5.4 This point has been more recently emphasized by Archie CJ in the case of **Anand Rampersad v. Willies Ice Cream Ltd. CA No. 20 of 2002**[6]. At page 8 of that judgment, His Lordship made the point that:

"The rule is that the Plaintiff must prove his loss."

Then, at page 10, he went on:

"…in the absence of any admissible evidence as to value, there was no basis upon which the loss could be assessed.

A lesser degree of strictness would apply to proof of the value of smaller items such as kettles, mops, brooms, mop pails, stainless steel trays and glasses that had to be replaced. In accordance with **Uris Grant** the Master, in the absence of any evidence to the contrary, would have been entitled to accept a reasonable figure. The Plaintiff/Respondent would have to persuade him by evidence led, that it was not simply plucked out of the air but based on an actual cost of replacement or

[6] Followed in **Newton Elliot et al v. Roderick Joefield & Kurt Joefield Claim No. T90 of 1988 at para. 35, Esther Cole Sammy v. Jaleel Fyzool & Mohanlal Nandlal** HCA 2178 of 1993 at pgs. 3-4, **Kent Hector v. Indranie Bhagoutie & Reinsurance Company of Trinidad and Tobago Limited No. 1115 of 2000 at pg. 3, Siewnarine Buchoon, Johnny Buchoon & Nicole Webber v. The AG of Trinidad and Tobago CV 2006-01846 at para. 19** and **Anil Reds v. Nyan Rattan & Inshan Salim Claim No. CV 2007-00903 at para. 25.**

what was actually paid for the item. A judicial officer assessing damages is not to assume the role of adjuster or estimator".

5.5 What then is the measure of damages which should be proved specifically?

The Principle Regarding The Measure Of Damages To Be Awarded When Chattel Is Damaged

5.6 In the case of chattel, the correct measure of damages is the cost of repair. According to the learning set out in **The Halsbury's Laws of England Volume 12(1) Reissue paragraph 862** it is stated that:

> "The basic rule is that the measure of damages in the case of damage to a chattel is the cost of repair".

This rule has been accepted in a number of cases. One such case is **Darbishire v. Warran [1963] 1 W.L.R. 1067** where it was said by Harman L.J. at page 1071 that:

> "It has come to be settled that in general the measure of damage is the cost of repairing the damaged article".

5.7 The method of assessing the cost of repairing the damaged article has been established as a cost of repair which is reasonable in that the work must be necessary, and the charges must not be extravagant. So in **The Pactolus (1856) Swab 173** the questions identified by the court to determine the claim before it, was stated at page 174 to be whether the:

> "…repairs were necessary in consequence of the collision, (and) whether the charges made for such repairs (were) fair and just".

What then was the evidence led on the cost of repairing PCC 1622?

The Evidence Of Special Damage

Evidence Of The Claimant

5.8 The evidence from the claimant regarding the damages sustained by PCC 1633 in the collision is this. His vehicle was hit at the front; more specifically the entire front was hit. There were two broken light fixtures. Additionally, the bumper and the trunk were moved inwards towards the car. The front of the vehicle was smashed in and the sides kicked out.

5.9 Using photographs of PCC 1633 which were collectively tendered and marked "RP6" the claimant told the Court that the photographs showed how the front bumper was bent (2nd photograph) which in turn caused the nickel bonnet to raise. The photographs also depicted the manner in which the top of the bonnet was not aligned (3rd and 4th photograph). Brackets for the front light were broken (6th photograph). Additionally, the number plate was bent and the whole front bumper was smashed in (3rd and 4th photograph).

Exhibit Evidence

5.10 The evidence which was led on the cost of repairing the claimant's vehicle is this:

(a) A Tax Invoice from Toyota Trinidad and Tobago Limited was tendered into evidence with no objection. This exhibit was marked "RP2". It shows that the cost of parts purchased on the 20th August 2008 was $6,940.17 TTD.

(b) A receipt from Bagaloo Auto Professional Auto Repairs & Service was tendered into evidence with no objection. This exhibit was marked "RP3". It is dated the 2nd September 2008 and shows that the cost of labour to effect repairs on the claimant's vehicle was $6,500.00 TTD.

5.11 Mr. Sookoo made the point that the investigator's report under the hand of Jason Lewis which was tendered into evidence with no objection and marked "RP5" has recorded therein the following:

DAMAGES TO VEHICLES

PCC 1633	not recorded
PBY 1176	nothing recorded

PERSONAL INJURIES

NIL

DAMAGES (PROPERTY ETC.)

NIL

This he argues is sufficient for the Court to conclude that the claimant car sustained no damages from the collision with the defendant's vehicle. As such specific damages have not been proved.

5.12 I am unable to agree with this logic. Stated in the investigators report are the words in relation to PCC 1633 "not recorded" . I do not equate this to mean no damages since I find it more probable than not that had no damages been observed to PCC 1633 it would have been recorded as "nil" as was the case with the personal injuries and damages (property etc.) headings below. Additionally, the claimant testified that Jason Lewis never told him that his vehicle did not have damage.

The Court's Findings On Proof of Special Damages

5.13 As such I find that the claimant's car sustained damages as a result of the collision with the defendant's car and I find further that the cost of parts to repair same was $6,940.17 TTD and the cost of labour to effect these repairs was $6,500.00 TTD.

5.14 The claimant admitted that he travelled whilst his car was being fixed. No evidence was led as to the expenses incurred by the claimant in this regard. Although the sum of $1000.00 TTD was pleaded under the heading of loss of use, no evidence was led to substantiate this aspect of the claim against the defendant and I accordingly find that this aspect of the claimant's case has not been proved.

5.15 In light of the Court's conclusions on fact and law which are set out above, I move now to my Final Order in this matter.

PART THREE

6.0 THE COURT'S FINDINGS

6.1 On a balance of probabilities my findings in this matter are:

1. On the 13th August 2008, the defendant left her car PBY 1176 in the care of the deceased so that the oil, coolant and brake fluid could be changed.

2. At the time of the collision PBY 1176 was driven by the deceased.

3. At the time of the collision the defendant was the registered owner of PBY 1176.

4. I reject the evidence of the defendant that at the time of the collision her car could not have been driven for her purpose as it was never within her contemplation that the deceased would have to test drive her car.

5. I reject the evidence of the defendant that at the time of the collision her car could not have been driven for her purpose as she gave expressed instructions to the deceased that he was not to drive her car because of her knowledge of his age.

5. Consequently I find that the defendant has failed to discharge the evidential burden on her to rebut the presumption of agency.

6. The *prima facie* presumption of agency which arose from the evidence of ownership of PBY 1176 remains undisturbed.

7. The deceased in his capacity as agent of the defendant reversed PBY 1176 when it was not safe to do so.

8. At the material time the La Horquetta Boulevard Road was wet.

9. The deceased was unable to bring PBY 1176 to a stop in time to avoid colliding with the claimant's car.

10. The deceased was in the circumstances of this case, negligent in the manner in which he drove PBY 1176.

11. The collision would not have occurred but for the negligent actions of the deceased.

12. The claimant is not guilty of contributory negligence.

13. It was proved specifically that the claimant incurred the cost of $6,940.17 TTD as the cost of parts required to repair PCC 1633.

14. It was proved specifically that the claimant incurred the cost of $6,500.00 TTD as the cost of labour to effect the repairs to PCC 1633.

15. Expenses incurred by the claimant because of loss of use were not proved specifically.

16. Since the deceased was agent for the defendant at the time of the collision on the 13th August 2008, I find that the defendant is accordingly liable for the damages specifically proved by the claimant as arising therefrom.

17. In the circumstances I find that the defendant is liable to the claimant for the judgment sum of $13,440.17 TTD

PART FOUR

7.0 INTEREST

7.1 I have a discretion under **section 28A of the Petty Civil Courts Act Chap. 4:21** to award interest on the judgment sum at such rate as I think fit on the whole or any part of the judgment sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. The cause of action arose on the day of the accident; 13th August 2008. The date of the entry of judgment for the claimant is the 6th June 2013. Interest is therefore awarded to the claimant on the judgment for the period 13th August 2008 to 6th June 2013 at a rate of 6% per annum.

7.2 I also have a discretion under **section 40A of the Petty Civil Courts Act Chap. 4:21** to award interest on the judgment at 12% per annum from the time of entering up of the judgment until same is satisfied. The date of the entering up of judgment in this case is 6th June 2013 as such interest at a rate of 12% is awarded to the claimant on the judgment debt from the 6th June 2013 until same is satisfied.

8.0 COSTS

8.1 I have discretion under **section 38 of the Petty Civil Courts Act Chap. 4:21** to award costs of actions tried in court. The claimant was successful in this matter and so he is entitled to costs. In the circumstances pursuant **to Part 6 of the First Schedule of the Petty Civil Courts Act Chap. 4:21** the sum of $500.00 TTD is awarded as Instructing Attorneys'-at-Law Fees. Further, pursuant to **Part 12(a) of the First Schedule of the Petty Civil Courts Act Chap.**

4:21, I certify the action as proper for an Advocate Attorney-at-Law and allow Advocate Attorneys'-at-Law Fees in the sum of $500.00 TTD.

9.0 FINAL ORDERS

9.1 <u>The Final Orders of this Court are therefore</u>:

1. Judgment is entered on this 6th day of June 2013 for the claimant against the defendant in the sum of $13,440.17 made up as follows:

(i)	**Cost of repairing the motor vehicle PCC 1633**	**$6,940.17**
(ii)	**The labour cost incurred in repairing motor vehicle PCC 1633**	**$6,500.00**

2. Interest on the judgment sum of $13,440.17 at a rate of 6% per annum from the 13th August 2008 to the 6th June 2013.

3. Interest on the judgment sum of $13,440.17 at a rate of 12% per annum from the 6th June 2013 until the judgment sum is paid in full.

4. Attorneys-at-Law Fees in the sum of $1,000.00 made up as follows:

(i)	**Instructing Attorneys'-at-Law Fees**	**$500.00**
(ii)	**Advocate Attorneys'-at-Law Fees**	**$500.00**

5. Stay of execution 28 days.

10.0 POSTSCRIPT

10.1 May I thank counsel on both sides for their considerable assistance in this case. I am particularly grateful for the very detailed and illuminating written submissions which were emailed to the Court and hard copies of which were filed at the Port of Spain Petty Civil Court Registry within the prescribed times; that is, for the claimant, on or before midnight of the 22nd May 2013 and for the defendant, on or before midnight of the 27th May 2013. They have helped greatly in the early delivery of this judgment.

…………………………………………

Her Worship Magistrate Nalini Singh

Petty Civil Court Judge

Dated 6th June 2013.