THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 220 of 2009

VAUGHN WILLIAMS

APPELLANT

AND

FARZAN RAHIM

RESPONDENT

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
N. Bereaux, J.A.

APPEARANCES: **P. H. Scobie for the Appellant**
R.A. Jagai for the Respondent

DATE OF DELIVERY: **April 22nd, 2013**

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The issue in this appeal is whether the Appellant is vicariously liable for the negligence of Jeron Nurse (Nurse), the driver of his vehicle at the material time.

2. The Appellant was at all material times the owner of motor vehicle registration number PBS 175. On May 18th 2005 the motor vehicle while being driven by Nurse, the Appellant's step-brother collided with the Respondent's vehicle. As a consequence of the collision the Respondent suffered personal injuries and damage to his vehicle. It is not disputed that at the time of the collision the Appellant was not in the motor vehicle driven by Nurse.

3. On February 27th 2008 the Respondent began these proceedings against the Appellant, Nurse and the Appellant's insurers claiming damages for the damage done to his vehicle, personal injuries and consequential loss caused by the negligence of Nurse who, it was alleged, was at the time of the accident the "servant or agent of the Appellant".

4. The Appellant in his defence denied that Nurse was his servant or agent. He averred that on the day of the accident he left his vehicle at his home and the keys to the vehicle were secured in his bedroom. No one was authorized to use the vehicle. He further alleged that the vehicle was driven from its parked position without his knowledge, permission or authority.

5. At the trial Nurse did not appear and was unrepresented. The Appellant's insurers also took no part in the trial and we have been informed they are now in receivership. The Appellant however filed a witness statement and was cross-examined on it. His witness statement essentially supported his pleaded case. He stated that on the day of the accident he left his vehicle locked and parked in his neighbour's garage as he usually did and went to San Fernando to attend a course of study in connection with his employment. The vehicle was locked and secured. He left the keys to it in the wardrobe in his bedroom. No one was authorized to enter his bedroom except his mother. His never authorized his step brother, Nurse, who lived in the same house with him, to use the vehicle as he had a vehicle of his own.. The Appellant said that it was on his way home on the evening of the accident he learnt his vehicle was involved in an accident and it had been driven at the time by Nurse. He stated that later that day he used Nurse's vehicle to go to the scene of the accident where he saw the wreck of his vehicle. In the final paragraph of his witness statement he stated:

   "Jeron Nurse was not my agent or my servant on that day. I never authorized him to use my car and had never given him permission to do so in the past. He took my motor vehicle without my authority and consent. Notwithstanding having secured my keys and the said vehicle he was able to access it and unlawfully and without my knowledge and

consent drive it on the road. It was during the course of this unauthorized use that the accident seemed to have happened. I deny that I am in any way liable for the accident or for the injury caused to the [Respondent]."

6. The Respondent in his witness statement gave evidence that was contradictory to the evidence of the Appellant in that he stated at paragraph 29:

    "I was familiar with the vehicle that hit my car as I knew it to be from Otoire Village which is on my taxi route. I also knew the two defendants to be living in the same house. I had very regularly seen the both defendants in the past driving PBS 175 individually or in the vehicle together with either one driving. I also observed them also sharing a sliver car as well, around the same time."

7. The Judge held that the accident was as a result of the negligence of Nurse. He found that the accident occurred when Nurse drove onto the proper lane of the Respondent and there collided with his vehicle. The Judge also held the Appellant was vicariously liable for the negligence of Nurse. In coming to this conclusion the Judge noted that the fact of ownership gave rise to a presumption that the Appellant's motor vehicle was being driven at the material time by his servant or agent. The Judge did not believe that the presumption was rebutted. He stated that there were certain matters which went towards him so concluding. First, he stated that the issue was primarily an issue of fact and involved a consideration of the evidence of the Appellant as to the usage of the vehicle by Nurse and the contrary evidence of the Respondent. Second, he noted the absence of corroborative evidence to support the Appellant's contentions, a) that he alone used that vehicle; b) that Nurse did not have permission to use that vehicle; and c) that Nurse was not using the vehicle for any purpose of the Appellant. On the other hand there was the evidence of the Respondent set out above that he regularly saw the Appellant and Nurse driving the vehicle while in the vehicle together or in the vehicle alone. He had also seen them sharing another vehicle. The Judge also referred to the evidence that the Appellant used Nurse's vehicle on the day of the accident to go to the scene of the accident. The evidence, the Judge said, suggested that the relationship between the Appellant and Nurse as to the usage of the vehicle was not *"as*

distant" as the Appellant sought to make out and that "*flexibility existed for the use by each of the other's vehicle*". Third, the Judge stated that the issue of agency only became a live one on the part of the Appellant for the purposes of the trial in that he never made any report to the police or the investigating officer touching on the question of agency.

8. The Judge emphasized the Appellant's evidence that he used Nurse's vehicle on the day of accident and stated :

> "*He [the Appellant] claims:*
> *(a) this took place on one occasion only and*
> *(b) that they worked offshore on different rotations. Hence they could not both have been seen driving together in the [Appellant's] or in Nurse's vehicle, as contended by the [Respondent]*
> *(c) because they were <u>not both on shore</u> at the same time and*
> *(d) because Nurse was <u>not allowed</u> to drive his vehicle and vice versa.*
>
> *But it turned out that: (a) The [Appellant] and Nurse were in fact both on shore on the date of the accident, despite the allegedly different rotations and*
> *(b) the [Appellant] <u>did</u> drive Nurse's vehicle on that date".*

9. The Judge concluded that:

> *"On a balance of probabilities I find that what happened that day is probably representative of what happened on a regular basis, namely interchangeable use of vehicles by the [Appellant] and Nurse. The suggestion that their rotations were mutually exclusive, <u>except that on that day</u>, is also highly suspect and is rejected. In those circumstances I prefer the evidence of the [Respondent] and reject the evidence of the [Appellant]."*

10. The Appellant contends that the Judge erred in rejecting the evidence and in concluding that the presumption of agency arising from the fact of ownership of the vehicle by the Appellant

had not been rebutted. I will first discuss the rejection of Appellant's evidence.

11. Counsel for the Appellant submitted that the Judge was wrong to reject the evidence of the Appellant as it was clear, consistent and uncontested. Counsel further argued that the Judge was also wrong to say that corroboration of the Appellant's evidence was required. I will first deal with the issue of corroboration.

12. Although the Judge did say in his judgment that there was no *"corroborative evidence to support"* the Appellant's contentions as mentioned above that appears to be no more than an observation by the Judge that there was indeed no evidence to support that of the Appellant. The Judge recognized that what was required of him was a consideration of the evidence of the Appellant and that of the Respondent. He proceeded to consider the evidence of the Appellant and the contrary evidence of the Respondent and having done so he preferred the evidence of the Appellant. In so doing nowhere does it appear in his reasons that that was because of the absence of corroboration. Nor does it appear in the Judge's reasons that the evidence of corroboration was a factor that was taken into account against the Appellant. It is clear from his Judgment that the Judge's conclusion was based entirely on an analysis of the evidence that was before him and the absence of corroboration was not an issue.

13. On the broader question of the rejection of the Appellant's evidence, it is not correct to say that that evidence was not contested. As I mentioned there was the evidence of the Respondent that he had seen the Appellant and Nurse regularly driving the vehicle. He had seen them together in the vehicle but had also seen Nurse driving the vehicle when he alone was in the car. This evidence contradicted the evidence of the Appellant that he had never authorized or permitted Nurse to drive his vehicle. As the Judge noted it called for a consideration of the evidence of the Appellant as to the usage of the vehicle and he preferred the evidence of the Respondent. . If the Judge accepted the Respondent's evidence he could not also accept the evidence of the Appellant. It was essentially a matter of credibility, which the trial Judge was uniquely in a position to judge. He saw and heard the witnesses, which is an advantage this Court does not enjoy. In such circumstances this Court is slow to set aside the Judge's finding unless it can be shown that he wasted that advantage. I have not

been persuaded by the submissions of Counsel that he has done so. In my judgment the Judge was well entitled to accept the evidence of the Respondent in preference to that of the Appellant.

14. I turn to the other and more difficult issue whether the Judge was correct to hold that Nurse was the agent of the Appellant.

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.

16. In **Hewitt v Bonvin [1940] 1 KB 188**, a son obtained from his mother, who had the authority to grant it, authority to drive his father's vehicle for his own purposes i.e. to drive two girlfriends to their home. On the way back through the negligent driving of the son there was a collision in which one of the persons in the vehicle was killed. In an action by the administrator of the deceased against the father, the owner of the car, it was held that the son was not driving as the father's servant or agent. In his judgment du Parcq L.J. stated the law in these terms (at p194-195):

    "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."

    To similar effect Mac Kinnon L.J. said (at p192):

    "*As I see it, the plaintiff to make the father Bonvin liable must establish: (1) the son was employed to drive the car as his father's servant and (2) that he was, when the accident happened , driving the car for the father, and, not merely for his own benefit and*

for his own concerns."

17. In **Ormrod and Anor. v Crosville Motor Services Limited & Anor. [1953] 2 ALL ER 753,** the question arose whether the driver of the vehicle at the material times was the agent of the owner. It was held that as the vehicle was being used wholly or partly for the owner's purposes, the owner was vicariously liable. Singleton L.J. said (at page 754):

    "It had been said more than once that a driver of a motor car must be doing something for the owner of a 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 ….."

    Denning L.J. (at pages 754 to 5) stated:

    "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if a driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes…. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in the which the owner has no interest or concern…"

18. The owner of a motor vehicle will therefore be liable for the negligence of the driver if it be shown that at the material time the driver was driving the vehicle with the owner's authority or permission and was doing so wholly or partly for the purposes of the owner. It is not sufficient to simply prove that at the material time the driver was driving the vehicle with the consent of the owner.

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. Not infrequently, however, the claimant does not know for what purposes the vehicle is being driven at the time of the accident and knows little more than the vehicle is owned by the defendant and driven by another. In those circumstances the fact of ownership provides some evidence that at the material time the motor vehicle was being driven by the owner's, servant or agent. This was established by **Barnard v. Sully [1931] 47 T.L.R. 557**. In that case Scrutton L.J. in his judgment with which the other Judges agreed stated:

> *"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 folly. But, apart from authority, the more usual fact was that a motor-car was being 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 or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts*."

20. In **Rambarran v. Gurrucharran [1970] 15 WIR 212** the judicial committee approved of **Barnard v. Sully** (supra). Lord Donavan in delivering the judgment of the Board stated :

> *"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership's affords some evidence that it was being driven by his servant or agent. But when facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence*."

21. In **Rambarran v. Gurrucharran** the Judicial Committee held that the inference was rebutted by the evidence of the owner. The Judicial Committee however made reference to one of the Respondent's grounds of appeal to the effect that the appeal could not succeed because the appellant failed to lead any evidence whatever to show the circumstances in

which the motor vehicle was being used at the time of the accident. In response to that the Board stated at page 216:

> *"The argument based on this assertion was misconceived. The appellant, it is true, could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other"*

22. The inference arising from the fact of ownership may therefore be displaced by evidence as to the purpose of the journey and establishing that it served no purpose of the owner or by the owner asserting that the vehicle was not being driven for any purpose of his and proving that assertion by means of any such supporting evidence as is available to him.

23. In this case there was no evidence as to the purpose of the journey. The Appellant took the other route which was available to him. He asserted that Nurse was not his servant or agent. He sought to establish this by proving that he had never given Nurse permission to use his vehicle at any time including the day of the accident. The Judge did not accept this evidence. He found that there was flexibility between Nurse and the Appellant as to the user of their respective vehicles by each other. *"Interchangeable use"* of each other's vehicle was how Judge described it.

24. The question whether Nurse was the agent of the Appellant at the material time must be decided in the light of that finding by the Judge. The finding was in effect that Nurse and the Appellant had a general permission to use each other's vehicle. Nurse therefore had a general permission to use the Appellant's vehicle. It is important to appreciate what drove the Judge

to that finding.

25. The Judge was impressed by the evidence that the Appellant used Nurse's vehicle on the day of the accident to go to the scene of the accident. According to the Judge that was *"probably representative of what happened on a regular basis, namely interchangeable use of vehicles by defendant and Nurse".* What happened was that the Appellant used the vehicle for his own purposes. That cannot be overlooked. That according to the Judge was probably representative of what happened on a regular basis. On a regular basis therefore Nurse probably used the Appellant's vehicle for his own purposes. In those circumstances, it cannot be asserted from the mere fact of ownership that when Nurse drove the Appellant's vehicle on the day of the accident that it was more probable than not he was doing so as his agent. The fact that he had general permission to use the vehicle and to do so for his own purposes, it seems is sufficient to displace the inference.

26. In **Rambarran v. Gurrucharran,** supra, the fact that there was a general permission given by the owner to the driver to use the vehicle and to do so for his own purposes seems to have been sufficient to displace or counterbalance the inference. Lord Donavan noted at p. 216):

> *"Leslie had a general permission to use the car. Accordingly it is impossible to assert, merely because the Appellant owned the car, that Leslie was <u>not</u> using it for his own purposes as he was entitled to do".*

For the reasons outlined above I respectfully agree with that position and it applies equally to the facts of this case.

27. The inference arising from ownership as was said in **Barnard v. Sully** is derived from the assertion that the more usual fact is that a motor vehicle is driven by the servant or agent of the owner. In those circumstances, it was said that the fact of ownership provides some evidence as to agency.

28. **Bernard v Sully** has been accepted as good law in this jurisdiction. But it was decided sometime ago and it is doubtful whether it is still relevant. I would venture to say, except in very few cases, that the driver is not employed to drive the vehicle, so that the question of service does not arise. Similarly in the case of agency, I would be slow to conclude that the more usual fact is that a vehicle on the roads of Trinidad and Tobago is being driven by the owner's agent. However, **Bernard v Sully** was not challenged by the parties to this appeal and for the purposes of this appeal I am prepared to consider it as still applicable.

29. In view of the judge's finding as to the interchangeable use by Nurse and the Appellant of each other's vehicle for their own purposes, it cannot be asserted that the more usual fact is that Nurse at the time was using the vehicle for the Appellant's purpose. There is no evidence in this case as to the purpose the vehicle was being driven by Nurse on the day of the accident. The Judge's analysis of the evidence that the use by the Appellant of Nurse's vehicle for his own purpose on the day of the accident as probably representative of what happened between them on a regular basis as to the usage of their vehicles would point to the position that it was more probable than not that Nurse was not driving the Appellant's vehicle for the Appellant's purposes. On the evidence in this case therefore it could certainly be no more probable that Nurse was using the vehicle for the Appellant's purposes as it was not. In that case it would be wrong to draw an inference either way. It therefore cannot be stated that on the facts of this case, the more usual fact was that Nurse was driving the vehicle for the purposes of the Appellant. Any inference that may be drawn from ownership is displaced. In my judgment, therefore, the Respondent has failed to discharge the burden on him of proving that the Appellant's vehicle at the material time was being driven by the agent of the Appellant.

30. In the circumstances I do not agree with the Judge's conclusion that the inference from the fact of ownership of the Appellant's vehicle was not displaced. He seemed to think erroneously that as Nurse had the Appellant's permission to drive the vehicle that was sufficient to find agency. Accordingly he failed to consider the purport of his own finding and the evidence. I would, therefore, allow the appeal and dismiss the Respondent's claim as

against the Appellant. The Respondent shall pay to the Appellant's the costs of the liability hearing in the court below to be assessed by a Master. The Respondent shall also pay the costs of the appeal determined at two thirds of the costs of the liability hearing.

31. I too agree with the judgment of Mendonça, J.A. and I have nothing to add.

N. Bereaux
Justice of Appeal

A. Mendonça
Justice of Appeal